

## **A.K. Roy v. Union of India, AIR 1982 SC 710**

### **1) Facts**

This case deals with a petition made under Article 32 of the Constitution which challenged the validity of the National Security Act, 1980. It involves the arrest of A.K. Roy who at the time was a member of parliament. He was arrested pursuant to the National Security Ordinance, 1980 which was later repealed and replaced by the National Security Act, 1980 on charges of participating in practices detrimental to national security and public order.

### **2) Issues**

Six broad issues were raised by the petitioners in this case with regard to-

- 1) The scope, limits, and justiciability of ordinance making power;
- 2) The soundness of preventive detention in light of the drastic deprivation of individual autonomy that it inevitably entails;
- 3) The effect of the 44th Amendment's non-implementation on the Advisory Boards' constitutions;
- 4) The ambiguity of the National Security Act's provisions authorising the detention of individuals for the purposes specified in section 3 of the Act;
- 5) The erosion of safeguards where the detenu is not granted the right to legal representation and cross examination.

### **3) Ratio**

The court held that as long as the preventive detention law is made within the legislative power arising out of a legislative entry and when it is within the conditions and restrictions on that power, and it cannot be construed that preventive detention is disallowed under the Indian Constitution. It also held that while care must be taken to restrict the application of National Security Act, the statute cannot be struck down for being vague or uncertain.

With respect to the ordinance making powers the court held that,

- i. Ordinances made by the president is a legislative act and not an executive act. The ordinances would be open to the same inhibitions as any other law passed by the parliament.
- ii. Ordinances are law within the meaning of Article 21 of the constitution.
- iii. Pre-conditions to Article 123 have been fulfilled in this situation.
- iv. Ordinances can be made on matters already covered by legislation and Article 14,19 and 21 will not become meaningless by executive ordinances.

With respect to the second question the court noted that preventive detention is permissible under the Indian constitution. However, it is subject to restrictions imposed by part III of the constitution.

With respect to the third question regarding the effect of the 44<sup>th</sup> amendment the court held,

- i. There is no contradiction between Article 368(2) and Section 1(2) of the 44<sup>th</sup> Amendment.
- ii. Article 1(2) of the constitution is not ultra vires Article 368 of the constitution.
- iii. The court cannot order the government to bring Section 3 into force. Additionally, there is no mala fide in the current situation.

With respect to the ambiguity in the National Security Act, the court held that the phrases used in Section 3(1) and 3(2) are difficult to define precisely, however, the Act cannot be struck down on the basis of the phrases being vague. It suggested that care must be taken while applying the provisions of the law.

With respect to the erosion of procedural safeguards such as effective legal representation and the right to cross-examine, the court rejected the arguments of the petitioner distinguishing the rights of the accused and the rights of a detenu. It further said that detenus should be kept separately from convicts.

#### **4) Rationale**

With respect to the first question the court noted:

- i. The court examined the history of ordinance-making powers in India, referring to the Government of India Act, 1935, as well as the debates in the constitutional assembly. The court then examines several Constitutional

provisions: First, Chapter III, Part V, provides for the President's "legislative powers." Second, Article 123(2) provides that ordinances have the "same force and effect as an act of parliament." Third, Article 13(2) states that ordinances are considered laws unless the context indicates otherwise. Finally, Article 367(2) states that all references to laws in the constitution are to be interpreted as references to ordinances. The court concludes that the only distinction between ordinances and laws is that ordinances expire six weeks after parliament reconvenes. Thus, the ordinances by the president are made in the exercise of legislative power. These powers exist to ensure that in times of crisis when both houses of parliament are not in session, laws can still be passed and the public's safety is not jeopardised.

- ii. The court drew on the preceding discussions and stated that ordinances must be treated as laws because they would otherwise be exempt from the requirements placed by Article 13(2) of the constitution. Second, the court cited Constitution Assembly discussions and recognised that it is inherent that ordinances will be subject to fundamental rights. Finally, the court stated that Article 21's purpose is to exemplify that the deprivation of a person's right to life or liberty should be brought on by a State-created law, not by natural law norms.
- iii. The court declined to consider these contentions because, first, the ordinance has been superseded by an act, rendering discussion of presidents' satisfaction moot. Second, the court stated even before the executive is requested to clarify why an emergency was declared, the petitioner must demonstrate that no conditions existed or could have emerged that required the President to act immediately by espousing the impugned ordinance. In this case the petitioners have made no such efforts.
- iv. The court noted that the constitution does not impose any inhibitions on ordinance making power. Additionally, as legislations are now found on nearly every manner it would be impossible to make ordinances which do not overlap with legislations. Secondly, as ordinances will be scrutinized from Article 14, 19 and 21 it is difficult to see how they would obliterate the same.

With respect to the general acceptance of preventive detention within the Constitution, the court outlined the legislative history of the of the Constitution and observed that

preventive detention was provided in order to guarantee that the country's safety is not jeopardised. Therefore, individual liberty must be subjugated, within acceptable boundaries, to the common good. If all conditions have been fulfilled by the law then the court cannot nullify the same on flimsy ground that it is calculated to impair the people's liberties.

With respect to the effect of the 44<sup>th</sup> Amendment Act, the court noted:

- i. While Article 368(2) establishes the broad rule regarding the date of the President's approval, Article 1(2) of the Amendment describes the method in which such an Act or any of its clauses may be brought into force. No grievance may be lodged with the Constituent Body requesting that the Amendment act take effect on a specific future date. The Constitution as amended pursuant to the Bill's clauses and the amendment integrated into the Constitution are separate things. Legislation has no impact unless it has been enacted; likewise, an amendment to the Constitution has no impact unless it is enacted. As a result, there is no inconsistency, and the clauses will take effect only pursuant to Section 1(2) of the Amendment Act.
- ii. The power to issue a notification to bring the provisions of a constitutional amendment into execution is not a parliamentary entitlement, as it lacks the power to modify the constitution in any way. Additionally, there are functional problems inherent in a central agency enacting and enforcing legislation. As a result, it was determined that the Legislature has the authority to enact contingent legislation with respect to the date of enforcement.
- iii. Section 1(2) vests the executive with the authority to bring about Section 3. If Legislature believes the executive has deceived its confidence by failing to implement any clause of the Amendment, it has the authority to reprimand the executive. The petition for writ of Mandamus is unsuitable as a solution because the legislature has not established any impartial criteria or enforcement guidelines. Additionally, the judiciary cannot intervene in this situation as the government is directly answerable to the parliament for execution delays. There is no evidence suggesting that the Government is acting improperly by failing to bring Section 3 into force.

With respect to the vagueness of phrases used in the National Security Act, the court held that the phrases used in Section 3 are inherently difficult to define. While such phrases are hard to define, they do not preclude their straightforward implementation to real-world situations. As a result, the provisions of S.3 of the Act cannot be invalidated on the basis of their ambiguity. However, because the concepts are undefined, undeniably since they are incapable of proper definition, courts must endeavour to give them a more limited construction than the literal phrases recommend.

With respect to the erosion of procedural and substantive safeguards, the court noted that individuals must be granted rights based on the nature of the proceedings and the rights afforded to a suspect in a criminal case cannot be enlarged to Advisory Board hearing, as the consequences of these deeds are quite distinct. The court determined that both detainees and the administration must be rejected legal assistance, or else they would violate Article 14.