

2009

## THE UNTOLD STORY OF HOW *KESAVANANDA BHARATI* AND THE BASIC STRUCTURE DOCTRINE SURVIVED AN ATTEMPT TO REVERSE THEM BY THE SUPREME COURT

by

T.R. Andhyarujina\*

Few persons know that the most momentous judgment of the Indian Supreme Court in constitutional law delivered on 24-4-1973 by the largest Bench of 13 Judges in *Kesavananda Bharati v. State of Kerala*<sup>1</sup> was subjected to a serious attempt to overrule it by a review by another Bench of 13 Judges for two days on 10-11-1975 and 11-11-1975 but on the third day the review was suddenly and inexplicably abandoned and the 13-Judge Bench was dissolved.

The circumstances under which the review was made and given up have for long been clouded in mystery and lawyers and judges have speculated about it till now. No official record or report exists of this attempt to review *Kesavananda*<sup>1</sup> judgment. The review took place during the height of the Emergency when even the reporting of courts' judgments by the press was restricted. Today, it is possible to piece together the full story of this important event in our constitutional history from a few published and mostly unpublished accounts, memoirs of some of the participants in the review and interviews by this writer and others of judges constituting the reviewing Bench.

It is a story as dramatic as instructive. It is an extension of the saga of the extraordinary circumstances in which *Kesavananda*<sup>1</sup> itself was heard for five months between 1972-1973. As a matter of interaction of constitutional law with politics of the day as well as for difficulties in formulating the abstruse concept of the basic structure of the Constitution, the story of *Kesavananda*<sup>1</sup> and the attempted reversal of *Kesavananda*<sup>1</sup> requires to be widely known. In the United States, landmark Supreme Court decisions in *Marbury v. Madison*<sup>2</sup>, *Dred Scott v. Sandford*<sup>3</sup>, *Brown v. Board of Education*<sup>4</sup> have been commented on for their political and social background as well as for the actual decision making by judges. Such an exercise has not been done for any important case of the Supreme Court of India. *Kesavananda*<sup>1</sup> is one case which requires to be related in its political background and the actual decision making to understand it.

As an active participating lawyer in the 76 days' hearing of *Kesavananda*<sup>1</sup> spread over five months in 1972-1973 and being privy to

\* Senior Advocate, Supreme Court of India, former Solicitor General of India (1996-1998), Advocate General of Maharashtra (1993-1995).

1 (1973) 4 SCC 225.

2 2 L Ed 60 : 5 US (1 Cr) 137 (1803).

3 15 L Ed 691 : 60 US 393 (1856).

4 98 L Ed 873 : 347 US 483 (1953).

some of the inside goings-on in that case, I have maintained that the so-called decision in *Kesavananda*<sup>1</sup> that Parliament has no power to amend the basic structure of the Constitution—was not truly the decision emerging from 11 judgments in that case. We now know that prior to the hearing of that case the Government appointed some judges who appeared to have pro-Government leanings. The manner of hearing and deciding that case by a faction-ridden Bench of 13 Judges did not lend itself to a dispassionate decision free from tensions in that case. Most importantly, some of the judges had preconceived ideas on Parliament's power to amend the Constitution which they maintained throughout the hearing. I have written of this and spoken on it earlier.

### ***Background of the review***

#### ***“The View of the Majority” in Kesavananda*<sup>1</sup>**

It is important to note how the review of *Kesavananda*<sup>1</sup> came about. The 11 judgments in *Kesavananda Bharati*<sup>1</sup> were controversial from the moment they were delivered in the Court on 24-4-1973. At the end of the delivery of the judgments by 11 Judges, Chief Justice Sikri produced a “The View of the Majority” by way of six propositions for the signatures of all the Judges. Proposition 2 of “The View of the Majority” was “Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution”. This “View of the Majority” was not debated or considered in open Court before it was given to the other judges to append their signatures. Four Judges, Justices A.N. Ray, K.K. Mathew, M.H. Beg and S.N. Dwivedi visibly and almost indignantly refused to sign it in open Court. It was signed by the remaining 9 Judges of the Court. Only the Court archives show this. The law reports do not reveal this significant fact. One of them even mixes up “The View of the Majority” with the order of the Court. The order of the Court was signed by all 13 Judges. The order of the Court merely stated “*The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law. The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to this stage*”. Subsequently, in the course of the hearing of its review some Judges of the *Kesavananda* Bench maintained that “The View of the Majority” was not a correct summary of the 11 judgments.

### ***Supersession of Judges***

On the very next day of the delivery of the judgments on 25-4-1973 Chief Justice Sikri was to retire. The next day, ignoring the seniority of 3 seniormost Judges viz. Justices J.M. Shelat, K.S. Hegde and A.N. Grover who had in their judgments subscribed to limitations on the amending power of Parliament and who had signed “The View of the Majority”, to the surprise of the Bar and the public, the Government appointed Justice A.N. Ray as the next Chief Justice of India. Justice A.N. Ray (with Justices Mathew, Beg, Dwivedi, Palekar and Chandrachud) had held that

Parliament's power to amend the Constitution was unlimited. The supersession of the 3 Senior Judges was seen by the Bar as a disappointment. Their judgments in *Kesavananda*<sup>1</sup> and as undermining the independence of the judges by appointing a Chief Justice pliant to the Government. The supersession led to strong protests from lawyers throughout India. Justices Shelat, Hedge and Grover resigned creating considerable tension in the Supreme Court Bar and in its Bench. It made the *Kesavananda*<sup>1</sup> verdict highly controversial, legally and politically. The Government and almost all sections in Parliament were highly critical of it.

### ***The Indira Gandhi election case***<sup>5</sup>

In this climate of tension prevailing in the Supreme Court an unexpected development took place on 12-6-1975 when Justice Sinha of the Allahabad High Court held Indira Gandhi guilty of two corrupt electoral practices under Section 123(7) of the Representation of the People Act, 1951, and disqualified her for 6 years in an election petition by Raj Narain. However, the Judge stayed his judgment for 15 days to enable Indira Gandhi to seek a stay pending her appeal to the Supreme Court. The Allahabad High Court's decision was made when the Supreme Court was in vacation. Justice Krishna Iyer was the Vacation Judge before whom urgent applications for stay of judgments would have to be made. We have it now from Justice Krishna Iyer in his memoirs<sup>6</sup> that within minutes of the delivery of the Allahabad High Court judgment at 10.30 a.m., the then Union Law Minister, Mr H.R. Gokhale without any reason sought to meet him at his residence. Justice Krishna Iyer queried the Law Minister for the purpose of the meeting. The Minister said "The verdict in the Prime Minister's case had gone against her in the High Court. You are the Vacation Judge. So to file the appeal and to seek stay of the order I wish to meet you". Justice Krishna Iyer declined to meet the Law Minister and told him to tell her advocate to file the appeal.

### ***Hearing of Indira Gandhi's application for stay***

In a day long hearing on 23-6-1975 before Justice Krishna Iyer in the Court, Mr N.A. Palkhiwala appearing for Indira Gandhi pleaded passionately for an immediate unconditional stay of Indira Gandhi's disqualification in national interest. This was opposed by Mr Shanti Bhushan appearing for Raj Narain. On 24-6-1975, Justice Krishna Iyer in a written judgment and order declined to grant a total stay of the Allahabad High Court's judgment but by a conditional order allowed Indira Gandhi to attend Parliament as a member and as the Prime Minister to participate in its proceedings without any vote pending the final decision in the election appeal<sup>5</sup>. Mr H.M. Seervai considers this the finest hour of the Supreme Court<sup>7</sup>. This order was considered an affront to the Prime Minister. The immediate effect of this order of Justice Krishna Iyer was a Proclamation of Emergency signed by the President of

5 *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159.

6 Krishna Iyer, *Off the Bench*, Chapter III "Before the Emergency and After", pp. 1-2.

7 *Constitutional Law of India*, H.M. Seervai, 4th Edn., Vol. 2, p. 2206.

India, Mr Fakruddin Ali Ahmed at midnight on the same day. It was published early the next day on 25-6-1975 and following upon it the fundamental right under Article 21 was suspended, leading opposition members were preventively detained, censorship was imposed and later some judges of the High Court were transferred.

### ***Parliament's efforts to validate Indira Gandhi's election***

Whilst Indira Gandhi's appeal was pending in the Supreme Court, on 10-8-1975 Parliament enacted the Constitution (Thirty-ninth Amendment) Act, 1975 inserting Article 329-A in the Constitution by which a dispute of a Prime Minister's election was retrospectively taken out of the jurisdiction of courts and freed from ordinary election laws and it was enacted that no election of a Prime Minister would be declared void by any court. Parliament also passed the Election Laws (Amendment) Act, 1975 (Act 40 of 1975) by which electoral offences for which Indira Gandhi was disqualified under the Representation of the People Act, 1951 by the Allahabad High Court were retrospectively nullified by changing the law. Thus, Indira Gandhi's election was sought to be validated by these amendments to the Constitution and to the election law.

### ***Basic structure theory raised in Indira Gandhi's appeal***

On 25-8-1975 Indira Gandhi's appeal came up for hearing in the Supreme Court before a Constitutional Bench of 5 Judges comprised of Chief Justice A.N. Ray, Justices H.R. Khanna, K.K. Mathew, M.H. Beg and Y.V. Chandrachud. Mr Ashok Sen now appeared for Indira Gandhi as Palkhivala had returned her brief on the proclamation of Emergency. Indira Gandhi relied upon the Constitution (Thirty-ninth Amendment) Act, 1975 and the Election Laws (Amendment) Act, 1975 for setting aside her disqualification and allowing her appeal. Thereupon, Mr Shanti Bhushan, counsel for Raj Narain challenged the validity of the amendments as destructive of the basic structure of the Constitution and relied on *Kesavananda case*<sup>1</sup>. The Attorney General, Mr Niren De to whom notice was given by the Court appeared to defend the amendments. The appeal largely turned on the question of whether Article 329-A inserted by the Constitution (Thirty-ninth Amendment) Act, 1975 destroyed various concepts of the basic structure of the Constitution following *Kesavananda case*<sup>1</sup>. The 5-Judge Bench hearing Indira Gandhi's appeal were bound by the decision of 13 Judges in *Kesavananda*<sup>1</sup>. In the course of his arguments the Attorney General Mr Niren De was highly critical and at times quite scornful of the theory of the basic structure of the Constitution.

### ***The Attorney General's application and order for review of Kesavananda***<sup>1</sup>

On 1-9-1975 whilst Indira Gandhi's appeal was being heard, the Attorney General Mr Niren De with the Advocate General of Tamil Nadu made an oral application to the Chief Justice for early hearing of certain petitions in land ceiling cases in which the question of violation of the basic structure of the Constitution was involved. On 9-10-1975 the arguments in

the election appeal were concluded and judgment was reserved. Even before the judgment was delivered, on 20-10-1975 Chief Justice Ray issued a written order that the Court would hear arguments on 10-11-1975 on two matters:

(i) Whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution.

(ii) Whether or not *Bank Nationalisation case*<sup>8</sup> had been correctly decided.

For this purpose a Bench of 13 Judges was to be constituted.

A review of an earlier judgment is ordered by the Court only after a judicial hearing by a Bench which feels a doubt about its correctness. No such hearing had taken place before the Chief Justice made the order for review on the application of the Government. The Chief Justice's order for review was also not reported or known to the other Judges of the Supreme Court. Indeed Justice H.R. Khanna records in his memoirs that he was taken by surprise when he heard of it from a colleague who told him that in the "prevailing atmosphere of the Emergency it would not be difficult for Government to have a favourable decision"<sup>9</sup>. For one thing it was believed that there would be no counsel of stature to vigorously argue for limitations on Parliament as had been done for five months in the hearing of *Kesavananda*<sup>1</sup> in 1972-1973.

#### ***Indira Gandhi's appeal allowed by the Supreme Court***

On 7-11-1975 the election appeal of Indira Gandhi was allowed and the Allahabad High Court judgment disqualifying her was set aside<sup>10</sup>. For this the Court relied on the amendments to an ordinary law, the Representation of the People Act which had retrospectively removed her disqualifications in her case but the Court held that the Constitution (Thirty-ninth Amendment) Act, 1975 was unconstitutional. Four out of 5 Judges viz. Justices H.R. Khanna, K.K. Mathew, M.H. Beg and Y.V. Chandrachud applied different and contradictory concepts of the basic structure of the Constitution to invalidate the Constitution (Thirty-ninth Amendment) Act, 1975 but Chief Justice Ray held that it was invalid for other considerations without expressly stating that it violated the basic structure of the Constitution. The Chief Justice made a significant reservation in his judgment that "The hearing has proceeded on the assumption that it is not necessary to challenge the majority view in *Kesavananda Bharati case*<sup>1</sup>".

#### ***Bench of 13 Judges constituted to hear the review***

Following the order of the Chief Justice of 9-10-1975, on 10-11-1975 a Bench of 13 Judges commenced hearing of the review of *Kesavananda Bharati case*<sup>1</sup>. The Bench consisted of Chief Justice A.N. Ray, Justices H.R.

8. *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248.

9. H.R. Khanna, *Neither Roses nor Thorns*, p. 73.

10. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

Khanna, K.K. Mathew, M.H. Beg, Y.V. Chandrachud, P.N. Bhagwati, V.R. Krishna Iyer, P.K. Goswami, R.S. Sarkaria, A.C. Gupta, N.L. Untwalia, M. Fazal Ali and P.M. Singhal. To the surprise of everyone, N.A. Palkhivala who was the principal exponent of limitations on the amending power of Parliament in *Kesavananda case*<sup>1</sup> in 1973 but who had returned the brief of Indira Gandhi on the proclamation of Emergency, now appeared in one of the petitions for a coal mining company to oppose its review by the Court.

### ***Palkhivala's letter to Indira Gandhi***

Palkhivala felt so strongly against the review that one day prior to the hearing on 9-11-1975 with doubtful propriety, he wrote a long letter to Indira Gandhi as the Prime Minister<sup>11</sup>. In the letter addressed to her as "My Dear Indiraji" he felicitated her on her victory in her election appeal, praised her personal qualities but implored her in the interest of the nation to stop the reconsideration by the Supreme Court of what he considered as the most vital doctrine of the basic structure of the Constitution. He pleaded that if Parliament was given an unlimited power of amending the Constitution democracy and the unity and integrity of the country would vanish, and after her there would be nobody to hold the entire country together. He wrote that the basic structure of the Constitution was the real safeguard of the minorities and with limitless amending power the rule of law would disappear. He stated that her own election appeal had been argued in the Supreme Court on the basis that *Kesavananda case*<sup>1</sup> represented the law of the land and it would be strange that within three days of the historic judgment in her favour the Court should consider whether that very case should be overruled. He concluded by writing:

"The hearing in the Supreme Court on correctness of *Kesavananda case*<sup>1</sup> begins tomorrow. It need not continue unless the Government wants it to. Believe me, my respectful appeal to you is not made out of any lack of confidence in the case for holding Parliament's amending power to be limited, but it is based upon my belief that it would be a great gesture on your part to withdraw the State's plea for unsettling the law. I shall be very happy to call upon you if you so desire."

It is a matter of speculation what Indira Gandhi did on receipt of Palkhivala's letter and whether it was acted upon in some way. Did the Attorney General receive instructions from her? We do not know. I myself had understood from Palkhivala towards the end of his life that he had met Indira Gandhi but my impression is strongly refuted by his brother, Mr Behram A. Palkhivala in a letter to me.

### ***Hearing of review on 10-11-1975***

Despite Palkhivala's plea to Indira Gandhi, the hearing of the review did commence on 10-11-1975 to a packed Central Court of the Supreme Court.

11 The lengthy letter of Palkhivala is reproduced in *Nani A. Palkhivala — A Life*, by M.V. Kamath pp. 190-94.

There is no official record of the hearing but we have brief accounts from observers of the arguments made on 10-11-1975 and 11-11-1975<sup>12</sup>.

On 10-11-1975 at the outset Palkhivala raised preliminary objections to the review of *Kesavananda*<sup>1</sup>. First, he argued that the *Kesavananda*<sup>1</sup> judgment could not be reviewed as the Court in that case had directed that six petitions would be decided in the light of the law laid down in that case. He argued that as long as those six petitions were pending before the Court, this Court cannot review *Kesavananda*<sup>1</sup> which was res judicata for these six cases. More plausibly, Palkhivala argued that no case had been made out to review the basic structure theory and there was no case in which the Court had expressed difficulty in applying the theory. He was referring to the fact that the order for the review had been made by the Chief Justice by a mere administrative order on the oral request of the Government. He urged that in any case it was most inopportune to review *Kesavananda*<sup>1</sup> during the time of Emergency. He then made out a powerful case of the consequences of unbridled power of amendment of the Constitution if the limitation of the basic structure was revised by the Court. He referred to the proposed forty-first Amendment to the Constitution which if passed by Parliament would give immunity for the most heinous crimes committed by a political person who became a Governor.

Whilst the first objection of Palkhivala did not receive serious consideration, the later objections of Palkhivala had a powerful impact. Argued with great force and eloquence he held the Court and spectators spell-bound. Palkhivala was at all times a master of advocacy when he developed the unacceptable consequences of a situation in law. He did this with telling effect in this case, sometimes derisively countering the arguments of some Judges who found difficulties in the basic structure theory and its vagueness and uncertainty. Several observers, including Justice H.R. Khanna<sup>13</sup>, who saw Palkhivala's performance that day believe that the height of eloquence reached by him on that day will never be surpassed in the Supreme Court.

Much of the arguments turned on how and why the review of *Kesavananda*<sup>1</sup> had been ordered by the Chief Justice. At one stage the Chief Justice said that the request for the review had even come from the petitioners which Palkhivala hotly denied as incredible. The Chief Justice then stated that the Tamil Nadu Government had asked for a review upon which Mr Govind Swaminathan, the Advocate General for Tamil Nadu promptly got up to deny that any such request had been made by him.

12 Some accounts of arguments are given by Prashant Bhushan in his book. *The Case that Shook India*, pp. 256-67. Prashant Bhushan was present in the Court. We have also an account based on Prashant Bhushan's version and interviews of observers in Granville Austin *Working of a Democratic Constitution*, pp. 328-33 and in *The Supreme Court of India - A social legal critique of its Justice Technique* by Dr. Rajeev Dhavan and by M.V. Kamath in his biography of Palkhivala, pp. 419-42. Palkhivala's written submissions given to the Court are reproduced in *Legend of Nani Palkhivala* by M.R. Pai, p. 127.

13 H.R. Khanna, *Neither Roses nor Thorns*, at p. 74.

**Hearing on 11-11-1975**

On the next day, 11-11-1975 the Attorney General replied to Palkhivala's preliminary objections. He argued that Palkhivala had delivered a political lecture in the guise of preliminary objections. He stated that the decision to review was taken by the Court for good reasons as with the doctrine of basic structure, the constitutional situation was chaotic. Following *Kesavananda*<sup>1</sup> every constitutional amendment was being challenged in various High Courts and nobody including the Supreme Court Judges were sure of what the basic structure of the Constitution was. In these circumstances, he pleaded that it was essential that the Court cleared up the situation. Interestingly, Justice Mathew and Justice Beg stated that they did not agree that "The View of the Majority" signed by 9 Judges correctly stated the result of 11 judgments in *Kesavananda*<sup>1</sup>. On the other hand Justice Chandrachud said that it was a correct summary.

At this stage several questions were put to the Attorney General by Judges if there was any pending case in which the Court had found any difficulty in applying the basic structure concept. The Attorney General could not point out any petition listed on board in which there would be any difficulty in applying the basic structure principle. Except one petition, the listed petitions related to right to property which had been declared as not a basic structure of the Constitution in *Kesavananda*<sup>1</sup>. The only case which was not a property case was a challenge to the Constitution (Thirty-second Amendment) Act, 1973 which had set up an Administrative Tribunal in Andhra Pradesh for deciding service matters excluding the jurisdiction of courts.

At this stage the Attorney General was asked searching questions by some Judges<sup>14</sup>:

*Justice Khanna*: Has the theory of basic features impeded any legislation about socio-economic measures?

*Mr De*: Socio-economic measures are not the only thing, important as they are. The very structure of the Government is the fundamental object of the amending process. You don't need the amending power for non-essential features of the Constitution.

*Justice Untwalia*: Is there any example where the Government wanted to amend the Constitution in public interest and has been prevented by the basic feature theory?

*De*: Take the case of the Thirty-ninth Amendment.

*Justice Untwalia*: I am talking of amendments in public interest.

*De*: The point is that Parliament doesn't know what it can do. It doesn't know where it stands. We must know where we stand.

De pleaded that the case be reconsidered as there were many fundamental issues involved in the case.

14 Reproduced from Prashant Bhushan's, *The Case That Shook India*, p. 265.

*Justice Krishna Iyer:* The same plea can be advanced the very next day after reconsideration. You can still say that it is very important and must be reconsidered. The point is, what has really happened to justify a second look at the ruling?

De told the court that there was a tremendous amount of uncertainty in the country about the meaning of the basic structure theory.

*Justice Krishna Iyer:* Are you asking for a clarification of the basic structure, or do you want us to annihilate the theory?

De: Mr Palkhivala has raised preliminary objection that we can't go into that case. At least the Court can go into it to clarify it.

*Justice Bhagwati:* This is a matter of application of the case. Every Judge can have his own view as to what the basic structure is. We need not review the case for that.

De: All over India, litigation is going on, on the concept of basic structure. Are we going to tolerate a situation where different High Courts give different judgments on the same concept?

*Justice Krishna Iyer:* Are you assuming that after reconsideration we will get a homogenised version?

*Justice Chandrachud:* There will be difference of opinion in every case. You cannot prevent that.

On this note the hearing stood over for the next day.

### ***Events of the final day — 12-11-1975***

On the next day, 12-11-1975 the Bench assembled to a packed Court for resumption of the arguments. Hardly had the 13 Judges taken their seats when to the surprise of all the Chief Justice stated "This Bench is dissolved". He observed that for two days arguments were found "to go in the air". He directed that a Constitution Bench would hear the petition from Andhra Pradesh which had challenged the Administrative Tribunal in Andhra Pradesh created by the Constitution (Thirty-second Amendment) Act, 1973 and that Bench could refer the case to the Full Court if it found any difficulty in applying *Kesavananda case*.

### ***Reasons for the sudden end***

The sudden end of the review hearing took everybody in Court including Palkhivala by surprise. The reason for it has remained a mystery till now. What was the reason for it? We now have some revelations. It appears that Palkhivala's arguments that there was no case in which the Court had found difficulty in applying the basic structure had made a big impact on some Judges. Justice Krishna Iyer for one felt this. What followed is best expressed in Justice Krishna Iyer's own words. He says:

"Hearing him (Palkhivala) at some length, I was inclined to the view that the objection merited serious consideration. As we rose, retiring for the day to reassemble for next day to continue arguments, I told Justice Mathew about my tentative response to Palkhivala's submissions. I

confided in him my opinion that the question of basic structure did not appear to arise in this case and the point raised by Palkhivala needs weighty consideration. I did not tell him what the reaction of any other member on the Bench was. We left for home to meet in the chambers of the Chief Justice the next morning as was our wont. Maybe, the CJI was inclined to a contrary view, like Justice Mathew.

However, my individual response to Palkhivala's contention was perhaps misunderstood by Justice Mathew, for, I gathered — whether it was accurate information or a mere guesswork is not beyond doubt — that Justice Mathew told Chief Justice Ray that I had ganged up a number of Judges on the Bench to my pro-Palkhivala view. It looks as if this first flush opinion expressed to Justice Mathew by me, which was unwittingly exaggerated by him into a gang-up conclusion, infuriated the Chief Justice. The next morning when all of us gathered, as usual, in the Chief Justice's chambers his face expressed his indignation. In impatient irritation, as it were, he remarked 'that everything was in the air' so far as the part-heard case was concerned. Then all of us moved on to the Bench and took our seats with appropriate decorum. The Bar was full in the hall and suspense prevailed when the case was called. Immediately, the learned Chief Justice announced with authoritatively brevity that the Bench was being dissolved and thereby put an end to the hearing. All of us rose, returned to our chambers to proceed with other cases assigned to us.

How, Justice Mathew, without any further discussion with me, came to the unwarranted view that I had ganged up other colleagues with me, I do not know. It is still a mystery inside an enigma. Or was there some missing element which I was not aware, especially because the Chief Justice for whom I had reverence had not asked me a word about my view of the case? This is the story of the dissolution of the Bench and *Kesavananda*<sup>1</sup> ruling surviving without its uncertain frontiers spelt out."<sup>15</sup>

We have another version from the late Justice Chandrachud. Mr M.V. Kamath who has written a biography of Palkhivala refers to Palkhivala's letter to Indira Gandhi and to the unexpected end of the hearing on 12th November. He interviewed Justice Y.V. Chandrachud in 2006 for an explanation for the sudden end of the hearing. Justice Chandrachud gave his own explanation which was in Mr Kamath's manuscript but for some unknown reason is not reproduced in his book on Palkhivala. It has been given to me by his brother Mr Behram Palkhivala. It is as follows:

"Since Chandrachud was one of the judges in the review of *Kesavananda Bharati*<sup>1</sup>, he was asked if the case was dropped at the behest of the Government or Indira Gandhi. Chandrachud said, "Nothing of that sort. The Bench of 13 Judges was dissolved because none of us

15 Justice Krishna Iyer, *Stroke of Genius* by V. Lakshmanan reproducing article by Justice Krishna Iyer "There was no hidden agenda Mr Nariman", in *The Hindu*, 28-10-2005.

was with the Chief Justice. All 12 of us were against it (i.e. the review). After the case was ably argued by Nani, the Chief Justice looked here, there and at everyone. He found everyone against it. How can you change a judgment? With great respect to Justice A.N. Ray, he was not a great jurist or anything. He was a very obstinate type of person. On the contrary, the Government was amazed. It lasted one hour when we all sat together. After it, he found that people were laughing at him. We too were whispering into each other's ears, virtually making jokes at the Chief Justice. And suddenly he said, "The Bench is dissolved." We too were very surprised."

Justice Chandrachud's recollection appears to me not accurate. For one thing not all 12 Judges were against the review. Justice Mathew and Justice Beg and, possibly Krishna Iyer in principle at least were in favour of a review of the basic structure theory. It is also not correct that the hearing on 12th November lasted as long as one hour. It was over in a few minutes and therefore the laughter in the Court at the Chief Justice or making jokes at him does not appear to be correct. In 2009, when I asked Justice Bhagwati who was also a member of the Bench about his recollection and the explanations given by Justice Krishna Iyer and Justice Chandrachud he was also inclined to think that Justice Krishna Iyer's account was probably correct and did not think that Justice Chandrachud was correct. Unfortunately, despite a request I have not been able to get the version of Chief Justice A.N. Ray.

From all accounts it does appear that the Chief Justice felt uncomfortable at the doubts expressed by some of his colleagues and the manner in which he had ordered the review. But however wrongly the review was ordered it was even more wrong to dissolve a Bench without any reason in the manner the Chief Justice did. No one objected to that except an editorial comment in the Calcutta Weekly Notes<sup>16</sup>.

### *The basic structure theory survives*

In this manner the basic structure theory doctrine survived a review and possibly a reversal. Never thereafter has it been suggested that it should be reconsidered. The basic structure doctrine has now become a mantra of our constitutional law and is accepted without demur and applied in subsequent cases as such by the Supreme Court of India<sup>17</sup>. It has been accepted by the Supreme Court of Bangladesh<sup>18</sup>. It is not clear whether the basic structure doctrine has been accepted in Pakistan. The latest judgment there does not

16 (1975) 80 CWN 21

17 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Waman Rao v. Union of India*, (1981) 2 SCC 362; *P. Sambamurthy v. State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212; *I.R. Coelho v. State of T.N.*, (2007) 2 SCC 1.

18 *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (AD) (Spl) 1.

favour the doctrine<sup>19</sup>. The Sri Lankan Supreme Court<sup>20</sup> and the Supreme Court of Malaysia have rejected it<sup>21</sup>. In India a maladroit attempt to review it has contributed to its standing for all times. Constitutional law is as much an accident of history as of political events. Nothing illustrates this better than the basic structure doctrine purported to be prescribed by *Kesavananda*<sup>1</sup> and preserved by its abortive review.

---

- 19 *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719, For a review of case law in Pakistan on the subject see, *Judicial Review of Public Actions* by Justice R. Fazal Rahim, pp. 1249-65.
- 20 *Thirteenth Amendment to the Constitution & Provincial Council Bill, In re*, 1990 LRC (Const.) 1.
- 21 *Phang Chin Hock v. Public Prosecutor*, (1980) 1 MLJ 70.