

"Parliament Cannot Destroy Basic Features of Constitution"

FROM OUR LEGAL CORRESPONDENT

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The Supreme Court has held that "Parliament cannot, under Article 368 (amending power of the Constitution), exceed its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features".

The Court was delivering a detailed judgment with reasons in what is known as *Minerva Mills* batch cases in support of its earlier orders of May 9, 1980, striking down Clauses 4 and 5 of Article 368 and also Article 31-C, as amended by the Constitution 42nd Amendment.

Clauses 4 and 5 were introduced in Article 368 by Section 55 of the 42nd Amendment.

In striking down Clause 5 of Article 368, the Chief Justice Mr. Y. V. Chandrachud (who delivered the main judgment) said that "this newly introduced clause demolishes the very pillars on which the preamble rests" (namely a polity whose basic structure is a sovereign Democratic Republic and whose essential attributes like justice, social, economic and political liberty of thought, expression, belief, faith and worship and equality of opportunity are recited in the preamble itself).

Clause 5 says that "for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article".

The Chief Justice delivered the main judgment speaking for himself, Mr. Justice A. C. Gupta, Mr. Justice N. L. Untawala and Mr. Justice P. S. Kailasam.

On the other hand, Mr. Justice P. N. Bhagwati, in his separate detailed judgment, agreed with the conclusion of the Chief Justice on the invalidity of Clauses 4 and 5 of Article 368 but differed with the Chief Justice on the invalidity of Article 31-C as amended and declared it valid.

The main judgment said that "no constituent power can conceivably go higher than the skyhigh power conferred by Clause 5, for it even empowers Parliament to repeal the provisions of this Constitution, that is to say, to abrogate democracy and substitute for it a totally antithetical form of Government".

"That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic

and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals and that the power to destroy is not power to amend".

"Indeed", the Chief Justice said that "a limited amending power is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed".

The avowed purpose of Clause 5 is the "removal of doubts", the main judgment pointed out and noted that after the decision of the Supreme Court in *Kesavananda Bharathi* Case (also known as *Fundamental Rights Case* in 1973) "there could be no doubts as regards the existence of limitations on Parliament's power to amend the Constitution".

In the *Kesavananda Bharathi* case, the Supreme Court by a majority of seven to six ruled that power to amend the Constitution under Article 368 "cannot be exercised so as to damage the basic features of the Constitution or to destroy its basic structure".

The main judgment also declared unconstitutional Clause 4 of Article 368—which deprives the courts of their power to call in question any amendment of the Constitution—"because the two clauses are interlinked".

FUNCTION OF JUDGES

In this context, the main judgment said that "our Constitution is founded on a nice balance of power among the three wings of State, namely the executive, the legislature and the judiciary and it is the function of the judges, nay their duty, to pronounce upon the validity of the law".

"If courts are totally deprived of that power, the Fundamental Rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water".

"Clause 4 of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed under Article 32 of the Constitution" (which is itself a Fundamental Right to move the Supreme Court for enforcement of Fundamental Rights).

The majority also held that the "conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power" and "if Clause 5 is beyond the amending power of Parliament, Clause 4 must be equally beyond that power and must be struck down as such".

In striking down Article 31-C as amended the judgment dealt with the relative roles of Directive Principles (Part IV) and Fundamental Rights (Part III) in the Constitutional scheme and held that "to destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure".

It may be mentioned that the main part of Article 31-C, as it stood before the amendment, was upheld by the Supreme Court in the *Kesavananda Bharathi* case.

According to Article 31-C, as it stood then, no law giving effect to the policy of the State specified in Clauses (B) or (C) of Article 39 of Directive Principles chapter—dealing with distributive justice and prevention of concentration of wealth—shall be deemed to be void on the ground that it is inconsistent with Fundamental Rights under Articles 14 or 19 or 31.

Article 31-C as amended says that no law giving effect to the policy of the State towards securing the principles specified in all or any of the Directive Principles shall be deemed to be void on the ground that such a law takes away, or is inconsistent with, or abridges Fundamental Rights under Articles 14 (equality before law), 19 (personal freedoms) or 31 (property rights).

The Chief Justice observed that "the Indian Constitution is founded on the bed-rock of the balance between Part III and Part IV and to give absolute primacy to one over the other is to disturb the harmony of the Constitution".

The main judgment declared that "this harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution".

The Chief Justice held "that since the amendment to Article 31-C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description, even if these laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31-C from challenge of unconstitutionality, by reading into the section words which destroy the rationale of that Article and an intentment, which is plainly contrary to the proclaimed purpose".

After noting the importance of Directive Principles to achieve a socialistic State and of Fundamental Rights to secure to our people basic freedoms with equality of opportunity and status and individual dignity, the judgment cautioned that "just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms".

The Chief Justice said that a plea (of the Union of India) that some laws may fall outside the scope of Article 31-C as amended "is no answer to the contention (of the petitioners) that withdrawal of the protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution".

"Three articles of our constitution and only three stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power and they are Articles 14 (equality), 19 (personal freedoms) and 21 (right to life and personal liberty)", the judgment noted.

Article 31-C, the Chief Justice said, "has removed the two sides of that golden triangle which affords to the people an assurance that the promise held forth by the preamble will be performed by ushering in an egalitarian era through the discipline of Fundamental Rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual".

The Chief Justice observed that "a total deprivation of Fundamental Rights, even in a limited area, can amount to abrogation of a Fundamental Right just as partial deprivation in every area". Giving an illustration, His Lordship said that an author, who writes exclusively on foreign matters, shall have been totally deprived of the right of free speech and expression if he is prohibited from writing on foreign matters.

"If Articles 14 and 19 are put out of operation in regard to the bulk of law which the legislatures are empowered to pass (for implementing Directive Principles), Article 32 (Fundamental Right to move the Supreme Court for enforcement of Fundamental Rights) will be drained of its life-blood the judgment added.

Section IV of the 42nd Amendment—which amended Article 31-C—found an easy way to circumvent Article 32(4) "by withdrawing totally the protection of Article 14 and 19 in respect of a large category of laws, so that there would be no Article 32" the Chief Justice said.

Article 32(4) says that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for by the Constitution.

"The power to take away the protection of Article 14 is the power to discriminate without a valid basis for classification", the judgment pointed out.

Stating that "Article 14 forbids class legislation but it does not forbid classification, the judgment observed that the purpose of withdrawing the protection of Article 14 can only be to acquire the power to enact the class legislation".

Then again, the Chief Justice said that "regional chauvinism

will have a field day if Article 19(1) (D) — right of free movement throughout India — is not available to the citizens" and "already, there are disturbing trends in a part of the Indian horizon" and "these trends will receive strength and encouragement if laws can be passed with impunity, preventing the citizens from exercising their right to move freely throughout the territory of India".

The Chief Justice rejected a plea of the Union of India that the deprivation of some of the Fundamental Rights for the purpose of achieving a just socio-economic order as envisaged in the Directive Principles chapter could not possibly be deemed as destruction of the basic structure of the Constitution.

In this context, pointing out that the principles in Part IV were the goals of almost all types of policy — democratic or authoritarian, the Chief Justice said that "if the discipline of Article 14 is withdrawn and if immunity from the operation of that Article is conferred, not only on laws passed by Parliament but on laws passed by the State legislatures also, the political pressures exercised by practically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite citizens for preferential treatment".

The judgment observed that "the device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed" and that "one must at least take Parliament at its word when, especially, it undertakes a constitutional amendment".

Rejecting a plea of the Union of India that Article 31-C as amended should be upheld for the same reasons for which Article 31-A(1) was upheld by the Supreme Court in a number of earlier decisions, the judgment pointed out that there was a "qualitative difference" between these two Articles.

"Article 31-A(1)—which deals with laws relating to agrarian reforms being protected from challenge in courts on ground of violation of specified Fundamental Rights—excludes the challenge under Articles 14 and 19 in regard to a specified category of laws", the Chief Justice noted and added that "if, by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired". But "if the protection of those Articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a parchment in a glass case "to be viewed as a matter of historical curiosity".

The judgment also negated a plea of the Union of India that the expanded Article 31-C should be upheld in the same way as Article 31-A was upheld by the court in earlier rulings.

In this context, the judgment said that Article 31-A dealt with specified matters while "Article 31-C, as amended, does not deal with specified subjects and the Directive Principles are couched in broad and general terms for the simple reason that they specify the goals to be achieved".

LIBERTY & COURTS

The Chief Justice observed that "human ingenuity, limitless though it may be, has not yet developed a system by which the liberty of the people can be protected except through the intervention of courts of law".

The majority thus came to the conclusion that "the nature and quality of the Amendment introduced by Section 4 of the 42nd Amendment (in expanding Article 31-C) is therefore such that it virtually tears away the heart and basis of basic fundamental freedoms."