THE SUPREME COURT'S JUDGMENT ON THE CONSTITUTION (42nd AMENDMENT) ACT, 1976

Rekindling the Light of the Constitution

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By

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I. REKINDLING THE LIGHT OF THE CONSTITUTION

Last week the judgment of the Supreme Court striking down sections 4 and 55 of the Constitution (Forty-Second Amendment) Act, 1976, replenished the faith of those who understand the Supreme Court's role as the watchdog of the Constitution, while it predictably displeased the small minority who want the Supreme Court to be the poodle of the party in power.

The Constitution is a part of the priceless heritage of every Indian. Its founding fathers wanted to ensure that even while India remained poor In per capita income, it should be rich in individual freedom. This, however, is not acceptable to certain political parties.

The light went out of the Constitution when, in 1976, a few days after Divali — the festival of lights — the Forty-Second Amendment was rushed through Parliament while most of the opposition leaders were languishing in jail without a trial.

It is the light of the Constitution which has been rekindled by the Supreme Court. It is of the utmost importance that the ordinary citizen should understand what was at stake and what has been salvaged for him by the Supreme Court's judgment.

It was held in Kesavananda Bharati's case (1973) that while Parliament has the power under Article 368 to amend any part of the Constitution (including the chapter on fundamental rights), the power cannot be so exercised as to alter or destroy the basic structure or framework of the Constitution; and this ratio was reaffirmed and applied in Mrs. Indira Gandhi's case (1976) in which a constitutional amendment to make the Prime Minister's election to Parliament unassailable in a court of law was declared void.

The rationale of the Supreme Court's judgment in Kesavananda Bharati's case is simple and cogent. Parliament is only a creature of the Constitution. Periodically, the Lok Sabha is dissolved, and members of the Rajya Sabha retire, while the Constitution continues to reign supreme. If Parliament had the power to destroy the basic structure of the Constitution, it would cease to be a creature of the Constitution and become its master.

Article 368 which confers on Parliament the power to amend the Constitution cannot be read

as expressing the death-wish of the Constitution or as a provision for its legal suicide. In exercising its amending power, Parliament cannot arrogate to itself the role of the official liquidator of the Constitution.

The crucial point is that the people of India are not associated with the amending process at all under Article 368. This factor is decisive in determining the ambit of the amending power. By contrast, in many countries no amendment of the Constitution can take place without the consent of the people determined by a referendum or by the summoning of a convention or otherwise.

As regards constitutional amendments, the will of Parliament is certainly not the will of the people. To equate Parliament with the people is to betray complete confusion of thought. In choosing their representatives the electorate take into account a vast number of factors which have nothing to do with constitutional amendments. This has been proved time and again in countries where the people's will is ascertained on a referendum held upon Parliament's proposal to alter the Constitution.

The Australian electorate have approved only five out of 32 changes in the constitution proposed by their Parliament in the last 79 years. At the end

of 1973 the Australian Parliament passed by an impressive majority two proposals for constitutional amendment, but both the proposals were rejected by equally impressive majorities by the people in every single state of Australia.

In countries where, upon the legislature proposing a constitutional amendment, the legislature is required to be dissolved and the representatives are compelled to seek re-election on the isolated issue of amendment, it has been found that the constitution is hardly amended half a dozen times in a hundred years.

The myth that Parliament's will is the people's will was exploded at the electioa held in March 1977. Did the Parliament which passed the Forty-Second Amendment and which also approved of the proclamation of Emergency, represent the will of the people? The people gave their resounding verdict in 1977 on those misguided representatives who claimed to be supreme over the Constitution and over basic human values.

It was with a view to superseding the aforesaid judgment in Kesavananda Bharati's case, and conferring absolute and unlimited amending power on Parliament, that section 55 of the Forty-Second

Amendment Act inserted Clauses (4) and (5) in Article 368. The effect of those two clauses is clear :

(a) "There shall be no limitation whatever" on Parliament's amending power. In other words, Parliament is declared to have the power to alter or destroy the basic structure of the Constitution and to deprive the Constitution of its identity.

(b) The Court's jurisdiction to consider the validity of any constitutional amendment is ousted and it is expressly provided that no amendment, whether made before the Forty-Second Amendment or thereafter, "shall be called in question in any court on any ground."

The Supreme Court had no choice but to strike down the above clauses as being invalid and ultra *vires* the amending power of Parliament. Irrefragable reasons in support of the Supreme Court's verdict would strike any rational mind :

(1) The donee of a limited power cannot, by the exercise of that very power, convert the limited power into an unlimited one.

An organ established by the Constitution and vested with a limited amending power cannot make its own power unlimited while purporting to exercise that very power. Parliament's power was limited by

the barrier of non-amendability of the basic features or framework of the Constitution. It is an untenable proposition that in the exercise of that limited power, Parliament could demolish that barrier.

What Parliament purported to do by the Forty-Second Amendment was to effect a revolution in the constitutional law of India. It sought to overthrow the supremacy of the Constitution and to make itself supreme.

Revolution is the only word to denote the substitution of one supremacy for another. Parliament, which is merely a creature of the Constitution, wanted to make itself the master of the Constitution and arrogated to itself the right to demolish the basic structure of the Constitution and to substitute a new Constitution with a totally different identity. It is impossible to uphold an amendment which makes the instrument the master, and the master the instrument.

(2) The limited amending power is itself a basic feature of the Constitution.

The limited amending power of Parliament which was limited to preserve and protect the basic structure of the Constitution is itself a fundamental feature of the Constitution. Since Parliament has no right to alter any fundamental feature, it has no right so to amend Article 368 as to destroy that basic feature by abrogating the fundamental limitation on the amending power.

In other words, the supremacy of the Constitution and the unaltered survival of its basic structure, are themselves fundamental features of the Constitution, and after the Supreme Court had laid down the law that Parliament had no competence to alter the fundamental features, for Parliament to declare that it has that competence is not merely an act of constitutional impertinence but an irrational exercise in futility.

(3) Ouster of the Court's jurisdiction destroys a basic feature.

Clause (4), which was inserted by the Forty-Second Amendment in Article 368, seeks to enact that however patently outrageous a constitutional amendment may be, no court shall have the jurisdiction to pronounce upon its invalidity.

This provision is clearly ultra **vires** the amending power of Parliament because it destroys the balance of power between the legislature and the judiciary, which is one of the essential features of the Constitution, and seeks to deprive the citizens of the mode of redress which is guaranteed by Article 32 as regards cases in the Supreme Court relating to fundamental

rights and which is implicit in the entire scheme of the Constitution.

There can be no clearer subversion of the Constitution than for Parliament to claim the right to destroy the framework of the Constitution and to say that no court of law shall pronounce upon the validity of such destruction.

In Kesavananda Bharati's case the second part of Article 31C and in Mrs. Indira Gandhi's case Article 329A(4) were struck down precisely because the exclusion of the Court's scrutiny was in areas which affected the basic structure of the Constitution. Surely, the same fate had to overtake Parliament's last desperate all-out attempt to exclude the Court's scrutiny in respect of all past and all future encroachments on the inviolability of the basic structure of the Constitution.

It is the function of the Supreme Court to erase ugly blots on the Constitution cast by a transient Parliament — and no constitutional amendment can effectively take away this function from that institution which is the final interpreter of the fundamental law.

There are countless examples of the truism that a country which forgets its history is doomed to

repeat it. When we hear the glib claptrap that Parliament can be trusted to pass only such constitutional amendments and other laws as are for the good of the people, let us remind ourselves of the type of irresponsible constitutional amendments and savage laws which have been passed by our Parliament in the past.

The Forty-Second Amendment itself affords a good example of the scant regard in which the Constitution is held by certain political parties in Parliament. A year before that amendment, in August 1975, the Rajya Sabha passed the Constitution (Forty-First Amendment) Bill which was introduced by the Government.

That Bill represented the ultimate in contempt for the rule of law. It sought to grant lifelong immunity to the President, the Prime Minister, and the Governor of a State, in respect of any and every crime committed before assuming office or during the term of office.

A man may commit the foulest of crimes, not excluding the murder of his political opponents, but if after such a criminal record he has sufficient political support to become the President or the Prime Minister or the Governor of a State, for any period of time however brief, he would get total immunity

for the rest of his life from all criminal proceedings whatsoever.

This Constitution Amendment Bill further provided that pending criminal proceedings for any crime could not be continued after a man assumed one of the three offices. Since governorship is entirely within the patronage of the executive, lifelong immunity from criminal liability could be conferred on any individual, at a day's notice, by the party in power.

This shocking piece of legislation, which has no parallel in civilised jurisprudence, would have been passed by the Lok Sabha also but for certain developments which need not be gone into here.

Again, we must bear in mind that India enjoys the dubious distinction of being the only country in the world whose elected representatives put on the statute book (in 1975-76) laws which said that no citizen should be entitled to claim the right to personal liberty on the ground of common law, natural law, or rules of natural justice; that no person who was imprisoned without a trial should be permitted to know the grounds for his detention and that no public servant should be permitted to disclose such grounds even to a court of law for the judge's own satisfaction;

and that a man who was ordered to be set at liberty by a court could be re-arrested on the same grounds which the court had found to be unsustainable.

II. STRUCTURE OF MARBLE OR OF RED BRICKS?

The basic structure of the Constitution is of marble. Article 31C, as amended by Section 4 of the Forty-Second Amendment Act, sought to substitute a framework of red bricks. The Supreme Court's judgment has cried a halt to the process of administering euthanasia to freedom.

Article 14 guarantees to every person "equality before the law" and "the equal protection of the laws." Article 19 enacts that "all citizens shall have the right — (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and ....(g) to practise any profession, or to carry on any occupation, trade or business."

While leaving untouched the validity of the substantive part of Article 31C as originally enacted, the Supreme Court in its judgment last week struck

down Section 4 of the Forty-Second Amendment Act which in effect provided that all laws which have a nexus with any directive principle of state policy in Part IV of the Constitution could with impunity ride roughshod over the fundamental rights conferred by Articles 14 and 19.

The Supreme Court has held that to abrogate the fundamental rights while purporting to give effect to the directive principles is to destroy one of the essential features of the Constitution. Ignorance and arbitrariness, injustice and unfairness, would not be open to challenge on the touchstone of the invaluable human rights if the amended Article 31C were held to be valid.

A study of political science leaves no doubt that the philosophy underlying Article 31C is the very quintessence of authoritarianism. All progressive states, democratic as well as authoritarian, profess to act in accordance with the broad principles which are called directive principles of state policy in our Constitution. The basic difference between an authoritarian state and *a* free democracy is that the former subordinates human freedoms to directive principles of state policy, while the latter achieves the same objectives by methods which respect human freedoms.

The conviction underlying our Constitution is that 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. Articles 14 and 19 enshrine human rights which are universally recognised as essential to a free society—they are almost identical with the provisions in the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations on December 10, 1948 and to which India is a signatory.

The bogey of a conflict between fundamental rights and directive principles is wholly misconceived. While Part IV (directive principles) contains the directory ends of the state, Part III (fundamental rights) indicates the permissible means of giving effect to those ends.

There can be no conflict between the directory ends and the permissible means. The only conflict is between the Constitution and those who refuse to accept the discipline of the Constitution. The real question is not of social interest versus the individual's but whether in the name of social interest the basic human freedoms can be trampled under foot.

The three attributes of an authoritarian state are—denial of equality before the law, denial of

freedom of speech and the right to dissent, and denial of various personal freedoms which are comprised in the omnibus word "liberty". The above three attributes of authoritarianism are patently visible in Article 31C which abrogates the fundamental rights conferred by Articles 14 and 19.

In order to appreciate the importance of the Supreme Court's judgment for the survival of Indian democracy, it is necessary to have a clear idea of the effect and implications of Article 31C and what its consequences would be if it were held to be valid.

(1) Article 31C makes the Constitution stand on its head. The fundamental rights which are enforceable are rendered unenforceable by Article 31C, while the directive principles which are unenforceable are virtually rendered enforceable against the citizen when they are pursued in violation of his fundamental rights.

(2) The contrary constitutional scheme of subordinating the fundamental rights to the directive principles, which the Constituent Assembly was specifically asked by B. N. Rau to accept and which it deliberately rejected, is revived.

(3) The creative balance between the fundamental rights and the directive principles is destroyed.

(4) The balance between the judiciary on the one hand, and the executive and the legislature on the other, is disturbed. The guarantee of enforcement of fundamental rights contained in Article 32(1) and (4) is rendered meaningless as regards Articles 14 and 19.

(5) Classification which has a reasonable relation to the subject-matter of legislation is not violative of the right to equality before the law under Article 14. As regards the rights in Article 19, reasonable restrictions in the public interest are expressly saved by clauses (2) to (6) of that Article. Therefore, it must necessarily follow that the object and effect of Article 31C is to legalise such encroachments on the fundamental rights as are not reasonable or not in the public interest.

(6) The directive principles are so comprehensive that they operate at all levels and they cover all the significant fields of international policy, as well as of domestic policy, including social, economic, educational, legal and judicial. The position of supremacy accorded by Article 31C to the directive principles — with their practically unlimited range — destroys the fundamental rights which cease to be fundamental and even cease to be rights. Only their corpses remain embalmed in Articles 14 and 19.

To limit the scope of Article 31C to the directive principles is really to impose no limit at all, because the directive principles comprise the bulk, if not the whole, of constitutionally relevant legislative and governmental activity.

The absurd situation is that, whereas an amendment of a single fundamental right would require a majority of at least two-thirds of the members of Parliament present and voting, a law falling within Article 31C which over-rides and violates several fundamental rights can be passed by a simple majority.

Further, one of the essential features of the Constitution is that no State legislature can amend the fundamental rights or any other part of the Constitution. This essential feature is repudiated by Article 31C which empowers even State legislatures to pass laws which involve in substance a repeal of the fundamental rights. If Article 31C were held to be valid, fundamental rights may prevail in some States and not in others, depending on the complexion of the State Government.

(7) The four pillars of the Constitution, as shown by the Preamble, are — justice, liberty, equality and fraternity. Article 31C takes away a very substantial part of justice, the whole of liberty of

thought and expression, the essence of equality and the heart of fraternity.

(8) The condition of India during the Emergency affords a telling indication of what happens when human rights are suspended. But Article 31C puts India in normal times in a worse position than during a state of emergency under Articles 358 and 359. The reason is that whereas under Articles 358 and 359 certain fundamental rights are merely suspended or their enforcement in a court of law is suspended, under Article 31C there is an almost total repeal of the rights.

(9) In sum, freedom and Article 31C cannot co-exist. The right to equality before the law is a basic principle of republicanism, while the right to freedom of 'speech and expression, which includes freedom of the press, is the very foundation of a free democracy. Both these rights are destroyed by Article 31C which authorises a Government-controlled press and even nationalisation of newspapers.

Sections 23 and 24 of the Bombay Prohibition Act made it an offence to commend the use of any intoxicant and Section 75 of that Act made the offence punishable with imprisonment up to six months. Though in 1951 the Supreme Court had struck down this provision on the ground that it

infringed freedom of expression under Article 19(1)(a), any criticism of the prohibition policy can now be effectively silenced under Article 31C since prohibition is a directive principle under Article 47.

No student of history can fail to be struck by the facts that the fighters for national freedom and later the architects of the Constitution strove to provide inalienable human rights which would not be submitted to vote and which depended on the outcome of no elections; the country became a free democracy and was welded into one state for the first time in history; the necessity arose of creating a sense of security and safety in the minds of numerous religious, linguistic and regional minorities; and the fundamental rights represented the solemn balance of rights, and the fundamental conditions on which all parts of India accepted the Constitution.

It is inconceivable that after having provided the most complete and comprehensive guarantees of the basic human freedoms known to any constitution of the world, the Constitution-makers still intended that any Parliament could take away those fundamental rights.

A good example of how essential the fundamental rights are to securing "fraternity. . . and the unity and integrity of the nation" (referred to in

the Preamble) is afforded by the present happenings in Assam.

The rights of all citizens to move freely throughout the territory of India and to reside and settle in any part of the territory of India are expressly enshrined in Article 19. But if these rights can be violated with impunity where the law is intended to give effect to the directive principles, any State Government may well contend that the welfare of its own people and the State's obligation to find employment for them (which are among the directive principles) impose the regrettable necessity of asking "foreigners" who have come from other Indian States to go back.

What is happening in Assam today can easily happen in several other States. In fact some time ago Meghalaya passed a law to the effect that Indian citizens coming from other States could not stay in Meghalaya without a permit for more than six months.

The fact that such State laws would require the assent of the President under Article 31C is hardly a safeguard. The President is bound to accept the advice of the Central Cabinet; and politicians are not known to be averse to making sacrifices of basic

values at the altar of political expediency and political acoommodation.

Thirty years ago the Supreme Court had quoted with approval the dictum : "A government which holds the life, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." The momentous significance of the Supreme Court's recent judgment is that it will save our people from such despotism in the unfolding future.

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