

# THE DOCTRINE OF BASIC STRUCTURE IN PRE AND POST *KESHAVANANDA'S CASE*

## 5.1 Introduction

Constitution of India did not emerge from vacuum. It is continuous process of evolution, reformation and recreating the existing system of governance by eminent scholars, experts and judges etc. No Constitution can remain static. It must respond to new challenges and take account of unanticipated and unforeseen events which were not within the contemplation of the framers of the Constitution. Ours is the living Constitution which requires an amendment from time to time according to the societal changes. Parliament in its constituent power can amend by way of addition, alteration, variation or repeal any provisions of the Constitution. 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*,<sup>1</sup> because there was no implied or express limitation on its amending power exercised under the Constitution.<sup>2</sup> But in the *keshavanandha's case*, 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. This doctrine conceived in the case of *Sajjan singh*<sup>3</sup> and took real birth in the case of *Keshavanandha Bharath's Case*<sup>4</sup>. It is the product of long struggle between the Judiciary and Parliament. Through this basic structure principle, the Supreme Court changed the course of Constitutional history by denying the assertion of supremacy of Parliament in matter of amending the Constitution at solely on the

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<sup>1</sup> *Keshavanand Bharti v. State of Kerala* AIR 1973 SC1461: (1973) 4 SCC.225.

<sup>2</sup> Article 368 of the Constitution of India

<sup>3</sup> *Sajjan Singh v. State of Rajasthan* AIR, 1965 SC 845

<sup>4</sup> *Supra 1.*

basis of requisite voting strength, quite unmindful of the basic or fundamental rights of citizens.<sup>5</sup>Art.31-B and Ninth Schedule<sup>6</sup> are the main root cause for developing this doctrine by the Judiciary in so many cases. The reason is, this Schedule made controlled Constitution into uncontrolled by excluding the judicial review which is also a form part of the basic Structure.

At this point, present chapter focuses to examine the scope and importance of this doctrine under the Ninth Schedule of the Constitution in Pre and Post *Keshavanand's* Case and to discuss the justiciabilty of exclusion of judicial review (which is also a basic structure) from the list of Ninth Schedule. This chapter is very significant in the present study as it deals with the various aspects that are held to be the basic or essential features or structure of the Constitution by the Apex Court in its judgements, which cannot be taken away or damaged by the constitutional amendments by the Parliament. As the Constitution is the Supreme Law of the land no Act or amendment could go contrary to it.

## **5.2 Development of Basic Structure Theory in Pre *Keshavananda's* case**

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.<sup>7</sup> To nullify the judgment of High Court and to

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<sup>5</sup> Article on *Basic Structure of the Indian Constitution : Doctrine of Constitutionally Controlled Governance ( From Keshavanand Bharti to I.R.Cohelho)* by Virendra Kumar published in Journal of India Law Institute 2007, Vol-49, Jan –March, p.365

<sup>6</sup> Art.31-B read with Ninth Schedule Inserted in the Constitution First Amendment Act, 1951

<sup>7</sup> *Kameshwar Singh v State of Bihar*, AIR, 1951, Pat.91, SB.

immunize this law<sup>8</sup> from Fundamental Rights, Art.31-B<sup>9</sup> and the Ninth Schedule<sup>10</sup> were introduced in the Constitution by the Constitution First Amendment Act 1951.

The question whether Fundamental Rights can be amended under Art.368 came for consideration in the Supreme Court in *Shankari Prasad case*.<sup>11</sup> In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Arts.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 Art.13<sup>12</sup> of Part III and hence was void. The Supreme Court however rejected the above argument and brought out the distinction between legislative power and constituent power and held that “law” in Art.13 did not include an amendment of the Constitution made in the exercise of constituent power and

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<sup>8</sup> The place of pride in the Schedule is occupied by the Bihar Land Reforms Act, 1950, which is Item 1 and which led to the enactment of Article 31-A and to some extent of Article 31-B.

<sup>9</sup> **Article 31-B:** Validation of certain Acts and Regulations- *Without prejudice to the generality of the provisions contained in Article 31-A*, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, *or ever to have become void*, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and *notwithstanding any judgment, decree or order of any court or tribunal to the contrary*, each of the said Acts and Regulations shall, *subject to the power of any competent Legislature to repeal or amend it*, continue in force.

<sup>10</sup> The Ninth Schedule when inserted under Constitution contained 13 Items, all relating to land reform laws immunizing them from challenge on the grounds of Contravention of Article 13 of the Constitution.

<sup>11</sup> *Sankari Prasad Singh v. Union of India*, AIR 1951SC 458

<sup>12</sup> Article 13: Laws inconsistent with or in derogation of the fundamental rights-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Fundamental Rights were not outside the scope of amending power.<sup>13</sup>The same view was also expressed by the court in *Sajjan Singh* case.<sup>14</sup>

In *Golak Nath case*,<sup>15</sup> the validity of 17<sup>th</sup> 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*<sup>16</sup> and *Sajjan Singh*<sup>17</sup> case. In order to remove difficulties created by the decision of Supreme Court in *Golak Nath's*<sup>18</sup> case the Parliament enacted the 24<sup>th</sup> Amendment Act.<sup>19</sup>

In *Keshavanandha Bharathi Case*<sup>20</sup> 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.<sup>21</sup>

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<sup>13</sup> The Court unanimously declared that the Constitution (1st Amendment) Act, 1951 was constitutional.

<sup>14</sup> *Supra* 3

<sup>15</sup> *Golak Nath v.State of Punjab*, (1967) 2 SCR 762: AIR 1967 SC

<sup>16</sup> *Supra*,11

<sup>17</sup> *Supra* 14

<sup>18</sup> *Supra* 15

<sup>19</sup> Article 13(4) and 368(3) were inserted through 24<sup>th</sup> Amendment. [13 (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

<sup>20</sup> *Supra* 1

<sup>21</sup> These Seven Judges were, Chief Justice Sikri, Justices Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy, and Khanna. The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment. See S.P.Sathe, "Judicial Review in India: Limits and Policy". H.M. Seervai, in his analysis of the case in his magnum opus, "Constitution of India" states that six of the seven majority judges held that there were implied and inherent limitations on the amending power of the Parliament, which precluded Parliament from amending the Basic Structure of the Constitution. However Khanna J. rejected this theory of implied limitations but held that the Basic Structure could not be amended away. All Seven judges gave illustrations of what they considered Basic Structure comprised of.

The Supreme Court recognized Basic Structure concept for the first time in the historic *Kesavananda Bharati*<sup>22</sup> case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by the Parliament. In this case the validity of the Twenty-fifth Amendment Act was challenged along with the Twenty-fourth and Twenty-ninth Amendments. The Court by majority overruled the *Golak Nath* case which denied the Parliament's power to amend Fundamental Rights of the citizens. The majority held that Art.368 even before the 24<sup>th</sup> Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Art.368 did not enable the Parliament to alter the basic structure or framework of the Constitution and Parliament could not use its amending power under Art.368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. This is how the development of this Basic Structure Doctrine evolved because of some controversy was found in the laws included in the Ninth Schedule. This basic structure doctrine may be called an 'invention' as it was inspired by an exceptional display of *art, courage and crafts* that the Supreme Court exhibited while evolving this doctrine which counts as one of the greatest contribution of Indian judiciary to theory of institutionalism.<sup>23</sup> In this context, it is also pertinent to note that, actually this doctrine of "basic structure" is introduced into India by a German scholar, Dietrich Conrad.<sup>24</sup>

### 5.2.1 Basic Structure

The "Basic Structure" doctrine is the judge-made doctrine whereby certain features of the Constitution of India are beyond the limits of the amending powers

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<sup>22</sup> *Ibid.*

<sup>23</sup> A phrase used by Upendra Baxi in "*Courage, Craft and Contention - The Supreme Court in Eighties*", 1985.

<sup>24</sup> See Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970). For the D. Conrad's influence on the Indian Supreme Court, see A. G. Noorani, "Behind the Basic Structure Doctrine: On India's Debt to a German Jurist, Professor Dietrich Conrad", 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/fl1809/18090950.htm>.

of the Parliament. Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what constituted the basic structure.<sup>25</sup> It is essential to make out the basic features of the Constitution which are non-amendable under Art.368. The question has been considered by the Court from time to time, and several such features have been identified, but the matter still remains an open one; no exhaustive list of such features has yet emerged and the Court has to decide from case to case whether a constitutional feature can be characterised as basic or not. Basic Features of the Constitution according to the Supreme Court cases verdict each judge laid out separately, what they thought were the basic or essential features of the Constitution.

### **5.2.2 Significance of the 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.

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<sup>25</sup> Article on “*Basic Structure Doctrine and its Widening Horizons*” by V.R.Jayadevan, published in CULR, Vol.27, March 2003,p.333.

**Table 5.1 List of Basic Structure:** Shows that what are the Basic Structure according to the observations of Judges of Supreme Court in different cases.

Sl. No	Supreme Court observations on Basic Structure in different cases.	Subject Matter of Basic Structure
1	<p><i>Keshavananda Bahrathi Case</i><sup>26</sup>  <i>Sikri, C.J.</i> explained that the concept of basic structure included:</p> <p>-----</p> <p><i>Shelat, J.</i> and <i>Grover, J.</i> added three more basic features to this list:</p> <p>-----</p> <p><i>Hegde, J. and Mukherjea, J.</i> identified a separate and shorter list of basic features:</p> <p>-----</p> <p><i>Jaganmohan Reddy, J.</i> stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:</p>	<ul style="list-style-type: none"> <li>• Supremacy of the Constitution</li> <li>• Republican and democratic form of government</li> <li>• Secular character of the Constitution</li> <li>• Separation of powers between the legislature, executive and the judiciary</li> <li>• Federal character of the Constitution</li> </ul> <p>-----</p> <ul style="list-style-type: none"> <li>• The mandate to build a welfare state contained in the Directive Principles of State Policy.</li> <li>• Unity and integrity of the nation</li> <li>• Sovereignty of the country.</li> </ul> <p>-----</p> <ul style="list-style-type: none"> <li>• Democratic character of the polity</li> <li>• Unity of the country</li> <li>• Essential features of the individual freedoms secured to the citizens</li> <li>• Mandate to build a welfare state Unity and integrity of the nation</li> </ul> <p>-----</p> <ul style="list-style-type: none"> <li>• Equality of status and the opportunity</li> <li>• Sovereign democratic republic</li> <li>• Justice - social, economic and political</li> <li>• Liberty of thought, expression, belief, faith and worship</li> </ul>

<sup>26</sup> *Supra* 1.

2	<i>Indira Gandhi v. Rajnarain</i> <sup>27</sup> , <i>Kihoto Hollohon</i> <sup>28</sup> cases	Democracy and Preamble to the Indian Constitution guarantees equality of status and of opportunity and that the Rule of law is the basic structure of the Constitution.
3	<i>Nachane, Ashwini Shivram v. State of Maharashtra</i> <sup>29</sup> case	The doctrine of equality enshrined in Art.14 of the Constitution, which is the basis of the Rule of Law, is the basic feature of the Constitution.
4	In a plethora of cases <sup>30</sup>	Independence of judiciary is a basic feature of the Constitution as it is the sine qua non of democracy
5	<i>In Bommai</i> <sup>31</sup> & <i>Poudyal</i> <sup>32</sup> cases	Secularism and “Democracy and Federalism are essential features of our Constitution and are part of its basic structure.”
6	<i>In Sampath Kumar</i> <sup>33</sup> Bhagwati, <i>In L.Chandrakumar Case</i> <sup>34</sup> <i>In Subhesh Sharma v. Union of India</i> <sup>35</sup> and <i>Waman Rao case</i> <sup>36</sup> in <i>Minerva Mills case</i> <sup>37</sup>	“Judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional Policy.” Several Articles in the Constitution, such as Arts.32, 136, 226 and 227, guarantee judicial review of legislation and administrative action.
7	<i>In Raghunath Rao v. Union of India case</i>	The unity and integrity of the nation. <sup>38</sup> And Parliamentary system. <sup>39</sup>

People in India seem to have accepted the basic structure doctrine in the same manner as the Americans accepted judicial review of legislation claimed by the Supreme Courts of the United States in *Marbury v. Madison*.<sup>40</sup> In determining

<sup>27</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC, 2299 (1975) 3 SCC 34

<sup>28</sup> AIR, 1993, SC 412

<sup>29</sup> *Nachane, Ashwini Shivram v.. State of Maharashtra*, AIR 1998 Bom 1 ; *Raghunath Rao v.. Union of India*, AIR 1993 SC 1267

<sup>30</sup> Bhagwati, J. *Union of India v. Sankal Chand, Himmatlal Sheth*, AIR 1977 SC 2328 : (1977) 4 SCC 193. and *The Gupta Case*, AIR 1982 SC 149 at 197, 198, *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213 : (2000) 4 SC 640, *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296, *Supreme Court Advocates-records- Association v. Union of India*, (1993)4 SCC 441.; AIR 1994SC268.

<sup>31</sup> *S.R. Bommai v. Union of India*. AIR 1994, SC 1918, at 1976.

<sup>32</sup> *Poudyal v. Union of India*, (1994) Supp.1SCC 324.

<sup>33</sup> *S.P. Sampath Kumar v. Union of India* (1987) 1 SCC 124 : AIR 1987 SC 386.

<sup>34</sup> *L.Chandrakumar v. Union of India*, AIR 1997, SC,1125

<sup>35</sup> AIR 1991 SC 631 at 646.

<sup>36</sup> *Waman Rao v. Union of India*, AIR 1981,SC271.

<sup>37</sup> AIR 1980, SC 1789.

<sup>38</sup> *Raghunath Rao v. Union of India*, AIR 1993 SC 1267.

<sup>39</sup> AIR 1973 SC at 1535, 1603, 1628 and 1860.

<sup>40</sup> I. Cranch 137 : 2 L.Ed. 60.



what basic structure is, the Court will have to keep national consensus about such basic structure in mind. It is impossible to articulate exhaustively the elements which would constitute the basic structure of the Constitution. It will have to be articulated from case to case. During last few years the Supreme Court has intervened with constitutional amendments on the ground of basic structure initially only in five cases.<sup>41</sup>

Dr. Virendra Kumar in his learned article rightly observes<sup>42</sup> that, “From the couple of cases as instanced above, it is plain that every case in which the protection of a Fundamental Right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon, not which particular Article of the Constitution is in issue but, whether what is withdrawn distorts the Constitution so as to rob it, of its total identity. However, on the analogy of specific enumeration of the basic feature emanating from the question namely, whether a particular feature of the Constitution is a part of the basic structure, once a provision is proclaimed as a part of the basic structure, it would always be deemed to be so irrespective of the changed context. This would make, in our submission, constitutional document static, which should essentially be dynamic for creating conditions necessary for security of social order envisaged under the Constitution.”

That the basic structure is not capable of being precisely enumerated or defined; a view shared very widely. Professor C.G. Raghvan says,<sup>43</sup> “The basic structure limitation on the amendment power, esoteric by its very nature, being over-dependent on judicial perception for articulation of its limits, extends in its

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<sup>41</sup> *Kesavananda Bharti v. Kerala* AIR 1973, SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC, 2299; *Minerva Mills v. Union of India* AIR 1980 SC 1789; *S.P. Sampat Kumar v. India* AIR 1987, 386; *Sambamurthy v. A.P.* AIR 1987, SC 663.

<sup>42</sup> Virendra Kumar, “The Proposed Perspective of the Doctrine of Basic Structure of the Constitution,” AIR 1982 (Jour), p. 55, 59.

<sup>43</sup> C.G. Raghvan, “*The Amendment Power and the Basic Structure Doctrine in the Indian Constitution : A Critique of the Minerva Mills Case*”. Indian Year Book of International affairs, Vol. XIX, p. 365 (1970).

comprehensive sweep to all the key and distinguishing features of our Constitution which participate in establishing the unique identity of our fundamental law. The concept of basic structure does not merely embrace the notion of institutional entrenchment of Fundamental Rights to the extent this can be achieved without diminishing the constitutionally mandated judicial respect for the balance and harmony which manifest in the relationship of fundamental rights to the Directive Principles of State Policy, but also brings within its protective wings the federal structure of the Constitution, the institution of judicial review, the principle of free and fair elections and other important features of the Constitution.”

Prof. Upendra Baxi<sup>44</sup> feels that the Constitutional consensus repeated in *Keshavananda's case* imposes basic structure limitations on the amendment power of the legislature, subsequent decision of the Supreme Court do not fully elucidate what these limitations precisely are. According to him the decision rendered so far indicate the following limitations alone, viz.

- Total repeal of the Constitution would be violative of the basic structure,
- Any expansion of Art.368 to achieve consequence of total repeal would similarly be violative of the basic structure,
- Any attempt to deprive the Court of its power of judicial review of Constitutional amendments would also be transgressive of basic structure,
- Freedoms guaranteed by Arts.14, 19 and 21 constitutes to limits the power of amendment ,
- Any attempt to abrogate Part IV of the Constitution may violate basic structure, and
- The democratic nature of the Constitution may not be validly transformed by the use of Art.368.

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<sup>44</sup> See his article on ‘Amendment of the Constitution in Constitutional Law of India,’ VOL.II, (Bar Council of India Trust)

### 5.3 Basic Structure in Post *Keshavananda's* Case

After *Keshavananda Bharathi's*<sup>45</sup> case, Supreme Court in many cases invoked this doctrine of basic structure. The doctrine of non-amendability of the basic features of the Constitution implies that there are certain provisions in the Constitution which cannot be amended even by the following prescribed procedure therefor. There is no exact list of as to what these basic features are<sup>46</sup>. The Supreme Court has also not provided any such exhaustive list of the basic features of the Constitution, though some of the basic features have been highlighted in various judgements of Supreme Court such as *Indira Nehru Gandhi*,<sup>47</sup> *Minerva Mills*,<sup>48</sup> *Waman Rao*<sup>49</sup> and *I.R.Coelho*<sup>50</sup> etc. In these cases many subject matters have been included under the principle of basic structure. This doctrine has got much importance after April 1973.

#### 5.3.1 Applicability of the Basic Structure Theory to Ordinary Laws

To discuss the applicability of basic structure doctrine to ordinary laws, it is appropriate to know the difference between an “ordinary” law enacted by Parliament in exercise of ordinary legislative power under Art.245 of the Constitution<sup>51</sup> and acts of the Parliament’s amending the Constitution under Art.368 of the Constitution.

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 the limitations laid down in the Constitution. The

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<sup>45</sup> *Supra* 1

<sup>46</sup> Dr. Ashok Dhamija’s ‘*Need to Amend a Constitution and Doctrine of Basic Features*’ published by Wadhwa Nagpur, First Edition, revised 2007, p.341.

<sup>47</sup> *Supra* 27

<sup>48</sup> *Minerva Mills v. Union of India* AIR 1980 SC 1789;

<sup>49</sup> *Supra* 37

<sup>50</sup> AIR, 2007 SC.

<sup>51</sup> By virtue of the powers conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union List and 52 subjects mentioned in the Concurrent List, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha (Council of States or the Upper House in the Parliament) the Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.

Constitution does not contain all the laws that govern the country. The 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 are provided by the Constitution. The Parliament alone is given the power to make changes to this framework under Art.368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in the Parliament.

Further, it is also pertinent to note the observation of *Prof. P.K.Tripathi*<sup>52</sup> about the difference of constituent power and law making power of the Parliament. He after relying upon the works of positivist jurist *Austin, Kelsen* and the realist *Salmond*, pointed out that the distinction between law and Constitution lay in the criterion of validity i.e. whereas an ordinary law depended on higher law for its validity, a provision of the Constitution did not so depend on another law and instead, generated its own validity. If this is the observation, what is the impact of basic structure doctrine on the “criterion” of validity? Now, even Constitutional amendment will depend for its validity, on the basic structure doctrine.<sup>53</sup>To substantiate above views of *Prof. P.K.Tripathi*, it is relevant to examine the *Election case* to know the applicability of basic structure to ordinary laws.

### **5.3.2 Verdict in the Election Case**

The first case to apply this doctrine was *Indira Nehru Gandhi v. Raj Narain*.<sup>54</sup>Where it was held that the basic structure doctrine had no application to ordinary legislation, and therefore could not be used to test the constitutionality of any law in the Ninth Schedule. In this case, Court had to examine the validity of

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<sup>52</sup> Prof. P.K.Tripathi, “*Keshavananda Bharathi v. State of Kerala, Who Wins?*” (1974)1 SCC.1.

<sup>53</sup> Arvind P.Datar, “*The Basic Structure Doctrine – A 37-Year Journey*”, published in book *Basic Structure Constitutionalism, Revisiting Keshavananda Bharathi* by Sanjay.S Jain and Sathya Narayan First Edition 2011,p.162

<sup>54</sup> AIR 1975 SC 2299.

the Thirty Ninth Amendment Act by which Art.329-A<sup>55</sup> was inserted into the Constitution. Along with this Art.329-A, the Parliament added 38 unrelated laws in the Ninth Schedule. Further some issues were also raised that whether the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 referred to as the Amendment Acts, 1974 and 1975 are unconstitutional because these Acts destroy or damage basic structure or basic features? The question as to whether Acts incorporated in the Ninth Schedule do not enjoy constitutional immunity because these Acts destroy or damage basic structure or basic features?

Clauses (4) and (5) of Art.329-A were impugned on the ground that they excluded the operation of any law and exercise of judicial review in the matter of election of Prime Minister and the Speaker of the Lok Sabha. The impugned amendment was therefore alleged to have violated the principles of democracy, rule of law, separation of power and judicial review, which according to the petitioner were essential features of the basic structure of the Constitution. The

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<sup>55</sup> **329-A.[Omitted.]** Special provision as to elections to Parliament in the case of Prime Minister and Speaker.-(1) Subject to the provisions of Chapter II of Part V [except sub-clause (e) of clause (1) of article 102], no election-

(a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election, shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election to any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been 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 respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(4) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(5) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.”

Court held that democracy was an ingredient of basic structure of the Constitution, that holding implies that any amendment violating democracy would be invalid. Further it was also held that ordinary laws are not subject to the test of the Basic Structure of the Constitution and therefore could not be used to test the constitutionality of any law in the Ninth Schedule. But this doctrine is applied only to determine the validity of Constitutional Amendments.

Chandrachud J., opined that the constitutional amendments have to be tested on the anvil of Basic Structure. In his esteemed view, one cannot logically draw an inference from this ratio that ordinary legislation must also answer the same test as a constitutional amendment.<sup>56</sup> He also justifies his stand on the ground that the amending power is subject to the theory of Basic Structure because it is a constituent power of the Parliament. This essentially refers to the distinction between legislative power and constituent power. Chandrachud J. brings out this distinction to emphasize the point that

*“Since the two are not the same a higher power should be subject to a limitation which will not operate upon a lower power and there would be no paradox ...same genus, they operate at different fields and are therefore subject to different limitations”.*<sup>57</sup>

Chief Justice Ray observed that ordinary laws shall not be subject to the test of Basic Structure as by doing so one would *“equate legislative measures with Constitution Amendment”*.<sup>58</sup> The only relevant test for the validity of a statute made under the plenary power of the Parliament, that is to legislate under Art.245, is whether the legislation is within the scope of the affirmative grant of power or is

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<sup>56</sup> As per Chandrachud J., Ordinary laws have to answer only two tests for their validity: (1) The law must be within the legislative competence of the Legislature and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. Basic Structure is neither a provision in the Constitution nor a part of fundamental rights; Para 691 of the *Election Case*.

<sup>57</sup> 692, in the *Election Case*. This was in response to the submission of Shri Shanti Bhushan that it is *paradoxical* that the higher power should be subject to a limitation which will not operate upon a lower power.

<sup>58</sup> 132, *Election Case*

forbidden by some provision of the Constitution? According to him, if the contention were accepted then the plenary power to legislate would be subject to an additional limitation that no legislation can be made as to damage or destroy basic features or basic structures. He further observed that “*this will mean rewriting the Constitution and robbing the Legislature of acting within the framework of the Constitution*”.<sup>59</sup> He noted that the Basic Structure is indefinable and the scope of the plenary power is more definite. Thus applying the doctrine of Basic Structure to ordinary laws would *denude* the power of Parliament and State Legislatures of laying down legislative policies, which would amount to a violation of the principle of separation of powers.

Mathew J. also supported this opinion and he was of the view that an ordinary law cannot be declared invalid for the reason that it goes against the vague concepts of democracy, justice, etc. The validity can only be tested with reference to the principles of democracy actually incorporated in the Constitution.<sup>60</sup> He also opined negatively on the issue whether the doctrine would apply to these ordinary laws after they are incorporated in the Ninth Schedule after a Constitutional Amendment to that effect.<sup>61</sup> This has been discussed at greater length hereinafter. Beg J. has expressed his dissent by holding that the “basic structure” of the Constitution tests the validity of both, constitutional amendments as well as ordinary laws. This is because ordinary law-making itself cannot go beyond the range of constituent power. He relies on Kelsen’s theory that the norms laid down in the Constitution are the supreme/*grund* norms and the legality of laws, whether purporting to be ordinary or constitutional, is tested by the norms laid down in the Constitution. However, this ruling was later abandoned by the Court in *Waman Rao v. Union of India*.<sup>62</sup>

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<sup>59</sup> 134, *Election Case*

<sup>60</sup> *Id.* 346

<sup>61</sup> *Id.* 353

<sup>62</sup> (1981) 2 SCC 362

### 5.3.3 Forty-Second Amendment and Basic Structure

After the decisions of the Supreme Court in *Keshavnand Bharati*<sup>63</sup> and *Indira Gandhi*<sup>64</sup> cases, the Constitution (42<sup>nd</sup> Amendment) Act, 1976, was passed which added two new clauses to Art.368 of the Constitution expressly prohibiting the review of the Constitutional amendments. The 42<sup>nd</sup> Amendment tried to overreach the implication of *Kesavananda Bharathi*'s case.

Clause (4) Art.368 stipulated that “No constitutional amendment (including the provision of Part III) or purporting to have been made under Art.368 whether before or after the commencement of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 shall be called in any court on any ground.” Therefore in India, as of 1976, the Supreme Court was precluded from reviewing constitutionality of Constitutional amendments. There is no doubt on this issue because clause (4) of Art.368 explicitly prohibits the judicial review of constitutional amendments. Moreover, clause 5 of the same Article states that “there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article.” This clause also provides that constitutional amendments cannot be judicially reviewed because Indian Constitution does not impose any limitations on the power of Indian Parliament to amend the Constitution.

But in *Minerva Mills Ltd. v. Union of India*<sup>65</sup>, question arose that, whether the amendments introduced by Sections 4 and 55 of the Constitution (42<sup>nd</sup> Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements? The Supreme Court in its answer considered clause (4) and (5) of Art.368 that were inserted by the 42<sup>nd</sup> Amendment and held them to be unconstitutional since they damage and destroy the basic structure of the Constitution.

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<sup>63</sup> *Supra*.1

<sup>64</sup> *Supra*.54

<sup>65</sup> (1981) 1 SCR 206: (AIR 1980 SC 1789)



Chief Justice Chandrachud, speaking for the Court observed that clause (5) of Art.368 would enable Parliament to abrogate democracy and substitute it with total antithetical form of the government denying people social, economic and political justice by emasculating liberty of thought, expression, belief, faith, worship and by abjuring commitment to the ideal of the society of equals. In other words, no “constitutional power can conceivably go higher than the sky-high power conferred by clause (5)...”<sup>66</sup>Justice Bhagavathi in his separate and concurring judgement agreed this view holding that, what was conferred by the Constitution was only a limited amending power which therefore could not be converted into an absolute and unlimited one<sup>67</sup> and therefore held clause (5) of Art.368 as unconstitutional.

The main reasons for the said decision were as under:

i) Clause (5) of Art.368 confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition.<sup>68</sup>Since the Constitution had conferred a limited power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of the Indian Constitution and therefore, the limitations on that power cannot be destroyed. The Parliament under Art.368 cannot, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its

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<sup>66</sup> *Ibid*

<sup>67</sup> Justice Bhagawathi held; “Therefore, after the decision in *Keshavananda Bharathi’s*, and *Smt.Indira Gandhi’s* case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and Clause (5) could not remove the doubt which did not exist. What Clause (5) really sought to do was to remove the limitation on the amending power of the Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of the Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to destroy its basic structure..... This clause seeks to convert a controlled Constitution into uncontrolled one by removing the limitation on the amending power of the Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of basic structure”. Id., at pp. 1826-27.

<sup>68</sup> *Ibid*

basic and essential features. The donee of a limited power cannot by the exercise of that limited power convert the limited power into an unlimited one.<sup>69</sup> Clause (5) of Art.368 was accordingly held unconstitutional and void.<sup>70</sup>

ii) The newly introduced clause (4) of Art. 368 must suffer the same fate as Clause (5) because the two clauses are interlinked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution.

iii) These clauses had transgressed the limits of the amending power available under the said Article, thereby damaging the basic structure of the Constitution. Judicial review is a basic and essential feature of the Constitution and no law passed by the Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away, the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited Government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. The Judiciary is considered the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of Government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with

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<sup>69</sup> *Minerva Mills Case*, para 22, p.1798.

<sup>70</sup> *Id.* para.25, p.1799.

the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is the most potent weapon in the hands of the judiciary for maintenance of the Rule of Law.

On the whole, *Minerva Mills*<sup>71</sup> is a comprehensive decision bringing clarity to the doctrine of basic structure. The holding enables the Indian Constitution and the Indian legal system to retain their identity even when attempts have been made to alter them for bringing about social revolution through legislation.<sup>72</sup>

After this case, Supreme Court in *Waman Rao v. Union of India*<sup>73</sup> once again reiterated and applied the doctrine of basic features of the Constitution. In this case, implications of the basic structure doctrine for Art.31-B were re-examined by a five-judge bench of the Supreme Court. The constitutionality of Art.31-B, as well as of Arts.31-A and 31-C (as it was before the 25<sup>th</sup> Amendment) were questioned on the grounds that they violated the basic structure of the Constitution. The majority judgment, delivered by C.J. Chandrachud, rejected this contention, and held that inasmuch as the impugned Articles were aimed at fulfilling the mandate of social and economic justice through agrarian reform, they were in conformity with the Constitution's basic structure.<sup>74</sup> Insofar as Art.31-B was concerned, the Court drew a line of demarcation at April 24<sup>th</sup>, 1973 i.e. the date of *Kesavananda Bharti's* decision and held it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to 24-04-1973, that means all the amendments which added to the Ninth Schedule before that date were valid. All future amendments were held to be

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<sup>71</sup> *Ibid.*

<sup>72</sup> V.R.Jayadevan's 'Basic Structure Doctrine and its Widening Horizons, published in CULR(2003).p.349.

<sup>73</sup> AIR 1981 SC271

<sup>74</sup> The Court held: 'The First Amendment has thus made the constitutional ideal of equal justice a living truth. It is like a mirror that reflects the ideals of the Constitution; it is not the destroyer of its basic structure.... The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution'. *Id.*p.285.

challengeable on the grounds that the Acts and Regulations which they inserted to the Ninth Schedule damaged the basic structure.<sup>75</sup>

Subsequently, the same bench in *Bhim Singhji v. Union of India*<sup>76</sup> by majority judgment partially invalidated S. 27(1) of the Urban Land (Ceiling and Regulation) Act, 1976, on the grounds that it violated Art.14 by providing for unbridled administrative discretion as to the transfer of land within a ceiling area, and this violation was unrelated to the object of the Act. However, the law had been included in the Ninth Schedule, and the question of whether this inclusion was valid, or whether the Ninth Schedule afforded protection against the violation of Art. 14, was not addressed by the majority. J. Tulzapurkar and J.Sen, however, who gave separate judgements striking down different provisions of the Act, felt it necessary to first establish that it was not protected by Art.31-B by arguing that certain provisions therein violated the basic structure of the Constitution. As such, there is still no clear ruling on the issue left unclear in *Waman Rao*. In recognition of this, the question of “whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the Fundamental Rights conferred by Arts.14, 19 and 31 can be included in the Ninth Schedule? or whether it is only a constitutional amendment amending the Ninth Schedule that damages or destroys the basic structure of the Constitution that can be struck down?” has been referred to a larger bench of the Supreme Court in *I.R. Coelho v. State of Tamil Nadu*.<sup>77</sup>

In *I.R.Coelho case*,<sup>78</sup>The Constitution Bench observed that, according to *Waman Rao and Ors. v. Union of India and Ors*<sup>79</sup> amendments to the Constitution

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<sup>75</sup> This decision gave rise to an anomaly, in that it was left unclear whether *any* law could be challenged on the grounds of violation of basic structure, or only those laws which were included in the Ninth Schedule by amendment. Subsequently, however, the position has been settled in *Indra Sawhney (II) v. Union of India* (2000)1 SCC 168, where it was held that the basic structure doctrine applied to all laws and executive orders, in addition to constitutional amendments.

<sup>76</sup> (1981) 1 SCC 166.

<sup>77</sup> *I.R.Coelho v. State of Tamilnadu* A.I.R. 1999 S.C. 3197

<sup>78</sup> AIR 2007 SC 137

<sup>79</sup> *Supra* 62

made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the Constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The Decision in *Minerva Mills Ltd. & Ors. v. Union of India & Ors*<sup>80</sup> and *Maharao Sahib Shri Bhim Singhji v. Union of India & Ors*<sup>81</sup>. were also noted and it was observed that the judgment in *Waman Rao* needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine judges. This is how the matters have been placed before Supreme Court's nine judge bench.

In *I.R.Coelho's*<sup>82</sup> case consisting Nine Judge Bench, question was raised that, Whether on and after 24<sup>th</sup> April, 1973 when Basic Structures Doctrine was propounded, it is permissible for the Parliament under Art.31-B to immunize legislations from Fundamental Rights by inserting them in the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court?

A Nine Judge bench of the Supreme Court held unanimously that all amendments to the Constitution made on or after 24<sup>th</sup> April, 1973, by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic features of the Constitution as reflected in Art.21 read with Arts.14,19 and the principles underlying them; to put it differently 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 to the basic structure. The researcher has already discussed

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<sup>80</sup> *Supra* 65

<sup>81</sup> (1981) 1 SCC 166

<sup>82</sup> *Supra* 78

complete facts, principles, Observations made in *I.R.Coelho* case. in the Second Chapter.

#### **5.3.4 The Constitution Forty-Fifth Amendment Bill, 1978**

It is really not possible to exhaustively enumerate the aspects of the basic structure of the Constitution. Such an attempt was made by the Constitution (Forty-Fifth) Amendment Bill, 1978 (CB 45),<sup>83</sup> which was undertaken during the short period of rule of the Janatha Government. In this, the following features were mentioned as features requiring special process of referendum for their amendment. They are: (i) The secular or democratic character of the Constitution; (ii) Rights of citizens under Part III; (iii) Free and fair elections to the House of the People or the Legislative Assemblies of states on the basis of adult suffrage; (iv) The independence of the Judiciary and (v) Amendment of the provision for the entrenchment of the above basic features and the requirement for the referendum. If an amendment of the Constitution was to be made for the amendment of any of the above matters, such an amendment had to be approved by the people at a referendum. The referendum for the purpose of seeking the approval of the people of India for any amendment of the nature referred to in the above provision was to be through a poll and all persons eligible for voting in the elections to the Lok Sabha were to vote in such a poll. Not less than fifty one percent of the total number of eligible voters must actually vote in the poll and the amendment was deemed to be approved at the poll if it was supported by a majority of the votes actually polled. The opposition to the amendment was a tacit admission of the basic structure doctrine. The opposition to the amendment was not because it had entrenched the basic structure but because it provided for even the destruction of

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<sup>83</sup> CB 45 is the abbreviation used in the text for the Constitution (Forty-Fifth Amendment) Bill, which later became the Constitution (Forty-Fifth Amendment) Act.

such basic structure through a referendum. Whether such matters could be left to popular will was also doubted. Seervai observed.<sup>84</sup>

The adoption of a referendum under the conditions prevailing in India was ill-advised and ill-conceived. Amendments to the Constitution are not capable of being formulated in such a manner as to ask for a simple ‘yes’ or ‘no.’

As against this Professor Baxi had strongly recommended such legislative enumeration of the basic structure limitations much before it was mooted by the amendment Bill. He had recommended referendum for the amendment of any such basic features.<sup>85</sup>

The basic structure doctrine has been legitimated due to gross abuse of constituent power by the ruling elite and subsequent acceptance of it by all major political participants.<sup>86</sup> Unfortunately, the Rajya Sabha where the Congress Party had a majority did not approve of these proposals although the Lok Sabha had passed the same by the requisite majority.<sup>87</sup>

#### **5.4 Basic Structure and Judicial Review**

A good Constitution always provides for the power of judicial review over the Constitutional amendments and legislative Acts.<sup>88</sup> 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

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<sup>84</sup> H.M. Seervai, 2 Constitutional Law, p. 2702.

<sup>85</sup> Upendra Baxi “Some Reflections on the Nature of Constituent Power” in Trends and Issues, p. 142 (Indian Law Institute, 1978).

<sup>86</sup> S.P. Sathe, “*Limitation on Constitutional Amendment : Basic Structure Principle Reexamined*” in Trends and Issues, p. 179 (Indian Law Institute, 1978).

<sup>87</sup> M.P.Jain ‘*Indian Constitution Law*’ Fifth Edition, 2003. p.1926.

<sup>88</sup> Dr. C.D.Jha’s ‘*Judicial Review of Legislative Acts*’, Second Edition, 2009, p xxxiv.

structure which is simply impermissible.<sup>89</sup> 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. Where as 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.<sup>90</sup>

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.<sup>91</sup> 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 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.<sup>92</sup>

This is how, initially Art.31-B also considered constitutionally valid in *Shankariprasad case*,<sup>93</sup> 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,

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<sup>89</sup> *Supra* 5

<sup>90</sup> See, *I.R.Cohelho*, at 884(para 105)

<sup>91</sup> *Ibid.*

<sup>92</sup> *Id.* at 883-84(para 100)

<sup>93</sup> *Supra* 11



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* or to its application on the principle of exception. In this regard, where we do find the definite and standard criterion for Art.31-B? It is in this context, the researcher submitted and observed that, framers committed some mistake while incorporating this provision under Constitution. They could have specifically mentioned land reform was the criterion instead of using 'wide language' in this Article by giving unlimited scope to the Parliament in their power of amending power under Art.368. If they had mentioned the definite criterion like Agrarian reform, they would have avoided to place controversial laws into the Schedule, which even do not have nexus with this land reform laws.

For re-reading or re-defining the scope of this Art.31-B, the Constitutional bench in *I.R.Coelho* has approached the whole issue *denovo* in the light of first principles of constitutionalism as evolved by the Court in *Keshavananda Bharathi's case*.<sup>94</sup> 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.<sup>95</sup> Finally, Supreme Court in *I.R.Coelho* observed that, "if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24<sup>th</sup> April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure..."<sup>96</sup> 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*.

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<sup>94</sup> *Supra* 1.

<sup>95</sup> *Supra* 5.

<sup>96</sup> See. *I.R.Coelho Id.* at.893 [para 148(v)]

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”.<sup>97</sup> These would be void only if it is also held that they are violative of the basic structure of the Constitution.<sup>98</sup> But in *Golak Nath*<sup>99</sup>, Supreme Court was observed by saying that you cannot adversely amend Fundamental Rights at all; whereas *Keshavananda Bharathi* case lays down that abrogation of fundamental rights may or may not violate the basic structure doctrine.<sup>100</sup> 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.<sup>101</sup>

### **5.5 Basic Structure and Article 31-B read with Ninth Schedule**

The very important issue needs to be discussed here that, whether Art.31-B read with Ninth Schedule violates Basic Structure or not? Since the land reform legislations directly impinged upon the Fundamental Right to property of the big land lords, this right proved to be the biggest obstacle in implementing land reforms. Such an obstacle was removed through the incorporation of Art.31-B along with Ninth Schedule by the very first amendment of the Constitution. Thus speaking truly and contextually, the singular objective “behind Art.31-B is to

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<sup>97</sup> *Id.* at 884(para105)

<sup>98</sup> For determining whether in a given case the basic structure doctrine has been damaged or not, the following factors need to be kept in mind: (a) the placement of violated right in the scheme of the Constitution; (b) the impact of the offending law on the right; (c) the effect of the exclusion of the right from judicial review; and the abrogation of the principle on the essence of that right. Fictional immunity granted by Article 31-B is no bar to undertake such an examination after *Keshavananda Bharathi Case*. *Id.* at 885 (para 108)

<sup>99</sup> *Supra* 15

<sup>100</sup> See. *Id.* at 892[150(i)]

<sup>101</sup> *Id.* at 892 (para 147)

remove difficulties and not obliterate part III in its entirety or judicial review.<sup>102</sup> The objective was essentially to accelerate the process of land reforms. In *Shankari Prasad*<sup>103</sup> case, the first amendment was upheld as constitutional, because seemingly it was designed to provide “restricted immunity” of Fundamental Rights “only to protect a limited number of laws.<sup>104</sup> Initially 13 laws were placed to the Ninth Schedule- all relating to land reforms.<sup>105</sup> This was perhaps” the basis for the initial upholding of the provision.<sup>106</sup> But, in subsequent development, Ninth Schedule has become constitutional dustbin in the hands of *Indira Gandhi* and later government by allowing controversial laws into the Schedule. It is unfortunate to observe that the laws included in the Ninth Schedule are no longer restricted to those enacted to further agrarian and land reforms.<sup>107</sup> It means Art.31-B “is no longer a mere exception to land reforms only.<sup>108</sup> If this indiscriminate use of Art.31-B were allowed, it would surely result in destroying the basic principle of Constitutionalism. Infact Nehru introduced this Article only to bring agrarian law reforms by abolishing the zamindari system. The following

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<sup>102</sup> *I.R.Coelho v.State of Tamilnadu*, AIR.2007 (1), at 890 (para 139)

<sup>103</sup> *Supra* 11

<sup>104</sup> See, Virendra Kumar’s article on *Basic Strucutre of the Indian Constituion: Doctirne of Constitutionally Controlled Governaanace (from keshavananda Bharathi to I.R.Cohelho)* , published in ILI 2007, Vol.49, p.380.

<sup>105</sup> *Id.at* 884 (para 104)

<sup>106</sup> *Ibid.*

<sup>107</sup> Entry 17: Sections 52A to 52G of the Insurance Act, 1938; Entry 18: The Railway Companies (Emergency Provisions) Act, 1951; Entry 19: Chapter IIIA of the Industries (Development and Regulation) Act, 1951; Entry 90: The Mines and Minerals (Regulations and Development) Act,1957; Entry 91: The Monopolies and Restrictive Trade Practices Act, 1969; Entry 95: The General Insurance Business (Nationalization) Act, 1972; Entry 96: The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972; Entry 97: The Sick Textile Undertakings (Taking Over of Management) Act, 1972; Entry 100: The Foreign Exchange Regulation Act, 1973; Entry 104: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Entry 126: The Essential Commodities Act, 1955; Entry 127: The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976; Entry 133: The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976; Entry 216: The Gujarat Devasthan Inams Abolition Act, 1969; Entry 257A: The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993. The above-mentioned legislations are a few instances.

<sup>108</sup> *Supra* 22

quote is an extract from the speech made by Pandit Jawaharlal Nehru while introducing Art.31-B in the Parliament,<sup>109</sup>

*“When I think of this Article the whole gamut of pictures comes up before my mind, because this Article deals with the abolition of the zamindari system, with land and agrarian reform ...the whole object of these Articles in the Constitution was to take away and I say so deliberately to take away the question of Zamindari and land reform from the purview of the courts. That is the whole object of the Constitution and we put in some provision...May I remind the House that this question of land reform is most intimately connected with food production. We talk about food production and grow-more-food and if there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Neither the zamindari nor the tenant can devote his energies to food production because there is instability.”*

It is in this context, the researcher submits that, the original intention of Art.31-B is limited only for the purpose of the land reform. But it is not expressly mentioned in the Art.31-B. This plain language of Art.31-B made Parliament to misuse this Schedule. As result, it is violating the Basic structure doctrine. As the researcher discussed above, Art.31-B provides no defined criterion or standards by which the exercise power may be evaluated. But this design, the amending power of Parliament seems to be augmented enormously.<sup>110</sup> Therefore we can see that the power under Art.31-B is being abused and exercised beyond the scope of the purpose for which it was enacted. At the same time Art.31-A and 31-C will have criteria and they do not violate the basic structure of the Constitution. In this regard detail study was made by the researcher in the second chapter.

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<sup>109</sup> The Parliamentary Debates, Part II, Volumes XII and XIII (May 15 - June 9, 1951)

<sup>110</sup> See, *I.R.Coelho*, at 883(para 99)

## 5.6 Critiques

The doctrine of “basic structure of the Constitution”<sup>111</sup> is very controversial. This doctrine does not have a textual basis. We do not find, a provision stipulating that this Constitution has a basic structure and that this structure is beyond the competence of amending power. Therefore the limitation of the amending power through the basic structure of the Constitution is deprived of positive legal validity. Moreover, not having its origin in the text of the Constitution, the concept of the “basic structure of the Constitution” cannot be defined. What constituted the basic structure of the Constitution? Which principles are or not included in this concept? An objective and unanimous answer cannot be given to this question. Indeed, in the *Kesavananda Bharati’s* case, the majority of judges who admitted the existence a “basic structure of the Constitution” did not agree with the list of the principles included in this concept. Each judge drew a different list. Each judge is able to define the basic structure concept according to his own subjective satisfaction. This leads to the fact that the validity or invalidity of the Constitution Amendment lies on the personal preference of each judge. In the event of this, the judges will acquire the power to amend the Constitution, not specifically conferred to them under the Constitution but given to the Parliament under Art.368 of the Constitution. For that reason, as noted by Anuranjan Sethi, the basic structure doctrine can be shown as a “vulgar display of usurpation of constitutional power by the Supreme Court of India.”<sup>112</sup> As illustrated in the case-law of the Indian

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<sup>111</sup> The doctrine of “basic structure” is introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970). For the D. Conrad’s influence on the Indian Supreme Court, see A. G. Noorani, “Behind the Basic Structure Doctrine: On India’s Debt to a German Jurist, Professor Dietrich Conrad”, 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/fl1809/18090950.htm>.

<sup>112</sup> Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, <http://ssrn.com/abstract=835165>, p. 6-8, 26-27 Similarly, S. P. Sathe concluded that “the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature” (S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL’Y 29-108, at 88 (2001), available at [http://law.wustl.edu/journal/6/p\\_29\\_Sathe.pdf](http://law.wustl.edu/journal/6/p_29_Sathe.pdf)). Likewise, T. R. Andhyarujina said that the “exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy” (T. R. Andhyarujina, ‘Judicial Activism and Constitutional Democracy in India’ 10 (1992), quoted in Sathe, at 70.

Supreme Court, when there is no explicit substantive limitation on the amending power, the attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.

Another criticism against the basic structure is that an amendment to a Constitution may be necessary even to change the original intention of the Constitution framers, which may not suit a subsequent generation which is to work with the Constitution. Therefore to hold that an amendment not falling in the line with the original intention of the founding fathers is not valid, does not seem to be a sound view<sup>113</sup>. The necessity of amending the Constitution to meet the needs of a changing society cannot be denied. This may even include changes in the basic scheme of the Constitution itself. The basic structure theory seeks to impose restrictions on the exercise of amending power by the delegates not by the ultimate sovereign.

One of the important critique is that, if the basic structure theory was upheld, “every amendment made by the Parliament would be subject to judicial approval on the question whether it damages the core of an essential feature or not... and it is up to the Supreme Court and High Courts either to validate or invalidate the amendment. It is a step towards the ‘Government of Judges’ as the final say rests with the judges of the Supreme Court not with the Parliament.”<sup>114</sup>

The criticism of *P.K.Tripathi* was also in the same vein when he wrote “the people and the Parliament will never have to worry about what the Constitution ought to be. The Court will do it for them... The Court will not only play the role of the opposition in criticizing all proposed legislations concerning socio-economic policies, but it will be above to wipe out legislation which does not

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<sup>113</sup> Dr. Harichand, ‘Amending Process in the Indian Constitution’ p.96

<sup>114</sup> *Ibid* p.440.

favour. In fact it will govern the country except perhaps in regard to routine matters which might be left to the Parliament and the cabinet.<sup>115</sup>

Moreover Court did not identify in detail the basic structure of the Indian Constitution, leaving it for the wisdom of subsequent benches to fill up the details, case by case. To reject, therefore, the very concept of basic structure for the reason that the Court has not identified it in detail would present unacceptable reasoning.

If we argue in favour of the basic structure doctrine, we can arrive some findings. Firstly, limitations sought to be imposed on various organs of the State are meant to prevent a movement towards authoritarianism. In *Golak Nath's*<sup>116</sup> case it was pointed out that having regard to the past history of our country, it could not implicitly believe the representative of the people, for uncontrolled and unrestrained power might lead to an authoritarian State.<sup>117</sup> The limitations in terms of basic features are thought of only so that the Constitution may not be wrecked within.<sup>118</sup> So the basic structure theory should not be misunderstood as the expression of any lack of confidence in the elected representatives but should be looked at only as a device to avoid possible unauthorized usurpation of power.

Secondly, The Supreme Court has had an occasion to show<sup>119</sup> that the probabilities have become actualities. Approving the Court's decision striking down clause (4) and (5) of Art.329-A, it has been written that "it could be asked without straining one's credulity too much, how this was concerned with advancement of the real purposes behind the Constitution".<sup>120</sup> If the representative bodies trusted with so much of power resort to constitutional amendments merely

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<sup>115</sup> Cited by Prasad Anirudh, "Dynamic of the Basic Structure Theory", Law 1978, Vol.10, No.10. October, 1978, p.199.

<sup>116</sup> *Supra* 15

<sup>117</sup> Chief Justice Subba Rao in *Golaknath v. State of Punjab*, AIR,1967,SC, 1643, para15.

<sup>118</sup> In the words of Justice Hidayathulla, "...to see that men of factions tempers, of local prejudices or sinister designs may not be intrigue, by corruption, or other means, first obtain the suffrages and then betray the interests of the people",-Ibid, para 194.

<sup>119</sup> *Indira Nehru Gandhi v.Rajanarain*, AIR,1975,SC.2299.

<sup>120</sup> Rajeev Dhavan's "*The Amendment Conspiracy or revolution*",p.5.

to facilitate persons in power, they can never be trusted with totality of constituent power and hence the need for and justification of the basic structure theory.

## 5.7 Conclusion

At the initial stage of introducing the Ninth Schedule, the controversy was between the right to property and land reforms laws. Due to this incident the validity of number of amendments made to Constitution with respect to Ninth Schedule were challenged in different cases. When the Parliament introduced this Schedule under the Constitution, they deliberately excluded the judicial review because of the effect of *Kameshwar sing's case*.<sup>121</sup> Of course, the attempt of Parliament to exclude the judicial review to question the laws placed in the Schedule are really appreciable since it was for bringing agrarian law reforms in the country and to protect the interest of land less, weaker sections of the society and speaking truly and contextually, the singular objective 'behind Art.31-B is to remove difficulties and not to obliterate part III in its entirety or judicial review.'<sup>122</sup> The objective was essentially to accelerate the process of land reforms. The first amendment was upheld as Constitutional, because seemingly it was designed to provide 'restricted immunity' of Fundamental Rights 'only to protect a limited number of laws' –initially 13 in numbers –all relating to land reforms.<sup>123</sup> This was perhaps "the basis for the initial upholding of the provision."<sup>124</sup> But subsequently they started to insert some laws which are directly affecting the values and principles of Constitution and they started to misuse the Schedule by incorporating controversial laws which have no nexus with the agrarian laws. Thereby they made an attempt to affect the basic structure of the constitution through exercising their amendment power under the Constitution. If Parliament excludes the judicial review for the purpose of questioning the agrarian reform laws, really their action

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<sup>121</sup> *Supra* 7.

<sup>122</sup> See, *I.R.Cohelho*, at 890(para 139)

<sup>123</sup> *Id.* at 884(para104)

<sup>124</sup> *Ibid.*



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, Art.31-B gives validation based on fictional immunity. In judging the validity of Constitutional amendment we have to be guided by the impact test i.e. Right Test. 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.”

In this context, the researcher observes that, the laws of the type covered by Art.31-B were not likely to infringe any other Fundamental Right except right to property. That is why Art-31-B was not declared unconstitutional though it was violating the principle of judicial review which forms parts of basic structure. But few non-agrarian laws inserted into the Schedule, were violating so many Fundamental Rights guaranteed under Part III. Because of this reason the Court, in

*Keshavanada's* case invented doctrine of basic structure to impose implied limitation on the amending power of the Constitution.

Finally the researcher opines that, If framers had inserted express provision under Constitution of India regarding limitation of amending power of the Parliament under Art.368 itself, there would not have been a situation of introducing this basic structure doctrine and very importantly, 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.