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ADMONISHMENTS THAT ENDANGER THE CONSTITUTION

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‘In any reasonable reading of constitutional history, one can see that the Constitution is a product of a collective vision’ | Photo Credit: PTI

Come April and it will be 50 years since the Supreme Court of India delivered its verdict in Kesavananda Bharati vs State of Kerala. The judgment is widely recognised as a milestone in India’s history. In holding that Parliament’s power to amend the Constitution was not plenary, that any change that damages the document’s basic structure would be declared void, the Court, it was understood, had helped preserve the essence of our republic.

In the years since the verdict — if not in its immediate aftermath — its importance has been recognised by successive governments. During this time, most criticism of the doctrine has been confined to the manner of its application rather than its legitimacy. But last week, India’s Vice-President Jagdeep Dhankhar launched a salvo of attacks at the Supreme Court, by calling into question the ruling’s correctness. Faced as we are with far greater issues of civic concern, this debate might well be regarded as tedious, if only the arguments made against the judgment were not part of what appears to be a concerted effort at undermining the judiciary’s importance.

Over the course of the last few months, not a day has gone by without one member or the other of the political executive excoriating the Court over its apparent excesses. Much of this criticism has been aimed at the functioning of the collegium — a body of senior judges that makes binding recommendations on appointments and the transfer of judges. The Union Minister of Law and Justice, Kiren Rijiju, and indeed Mr. Dhankhar, have repeatedly doubted the Court’s judgment in 2015, in which it struck down efforts to replace the collegium with a National Judicial Appointments Commission (NJAC). That criticism has now turned sharper, with the Vice-President’s diatribe against Kesavananda.

In his maiden address to the Rajya Sabha in December 2022, Mr. Dhankhar claimed that the striking down of the NJAC had no parallels in democratic history. A “duly legitimised constitutional prescription,” he claimed, “has been judicially undone.” Speaking on January 11 at the 83rd All India Presiding Officers (Assembly Speakers) Conference in Jaipur, Rajasthan, he said that “in a democratic society, the basic of any basic structure is supremacy of people, sovereignty of parliament…The ultimate power is with the legislature. Legislature also decides who will be there in other institutions. In such a situation, all institutions must confine to their domains. One must not make incursion in the domain of others.”

Mr. Dhankar then heightened his criticism by doubting the legitimacy of the basic structure doctrine. The correctness of the Court's view, he said, "must be deliberated…Can Parliament allow that its verdict will be subject to any other authority? In my maiden address after I assumed the office of Chairman of Rajya Sabha, I said this. I am not in doubt about it. This cannot happen."

To be sure, genuine criticism of both the Collegium's functioning and the Court's judgment upholding the body's legality ought to be welcomed. But seeing as the Government, as Mr. Rijiju confirmed in Parliament last month, has no plans to implement any systemic change in the way we appoint judges, and given that the Government itself has done little to promote transparency in the process, the present reproach is, at its best, unprincipled, and, at its worst, an attempt at subverting the judiciary's autonomy. That it is likely the latter is clear from the fact that the Vice-President has now carried his denunciation to a point where his admonishments are reserved not just for the collegium but also for the ruling in Kesavananda.

Were we to begin with the elementary premise that India's Constitution, as originally adopted, comprises a set of principles that together lend it an identity, we will see that the raison d'etre for the basic structure doctrine is not difficult to grasp. On any reasonable reading of constitutional history, one can see that the Constitution is a product of a collective vision. That vision was built on distinct, if interwoven, ideals: among others, that India would be governed by the rule of law, that our structure of governance would rest on Westminster parliamentarianism, that the powers of the legislature, the executive and the judiciary would be separate, that the courts would be independent of government, and that our States would have absolute power over defined spheres of governance.

Now, ask yourself the following questions: what happens when an amendment made to the Constitution harms one or more of these principles in a manner that alters the Constitution's identity? Would the Constitution remain the same Constitution that was adopted in 1950? Should Parliament amend the Constitution to replace the Westminster system with a presidential style of governance, would the Constitution's character be preserved? Or consider something rather more radical: can Parliament, through amendment, efface the right to life guaranteed in Article 21? Would this not result in the creation of a document of governance that is no longer "the Constitution of India?"

It is by pondering over questions of this nature that the majority in Kesavananda found that there was much that was correct in the German professor Dietrich Conrad's address in February 1965 at the Banaras Hindu University, Varanasi. There, Conrad had pointed out, that "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".

As the Court would later explain in Minerva Mills vs Union of India (1980) — and incidentally at stake there was the very survival of the idea that fundamental rights are inviolable — "Parliament too is a creature of the Constitution". Therefore, it can only have such powers that are expressly vested on it. If those powers are seen as unlimited, Parliament, the Court found, "would cease to be an authority under the Constitution"; it would instead "become supreme over it, because it would have power to alter the entire Constitution including its basic structure". In other words, the principle that Parliament is proscribed from changing the Constitution's essential features is rooted in the knowledge that the Constitution, as originally adopted, was built on an intelligible moral foundation.

On this construction, it is possible to see the basic structure doctrine as implicit on a reading of the Constitution as a whole. But it is also deductible, as Justice H.R. Khanna wrote in his controlling opinion in Kesavananda, through an interpretation of the word "amendment". The

dictionary defines “amendment” to mean a “minor change or addition designed to improve a text”. As Justice Khanna saw it, when the Constitution that emerges out of a process of amendment as stipulated in Article 368 is not merely the Constitution in an altered form but a Constitution that is devoid of its basic structure, the procedure undertaken ceases to be a mere amendment.

Since its judgment in Kesavananda, the Supreme Court has identified several features that are immutable. There is no doubt that on occasion, the Court’s interpretation of these features has suffered from incoherence. But to suggest that the basic structure doctrine is by itself unsanctioned is to place the Constitution at the legislature’s whim. When taken to its extreme, accepting the Vice-President’s claims would mean that, in theory, Parliament can abrogate its own powers and appoint a person of its choice as the country’s dictator. Consider the consequences.

Suhrith Parthasarathy is an advocate practising in the Madras High Court