FOREWORD

UNDERSTANDING THE MYSTERY AND MIRACLE OF THE BASIC STRUCTURE*

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It is a matter of joy that the NUJS Law Review is honouring itself by publishing some of the finest essays presented to the Nani A. Palkhivala Memorial Essay Competition, 2023, on various aspects of the basic structure doctrine ('BSD'), and the normative progeny of *Kesavananda Bharati* v. *State of Kerala*,[1] ('Kesavananda Bharati') decision.

The miracle lies in the BSD's underlying idea and ideal which is two-fold: *first*, is that all constitutional powers are plenary powers supreme within their decisional domains, and *second*, that all powers are accordingly, while supreme in their own sphere are limited and accountable according to the BSD limits. There are no sovereign powers, each form of power is constitutionally limited — including the judicial power and process of constitutional judicial review ('CJR'). The juristic doctrine of auto-limitation of each form of plenary constitutional power was a collective work of many juristic and juridical minds and this timely literary contribution is a testament to the enormous normative labours of adjudicatory investment in the Indian constitutional development.

The mystery lies in the ways in which the BSD has been evoked and the considerable latitude given for argumentation over what feature, if any,

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* I borrow a bit from the title of the article by Julius Stone on Kelsen's grundnorm theory, see, Julius Stone Mystery and Mystique in the Basic Norm, Vol. 26(1), Mod. L. Rev., 34 (1963); Hans Kelsen & Albert A. Ehrenzweig, Professor Stone and the Pure Theory of Law, Vol. 17(6), Stanford Law Review, 1128-1157 (1965); see also Iain Stewart, Coincidence or Derivation? When Julius Stone Accused Hans Kelsen of Plagiarism, Vol. 17(1), Griffith Law Review, 203-221 (2008).

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[1] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 ('Kesavananda Bharati'); The progeny includes decisions after the Kesavananda Bharati, for instance, Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625; Waman Rao v. Union of India, (1981) 2 SCC 362; Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261; Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 ('NJAC case'); M. Nagaraj v. Union of India, (2006) 8 SCC 212; S. R. Bommai v. Union of India, (1994) 3 SCC 1; I. R. Coelho v. State of T.N., (2007) 2 SCC 1; Janhit Abhiyan v. Union of India, 2022 SCC OnLine SC 1771.

attached to basic structure is essential in each case. The feature remains associated with the basic structure but still is not considered violated in the fact-law complex at hand.[2]

Even when we discuss these mysteries, and the miracle, on the imminent eve of the closure of the Golden Jubilee of the Indian Constitution, 1950 ('the Constitution') (on April 23, 2024), we ought to recall that the BSD has nurtured the many splendored Indian traditions of constitutionalism.

Nani is immortally associated with this development, as the essays published here un-hagiographically demonstrate.[3] However, he would have been the first to acknowledge the notion of collective normative enterprise. No doubt, the forensic support for the doctrine was initially as strong as the fierce opposition on the other side. Further, there is contemporary internal evidence that suggests that the justices had already made up their minds early[4]; those led by Chief Justice A.M. Sikri were opposed to those led by Justice A. N. Ray; as we know, Justice H.R. Khanna held a somewhat ambivalent ground,[5] and the innovation of the device of judicial summary disciplined somewhat whatever the learned justice felt and thought. The experience of the Emergency proved sufficient to uphold the ramparts of deliberative discipline followed by those who held views in favour of absolute parliamentary sovereignty — the dissentient Kesavananda Bharati justices were subsequently the most eloquent exponents of constitutional powers.[6]

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[2] Thus, for example, the right to adult suffrage is considered associated with democracy and both are considered indispensable to the basic structure. However, statutory disqualifications (such as those involved in Rajbala v. State of Haryana, (2016) 2 SCC 445 : AIR 2016 SC 33) are not considered violative of basic structure; *see also* Upendra Baxi, *No Limit to Constitutional Disenfranchisement?*, India Legal, May 20, 2023, available at https://www.indialegallive.com/magazine/voting-rights-for-prisoners-representation-of-the-people-act-supreme-court-decisions/ (Last visited on February 6, 2024).

[3] *See also* Nani Palkhivala, The Courtroom Genius (Lexis Nexis, 2012); Major General Nilendra Kumar, Nani Palkhivala: A Role Model (Universal Law Publishers, 4th edn., 2012); Upendra Baxi, *Halting the Process of Administering Euthanasia to Freedom Palkhivala in the Juristic Landscape of Soli Sorabjee* in Soli Sorabjee — a Great Maestro (Sudhish Pai ed., Law and Justice Publishing, 2022).

[4] Justice Pingle Jagamohan Reddy brings to our notice how firmly set in their opinions the thirteen Kesavananda justices were, even as the hearing was on. Justice Ray kept on answering questions put forth by brother justices to the counsel; he even reproached Justice Hegde on this score. For details on the same, *see* Justice Pingle Jagamohan Reddy, The Judiciary I Served, 229 (Orient Longman, 1999).

[5] *See* Upendra Baxi, The Indian Supreme Court and Politics (Eastern Book Company, 1980); Upendra Baxi, Courage, Craft, and Contention: The Indian Supreme Court in the Mid-Eighties, Chapter 3, 84-87 (N. M. Tripathi, 1985); The learned justice very often pointed out to me, in personal conversations, that his observations did not qualify any specific majority; *see also* Upendra Baxi, *Laches and the Rights to Constitutional Remedies: Quis Custodiet Ipsos Custodes?* in Constitutional Developments Since Independence (Alice Jacob ed., The Indian Law Institute, 1975).

[6] Upendra Baxi, Courage, Craft, and Contention: The Indian Supreme Court in the Mid-Eighties, Chapter 2, 24-32 (N.M. Tripathi, 1985) (Justice Khehar's attention was not specifically drawn

Gradually, as we know, the CJR resulting into the invalidation of an amendment has been very sparingly used. In fact, although massive party propaganda and populism in politics would have us believe, otherwise, almost all amendments have been sustained in the full force of the BSD grounds.[7]

While again facilitating the ardent extensions and interlocutions in this anthology, I merely focus upon some general criticisms of the BSD. *First*, is the view which asserts that CJR should end when the claims of absolute parliamentary sovereignty are made and are at stake. This represents a theory of the last word or the final say. It has been said often by the highest constitutional dignitaries that the Supreme Court does not have the last say and that it should not act as a 'third chamber'. While to say this is regarded as politically correct, it is constitutionally false. No doubt justices swear or affirm a Third Schedule oath to preserve the Constitution as established by law, leaving aside the question how a law may bind justices when the constitutional validity is adjudged when questioned under Article 32 — itself a right to constitutional remedies. However, should an unconstitutional constitutional amendment also bind justices simply because it is deemed to be a law? Should the court, therefore, not adjudicate any violation of the Constitution — whether of the Preamble, Parts III to IV-A, or principles of federalism, and fairness/reasonableness? Is the identity of the Constitution to exclusively reside in legislature and executive combine or to modify the immortal words of Justice Hidayatullah "a plaything of legislative majority"?[8] More narrowly put, has the presumption of the validity of legislation at all been adversely affected by the BSD? Relevant also is the issue: is parliamentary acquiescence with limiting the scope of Article 368 to count for *nothing at all*?

Second, many scholars have decried the basic structure limitations on grounds of indeterminacy. No doubt judgments must be written in intelligible ways. Obfuscation and prevarication are clearly not recognized as judicial virtues. That being fully said, it must be recognised that (a) language itself is highly polysemic, (b) fresh arguments may entail different interpretation of the same words and phrases, and (c) there is no resting place in legal disputations, and judicial interpretation about the basic concepts enshrined in the Preamble, Parts III to IV-A, and other salient aspects of the Constitution. Lawyers and judges play different language games (to adapt Wittgenstein's original notions) and arrive at

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to this work when he referred to the threats to the independence of judiciary from within in the elaborate discourse in the NJAC case).

7 Arvind P. Datar, *Our Constitution and its Self-Inflicted Wounds*, Vol. 4, Indian Journal of Constitutional Law, 92-112 (2007); *see also*, V.R. Jayadevan, *Basic Structure Doctrine and its Widening Horizons*, Vol. 27(3-4), Cochin University Law Review, 327-373 (2003).

8 Upendra Baxi, *No Plaything; Legislators Are Bound to Uphold the Basic Structure of a Secular, Socialist Constitution*, The Indian Express, February 4, 2015, available at https://indianexpress.com/article/opinion/columns/no-plaything/ (Last visited on February 6, 2024).

different meanings of the same words and phrases over time and across generations. However, for the time being, they need to, and must, most expeditiously handle conflicts about the limits of plenary powers.

Third, I must highlight that Dr. Durga Das Basu long ago emphasised limited government under the Constitution as a hallmark of constitutional governance.[9] In ancient times the classical Hindu notions of *dharma* also emphasised the notion of sovereignty within the mediating concepts like *Rajadharma* and *Praja Dharma*, further reinforcing virtues such as *Sanyam*, *Vivek*, and *Niyama*. I think that the BSD unfolds this heritage further through the distinctive notions of constitutional rule of law and democratic justice.

Finally, for the purposes of this note, too much has been made of the *Supreme Court Advocates-on-Record Assn.* v. *Union of India*,[10] ('NJAC case'). True, not merely the National Judicial Appointments Commission Act, 2014, ('NJAC Act') and the Constitution (Ninety-Ninth Amendment) Act, 2014, were supported in Lok Sabha by all but also by the redoubtable Ram Jethmalani.[11] However, the entire effort was negatived by the Supreme Court on the ground of violation of basic structure primarily because it violated the independence of the judiciary embodied in the 'limited primacy' of the Chief Justice of India and the judicial collegium headed by him.[12]

The critics of this decision have entirely ignored the first decision in the case on recusal which made possible the second decision on the merits of the case. They also ignored the fact that the Union of India never filed a review application the Second Judges case and it was the court in the NJAC case which *suo motu* underwent the process of argumentation as if a review was asked of it and

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[9] *See* Upendra Baxi, *Demosprudence and Socially Responsible/Response-Able Criticism: The NJAC Decision and Beyond*, Vol. 9(3-4), NUJS L. Rev., 158-162 (2016).

[10] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1 (per Hon'ble Justice Jagdish Singh Khehar, Justices Chelameswar, Justice Madan B. Lokur, Justice Kurian Joseph and Justice Adarsh Kumar Goel); *see also* Upendra Baxi, *Basic Structure: A "Solid" Foundation or a "Fragile Bastion"?*, in Doctrine of Basic Structure: Revisiting Kesavananda Bharati Verdict on its 50th Anniversary, 19-38 (V. K. Ahuja et al. (eds.), Guwahati National Law University and Judicial Academy, Assam, 2024).

[11] *See*, NJAC case, *supra* note 1, ¶435 (per Justice Madan Lokur, "The 99th Constitution Amendment Act and the NJAC Act have reduced the consultation process to a farce a meaningful participatory consultative process no longer exists; the shared responsibility between the President and the Chief Justice of India in the appointment of judges is passed on to a body well beyond the contemplation of the Constituent Assembly; the possibility of having committed Judges and *the consequences of having a committed judiciary, a judiciary that might not be independent is unimaginable*" (emphasis added).

[12] I say 'him' because the first woman justice still to be elevated as the Chief Justice of India will be Justice B. V. Nagarathna, if the inveterate convention of elevating the senior-most justice of the Supreme Court is followed. She will be India's first woman Chief Justice, though for a short tenure of thirty-six days.

negatived all submissions. Further, the reference by the President of India, what is known as the Third Judges case, did not revisit the propriety of the collegium but only urged its enlargement to five, instead of the three, members. They totally ignored three principal points made in the judgment (led by a 500-page long opinion of Justice Khehar:

1. There was only 'limited primacy' of the President and the Chief Justice of India in the appointment of appointment of justices,

2. The NJAC Act prescribed a composition of the Judicial Commission in which a majority of three members of the committee may override that limited primacy of the collegium; and

3. Parliament had the power to enact the change they wanted provided ways were found to overcome the constitutionally proclaimed infirmities in the NJAC Act.

As far as I know, not a single move has been made in that direction.[13] Despite this acquiescence by the State, the so-called progressive opinion somehow continues to critique the decision.

In the end of this short essay, let me now reiterate what I have said earlier. There are two phrases used in juristic discourse: 'basic structure' and 'essential features'. One simple way, which Justice Chelameswar used in the NJAC case, is to say that there is no difference between the two. The learned justice, accordingly, held that the former is merely a 'sum total' of the latter. He even talks about structure as simply another way of speaking about the essential features, which he renames as 'basic features', without any further ado. The two-for-the price-of-one approach may well suit 'free' markets but is at odds with the constitutional hermeneutics, simply because, as noted earlier, the court has often decided that an essential feature is violated by State action, but it still falls short of the violation of the basic structure. True, that essential feature remains essential but it does not in a particular fact-law complex of a case violate it.

What then is the basic structure, if anything? I think it comprises two aspects: *first*, forensic freedoms (free space of argumentation in an open court — the independence of the Bar), and *second*, the independence of judiciary (executive-free spaces for judicial interpretation of the interpenetrating text and context).

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[13] Though suggestions in that direction were not lacking, I, for example, had offered some concrete suggestions in a meeting of jurists (including the ex-Chief Justices of India and the High Courts at Vigyan Bhavan) convened soon after the judgment by the Union Law Minister, Ravi Shankar Prasad, ways in which an advisory opinion from the Supreme Court may be sought on some newly worded provisions or a new NJAC structure.

To take these away is to take away altogether the idea of Constitution and the responsible sovereignty and the very idea of legitimate authority. The last is crucial even if tautologous, in the sense that all authority is legitimate by definition. However, tautologies are important not as matters of meaning but of emphasis on certain notions that covert performances of mere power into abiding legitimation costs. Surely, the imposition of legitimation deficits is the very function of BSD. Should that not be preserved, or ought the Constitution be conceived as a sheer engine of 'governance' and 'development' for all times to come?