

THE FUNDAMENTAL RIGHTS CASE

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By

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In order to understand the implications of the monumental judgments of the 13-judge Bench of the Supreme Court, delivered on April 24, 1973, it is necessary to refer to the historical background and the scheme of the Constitution.

Our Constitution envisages a true and noble democracy which ensures freedom under law and the dignity of the individual. Part III enumerates the Fundamental Rights and Part IV sets out the Directive Principles of State policy. There can be no inconsistency or collision between the Fundamental Rights and the Directive Principles, since they are on different planes. While Part IV sets out the directory ends of Government, Part III sets out the permissible means for achieving those ends. There is no conflict between the ends and the means; the only conflict is between the Constitution and those who refuse to accept the discipline of the Constitution.

Refusal to accept discipline on the university campus is called student unrest; refusal to accept discipline in the political capitals is called progressive radicalism.

Most modern Constitutions assure the basic human freedoms to its citizens. Citizens need protection against their own representatives, because men dazzled by the legitimacy of their ends seldom pause to consider the legitimacy of the means. Man being what he is, cannot safely be trusted with complete power in depriving others of their rights. The protection of the citizen against all kinds of men in public affairs, none of whom can be trusted with unlimited power over others, lies not in their forbearance but in limitations on their power. That is the conviction underlying our Constitution.

Article 13(2) of the Constitution, as it stood prior to the 24th Amendment, provided that the State shall not make any law which takes away or abridges the Fundamental Rights. The word "law" in that Article was construed by the Supreme Court in Golaknath's case as including constitutional amendments; and it was held in that case that Parliament

could not abridge or take away the Fundamental Rights in exercise of its power under Article 368 to amend the Constitution.

The 24th Amendment sought to supersede that judgment by enacting that Article 13(2) shall not apply to constitutional amendments and aimed at empowering Parliament to take away or abridge all or any of the Fundamental Rights.

After having armed itself with the power to ride roughshod over the basic human rights of the citizens, Parliament enacted the 25th Amendment which contained two significant provisions.

First, it amended Article 31(2) and provided that anyone's property may be acquired on payment of an "amount" instead of "compensation". The intention was that the citizen's right to property should be transformed into the State's right to confiscation, and the State should be able to deprive anyone of any property in return for any amount payable at any time on any terms; and the executive action, however arbitrary or irrational, should not be the subject of the Court's scrutiny. Such State action may even result in virtually abrogating any

of the other Fundamental Rights, the exercise of which would be impeded or negated by the deprivation of property without compensation, the only exception being the case of educational institutions. Publishers may be deprived of their printing plant and building, trade unions of their funds, professionals of their professional assets—and thus the Fundamental Rights to freedom of speech, to form unions and to practise any profession could be damaged or extinguished. Religious freedom guaranteed by Articles 25 to 30 could also be virtually stifled by the taking away of properties held for religious and charitable purposes.

Secondly, the 25th Amendment inserted Article 31-C which provides that if a law is passed to give effect to the Directive Principles of State policy under Article 39 (b) or (c), the various Fundamental Rights set out in Articles 14, 19 and 31 would cease to apply. The Directive Principles set out in Article 39(b) and (c) deal with the economic system and, therefore, countless categories of law can claim the protection of Article 31-C since most laws can be related to the economic system in one way or another.

Article 31-C constitutes a monstrous outrage on the Constitution and seeks to subvert its seven essential features.

1. It destroys the supremacy of the Constitution by giving a blank charter to Parliament and all State legislatures to defy and ignore the Constitution.

2. It postulates that the end justifies the means, and provides that the Fundamental Rights must give way before the Directive Principles of State policy. Thus it destroys one of the foundations of the Constitution.

3. The manner and form of amendment laid down in Article 368 is virtually abrogated. The Fundamental Rights can be effectively silenced by a law passed by a simple majority in Parliament or in a State legislature.

4. Ten Fundamental Rights, including the right to equality before law which is the very bedrock of republicanism, the rights to freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of India, to acquire, hold and dispose

of property, to practise any profession or carry on any occupation, trade or business, as well as rights to property, are all abrogated. Seven of these ten Fundamental Rights have no connection with property.

5. Judicial review and enforceability of the Fundamental Rights is destroyed by Article 31-C which expressly provides that no law containing a declaration that it is for giving effect to the Directive Principles of State policy "shall be called in question in any court on the ground that it does not give effect to such policy".

6. One of the essential features of the Constitution is that no State legislature can amend the Constitution; but Article 31-C permits State legislatures to supersede a whole series of Fundamental Rights. The net result is that Fundamental Rights may prevail in some States and not in others, depending on the complexion of the State Government.

7. One of the essential features of the Constitution, which is the provision for due protection of

minorities and their religious, cultural, linguistic and educational rights, is gravely impaired by Article 31-C.

The four attributes of a totalitarian State are: constitutional permission to the ruling party to favour its own members; denial of the right to dissent or to oppose; denial of the various personal freedoms; and the State's right to confiscate anyone's property. All these four attributes of a totalitarian State are implicit in Article 31-C. It would be no exaggeration to say that Article 31-C has a built-in mechanism for the dissolution of the true democracy that India has been so far, cessation of the rule of law and disintegration of the nation.

The Government's argument was that, though its power of amending the Constitution, after the 24th Amendment, must be held to be limitless and they can destroy human freedoms under Article 31-C, the legislature will not use the power. The answer to this is contained in the words of W. B. Yeats: "No Government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used."

Six senior judges of the Supreme Court (including Chief Justice Sikri, who retired a day after the judgment, and Justices Shelat, Hegde and Grover, who have paid the price of their independence and intellectual integrity by being superseded for the office of the Chief Justice of India) held as follows:

1. Parliament's amending power is limited. While Parliament has the right to abridge any Fundamental Right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the Constitution. The Fundamental Rights are among the essential features of the Constitution; therefore, while they may be abridged, the abridgement cannot extend to the point of damage to or destruction of the core of the Fundamental Rights. Thus, it was unnecessary to decide whether Golaknath's case was rightly decided or not, since after the 24th Amendment Parliament has the power to abridge any Fundamental Right without damaging or destroying its core.

2. While the property of any person may be taken away on payment of an "amount" which may

not be the market value or constitute “compensation” in the eye of the law, the amount or the principles on which it is based must have a reasonable relation to the property.

3. Article 31-C is void since it takes away most valuable Fundamental Rights, even those unconnected with property. (The question of severability of the offending provisions of Article 31-C, which was dealt with by one of the judges, is not referred to here for lack of space.)

On the other hand, six other judges held as follows : 1. The power of amendment is unlimited. 2. On a fair construction of Article 31(2) as altered by the 25th Amendment, the State’s right to acquire or requisition property on payment of an “amount” must, according to some of these judges, be so exercised that the amount is not illusory and does not constitute a fraud upon the right to property. 3. Article 31-C is valid, even though it damages or destroys the essential features of the Constitution.

Thus, six judges decided the case in favour of the citizen and six in favour of the State. Justice

Khanna agreed with none of these 12 judges and decided the case midway between the two conflicting viewpoints. He held that (a) the power of amendment is limited; it does not enable Parliament to alter the basic structure or framework of the Constitution; and (b) the substantive provision of Article 31-C, which abrogates the Fundamental Rights, is valid on the ground that it does not alter the basic structure or framework of the Constitution. But the latter part of Article 31-C, which ousts the jurisdiction of the Court, is invalid.

Thus, by a strange quirk of fate, the judgment of Justice Khanna, with which none of the other 12 judges agreed, has become the law of the land. This result follows from the fact that while Justice Khanna did not agree with the six judges who decided in favour of the citizen, he went a part of the way along with them; and the greatest common denominator between the judgments of the six judges in favour of the citizen and the judgment of Justice Khanna became the judgment of seven judges and thus constituted the majority view of the Supreme Court.

The effect of the majority judgment of the

Supreme Court may be summed up thus: Parliament cannot, in the exercise of its amending power, alter the basic structure or framework of the Constitution. For instance, it cannot abolish the sovereignty of India or the free democratic character of the State; nor can it impair the integrity and unity of India or abolish the States. The amending power cannot be so exercised as to make the Constitution suffer a loss of identity. (The principle that the basic structure or framework of the Constitution cannot be altered gives a wider scope to the amending power than the principle that none of the essential features of the Constitution can be damaged or destroyed.) The Court's jurisdiction cannot be ousted as is sought to be done by Article 31-C. If the Court's jurisdiction were ousted, any of the States may pass laws which may in effect be conducive to the disintegration of India. Further, the Government's right to acquire or requisition property must be exercised on the payment of such an amount as does not constitute a fraud on the right to property.

It is thus clear that something precious has been salvaged out of the Government's claim to have the

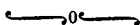
power to wreck the Constitution. In the considered opinion of this writer, the ruling of the six learned judges, who decided in favour of the citizen, represents the correct position in law. But there is hope for the survival of liberty and the rule of law in India even on the narrower view which represents the law laid down by the Supreme Court, provided the law is administered by judges whose only commitment is to the Constitution and not to any ideology or the philosophy of any ruling party. In the last analysis, the final guarantee of the survival of the citizen's rights is not the Constitution but the personality and intellectual integrity of our Supreme Court judges.

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