BOOK REVIEWS

THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT (2011). By T.R. Andhyarujina.Universal Law Publishing Co., C-FF-1A, Dilkhush Industrial Estate, G.T. Karnal Road, Delhi-110033. New Delhi. Pp.xi+152 . Price Rs.295/-

ADMITTEDLY THE *Kesavananda Bharati* case[1] is a landmark in the judicial and constitutional history of independent India for a number of reasons. It invented the theory of "Basic Structure of the Constitution" thereby saving the soul of the Constitution and the liberty of citizens against the might of a majoritarian state. Secondly, it put limits to the amending power of Parliament and established the principle of complimentarity of constitutional institutions. Thirdly, it reiterated the authority of the Supreme Court in the matter of interpretation of the Constitution and its basic features. Judicial review, among others, got entrenched as one of the basic features unamendable by Parliament ensuring the principle of limited government and supremacy of rule of law. On the debit side, one has to admit that in the confrontation between the judiciary and Parliament, Indians lost one of the fundamental rights (right to property). Furthermore, an obnoxious ninth schedule got into the Constitution whereby Parliament legitimized certain Acts which otherwise could not have secured the constitutional sanction. Also on the debit side one may put the attempt by the executive to "discipline" the judges by superceding many senior-most judges and appointing one junior judge of its choice as the next Chief Justice of India who, in turn, tried unsuccessfully to overturn the majority judgment of *Kesavananda* case.

A lot has been written, debated and argued about the case within India and abroad. Senior Advocate T.R. Andhyarujina in his book reveals several new dimensions of the case including the differences among the judges and the politics behind the judgment which were not in the public domain, at least outside legal circles. Such a momentous case argued for over two months before the largest ever bench of thirteen judges of the apex court by an array of outstanding lawyers including Nani Palkhivala and H.M. Seervai got a surprise outcome hurriedly organized by S.M. Sikri CJI through a note described as "The View by the Majority". Four judges reportedly refused to put their signatures on the paper. Judicial politics and rivalry between Parliament and

1. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

the judiciary since got under way leading to several decisions circumscribing executive-judiciary-legislature relations sharper than before. The citizen is indeed the beneficiary of this conflict and the new constitutionalism got entrenched in Indian jurisprudence. Though Indian judiciary has, in the process, came out as the most powerful institution of its kind in the world, the struggle is not yet over and governance may have to suffer several avoidable twists and turns challenging established principles in the process.

Did the Supreme Court reverse its rather conservative approach to property after the confrontation? Did socio-economic legislation get a better deal from the court since the long drawn acrimony between Parliament and the court? Andhyarujina believes that the court was forced to change its views on the property question and revise its approach to economic laws ever since *Kesavananda* case. Such is the importance of the case in India's story of constitutional governance.

The reasons for writing on the case nearly four decades after the judgment are, in the words of the author, the need to trace the origins of the basic structure doctrine, to project the unanticipated dimensions the theory is assuming on constitutional governance and to explain the inevitable vagueness of the doctrine which, incidentally, gives a unique power to the court of nullifying not only constitutional amendments but also constitutional law as well. Law, it is said, is institutionalized politics. Constitutional law is certainly capable in the Indian situation to set the tone and direction of democratic politics. If so, the Supreme Court will continue to be the focus in future political developments in the country. If judges of the apex court fail to keep their independence in constitutional decision making when politically sensitive cases are brought before them, there is a danger of the messy situation resulting in greater harm than good. Judicial appointments, therefore, have to be more careful than ever before and judicial conduct must be subjected to greater public scrutiny to maintain the balance of power and complimentarity of institutions of governance. In other words, the aftermath of *Kesavananda* case can potentially be a blessing or a curse in India's evolution as a constitutional democracy.

Chapter-II of the book gives interesting episodes and quotable quotes thrown up in the course of proceedings in the case. It speaks not only of the politics of judges but also of advocates who play the game according to rules of their own making. If the case had followed the normal course instead of Sikri's CJI strategy of producing a short note on "View of the Majority" what would have been the outcome? Would it have led more judges shifting sides? Andhyarujina has a theory based on the unusual step of pronouncing only

the substance of the judgment orally without discussion, getting signatures of judges on the bench, and later reasoning differently by different judges leaving the *ratio* to be a matter of inference. He suggests that all the thirteen judges could not have even read the eleven judgments to form a "view by the majority" as the drafts of all the judgments were not circulated to the judges! This, if true, raises serious questions on collective decision making and the scope of powers of the chief justice. One judge says the note was "hastily drawn up by the Chief Justice". Another judge writes that because of time constraints arising from the immediate retirement of chief justice, he could only read some of the judgments. No judicial conference was held to formulate the decision while there was only one amongst them who was in favour of limitations on Parliament's amending power! The judges who were of the opinion that Parliament's power was unlimited were not deliberately called for the only conference held. In the circumstances, Andhyarujina argues that the "View by the Majority" cannot be taken as the *ratio* of the *Kesavananda* judgment. He adds that deriving a *ratio* could have been done only after a full hearing by a later constitution bench. The summary signed by 9 judges has no legal effect and does not represent the *ratio* of *Kesavananda* case! In this perspective, there is no majority view to the effect that Parliament could not amend the basic structure of the Constitution. The author finds fault with later judgments of the court which changed the course of constitutional history to the extent that they were based on wrong assumptions of the *Kesavananda ratio*. Chapter-IV which analyses the series of post-*Kesavananda* judgments is perhaps the most important and potentially controversial part of the entire book. For the same reason the book will attract critics' attention the most in coming days.

Though the perspective of the author is now only of academic interest in view of the conclusive judgment of the Supreme Court in *Minerva Mills* case[2] upholding the basic structure doctrine limiting power of amendment, the issues raised by him leave many questions unanswered. They will haunt the Supreme Court whenever constitutional questions on balance of power are presented for adjudication. After all, the court had since conceded Parliament's superior authority to decide on the scope of property rights and economic policies.

Every student of constitutional law will benefit from reading the "untold story"of Andhyarujina though they may not agree with the views expressed by the author. It will be interesting to speculate and write a fictional story of Indian constitutional journey assuming that the *Kesavananda* case did not propound the limitation of basic structure in Parliament's amendatory

2. *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789.

power. The fact that several other jurisdictions have found it appropriate to endorse the Indian approach in constitutional interpretation is proof of the wisdom of Indian judiciary despite what the author called the "dubious procedure" adopted by the court to produce the basic structure limitation.

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