Judicial Independence as A Basic Feature of The Constitution of India*

*Shri. V. Sudhish Pai***

Judicial independence or independence of the judiciary is a matter of vital concern and significance. In a constitutional democracy with an entrenched Bill of Rights, the essence of the constitutional scheme is checks and balances. The agency constitutionally vested with the power to oversee this is the judiciary. That underscores the imperativeness and significance of judicial independence. Judicial independence is at different planes or levels- philosophical, ethical, behavioural. It is important and necessary to understand and appreciate the concept, its content and nuances.

The ultimate guarantee for upholding constitutional values and the rule of law and for enforcing constitutional limitations and protecting the rights of the people is the personality and intellectual integrity of judges. Constitutional guarantees are futile unless they are enforced by judges of ability and integrity, who can withstand pressures from all quarters, within and without, including their own notions. A fearless and independent judiciary is the very bedrock of our constitutional edifice. Democracy cannot exist without justice and justice cannot be dispensed without an independent judiciary. The judiciary must possess and be seen to have fierce independence manifested through a rare courage of conviction.

As Lord Woolf perceptively said, 'judicial independence is not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public.'

We must, therefore, be clear as to what is judicial independence. In its classical and generally known and accepted sense judicial independence embodies the idea that the judiciary should be independent- free from executive control and pressure and judges should decide cases that come

* Special Lecture delivered on 28th March,2023 at the CMR University School of Legal Studies, in commemoration of the 50th Anniversary of the Supreme Court of India's judgment in Kesavananda Bharati v. Union of India

** Senior Advocate, High Court of Karnataka, Distinguished Lawyer, Acclaimed Author and Eminent Jurist.

before them not according to the likes and dislikes of the Government of the day, but freely, fairly and impartially.

The United Nations concept of judicial independence reflected in the 1975 Basic Principles on the Independence of the Judiciary is quite comprehensive. The standard is that 'the judiciary shall decide matters before them without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'

But what does all this mean? It is best to refer to what the Supreme Court observed in *Union of India* v. *Madras Bar Association*, (2010) 11 SCC 1 "Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of the judiciary. If 'impartiality' is the soul of the judiciary, 'independence' is the lifeblood of the judiciary. Without independence impartiality cannot thrive. Independence is not freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends, however, not only on philosophical, ethical or moral aspects but also upon several mundane things- security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the judiciary) and without (from the executive)."

We speak of the court as though it were an abstraction. But surely, the court as an institution is made up of men who with their diversities of endowment, experience, attitude and character determine its actions and the course of its development. As Durga Das Basu remarked in his Tagore Law Lectures, "It goes without saying that a court cannot claim to be respected unless its individual members can command respect and confidence of the people." Independence does not mean merely security of tenure or decent salaries but a condition under which judges may keep their oath to 'uphold the Constitution and the laws.' It is futile to expect an impartial judgment from a judge who is not immune from extraneous influences of any kind

whatsoever. As Learned Hand said an independent judge would be a person whom nothing could daunt and nothing could bribe.

These qualities must also inform the courts' functioning on the administrative side. It is inherent in the independence of judges that they should be independent of each other, as Lord Bingham remarked. In *Somesh Chaurisa* v. *State of M.P.*[1], D.Y. Chandrachud, J. observed that independence of the judiciary is independence of each and every judge - that judges are independent of their judicial superiors and colleagues.

There are various constitutional provisions which ensure judicial independence. Art 50 speaks of separation of the judiciary from the executive. There is more fusion than separation as between the legislature and the executive in a parliamentary system. But the judiciary is separate and has to keep its distance. The relationship between the judiciary and the other wings has to be correct and proper, not cordial. Some struggle and tension is inevitable. Reciprocal influence is a continuing process. Indeed, a Canadian judge, Marshall, writing about judicial independence a few decades ago, observed that even unavoidable interactions between the top echelons of the judiciary and the executive can be harmful to judicial independence.

There is a recent trend of judges of the Supreme Court/High Court speaking in very adulatory terms and lavishing fulsome praise on the head of the political executive at the Centre or in the State. Such behaviour and remarks can only be described as being in bad taste and unwarranted. This is not to cast any aspersions on the elected leaders of the nation and the states who are entitled to due respect. But institutional propriety would dictate that sitting judges do not indulge in such talk or behaviour. Such statements by the judges would shake public confidence in their independence and impartiality, tend to lower the dignity of the judiciary and constitute a threat to the rule of law. The ramparts do not fall except from within. Such statements and behaviour are also not in consonance with the spirit of the Bangalore Principles and the Restatement of Values of Judicial Life adopted at the Conference of Chief Justices.

[1] Somesh Chaurisa v. State of M.P, 2021 SCC OnLine SC 480.

Judicial independence has many dimensions. It is not confined or limited to independence from executive pressure or influence but includes independence from and fearlessness of all power centres- economic, political, social. But above all a judge has to be independent of himself. To be free of oneself, to uphold not only that which he likes, but also what is hated, is of the essence. In the memorable words of Vivian Bose, J in *State of Madras* v. *Krishnan*[2] 'I cannot allow personal predilections to sway my judgment of the Constitution.'

It has been rightly said, 'the highest exercise of judicial duty is to subordinate one's private personal pulls and one's private views to the law of which we are all guardians-those impersonal convictions that make a society, a civilized community, and not the victims of personal rule.'[3]

Judges are human beings, not some disembodied spirits. Like the rest of humankind, they cannot completely shed their past-their ideas and ideologies, background and past experience. It is inevitable that their so-called philosophy and scale of values play an important part in decision-making, as Patanjali Sastri, CJ, said. Cardozo deals with all this so graphically in his *The Nature of the Judicial Process*[4] where he states that "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by".

Judges can be influenced by what is said in the media. But a judge is not to shut himself in an ivory tower. He should not be like Sir Mathew Sausse, the first Chief Justice of the Bombay High Court who was known as Sausse the silent and who did not read newspapers, did hardly go out or mix with people except going for a ride on the beach in the evening or again like Lallubhai Shah, J. a judge of the Bombay High Court later in point of time and who too did not read newspapers.

Judges are not to bend to social pressures and populist ideas. But this does not mean that they should not be responsive to contemporary mores and values of society. They cannot ignore the change in the thinking and values

[2] State of Madras v. Krishnan, AIR 1951 SC 301.
[3] Frankfurter, Felix in Clark, Tom C., Mr. Justice Frankfurter: 'A Heritage for all Who Love the Law'"
[4] Cardozo, B.N., 1921. The Nature of the Judicial Process, p.168

of the times. "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind", observed Holmes. J[5].

A judge must recognize that he can be influenced and should resolve to counteract it. The test of judicial independence lies in the conscious and conscientious efforts of the judge to neutralize the effect of personal predilections and overcome his personal beliefs, preferences, preconceptions. That is easier said. But there should be sincere efforts in that direction.

It is extremely important that judicial independence should not be confused with the proclivity to strike down legislation or executive action in a cavalier manner. That would not be judicial independence but judicial showmanship. In the inimitable language of Krishna Iyer, J. 'Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.'[6] But judges need the great virtue of courage-courage in trying times and circumstances. If judges fail to exercise their much vaunted independence, they fail to discharge their judicial oath of dispensing justice without fear or favour.

Judicial independence is a *sine quo non* for a functioning, vibrant constitutional democracy. Even without the theory of basic features or the basic structure doctrine it has always been recognized as seminal in the scheme of things.

An understanding of the constitutional scheme and the constitutional developments of the first two decades will help to comprehend and appreciate the origin and evolution of the doctrine of basic structure.

The objective of the Constitution makers inspired by the freedom movement was to usher in an egalitarian society by bringing about socio-economic reforms. Agrarian reforms were high on the Government's agenda. With this end in view land reforms legislation was brought. This came into conflict

[5] Holmes Jr, O.W., 2009, The Path of the Law. The Floating Press.
[6] Mainstream, 22 November, 1980 referred to and quoted in S.P. Gupta vs. Union of India, 1981 Supp SCC 87 and K. Veeraswami vs. Union of India and others, 1991 SCC (3) 655

with the fundamental right to property. Courts declared unconstitutional land reforms laws as offending the right to property. The judiciary appeared as the stumbling block on the road to social reconstruction. The political executive had to respond keeping in view its promises and the public sentiment. Parliament, which was then the Provisional Parliament till the first general election in 1952 and comprising the same persons who were members of the Constituent Assembly, enacted the Constitution 1st Amendment in 1951. It introduced Arts 31A[7] and 31B[8] into the Constitution to shield agrarian reforms and other nationalization schemes against attack on the ground of inadequacy of compensation. It also brought in the device of Schedule IX in the Constitution which immunized all laws included therein from any challenge on the ground that they infringed any of the fundamental rights. It is a historical truth that some of the purposes and objectives of the Constitution would have been delayed or defeated but for this amendment.

In *Sankari Prasad* v. *Union of India* [9] the Court held that Parliament's constituent power certainly included the power to amend fundamental rights and 'law' in Art 13 refers only to ordinary legislation and not constitutional amendments.

However, in matters regarding compensation, the Court ruled that in spite of Arts. 31A and 31B, an attack on the ground that the compensation provided was so inadequate as to be illusory or amounting to no compensation, was not barred. In a challenge to laws relating to urban development and not covered by Arts 31A and 31B the Court held that compensation in Art 31(2) meant payment of full market value so as to fully indemnify the expropriated owner.[10] The Constitution 4th Amendment provided that adequacy of compensation was not justiciable. Even so, in *Rustom Cooper* v *Union of India*[11], the Court held that as 'compensation' in Art 31(2) was still there, it would signify only full compensation. *Sankari Prasad*[12] was

[7] INDIA CONST. Art. 31A, Ins by The Constitution (First Amendment) Act, 1951.
[8] INDIA CONST. Art. 31B, Ins by The Constitution (First Amendment) Act, 1951.
[9] Sankari Prasad v. Union of India, AIR 1951 SC 458.
[10] See also State of West Bengal v. Bela Banerjee, AIR 1954 SC 170.
[11] Rustom Cooper v. Union of India, AIR 1970 SC 564.
[12] *Supra note 11*

followed in *Sajjan Singh* v *State of Rajasthan*[13], but doubts about that legal position were expressed by Hidayatullah and Mudholkar, JJ. Then came *Golak Nath* v *State of Punjab*[14] in which it was held of 6:5 that Parliament had no power to take away or abridge any fundamental right and 'law' in Art 13 included a constitution amendment and, therefore, the limitations in Art 13(2) applied to that also.

The effect of the judgments of the Supreme Court in the view it took, of the right to property and to receive full compensation was, in a sense, similar to the impact of the judgments of the US Supreme Court during the heyday of the substantive due process when the Court gave full play to freedom of contract and the right to property.

The net result was a kind of confrontation between the judiciary which was seen as supporting vested interests and Parliament representing the populace and appearing to be keen about reforms and progress.

To overcome the *Golak Nath* judgment[15], the 24th Constitution Amendment specifically provided that Art 13 would not apply to a Constitution Amendment, that is, it would not be susceptible to a challenge on the ground that it infringed fundamental rights. The title of Art 368 –'Procedure for amendment of the Constitution' was changed to 'Power of Parliament to amend the Constitution and procedure therefor.' It was also clarified that an amendment under Art 368 would not come within the purview of Art 13. The 25th Constitution Amendment replaced the word 'compensation' in Art 31(2) with 'amount' to place beyond any doubt that compensation was not justiciable.

The stage was then set for the biggest and most significant constitutional case in India's history, the largest bench hearing for the maximum number of days and writing the longest judgment -*Kesavananda Bharati* v *State of Kerala*[16]. The challenge was to the Constitution 24th, 25th and 29th Amendments. By the 29th Constitution Amendment the Kerala Land Reforms laws were included in Schedule IX. The Court was faced with an

[13] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[14] Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[15] *Supra note 16.*
[16] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

unenviable task. The *Golak Nath*[17] judgment appeared to have laid down too wide and too wild a proposition which was clearly unsupportable and had to go. The Court wanted to save the Constitution from, what was alleged and the majority of the Court also believed to be, onslaughts on the Constitution.

We first come across the idea of basic features in the context of a constitution and constitutional amendment in the judgment of Cornelius, CJ of Pakistan in *Fazlul Quadar Chowdhry* v *Muhd.Abdul Haque*[18] where he took the view that though the Pakistan President under the 1956 Constitution of Pakistan was empowered to remove difficulties, he had no power to remove a fundamental feature of the Constitution. The power would not extend to altering the fundamental features. Shortly thereafter in October 1964 Mudholkar, J. in his separate opinion in *Sajjan Singh* v. *State of Rajasthan*[19] observed whether the basic features of the Constitution should be given a permanency; and whether making a change in a basic feature can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution.

Almost immediately thereafter in February 1965, Prof. Dieter Conrad, Head of the Department of Law, South Asia Institute of the University of Heidelberg, West Germany delivered a lecture on *Implied Limitations on the Amending Power* to the Law Faculty of Banaras Hindu University. Our great constitutional lawyer M.K.Nambyar borrowed this from the Professor and presented it to the Supreme Court in the *Golak Nath* case. The Court, however, did not express any opinion in that regard and decided the case on a narrower basis in February 1967[20]. There was also an article by Prof. Conrad- *Limitation of Amendment Procedures and the Constituent Power*[21]. The seed that was planted by Dr. Conrad, adopted in the arguments of the redoubtable Nambyar in *Golak Nath* was brought to flower and fruition by the impassioned advocacy and forensic brilliance of Nani Palkhivala in *Kesavananda Bharati* v *State of Kerala*[22].

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[17] *Supra note 16*.
[18] Fazlul Quadar Chowdhry v. Muhd Abdul Haque, PLD 1963 SC 486.
[19] *Supra note 15.*
[20] *Supra note 16.*
[21] India Year Book of International Affairs XV-XVI 1966-67
[22] *Supra note 18.*

The purported view of the majority as signed by 9 of the 13 Judges on the Bench in *Kesavananda* was: "Art 368 does not enable Parliament to alter the basic structure or framework of the Constitution." Khanna, J. whose judgment tilted the balance approvingly quoted Prof. Conrad: "Any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure, change the fundamental pillars supporting its constitutional authority."

Commenting on these developments, Granville Austin in his *Working of a Democratic Constitution* remarked: "The nine judges (who signed the summary of the *Kesavananda* judgment) seem to have performed an act of statesmanship, even of legerdemain. The Court mollified the Government by overruling *Golak Nath* and upholding the three amendments, in effect nearly returning to the *Sankari Prasad* case position, while preserving, indeed strengthening, its own power of judicial review. The history of *Golak Nath* is a cautionary tale of unintended consequences. The fears for civil liberty and for institutions of the Constitution that fed that decision's rigid restrictions on amendment evoked amendments hazarding liberty and the Constitution- as their use during Mrs. Gandhi's Emergency soon would demonstrate. The amendments, in their turn, produced *Kesavananda* which entrenched the Fundamental Rights- as even the Constituent Assembly had not done- while strengthening the courts under the Constitution."

The Constitution in Art 368 vests the amending power in Parliament and prescribes the manner of its exercise. That is constituent power. Where a written Constitution like ours after setting up an amending body invested with the power to amend does not impose any express limitations upon that power, it may not be right to read implied limitations upon it by judicial interpretation. As Dr. Ambedkar said in the Constituent Assembly, "If the future Parliament wishes to amend any particular article all that is necessary for them is to have a two-thirds majority."[23] And again, "Those who are dissatisfied with the Constitution have only to obtain a two thirds majority."[24] The entire tenor of the Constituent Assembly Debates was that all articles of the Constitution were subject to the amendatory process as Khanna, J. also noted in his *Kesavananda* judgment. And in the earliest case

[23] IX CAD 1663 (17.9.1949)
[24] XI CAD 976 (25.11.1949)

of *Sankari Prasad* v *Union of India*[25] where the Constitution First Amendment was under challenge, Patanjali Sastri, J. speaking for a unanimous Constitution Bench declared in ringing tones, "To make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament."[26]

Yet for the first time in *Kesavananda* the Court by a slender majority of 7:6 declared that while Parliament had the power to amend every part of the Constitution including Fundamental Rights in Part III and there were no implied limitations on the amending power, the power did not extend to amending 'the basic structure of the Constitution', a term not found in the Constitution. Six judges held that the amending power was limited by various inherent and implied limitations, while six other judges held that there were no limitations on the amending power. Khanna, J. expressly rejected the theory of inherent or implied limitations and held the amending power was plenary, but the word 'amendment' by its limited connotation did not permit abrogating the Constitution and, therefore, subject to retention of the basic structure or framework of the Constitution, any part of it could be amended.

There is no common ground on the reasoning for any limitation on the amending power between Khanna, J. and the six other judges in the majority. Indeed there appears to be an unbridgeable gap between their concepts and lines of reasoning. The idea of the impermissibility 'to alter the basic structure or framework of the Constitution' was picked up and adopted from the judgment of Khanna, J. It is inconceivable how this could be said to be the view of the majority. Equally, if not more, incomprehensible is the reasoning and conclusion that though there are no implied limitations on the power of amendment, it could still be restricted or curtailed only on the basis of the meaning of the word 'amend' which in plain English means change, alter and no qualifications or limitations inhere in that word or its meaning.

[25] *Supra note 11.*
[26] Ibid

This doctrine was accepted and applied in *Indira Gandhi* v *Raj Narain*[27]. As Chandrachud, J. said the ratio of the majority in *Kesavananda Bharati* is that the power of amendment cannot be exercised so as to damage or destroy the essential features or basic structure of the Constitution, *whatever those expressions may comprehend*. And *Minerva Mills* v *Union of India*[28] stated the theme song of the majority in *Kesavananda*: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage, therefore you cannot destroy its identity."[29]

This then is the genesis and purport of the basic structure doctrine. Thereafter the theory has been invoked and applied in many cases, some justifiably, some indiscriminately and sometimes wholly unjustifiably.

When we try to understand and define basic structure and dwell upon the doctrine, difficulties arise. Is there a match between the label and the thing? To quote T.S. Eliot, "When a term has become so universally sanctified as 'democracy' now is, I begin to wonder whether it means anything in meaning too many things." I am afraid much the same can be said about the basic structure doctrine.

The *raison d'etre* for the basic structure doctrine apparently is: Every measure or action, executive or legislative, has to conform to the limits set by the Constitution. It is open to challenge and judicial scrutiny on recognized grounds. A law can be assailed only on the ground of lack of legislative competence, violation of fundamental rights or any other constitutional limitations. The ultimate power and responsibility of law making is vested in the legislature. But Parliament exercises not only legislative power. While acting under Art 368 Parliament exercises constituent power and the product of that exercise is an amendment to the Constitution which is not amenable to substantive challenge on any grounds of challenge to a legislation. It is to ensure that by the process of amendment the Constitution is not denuded of its core or made to suffer a loss of

[27] Indira Gandhi v. Raj Narain, AIR 1975 SC 2299.
[28] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[29] Ibid

identity that the doctrine of basic structure has been judicially conceived and evolved as a substantive and only ground to challenge a constitutional amendment. It is to be applied wisely and cautiously in appropriate cases.

Coming to the concept of judicial independence as a basic feature of the Constitution: Arts 124 and 217 vest in the President, a metaphor for the Union Government, the power to appoint and transfer judges of the superior judiciary in consultation with the Chief Justice of India. By judicial interpretation in *II*[30] *and III*[31] *Judges* cases consultation was held to mean concurrence making the President a consultee. The Supreme Court innovated the apparatus and apparition of the collegium, wresting the power of the appointment to itself, quite contrary to the language and intendment of the Constitution. This is not interpretation but rewriting the Constitution.

That judges should be appointed by and with the concurrence of judges through a collegium, otherwise it would infringe the independence of the judiciary and abrogate the basic structure shows the absurd length to which the Constitution can be perverted. Pushed to its logical end it would even mean that the constitutional process of removal of a judge is encroachment on judicial independence. Sir Alladi perceptively said in the Constituent Assembly, "The doctrine of independence (of the judiciary) is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super legislature or super executive."[32] For the Court to decide that independence of the judiciary is a part of the Constitution's basic structure was quite uncontroversial. The Court's judgment, however, went further and held that primacy of the judiciary in the process of appointments is indispensable for independence of the judiciary and by implication forms part of the basic structure. This was a tall claim. There can be other means of protecting judicial independence and the choice should lie with Parliament.

By its very name and the reason that the basic structure doctrine is to ensure that the core of the Constitution is not destroyed or abrogated, basic structure and the touchstone of testing constitutional amendments is and

[30] Supreme Court Advocates on-Record Association v. Union of India (1993) 4 SCC 241
[31] Special Reference No.1, In re (1998) 7 SCC 739.
[32] XII CAD 837 on 23.11.1949

must be what is contained in the original Constitution and not what is added later either by an amendment or judicial gloss or interpretation and whose legitimacy and correctness itself may be in serious doubt. There can be no greater distortion and defilement of the Constitution than the court referring to and relying on such gloss as the basic structure. When an amendment to the Constitution is challenged as damaging the basic structure, it would have to be tested with reference to what the Constitution originally said; and not with reference to judgments or later interpretations. But curiously and unfortunately, this is what was done in the *NJAC* case.[33]

There can, of course, be many subtle ways of encroaching upon or undermining judicial independence. For instance, the number of judges required for deciding a constitutional issue is prescribed and a lesser number of judges are appointed. Apart from the jurisprudential support for the collegium system or lack of it, the general public who are the consumers of justice dispensation would be interested in the smooth working of the judiciary and disposal of matters resulting in justice delivery. What is intriguing is that there are no timelines and uniform practice in the matter of appointments to the higher judiciary. After the judiciary (the collegium) recommends names for appointment, the response of the executive is quite unpredictable, there being no uniform standard or practice. Sometimes recommendations by the judiciary and appointments by the executive happen in a couple of days. Sometimes the executive does nothing for months and even years, and that is even after the collegium has considered and reiterated the recommendation which then, as the law now stands, has to be given effect to by making the appointment. And both these events happen for no explicable reason that is disclosed. It is settled that every action of the State has to be reasonable and that implies it has to be within a reasonable time. Inaction on the part of the executive in responding and giving effect to the recommendations, on occasions for months or even years, is certainly unreasonable and unjustified and undermines judicial independence.

Over the years after *Kesavananda*[34] what was then thought of and understood as the limited scope of judicial control by the basic structure

[33] Supreme Court Advocates-on-record Association & Anr. vs. Union of India, (2016) 5 SCC 1

[34] *Supra Note 18*

doctrine has been enlarged by subsequent pronouncements into a total judicial supremacy over the amending power. Successive judgments have simply proceeded on the basis that *Kesavananda* has held that an amendment to the Constitution cannot alter its basic structure. With even Constitution amendments being susceptible to a challenge as destroying the basic features and violating the basic structure of the Constitution, the basic structure theory upsets the fine balance among the different co-equal wings and raises the issue of the democratic character of judicial review in its most acute form. In limiting the amending power, the doctrine in effect stifles democracy, a basic feature. The basic major premise of the Constitution is that what obtains is limited government. Checks and balances of powers in the constitutional scheme is perhaps the most fundamental feature of democratic constitutions. Is that basic feature not breached by the basic structure doctrine? If the constitutional government is limited government, one of its enemies is absolutism of any kind. The *Kesavananda* doctrine is indeed judicial absolutism or imperialism.

The basic structure doctrine puts the Indian Supreme Court in the same position as the U S Supreme Court of the substantive due process era, in a different sense, not of supporting freedom of contract and property but of arrogating unlimited authority to itself which tends to become 'some amorphous general supervision of the government', as Justice Powell put it in *U.S.* v. *Richardson*.[35]

It is important to note that Prof. Conrad's thesis was greatly influenced by the entrenched provisions in certain European constitutions. Those Constitutions expressly declare certain provisions as basic and make them unamendable. It is not a case of any implication or implied limitation but express entrenchment. Such is not the case with the Indian Constitution and Art 368. When the Constitution has provided for its amendment without any reservation, the mere gravity of the subject of amendment cannot give rise to any implied limitation.

Without doubt, the *Kesavananda* judgment salvaged something precious. The doctrine is, perhaps, essential to save the Constitution which needs and

[35] U.S. v. Richardson (1974) 418 US 166,191.

deserves to be kept pristine and inviolate. But one cannot test or justify the juristic foundation of a concept based on the result, however beneficial or alluring.

The basic structure doctrine is a product of its time and history. Having been in place for half a century, it may be difficult and perhaps even imprudent to dislodge it or even make such a suggestion. Now on the occasion of the golden jubilee of that celebrated judgment and the doctrine expounded therein, we need to remind ourselves that the doctrine is neither an unalloyed blessing nor an unmitigated disaster. Like many other tools it has to be judiciously and cautiously employed. It is a rare weapon to be used sparingly. Unjustified and indiscriminate invocation and application of the basic structure doctrine will itself be an abrogation of the Constitution's basic structure. We cannot avoid what Cardozo, J. deemed inherent in the problem of construction, and in constitutional exposition even more, 'making a choice between uncertainties, we must be content to choose the lesser.'[36] As held by the Supreme Court in *Ambika Prasad Mishra* v *State of Uttar Pradesh*[37], "It is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses by perennial suspense all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow up."

Under Art 141 the law declared by the Supreme Court is the law of the land binding on all. But does that mean one should give up the independence of thought? Judicial discipline and the regime of Article 141 undoubtedly require every judge to follow the law laid down by the Supreme Court. That is judicial duty. It is imperative in a hierarchical system of courts like ours that the last word should belong to someone and that having been said, it ought to be faithfully accepted and followed even if a judge at the lower tier has any reservations. However, nothing prevents a judge at any level while abiding by the law laid down by the Supreme Court or the High Court to state in his judgment, of course, in very polite and respectful language, if he has any reservations about the view of the superior court and point out what he feels to be erroneous and what may be a more tenable view. That is judicial independence and adhering to the judicial oath and conscience. That

[36] See Burnet v Guggenheim 288 U S 280, 288
[37] Ambika Prasad Mishra v State of Uttar Pradesh (AIR 1980 SC 1762)

will give the necessary impetus for review and correction at a future date. Far from being undesirable, it will help in a healthy development of the law, sowing the seeds for future rectification or improvement and growth. To mention a couple of instances:

In *Broome* v. *Cassell & Co*,[38] Lord Denning in the Court of Appeal pointed out the difficulties presented by the House of Lords' decision in *Rookes* v. *Barnard* [39]and doubted the validity of the doctrine propounded there. In appeal the House of Lords in *Cassell & Co*. v. *Broome*[40] took umbrage at that. But the House did consider the problem; the appeal was dismissed affirming the judgment of the Court of Appeal. To that extent the cause was served. [41]

Niranjan Swain v. *State of Orissa*[42] is a case in point. There R.C.Patnaik, J. (who later came to the Supreme Court where he had a very short tenure because of his untimely tragic death in a road accident) respectfully pointed out that the law declared in the State *of M.P*. v. *Smith & Skelton (P) Ltd*.[43] and *Guru Nanak Foundation* v. *Rattan Singh*[44] appeared to be flawed. He stated 'the rule laid down in those cases is binding on me. However, with great respect, I hope that the Supreme Court would on an appropriate occasion reconsider its views.' That happened more than 28 years later when, without reference to the observations of Patnaik, J., those cases were overruled by a Constitution Bench in *State of Jharkhand* v. *Hindusthan Construction Co. Ltd*.[45] While the observations of Patnaik, J. were not referred to, the cause was served.

Any discussion on judicial independence cannot be divorced from judicial accountability. Without accountability independence becomes meaningless and a myth. Moreover judicial independence and judicial accountability are not ends in themselves; they are means to achieve the goal of fair and impartial administration of justice and upholding the rule of law. Judicial

[38] Broome v. Cassell & Co. [1971] 2 QB 324
[39] Rookes v. Barnard [1964] AC 1129
[40] Cassell & Co. v. Broome [1972] AC 1027
[41] Ibid. See Lord Denning, *The Discipline of Law*, pp. 308-13
[42] Niranjan Swain v. State of Orissa 1989 SCC OnLine Ori 336
[43] State of M.P. v. Smith & Skelton (P) Ltd. (1972) 1 SCC 702
[44] Guru Nanak Foundation v. Rattan Singh (1981) 4 SCC 634
[45] State of Jharkhand v. Hindusthan Construction Co. Ltd. (2018) 2 SCC 602

independence is an instrumental value. It is no unbridled power. 'Judicial independence is not secured by the secrecy of cloistered halls. It cannot be said that increasing transparency would threaten judicial independence.' The institution of judiciary cannot be used as a shield to insulate a judge from his actions which have no bearing on the discharge of official duty. A judge must recuse when there is a potential conflict of interest. Judicial independence is not insulation of judges from the rule of law.

Again, judicial independence is meaningless without judicial integrity. Integrity in common parlance denotes honesty, straightforwardness and uprightness. But judicial integrity is all this and more. Its essential feature is a passion for justice informed by a deep and abiding morality. It is the courage of conviction and the willingness to reach the result which a judge's understanding of the law tells him is right and not that which is popular.

Judges being offered and accepting any office/position immediately on retirement does not augur well for judicial independence. It is destructive of judicial independence when judges openly go after post-retirement appointments by the Government, that too during their tenure on the Bench. Perceptions-well founded- or even otherwise- are inescapable and do matter. It is public perception that generates public confidence or lack of it in the judiciary.

It has now become not uncommon for judges who retire from the highest court to take up new offices which are totally political appointments which leave a disconcerting message and turn out to be disappointments for those who value values. Late Arun Jaitley famously said that public perception would be that pre-retirement judgments would be influenced by post-retirement benefits. Many legislations and quite a few judicial orders create post-retirement avenues for judges. The desire for a post-retirement job can influence pre-retirement judgments and constitute a threat to the independence of the judiciary. This is the position in the case of appointments to different tribunals/commissions. Only in cases like the Law Commission or the NHRC such appointments would be inevitable. But even those should be made only after some cooling-off period. But appointments like nominated member of Parliament or Governor of a State which are purely political in their selection as well as function leave one aghast.

The Constitution envisages nomination to the Upper House of persons having special knowledge or practical experience in matters such as literature, science, art and social service. The nomination is by the President acting on the advice of, and therefore effectively by, the Union Government. It is difficult to envisage in what matters set down in Art 80 a retired Supreme Court judge fits and fulfills the criteria to be nominated. It may be a totally different matter for a retired judge to contest an election and enter the legislature. But even that would have to be after a cooling-off period. But nomination coming on the heels of the retirement of a judge renders it wholly unacceptable.

The Governor is the linchpin in the constitutional apparatus of the State. The Governor is appointed by the President on the advice of the Union Government. While it cannot be universalised, Governors, of late, have not acquitted themselves well as non-partisan statesmen abiding by the Constitution and its ethos. Appointed by the Central Government, many times they act as agents or servile subordinates of the Union Government, or worse, of the party in power at the Centre. The office of the Governor was never intended to be a parallel centre of political power. It is not known what special qualifications a retired judge has for filling a gubernatorial position.

Such appointments are not happening for the first time now. But two wrongs do not make one right. Justice Fazl Ali was appointed Governor of Orissa within days of his retirement from the Supreme Court in 1952. Chief Justice Chagla resigned at the call (phone call) of the Prime Minister to be appointed India's Ambassador to the United States. But these are exceptions. Everyone is certainly not a Chagla. One does not become a Shakespeare merely by marrying a lady older than oneself.

Chief Justice Subba Rao, indisputably one of our most eminent judges, while still holding the highest judicial office, met and discussed with political parties his candidature for election as President and filed his nomination as a candidate for Presidential election immediately on resigning as Chief Justice of India. This brought him no credit and rightly incurred public criticism as being an act of grave judicial impropriety.

Chief Justice Hidayatullah became Vice President many years after his retirement and as the unanimous choice of all political parties. Justice H R Khanna becoming Union Law Minister and later contesting the Presidential election and also Justice Krishna Iyer being a candidate for the Presidential election were all some years after they ceased to be judges of the Supreme Court. These are altogether different situations.

Public perception- perception of right thinking and well meaning people- matters. Such perception is against such appointments. The test in all such cases is the instinctive feeling one would get on hearing of such nomination/appointment. It is, as Lord Denning famously observed in two different contexts- bias of a judge and interference in appeal with award of compensation in accident claims- 'right thinking people would leave the courtroom thinking the judge was biased' and 'oh! So much or so little' Even where pre-retirement judgments have been impeccable and there is no doubt that they are not influenced by post-retirement advantages, the sheer possibility of a shadow being cast is reason enough not to get any nomination/appointment. Persons in high offices, like Caesar's wife, should be above board. In one sense such nomination/appointment is devaluing the high and impartial office of a Supreme Court judge. Judges themselves can undermine their independence and integrity.

Such nominations/appointments do not seem to bring any credit to those who nominate/appoint or to those nominated/appointed. They are not illegal, but they are certainly improper. The letter of the law may be satisfied, but its spirit and import are buried six fathoms deep.

It is apposite to quote what N.U. Beg, J. said addressing the conference of U.P. Judicial Officers at Lucknow in April 1967: "No doubt, it (the brotherhood of judges) carries great honour and glory with it, but the very nobility and greatness of this honour and glory cast a heavy and onerous responsibility on the shoulders of everyone who has the privilege of belonging to it.. Be it, however, remembered that if honour in brotherhood is indivisible, so is dishonor. Any deflection from the path of rectitude by a single member casts a serious slur on the honour of the entire brotherhood. Any culpable conduct on the part of a single member constitutes betrayal of the brotherhood as a whole."

Independence of the judiciary does not depend upon the source or power or manner of appointment of judges or on anything that happens before appointment. It is to be judged by and the test is how independently judges behave on and off the Bench after their appointment and in their thinking and functioning. It also means independence from their own prejudices and pet notions. Judicial independence and integrity are ultimately in the minds and hearts of judges. When they are there, there is no need for any law, when they die there, no law can do much to save them. Impartiality is not a technical conception; it is a state of mind, said Chief Justice Hughes. Great examples of persons with political backgrounds appointed as judges who proved their integrity and independence are the likes of Chief Justice Earl Warren of the United States and Justice Krishna Iyer.

Earl Warren was President Eisenhower's nominee to be the Chief Justice of the US Supreme Court. After the famous *Brown* v. *Board of Education*[46] case was heard and reserved, at a stag dinner at White House in February 1954, Eisenhower shocked Warren. Over coffee, Eisenhower took Warren by the arm and asked him to consider the perspective of white parents in the Deep South. "These are not bad people," the President said. "All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big black bucks." The judgment came in May 1954 declaring segregation in public schools unconstitutional, the Chief Justice writing judgment for a unanimous court. Justice Krishna Iyer, a known leftist whose elevation to the Supreme Court did not evoke that favourable a response, demonstrated his independence and integrity when he declined to allow Shri H.R. Gokhale, the then Union Law Minister and a fellow traveller, to call on him in the wake of Smt. Indira Gandhi losing the election case in the Allahabad High Court.

We have such stellar examples: P.B. Chakravartti, J, (then Chief Justice of the Calcutta High Court) who could tell the Chief Justice of India to come to the High Court only after court hours. S.P. Mitra, J, (then Chief Justice of the Calcutta High Court) who could tell the Chief Justice of India that he (the CJI) would be received by him (Mitra CJ) only in his chambers. D.M.

[46] Brown v. Board of Education of Topeka,347 U.S. 483 (1954)

Chandrasekhar, J, (then senior most puisne judge of the Karnataka High Court) who told the Chief Justice of India, who wanted to sit in court with the High Court judges so as to help him to make appointments to the Supreme Court, that the High Court judges were not inviting the CJI to sit with them and that they were not interested in Supreme Court judgeship. R.M. Kantawala, J, (Chief Justice of the Bombay High Court) who could tell the Chief Justice of India that the CJI's proposals for appointment as judges would not go through because he (Kantawala, CJ) did not approve of them. Justice H.R.Khanna who gave his famous dissent knowing full well that it would cost him the Chief Justiceship of India. These are but a few instances, the likes of which we are perhaps unlikely to come across these days.

It is also necessary to do away with the pernicious practice of appointing Additional Judges. Chief Justice Subba Rao had said way back in 1966 in his speech at the Centenary celebrations of the Allahabad High Court that appointment of Additional Judges detracts from the concept of judicial independence. Article 224 contemplates appointment of Additional Judges only when there is a temporary increase in work or accumulation of arrears, i.e., to meet a particular contingency and not to be a permanent feature so as to form a training base for recruiting judges. The original idea behind the provision has been perverted in practice. While this was so denounced by the Supreme Court way back in 1981 in the *First Judges'* case,[47] which is still good law, in *Shanti Bhushan* v *Union of India*,[48] a two-judge bench endorsed the practice of assessing the statistics of an Additional Judge's work for making him permanent. In recent times the Supreme Court, on the administrative side, has perpetuated this baneful practice and even worsened the situation by requiring some certification of the judgments passed by the Additional Judges by their peers and now by the Supreme Court. This has no constitutional or legal sanction and it is not understandable how High Court judges pusillanimously put up with such a practice which is derogatory for judges of the highest court of a state and is unconstitutional. Over a period of time seemingly innocuous but really ominous practices that have sullied the image and defiled the system have come to stay.

[47] S.P. Gupta v. Union of India, AIR 1982 SC 149
[48] Shanti Bhushan v Union of India (2009) 1 SCC 657

There is another disturbing sign. Appointment of a High Court judge in the common law tradition is the announcement of an emerging judicial personality. Elevation to the superior judiciary has always been considered an invitation to cross over from the Bar to the Bench. It is something for which any Chief Justice is to be thankful to the counsel. M.S.Menon, CJ considered his persuading Krishna Iyer to become a judge as one of the major achievements of his judicial career. However, over the years it has become common for the newly appointed judges to express gratitude to the Chief Justice and others and for newly appointed High Court chief justices and Supreme Court judges to thank the collegium, while it should be the other way round. Now matters have come to such a dismal and farcical state that prospective candidates for appointment to the High Court Bench are called by the Supreme Court collegium for an interaction and these future judges unabashedly present themselves and get appointed. Nothing can be more demeaning. It also discloses a trust deficit in the High Court which recommends the candidates. It is incomprehensible as to what can be gathered in such short interactions. Those who are to be watch dogs appear to act as poodles. Invitation has degenerated to application and supplication! The whole system of appointments to the superior judiciary is flawed and illegitimate. This new practice without any constitutional support is another addition to the flaws. It may not be wrong to say that the present system of appointments and transfers in the superior judiciary- collegium system- greatly undermines judicial independence.

The behaviour of judges off the bench at all levels is another feature that is perturbing and detrimental to the integrity and dignity of the system. It is pathetic to see how members of the lower judiciary genuflect before the High Court judges and how they are treated by the High Court judges sometimes. It is equally saddening to see the subservient behaviour of High Court judges towards judges of the Supreme Court. In earlier days the visit or presence of a Supreme Court judge in his city was not even noticed by a High Court judge. Today it is a different story. Even the form of address is equally significant. High Court judges and chief justices addressing Supreme Court judges as ‘Your Lordship’ is, to say the least, belittling. Unfortunately this kind of a culture has been nurtured by successive generations of judges in recent times.

Setalvad's strong opposition to welcomes and farewells to incoming and outgoing judges and the practice he established in the Supreme Court is ideal. The practice in the High Courts was never that and in the Supreme Court also it has long since been changed. Not having such felicitation functions where generally everything but the truth is said, adds to the dignity and independence of the Bar which is so vital and essential for judicial independence.

Impressions and public perception, the perception of right thinking people, are indeed important and cannot be brushed aside. The situation can worsen when one tries to push under the carpet any allegations; the entire system may get corroded. Fali Nariman hit the nail on the head when he said that regrettably- with a few notable exceptions- the fraternity of justices in the higher judiciary in India tend to stick together when anyone speaks of any wrongdoing about one of them- alas, even when some of its members themselves entertain a shrewd suspicion of some wrongdoing. It is imperative that there is a social boycott of black sheep by their peers and the public at large. Otherwise, all our crying about deviant and unworthy conduct and behaviour is not only futile but dishonest. To quote Nariman again, "It is a common human failing amongst us that we treat all persons with civility- even those who may have indulged in some questionable conduct. Men and women who are otherwise upright in their own behaviour think it bad form to slight someone or ignore someone against whom even credible charges have been levelled." How sadly we miss a Seervai!

While there are shortages of many commodities, nothing is so scarce in our society as intellectual integrity, which is standing by and speaking out for the values and principles which one holds sacred. Everyone is at his best when the going is good and finds it easy to swim with the tide. The ultimate measure of a man is, as Martin Luther King Jr. said, where he stands at times of challenge and controversy. One cannot overlook Dante's powerful remark: The hottest places in hell are reserved for those who, in a time of great moral crisis, maintain their neutrality.

The need and significance of critical legal literature –an evaluation of the judiciary's role and contribution- cannot be over emphasized. It is without doubt of invaluable assistance in presenting a true and coherent picture of

the law while deciding cases by themselves might appear as 'a wilderness of single instances.' The purpose of such writing is to subject judicial power to the restraints of reason, of sceptical analysis, of philosophical enquiry. Some criticism may be justified, some criticism may be mistaken. But criticism cannot be abandoned altogether. For, if any criticism is found to be correct the cause of finding a correct and coherent picture is served; if it is incorrect, the process of discovery of the mistakes and the correct position would serve the cause no less. Such criticism has to be tolerated, appreciated and welcomed. To quote what Dr. Radhakrishnan said in a somewhat different context: "Tolerance is the homage that the finite mind pays to the inexhaustibility of the infinite." Criticism is essentially a method of appreciation, as Lord Radcliffe said. The criticism of a great poet or artist leaves his essential greatness untouched or rather brings it out in a more striking fashion.

It is appropriate to refer to Glanville Williams' stringent criticism of the decision of the House of Lords in *Anderton* v. *Ryan*[49] and the Law Lords' response to it in *R* v. *Shivpuri*[50]

"The tale I have to tell is unflattering of the higher judiciary. It is an account of how the judges invented a rule based upon conceptual misunderstanding; of their determination to use the English language so strangely that what they spoke by normal criteria would be termed untruths; of their invincible ignorance of the mess they had made of the law; and of their immobility of the subject, carried to the extent of subverting an Act of Parliament designed to put them straight.[51]

Lord Hailsham L.C. (presiding in *R.* v. *Shivpuri*[52]) said, "There is obviously much to be said for the view to be expressed by Lord Bridge that if a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better." Lord Bridge, giving the leading opinion for a unanimous House, overruling the earlier decision said, "I cannot conclude this opinion without disclosing that I have had the advantage since the

[49] Anderton v. Ryan 1985 AC 560
[50] R v. Shivpuri 1987 AC 1
[51] Prof.Glanville Williams: The Lords and Impossible Attempts or Quis Custodiet Ipsos Custodes, (1986) CLJ 33
[52] R v. Shivpuri (1986) UKHL 2.

conclusion of the arguments in this appeal of reading an article by Prof Glanville Williams. The language in which he criticizes the decision in *Anderton* v. *Ryan*[53] is not conspicuous for its moderation, but it would be foolish on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it."

Prof. Glanville Williams' question *Quis Custodiet Ipsos Custodes* (who watches the watchmen) was answered by Prof Atiyah in his Hamlyn Lectures (1987) on *Pragmatism and Theory in English Law*[54], by saying that the answer clearly was, "Prof Glanville Williams or in default, some other academic lawyer of equal calibre." This highlights the importance of critical appraisal and if the criticism is sound, it will prevail and be accepted sometime or the other.

It is said that that noble warrior of life and the law, Justice Holmes refused to regard even the highest tribunal as a Grand Lama. Like all human institutions, he believed, the courts must earn reverence through the test of truth.

All these various facets, that I have referred to, have their bearing on the independence of the judiciary. As Krishna Iyer, J. said in *Sankalchand* case,[55] "Avoiding callous underestimations and morbid exaggeration, we must realize that independence of the judiciary is vital but is only an inset in the larger picture of the nation's free, forward march."

It has been well said that when the Constitution gives the judiciary enormous power and responsibility to ensure that every institution and every citizen must strictly conform to law and to the standards of propriety, it is logical then to expect that the institution of the judiciary itself must be worthy of the full confidence of the people.[56] Judges both in office and out of office as also post retirement should maintain the highest standards of propriety. Judges should not only be, but should be seen and believed to be, exemplars. Judges are really trustees of 'limited government' and of our

[53] Anderton v Ryan [1985] AC 560
[54] Atiyah, P.S., 1987. Pragmatism and Theory in English Law.
[55] Union of India vs. Sankal Chand Himatlal Sheth & Anr [1977] INSC 177 (19 September 1977)
[56] See Dr.P.C.Alexander, *India in the New Millenium*

liberties and constitutional values. The standards of fiduciary conduct set by Cardozo for even an ordinary trustee is that "he is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is the standard of behaviour."[57] What then to say of a constitutional trust at once so lofty and so noble! The tradition regarding all this is, and has to be, unbending and inveterate.

It is, however, important that judicial independence is not an end in itself. To recall what Brennan, J. said: The law is not an end in itself, nor does it provide ends. It is pre-eminently a means to serve what we think is right ….. Law is here to serve! .. To serve, insofar as law can properly do so, within limits, that I have already stressed the realization of man's end, ultimate and mediate …..[58] And Joseph Raz eloquently put it "...Conformity to the rule of law is not itself an ultimate goal …. After all, the rule of law is meant to enable the law to promote social good … Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty." [59]

So it is with judicial independence. It is not an end in itself. It is the means to serve the dispensation of justice, the protection of our rights and liberties, upholding constitutional values and enforcing constitutional limitations. Judicial independence is not for the benefit of the judges personally or the judiciary institutionally. It is for the health and well being of the polity.

In saying all this, the idea is not to condemn or criticize, but to endeavour to seek improvement. One is fortified by what Justice Holmes said: "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism…I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law and especially our system of law, as one of the vastest products of the human mind…But one may criticize even what one reveres. Law is the business to which my life is devoted and I should show less than devotion if I did not do what in me lies to improve it."[60] And he spoke of "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the

[57] Meinhard v. Salmon, 249 NY 458 (1928)
[58] Roth v. U S 354 US 476 (1957)
[59]The Rule of Law and its Virtue (1977) 93 LQR 195 @ 211]
[60] The Path of the Law, Collected Legal Papers, 167,194 (1920)

measure of his thought."[61] It is in this spirit of enquiry and humility that I have placed my thoughts before you.

[61] Howe, M.D., 1963. The Proving Years, 1870–1882. Harvard University Press.