

CHAPTER 5

JUDICIAL REVIEW AS THE BASIC STRUCTURE OF THE CONSTITUTION: A NEW CONSTITUTIONALISM IN INDIA

5.1 An Overview

Though fundamental to the legal system, constitution also is subject to changes. In the case of an unwritten constitution such changes occur involuntarily while written constitutions are subject to changes through deliberation, known as amendments.' Amendability of the constitution is a sine qua non, as absence of possibility to make changes through amendments may lead to its changes through extra constitutional methods including revolution.' Moreover, non-amendability of the fundamental law implies monopoly of a generation over the future, which is an unacceptable proposition." In short, to live up to the needs of the changing times as well as to assume self-existence a constitution should be capable of adjusting to changes, how-ever protecting itself against self eradication.'

In the absence of appropriate provisions for schematic amendment the changes in the Constitution may run riot, damage its identity and leave the very existence of the constitution doubtful. Therefore, provision for amendment to bring about an orderly change is usually incorporated in constitutions.

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of "we the people". The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. On its plain terms Art.368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power.

Bringing alteration to the Constitution provisions by the Parliament was very easy process before *Keshavananda Bharathi's Case*¹, because there was no implied or express limitation on its amending power exercised under the

AIR 1973 SC 1461

Constitution. But in the *keshavanandha's case*², uncontrolled power of the Parliament has been controlled and curtailed by the Doctrine of basic structure. We did not have this doctrine at the commencement of the Constitution of India.

The 'Doctrine of Basic Structure' is a judge- made doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of "the land" cannot be amended in exercise of its constituent power under the Constitution.

5.2 Constituent Power and Ordinary Legislative Power

Unlike the British Parliament which is a sovereign body, in the absence of a written constitution, the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law.

The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing

²*Ibid.*

death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the *Kesavananda Bharati case*³, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Constitution that would profoundly change its character, whether by changing institutional structures or altering its basic principles. under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Thus, the decision has strengthened our democracy, and that Parliament's authority and legitimacy are not diminished if it lacks the power to make radical changes in the Constitution.

5.3 Evolution of the Concept of Basic Structure: The Kesavanada Case a Milestone

After independence, the Government of India started to implement agrarian reforms scheme, but unfortunately, this action of the government was attacked and challenged in many High Courts, because the initiation of agrarian reforms were directly violating the Fundamental Right such as Arts.14, 19 and 31, especially right to property which was a fundamental right in the original constitution. Bihar Land Reforms Act, 1950 was the first enactment on agrarian reform which was challenged in the Patna High Court.⁴ To nullify the judgment of High Court and to immunise this law from Fundamental Rights, Article 31-B and the Ninth Schedule were introduced in the Constitution by the Constitution First Amendment Act 1951.

The question whether Fundamental Rights can be amended under Article 368 came for consideration in the Supreme Court in *Shankari Prasad case*⁵. In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Articles.31-A and 31-B of the Constitution were also challenged. The amendment was challenged on the ground that it abridges the rights conferred under Article 13 of Part III and hence was void. The Supreme Court however

Ibid.

AIR 1951 SC 455

rejected the above argument and brought out the distinction between legislative power and constituent power and held that “law” in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power.⁶

The Constitution (Seventeenth Amendment) Act, 1964 introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review and was challenged before the Court. The majority of the judges in *Sajjan Singh case*⁷ on the same logic as held in the *Shankari Prasad case*⁸ held that the law of amendment is superior law and is not subject to Article 13(2). It also held that the *Shankari Prasad case*⁹ was rightly decided and affirmed that the Parliament under Article 368 can amend any of the provision of the Constitution including the Fundamental Rights and make a suggestion to the Parliament that Fundamental rights should be included in the Proviso of the Article 368.

One of the arguments in this case was the scope of judicial review which was reduced to a great extent, so the amendment should be struck down. The Court rejected this argument and held by majority that the pith and substance of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226. Their minority view on this point was very different, they are of the view that every Constitution has certain basic principles which could not be changed.¹⁰

In *Golak Nath case*¹¹, the validity of 17th Amendment which inserted certain Acts in Ninth Schedule was once again challenged. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decision in *Shankari Prasad*¹² and *Sajjan Singh case*¹³. In order to remove difficulties created by the decision of Supreme Court in *Golak Nath's case*¹⁴ the Parliament enacted the 24th Amendment Act.

The Court unanimously declared that the Constitution (1st Amendment) Act, 1951 was constitutional.

AIR 1965 SC 845

⁸*Id.n.5.*

Id.

¹⁰*Supra n.7.*

AIR 1967 SC 1643

¹²*Supra n.5.*

¹³*Supra n.7.*

¹⁴*Supra n.11.*

In 1973, in *Keshavananda Bharati vs State of Kerala*¹⁵, the Supreme Court reviewed the decision in the *Golak Nath case*¹⁶. Ten of the 13 judges held that Article 368 itself contained the power to amend the Constitution and that law' in Article 13(2) did not take in a constitutional amendment under Article 368. The law declared in the *Golak Nath case*¹⁷ was accordingly overruled. On the question whether the amending power under Article 368 is absolute and unlimited, seven judges, constituting a majority, held that the power was subject to an implied limitation; a limitation that arose by necessary implication from its being a power to 'amend the Constitution'. By a majority of 7:6 the Court ruled that Article 368 does not enable Parliament to alter the "basic structure" or framework of the Constitution'. Three different terms, 'basic elements', 'basic features' and 'basic structure', were used. What constituted the basic elements, features or structure was, however, not clearly made out by the majority and remained an open question.

In *Keshavanandha Bharati Case*¹⁸ an attempt was made to question the plenary power of the Parliament to abridge or take away the Fundamental Rights, if it was necessary by the way of amendment under Art.368 of the Constitution. Seven out of the thirteen judges Bench held that the Parliament's constituent power under Art.368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment.

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Justice Sikri, C.J., had tabulated the 'basic features' of the Constitution as follows¹⁹:

Supremacy of the Constitution.

Republican and democratic form of government.

¹⁵*Supra n.1*

¹⁶*Id. n.14.*

Id.

¹⁸*Id. n.15.*

¹⁹*Id.*

Secular character of the Constitution.

Separation of powers.

Federal character of the Constitution.

In the same case²⁰, Justice Hegde and Justice Mukherjee included the sovereignty and unity of India, the democratic character of our polity and individual freedom in the elements of the basic structure of the Constitution. They believed that Parliament had no power to revoke the mandate to build a welfare state and an egalitarian society. Justice Khanna also said that Parliament could not change our democratic government into a dictatorship or a hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and Rajya Sabha. The secular character of the state could not, likewise, be done away with.

In summary the majority verdict in *Kesavananda Bharati*²¹ recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of *Sankari Prasad*²² by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

5.4 The Relevance of Kesavananda in the Aftermath of the Case

The *Kesavananda Bharati case*²³ upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. Further the Court also held that certain key words in the Preamble formed part of the basic structure of the Constitution and declared that this basic structure was inviolable thereby casting a limitation to Parliament's power to amend the Constitution. Earlier the Court while deciding *Berubari*²⁴ had taken the view that the Preamble as not a part of the Constitution. Applying the

²⁰*Id.*

Id.

²²*Supra n.5.*

Supra n.1.

AIR 1960 SC 845

ratio decidendi in this case an amendment of the Preamble may well neigh have been impossible since the Court had ruled that the amending power under Art.368 relates only to the amendment of the Constitution and the Preamble was declared not a part of it.

With *Kesavananda*²⁵ having changed status quo, in an act of asserting Parliamentary supremacy the Parliament amended the preamble in 1976. The original drafting in the Preamble used the words "sovereign democratic republic". The two additional words "socialist" and secular were introduced by the controversial 42nd amendment. The amendment was pushed through by Indira Gandhi in 1976, when she had dictatorial powers. A committee under the chairmanship of Sardar Swaran Singh recommended that this amendment be enacted after being constituted to study the question of amending the constitution in the light of past experience. Further the words "integrity of the Nation" was also inserted in the last of the objectives mentioned in the Preamble.

The question of the validity of the amendment of the Preamble has not been challenged. The Supreme Court in *D.S. Nakara v. Union of India*²⁶ however relied on the word "Socialism" inserted by virtue of the 42nd Amendment Act, 1976. In that case it was held that the 1973 Pension Rules introduced by the Central Government revising the earlier pension rules 1972 should be applied to all pensioners and not merely to those who retired after 31-3-79 with the Court taking the view that the principle of Socialism requires that the State should take care of the old and the infirm.

The mistrust the Apex Court seemed to place with Parliament's sweeping powers to amend the constitution and the apprehension that the elected representatives of the people could not be trusted to act responsibly, which appeared farfetched at the time when *Kesavananda*²⁷ was decided, came true very soon and all too dramatically.

Mrs. Gandhi's election to the Lok Sabha was set aside by the Allahabad High Court on June 1975 on the ground of committing a 'corrupt practice'.²⁸ To quell

*Id.n.*23.

AIR 1983 SC 130

²⁷*Supra n.1.*

State of U.P. v. Raj Narain, AIR 1975 SC 865

the turmoil that followed, an internal Emergency was imposed on 25 June 1975 and Mrs. Gandhi filed an appeal in the Supreme Court.²⁹ Before the appeal was taken up for hearing, the electoral law was amended retrospectively to take away the basis on which the finding of 'corrupt practice' was arrived at by the High Court. In addition, an amendment to the Constitution, namely, the Constitution (Thirty-ninth) Amendment Act, 1975 was rushed through.³⁰

The amendment had three principal features. First, it substituted the existing Article 71 with a new article which stated that Parliament may by law regulate any matter relating to or connected with the election of the President or Vice-President including the grounds on which such election may be questioned. Secondly, it inserted Article 329A, which purported to apply to the Prime Minister and Speaker, but was clearly intended to apply to Mrs. Gandhi, and had the effect of wiping out all judicial proceedings concerning her election.³¹

Representation of People Act, 1951, the Representation of People (Amendment) Act, 1974 which had been enacted in order to get over the judgment of the Court in *Kanwar Lal Gupta v Amarnath Chawla*³², where it was held that the expenditure incurred by a political party on his behalf would be included in the expenditure incurred by a candidate and the Election Laws (Amendment) Act, 1975 were inserted in the Ninth Schedule. The most offensive feature of Article 329A was clause 4, which provided that no law made by Parliament before the commencement of the Thirty-ninth Amendment Act, in so far as it related to election petitions and matters connected therewith, shall apply or shall be deemed to have ever applied to or in relation to the election of the Prime Minister or the Speaker to either House of Parliament. The said amendment further provided that such election shall not be deemed to be void or ever to have become void of any ground on which such election could be declared to be void under any such law and notwithstanding any order made by any court before such commencement declaring such election to be void, such election shall continue to be valid in all

²⁹*Indira Nehru Gandhi v Raj Narain*, AIR 1975 SC 1590

³⁰*Id.*

³¹*Id.*
(1975) 3SCC 646

respects and any such order and any finding on which such order is based shall be deemed always to have been void and of no effect'.³³

In *Indira Nehru Gandhi v Raj Narain*³⁴, a five-judge bench applied the basic structure doctrine to invalidate Article 329(A), though the Prime Minister's election was upheld on the basis of the retrospective amendment to the electoral law. The judges invalidated the amendment on various grounds such as free and fair elections, democracy, equality, and the rule of law being parts of the basic structure of the Constitution.

5.5 Basic Structure Concept Reaffirmed: The Indira Gandhi Election Case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.³⁵

Amendments were also made to the Representation of Peoples Act of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The mala fide intention of the government was proved by the haste in which the Thirty-ninth amendment was

³³*Supra n. 29.*

³⁴*Id.*

³⁵*Id.*

passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.³⁶

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.³⁷

Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, Beg, J. upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.³⁸

Again, each judge expressed views about what amounts to the basic structure of the Constitution. According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections. Justice K.K. Thomasheld that the power of judicial review is an essential feature.³⁹

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:⁴⁰

Sovereign democratic republic status

Equality of status and opportunity of an individual

Secularism and freedom of conscience and religion

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

4. Government of laws and not of men *i.e.* the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.⁴¹

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Begdis agreed with Ray, C. J. on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent power were said to be above it. Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the *Kesavananda Bharati*⁴² case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also.⁴³

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.

5.6 Forty Second Amendment: Efforts to Nullify the Effect of Kesavananda during the Period of Emergency

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment

⁴¹*Id*

⁴²*Supra n.1.*

⁴³*Id. n. 41.*

(passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

Gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;⁴⁴

Laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground;

Removed all amendments to fundamental rights from the scope of judicial review and

Removed all limits on Parliament's power to amend the Constitution under Article 368.

5.7 The Basic Structure Doctrine in the Post-Emergency Phase

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the Forty-second amendment was challenged before the Supreme Court by the owners of Minerva Mills a sick industrial firm which was nationalised by the government in 1974.⁴⁵ Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's power to amend the Constitution. Mr. Palkhivala argued that Section 55 of the amendment⁴⁶ had placed unlimited amending power in the hands of Parliament. The attempt to immunise constitutional amendments against judicial review violated the doctrine of basic structure which had been recognised by the

Article 31C stated that laws passed to implement the Directive Principles of State Policy could not be challenged in courts on the ground that they violated any fundamental right. Prior to the Forty-second amendment this clause was applicable only to Article 39 (b) & (c) of the Directive Principles which dealt with equitable distribution of wealth and resources of production.

⁴⁵*Minerva Mills v. U.O.I.*, AIR 1980 SC1789
Constitution (Forty-Second Amendment) Act, 1976.

Supreme Court in the *Kesavananda Bharati*⁴⁷ and *Indira Gandhi Election Cases*⁴⁸. He further contended that the amended Article 31C was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.⁴⁹

Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure.⁵⁰

The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution. Bhagwati, J. the dissenting judge also agreed with this view stating that no authority howsoever lofty, could claim to be the sole judge of its power and actions under the Constitution.⁵¹

The majority held the amendment to Article 31C unconstitutional as it destroyed the harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution. The amendment to Article 31C remains a dead letter as it has not been repealed or deleted by Parliament. Nevertheless cases under it are decided as it existed prior to the Forty-second amendment.⁵²

5.7.1 The Consolidation of the Basic Structure Doctrine in the Post-Emergency Phase

The surviving provisions of the Forty-second amendment, which amended Article 31C and Article 368 were challenged before the Supreme Court in *Minerva Mills v Union of India*⁵³. The basic structure doctrine was expanded in this case. The Court, relying on the doctrine of stare decisis and the earlier ruling in *Kesavananda*⁵⁴ held that, the power of Parliament to amend the Constitution

⁴⁷*Supra n. 1.*

⁴⁸*Supra n.29.*

⁴⁹*Id. n.45.*

⁵⁰*Id.*

Id.

⁵²*Id.*

⁵³*Id.*

Supra n.1.

was limited, it could not by amending the Constitution convert the power into an unlimited power (as it had purported to do by this amendment.) The court went on to invalidate the amendment of Article 31-C by the Forty-second Amendment on the ground that it subordinated fundamental rights conferred by Articles 14 and 19 to the Directive Principles, that the Constitution was founded on the bedrock of the balance between Fundamental Rights and Directive Principles; that to give absolute primacy of one over the other was to disturb the harmony of the Constitution and that this harmony between Fundamental Rights and Directive Principles was an ‘essential feature’ of the ‘basic structure of the Constitution’.⁵⁵

It has often been expressed that *Minerva Mills* represents the assertion of judicial supremacy without contest. All the same it is pertinent to point out that a subsequent Constitution Bench in *Sanjeev Coke Manufacturing Company v Bharat Coking Coal Limited*⁵⁶ expressed serious misgivings about the decision in *Minerva Mills* observing: ‘.... We confess that the case has left us perplexed’, and noted further,

*We have serious reservations on the question whether it is open to a Court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We [judges] are not authorized to make disembodied pronouncements on serious and cloudy issues of constitutional policy without the battle lines properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper list between parties properly ranged on either side or crossing of swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon.*⁵⁷

Though Article 31-C did come under scrutiny, in this case, the Basic Structure Doctrine was not overruled.

*Woman Rao v Union of India*⁵⁸, following close on the heels of *Minerva Mills*⁵⁹, is noteworthy for two reasons. First, as a logical extension of the basic structure

⁵⁵*Id. n.53.*

AIR 1983 SC 239

⁵⁷*Id.*
(1981) 2 SCC 362

⁵⁹*Supra n.45.*

doctrine, it held that any amendment of the Constitution after 24th April 1973, which included laws in the Ninth Schedule would have to be tested by reference to the basic structure doctrine. The Court did not disturb the pre-Kesavananda insertions in the Ninth Schedule. This was also necessary to prevent a fraud on the Constitution, because laws which had nothing to do with agrarian reform or Directive Principles were included in the Ninth Schedule merely to protect them from constitutional challenge.

Secondly, *Woman Rao*⁶⁰ applied the basic structure doctrine to uphold the validity of Article 31A and 31C instead of holding them valid on the basis of stare decisis. The majority took the view that in none of the earlier decisions, namely *Sankari Prasad*⁶¹, *Sajjan Singh*⁶², *Golak Nath*,⁶³ and *Kesavananda*⁶⁴ was the validity of the First Amendment put in issue and that it could only be said that the validity of Article 31A was recognized in those decisions. It then proceeded to hold that the Directive Principles contained in Article 39(b) and (c) were part of the Constitution as originally enacted, and that it was in order to effectuate the purpose of these Directive Principles that the First and Fourth Amendments were passed.⁶⁵

It held that the First and Fourth Amendments strengthened, rather than weakened the basic structure of the Constitution. A portion of Article 31C, though already upheld in *Kesavananda*, was again upheld by applying the basic structure test, holding that laws passed truly and bona fide for giving effect to Directive Principles contained in Article 39(b) and (c) would, far from damaging the basic structure, only fortify it.⁶⁶

Though several other features of the Forty-second amendment were removed by the Forty-third and Forty-fourth amendments passed by the Janata government, which came to power after Mrs. Gandhi's defeat, the Forty fifth amendment which had proposed to amend Article 368 with provision for a referendum and

⁶⁰*Id* n.58.

⁶¹*Supra* n.5.

⁶²*Supra* n.7.

⁶³*Supra* n.11.

⁶⁴*Supra* n.1

⁶⁵*Id.* n.60.

Id.

with an enumeration of basic features in the article itself fell through as the Janata Party did not have the requisite majority in the Upper House.

*Minerva Mills*⁶⁷ and *Woman Rao*⁶⁸ gave the Court the opportunity to regain the role of ‘sentinel’ which had suffered significant erosion during the Emergency particularly in the light of the ruling in *ADM Jabalpur v Shivkant Shukla*⁶⁹. Though it had in the *Indira Nehru Gandhi*⁷⁰ case struck down a constitutional perversion, it had failed to protect the citizen’s liberty. The innovative and nascent basic structure doctrine gave the Court an opportunity to show in *Minerva Mills and Woman Rao* that it was willing to stand up against Parliamentary might, and public opinion, happy and relieved that the Court was standing up again, preferred not to worry about the sovereignty of Parliament.

In *Kihoto Hollohan vs Zachillhu*⁷¹ the Supreme Court held that para 7 of the 10th Schedule to the Constitution, which excluded judicial review of the decision of the Speaker/Chairman of the House on the question of disqualification of MLAs/MPs offended the basic structure of the Constitution. As a result, the decisions given by the presiding officers of the legislature are subject to judicial review. This again is a salutary decision considering the inability of many presiding officers to decide the questions of disqualification dispassionately, uninfluenced by the party in power.

These decisions illustrate that the theory of basic structure has served us well. It helps protect the core of the Constitution from the onslaughts of Parliament. However, there is no way out of judicial errors. In *L. Chandra Kumar v Union of India*⁷² the Supreme Court declared that the power of judicial review over legislative action vested in High Courts by Articles 226 and 227 and in the Supreme Court by Article 32 is an integral and essential feature of the Constitution and part of its basic structure. Consequently, clause (2)(d) of Article 323-A and clause (3)(d) of Article 323-B, to the extent they excluded jurisdiction of the High Courts and the Supreme Court under Articles 226, 227 and 32 with respect to matters falling within the jurisdiction of tribunals constituted under Articles 323-A and 323-B, were found to be violative of the basic feature of judicial review, and struck down. However, the Supreme Court, instead of restoring status quo ante and thereby reviving the

⁶⁷ *Supra n.45.*

⁶⁸ *Supra n.58.*
AIR 1976 SC 1207

⁷⁰ *Supra n.29.*
(1992) 1 SCR 686
AIR 1995 SC 1151

jurisdiction of the High Courts under Articles 226 and 227 to entertain petitions directly in matters over which the tribunals had jurisdiction, placed a fetter on the resurrected jurisdiction of the High Courts by laying down that:⁷³

*The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.*⁷⁴

This postscript raises a serious question for consideration. While striking down a part of the Constitution (42nd Amendment) Act, passed by Parliament as violative of the basic structure of the Constitution, how could the Supreme Court itself restrict the revived jurisdiction of the High Courts under Articles 226 and 227 by creating a bar to their entertaining writ petitions directly in matters falling under the jurisdiction of the tribunals? What Parliament cannot do under Article 368 can the judiciary do with respect to the basic structure of the Constitution? In other words, can the Supreme Court restructure the basic structure? In fact, there was no need for the earlier mentioned postscript at all, because it is a settled principle of law that if there is an adequate and equally efficacious alternative remedy, High Courts will not ordinarily entertain a writ petition and instead relegate the petitioner to the alternative remedy.⁷⁵

Therefore, the question to be considered is, in the rare event of the judiciary committing a serious error in striking down an amendment of the Constitution applying the doctrine of basic structure in a given case, who can correct it, when and how? The basic structure is what the Supreme Court says it is. Parliament is bound by the law declared by the Supreme Court. Therefore, Parliament cannot overcome a decision of the Supreme Court declaring a constitutional amendment ultra vires the basic structure of the Constitution. The Court alone has the power to correct its errors. Correction of judicial errors requires constitution of larger Benches. Experience shows that it takes a long time for the Court to appreciate its

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

error and correct it. There is a feeling in some quarters that Parliament can get over the theory of basic structure by convoking another Constituent Assembly by law. In the *Golak Nath case*⁷⁶, Justice Hidayatullah had observed:

*Parliament must amend Art. 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule VII to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. It cannot be done otherwise.*⁷⁷

There is no provision in the Constitution that permits creation of a Constituent Assembly to revise it or to redraft its provisions constituting the basic structure. Entry 97 of the Union List confers residuary power of legislation with respect to matters not enumerated in any of the three lists in Schedule VII. The power of legislation for facilitating amendment of the Constitution so as to abridge its basic structure cannot be located in Entry 97 at all. What an amendment of the Constitution made under Article 368 cannot do, obviously a law made under Entry 97 cannot accomplish. Parliament's assertion of its unlimited right to amend any provision of the Constitution in exercise of its constitutional power through the Constitution (24th Amendment) Act, 1971, as the present wording of Article 368 reads, stands frustrated by the theory of basic structure in *Keshavananda Bharati*⁷⁸ and the categorical declaration in *Minerva Mills*. What cannot be done directly cannot be achieved indirectly is a well-known proposition of law.

It follows that error, if any, committed by the Supreme Court while applying the theory of basic structure can be corrected only by the Supreme Court. But self-correction takes a long time. No one can be sure that it will be corrected at all. By propounding the theory of basic structure, the Court has assumed a larger role as sole guardian of the Constitution and taken upon its shoulders enormous responsibility for discharging which statesmen like judges with vision, exceptional ability and integrity are needed.

The judiciary has secured for itself a decisive voice in the appointment of judges by its

⁷⁶*Supra n.11.*

⁷⁷*Id.*

⁷⁸*Supra n.1.*

controversial decision in *Supreme Court Advocates-on-Record v Union of India*⁷⁹. It is now fairly clear what a difficult task it is for the Chief Justice of India and the few seniormost judges of the Supreme Court constituting the collegium to select the most suitable candidates for elevation to the highest court. In the absence of transparency about the selection process, doubts are expressed about some of the selections made. Past experience does not show that the hope expressed by the president of the Constituent Assembly has borne fruit. The apprehensions voiced by Dr B.R. Ambedkar on the floor of the Constituent Assembly in 1949 are today entertained by many more citizens who are somewhat disillusioned and are seriously concerned about the future of parliamentary democracy in the country.

Present-day political groupings do not permit Parliament to function regularly, much less effectively. For example, allowing the budget to be passed without any debate is a serious matter. If Members of Parliament are mainly interested in settling political scores with their rivals in the two Houses of Parliament and outside, and are not much concerned about the problems of the people that warrant concerted action on the part of all constitutional authorities, if the electoral process continues to be dominated by money power, muscle power, caste and communal factors, if criminalization of politics has already crossed limits of tolerance, and if the checks and balances provided in the Constitution have by and large collapsed or ceased to be effective, it would be difficult to work the Constitution in the manner visualized by the founding fathers. The situation calls for serious introspection and decisive action to save the institutions that are out of shape and to make the Constitution work better.

Radical electoral reforms to revitalize Parliament and state legislatures so as to make parliamentary democracy a success, and judicial and administrative reforms to ensure that the institutions function strictly within the constitutional bounds, with greater transparency, accountability and efficacy, are the need of the hour.

In another case⁸⁰ relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the *Kesavananda Bharati* judgement were open to judicial review. All laws placed in the Ninth Schedule after the date of the *Kesavananda Bharati* judgement were

(1993) 4 SCC 441

⁸⁰*I. R. Coelho v. State of T.N.*, AIR 2007 SC861

also open to review in the courts. They can be challenged on the ground that they are beyond Parliament's constituent power or that they have damaged the basic structure of the Constitution.

5.8 Basic Structure and Power of Judicial Review

A good Constitution always provides for the power of judicial review over the Constitutional amendments and legislative Acts.⁸¹ The core concern of the Basic Structure is the 'Judicial Review', which is its integral or inseparable part. In this sense, without judicial review, the basic structure doctrine is simply inoperable or non-functional. That is by taking away the component of judicial review, we would be denying the very existence of the doctrine of the basic structure which is simply impermissible.⁸² Art.31-B confers uncontrolled power on the Parliament by excluding judicial review in the exercise of its amending power.

Such a scope has been given to the Art.31-B for the purpose of promoting agrarian reforms in order to establish an egalitarian society. But unlike Arts.31-A and 31-C, Art.31-B has no definite criterion and Parliament under this Article has the power to confer 'fictional immunity' on the laws passed by it. Whereas Art.31-A and C have specific standards which are not affecting or violating the basic structure.

Art.31-A excludes judicial review of certain laws from the application of Arts.14 and 19. It does not exclude un-catalogued number of laws from the challenge on the basis of Part III. It is for the reason, the provisions of Art.31-A has been held to be not violative of the Basic Structure.⁸³

Likewise, Art.31-C carries its own criteria. It applies as a yardstick the criteria of sub clause (b) and (c) of Art.39, which refers to equitable distribution of resource.⁸⁴ However, when the ambit of Art.31-C was enlarged by the Forty Second Amendment of the Constitution, vesting the power of the exclusion of

⁸¹Arijit pasayat & C.K. Thakker, *C.D.Jha's 'Judicial Review of Legislative Acts'*, Second Edition, 2009, p xxxiv.

⁸²Virendra Kumar, *Basic Structure of the Indian Constitution : Doctrine of Constitutionally Controlled Governance (From Keshavanand Bharti to I.R.Coelho)*, JI LI, 2007, Vol-49, Jan – March, p.365.

⁸³*I. R. Coelho v. State of T.N.*, Supra n. 80 at 884.

⁸⁴*Id.*

judicial review in the legislature, such an addition was held to strike at the basic structure of the Constitution. It is on this ground that second part of Art.31-C was held to be beyond the permissible limits of power of amendment of the Constitution under Art.368.⁸⁵

This is how, initially Art.31-B also considered constitutionally valid in *Shankari Prasad case*⁸⁶, because, in the initial stage, the Parliament placed only land reforms laws into the Schedule. But afterwards they enlarged this Article and Schedule by inserting divisive laws to this Schedule which were abhorrently violating Constitution principles. As a result, Supreme Court said and permitted the judiciary to review the Ninth Schedule laws by evolving the basic structure otherwise, we would have not seen this doctrine and if the invocation of amending power in pursuance of Art.31-B would have remained confined to land reforms, there seemed no difficulty either to seek basis of the basic structure of the Constitution which was propounded in *Keshavanada's case*⁸⁷ or to its application on the principle of exception.

For re-reading or re-defining the scope of this Art.31-B, the Constitutional bench in *I.R.Coelho*⁸⁸ has approached the whole issue de novo in the light of first principles of constitutionalism as evolved by the Court in *Keshavananda Bharathi's case*⁸⁹. Legitimacy of Art.31-B read with the Ninth Schedule of the Constitution is preserved by redrafting the scope of judicial review under basic structure doctrine. Finally, Supreme Court in *I.R.Coelho*⁹⁰ observed that, “if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infracton shall be open to challenge on the ground that it destroys or damages the basic structure...”⁹¹ this means that, mere violation of Fundamental Rights by the laws incorporated in the Ninth Schedule by virtue of exercise of amending power in pursuance of Art.31-B is not a ground for invalidating the Constitutional amendments ipso facto.

⁸⁵*Id.*

⁸⁶*Supra n.5.*

⁸⁷*Supra n.1.*

⁸⁸*Supra n.80.*

Supra n.1.

⁹⁰*Id. n.88.*

⁹¹*Id.*

Further Court clarified that, “We are not holding such laws per se invalid but, examining the extent of power which the legislature will come to possess”.⁹² These would be void only if it is also held that they are violative of the basic structure of the Constitution. But in *Golak Nath*⁹³, Supreme Court was observed by saying that you cannot adversely amend Fundamental Rights at all; whereas *Keshavananda Bahrathi*⁹⁴ case lays down that abrogation of fundamental rights may or may not violate the basic structure doctrine.¹⁰⁰ If they violate basic structure doctrine, then violation of Fundamental Rights is not permissible, if their violation does not violate basic structure doctrine, then their violation is permissible. But in *I.R.Coelho*, Nine judge bench clearly crystalized the steps that are required to be taken for determining whether the Ninth Schedule laws violative of part III, then its impact examined and if it shows that in effect and substance, it destroys the basic structure, the consequence of invalidation has to follow.⁹⁵

5.9 Ninth Schedule: Challenge to the Power of Judicial Review

Before determining whether the doctrine of Basic Structure applies to the legislations included in the Ninth Schedule, it is important to deal with the genesis and evolution of the Ninth Schedule and the constitutional challenge faced by it.

5.9.1 Background to Ninth Schedule Leading up to Coelho

India achieved independence from Great Britain in 1947. Shortly afterwards, India’s leaders crafted the Constitution of India (constitution), which came into effect on January 26, 1950. Authored by Dr.B.R. Ambedkar, it is the longest written constitution in the world. As with most constitutions, all laws passed by the legislative branch must conform to its provisions.⁹⁶ Not long after the enactment of the constitution, Parliament found reason to amend it.⁹⁷ India’s first

⁹²*Id.*

⁹³*Supra n. 11.*

⁹⁴*Supra n.1.*

⁹⁵*Id.n.90.*

Milan Dalal, *India's New Constitutionalism: Two Cases That Have Reshaped Indian Law*, 31 B.C. Int'l & Comp. L. Rev. 257 (2008), <http://lawdigitalcommons.bc.edu/iclr/vol31/iss2/4>

⁹⁷See A.G. Noorani, *Ninth Schedule and the Supreme Court*, Econ. & Pol. Wkly., March ,2007, at

prime minister, Jawaharlal Nehru was a staunch supporter of nationalisation and expropriation of land from the elite for redistribution to the poor. Yet, India's new constitution had guaranteed a right of property to its citizens, and therefore Nehru's grand plans for equitable redistribution of zamin (land) were soon confronted by the zamindars (landowners) in the courts.⁹⁸ Early court rulings held the land reform laws "transgressed the fundamental right to property guaranteed by the Constitution".⁹⁹

As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the "Ninth Schedule".¹⁰⁰ The First Amendment created article 31B, which described the Ninth Schedule and was inserted into part III of the constitution.¹⁰¹ Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunise land reform laws from judicial review.¹⁰²

Article 31B and the Ninth Schedule were introduced in the Constitution by the First Amendment to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights. Article 31B provides that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The provisions of the Article are expressed to be without prejudice to the generality of the provision in Article 31A and the concluding portion of the Article supersedes any judgment, decree or order of any court or tribunal to the contrary. It is extremely unfortunate to note that the number of items in the Ninth Schedule have increased from 13, when initially enacted, to more than 284.¹⁰³

⁹⁸*Id.*

Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 2006, available at http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf

¹⁰⁰*Id.*

Constitution (First Amendment) Act, 1951.

¹⁰²*Supra n.97.*

¹⁰³*Id.*

Furthermore it is also regrettable to observe that the laws included in the Ninth Schedule are no longer restricted to those enacted to further agrarian and land reforms. The constitutionality of Article 31B and the Ninth Schedule first came up for challenge in *Sankari Prasad v. Union of India*¹⁰⁴ wherein the Court upheld the Constitutionality of the First Amendment. The decision in *Sankari Prasad* was reaffirmed by the Supreme Court in *Sajjan Singh v. State of Rajasthan*¹⁰⁵. In that case, Gajendragadkar C.J., observed that the genesis of the amendment made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms.⁶⁷ This Amendment came up for challenge again in the famous *Golak Nath Case*¹⁰⁶ in 1967, wherein it was upheld.

After this case the Parliament passed the Constitution (29th Amendment) Act, 1972 and amended the Ninth Schedule to the Constitution by inserting therein two Kerala Amendment Acts in furtherance of land reforms namely, the Kerala Land Reforms Amendment Act, 1969;70 and the Kerala Land Reforms Amendment Act, 1971.⁷¹ These amendments were challenged in *Kesavananda Bharati's case*¹⁰⁷. The decision in *Kesavananda Bharati's case* was rendered on 24th April, 1973 by a 13 Judge Bench and, by majority of seven to six, *Golak Nath's case*¹⁰⁸ was overruled. The Constitution 29th Amendment was declared to be valid. In *Kesavananda Bharati's case*¹⁰⁹ the validity of Article 31B was not in question. The constitutional amendments under challenge in *Kesavananda Bharati's case*¹¹⁰ were examined assuming the constitutional validity of Article 31B. Khanna J. opined that the fundamental rights could be amended, abrogated or abridged so long as the Basic Structure of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid. Khanna J. upheld the 29th Amendment in the following terms:¹¹¹

“We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the

¹⁰⁴*Supra n.5.*

¹⁰⁵*Supra n.7.*

¹⁰⁶*Supra n.11.*

¹⁰⁷*Supra n.1.*

¹⁰⁸*Id. n.106..*

¹⁰⁹*Id. n.107.*

¹¹⁰*Id.*

¹¹¹*Id.*

Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act.”¹¹²

The constitutional validity of all the legislations incorporated in the Ninth Schedule again came up for question in 1981, when the Supreme Court was asked to determine the constitutional validity of all Amendments to the Ninth Schedule in the case of, *Waman Rao v. Union of India*¹¹³. This is because in this case, the Constitution (First Amendment) Act, 1951 which introduced Article 31-A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which added the new clause (1), sub-clauses (a) to (e), for the original clause (1) with retrospective effect was questioned. In addition to this, Section 5 of the Constitution (First Amendment) Act, 1951, which introduced Article 31B was questioned in addition to the constitutionality of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.⁷⁶ The Court unanimously upheld the First and Fourth Amendments. This decision is a classical manifestation of “Judicial Convenience or Judicial Arbitrariness”.

The Acts were put in the Ninth Schedule prior to that decision, that is, 24th April 1973, were immune from challenge. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. However the laws included thereafter are subject to challenge and can be examined on the touchstone of Articles 14, 19 and 31.¹¹⁴

The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the Basic Structure of the Constitution.¹¹⁵ The Court upheld Article 31B and the First Amendment and Chandrachud C.J., stated:¹¹⁶

Id.
¹¹³*Supra n. 58.*

¹¹⁴*Id.*
Id.
Id.

*“The Amendments, especially the 1st, were made so closely on the heels of the Constitution that they ought in deed to be considered as a part and parcel of the Constitution itself. These Amendments are not born of second thoughts and they do not reflect a fresh look at the Constitution in order to deprive the people of the gains of the constitution. They are, in the truest sense of the phrase, a contemporary practical exposition of the Constitution.”*¹¹⁷

The primary ground on which this case faces criticism is the utter disregard of the judiciary to the explicit text of Article 31B.

5.9.2 Application of the Basic Structure to Laws in the Ninth Schedule

The issue whether the Basic Structure applies to laws in the Ninth Schedule has to be analysed in light of Mathew J.’s decision in *the Election Case*¹¹⁸. He is against the proposition that a constitutional amendment putting an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure. He justifies his stand in rejecting the proposition on the grounds that the ratio in *Kesavananda Bharati v. State of Kerala*¹¹⁹ cannot be construed to lead to such a conclusion.¹²⁰

This brings us to the question as to whether the validity of a statute incorporated in the Ninth Schedule can be determined on the grounds that it violates any other part of the Basic Structure besides those fundamental rights which pertain to the Basic Structure? Mathew J., relying on Sikri C.J.’s opinion in *the Fundamental Rights Case* came to the conclusion that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertain or pertain to basic structure.¹²¹

However, the Act cannot be attacked for a collateral reason, namely, that the provisions of the Act have destroyed or damaged some other basic structure, say, for instance, democracy or separation of powers. Also pertinent to note is Khanna

¹¹⁷*Id.*

¹¹⁸*Indira Gandhi v. Raj Narain*, Supra n.29.

¹¹⁹*Supra n.1.*

¹²⁰*Id. n.117.*

¹²¹*Id.*

J.'s clarification of his stand in *Kesavananda Bharati case*¹²² that fundamental rights can be a part of the Basic Structure. This clarification, as observed by Seervai raises a few serious problems of its own:

*“The problem was: in view of the clarification, was Khanna J. right in holding that Article 31B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended?”*¹²³

Seervai also notes another problem which will arise if the power of amendment is limited by the doctrine of basic structure, which is that though the Acts included in the Ninth Schedule do not become a part of the Constitution, by being included in the Ninth Schedule they owe their validity to the exercise of the amending power.¹²⁴ It is Seervai's submission in light of Khanna J.'s clarification that if Parliament, exercising constituent power, cannot enact an amendment destroying the basic feature of the State, neither can Parliament, exercising its constituent power, permit the Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result.¹²⁵

Although the government questioned the basic structure doctrine articulated in *Kesavananda Bharati*, the ruling was re-affirmed in subsequent decisions. Thus, for over forty years, Parliament was able to operate by amending the constitution so long as it did not erode the basic structure of the constitution.

5.9.3 Justiciability of the Ninth Schedule

The power to put laws out of the reach of the judiciary under article 31B led Parliament to enact several laws and place them within the Ninth Schedule, which had originally been created by Prime Minister Nehru to help protect progressive land reform laws from judicial scrutiny.¹²⁶ The proliferation of laws included within the Ninth Schedule led to much public consternation, and the constitutional bench of the Indian Supreme Court finally agreed to take up a case

¹²²*Supra n.119.*

Seervai, *“Constitution of India”*, Universal Law Publishing, 4th ed., Vol.3.

¹²⁵*Id.*

¹²⁶*Supra n. 117.*

challenging laws under the grounds that they “could not have been validly inserted in the Ninth Schedule.”¹²⁷

On January 11, 2007, Chief Justice Y.K. Sabharwal handed down the case of *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu*¹²⁸. The Chief Justice began by stating the broad question to be considered by the court:

*“[W]hether on and after [April 24, 1973] when [the] basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunise legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court?”*¹²⁹

The Chief Justice first traced the development of the law, citing the major cases that had been decided by the court with respect to interpretation of some articles of the constitution and challenges to the Ninth Schedule.⁹⁰ Thus the court found occasion to focus on the *Golak Nath case*¹³⁰, which had “held that [a] constitutional amendment is next, the court dove into a discussion on the importance of fundamental rights.¹³¹ Quoting the Nobel laureate and economist, Dr. Amartya Sen, the court noted “the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.”¹³²

Furthermore, the court noted that “fundamental rights occupy a unique place in the lives of civilized societies and have been described . . . as ‘transcendental,’ ‘inalienable’ and ‘primordial.’¹³³ Moreover, noting the importance of fundamental rights in providing checks and balances, the court stated:

[T]he jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the

¹²⁷ *Supra n. 80.*

Id.

¹³⁰ *Supra n. 11.*

¹³¹ *Supra n. 129.*

¹³² *Id.*

¹³³ *Id.*

*State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.*¹³⁴

Noting the nature of fundamental rights in providing a check against actions of Parliament, the court then stated that “separation of powers is part of the basic structure of the Constitution.”¹³⁵ This led the court to examine the central question of “whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights.”¹³⁶

The court disposed of the question of its ability to conduct judicial review of legislation under the Ninth Schedule by stating that it would be contrary to the check that article 32¹³⁷ confers: “It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution.”¹³⁸

Additionally, the court again looked to its previous jurisprudence in the *Kesavananda Bharati* case and pointed out that although “Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine,” and “at least some fundamental rights do form part of basic structure of the Constitution.”¹³⁹ The Supreme Court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the constitution.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

Article 32 provides: Remedies for enforcement of rights conferred by this Part—

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of fundamental rights.

¹³⁸*Supra n.80.*

¹³⁹*Id.*

5.10 Expanded Scope of Judicial Review over Ninth Schedule: I.R. Coelho Case

At the very outset, the *IR Coelho v. State of Tamil Nadu*¹⁴⁰ Court clearly states that the decision in the case is based on the presumption that Article 31B is valid and shall not look into the same. The Court held that after the 24th April 1973, the laws that were included in the Ninth Schedule could not escape scrutiny by the Courts based on the rights contained in Part III of the Constitution and such laws are “consequently subject to the review of fundamental rights as they stand in Part III”.¹⁴¹ However, the test is not restricted to this stage, since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles.¹⁴²

If the law infringes on the essence of any of the fundamental rights or any aspect of the Basic Structure then it will be struck down. The extent of abrogation and limit of abridgement shall have to be examined in each case.

There have been several decisions relating to what constitutes the Basic Structure over the years.¹⁴³ The very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its nebulous and ill-defined nature. The *IR Coelho case*¹⁴⁴ is the latest milestone in the judicial description of what constitutes the Basic Structure. Justice Sabharwal was mindful of the decision delivered a couple of months earlier in the *M. Nagaraj Case*¹⁴⁵. In that case, the Court, while considering the debate between the need to interpret the Constitution textually, based on original intent on the one hand, and the indeterminate nature of the Constitutional text that permits different values to be read into the Constitution, held that the Basic Structure of the Constitution need not be found in the Constitutional text alone.¹⁴⁶ This view of the Court

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.*

¹⁴³*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC

2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *Waman Rao v. Union of India*, AIR 1981 SC 781

¹⁴⁴*Supra* n.80.

¹⁴⁵*M. Nagaraj v. UOI*, AIR 2007 SC 71

¹⁴⁶*Id* n.144.

found reiteration in *IR Coelho Case*¹⁴⁷ wherein the Court noted that textual provisions and such overarching values could both form part of the Basic structure. In light of this the Court was faced with the task of answering the questions: whether all fundamental rights are included in the Basic Structure doctrine? If the answer to the question is in the negative, then the Court is required to determine, which fundamental rights can be identified as part of the Basic Structure.¹⁴⁸

The Court, while discussing the hierarchy it has created amongst the fundamental rights, takes recourse under the distinction between the ‘rights test’ and the ‘essence of rights test’. At this juncture, the view of the Court warrants mention:¹⁴⁹

*“We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it merely excludes Part III at will. For these reasons, every addition to the Ninth Schedule triggers Article 32 as part of the Basic Structure and is consequently subject to the review of the fundamental rights as they stand in Part III”.*¹⁵⁰

This would mean that if a law was to be included in the Ninth Schedule the scrutiny of all fundamental rights would be available as per the ‘rights test’. However, the Court does not stop at this but goes on to say that every amendment that places a law in the Ninth Schedule after 24th April 1973 would have to satisfy the Basic Structure test.¹⁵¹

A natural implication of this distinction is that the laws placed in the ninth schedule are not a formal part of the Constitution. An ambiguity which is created by drawing this distinction is that the distinction between the amendment and the law that it includes in the Ninth Schedule gets blurred. It becomes impossible to

¹⁴⁷*Id.*

Id.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.*

separate the laws, which constitute the body of the amendment from the amendment itself.¹⁵²

5.11 Significance of the Doctrine of Basic Structure

The basic structure limitation comes out of the realization that the only way to safeguard the Constitution from opportunistic destruction and defilement by temporary majorities in Parliament is to reject those amendments which go to tarnish its identity. It arises out of the need to strengthen the Constitution and to prevent its destruction by a temporary majority in Parliament. What is basic structure will depend upon what is vital to Indian democracy and that cannot be determined except with reference to history, politics, economy and social milieu in which the Constitution functions. The Court cannot impose on society anything it considers to be basic. What the judges consider to be basic structure must meet the requirement of national consciousness about the basic structure. Whatever may be the merits or demerits of judicial review, to an extent, the basic structure limitation upon the constituent power has helped arrest such forces to some extent and to stabilize the democracy.

5.12 Uncertainty of Basic Features

A five-judge Bench of the Supreme Court in the *Shankari Prasad case*¹⁵³, unanimously held within a year after the commencement of the Constitution that Parliament had unfettered power to amend the Constitution. This position was reiterated by majority in the *Sajjan Singh case*¹⁵⁴, 15 years later though a minority view doubted the amenability of Fundamental Rights.

The settled law on Parliament's power to amend any part of the Constitution was reversed in the 11-judge Bench decision in the *Golak Nath case*¹⁵⁵ by a narrow majority of six to five. Chief Justice Subba Rao in effect ruled that Fundamental Rights cannot be abrogated even by an amendment of the Constitution because amendments are also laws within the meaning of Article 13.¹⁵⁶

Id.
¹⁵³*Supra* n.5.
¹⁵⁴*Supra* n.7.
¹⁵⁵*Supra* n.11.
¹⁵⁶*Id.*

The shift in the Court's perception can be understood only in terms of the socio-political developments of the times. The repeated judicial interventions against zamindari abolition and land reform laws based on inadequacy of compensation under right to property guarantee did create distrust between Parliament and the judiciary, each claiming to interpret constitutional intent in opposing fashion. Parliament ultimately won, though in the process the people lost a valuable right originally guaranteed as a Fundamental Right under the Constitution (Right to Property) (Article 31), deleted from Part III by Constitution (44th Amendment Act, 1978).

The birth of the basic features doctrine happened in the *Keshavananda Bharati case*¹⁵⁷, wherein the thirteen judges, by a majority of seven to six, overruled *Golak Nath* to declare that the Constitution has certain 'basic features' that cannot be altered or destroyed at all through the amending process. To the extent Fundamental Rights are part of the 'basic features' they are un-amendable. It is difficult to explain how and where the majority of judges in *Keshavananda Bharati* discovered this unique doctrine to curtail the parliamentary power of amendment which the Court itself had repeatedly held before to be unfettered.

Does the Court have such a power as part of judicial review or in its inherent jurisdiction? Interpretation of which provision of the Constitution can lead to such a result? Can such a thin majority of just one judge rewrite the constitutional text to make a substantial dent in the distribution of powers and cause erosion of parliamentary authority in legislative business? While these and related questions were debated again and again, the 'basic structure doctrine' has been acted upon by the Court, thereby establishing judicial supremacy on matters of constitutional principles and policies.

In fact, it is pertinent to point out that the parliamentary political system was chosen for India because of a desire to have a strong executive government in the context of the political situation arising out of the partition of the country and the integration of states. Parliamentary sovereignty, an associated legal paradigm of strong executive government, became a powerful institutional fact in the working of the Constitution. However, lawyers and judges brought up in the legacy of the

¹⁵⁷*Supra* n. 1.

Common Law culture projected the argument that Parliament is only a creature of the Constitution and, therefore, primacy is with the Constitution. This logic paved the way for the acceptance of the law declared by judges having priority over all enacted laws, including constitutional amendments. In all this, there was a lurking fear of Parliament not respecting Fundamental Rights to the same degree as the judges thought the Constitution demanded. The 'basic structure' doctrine which the minority judges (Justices Mudholkar and Hidayatullah) hinted at in the *Sajjan Singh case*¹⁵⁸, came in as a solid shield against the claim of parliamentary supremacy in the matter of amendments even in the face of the explicit language of Article 368.

The question is not whether such an ingenious interpretation blocking unfettered discretion for Parliament's power of amenability has done some good against the uncertainties of majoritarian politics, or whether the Constitution is safer in the hands of the Court than of Parliament; the question is whether 'the people' operating through a representative parliament are helpless to determine the structure and quality of governance and whether a small, often divided, set of appointed judges can replace democratic judgment on 'basic features', whatever it means. One cannot forget that the infamous judgment in *ADM Jabalpur*¹⁵⁹ also came from the very same court that unhesitatingly approved the suspension of the Right to Life and Liberty under Emergency laws. The difficulty arises because of the uncertainty of so-called 'basic features' and the inclination of the court to change its interpretation by narrow majorities from time to time.

Secularism is declared a basic feature in the *S.R. Bommai case*¹⁶⁰. Presumably, socialism, as interpreted by the Supreme Court in the nationalization era, is also a basic feature. If so, it may raise several questions for policy planners now involved in disinvestments and privatization that the court alone can clarify. Judicial review and judicial independence are considered part of the 'basic features'. When the Court claims exclusive jurisdiction in deciding judicial appointments to superior courts, interpreting the written text that way, and limits power expressly given to the executive by the Constitution, it is legitimate to ask

¹⁵⁸*Supra* n.7.

¹⁵⁹*Supra* n. 69.

¹⁶⁰AIR 1994 SC 1918

whether we are heading for an arrangement that is contrary to the spirit of parliamentary democracy and concentrates unfettered power in one institution, which, incidentally, is not an elected body. Can one proceed on the assumption that judges cannot go wrong and what they decide would always be in the best interests of the people? Or is it that 'the people themselves' do not know their interests and they need to be told by an expert body? These are discomfoting questions that loom large in the public mind and present themselves whenever controversial decisions on popular issues are rendered by the Court.

5.13 Doctrine of Basic Structure: Advantages and Perils

Once the power to annul amendments to the Constitution, which is the highest form of activism, is conceded to the Court, the exercise of lesser powers is logical, and ultimately judicial restraint based on the Court's own view of its area of competence and effectiveness becomes the only check on the exercise of judicial power.

The criticism that may be attributed to the Basic Structure Doctrine is that the doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It imposes constraints and limitations on the Parliament to amend the Constitution, a matter which was not contemplated by the founding framers. It fails to appreciate that we live in changing times and laws cannot be static. A constitution has to reflect the changing needs of the nation and must be dynamic and flexible.

Another pertinent limitation to the basic structure doctrine is that if the power to amend the constitution cannot be exercised to amend its basic features, the power gets reduced to the status of a 'removal of difficulties' clause. Surely, high constituent power ought to mean something more. The Basic structure doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It emerged for the first time in 1973 by a majority of one, twenty-three years after the working of the Constitution. Yet in 1980, in the *Minerva Mills* case¹⁶¹, the Court found a 'limited amending power' to be a basic feature of the Constitution-

¹⁶¹*Supra* n. 45.

when right from *Sankari Prasad*¹⁶² to *Sajjan Singh*¹⁶³ the view was that there were no limitations on the amending power.

Critics point out that the basic structure doctrine proceeds upon a distrust of the 'democratic process', which in itself must surely be part of the basic structure. In limiting the amending power, the basic structure doctrine in fact stifles democracy, a basic feature. The limitations of the basic structure doctrine were brought out by the Court's decision in *ADM Jabalpur*¹⁶⁴. The Presidential proclamation suspending Article 21 did not, according to the Court, leave the citizen with the right to protect his liberty. Thus a right which could not be taken away even by amending the Constitution, pursuant to the basic structure doctrine was now stripped by an executive proclamation. However the Parliament strengthened the right to life and liberty by providing in the Forty-fourth amendment that the rights conferred by Articles 20 and 21 could not be suspended even during an emergency.

Since 1967, the Supreme Court has interpreted Article 13 of the Constitution to mean that the document's "basic structure" cannot be altered by any means. Using this doctrine, the Supreme Court has struck down the 39th Amendment and parts of the 42nd Amendment as being in violation of the Basic Structure of the Constitution.

In recognising the need of the Constitution not to be rigid but a dynamic document the doctrine nevertheless ensures that Parliament cannot use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. By declaring that judicial review is part of the Basic Structure of the Constitution the Supreme Court reserves its right to review any amendment to the Constitution in the light of the Basic Structure. Indeed The basic structure doctrine stands in the way of untrammelled constitutional reform and provides the much needed check and balance required in a Parliamentary Democracy.

¹⁶²*Supra* n.5.

¹⁶³*Supra* n.7.

¹⁶⁴*Supra* n. 69.

5.14 A Sum Up

The constitution of a nation is a living thing and must be allowed to evolve naturally unless a revolution overtakes it. Any attempt to redraft the Indian Constitution in its essential elements is fraught with unforeseen consequences, which at the present stage of India's democracy very few would venture to invite. At the same time debating the strengths and weaknesses of the system and proposing alternative courses of action is the democratic way of building public opinion towards change and progress.

The basic philosophy underlying the doctrine of non-amenability of the basic features of the Constitution, evolved by the majority in *Kesavananda Bharati v. State of Kerala*, has been beautifully explained by Justice Hegde and Justice Mukherjee, and, I quote:

“Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.”

If Parliament excludes the judicial review for the purpose of questioning the agrarian reform laws, really their action is justiciable and commendable, but if they exclude the same which form parts of basic structure to question the laws like election, reservation, insurance law etc. were placed in the Schedule is really it is great threat to the ideals and principles of the Constitution. Thereby Schedule made controlled Constitution into uncontrolled and made Principle of Constitutionalism disappear from the Constitution text. This kind of act by Parliament affects the supremacy of the Constitution and this gives scope to the Parliament to become supreme.

But in *I.R.Coelho's* case Supreme Court held that, the basic structure doctrine requires the State to justify the degree of invasion of Fundamental Rights. The

Parliament is presumed to legislate compatibly with the Fundamental Rights and this is where judicial review comes in.

The greater invasion into essential freedoms, greater is the need for justification and determination by the Court whether invasion was necessary and if so to what extent. The degree of invasion is for the court to decide. Compatibility is one of the species of judicial review which is premised on compatibility with rights regard as fundamental.

The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. Thereby Supreme Court reaffirms the Constitution Supremacy through this basic structure and now we can say that the “Doctrine of Basic Structure made uncontrolled Constitution into Controlled one.

Finally it can be said that, if the Framers of our Constitution, had inserted express provision under Constitution of India regarding limitation of amending power of the Parliament under Article 368 itself, there would not have been a situation of introducing the basic structure doctrine and if the Parliament had exercised its amending power without disturbing the Constitution’s supremacy in the case of Ninth Schedule, judiciary would not have made any attempt to propound the doctrine of basic structure even without express provisions of Constitution relating to limitation of amendment.