JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 65 OCTOBER-DECEMBER 2023 NUMBER 4

RESERVATION FOR EWS UNDER 103RD CONSTITUTIONAL AMENDMENT *VIA* BASIC STRUCTURE DOCTRINE OF THE CONSTITUTION A CRITIQUE OF FIVE-JUDGE BENCH JUDGMENT OF THE SUPREME COURT IN *JANHIT ABHIYAN* V. *UNION OF INDIA*

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Abstract

Attempt has been made to present a rounded view of 50-year's singular story of the Basic Structure Doctrine (BSD) of the Constitution, showing how it was born to survive and sustain with the avowed objective of conserving constitutionalism against all the odds! This has been done through the critiquing of the deeply divided five-Judge bench judgment of the Supreme Court in *Janhit Abhiyan* case on reservation for EWS under 103rd Constitutional Amendment. In effect, in this critique, we have mapped the constitutional development from Kesavananda Bharati to Janhit Abhiyan *via I.R Coelho*, revealing how the issue of survival of the BSD in 1973 has become transformed, and continues to be so in the year 2022, into the issue of comprehending the philosophical foundations of the BSD notwithstanding its elaboration and exposition by the nine-Judge Bench unanimous judgment of the Supreme Court in 2007! However, while examining the issue of duality of opinion in Janhit Abhiyan with the perspective gained from *I.R Coelho*, we are prompted to arrive at two bizarre findings. The first one is that it is the non-comprehension of the underlying philosophy of the BSD (as is reflected in the duality of opinion amongst judges themselves) that has led to the current controversy between the government and the Supreme Court of India! The second one is that when the result of our analysis of the BSD are applied to examine the constitutionality of the added clauses (6) to article 15 and article 16, inserted by the 103rd Amendment of the Constitution, it has instantly yielded a hitherto untold story: the 13-Judge Bench of the Supreme Court in *Kesavananda Bharati* case had not propounded the BSD; it had merely enunciated what was already inherent in article 15 of the

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Constitution, wherein the founding fathers of the Constitution reconciled the provisions of clause (3) with those of clause (1) on the basis of foundational value of the fundamental right to equality, which is christened as the value of 'egalitarian equality'! This mode of reconciliation enables us to overcome the limitations of 'thus far and no farther' approach in the maters of making special provisions for women and children, when we struggle hard to reconcile the provisions of clause (3) with those of clause (1) on the principle of harmonious construction in terms of saying that latter clause is an exception or proviso to the former.

In our rounded understanding of the whole development, we have made three summations. First: The BSD, through its uniquely dynamic multi-dimensional foundational value of egalitarian equality, augments the power of the Parliament rather than restricting it. Hence it is vital to revisit and revise our conventional thinking about the very nature and scope of BSD, the prevalent notion that the BSD severely limits the power of the Parliament does not reflect its true perspective. Thus, it is not the BSD which is bad, it is only our own understanding about its underlying philosophy, which is shaky, weak or feeble! With this understanding of BSD, any standoff, between the State (Government and the Parliament of India) and the Supreme Court, in our view, should stand dissolved! Second: It relates to self-fulfilling prophecy. With the augmented power of Parliament, a possibility is forseen and that also in not too distant a future, wherein under the overarching principle of 'egalitarian equality' of the BSD, the government and Parliament of India may eventually go in for a comprehensive amendment of the Constitution by abolishing all such existing special provisions as for SCs, STs, OBCs, etc., and come up with one single criterion on economic basis, and thereby effectively and rationally eschewing the growing clamour for reservations on basis of religion, race, caste, *etc.*! However, such an anticipated supervening measure solely on economic basis need not be mixed up with the 33 per cent seats recently reserved for women in the Lok Sabha and State Legislative assemblies through 106th Amendment of the Constitution, which is a step forward for women empowerment through the strategy of 'political inclusion.' Third: The BSD does not distract or destroy the doctrine of separation of powers, which is the prime functional basis of preserving and promoting constitutionalism; it rather strengthens the independence of both the Supreme Court and the Parliament along with the Executive in their respective domains, as envisaged under the Constitution.Fourth: The BSD is the Savior of 'Sovereignty of the Constitution', and, thereby, strengthening our resolve to pursue the constitutional mandate of social transformation eventually by seeking inter-dependence even in independence that we vigorously protect and promote under the doctrine of separation of powers. We may define this somewhat enigmatic process, by using an expression of our own devising, as 'collaborative constitutionalism', implying thereby a continuum of interaction between the Supreme Court on the one hand and the government and Parliament of India on the other. All this happens via the constitutionally sanctioned contrivance of judicial review envisaged under article 141 of the Constitution.

I Introduction

The Constitution (One Hundred and Third Amendment) Act, 2019, passed by the Parliament almost unanimously,[1] amends articles 15 and 16 of the Constitution by inserting new clauses, namely, Clause (6) to Article 15 with Explanation and Clause (6) to article 16.[2] The newly inserted clauses, empower the State, *inter alia*, to make special provisions and provide for a maximum of ten per cent reservation for 'the economically weaker sections'(EWS) of citizens other than 'the Scheduled Castes (SCs), 'the Scheduled Tribes (STs) and the non-creamy layer of 'the Other Backward Classes' (OBCs).[3]

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1 In Lok Sabha, the amending bill received overwhelming support from the 326 members present with 323 votes in favour and only 3 members voting against. The Prime Minister Narendra Modi hailed the passage of the bill a "landmark moment in our nation's history". The Bill, as passed by the Lok Sabha, was cleared by the Rajya Sabha on Jan. 10, 2019 with 165 votes in favour and 7 against. The Bill received assent from President on Jan. 12, 2019. It was notified in *The Gazette of India* on the same date. The 103rd Amendment, thus, came into effect on Jan. 14, 2019. Hereinafter, simply 103rd Constitutional Amendment.

2 Art. 15, Cl. 6: "Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making —

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation: For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage." [Inserted by the Constitution (One Hundred and Third Amendment) Act, 2019, s. 2 (w.e.f. Jan. 14, 201914-1-2019].

Art. 16, Cl (6): "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category." [Inserted by the Constitution (One Hundred and Third Amendment) Act, 2019, s. 3 (*w.e.f.* 14-1-2019)].

3 The benefit of special provisions can be availed by persons with an annual gross household income of up to eight lakh. Families that own over five acres of agricultural land, a house over 1,000 square feet, a plot of over 100-yards in a notified municipal area or over a 200-yards plot in a non-notified municipal area cannot avail the reservation. Persons belonging to communities that already have reservations such as Scheduled Castes, Scheduled Tribes and the "non creamy layer" of Other Backward Classes are also not eligible for reservation under this quota (creamy layer of OBC crosses 8 lakh limit) has introduced 10% reservation for Economically Weaker Sections (EWS) of society for admission to Central Government-run educational institutions and private educational institutions (except for minority educational institutions), and for employment in Central Government jobs. The amendment does not make such reservations mandatory in state government-run educational institutions or state government jobs. However, some states have chosen to implement the 10% reservation for economically weaker sections.

The validity of the *103rd Constitutional Amendment* was challenged before the five-Judge bench of the Supreme Court in *Janhit Abhiyan* v. *Union of India*[4] for determining whether "the very amendments run contrary to the constitutional scheme."[5] The established constitutional mode or mechanism to test the constitutionality of an amending Act passed by the Parliament, as distinguished from the Act enacted by it in the exercise of its ordinary legislative power, is the Basic Structure doctrine (BSD), as enunciated by the Supreme Court in 1973 in the case of *His Holiness Kesavananda Bharati, Sripadagalvaru* v. *State of Kerala*.[6] To render this classic judgment, 13 judges sat of 68 days and produced a cluster of 11 separate judgments running into over a thousand pages, and eventually resulted in the propounding the said doctrine.[7] The five-judge bench in *Janhit Abhiyan* has applied the BSD for determining the constitutionality of the impugned amending Act.[8]

The doctrine of basic structure has been termed as historic and most authoritative. This is so primarily for three reasons: One, it was propounded by the largest Constitution Bench of 13 Judges of the Supreme Court hitherto ever constituted (13 out of 18). Two, it considered perhaps the most critical issue of immense public importance on which depended the destiny of the Nation, and, therefore, needed an authoritative decision of the Supreme Court. Three, it permits the Parliament in exercise of its amending power to amend each and every part of the Constitution, including fundamental rights, but deftly denies that henceforth such power would be absolutely absolute.

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4 MANU/SC/1449/2022, per U.U. Lalit, C.J.I., Dinesh Maheshwari, S. Ravindra Bhat, Bela M. Trivedi and J.B. Pardiwala, JJ. (Hereinafter cited as *Janhit Abhiyan*).

5 See, *Janhit Abhiyan,* para 4. Since the resolution of this issue involve "substantial questions of law as to interpretation of constitutional provisions," these are required to be resolved at least by a Bench of five Judges.

6 AIR 1973 SC 1461: (1973) 4 SCC 225. Hereinafter simply cited as *Kesavananda Bharati.*

7 Extracted on the basis of a separate note signed by eight justices – an exceptional unprecedented mode of determining the ratio of an elaborate judgment!

8 See, *Janhit Abhiyan*, para 5: the crystalized four issues for determining the issue of constitutional legitimacy of the impugned amendment on the basis of basic structure doctrine: (1) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria? (2) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions? (3) Whether the 103rd Constitution Amendment can be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation? (4) Whether the cap of 50% referred to in earlier decisions of the Supreme Court can be considered to be a part of the basic structure of the Constitution? if so, can the 103rd Constitution Amendment be said to breach the basic structure of the Constitution?

On the basis of the BSD of the Constitution, the Constitution Bench of the Supreme Court for determining the constitutionality of 103rd Amendment of the Constitution is, however, deeply divided. Three justices out of five (Dinesh Maheshwari, Bela M. Trivedi and J.B. Pardiwala, JJ.), constituting the majority court, has held that the 103rd Constitutional Amendment, by permitting the State to make special provisions, including reservation, based on economic criteria, while excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation, cannot be said to breach the basic structure of the Constitution.[9] The other two justices out of five (U.U. Lalit, C.J.I., agreeing with S. Ravindra Bhat, J.), on the other hand, constituting the minority opinion, have held that sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019, which inserted clause (6) in article 15 and clause (6) in article 16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution.[10]

II Basic Structure Doctrine and application

In this backdrop, our inquiring inquisitive question is: 'Why is there duality of views in the application of BSD, resulting into majority and minority opinions, when the same principle/doctrine is applied to one and the same set of conditions as laid down in the impugned amendment?' To this pointed interrogative our own searching answer is: The reason(s) for duality of views may legitimately be traced in comprehending the mystic nature of the basic structure doctrine as enunciated by the 13-Judge Bench of the Supreme Court in *Kesavananda Bharati* case (1973)! However, what is this mystic nature of the basic structure doctrine, which seemingly continues to blur our vision till date, needs to be explored?

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9 See, Dinesh Maheshwari, J.: *Janhit Abhiyan*, para 104 – 1. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions, including reservation, based on economic criteria. 2. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution by permitting the State to make special provisions in relation to admission to private unaided institutions. 3. The 103rd Constitution Amendment cannot be said to breach the basic structure of the Constitution in excluding the SEBCs/OBCs/SCs/STs from the scope of EWS reservation." Bela M. Trivedi, J., obliquely refers to BS principle which provides the requisite dynamism by virtue of being "a living and organic document.: Para 131 "Can we not move towards an ideal envisaged by the framers of our Constitution to have an egalitarian, casteless and classless society? Though difficult, it is an achievable ideal. Our Constitution which is a living and organic document continuously shapes the lives of citizens in particular and societies in general" (emphasis supplied)." Pardiwala, J.: Para 326 – "In the result, I hold that the impugned amendment is valid and in no manner alters the basic structure of the Constitution."

10 Ravindra Bhat, J. (U.U. Lalit, C.J.I. agreeing with him): *Janhit Abhiyan,* para 522: "For the above reasons, it is hereby declared that Sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted Clause (6) in Article 15 and Clause (6) in Article 16, respectively, are unconstitutional and void on the ground that they are violative of the basic structure of the Constitution."

For the exploration of mystic character of the BSD, we may raise a counter expository question: Why did the Basic Structure principle, though termed as 'historic' or *"locus classicuss"*[11] decision in the annals of constitutional development in India, and yet it remained virtually dormant and non-functional for years to come – say for about more than next 30 years since its enunciation by the 13-Judge bench of the Supreme Court in *Kesavananda Bharati (*1973)? In our own mapping of the constitutional development in 2007,[12] It was found that the BSD remained dormant or non-functional despite its being legendry and most authoritative primarily because of at least the following three lingering reasons!

First lingering Reason: Precarious (unpredictable) birth of the Basic Structure principle due to the deeply divided Supreme Court Bench of 13 Judges! Complexion of the deeply divided 13-Judge bench of the Supreme Court in *Kesavananda Bharati* (1973) was as under: Six judges led by S.M. Sikri, CJ (Shelat, Grover, Hegde, Mukherjea, and Reddy, JJ.), plus Justice H.R. Khanna *versus* six judges led by Justice A.N. Ray (Phalekar, Mathew, Beg, Dwivedi, and Chandrachud, JJ.). This meant that the former group of six Justices led by Chief Justice Sikri, held the view that there had to be some sort of 'basic structure apart from the Constitution' on which rested the whole of constitutional edifice. The holders of this view were numerically balanced by the latter group of six justices headed by Justice Ray, who equally vehemently asserted that there was no such basic structure outside the Constitution, as the Constitution itself was the most basic document of the Nation. However, Justice H.R. Khanna, after weighing the pros and cons of the two opposite views, eventually decided to join the former group of judges, because in that he saw the way out to protect constitutionalism; that is, a system of governance in which sovereignty lies, not the Parliament but, in the Constitution itself.

Second lingering Reason: Premature death of the 'basic structure doctrine'; that is, whether it died prematurely soon after its birth. The issue of 'instant death' came to the fore soon after holding the constitutionality of the Constitution (29th Amendment) Act, 1972 in *Kesavananda Bharati* (1973) itself. As has been stated above, in the enunciation of 'basic structure doctrine', Justice Khanna's eventually joining the group led by Chief Justice Sikri had leant perhaps the most critical and indispensable support and, thereby, making the 13-judge decision by the thin razor majority of 7:6. However, soon after the basic structure doctrine thus enunciated, when the issue of determining the constitutional validity of the 29th Amendment of the Constitution came to the fore before the 13-Judge Bench, Justice Khanna, in the light of past precedents set

11 See Dinesh Maheshwari, J., para 34, describing the decision of the 13-Judge bench as "locus classicuss"; that is, the most authoritative elucidation of the BSD.

12 See, the author's critique, *infra* note 24.

13 AIR 1975 SC 2299 at 2389.

up on the basis of reading the Constitution, as interpreted prior to *Kesavananda Bharati* (1973), joined the group of judges led by Justice Ray. This shifting vote scenario of Justice Khanna seems to convey as if the basic structure doctrine had died prematurely, and, thus, nothing was left of this doctrine thereafter.

Third lingering reason: Diffused or unclear character of the BSD about its precise nature, scope and existence in the body-frame of our Constitution. This, it seems, was caused primarily because there had been no in-depth discussion or deliberation amongst justices constituting the Constitution Bench leading to their deep division. Otherwise, how else Justice K.K. Mathew, a member of the Bench in *Kesavananda Bharti*, could say a couple of years later in *Indira Nehru Gandhi* v. *Raj Narain*: "The concept of a basic structure, as brooding omnipresence in the sky, apart from specific provisions of the constitution, is too vague and indefinite to provide a yardstick for the validity of an ordinary law."[13] Likewise, still later, a Constitution Bench of 7 Judges led by Justice M.H. Beg, Chief Justice [earlier a member of the Bench in *Kesavananda Bharati* (1973) led by S.M. Sikri, CJ], in *State of Karnataka* v. *Union of India,*[14] *inter alia*, observed:

> ...In Kesavananda Bharati case this Court had not worked out the implications of the basic structure doctrine in all its applications. It could, therefore, be said, with utmost respect, that it was perhaps left there in an amorphous state which could give rise to possible misunderstandings as to whether it is not too vaguely stated or too loosely and variously formulated without attempting a basic uniformity of its meaning or implications...

The "amorphous state" of the BSD, in its application often led to the constitution of Constitution Benches to clarify its true import and meaning. In this respect, we had the opportunity to examine a series of cases in which the Supreme Court attempted to decipher the true character of basic structure.[15] Mention may be made of the following cases: *Minerva Mills Ltd.* v. *Union of India*,[16] *Waman Rao* v. *Union of India*, [17] and *Maharao Sahib Shri Bhim Singh ji* v. *Union of India*.[18] In these cases, and in many more thereafter,[19] the position still remained hazy, whether the basic structure of the Constitution lay within or without its concrete framework. Analyses of few leading

14 MANU/SC/0144/1977: (1977) 4 SCC 608, para 120 (per M. Hameedullah Beg (CJ), Y.V. Chandrachud, P.N. Bhagwati, N.L. Untwalia, P.N. Shingal, Jaswant Singh, P.S. Kailasam),

15 See*, infra* note 24.

16 AIR 1980 SC 1789. Hereinafter simply cited as *Minerva Mills.*

17 AIR 1981 SC 271. Hereinafter simply cited as *Waman Rao.*

18 AIR 1981 SC.

19 See generally, Virendra Kumar, "The Institution of Property in the Continuum of Directive Principles (Minerva Mills in Retrospection)," (1) Directive Principles Jurisprudence, [Paras Diwan and Virendra Kumar, Eds., 113-160 (Seema Publications, New Delhi, 1982).

cases and attempts to propose a perspective of the BSD, could go only to the extent by stating that it has to be located somewhere outside, and not within, the Constitution on which its edifice could be raised; else there would hardly be any meaningful differentiation between the 'basic structure' and the existing provisions of the Constitution.[20]

More or less, the 'amorphous' state of basic structure doctrine, with varying degree of emphasis, continued to prevail till the judgment of the Supreme Court in *IR Coelho (dead) by L.Rs* v. *State of Tamil Nadu*[21] in 2007, in which the nine-judge Constitution Bench had attempted to clarify the concept of this doctrine and lay down clearly the concrete criteria for its application. How did they do so, and the extent to which they had succeeded by removing very many misgivings about its nature and scope, became the subject of special lecture, which was of delivered under the aegis of Indian Council of Social Science Research (ICSSR) North-western Regional Centre at Panjab University, Chandigarh,[22] under the title, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From *His Holiness Kesavananda Bharati* (1973) to *I.R. Coelho* (2007)]." With a view to lend credibility to the result analysis presented under its aegis, the ICSSR invited Justice Ashok Bhan, Judge, Supreme Court of India, to chair the special lecture, and also invited sitting and retired Justices of the Punjab and Haryana High Court at Chandigarh, along with other legal luminaries and faculty colleagues across disciplines, to participate in the academic proceedings. Professor S.K. Kulkarni, who was the then academic head of the University as the Dean of University Instructions (DUI), was specially invited as Guest of Honour to overview the academic discourse.

III Objective of basic structure docterine

The critiquing of the nine-judge bench judgment of the Supreme Court in *I.R. Coelho* (2007) has led this paper to spell out, especially in the context of *Janhit Abhiyan* (2022), the two main related findings; one, it has de-mystified the nature of the BSD; two, it has invested the BSD with the spirit of unique dynamism, resulting into its

20 See, Virendra Kumar, "The Proposed Perspective of the Doctrine of Basic Structure of the Constitution." *All India Reporter Journal* 55-59.

21 AIR 2007 SC 861,*per* Y.K. Sabharwal, C.J. (for himself and behalf of Ashok Bhan, Dr. Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, and D.K. Jain, JJ.) Hereinafter *I.R. Coelho* (2007).

22 Indian Council of Social Science Research North-western Regional Centre at Panjab University, Chandigarh is an autonomous organisation sponsored by the Government of India. its avowed objective is to promoting quality research work in social sciences. It was set up in 1977 for encouraging the social scientists in N-W region comprising Punjab, Haryana, Himachal Pradesh, Jammu and Kashmir and the Union Territory of Chandigarh to carrying out quality research work by organising Special Lectures, and thereby giving opportunity to share the outcome of their research with the knowledgeable persons in their respective fields of specialization.

resurrection and making it a powerful ploy for protecting and promoting constitutionalism. The intriguing and interesting feature of critiquing exercise is, how has the twin-objective of demystification and dynamism been accomplished consistently with constitutionalism, and what is their conceptual exposition?

Conceptual exposition of de-mystification and dynamism of BSD in I.R. Coelho (2007): It is envisaged in two stages -

First stage:

The nine-judge bench distinctly located the centrality of the BSD in the notion of universal protection of fundamental rights by stating unequivocally:

The protection of fundamental constitutional rights through common law is the main feature of *common law constitutionalism*. [Emphasis added]

I.R. Coelho (2007) at 871 (para 45)

Second stage:

The 9-Judge Bench distinctly located the centrality of BSD in Part III of the Indian Constitution, titled as 'Fundamental Rights' by stating:

> If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that *Part III of the Constitution has a key role to play in the application of the said doctrine*. [Emphasis added]
>
> I.R. Coelho (2007) at 884 (para 101)

Pursuing this line of logic, there was a riddle to be resolved by the nine-Judge Bench: If the very basis of the Basic Structure Doctrine (BSD) were to be located in the complex of Fundamental Rights enumerated in Part III of the Constitution, did it mean that the 'Basic Structure of the Constitution' and 'enumerated Fundamental Rights' in Part III were just synonym? If so, then there was yet another riddle to be resolved: how to reconcile the *violability* of fundamental rights with the *inviolability* of the basic structure of the Constitution?

The answer to this enigmatic question, in our view, had led the nine-Judge bench to dispelling mysticism that hitherto enveloped the BSD, and also to invest it with the spirit of new dynamism to fulfil the objective of social welfare State under the Constitution. And this was accomplished through the enunciation of twin-test theory in I.R. Coelho (2007), which functionally reconciled the two propositions that were seemingly irreconcilable! The format of twin-test theory is as under:

(a) The 'rights test', requiring the court to determine "the direct impact and effect," of an amendment on the enumerated fundamental rights irrespective of "the form" of amendment.

(b) The 'essence of the rights test' requiring the court to determine "the direct impact and effect" of an amendment on "the synoptic view" of fundamental rights enumerated in Part III, or "the principles underlying thereunder."

I.R. Coelho, at 893 [para 150(iv)]

The sum and substance of reconciliation: The nine-Judge Bench of the Supreme Court located the 'Basic structure' doctrine of the Constitution' in the foundational values of Fundamental Rights enunciated in Part III of the Constitution, by observing a very subtle distinction between Fundamental Rights on the one hand and their underlying value-principles on the other. Logical corollary of this differentiation led us to unfold the premise of the BSD and say that the violation of fundamental rights in the process of amending the Constitution may not necessarily be construed as the violation of foundational values of Fundamental Rights. And this stance has invested the BSD with the spirit of dynamism helping us to achieve the broader objectives of social welfare State enshrined in the Constitution through its much-needed structural changes or amendments.

This indeed was the summation of nine critique of nine-Judge Bench of the Supreme Court. And, it was this thrust of summation which was reasonably received well, if I rightly recall the observations made by Justice Bhan in his presidential Address now more than 15 years ago, who himself was one of the members of the unanimous nine-Judge judgment in *I.R. Coelho* case![23] The immediate acceptance and publication of the presented research work by the Indian Law Institute in their prestigious research journal, it seems, added further credence to the merit of the research paper![24]

23 The overwhelming reception of the presentation made by me was corroborated officially by Professor S.K. Kulkarni, Dean of University Instructions, Panjab University, Chandigarh, who overviewed the proceedings of the Special Lecture. In his communication, *vide* letter No. 3841/DUI/DS, September 5, 2007, he has written to say, , "…Let me at the outset congratulate you on the excellent talk that you delivered on such a difficult topic, which is going to determine the future course of action of every Indian in protecting the fundamental rights. I was amazed of your oratory and in-depth study on the Constitutional and Judicial implications of the landmark judgment of 2007 by analyzing the issue threadbare. Your arguments had kept the entire audience including learned both present and past Judges of the Hon'ble High Court and other legal luminaries spell bound nearly for one and a half hours. Please accept our hearty compliments and congratulations for your academic disposition. Such Lectures have become rarity on the campus. We look forward to listening to you again on similar or related subjects, which affect every one of us."

24 Virendra Kumar, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From His Holiness Kesavananda Bharati (1973) to I.R. Coelho (2007)]," *Journal of the Indian Law Institute*, 49 (3) (2007) 365-398.

IV Foundational principles and basic structure

In fact, it is the publication this paper in 2007 under the very title of the delivered lecture, which has found favour in the majority judgment of the Supreme Court in *Janhit Abhiyan* case (2022). The two consecutive paragraphs in the individual independent opinion of Justice J.B. Pardiwala, constituting a part of the majority court judgment, may be reproduced as under:

Janhit Abhiyan, para 317 (per JB Pardiwala, J.):

'I am of the view as Prof. Satya Prateek rightly puts that …. the fundamental tenets or the core principles of the Constitution are foundational - they are at the core of its existence. They are seminal to the Constitution's functioning. The Constitution retains its existence on these foundations as they preserve the Constitution in its essence. This is not to mark out the possibilities of structural adjustments in the foundations with time. The foundations may shift, *fundamental values may assume a different meaning with time but they would still remain to be integral to the constitutional core of principles,the core on which the Constitution would be legitimately sustained*."

Janhit Abhiyan, para 318 (per JB Pardiwala, J.):

> "Prof. Virendra Kumar believes that there is a difference between the fundamental rights and the values that structure such fundamental rights. He views the values to have an overarching influence and says that it is totally possible to hold that violation of the fundamental rights in certain situations, may not infringe the fundamental values in their backdrop." (Reference-Essay by Satya Prateek)."

I got the opportunity to update the results of my research article on BSD (2007) in a review article,[25] It revealed that after the nine-Judge bench judgment, the concept of 'basic structure of the Constitution' has started evolving, and by virtue of its unique dynamism, it has also become a prolific source of foundational value-principles of fundamental rights in terms of over-arching principles, like 'egalitarian equality,' 'secularism,' 'judicial independence,' 'democracy,' 'separation of powers,' 'inter-generational equity', 'sustainable development,' 'right to privacy'.[26]

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25 See Virendra Kumar, 49 (3) *JILI* 365, 385 (2007), see also 56 (2) *JILI* at 189-233.

26 See, *per* S.H. Kapadia, C.J.I. (for himself, Swatanter Kumar and K.S. Panicker Radhakrishnan, JJ. in Glanrock Estate (P) Ltd. v. The State of Tamil Nadu (2010) 10 SCC, para 8. See also: *Subramanian Swamy* v. *Director, Central Bureau of Investigation.,* per R.M. Lodha , C.J.I. (for himself and A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra and Fakkir Mohamed Ibrahim Kalifulla , JJ.), (2014) 8 SCC 682, and Virendra Kumar, "Dynamics of the 'Right to Privacy': Its characterization under the Indian Constitution [A juridical critique of the 9-Judge Bench judgment of the Supreme Court in Justice K S Puttaswamy (Retd.) case (2017)] 61:1 *Journal of the Indian Law Institute* 68-96 (2019).

The principle of basic structure of the Constitution has now become entrenched and, thus, truly attained the status of a 'doctrine'[27] - called 'the doctrine of basic structure'. "Some doctrines die hard," and that "certainly is true of the doctrine of basic structure of the Constitution," has been stated assertively by S.H. Kapadia, C.J. (for himself, Swatanter Kumar and K.S. Panicker Radhakrishnan, JJ.) in *Glanrock Estate (P) Ltd.*[28] Most recently, while delivering the 18th Nani Palkhivala Memorial Lecture on January 21, 2023 organised by the Bombay Bar Association, DY Chandrachud CJI termed the verdict of 13-Judge Bench in *Kesavananda Bharti* case (1973) as a "ground-breaking" judgment that guides the judges like a "North Star" in interpreting and implementing the Constitution.[29] He poignantly stated that this judgment "aids in keeping the soul of the Constitution intact even as judges interpret the text of the Constitution with the changing times," especially "when the path looked convoluted."[30] "The basic structure or the philosophy of our Constitution is premised on the supremacy of the Constitution, rule of law, separation of powers, judicial review, secularism, federalism, freedom and the dignity of the individual and the unity and integrity of the nation," he elaborated.[31] Amplifying the other facets of the this doctrine, the Chief Justice stated that "the doctrine of basic structure has shown that it might be beneficial for a judge to look at how other jurisdictions dealt with similar problems for them."[32] "The craftsmanship of a judge lies in interpreting the text of the Constitution with the changing times while keeping its soul intact."[33]

Most seemingly, such an assertion is a counter response to Vice-President of India, Jagdeep Dhankhar's statement in which he had on January 11, 2023, questioned the Supreme Court's landmark verdict in the *Kesavananda Bharati* case while addressing the 83rd All-India Presiding Officers Conference in Jaipur.[34] Dhankhar vehemently stated that the verdict had set a bad precedent and if any authority questioned Parliament's power to amend the Constitution, it would be difficult to say "we are a

27 In constitutional law, a 'doctrine' is a principle, usually established through past decisions; it represents the eternal progression of thoughts through enlightened thinking; these are fewer in number and remain relatively stable and unchangeable.

28 See, *supra*, note 26.

29 See, Utkarsh Anand, "Days after V-P's criticism, CJI hails 'Basic Structure' verdict." Sunday *Hindustan Times*, (Jan. 22, 2023).

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 See Satya Prakash, "Days after V-P's remark, CJI says Basic Structure Doctrine Guides Interpreters of Constitution." *The Tribune*, (Jan. 22, 2023).

democratic nation."[35] Elaborately, he stated that he could not subscribe to this incorrect "view", and that it "must be deliberated."[36] So, we must need to heed to these apprehensions as well, especially when these emanate from the person who holds the second highest position in our constitutional hierarchy, besides bearing the background of an highly accomplished professional lawyer!

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35 *Ibid.* See also, *Hindustan Times*, Jan. 12, 2023: "Apex court's 'basic structure' verdict set bad precedent: V-P." The debunking of BSD by the Vice President openly may be traced to the incident of annulling of the 99th Constitutional amendment Bill that entailed the formation of the NJAC by the Supreme Court on October 16, 2015, by a majority of 4:1, finding that the same was not being in consonance with the judicially evolved doctrine of 'Basic Structure' of the Constitution." See, Satya Prakash. "Vice-President Jagdeep Dhankhar raises questions over Supreme Court 'undoing' NJAC Act," *The Tribune*, Dec. 3, 2022 and *The Tribune*, Dec. 8, 2022: "V-P raises NJAC issue in his maiden speech as RS chief," at 9 alleging that the Supreme Court scrapping the National Judicial Appointments Commission (NJAC), was an instance of "severe compromise of parliamentary sovereignty", whereas under the Constitution the government's three organs should respect the "Lakshman rekha". Any incursion by the three organs of the government into each other's domains, it was stated, "had the potential to upset the governance apple cart." He wondered if a constitutional amendment unanimously passed by Parliament reflecting the will of the people could be "undone" by the Supreme Court. Elaborating on this count, he is reported to have said: "In the year 2015-16, Parliament was dealing with a constitutional amendment Act and as a matter of record the entire Lok Sabha voted unanimously. There was no abstention and no dissension. And the amendment was passed. In the Rajya Sabha it was unanimous, there was one abstention. We the people… their ordainment was converted into a constitutional provision." On Dec. 2, 2022, while delivering the 8th Dr LM Singhvi Memorial Lecture on 'Universal Adult Franchise: Translating India's Political Transformation into a Social Transformation', Mr. Dhankhar said, "Power of the people, which was expressed through a legitimate platform, was undone. The world does not know of any such instance." "I appeal to the people here, they constitute a judicial elite class, thinking minds, intellectuals — please find out a parallel in the world where a constitutional provision can be undone," he said in the presence of Chief Justice of India DY Chandrachud, several Supreme Court judges, Union ministers, Delhi Chief Minister Arvind Kejriwal and several lawyers. See, *The Tribune*, Dec. 3, 2022.

On the contrary, see, PTI, "Collegium System of Appointment of Judges Near Perfect Model: Ex-CJI UU Lalit." *The Sunday Tribune*, Feb. 19, 2023. Justice Lalit, who retired in November 2022, speaking at an event organized by 'Campaign for Judicial Accountability and Reforms' (CJAR) on "Judicial Appointments and Reforms", said a rigorous process is involved in recommending names for judgeship of constitutional courts. In his own view, judiciary is in a better position to adjudicate on the merits of the potential candidates as they have seen their work over the years. The system is a near perfect model, which is "fool proof." "According to me," he said, "we don't have a system better than the collegium system. If we don't have anything qualitatively better than the collegium system, naturally, we must work towards making it possible that this collegium system survives. Today the model as per which we work is a near perfect model."

36 *Ibid.* Noting that India's legal landscape has undergone a significant change in the recent decades in favour of removing "strangulating regulations, augmenting consumer welfare and supporting commercial transactions", CJI Chandrachud said, "The identity of the Indian Constitution has evolved through the interaction of Indian citizens with the Constitution, and has been accompanied by judicial interpretation," see, *ibid.*

V Basic structure and constitutional development

In the present paper, my own singular concern as an academic is to direct my inquiry on two counts: (a) Why there is a conflict of opinion about the BSD between the government and the Supreme Court, and that how should we resolve that conflict? (b) Why is there duality of opinion amongst the judges of the Supreme Court themselves about the BSD as it has happened in the most recent case of *Janhit Abhiyan (2022)*? In fact, our concern on the latter count is more worrisome, as the genesis of the conflict in the former case may itself be located in the latter. And more so as it is observed in the case of the BSD, that "the Court also is 'State' within the meaning of article 12 and makes law even though 'interstitially from the molar to the molecular'," to borrow the idea and expression used by K.K. Mathew, J.[37] This implies that the duality of opinion amongst the justices of the Supreme Court in *Janhit Abhiyan* (2022) needs to be addressed more from within rather than outside.

Accordingly, it shall examine the duality of opinions in *Janhit Abhiyan* case (2022) *de novo* in the light of the dynamic nature of the BSD, as presented by us in our research paper of 2007, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance," carrying the critique of the nine-Judge Bench judgment of Supreme Court in *I.R. Coelho (2007)* case. By virtue of the one single unanimous judgment,[38] the principle of basic structure of the Indian Constitution has become truly entrenched in the form of a 'doctrine' over the years in its tumultuous journey of constitutional development since 1973.[39]

With a view to explore the duality of opinion in *Janhit Abhiyan* (2022), it is important to narrow down the area of inquiry by raising the basic question: what is the singular point of divergence or deviation between the two opinions – minority and majority?[40]

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37 In *N.M. Thomas* case (para 64), cited in *Janhit Abhiyan* per Dinesh Maheshwari, J., para 71.4.

38 *Cf.* The nine-Judge Bench judgment of the Supreme Court in *Justice K S Puttaswamy (Retd.) case (2017*), in which there were as many as six separate but concurring judgments. See, Virendra Kumar, "Dynamics of the 'Right to Privacy': Its characterization under the Indian Constitution [A juridical critique of the 9-Judge Bench judgment of the Supreme Court in Justice K S Puttaswamy (Retd.) case (2017)]," 61 (1) *Journal of the Indian Law Institute*, 68-96 (2019).

39 See, *supra* note 27.

40 The challenge to the amendment in question is premised essentially on three related grounds: first, whether making of special provisions, including reservation in education and employment, on the basis of economic criteria militates against the basic structure of the Constitution; second, whether exclusion of socially and educationally backward classes, that is, SCs, STs and non-creamy layer OBCs from the benefit of these special provisions for EWS destroys the basic structure of the Constitution; and third, that providing for ten per cent additional reservation directly breaches the fifty per cent ceiling of reservations already settled by the decisions of the apex Court and hence, results in unacceptable abrogation of the Equality Code which, again, destroys the basic structure of the Constitution. See, *Janhit Abhiyan,* para 2 (per Dinesh Maheshwari, J.)

On this count, a close and cumulative reading of the two opinions reveals that they differ, neither on the basis economic criterion as the sole basis of classification, nor on the crossing of the hitherto judicially laid down limit of 50 percent reservation but, on the ground whether exclusion of 'the Scheduled Castes (SCs), 'the Scheduled Tribes (STs) and the non-creamy layer of 'the Other Backward Classes' (OBCs) under the new clauses (6) to article 15 and 16 amount to violation of the BSD.

In the opinion of minority, the exclusion of SCs, STs and the non-creamy layer of OBCs, representing the "the poorest Sections of the society" by virtue being "socially and educationally backward and/or subjected to caste discrimination," by the 103rd Amendment of the Constitution through the insertion of clause (6) to article 15 is "arbitrary," and, therefore highly discriminatory. And, as such, it is not sanctioned by the basic structure of the Constitution.The majority's view is on the contrary. This pivotal point of deviation between the minority and majority views has been clearly crystalized by Justice Pardiwala in his independent opinion by observing (which needs to quoted in full to bring out the full import of deviation): [41]

> I have had the benefit of carefully considering the lucid and erudite judgment delivered by my learned Brother Justice Ravindra Bhat taking the view that Sections 2 and 3 of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted Clause (6) in Article 15 and Clause (6) in Article 16 respectively are unconstitutional and void on the ground that they destroyed and are violative of the basic structure of the Constitution. My esteemed Brother Justice Bhat has taken the view that the State's compelling interest to fulfil the objective set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate; that reservation or special provisions have so far been provided in favour of historically disadvantaged communities cannot be the basis of contending that the other disadvantaged groups who have not been able to progress due to the ill effects of abject poverty should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf. My learned esteemed Brother Justice Bhat has concluded that therefore the special provisions based on objective economic criteria, is *per se* not violative of the basic structure. However, my esteemed Brother Justice Bhat thought fit to declare Clause (6) of Article 15 as unconstitutional essentially on the ground *that the exclusion Clause therein and the classification could be termed as arbitrary resulting in hostile discrimination of the poorest Sections of the society who are socially and educationally backward and/or subjected to caste discrimination*. (Emphasis supplied)

41 *Janhit Abhiyan,* para 136, *per* Pardiwala, J.

Thus, the moot point to be resolved is: whether the exclusion clause is arbitrary and not sanctioned by the BSD, or is it rational because the same is permitted by the BSD? In the opinion of minority, the exclusion is "arbitrary," or/and "discriminatory" on the principle of fundamental right to equality, and as such, it is not sanctioned by the BSD; whereas it is just the opposite in the opinion of majority court.

VI Exclusion clause and basic structure

The underlying critical question in the context of examining, whether or not the added exclusion clause (6) of article 15 and article 16 on the touchstone of the BSD is constitutional, it is important to spell out, what is the foundational value of the fundamental right to equality, which is said to be violated?

The foundational value of the fundamental right to equality: It stands realized and crystalized in the concept of 'egalitarian equality', which, in our view is inherent in the provisions of articles 15 and 16 read with those of article 14 of the Constitution as envisioned by the founding fathers of our Constitution. It is this foundational value, which instantly transforms the *formal* fundamental right to equality [as reflected in clause (1) of article 15 or clause (1) of article 16] into the *substantive* fundamental right to equality [as reflected in clause (3) of article 15 and clause (4) of article 16].[42] This proposition needs elucidation, inasmuch as it is loaded with some startling implications leading us to say that the whole notion of basic structure doctrine of our Constitution is anterior and not posterior to the propounding of 13-Judge Bench of the Supreme Court in *Kesavananda Bharati* case. And, this is so notwithstanding the fact that "[t]he

42 The concept of 'egalitarian equality' as the foundational value of the fundamental right to equality is born, it seems, out of the difficulties involved in the very fructification of the fundamental right to equality! This right is made functional on the principle of classification, by stipulating that 'like should be treated alike'. It is this concept of 'egalitarian equality', which helps us to create 'likes' through equity in the form of special provisions as envisaged under clause (3) of art. 15 of the Constitution.

The 'egalitarian equality' essentially refers to the moral and political philosophy that prioritizes equal treatment of all people, not just in restricted legal sense, conveying that all persons are equal in the eye of law, but in the most comprehensive sense, emphasizing equality of status and of opportunity, rendering justice in all walks of life - social, economic and political, by eliminating discrimination based on religion, race, caste, sex, place of birth or any of them. The most clear articulation on this count we find in the exposition of Justice K.K. Mathew, when he stated: "I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of scheduled castes and scheduled tribes. If equality of opportunity guaranteed Under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried *viz.*, even upto the point of making reservation," in *His Holiness Kesavananda Bharati Sripadagalavaru* v. *State of Kerala* (para 78), cited in *Janhit Abhiyan, para* 71.4*, per* Dinesh Maheshwari, J.

doctrine of basic structure was not as such discussed in the Constituent Assembly while formulating the enabling provisions for amending the Constitution."[43] Illustratively, we confine our elucidation in respect of the provisions of article 15 of the Constitution, as the same could be applied *mutatis mutandis* (with necessary changes) to the provisions of article 16. The concept of 'egalitarian equality' is clearly envisioned by the founding fathers of our Constitution in clause (3) read with clause (1) of articles 15 of the Constitution:

Article 15:

Clause (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

43 *Cf. Janhit Abhiyan,* paras 35, 36 and 36.1, *per* Dinesh Maheshwari, J., in the lead majority court judgment, very ably and painstakingly tracing the systematic judicial evolution and development of basic structure doctrine in India [Reference to notes 26-28 has been omitted]: Para 35 - "The doctrine of basic structure was not as such discussed in the Constituent Assembly while formulating the enabling provisions for amending the Constitution. Then, at the initial stages of Constitutional Law development, the proposition of challenging an amendment to the Constitution, as mooted in the case of *Sri Sankari Prasad Singh Deo* v. *Union of India*. MANU/SC/0013/1951: 1952 SCR 89 as also in *Sajjan Singh* v. *State of Rajasthan*: MANU/SC/0052/1964: (1965) 1 SCR 933 did not meet with approval of this court. However, first reference to the idea of 'basic feature' was made by Justice Mudholkar in Sajjan Singh (supra)[note26]. Then, the idea that certain Parts of the Constitution were unamendable was accepted by the 11-Judge Bench in *I.C. Golak Nath* v. *State of Punjab* MANU/SC/0029/1967: (1967) 2 SCR 762. However, in *Kesavananda*, the 13-Judge Bench of this Court, while partially overruling *Golak Nath* by a majority of 7-6, held that though any part of the Constitution could be amended by the Parliament, its basic structure could not be damaged." Para 36 - "A precursor to the developments aforesaid could be traced to the year 1965 when a German jurist, Prof. Dietrich Conrad (1932-2001), gave a lecture on 'Implied Limitations of the Amending Power' at the Banaras Hindu University wherein he, inter alia, asked: "Could the amending power be used to abolish the Constitution, and reintroduce, let's say, the Rule of a Moghul emperor or the Crown of England?" [note 27]. Later, he wrote an Article titled 'Limitations of Amendment Procedures and the Constituent Power' published in the Indian Year Book of International Affairs wherein he described the limits on the amending power as follows: The functional limitations implied in the grant of amending power to Parliament may then be summarized thus: No amendment may abrogate the constitution. No amendment may effect changes which amount to a practical abrogation or total revision of the constitution. Even partial alterations are beyond the scope of amendment if their repercussions on the organic context of the whole are so deep and far reaching that the fundamental identity of the constitution is no longer apparent....." [note 28]

36.1.- "Thus, even the origin of the submissions before this Court leading to the expositions on the doctrine of basic structure could be traced to the thought-process stimulated by the thinkers like Prof. Conrad. …."

Clause (2) …..

Clause (3) Nothing in this article shall prevent the State from making any special provision for women and children.[44]

How do we reconcile Clause (3) with Clause (1), which is seemingly in direct conflict with the former? It has been often construed by observing that Clause (3) is an exception or proviso to clause (1) on the principle of harmonious construction.[45] Such a construction in our view does not do full justice to women for whose benefit such a special provision has been envisaged by the founding fathers of our Constitution: it amounts to limiting upliftment of women by adopting the restrictive 'thus far, no further' approach, which is far from meeting the ends of right to equality in fact. *Prima facie*, it tends to deprive women of the benefit of right to equality under Clause (1) only on ground of sex, which could never ever be the intent of our constitution makers in the enactment of clause (3) of article 15![46]

44 The latest version of making special provision for women is conceived judicially in the constitution of special all-women benches of the Supreme Court in dealing with women-centric issues, see, *The Tribune*, December 3, 2022: Chief Justice of India DY Chandrachud has constituted an all-women bench comprising Justices Hima Kohli and Bela M Trivedi to hear transfer petitions involving matrimonial disputes and bail matters. This is the third occasion in the history of the apex court that an all-women bench has been constituted.

45 The supervening expression, "Nothing in this Article," implies that reservation policy under Cl. (3) or Cl. (4) is an exception to the general principle of equality enshrined in Clause (1) of Article 15. This view was reflected in number of judicial decisions - See, for instance: *The General Manager Southern Railways* v. *Rangachari*, 1962(2) SCR 586 at 607 and *M.R. Balaji* v. *State of Mysore*, 1963 Supp. 1 SCR 439 at 455. See also for the similar view, *T. Devadasan* v. *Union of India*, 1964(4) SCR 680, and *Triloki Nath* v. *State of Jammu and Kashmir and Others (II)*, 1969(1) SCR 103 at 104.

46 For an elaborate discussion on this count, See, Virendra Kumar, "Dynamic of Reservation Policy: Towards of More Inclusive Social Order," 50 (4) *Journal of the Indian Law Institute*, 642-681 (2008), which is a critique of Constitution Bench judgment of the Supreme Court in *Ashok Kumar Thakur* v. *Union of India*, 2008(5) SCALE*, per* K.G. Balakrishnan CJI and Arijit Pasayat, C.K. Thakker, R.V. Raveemdran, and Dalveer Bhandari JJ. See particularly our analysis at 654-655: "However, this restricted view of treating reservations as merely "exceptions" was abandoned in later decisions of the apex court. For this reversal, Balakrishnan, CJI, on the authority of the 7-judge bench decision in *State of Kerala* v. *N.M. Thomas*, holds that 'Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) respectively.' These are truly '[i]ndependent enabling provisions.' By extending the same logic to article 15(5), Balakrishnan, CJI said: 'Article 15(5) also to be taken as an enabling provision to carry out certain constitutional mandate and thus it is constitutionally valid.' The plea for freeing reservation under clause (4) from the control of clause (1) of articles 15 [or freeing clause (4) from clause (1) of article 16] is perhaps best expounded earlier by Subba Rao, J in his dissenting opinion in T. Devadasan when he observed: The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred hereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article. Thus, clause (4) [and now also clause (5) on the same analogy], as pithily observed by Raveendran, J, 'is neither an exception nor a proviso to clause (1) of Article 15'" [The reference to footnotes has been omitted in this abstraction.]

In this structural matrix of the provisions of article 15, Clause (3) may be reconciled with Clause (1) on the principle of 'egalitarian equality', which is the foundational value of right to equality. This indeed is the exposition of mystic character of basic structure doctrine of the Constitution by the nine-Judge bench of the Supreme Court in *I.R. Coelho case* (2007). This, in turn, also reveals that the BSD was in the contemplation of our founding fathers in the very structuring of provisions of article 15 of the Constitution.

VII Egalitarian equality and basic structure

This dynamic concept of 'egalitarian equality' under the BSD, which instantly transforms the formal fundamental right to equality into substantive fundamental right is, indeed, a must for fulfilling the objective of social welfare state enshrined in the Constitution; namely, the creation of inclusive society! The constitutional complexion of the creation of inclusive society [read as Fraternity in the Preamble] is informed by Justice, Liberty, Equality, and premised on the principle that ensures dignity of the individual and unity and integrity of the Nation! This may be termed as dynamic perspective of the constitutional fundamental right to equality as the movable element of 'the Code of Equality'.

Strangely enough, the fructification of fundamental right to equality under the Constitution, *via* the concept of 'egalitarian equality', itself is founded (oddly enough) in the very violation of the generic principle of equality by resorting to the process of classification, which forbids class legislation but permits reasonable classification. This is premised on the principle of 'like should be treated alike'. It is only on the basis of reasonable classification that the various women-centric laws have been enacted by the Parliament without violating the principle of equality only on grounds of sex.[47]

Likewise, following the lead of the founding fathers in respect of clause (3) of article 15, the concept of 'egalitarian equality' has been carried forward to widen the ambit of inclusive society by the Parliament through the insertion of clauses (4) and (5) in Article 15 by the First Amending Act of 1951[48] and Ninety-third Amendment of

47 See, for instance, The Immoral Traffic (Prevention) Act, 1956; The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986); The Commission of Sati (Prevention) Act, 1987 (3 of 1988); Protection of Women from Domestic Violence Act, 2005; The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013; The Criminal Law (Amendment) Act, 2013 (1.72 MB); The Indecent Representation of Women (Prohibition) Act, 1986.

48 Added by the Constitution (First Amendment) Act, 1951, s. 2 (w.e.f. June 18, 1951): Clause (4) of Article 15 – "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

2005[49] respectively that empower the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, including such special provisions that relate to their admission to all educational institutions other than the minority educational institutions referred to in clause (1) of article 30.[50]

In this sequential development our submission is that addition of Clause (6) to Article 15 through the 103rd Amendment of the Constitution[51] by the Parliament for making a special provision, including the maximum of 10 per cent reservations in the educational institutions other than minority educational institutions, excluding the SCs, STs, and non-creamy layers of OBC is only a further continuation of the process of widening the ambit of 'inclusive society'. This has been done by empowering the State (the Government and the Parliament of India) to make special provisions for EWS of citizens, including such special provisions as relate to their admission to all educational institutions other than the minority educational institutions referred to in clause (1) of article 30.) The only issue that needs to be addressed is, whether exclusion is 'arbitrary' or 'discriminatory' on the touchstone of the BSD?

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49 Inserted by the Constitution (Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. Jan. 20, 2006): Clause (5) of Art. 15 – "Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

50 In our critique of 11-Judge Bench judgment of the Supreme Court in *T.M.A. Pai Foundation* case (2002), we had the opportunity to examine critically 'such special provisions that relate to their admission to all educational institutions other than the minority educational institutions referred to in clause (1) of article 30'. It was argued: "Thus, there are two distinct domains of educational institutions. One refers to educational institutions that have been set up by minorities 'at their own expense' for the purpose of conserving their 'distinct language, script or culture'. In this domain, minorities enjoy almost unrestricted freedom and the state is not supposed to interfere except perhaps on such grounds as 'public order', 'morality' or 'health'. … The second domain of educational institutions is the one whose prime purpose is not to conserve a particular language or culture but to impart, say, professional education in the field of medicine or engineering. These institutions invariably require the state support by way of recognition or affiliation to a university with or without aid. In this domain, minorities exercise their right, not qua minorities, but qua citizens, and, thus, instantly become subject to the discipline of article 19(6) as well as of article 29(2)." On this premise, we had concluded that exception granted to the minority educational institutions by the majority court is not justified, and, thus, the decision needed reconsideration. See, Virendra Kumar, "Minorities' Rights to Run Educational Institutions: *T.M.A. Pai Foundation* in Perspective," 45(2) *Journal of the Indian Law Institute*. (2003), 200-238, at 225-226.

However, in author's view, such an opportunity arose before the Parliament while enacting the Constitution (Ninety-third Amendment) Act, 2005, but unfortunately missed.

51 For the text of Cl. (6) of art. 15, inserted by the Constitution (One Hundred and Third Amendment) Act, 2019, s. 2 (w.e.f. 14-1-2019), see, *supra,* note 2.

VIII Directive principles and basic structure

Recognizing that the avowed objective of 'egalitarian equality', the foundational value of the fundamental right to equality under the BSD, is eventually to widen the ambit of inclusive society as envisaged under the Constitution, then the provisions conferring special benefits on EWS *per se* cannot be termed as violative of the BSD. This is so as it confers very wide discretion on the State to fulfil the constitutional mandate as spelled out in Directive Principles of State Policy in Part IV of the Constitution.

In the context of reservation for EWS under the 103rd Constitutional Amendment, purpose is solely concerned to find out whether the newly inserted clauses, clause (6) to article 15 and clause (6) to article 16 by sections 2 and 3 respectively of the Amending Act, denying the benefit of those special provisions, including reservations. to SCs, STs and non-creamy layers of OBCs, also violate the BSD? That is, whether the exclusion clauses also violate *the foundational value of the Fundamental Right to Equality* under article 15 and article 16, read with article 14? In this respect, we need to bear in mind that under the BSD, the mere fact of violation of fundamental right to equality is not enough, it must result into violation of the foundational value of the fundamental right to equality.

Prima facie, the exclusion of SCs, STs, and non-creamy layers of OBCs does not violate the principle of egalitarian equality. This is so, inasmuch as the prime objective of the foundational value of the fundamental right to equality is to widen the ambit of 'inclusive society' by consciously leaving the SCs, STs and non-creamy layers of OBC out of its coverage.

The underlying rational of specifically excluding the SCs, STs and non-creamy layers of OBC from the purview special benefits for EWS of society may be crystalized mainly in terms of the following three reasons:

> The first reason is revealed by the very genesis of the BSD. It discloses that in the matter of amendment of the constitution, the concept of 'egalitarian equality', the foundational value of right to equality, allows the Parliament widest possible amplitude of undertaking classification, whether by exclusion, inclusion, or both, as long as the basis of classification has nexus with the objective sought to be achieved, namely to continually widen the ambit of 'inclusive social order'.
>
> The second reason is on account of versatility of the BSD. The exclusion of SCs, STs and non-creamy layers of OBCs is justified *ipso facto*,

inasmuch as these are already in the avail of such benefits[52] and are not deprived of the same, say, by reducing their percentage of reservation.[53]

The third reason, albeit somewhat obliquely, is that, as per the current critical thinking, economic backwardness is *anterior,* rather than *posterior*, to'socially and educationally backwardness,' with or without subjected 'to caste discrimination.' This is reflected in the 2001 Explanation of poverty by the United Nations Committee on Economic, Social and Cultural Rights, which clearly says that poverty is the "the most severe obstacles" "to accessing their rights and entitlements," whether "physical, economic, cultural and social."[54]

IX Conclusion

Three summations in the light of the foregoing

First summation: We need to revisit and revise our conventional thinking about the very nature and scope of the Basic Structure Doctrine (BSD) of our Constitution, which has hitherto remained continually problematic. In our justifiable estimation, the prevalent notion that the BSD severely limits the power of the Parliament does not reflect its true perspective. Perhaps, it is this kind of restrictive approach that has led us to the present predicament of having two diagonally opposite views in public domain about the BSD.[55] We tend to approach the whole episodic situation somewhat differently: it is not the doctrine of basic structure, which is bad; it is only our own comprehension about this doctrine, which is shaky, weak or feeble. We need to recognize that the basic structure doctrine has been conceived and construed as the foundational values of fundamental rights enshrined in the Constitution. Thus comprehended, it becomesthe perennial source of making our Constitution dynamic sheerly through interpretative processes. This is for the simple reason that the

52 The SCs, STs and non-creamy layers of OBCs are already in the avail of such benefits to the extent of 15 per cent, 7.5 per cent and 27 per cent respectively.

53 See, *Janhit Abhiyan*, para 78.3, *per* Dinesh Maheshwari, J.: "Moreover, the benefit of reservation avails to the excluded classes/castes under the existing clauses of Articles 15 and 16; and by the amendment in question, the quota earmarked for them is not depleted in any manner."

54 Since the economic backwardness (that is, poverty) is far deeper than that the basis of social and educational backwardness itself, it should dispel the notion that the named excluded categories represent the poorest section of society.

55 In the public domain, for instance, we have two opposite views about this judicially settled basic structure doctrine. One view is that the Supreme Court had set a bad precedent in the propounding of 'basic structure doctrine' (see, *supra,* notes 34-36, and the accompanying text).; the other view is diagonally opposite to the first one, stating that the 13-Judge Bench in *Kesavananda Bharati* (1973) had set a 'good' precedent for ever! (See, *supra,* notes 29-33, and the accompanying text).

foundational values of fundamental rights[56] are expressed invariably in the most generic, universal overarching principles, and, therefore, capable of assuming varying complexions for meeting the needs of ever emerging new age. Such a constitutional dynamism is often brought out by citing the classical statement of Benjamin N. Cardozo: "The great generalities of the Constitution have a content and a significance that vary from age to age."[57] And the singular function of the Parliament in the exercise of its amending power, unarguably, is to realize those values in the life of its citizenry as much as possible. Impliedly, this means that the amplitude of the amending power of the Parliament is as wide as the ambit of foundational values of the Constitution. The BSD, thus, does not restrict the power of the Parliament; rather, throughits foundational values of fundamental rights enshrined in the Constitution, it further augments the Parliament's power to fulfil the goals of Social Welfare State.[58]

What, then, is the role of the Supreme Court under the BSD*vis-à-vis*the Parliament? The role of the Supreme Court is limited to examine whether the proposed constitutional amendment rationally, logically or reasonably promotes the foundational values of the constitution. In this respect, as in the instant case, the focus of Supreme Court enquiry is limited to, whether the basis of classification of reservation for EWS to the exclusion of SCs, STs and non-creamy layers of OBCs has any nexus with the objective sought to be achieved? Since patently and *prima facie* the singular

56 The enumerated fundamental rights in the Constitution, are singular concepts in their own terms, and therefore, said the Supreme Court to have "no fixed content," and that "most of them are empty vessels into which each generation has to pour its content in the light of its experience", *People's Union for Civil Liberties v. Union of India*, cited in *Janhit Abhiyan,* para74.2.1. See also generally, Virendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies," *Journal of the Indian Law Institute*, Vol. 47 No. 2 (2005) 135-157. However, the foundational values of fundamental rights are more abstract than the fundamental rights, and, therefore, still more expansive in their scope and coverage.

57 Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press (1921), at 17, cited in *Janhit Abhiyan,* para74.2.1 for showing that "a Constitution, unlike other enactments, is intended to be an enduring instrument." per Dinesh Maheshwari, J. Fundamental rights enunciated in the Constitution itself, as held by this Court in *People's Union for Civil Liberties v. Union of India*, have no fixed content, most of them are empty vessels into which each generation has to pour its content in the light of its experience.

58 Even in the exercise of its ordinary legislative power under the Constitution, the range of its power is very wide. The denial of the exercise of this power is by way of an exception, which is often expressed in the established practice principle of 'presumption of constitutionality'. That is, whatever has been done by the Parliament, it is presumed to be perfectly constitutional, implying thereby that if it is not so, the burden would lie upon the party to prove who says that it is not constitutional. The sway of this power under the BSD, when the Parliament undertakes amendment of the Constitution under Article 368, increases many-times more, almost limitless, so to speak, because the issue before the Supreme Court is not limited to whether it violates any of the fundamental rights under the Constitution. It goes far beyond to examine whether or not the foundational value of that fundamental right(s) is also violated.

objective is to widening the ambit of 'inclusive society', as envisaged in the very Preamble of the Constitution,[59] the Parliament has been prompted to take that recourse *via* the unique dynamism of the BSD.

To this 'limited role' of the Supreme Court, however, there is an inalienablepotential converse or a contraposition, which instantly andsimultaneouslyconverts theso-called 'limited role' into the 'unlimited one'! All this happens in the realization that the interpretative process of the Constitution, particularly at the level of apex court, is notmerely a mechanical exercise but a highly creativeone. In this wise, the BSD, as a unique repository of foundational values of fundamental rights, bolsters the role of judicial independence in continually exploring the spirit of Constitution, and thereby making it a powerful dynamic instrument of social transformation of futuristic import. This is the role of judiciary, which is far greater and profound than merely deciding a dispute between two contestants![60]

Second summation: It is in the nature of *self-fulfilling prophecy*. With the augmented power of Parliament, we do foresee a possibility, and that also in not too distant a future, wherein under the overarching principle of 'egalitarian equality' - the foundational value fundamental right to equality -under the BSD, the Government and Parliament of India may eventually go in for a comprehensive amendment of the Constitution by abolishing all such existing special provisions as for SCs, STs, OBCs, *etc*., and come

59 See, *supra*, part VII, dealing with the objective of social welfare State enshrined in the Preambulatory statement of the Constitution; namely, the creation of inclusive society.

60 Most recently, while participating in the International Conference on Dr BR Ambedkar in the US, the Chief Justice of India Dr. D.Y. Chandrachud, deeply reflected upon the role of judiciary in their decision-making: "Judges, though unelected,play vital role in social evolution," he stressed.Elaborating hisreflective thinking, he, *inter alia*, affirmed at least on three counts: one, that the Judges are the voice of 'something' which must subsist beyond "the vicissitudes of time;" two, that the Judges have a "stabilising influence" in the evolution of societies which are rapidly changing with technology, "particularly in the context of a plural society, such as India;" three, that the Judges become the "focal points of engagement between civil society and the quest for social transformation." See, *The Tribune*, Oct. 25, 2023.

up with one single criterion on economic basis,[61] and thereby effectively and rationally eschewing the growing clamour for reservations on basis of religion, race, caste, *etc.*,[62] and thereby meaningfully moving towards the castles secular society![63] However, such an anticipated supervening measure solely on economic basis need not be mixed

61 The reverberation of the view that economic criteria should be the sole basis for determining backwardness is found in the statement of S.H. Kapadia J., in *M. Nagaraj* (para 120): "… Views have often been expressed in this Court that caste should not be the determinant of backwardness and that *the economic criteria alone should be the determinant of backwardness*," cited in *Janhit Abhiyan* (2022), para 71.7, *per* Dinesh Maheshwari J., (Emphasis added)

Bela M. Trivedi J., has also emphasized the need for revisiting the whole gamut of reservations by eloquently stating: "It cannot be gainsaid that the age-old caste system in India was responsible for the origination of the reservation system in the country. It was introduced to correct the historical injustice faced by the persons belonging to the scheduled castes and scheduled tribes and other backward classes, and to provide them a level playing field to compete with the persons belonging to the forward classes. However, at the end of seventy-five years of our independence, *we need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism*," and that by following the lead as provided by the 104th Amendment of the Constitution in abolishing the special representation of Anglo-Indian community in the House of the Parliament and in the Legislative Assemblies of the States by nomination *w.e.f.* Jan. 25, 2020, "*it could be a way forward leading to an egalitarian, casteless and classless society*," see, *Janhit Abhiyan*, paras 134 and 135 (Emphasis added)

62 See, for instance, the continuing thrust for extending the benefits of special provisions on the basis of caste in the recommendations made in the Justice Ranganath report, and their denial by the government on conversion: *The Tribune*, Dec. 8, 2022: "Justice Ranganath report 'myopic', Centre tells SC." This Report of 2007 favoured extending reservation benefits to Dalits who had converted to Islam and Christianity, which the Government has not accepted. Instead, the Government has appointed a new Commission headed by former CJI KG Balakirshnan to examine the matter de novo. Centre maintained that untouchability was not prevalent in the Christian and Islamic societies, and therefore opposed the petitions seeking SC status for Dalits who have converted to Christianity and Islam. In the affidavit filed, the Ministry of Social Justice and Empowerment submitted, "The Constitution (Scheduled Caste) Order, 1950, was based on historical data, which clearly established that no such backwardness or oppression was ever faced by members of Christian or Islamic society."

63 See *Janhit Abhiyan*, para 132, per Bela M. Trivedi J., citing the observations made by the Constitution Bench in *K.C. Vasanth Kumar* MANU/SC/0033/1985 : (1985) Suppl. SCC 714 (para 30), per D.A. Desai, J., showing, how the economic criterion is a strategy to serve the two-fold purpose of making India a casteless society and upliftment of poverty-stricken disadvantaged sections of society: 'If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged Sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

up with the 33 per cent seats recently reserved for women in the Lok Sabha and State Legislative assemblies through the 106th Amendment of the Constitution,[64] which is a step forward for women empowerment through the strategy of 'political inclusion' – a distinct political concept, which cuts across the narrow confines of reservations based solely upon religion, race, caste, *etc.*

Third summation: The BSD does not distract or destroy the doctrine of Separation of Powers, which is the prime functional basis of preserving and promoting constitutionalism. It rather strengthens the independence of both the Supreme Court and the Parliament along with the Executive in their respective domains, as envisaged under the Constitution. This is what we have contended in the elaboration of our first summation.[65] Following this logical line of thinking, we are encouraged to contend and conclude that the BSD is the saviour of 'Sovereignty of the Constitution', and, thereby, strengthening our resolve to pursuethe constitutional mandate of social transformation eventually by seeking *inter-dependence* even in *independence* that we vigorously protect and promote under the doctrine of separation of powers. We may define this somewhat enigmaticprocess, by using an expression of our own devising, as 'collaborative constitutionalism', implying thereby a continuum of interaction between the Supreme Court on the one hand and the government and

64 The Constitution (One Hundred and Sixth Amendment) Act, popularly known as the Women's Reservation Bill, 2023 (Nari Shakti Adhiniyam), was introduced in Lok Sabha on September 19, 2023 during the special session of Parliament, and passed on Sep. 20, 2023 almost unanimously[passed with the majority of 455:2].New clauses have been inserted, reserving seats for women in art. 239-AA (Legislative Assembly of Delhi); Article 330-A (Lok Sabha or House of the People); and art. 332-A (Legislative Assembly of every State). Rotation of seats will be exercised after delimitation exercise. The Act will expire after a period of 15 years from the date of commencement.

65 For the illumination of the operation of doctrine of separation of powers, see, *Hindustan Times*, Nov. 5, 2023: "Parliament can cure laws, not overrule verdicts: CJI." Chief Justice of India D. Y. Chandrachud, while addressing on the fifth day of the 21st edition of the Hindustan Times Leadership Summit in New Delhi on Nov. 4, 2023, dilated upon the *inter se* relationship between the Parliament and the Supreme Court under the doctrine of separation of powers. It was vehemently stated that the Parliament, as elected representatives of the people,enacted laws in response to 'popular morality', whereas the Supreme Court, not being the elected arm of the state, test the constitutional validity of the enacted laws on the touchstone of 'constitutional morality.' The legitimacy of such a testing lay in the fact that even the Parliament functions under, and not above, the Constitution, and, therefore, the perceived notion of 'popular morality' must confirm to that of 'constitutional morality'. If the Parliament still perceived any lacuna in the voided laws, the same can be "cured" by enacting fresh laws, but not by 'overruling the verdict', as that would amount to violation of doctrine of separation of powers. Under the doctrine of separation of powers the Supreme Court is not subservient to the Parliament; in fact, both are independent of each other. Thus, consistently with this doctrine, the Parliament can override, but not overrule!

Parliament of India on the other.[66] All this happens *via* the constitutionally sanctioned contrivance of judicial review envisaged under article 141of the Constitution.[67]

66 In the terminology of social sciences, the common law developmental process in the judicial domain is akin to the movement from thesis to anti-thesis to synthesis, and so on so forth, representing the progressive development of human thought.

67 See, Virednra Kumar, "Statement of Indian Law - Supreme Court of India Through its Constitution Bench Decisions since 1950: A Juristic Review of its Intrinsic Value and Juxtaposition,"*supra* note 25 at 224-225.