

# TO BE A 'CONSTANT IRRITANT' TO UNTRAMMELLED POWER IS THE VERY ESSENCE OF JUDICIAL DUTY

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Not many who speak, write, or think about religion and law recognise how religious institutions have affected the law and shaped interpretation in enduring ways. His Holiness Swami Kesavananda Bharati Sripadagalvaru, then a senior head of Edneer Mutt in Kasaragod district Kerala, made possible the landmark decision of the Supreme Court (though other petitions were also bunched together). I call the judgment the second most important text after the Constitution of India.

The mutt is believed to have been established by Thotakacharya, among the first four disciples of Adi Shankara. It blossomed under his leadership. No mukadamabaz himself, Kesavananda Bharati protested the validity of the 29th amendment which immunised, in the Ninth Schedule, Kerala's takeover of the mutt's property. The seer lost the battle but won the war because the amending power was made subject to the basic structure.

The legendary barrister, M K Nambiar, a native of Kasaragod, and father of K K Venugopal, now the Attorney General of India, persuaded Kesavananda Bharati to consult Nani Palkhivala, who then urged before the Supreme Court that the seer's rights to religious freedom, equality, and property were violated. The seer later described the verdict as "God's decision" — it was so to many people of faith. The seer passed away on September 6.

## **EDITORIAL | [Kesavananda Bharati case laid down important red lines, set scope and limits of amending Constitution.](#)**

A hearing for 68 days by the full court of 13 justices yielded 11 separate opinions commonly grouped together as Sikri 6 (subjecting Article 368's amending power to the implied limitation) and Ray 6 (conceding all plenary powers of amendment including repeal of the Constitution). This made the task of ratio hunters difficult and they were not enabled by the heroic Justice H R Khanna. Still, the basic structure and essential features (BSEF) govern now the political and juristic destiny of Indian constitutional development.

Theological fervour animates the BSEF discourse. Justice Y V Chandrachud, while upholding the absolute amending power, had to invent a resounding judicial curse: "We have given you vast powers for the welfare of the country, but woe betide you if you misuse these powers". And Justice S N Dwivedi spoke of the "reverence for the Constitution" as a public virtue. In the assembly dissolution case, Justice P K Goswami described the Supreme Court as the "last resort for the oppressed and the bewildered" citizens of India. Kesavananda, and its progeny, has yet to be visited as constitutional secular theology of law.

As the chief survivor of Kesavananda, and also as the longest-serving CJI, Justice Y V Chandrachud developed the doctrine in chiselled prose and with the strict discipline of a constitutional soldier. Cases like Raj Narain, Waman Rao, Minerva Mills mark the pilgrim's progress to the shrine of basic structure. Boldly questioning Parliament's plenary power to accord primacy to all Directive Principles over Articles 14 and 19, Justice Chandrachud said in Minerva that an eternal deferral of constitutional promises invites "a lurking danger that people will work out their destiny". He poignantly added: "Words bandied about in marbled halls say much but fail to achieve as much."

In Waman Rao, he performed a constitutional miracle by validating all amendments retrospectively and achieved this feat by invoking the BSEF doctrine. Closely read, the discourse in, and since Kesavananda, insists that basic structure is the power of judicial review and essential features are what the Court identifies as such in exercise of that power. For example, Justice Bhagwati remarkably enunciated as an essential feature the “harmony” between fundamental rights and directive principles. Similarly, Parliament amended Part III — deleted the right to property under Article 31 and demoted it to the status of mere constitutional right. The crucial message though is that the apex court has, in the rarest of rare cases, the constituent power to pronounce a constitutional amendment invalid.

**Explained: [In SC reading of basic structure, the signature of Kesavananda Bharati](#)**

This scarcely means that the Supreme Court may exercise its power just as it pleases. The Court is bound by the “golden triangle” of rights created by Articles 14, 19, and 21 of the Constitution. Further, the Court must derive the “spirit” of the Constitution by scrupulous and meticulous reference to the provisions of the Constitution. Since 1973, the evidence shows the Apex Court has shown utmost democratic responsibility and rectitude in interpreting the doctrine of BSEF, perhaps more than can be said of other branches of co-governance.

The spirit of the Constitution is a vexed question. But my favourite passage is Para 399 in *Raila Amolo Odinga* (2017), where Chief Justice David Kenai Maraga of Kenya’s Supreme Court has probably said the last word. In nullifying President Uhuru Kenyatta’s election for a second term (while also giving 50 days to plan and hold free and fair re-election, whose results in the incumbent’s favour were later upheld), Justice Maraga said: “However burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant.”

The seer would have agreed. The ultimate message of BSEF doctrine is not merely to set limits to the power of the managers of people, but to make little by little the tasks of emancipation less onerous. The BSEF does not betoken any arrogant judicial overreach or sovereign judicial despotism as the Court has not obstructed the tasks of just development and governance. It has shown considerable accommodation for executive and legislative power. But to be a “constant irritant” to untrammelled power is the very essence of judicial duty. The BSEF rules that constitutional dismemberment is not allowed in the name of an amendment. Permissible remains the enhancement of the arcs and arts of governance, but if only exposed to the “constant irritant” of constitutional good governance. Truly a “God’s decision”, as the seer said.

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