HISTORICAL BACKGROUND OF NINTH SCHEDULE AND POWER OF JUDICIAL REVIEW

2.1 Introduction

A good Constitution must possess some fundamental limitations and restrictions on the powers to govern and legislate. The limitations and restrictions are direct or indirect, express or implied. A good Constitution must also provide for the power of judicial review over the Constitutional amendments and legislative Acts.[1] Judicial review scans the unconstitutional laws enacted by both Centre and State Legislatures and examines the action taken by the executive. The power of judicial review must vest in the Court which is the only competent, impartial, effective and authoritative organ to check the violations of the constitutional rights affecting the Union, the State and the people.

Judicial review is a part and parcel of the principle of Constitutionalism. The principle of Constitutionalism is an antithesis of arbitrary rule and it imposes limitations on the exercise of governmental power in order to avoid usurpation or its tyrannous applications. Any law enacted either by the Parliament or State legislature must always confer an opportunity to the judiciary to test the laws, whether such laws are against to the common right and reason.[2] If such laws are not based on any reason and irrational, they shall be declared void. In India *suo motto* power is not conferred on the judiciary to question the constitutional validity of laws passed by the legislatures. Such being the case, there should not be any scope under Constitution for excluding the power of judicial review even for special laws. Otherwise it affects the principles of Constitutionalism which exist in Constitution of India and there may be chance to abuse the same by so called Parliamentarians. In addition to that the Parliament occupies the supremacy, which Constitution is having. This happened in the Constitution of India in the Ninth

[1] Dr. C.D.Jha's '*Judicial Review of Legislative Acts*', Second Edition, 2009, p xxxiv.
[2] Observation by Chief Justice Coke in *Bonham's Case* (1610) 8 Co Rep 113 b: 77 ER 646.

Schedule which included some laws which are irrational, controversial, unscientific, illogical, unreasonable and no way related to land reforms also. (Example Tamil Nadu Reservation Act provides 69% reservation against to the mandate of *Indra sawhney's case).* Thereby this Schedule confers unlimited power to the Parliament to make judiciary silent to question the constitutional validity of laws listed in the Ninth Schedule[3] by excluding the judicial review. Initially land reforms laws were placed in the Schedule with sole object of abolishing the Zamindari system, though they were violative of right to property which was earlier considered as fundamental right. But thereafter, especially in Thirty-ninth and Fortieth Constitutional Amendments during *Indira Gandhi's* period, Schedule was misused like any thing by putting unrelated laws into the Ninth Schedule and it has become Constitutional Dustbin in the hands of legislatures.

At this juncture, the researcher has made an attempt in this chapter to discuss the historical background of Ninth Schedule and its importance, objectives and its development pre and post *I.R.Coelho case*. Further, the researcher also concentrated on the evolution of concept of judicial review and its importance.

2.2 Historical Background of Ninth Schedule

Land reforms essentially consist of a systematic change in the laws and regulations and customs that govern ownership of land. For a country which is dependent on its agriculture, India has since long seen a struggle to formulate that correct legislation which could bring about positive growth. Every Kingdom, every government constantly endeavoured to regulate the system of land in a way which brought about an increase in the revenue from these lands.

India is predominantly an agrarian country with nearly three fourths of the people dependent on agriculture or rural economy. When India became independent in 1947, huge majority of her people were living in rural areas and

[3] Added by the Constitution (First Amendment) Act, 1951, sec.14.

were dependent on the agrarian economy for their livelihood.[4] The state of this economy was vey poor, primarily as a result of policies of the British. Indian farmers were completely frustrated from the plans and actions of British rulers with respect to agrarian development concern. The living condition of the peasants during British period was so critical and deplorable.

After independence, Indian leaders had to concentrate on harsh realities of country's economy and poverty.[5]Independence had raised high hopes and expectations among all the sections of the society. It was realized that, various revolutionary changes have to be made to protect the interest of agriculturist.

As a result the democratic Governments of States and Centre had moved in a large way to remove the unhealthiest impediments to the progress of the agrarian Sector. Land reform programmes, which were given a place of special significance both in the First and in the Second Plan, had two specific objects. The first is to remove such impediments to increase in agricultural production from the agrarian structure inherited from the past. This should help to create conditions for evolving as speedily as possible an agricultural economy with high levels of efficiency and productivity. The second object which is closely related to the first, is to eliminate all elements of exploitation and social injustice within the agrarian system to provide security for the tiller of soil and assure equality of status and opportunity to all sections of the rural population.

The abolition of zamindari (intermediaries) system was only a small part of the larger programme of economic and social reconstruction undertaken by the Government of India. This larger progarmme involved taking steps for the protection of tenants from arbitrary ejectment, the allotment of land to the landless, the imposition of ceilings on individual holdings, the reduction of rental

[4] See Mohammmed Ghouse, "*Agrarian Reforms v. Social Engineering*", Vol. 10(4), *Indian Bar Review*, 1983, 599, at 600-603.
[5] Vera Michells Dean, *New Patterns of Democracy in India*, 1969, p. 103. [by Prof. P.K. Rao, as quoted in *Supreme Court and Parliament – Right to Property and Economic Justice*, p. 3.]

values of land, the prescription of maximum rental values, the introduction of co-operative farming, the consolidation of holdings, and the like.[6]Since Five –Year Plans became an integral part of the development process, agriculture legislations also became portion of a purposeful national effort for changing the socio-economic condition of the society.

Reforms in agrarian social and economic structure became a top priority after independence. Accordingly, several land reform legislations were passed by various States, aimed mainly at the abolition of intermediaries in the agricultural economy, and the institution of land ceilings. However, problems regarding the constitutional validity of these legislations soon arose, in the context of the Fundamental Rights chapter of the Constitution and this initiation affected the Fundamental Rights of the Zamindars.

Therefore, certain aggrieved zamindars challenged the validity of those Acts in various High Courts of the States on the ground of contravention of Fundamental Rights recognized under Part III of the Constitution. In 1950, the Bihar Land Reforms Act was challenged before the Patna High Court in *Kameshwar Singh v. State of Bihar.*[7] Patna High Court, in this case held that the Bihar Land Reforms Act was violative of fundamental rights and declared unconstitutional. But the Allahabad High Court upheld the relevant agrarian laws passed in Uttar Pradesh.[8]The Nagpur High Court also upheld the agrarian legislation. The person aggrieved by these decisions filed appeals in Supreme Court and some of the parties filed writ petitions under Art.32 directly before the Supreme Court.[9]

Before, however, the Supreme Court in appeals, could give its verdict on the validity or otherwise of this type of legislation, the Central Government under

[6] Dr. B.S.Sinha's *'Law and Social Change in India'* published by Deep and Deep Publications, p.252.
[7] *Kameshwar Singh v State of Bihar*, AIR, 1951, Pat.91, SB.
[8] *Surya Prakash v Uttar Pradesh Government*, AIR, 1951, All.674, FB.
[9] *Supra*.1, p.166

Shri Jawaharlal Nehru became restive at the delay being caused by litigation in furthering the programme of agricultural land reforms and thought of short circuiting the judicial process. Nehru was an ardent supporter of agrarian reform which he regarded as a process of social reform and social engineering. The Centre wanted to remove any possibility of such laws being declared invalid by the courts and have brought the amendment to put an end to all these litigations. Therefore, the Central Government in order to carry out agrarian scheme sponsored by the party in the power brought about the First Constitutional Amendment of 1951 by which Arts.31-A and 31-B were introduced and Ninth Schedule was also incorporated in the Constitution curtailing the power of the Court in the matter of judicial review of land reforms legislation.

2.3 Parliament Debates on Ninth Schedule

The then Prime Minister Nehru introduced the Constitution (First Amendment) Bill in the *Loka Sabha* (Provisional Parliament) on 8th May, 1951. After its introduction, on 16th May 1951, Nehru moved that Bill to amend the Constitution to be referred to a Select Committee consisting of himself and twenty other members of the Provisional Parliament. While moving the Bill he said:[10]

"The Bill is not a very complicated one; not is it a big one. Nevertheless, I need hardly point out that it is of intrinsic and great importance. He further said that, the real important provision which he was putting before the house related to Art.31.[11]*Emphasizing the need of Art.31-B and Ninth Schedule, he said that if they did not make proper arrangements for the land, all their schemes would fail. As such something of the above amendment was necessary.*[12]

Further he opined that "When I think of this Article the whole gamut of picture comes up before my mind. I am not a Zamindar nor am I a tenant, I am an

[10] See. *Parliament Debates*.Vols.XII – XIII, pt.II.p.8814 (1951)
[11] See. *Id*. at 8820-21.
[12] *Id,* at 8831-2

outsider. But the whole length of my public life has been intimately connected with agrarian agitation in my province." The debates in Parliament prior to the enactment of the First Amendment throw light on the factors that led to the creation of the Ninth Schedule.

Pandit Jawaharlal Nehru set the tone of the debates in Parliament on May 18, 1951.[13] Due to the confusion of doubt created by Bihar, Allahabad and Nagpur High Courts on the issue of progressive agrarian reform legislation by giving contrary decisions on the matter Nehru was worried. He said,

"…Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? If there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Therefore, these long arguments and these repeated appeals in courts are dangerous to the State, from the security point of view, from the food production point of view, and from the individual point of view, whether it is that of the zamindar or the tenant or any intermediary."

He further said, Arts.31-A and 31-B were aimed to give effect to a dynamic move of directive principles and strengthen the Constitution.[14] He trusted that immunity to the Scheduled legislations was essential for advancing social change initiated by the State.

On May 29, 1951, after the Select Committee submitted its report on the First Amendment, Nehru said: "It is not with any great satisfaction or pleasure that we have produced this long Schedule. We do not wish to add to it for two reasons. One is that the Schedule consists of a particular type of legislation, generally speaking, and another type should not come in. Secondly, every single measure included in this Schedule was carefully considered by our President and certified by him. If you go on adding at the last moment, it is not fair, I think, or just to this

[13] http://www.frontlineonnet.com/fl2402/stories/20070209005101200.htm
[14] *Parliamentary Debates*, Part II. Vol.XII and XIII (May 15 –June 9, 1951)

Parliament or to the country." Nehru's reply was in response to some members who had given notice of amendments to add other laws to the Schedule.

When the proposed amendment came for discussion in the House, Ranga, Renka Ray, Kala Venkata Rao, M.P.Mishra, Rev.D'Souza, Deshmukh, Frank Anthony, S.L.Sakshena, T.Hussain and Durga Bai supported the amendment.[15]But S.P. Mookerjee, Kunzru, Kamath, Shyamanandan Shaya, Hussain Imam, K.T.Shah and Acharya Kripalani opposed the amendment. They were in favour of awaiting of the decision of apex court on the matter.[16]

Hussain Imam while speaking on the amendment observed that it was an inopportune and unnecessary amendment to the Constitution and it was altogether, so anti democratic that it would be difficult to find in the annals of the history a measure of this nature that had been introduced in any democracy of the world. He explained that, it was inappropriate because no indication in advance was given. It was unnecessary because it was not going to be used by the existing government and the laws that are to be included in the Ninth Schedule had not been pronounced by the highest tribunal to be *ultra vires* the legislature. And it was undemocratic, because Art.31 was included in the list of justiciable rights, but by means of this amendment they were excluding all the jurisdiction of the Court.[17]

Prof. K.T. Shah, a Member of the Constituent Assembly who opposed the Ninth Schedule, appealed against it in order to "uphold the sanctity of the Court", and urged the government to validate the laws to be placed under the Ninth Schedule after the Supreme Court considered them on a reference by the President. But Nehru was categorical. He replied to the debate: "Millions wait and have been waiting for decades. Do you think that lawyers or any petty legal arguments are going to come in the way of these millions? Are we to submit to

[15] *Parliament Debates*.Vols.XII – XIII, pt.II.p.8856-7, 8906, 8950-5, 8963, 8981-3, 9775 (1951)
[16] See, *Id*, at 8836, 8848-9, 8903-4, 8916-7, 8924-33, 8955, 9650-4, and 9720-2.
[17] See, *Id*, at 8955, 8963.

things and wait till some great revolution comes to change the condition of things?"

He further said," The Constituent Assembly took great care to lay down that these changes should not be challenged in a Court of law. In spite of this care, perhaps the language was not clear enough. That was our fault and so it has been challenged and these reforms have been in consequence delayed. Are we to wait for this delaying process to go on and for this process of challenge in Courts of law to go on month after month and year after year? And the people who talk about waiting do not know what is stirring the hearts of those millions outside."

Prior to this even in the Constituent Assembly, on 10th September1949, Pandit Nehru said that, if the property is required for public use it is well established law that it should be acquired by the State, by compulsion if necessary and compensation is paid accordingly by methods laid down by law and the principles governing the source should not be challenged in Courts of law except where there has been any abuse of law or a fraud on the Constitution. But, normally it is presumed that Parliament representing the entire community of the nation will not commit the same and will be very much concerned with doing justice to individual as well as the community.

There has been a tendency for monopoly of wealth and property in a limited number of hands who really dominated the scene and the small man is crushed out of existence by the modern tendency to have money power concentrated in some hands. To break this circle and to provide for equitable distribution of the resources to all, the national leaders were thinking to adopt various legislative measures to achieve the objectives of egalitarian society in a move towards social welfare states and the Ninth schedule was one of them.

The external inspiration for the Ninth Schedule came from Ireland, where land had been unevenly distributed. Art.43 (2) of the Irish Constitution stated that the exercise of the right on land should be regulated by the principles of social

justice. Dr. B.R. Ambedkar explained to the House, the Irish law had appointed a separate board with the power to acquire land, to break up holdings, to equalise land, and to make uneconomic holdings economic ones by taking land from a neighbouring owner, and the right to assign compensation was given to this board. Ambedkar underlined the point that there was no judicial authority to interpret the action of this board and there was no appeal against the board's decision. "Some people took appeals to the Courts, but they held that no appeals lay with any Court," he told the House.

Further he said that, Art.31-B, enumerates in the Ninth Schedule certain laws which had been passed … prima facie it was an unusual procedure, but looked at from the point of view of principles on which those laws were made to acquire estates and neither the principle of compensation nor the principle of discrimination should stand in the way of validity of it. Therefore, sentimentally there might be objection, but from the practical point of view there should not be any objection to declare such laws valid.[18]

Finally the Bill was passed with 238 ayes and 7 noes (Speaker announces the final result by saying 'The Ayes/Noes have it) and received the assent of the President 18th June 1951.[19]Thus the Constitution First Amendment Act, 1951 was passed and added Arts.31-A and 31-B read with Ninth Schedule to the Constitution. This is how, The First Amendment was made to the Constitution in 1951 by the Provisional Parliament. This is the historical background of the Ninth Schedule which was added to the Constitution along with Art.31-B.

The rationale for Art.31-B and the Ninth Schedule becomes clear on reading the Parliament debates on the First Amendment relating to the Ninth Schedule. It is not the fear of the judiciary striking down land reform laws that compelled the Nehruvian state to prevent judicial review of those laws, but its

[18] See. *Parliament Debates*.Vols.XII – XIII, pt.II.p. 9005, 9024, 9027-8. (1951)
[19] See, *Id.* at 9936.

remarkable degree of impatience - characteristic of those early years following the achievement of freedom - with the conservatism of the judiciary. Therefore, the rationale for the Ninth Schedule, as articulated by Nehru and Ambedkar in the early 1950s, continues to be relevant even today.

An Act is included in the Ninth Schedule by exercising the Constituent Power of Parliament i.e. by process of Constitutional majority and it is for this reason that all subsequent amendments made by a simple majority to those Acts are open to challenge in courts, though not the Act itself. To begin with, only Acts abolishing zamindari were included in the Schedule.

2.4 The Constitution (First Amendment) Act, 1951

The Statement of Objects and Reasons stated in the Constitution (First Amendment) Act, 1951, are as follows:

2.4.1 Statement of Objects and Reasons

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements especially in regard to the chapter on Fundamental Rights. In this regard unanticipated difficulties have arisen in Art.31. The validity of agrarian reform measures passed by the Legislatures, in spite of the provisions of clauses (4) and (6) of Art.31, formed the subject-manner of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people has been held up.

The main object of this Bill is, to insert provisions fully securing the Constitutional validity of Zamindars abolition laws in general and certain specified State Acts in particular. The opportunity has been taken to propose a few minor amendments to other Articles in order to remove difficulties that may arise.

2.5 Insertion of Art.31-B read with Ninth Schedule

After Art.31 of the Constitution the following Articles shall be inserted, and shall be deemed always to have been inserted, namely Arts.31-A[20] and 31-B.[21] No doubt these two Articles are exception to Art.13 of the Constitution.[22] Though the laws enacted by the legislature under Arts.31-A and 31-B contravene the Fundamental Rights recognized under part III of the Constitution, it is necessary to make those laws which are constitutionally valid, in order to give effect to the agrarian reforms and to establish egalitarian society.

Art.31-B operates to immunize legislations from challenge on the grounds that they violate Fundamental Rights. Furthermore, it acts retrospectively to confer

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[20] **31-A. Saving of laws providing for acquisition of estates etc**.:-
(1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights, therein or for the extinguishments or modification of any such rights shall be deemed to be void on the ground that it is in consistent with, or takes away or abridges any of the rights, conferred by any provisions of this part; provided that where such law is law made by the legislature of a state, the provisions of this Article shall not apply thereto such law, having been reserved for the consideration of the President, has received his assent.
(2) In this article:
the expression 'estate' shall, in relation to any local area have the same meaning as that expression or its local equivalent, has in the existing law relating to land tenures in force in that area and shall also include any jagir, inam or maafi or other similar grant :the expression 'right', in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, under proprietor tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

[21] After Article 31A of the Constitution as inserted by Section 4, the following Article shall be inserted namely: **"31-B. Validation of Certain Acts and Regulation:** "Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or even to have become void, on the ground that such Act, regulation as provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgement, 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."

[22] 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.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

validity on Acts and Regulations which have been previously declared void under Art.13, such that these Acts and Regulations are to be treated as having been valid since their inception. On a plain reading, this seems a drastic provision- several members of Parliament who opposed the First Amendment criticized it as undemocratic, on the grounds that it eradicates the judicial review of laws as against the provisions of Part III.[23]

Art.31-B[24] has to be read with the Ninth Schedule because it is only those Acts and regulations which are put in that Schedule that can receive the protection of that article. This Schedule was added under section 14 of the First Amendment Act 1951. According to this Section 5 and 14 of the said Act, as and when Acts and Regulations are put into the Ninth Schedule by constitutional amendment made from time to time, they will automatically by the reason of the provisions of Art.31-B, receive the protection of that Article[25].

2.5.1 Retrospective Effect of Art.31-B

The very significant characteristic of Art.31-B is that it is having retrospective effect. As result of this effect, any legislation which is previously declared void by the Supreme Court on the ground that it violated any of the fundamental rights, receives protection if such void legislation is introduced in the Ninth Schedule by the Constitutional Amendment. Any Act, cannot after its introduction in the Ninth Schedule be declared void or ever to have become void, on the ground of its inconsistency with any fundamental right. In *State of Uttar Pradesh v. Brijrnder Singh*[26]*case,* Supreme Court also made above observations.

Because of this characteristic of Art.31-B, it became very easy for the Parliament to validate any Act already declared unconstitutional, simply by

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[23] Baldev Singh, "*Ninth Schedule to Constitution of India: A Study*", 1995, Vol. 37(4), *Journal of the Indian Law Institute*, 457, at 464.
[24] Inserted under Section 5 of the First Amendment Act 1951
[25] Jagadish Swarup's '*Constitution of India, Vol.-2 (Arts.23 -239)'* published by Modern Law Publications, New Delhi, 2008 edition, p.1424.
[26] AIR 1961 SC 14.

putting such unconstitutional Act in the Ninth Schedule. Once legislation enters into the protective umbrella of the Ninth Schedule its constitutionality cannot be challenged as per the wordings of Art.31-B.

The protection of Art.31-B is only available to original Acts included in the Ninth Schedule. Similarly, in *Prag Ice and Oil Mills v. Union of India*,[27] it has been held that order and notifications made under the Acts included in the Ninth Schedule also are not entitled to protection of Art. 31-B as they are not the part of the original Acts.

2.5.2 Ninth Schedule

The Ninth Schedule and Arts.31-A and 31-B represent a novel, innovative and drastic technique of Constitutional amendment. It is an interesting innovation in the area of Constitutional Amendment. A new technique of by-passing judicial review was initiated. Any Act incorporated in the Schedule becomes fully protected against any challenge in a Court of law and any Fundamental Rights. The Ninth Schedule was drafted by the Nehru government in 1951. It emanates from Art.31-A and 31-B which were introduced by the Constitution (First Amendment) Act, 1951, with effect from June 18, 1951 ensure certain laws were valid even if it violated the fundamental rights of citizen.

The Schedule was not envisaged by our founding fathers at all. In fact, it owes its birth to ideological battles in the nascent republic between the progressive executive and legislature on the one hand and the conservative judiciary on the other.[28] According to the provision of Art.31-B, "none of the laws specified in the Ninth Schedule shall be deemed to be void on the ground that it was inconsistent with any of the Fundamental Rights, notwithstanding any judgement, decree or order of any court or tribunal to the contrary." This meant that the laws put in the Ninth Schedule were not subject to judicial review. The justification offered was

[27] AIR 1978 SC 1296. See also, *Godavari Sugar Mills v. S.B Kamble*, AIR 1975 SC 1193.
[28] See, The Times of India (Bangalore 12th January 2007)

that Courts should not be allowed to get in the way of socialist polices such as land reforms. As the researched mentioned earlier Art.31-B, which gives blanket protection to all items in the Ninth Schedule, is also retrospective in nature. So, even if a statute which has already been declared unconstitutional by a court of law is included with in the Schedule, it is deemed to be constitutionally valid from the date of its inception. In short, the judicial decision is nullified when the statute is included in the Schedule.

Thus, initially only thirteen State Acts were put beyond any challenge in courts for contravention of Fundamental Rights. But Schedule Nine has swelled and swelled in course of time as all kinds of statutes have been included therein to protect them from judicial review so much so that today the Schedule contains as many as 284 entries.

2.5.3 Objectives of Ninth Schedule

When the Ninth Schedule was introduced through the First Amendment of Constitution, then the framers felt the following objectives for its adoption and inclusion. They are:

- To protect the agrarian reforms laws i.e. to say to push land reforms.
- To abolish the zamindari system which was deemed to be an evil and a terrible evil of feudalism should be ended and socialism should be ushered in, was a slogan then.
- To immunize certain Acts and regulations from a challenge and the ground of violations of Fundamental Rights under Arts.14 and 19 of the Constitution. Thus its very purpose was to deprive the powers of court to challenge the validity of the Act passed by the legislation.
- To bring the weaker section of the society into main stream and uphold the interest of same category.

- To promote social change towards a more equal justice and the Constitutional goal of egalitarianism.[29]
- To reduce the concentration of land in a few hands, so that the agriculturist may feel sure of reaping the fruits of his labour.[30]

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. In order to remove such an obstacle and fulfill the above mentioned objectives, Art.31-B read with Ninth Schedule was incorporated under the provisions of the Constitution through First Amendment Act, 1951. Thus speaking truly and contextually, the singular objective "behind Art.31-B read with Ninth Schedule is to remove difficulties and not obliterate part III in its entirety or judicial review"[31] the objective was essentially to accelerate the process of land reforms.

2.6 Constitutional Amendments and the Overburdening of Ninth Schedule

Various Constitutional amendments which added/omitted various Acts/provisions in the Ninth Schedule from Item No. 1 to 284. It is as under:

Table 2.1

Sl.No.	Amendments	Year	No. of Laws
1	1st Amendment	1951	1-13 (13)
2	4th Amendment	1955	14-20 (7)
3	17th Amendment	1964	21-64 (44)
4	29th Amendment	1971	65 -66 (2)
5	34th Amendment	1974	67-86 (20)

[29] Journal of the Indian Law Institute 1995, Vol. 37, P. 467
[30] Ibid.
[31] *I.R.Coelho* at 890(para 139)

6	39th Amendment	1975	87-124 (38)
7	40th Amendment	1976	125-188 (64)
8	47th Amendment	1984	189-202 (14)
9	66th Amendment	1990	203-257 (54)
10	76th Amendment	1994	257-A (1)
11	78th Amendment	1995	258-284 (27)

Table 2.2

No.	Subjects	No. of Acts
1	Laws Relating to Agrarian /Land[32]	249
2	Laws Relating to Industrial Development[33]	15
3	Laws Relating to Economic offences[34] Ex:COFEPOSA,1974,FERA1973,MRTPAct,1969 etc.	07
4	Laws Relating to Social Welfare Ex: Insurance Law, General Business (Nationalization) Act1972, Levy Sugar Price Equalization Act 1976 etc.[35]	06
5	Laws Relating to Elections and Press[36]i.e. Representation of the People Act 1951 with its amendment made in 1974 and 1975 and Prevention of Publication of Objectionable Matters Act 1976.	2
6	Law Relating to Reservation[37]i.e.Tamilnadu Reservation Act 1994.	1
7	Law Relating to P.T.C.L. [38]	1
8	Miscellaneous Laws[39]	3
	Total	284

[32] See, Ninth Schedule of the Indian Constitution.
[33] See, the Constitution of India, Schedule nine, Entries 18, 19, 88, 90, 93, 94, 96, 97, 98, 99, 101, 102, 105, 131, and 148.
[34] See, *Id*., Entries 126, 127, 129, 148, 149, 91 and 18.
[35] See, *Id*., Entries 95, 125, 17, 128, 131 and 92.
[36] See, *Id.*, Entries 87 and 130.
[37] See, *Id*., Entry 257-A.
[38] See, *Id.*, Entry 267.
[39] See, *Id.*, Entries103, 133 and 149.

The Constitution (First Amendment) Act, 1951, Sec. 14 had included initially only thirteen Acts in the Ninth Schedule. The Constitution (Fourth Amendment) Act, 1955, Sec. 5 added another seven entries and Section 5 of the Act read: "In the Ninth Schedule to the Constitution after entry 13, the following entries shall be added…" The Constitution (Seventeenth Amendment) Act, 1964, Sec. 3 with the same formula, added another forty-four Acts, without specifying any grounds for protection bringing the number to sixty four. The Constitution (Twenty Ninth Amendment) Act, 1972, Sec. 2 added only two more Acts Viz. The Kerala Land Reforms (Amendment) Act, 1969 and The Kerala Land Reforms (Amendment) Act, 1971, which were upheld by the Supreme Court in *Kesavananda Bharati v. State of Kerala*.[40]The Constitution (Thirty Fourth Amendment) Act, 1974, Sec. 2 added not less than twenty Acts and the score was eighty six. Then the Constitution (Thirty Ninth Amendment) Act, 1976 Sec. 5 which added 38 Acts and raised the score of 124. Then, the Constitution (Fortieth Amendment) Act, 1976, Sec. 3 took the figure to 188.

In 1978, Entries 87, 92 and 130 respectively relating to the Representation of Peoples Act, 1978 and Election Laws (Amendment) Act, 1975 and Maintenance of Internal Security Act and Prevention of Publication of Objectionable Matters, Act 1976 were omitted by the Constitution (Forty Fourth Amendment) Act, 1978, Sec. 44. Fourteen Land Reforms Acts, passed in various States were included in the Ninth Schedule of the Constitution by the (Forty Seventh Amendment) Act, 1984. Then, the Constitution (Sixty – Sixth Amendment) Act, 1990, Sec. 2 added Fifty Four Land Reforms Acts which lifts the score to 257. Entry 257-A was inserted by the Constitution (Seventy Sixth Amendment) Act, 1994 relating to the Act passed by the State of Tamil Nadu providing 69% reservation for Backward Classes, Scheduled Casts and Scheduled Tribes in Educational Institutions and Appointment as Posts in State Services

[40] (1973) 4 SCC 225.

(Contrary to the Supreme Court's Judgements in *Indra Sawhney's Case*[41] fixing ceiling of 50% reservation of all categories put together), was inserted into the Ninth Schedule against the original objective of Art.31-B and Ninth Schedule of confining it to land reforms legislations. Thereafter, 27 Land Reform Laws (Entries 258 to 284) were inserted in the Ninth Schedule by the Constitution (Seventy – Eighth Amendment) Act, 1995, Sec. 2, which finally makes a 'king size' Ninth Schedule containing 284 legislations receiving protection under Ninth Schedule from the judicial scrutiny. Then, this process has stopped because the Ninth Schedule threatened to become longer than Constitution, itself and offered to absorb all legislations which might be questioned.

The Ninth Schedule now contains Union as well as State Legislations, Land Reform Laws containing agricultural land acquisition as well as non-agricultural land acquisition, Tenancy laws, Land Ceiling Acts, Zamindari Abolition Acts, Laws of Eviction and various other land laws. Some other categories of laws like Tax, Revenues, Railway, Industries, Insurance, Coal, Mines, Textiles, Trade Practices, Essential Commodities, Motor Vehicle Act, etc. are added to the Ninth Schedule which are contrary to the very purpose of its creation. Thus, it shows the tenancy of Parliamentarians to escape from the clutches of Judiciary for gaining their selfish motives.

2.7 Nature and Scope of Article 31-B read with Ninth Schedule

It has already been pointed out that the Ninth Schedule has today become a constitutional dustbin and house for every controversial law passed by the government of the day. Such a situation was not envisaged at the time, the First Amendment was enacted. It is argued here that a correct interpretation of the language of Art.31-B can effectively end this problem.

[41] *Indra sawhney v. Union of India (Mandal case)* A.I.R. 1993 S.C. 477.

Arts.31-A (1) and 31-B are intended to operate as protections against consequences which could otherwise mean breach of Constitution. Legislation falling under any part of Art.31-A (1), including the provisions, can also receive protection under Art.31-B. If conditions of either article are satisfied, there is no bar to a legislation receiving double protection.[42] In this connection, to know further about relationship between Arts.31-A and 31-B, Prof. A.R. Blackshield's observation is relevant for the discussion. He considered the opening words of Art.31-B (Without prejudice to the generality of the provisions contained in Art.31-A) as structural interconnection between Arts.31-A and 31-B. That gives rise to an inference that Art.31-B read with Ninth Schedule is particularization of Art.31-A itself.[43]

But unfortunately, the judicial approach on this matter is not on the above lines, with a result that Ninth Schedule has become an open ended weapon of protecting unconstitutional laws indefinitely in terms of time, subject and space.[44] *In Vishweshwara v. State of Madhya Pradesh,*[45] the Court observed Art.31-B as independent of Art.31-A. Thereafter, the opening words of Art.31-B were interpreted by the Supreme Court in *N.B. Jeejeebhoy* v. *Assistant Collector, Thana*[46] as implying that "the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Art.31-A of the Constitution." The Court's reasoning was that "if every Act in the Ninth Schedule would be covered by Art.31-A, this Article would become redundant." Further, they derived support from the existence in the Ninth Schedule of laws unrelated to 'estate' as defined in Art.31-A(2), and concluded that Art.31-B was not governed by Art.31-A.

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[42] *Hasmukhlal Dahayabhai v. State of Gujarat*, AIR 1976 SC.2316

[43] See A.R. Blackshield, "*Fundamental Rights and the Economic Viability of the Indian Nation*", Vol. 10(1), Journal of the Indian Law Institute, 1968, 107, for another argument to the effect that Art.31-B, by virtue of its opening phrase, is a particularization of Art.31-A.

[44] *Ibid*, p.99

[45] 1952 SCR 1020

[46] AIR 1965 SC 1096

It is submitted that this reasoning is misleading, and that the correct conclusion was arrived at by J. Bhagwati in *Minerva Mills* v. *Union of India*,[47] when he stated that "the Ninth Schedule of Art.31-B was not intended to include laws other than those covered by Art.31-A." In this regard, it is submitted that the correct interpretation of the phrase 'without prejudice to the generality of Art.31-A' can be arrived at in the following way. The ambit of Art.31-A extends to five types of laws, corresponding to sub-clauses a) to e) of its first clause. Now, by providing that Art.31-B does not detract from the generality of Art.31-A, what is meant is that although a law may be included in the Ninth Schedule under Art.31-B, this does not mean that it is thereby deprived of the protection afforded by Art.31-A.

The kind of laws which are entitled to protection under Art.31-B are also necessarily entitled to protection under Art.31-A, although there may be many laws under Art.31-A which are not covered by Art.31-B i.e. which are not included in the Ninth Schedule. Infact, there would be no purpose in providing that Art.31-B does not detract from the generality of Art.31-A unless their subject matters overlapped. As for the reasoning in *Jeejeebhoy*, the Court was wrong in supposing that the above interpretation would make Art.31-B redundant, because the protection it affords is greater than that provided by Art.31-A. Also, the fact that there exist many laws in the Ninth Schedule unrelated to Art.31-A is indicative, not of the correct use of Art.31-B, but of its blatant misuse. Therefore, it is submitted that Art.31-B should be interpreted as above, so as to render unconstitutional any additions to the Ninth Schedule which are not covered by Art.31-A.[48]

Art.31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Art.13 read with other relevant Articles in Part III, while Art.31-B purports to validate certain specified

[47] AIR 1980 SC 1789
[48] *Supra* 44

Acts and Regulations already passed which but for such a provision would be liable to be impugned under Art.13.

The scope of Art.31-B is wider in nature than Art.31-A, as Art 31-A is limited to property related laws and regulations, Art.31-B not only stand independent of Art.31-A, but will also validate a law if it contravenes the provisions of Art.31-A. The protection of Art.31-B extends to the Act as it stoods on the date of its inclusion in Ninth Schedule. It means that, the protection would not apply to the Act after the inclusion within the Schedule. The reason for this is, while the inclusion of an Act requires an exercise of the amending powers of Parliament, an amendment to the Act can be made by ordinary legislative process. Thus, it can be said that, wide range of powers are given to the legislature under Art.31-B. No review of policies and principles enshrined within the State laws could ever be or were ever inspected by the Courts.

Since 1951, the Ninth Schedule has been expanded constantly so much so that today 284 Acts are included therein. From the context of Art.31-B it is put under the heading of right to property immediately after Arts.31 and 31-A, and its opening words are "without prejudicing the generality of the provisions contained in Art.31-A" – it could plausibly be assumed that Art.31-B was meant to protect legislation dealing with property rights and not any other type of legislation. But, in practice, Art.31-B has been use to invoke protection for many laws not concerned with property rights at all. Art. 31-B is thus being used beyond the socio- economic purposes which was its only justification.[49]

After examining the relationship between Arts.31-A and 31-B, the researcher made an attempt to find out the exact difference between these two Articles through below mentioned table.

[49] M.P.Jain's '*Indian Constitutional Law*', Wadhwa and Company Ltd, Fifth edition 2003, p.1509.

Table 2.3

Sl No.	**Article 31-A**	**Article 31-B**
1.	Art.31-A validates law which would otherwise contravene Art.31(2) but its operation is restricted to laws providing for acquisition of estates and other matter mentioned in sub-clause (1).[50]That means This Article provides protection only to the laws enacted by the competent legislature with in the purview of clauses (a) to (e) of Art.31-A(1).	Art.31-B specifically validates certain Acts in the Ninth Schedule despite the provision of Art.31-A. It is not illustrative of Art.31-A, but stands independent of it.[51]
2.	This Article protects specified laws enacted by the legislatures only against Arts.14, 19 and 31 of the Constitution.	Whereas this Article protects the laws placed in the Ninth Schedule, no matter what character, kind or category they may be, against all fundamental rights.
3.	Art.31-A gives definite criterion and it provides for a standard by which laws stand excluded from judicial review.	Art.31-B provides no definite criterion or standards.
4	Jurisdiction of Parliament and State legislatures to enact law under Art.31-A is so limited.	Jurisdiction of Parliament to enact law under Art.31-B is Unlimited. So Art.31-B has wider jurisdiction than Art.31-A.
5	Art.31-A has no competency • to give retrospective effect to agrarian or economic legislations, • to override the judicial decisions.	Where as Art.31-B alone is competent • to give retrospective effect to agrian or economic legislations, • to override the judicial decisions.
6	Art.31-A cannot extend protection to the laws placed in the Ninth Schedule unless those laws fall under the category of Art.31(A)(1)(a) to (e) of the Constitution.	Where as Art.31-B can extend protection even to the laws made under Article 31-A.(Law relating to Acquisition etc.) i.e. Double protection.

[50] *Pritam Singh Chahil v. State of Punjab*, AIR 1967 SC 930.
[51] *State of Bihar v. Kameshawar Singh*, AIR1952, sc 252.

2.8 Constitutional Amendments and the Ninth Schedule

Constitutional validity of laws placed in the Ninth Schedule through different amendments have been questioned from *Shankari Prasad*[52] case to *Kesavananda Bharathi*[53] and from Forty-fourth Amendment to *I.R.Coelho case.* The Ninth Schedule has the effect of nullifying the judicial pronouncement prospectively as well as retrospectively. It is agreed by all, that the legislature can nullify the effect of judicial decisions by changing the basis of decision and giving it retrospective effect. However, it is not open for the legislature to directly overrule a decision pronounced by the competent Court.[54] It can neither be done in the exercise of ordinary legislative power nor in the exercise of the constituent or amendment power.[55] In all cases, the challenge was against the law relating to the agrarian revolution. Hence, all these cases are dealing with agrarian revolutions which are discussed below in brief.

2.9 Status of Ninth Schedule in Pre *I.R.Coelho's* case

When Arts.31-B read with Ninth Schedule have been inserted through Constitution (First Amendment) Act in 1951, same was challenged in *Shankariprasad v. Union of India.*[56]Two principal contentions were urged for the petitioners. In the first place it was urged that the Constitution-makers had in mind of Art.11 of the Japanese Constitution declaring certain rights to be "eternal and inviolate" and also Art.5 of the U.S. Constitution by which "No State shall be deprived of its equal representation in the senate without consent."Art.13 was thus intended to place the fundamental rights beyond the reach of even Constitution Amendment. Secondly, the definition of law in Art.13(3) being inclusive

[52] *Shankari Prasad v.Union of India* A.I.R. 1951 S.C. 458.
[53] *Supra.* 40.
[54] See, *Tirath Ram Rajendra Nath v. State of U.P.*(1973) 3 SC.585
[55] Baldev Singh, "*Ninth Schedule to Constitution of India: A Study*", Vol. 37(4), *Journal of the Indian Law Institute*, , at 462.
[56] *Shankari Prasad v. Union of India* A.I.R. 1951 S.C. 458.

definition must necessarily include a Constitutional Amendment and hence a Constitutional Amendment also comes with in the prohibition of Art.13 (2). A unanimous Bench of Five Judges rejected both the contentions. The Court pointed out that the terms of Art.368 are perfectly general and confer power on Parliament to amend the Constitution without exception whatever. The terms of Art.13 (2) are also general. Hence by the rule of Harmonious Construction, Art.13(2) should be read down so as to exclude a Constitutional Amendment. Further, Court observed that, there is a well-recognised distinction between Constitutional Law and Ordinary Law, the former being made in exercise of *constituent* power while the latter is made in exercise of *legislative* power. Hence, a constitutional amendment made under Art.368 will not come with in the mischief of Art.13(2).

Another contention before the Court was that since the First Amendment declares that certain kinds of law will not be void for violation of Fundamental Rights, the jurisdiction of Supreme Court and High Courts was to that extent curtailed and therefore the First Amendment required ratification by the State Legislatures under the Proviso to Art.368. The Court rejected the argument as proceeding on a misconception that the First Amendment sought to make any changes in Arts.226, 132 or 136. The powers of the Court under those Articles still remain intact: only certain classes of cases have been excluded from the operation of Art.13 so that there will be no occasion for the Courts to exercise their powers in respect of those cases. Thus, the First Amendment, and the power of Parliament to abridge or take away any of the Fundamental Rights by a constitutional amendment made under Art.368, were upheld by an unanimous Court.

After nearly fifteen years of settled Constitutional law, a second attempt to challenge the power of Parliament to amend the Fundamental Rights was made in *Sajjan Singh v. State of Rajasthan,*[57]writ petitions were filed impugning the

[57] AIR, 1965 SC 845

validity of the Constitution (Seventeenth Amendment) Act, 1964 as petitioners were affected by one or the other Acts, added to the Ninth Schedule by the impugned Amendment. It was argued that the impugned Amendment was invalid, as the impugned Act passed by the Parliament was merely validating the land legislation already passed by the State Legislature, falling within its jurisdiction. And also that the impugned Act purported to set aside the decisions of Courts by adding to the Ninth Schedule, Acts, which were declared to be invalid.

The Court held with respect to the question of powers of Parliament to validate State laws, by amending the definition 'estate' in Art.31-A by the Constitution (Seventeenth Amendment) Act, 1964, that even though land was in the State list, Parliament was competent to enact Seventeenth Amendment if it has power to amend Fundamental Rights. Court also held that, the constituent power conferred by Art.368 on the Parliament could also be exercised both prospectively and retrospectively.[58]It was noted that Arts.31-A and 31-B were added to the Constitution realizing that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the Courts of law on the ground that they contravene the Fundamental Rights guaranteed to the citizen by Part III of the Constitution. The Court observed that the genesis of the amendment made by adding Arts.31-A and 31-B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, it would be clear that the Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy viz. a policy in which the party in power believes. Finally the Court upheld the Constitutional validity of the impugned amendment.

[58] *Ibid*, p. 854

In I.C. Golaknath v. State of Punjab[59] case the validity of the Constitution (17th Amendment) Act, 1964 was again challenged which inserted certain State Acts in Ninth Schedule. This case is the most controversial one which dealt by the Supreme Court relating to the right to property issue. The Supreme Court in this land mark decision overruled the decision given in the *Shankariprasad and Sajjan Singh's* case. It held that the Parliament had no power from the date of this decision to amend Part III of the Constitution so as to take away or abridge the fundamental rights. Eleven Judges participated in this decision with the ratio being 6:5.The judges were worried about the numerous amendments made to abridge the fundamental rights since 1950. It apprehended that if the Courts were to hold that the Parliament had power to take away fundamental rights a time might come when these rights are completely eroded. Chief justice in this case applied the doctrine of the prospective overruling and held that this decision will have only prospective operation and, therefore, the 1st, 4th and 17th amendment will continue to be valid. It means that all cases decided before the *Golaknath's* case shall remain valid.

In order to remove difficulties created by *Golaknath's* decision Parliament enacted the 24th Amendment.[60]This Amendment added a new clause (4) to Art.13 which provides that nothing in this Article shall be applied to any amendment of these Constitution made under Art.368.[61]

It also inserted a new sub clause (1) of Art.368[62], which provides that notwithstanding anything in the Constitution, Parliament may, in exercise of its constituent power amend by way of addition, variation, or repeal any provision of this Constitution in accordance with procedure laid down in the Article. Thus the 24th Amendment restored the amending power of the Parliament. The validity of the 24th Amendment was challenged in the case of *Keshavananda Bharathi v.State*

[59] AIR, 1967 SC 1643.
[60] Ins by the Constitution (24th Amendment) Act 1971 section 3.
[61] Article 13(4) inserted in 24th Amendment, section 2 (w.e.f. 5-11-1971).
[62] 368(1) inserted by 24th Amendment under section 3.

of Kerala.[63] It also challenged the validity of the Kerala land reform Act 1963. But during the pendency of the petition the Kerala Land Reforms Act was placed in the Ninth Schedule by the 29th Amendment.[64]The question involved was the extent of the amending power conferred by Art.368 of the Constitution. A special bench of the 13 judges were constituted to hear the case. The Court by majority overruled by the *Golaknath'*s case which denied Parliament the power to amend fundamental rights of citizens. It held that the 24th Amendment merely made explicit which was implicit in the unamended Art.368. The Court further held that under the Art.368, Parliament is not empowered to amend the basic structure or framework of the Constitution. After the decision of the supreme court in *Keshavananda Bharathi* and *Indira Gandhi*[65]cases the Constitution (42nd Amendment) Act, 1976, was passed which added two new clauses, namely, clause 4 of Art.368 Provided 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 (42nd Amendment) Act, 1976 shall be called in any court on any ground'. Clause 5 of Art.368 removed any doubts about the scope of the amending power.[66] It declared that there shall be no limitations 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.

Thus by inserting this clause it was made clear that the basic structure of the Constitution could be amended. In *Minerva Mills v. Union of India*,[67] the Supreme Court by 4 to 1 majority struck down clauses (4) and (5) of Art.368[68]inserted by the 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the Constitution. Since these clauses removed all limitations on the amending power and there by

[63] *Keshavananda Bharathi v.State of Kerala* A.I.R. 1973 S.C. 1461.
[64] Constitution (29th Amendment) Act 1972.
[65] *Indira Gandhi v. Rajanarayan* A.I.R. 1975 S.C. 2299.
[66] Amendment to Article 368(1) in 42nd Amendment.
[67] *Minerva Mills v. Union of India* A.I.R. 1980 S.C. 1789.
[68] 368(4) & (5) inserted in constitution (42nd amendment) Act 1976 under section 65.

conferred an unlimited amending power, it was destructive of the basic structure of the Constitution. The judgement of the Supreme Court thus makes it clear that the Constitution and not the Parliament which is supreme in India. The Parliament owes its existence to the Constitution and it cannot take priority over the Constitution. Therefore this landmark decision ended the long controversy between courts and the executive.

In *Waman Rao v. Union of India*,[69] the Supreme Court ruled by majority that all laws and regulation included in the Ninth Schedule before 24th April, 1973 could not be challenged on the ground of being inconsistent with a Fundamental Rights. But Acts and Regulation included in the Ninth Schedule after 24th April, 1973, would not be protected by Art.31-B for simple reason that because of *Keshavananda Bharathi* case decision in which Constitution bench held "in every case where Constitutional Amendment includes a laws in the Ninth Schedule, its constitutional validity would have to be considered by reference to the basic structure doctrine and such Constitutional Amendment would be liable to be declared invalid to the extent to which it damages or destroys the basic structure of the Constitution.

In *Waman Rao case*, judicial observation which create an ambiguity i.e. Whether all Acts or Regulations which or a part of which, is or has been found by the Supreme Court to be violation of any of the Arts.14, 19 and 21 can be included in the Ninth Schedule and 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.

The bench in *I.R.Coelho case*[70] observed that the judgement in *Waman Rao case* needed to be reconsidered by the Nine judges bench in view of certain inconsistencies.

[69] *Waman Rao v. Union of India* A.I.R. 1981 S.C. 271.
[70] *I.R.Coelho v. State of Tamilnadu* A.I.R. 1995 S.C. 3197.

2.10 Development of Ninth Schedule in Post *I.R.Coelho's Case* (old, 1999)

In the present study this case is of utmost importance as it is the recent case relating to the confrontation of power between the Supreme Court and the Parliament. The judgement in this case put an end to the politico-legal controversy by holding the Parliament's amending power subject to Judicial Review in line with *Kesavananda Bharti's* decision that the violation of Doctrine of Basic Structure will not be considered.

The Nine-Judge bench headed by Y.K. Sabharwal, C.J.I., after a reference being made to it by a Five-judge Bench has unanimously pronounced upon the constitutional validity of the Ninth Schedule laws that, in the post-1973 era, they are open to attack for causing the infraction which affects the basic structure of the Constitution. Such laws will not get the protection of the Ninth Schedule for escaping the judicial scrutiny and are open to challenge in the courts of law.

In this connection, the researcher has made an attempt to analyse the case by stating the facts of the case, the issues involved, the contentions of the petitioner and respondents and the concluding decision of the Apex Court which is most important. The researcher has also placed the development of law that has been considered by the Supreme Court.

2.10.1 I. R. Coelho v. State of Tamil Nadu (New, 2007)[71]

The recent judgement by the Supreme Court in *I.R.Coelho* has initiated the thought process among various segments and different interpretations have emerged. It is an unanimous judgement of the nine judge bench of the Supreme Court of India, wherein the Court is confronted with a very important yet not very easy task of determining the nature and character of the protection provided by Art.31-B of the Constitution of India to the laws added to the Ninth Schedule by amendments made after 24th April 1973, the date on which the judgement was

[71] 2007(1) SC, 197 Quorum; Y.K. Sabharwal, CJI., Ashok Bhan, Arijit Pasayat, B.B. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir and D.K.

pronounced in the *Kesavananda Bharathi's* case propounding the doctrine of basic structure of the Constitution to test the validity of constitutional amendments.

2.10.2 Brief Facts of the Case

The order of reference was made more than seven years ago by a Constitution Bench of Five Judges as reported in *I.R. Coelho (Dead) by L.Rs v. State of Tamil Nadu.*[72] The Gudalur Janmann Estates (Abolition and Conversion into Ryotwari), Act, 1969 (the Janman Act), in so far as it vested forest lands in the Janman estates in the State of Tamil Nadu, was struck down by this Court in *Balmadies Plantations Ltd and Anr. v State of Tamil Nadu*[73] because this was not found to be a measure of agrarian reform protected by Art.31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgement by the State of West Bengal was dismissed. By the Constitution (Thirty-Fourth Amendment) Act, the Janman Act, in its entirety was inserted in the Ninth Schedule and in the Constitution (Sixty – Sixth Amendment) Act, the West Bengal Land Holding Revenue, Act. 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject matter of challenge before a Five Judges Bench. It rests on two counts (1) Judicial review is a basic feature of the Constitution; to insert in the Ninth Schedule an Act which, or part of which, has been struck down as unconstitutional in exercise of the power of judicial review, is to destroy or damage the basic structure of the Constitution. (2) To insert in the Ninth Schedule after 24.4.1973, an Act which, or part of which, has been struck down as being violative of the Fundamental Rights conferred by Part III of the Constitution is to destroy or damage its basic structure. These insertions were the subject matter of challenge before a Five Judge Bench. The contention urged before the Constitution Bench was that the statutes, inclusive of the portions

[72] (1999) 7 SCC 580(14.9.1999)
[73] (1972) 45 2 SCC 133

thereof which had been struck down, could not have been validly inserted in the Ninth Schedule.

2.10.3 Five Judges Constitution Bench

The Constitution Bench observed that, according to *Waman Rao and Ors. v Union of India and Ors*,[74] amendments to the Constitution 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 the 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*[75] and *Maharao Sahib Shri Bhim Singhji v Union of India & Ors*[76] were also noted and it was observed that the judgement 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.

2.10.4 Question before Supreme Court

Whether on and after 24th 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.

2.10.5 Development of the law

The researcher thinks it proper to place the developments that have taken place and considered by the Supreme Court in the present case. The Constitution was framed after an in depth study of manifold challenges and problems including

[74] (1981) 2 SCC 362
[75] (1980) 3 SCC 625
[76] (1981) 1 SCC 166

that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State's welfare obligations in Part-IV.The Constitutions of various countries including that of United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The Fundamental Rights Chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitutions of most of the other countries, the Supreme Court and High Courts are vested with original jurisdiction respectively under Art.32 and 226 of the Constitution.

In respect of law relating to agrarian reforms concern, firstly, the challenge was made in *Kameshwar v. State of Bihar*.[77]The High Court of Patna in this case held that a Bihar legislation relating to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain zamindars had also approached the Supreme Court under Art.32 of the Constitution. It was, at this stage, that Parliament amended the Constitution by adding Arts.31-A and 31-B 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 of the citizen. Art.31-B was not part of the original Constitution. As the researcher has discussed earlier, it was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added Ninth Schedule containing thirteen items, all relating to land reform laws, immunizing these laws from challenge on the ground of contravention of Art.13 of the Constitution.

[77] (AIR 1951, Patna, 91)

Thereafter, the Constitutional validity of the First Amendment, Court was challenged and upheld in Sri *Sankari Prasad Singh Deo v. Union of India and State of Bihar.*[78]

Then, the Constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in *Sajjan Singh v. State of Rajasthan.*[79] Upholding the constitutional amendment, the law declared in *Sankari Prasad* was reiterated. In *I.C. Golak Nath & Ors. v. State of Punjab & Anr.*[80] A bench of 11 judges considered the correctness of the view that had been taken in *Sankari Prasad and Sajjan Singh cases.* By majority of six to five, these decisions were overruled. It was held that the constitutional amendment is 'law' within the meaning of Art.13 of the Constitution. Soon after *Golak Nath's case*, the Constitution (24th Amendment), Act 1971and the Constitution (29th Amendment) Act, 1972 were passed.

By Constitution (24th Amendment) Act, 1971, Art.13 was amended and after clause (3), the following clause was inserted as Art.13 (4).[81]

The Constitution (29th Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65 Kerala Land Reforms Amendment Act, 1969[82]; and Entry 66 Kerala Land Reforms Amendment Act, 1971.[83]

These amendments were challenged in *Kesavananda Bharti's* case.[84]The decision in *Kesavananda Bharti's* case was rendered on 24th April, 1973 by a 13 Judges Bench and by majority of seven to six *Golak Nath's* case was overruled. The majority opinion held that Art.368 did not enable the Parliament to alter the

[78] (1952), SCR 89
[79] (1965) 1 SCR 933
[80] (1967) 2 SCR 762
[81] "Article13 (4): Nothing in this article shall apply to any amendment of this Constitution made under Article 368."
[82] (Kerala Act 35 of 1969)
[83] (Kerala Act 35 of 1971).
[84] AIR 1973 SC 1461

basic structure or framework of the Constitution. The Supreme Court further held that The Constitution 24th and 29th Amendment are held valid.

Another important development took place in June, 1975 when the Allahabad High Court set aside the election of the then Prime Minster Mrs. Indira Gandhi. Pending appeal against the High Court judgement before the Supreme Court, the Constitution (39th Amendment) Act, 1975 was passed and inserted Art.329-A.

Art.329-A Cl.(4) and (5) states that election before Thirty Ninth Amendment Act, 1975 shall continue to be valid in all respects irrespective of any findings and it shall not deemed to be void and disposal of pending appeal shall be according to the amended sections.

In *Smt. Indira Nehru Gandhi v. Raj Narain*[85] the aforesaid clauses were struck down by holding them to be violative of the basic structure of the Constitution. During the emergency from 26th June, 1975 to March, 1977, Art.19 of the Constitution stood suspended by virtue of Art.358 and Arts.14 and 21 by virtue of Art.359.

Art.368 was amended by the Constitution (42nd Amendment) Act, 1976. It inserted in Art.368, clauses (4) and (5)[86]. After the end of internal emergency the Constitution (44th Amendment) Act, 1978 was passed. Section 2, interalia, omitted sub-clauses (f) of Art.19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Art.300-A in the Constitution.

The Constitution (Forty-fourth Amendment) Act amended Art.359 of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Art.20 and 21 could not be

[85] (1975 Supp. (1) SCC 1)

[86] Art.368 Cl. (4) and (5) provides that amendment under this article shall not be called in question in any court on any ground and it declares that there shall be no limitation on the power of Parliament to amend the Constitution.

suspended. During emergency, the fundamental rights were read even more restrictively as interpreted by majority in *Additional District Magistrate, Jabalpur v.Shivkant Shukla.*[87]The Fundamental Rights received enlarged judicial interpretation in the Post Emergency period. Art.21 was given strict textual meaning in A.*K. Gopalan v. The State of Madras.*[88] *In Maneka Gandhi*[89] a Bench of Seven judges held that the procedure established by law in Art.21 had to be reasonable and not violative of Art.14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights.

In *Minerva Mill's* case,[90] the Court struck down clauses (4) and (5) of Art.368 finding that they violated the basic structure of the Constitution. The next decision to be noted is that of *Waman Rao.*[91]The developments that had taken place post-*Kesavananda Bharthi's* case have been noticed in this decision.

In *Bhim Singhiji*[92]case, challenge was made to the validity of Urban Land (Ceiling and Regulation), Act,1976 which had been inserted in the Ninth Schedule after *Kesavananda Bharathi's* case. The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Arts.14 and 19(1) (f) of Part III of the Constitution.

It was held in *L. Chandra Kumar v. Union of India & Ors*[93] that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of Constitution of India.

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[87] (1976), 2 SCC 52(1)
[88] 1950, SCR 88
[89] *Maneka Gandhi v. Union of India* ((1978) 1 SCC 248)
[90] *Supra*, n. 75
[91] *Supra*, n. 74
[92] *Supra*, n.76
[93] (1997) 3 SCC 261

2.10.6 Contentions of the Petitioners

In the light of aforesaid developments, the main argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Art.368, is the thrust of the contention. The contention precedes that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structures shall have to be examined on the Fundamental Rights test.

The key question however is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of Fundamental Rights. According to the petitioners, the consequence of the evolution of the principles of basic structure is that, Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Art.31-B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor. The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The petitioner contended, to emasculate Art.32 in entirety if the rights themselves (such as Art.14) are put out of the way, the remedy under Art.32 would be meaningless.

Infact, by the exclusion of Part III, Art.32 would stand abrogated to question the Ninth Schedule laws. The contention is that the abrogation of Art.32 would be per se violative of the basic structure. The constituent power under Art.368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the

power under Art.32 is removed and, on the other hand, the said power is exercised by the legislature itself by declaring in a way, Ninth Schedule laws as valid.

2.10.7 Contentions of the Respondent

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in *Kesavananda Bharti's*[94]case which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of Fundamental Rights chapter. This chapter, it is contended, stands excluded as a result of protective umbrella provided by Art.31-B, and, therefore, the challenge can only be based on the ground of basic structure doctrine. Legislation can further be tested for (i) lack of legislative competence and (ii) violation of other Constitutional provisions. This would also show that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine.

It was also contended that the Constitutional device for retrospective validation of laws was well known and it is legally permissible to pass laws to remove the basis of the decisions of the Court and consequently, nullify the effect of the decision. It was submitted that Art.31-B and the amendments by which legislations are added to the Ninth Schedule form such a device, cure the defect of legislation.

Further the respondents contended that the point in issue is covered by the majority judgement in *Kesavananda Bharti's* case.[95]According to that view, Art.31-B or the Ninth Schedule is a permissible Constitutional device to provide a protective umbrella to the laws of Ninth Schedule. The distinction is sought to be drawn between the necessity for the judiciary in a written Constitution and judicial

[94] *Supra* 40.
[95] *Ibid*

review by the judiciary. Whereas the existence of judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of the Parliament under Art.368, the power of judicial review of the judiciary can be curtailed over certain matters. The contention is that there is no judicial review in absolute terms and Art.31-B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be established in *Kesavananda Bharathi's* case, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. Giving immunity of Part III to the Ninth Schedule laws from judicial review does not abrogate judicial review from the Constitution. Judicial review remains with the Court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply.

It was further contended that Justice Khanna in *Kesavananda Bharti's* case held that subject to the retention of the basic structure or framework of the Constitution, this power of amendment is plenary and will include within itself the power to add, alter or repeal various articles including taking away or abridging Fundamental Rights and that the power to amend the Fundamental Rights cannot be denied by describing them as natural rights. The contention is that the majority in *Kesavananda Bharti's* case held that there is no embargo with regard to amending any of the Fundamental Rights in Part III subject to basic structure theory and therefore the petitioners are not right in the contending that, in the said case the majority held that the Fundamental Rights form part of the basic structure and cannot be amended. The further contention is that if Fundamental Rights can be amended, which is the effect of *Kesvananda Bharti's* case overruling *Golak nath's* case, then fundamentals rights cannot be said to be the part of the basic structure, unless the nature of the amendment is such which destroys the nature and character of the Constitution.

It is further contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of Fundamental Rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

2.10.8 Court's Observation on Ninth Schedule

The Court observed the following on the issue of validity of Art.31-B and the nature and extent of immunity provided by Art.31-B:

It is contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Art.31-B has been abused and that abuse is likely to continue. The Court said that, the validity of Art.31-B is not in question before them. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. We, therefore, cannot make any assumption about the alleged abuse of the power.

There was some controversy on the question whether validity of Art.31-B was under challenge or not in *Kesavananda Bharti'case*. The petitioners produced before the Court copy of the Civil Misc. Petition which was filed in *Kesavananda Bharati case*, by which the relief originally asked for were modified. It appears that what was challenged in that case was the 24th, 25th and the 29th Amendments to the Constitution. The validity of the First Amendment was not questioned.

The Court said that, they have examined various opinions in *Kesavananda Bharti's* case but are unable to accept the contention that Art.31-B read with the Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge in *Kesavananda Bharti's* case were examined assuming the constitutional validity of

Art.31-B. Its validity was not in issue in that case. Be that as it may, we will assume Art.31-B as valid. The validity of the First Amendment inserted in the Constitution, Art.31-B is not in challenge before us.

The real crux of the problem is as to the extent and nature of immunity that Art.31-B can validly provide. The six Judges which held 29th Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held 29th Amendment valid subject to it passing the test of basic structure doctrine.

The 13th Learned Judge (Khanna, J.), though subscribed to basic structure doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. Therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of 29th Amendment unconditionally.

While upholding the Twenty-ninth amendment, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The decision in *Kesavananda Bharti* regarding the Twenty ninth Amendment is restricted to that particular amendment and no principle flows there from.

The Court observed that, The first aspect to be borne in mind is that each exercise of the amending power inserting laws into Ninth Schedule entails a complete removal of the Fundamental Rights chapter vis-à-vis the laws that are added in the Ninth Schedule. Secondly, insertion of laws in Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power totally nullifies Part III in so far as Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent

organ, i.e., the judiciary. The responsibility to judge the constitutionality of all laws is that of judiciary.

If Art.31-B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise.

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. If the law infringes the essence of any of the Fundamental Rights or any other aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgements shall have to be examined in each case.

We are of the view that while laws may be added to the Ninth Schedule, once Art.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 completely excludes Part III at will. For this reason, every addition to the Ninth Schedule triggers Art.32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.

Constituent power under Art.368, the other name for amending power, cannot be made unlimited, it follows that Art.31-B cannot be so used as to confer unlimited power. Art.31-B cannot go beyond the limited amending power contained in Art.368. The power to amend Ninth Schedule flows from Art.368.

This power of amendment has to be compatible with the limits on the power of amendments. This limit was imposed in the *Kesavananda Bharti's* case. Therefore Art.31-B after 24th April, 1973 despite its wide language cannot confer unlimited or unregulated immunity.

To legislatively override entire Part III of the Constitution by invoking Art.31-B would not only make the Fundamental Rights overridden by Directive Principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also the judicial review, which are the basic feature of the Constitution and essential elements of rule of law and that too without any yardstick standard being provided under Art.31-B.

Every amendment to the Constitution whether it be in the form of amendment of any Article or Amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Art.21 read with Arts.14,15 etc. As stated, laws included in Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by the Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise, the principle of compatibility will come in. One has to see the effect of the impugned law and the exclusion of Part III in its entirety at the will of the Parliament. In *Waman Rao,*[96]it was accordingly rightly held that the Acts inserted in the Ninth Schedule after 24th April, 1973 would not receive the full protection.

2.10.9 Application of Doctrine of Basic Structure

The Court observed that, there is difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Art.368. By addition of the words 'constituent power' in Art.368, the amending body, namely, Parliament does not become the

[96] S*upra* 74.

original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words 'constituent power' are inserted in Art.368, the limitations of doctrine of basic structure would continue to apply to the Parliament. It is on this premise that clause 4 and 5 inserted in Art.368 by 42nd Amendment were struck down in *Minerva Mills* [97]Case.

The relevance of *Indira Gandhi's* case, *Minerva Mills* case and *Waman Rao's* case lies in the fact that every improper enhancement of its own power by Parliament, be it clause 4 of Art.329-A or clause 4 and 5 of Art.368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. We have to examine the power of immunity bearing in mind that after *Kesavananda Bharti's* case, Art.368 is subject to implied limitation of basic structure.

The question examined in *Waman Rao's* case was whether the device of Art. 31-B could be used to immunize Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render doctrine of basic structure redundant. It would remove the golden triangle of Art.21 read with Arts.14 and19 in its entirety for examining the validity of Ninth Schedule laws as it makes the entire Part III inapplicable at the will of the Parliament. This results in the change of identity of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors.

[97] S*upra* 75

The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. The existences of the power of Parliament to amend the Constitution at will, so as to make any kind of laws that excludes Part III including power of judicial review under Art.32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Art.21 read with Art.14 19 and 15 and the principles thereunder. The details on basic structure have been discussed by the researcher in the fifth chapter.

2.10.10 Concluding Remarks of the Apex Court

The Court held that Constitutional validity of the Ninth Schedule Laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test, i.e. rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor. The court held the following:

- A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court.
- The majority judgement in *Kesavananda Bharti's* case read with *Indira Gandhi's* case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

- All amendments to the Constitution made on or after 24th 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 or essential 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 pertains or pertain to the basic structure.

- Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and the extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Art.21 read with Arts.14 and 19 by application of the 'rights test' and the 'essence of the right' test. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule.

- As to the question referred to them vide order dated 14th September, 1999 in *I.R. Coelho v. State of Tamil Nadu*[98], the court answered the following:

- If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law on the principles declared by this judgement. However, 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 / infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Art.21 read with Arts.14,19 and the principles underlying thereunder.

[98] *Supra,*70

- Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge.

Thereafter, the Court directed to place the petitions / appeal for hearing before a Five Judge Bench for giving decision according to the principles laid down in this judgement.

In this regard the researcher submits that the decision of the Supreme Court that if a law abrogates or abridges the rights guaranteed by Part III and by applying the direct impact and effect text, if it is found that, it is violating the basic structure doctrine then such law can be invalidated by exercising the power of judicial review by the courts is a correct one having rationale basis.

The researcher also submits that by supporting the courts view that even though an Act is put in the Ninth Schedule by constitutional amendment, its provisions are open to attack on the ground that they destroy or damage the basic structure of the Constitution, because the doctrine aims to afford protection to the rights of people and also aims to preserve the principle of constitutionalism in democratic polity by keeping the power of judicial review intact with the judiciary.

The researcher sticks to the assertion of the Court that the justification for conferring protection on the laws included in the Ninth Schedule shall be matter of constitutional adjudication, as it observed from the developments in past that the protective umbrella of Ninth schedule and Art.31-B is being misused to the purposes contrary to its creation by the parliamentarians and the executives. The researcher finds the judgement to be correct one and opines that the attitude of judiciary should not be considered as against the socio-economic development of the nation.

Now the researcher examines the importance of theory of judicial review by explaining its history in brief. Since the Ninth schedule excludes judicial review to question the constitutional validity of laws placed in its bag, it is relevant and appropriate to know the conceptual growth and development of judicial review.

2.11 Evolution of Concept of Judicial Review

The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us.[99]Judicial review is a great weapon in the hands of judges. It is the corner stone of Constitutionalism, which implies limited government.[100] It is justified on a combined upholding of the principles of rule of law and separation of powers.[101] It comprises the power of a Court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. It is an integral component of the delicate system of checks and balances which, together with the corollary principle of separation of powers, forms the bedrock of our republican form of government and insures that its vast powers are utilized only for the benefit of the people for which it serves.[102] The fundamental object of the judicial review is to determine the unconstitutionality of legislative Acts.

Before a study of the role of judiciary in its review to question the constitutional validity of laws inserted in the Ninth Schedule, it is appropriate to know a very brief reference about judicial administration in ancient and medieval India as well as during British period.

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[99] Dr. Justice A.S. Anand, Justice N.D.Krshna Rao Memorial Lecture on protection of Human Rights – Judicial Obligation or Judicial Activism, (1997) 7SCC(Jour) 11.
[100] S.S. Dash, '*The Constitution of India, A Comparative Study'* Chaithanya Publishing House, Allahabad, 1960, p334.
[101] Jasmine Alex, '*Ninth Schedule and Principles of Constitutionality in the light of Coelho's case*, Published in CULR,(2007),p.262.
[102] Francisco, *Jr. vs. House of Representatives*, G.R. No. 160261, 10 November 2003, citing *Angara v. Electoral Commission,* 63 Philippines 139 (1936)

2.12 Judicial Review in Ancient and Medieval Period

Judicial review, which is the life breath of constitutionalism and rule of law, has been given pride of place in the legal system of all periods. The Dharmashastra and Nitisara literature, the Arthasastra of Kautilya and Smritis are the earliest sources of information on the judiciary in ancient India. In this age, the Rule of law had a firm stand which meant that the law was above the ruler and that the government had no constitutional authority to enforce any arbitrary or tyrannical law against the governed. Thus, the people of ancient India visualized and cherished the supremacy of law and not the supremacy of the king.

The King was the fountain source of all justice. In that period administration of justice was not considered a function of the State. King was only resolving the issues according to the principles of Dharma. The concept of dharma is an integral part of human activities. The King constituted highest appellate court.[103]He was reviewing the bad attitude of human beings according to justice and equity. He was the punishing authority.

During the Moghul period the King was the highest judge in the empire. He held Court and decided cases in person. King's Vourt is the highest court of appeal. In ancient Europe, Greek legal philosophers preached against tyranny of law. Plato emphasized the need for ethical element of law. Aristotle interpreted the philosophy of Plato in a more concrete and practical form in his 'Politics.' According to him, law must be in conformity to the Constitution. The Roman legal Philosopher Cicero also pleaded for reasonableness of law. Then the great legal philosophers who gave a practical shape to judicial review are Chief Justice Coke and Locke.

[103] Cited in Dr. A,S,Altekar, '*State and Government in Ancient India'*,(Delhi, 1958), 247, Arthasastra,1.16.

2.13 Judicial Review in U.K

The doctrine of judicial review dates back much earlier. In Britain, Chief Justice Coke played an instrumental role in this regard.[104]Lord Coke in *Dr.Bonham's* case (1610) asserted that the common law is above the House of Commons. This has been considered by American jurists as one of the most important sources of the notion of judicial review. He also started to source his conception of principles of "common right and reason" from his version of the *Magna Carta*, in order to render it greater legitimacy.[105] But later jurists, notably Blackstone, did not subscribe to that view and moreover, the Bill of Rights in 1689, explicitly forbade the courts from exercising judicial review over legislative acts. The doctrine of judicial review had a governing force in England till the doctrine of parliamentary sovereignty was established which exerted some influence on the arbitrary actions of the monarch also. In the tussle between the Crown and Parliament the judges sided with Parliament. The principle of judicial review never became active or operational in England, but it remained dormant for long time.[106]The reasons for the absence of judicial review in England are, doctrine of Parliamentary Supremacy, absence of Fundamental Rights, absence of written Constitution, unitary form of government, and importantly members of Parliament such as members of the House of Lords taking part in the judicial administration.[107]

2.14 Judicial Review in America

Dr. Bonham's case of Lord Chief Justice Coke is said to be a great heritage to the American system of judicial review. Reginald Parker is also of the view that

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[104] Chakradhar Jha's, '*Judicial Review of Legislative Acts'* xi (Bombay: N.M. Tripathi Pvt. Ltd., 1974).
[105] Edward S. Corwin, "*The "Higher Law" Background of American Constitutional Law*" 42 *Harvard Law Review* (1928) at 380.
[106] See N.Krishna Murthy's '*judicial review'* published in Andhra Law Times, Vol.CIV, Journal (2000),p2
[107] Dr. C.D.Jha's '*Judicial Review of Legislative Acts',* Second Edition 2009,189.

judicial review in America is the political and social heritage from England.[108] This much is certain that the doctrine enunciated in *Bonham's* case by C.J.Coke laid an unshakeable foundation of judicial review in America. In the United States, the concept of judicial review as flowing out of the Constitution was laid down in the landmark decision of the U.S. Supreme Court in *Marbury* v. *Madison.*[109]The *Marbury's* decision was a landmark judgement in as far as it traced the source of judicial review as being implied in a written Constitution. It further characterized the law of the Constitution as supreme ordinary law and hence subjected them to the rules of statutory interpretation. In this case, Chief Justice Marshall observed that even though judicial review was nowhere explicitly provided in the American Constitution, yet the power existed impliedly in the written Constitution. It established the supremacy of the judiciary in the field of exposition of the law as laid down in the Constitution.[110]This enlarged the scope of judicial control and introduced judicial supremacy.[111]This doctrine propounded by Justice Marshall is still vibrant and its force stands unabated.

However, Marshal's concept of judicial review had a limited scope. His philosophy of judicial review was that a legislative act in violation of the Constitution was void. He did not envisage that even an arbitrary and unjust legislation would be considered to be the legislation against the will of the sovereign people for which the sovereign people did not delegate power to the Legislature and as such, the law should be void. This development took place later on the enactment of the Fourteenth Amendment of United States Constitution. By 1803, judicial review had a long history in America.[112]

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[108] Reginald Parker, '*Administrative Law'*, Bobbs Merrill Co. Indiana Polis, 1951, pp257-58
[109] 1 Cranch (5 U.S.) 137 (1803).
[110] S.P. Sathe, '*Judicial Activism in India'* 33 (New Delhi: OUP, 2002).
[111] Sylvia Snowiss, '*Judicial Review and the Law of the Constitution'* (Delhi: Universal Law Publishing Co. Ltd., 1996).
[112] Dr. C.D.Jha's '*supra, 107.* p.208..

In Taney era, the *Dredscott*[113]case considerably advanced the cause of judicial review and held that the Constitution is the fundamental and supreme law and it was the duty of the courts of the United States to declare a statute unconstitutional if it appeared to the court that it was not with in the limits of the power assigned to the Federal Government. In 1968, the Fourteenth Amendment of the American Constitution was enacted by which the 'Due Process of Law' clause was introduced. It worked as a great weapon against arbitrary legislation.

2.15 Judicial Review in India

In post-independent India, the inclusion of explicit provisions for 'judicial review' was necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Broadly speaking, judicial review in India comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress constitutional limitations.[114] Unlike in United States of America, Constitution of India has expressly and explicitly established the Doctrine of judicial review in several Articles, such as 13, 32, 131 to136, 143, 226 and 227.[115]The only difference between the American and Indian Legal systems of judicial review is that it is more procedural in India, whereas it is more substantive in the United States.

[113] *Dredscott v. Stanford, 19* How 393 (1857)
[114] *L.Chandra Kumar v Union of India,* (1997) 3SCC 261
[115] See, Dr.K.L.Sharma's '*Application of the Doctrine of Judicial review in India'* published in journal of Legal Studies.p.91

2.16 Importance of Judicial review

The doctrine of judicial review, having been nourished in a legal culture and socio-political environment favorable to its growth is essential for the maintenance and enforcement of the separation of powers and the balancing of powers among the three great departments of government through the definition and maintenance of the boundaries of authority and control between them.

Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any Article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and High Courts are empowered to strike down the said provisions. The one sphere where there is no judicial review for finding out whether there has been infraction of the provision of Part III and there is no power of striking down an Act, regulation or provisions even though it may be inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution is, that incorporated in Art.31-B taken along with the Ninth Schedule.

Dealing with the question of judicial review, it is pertinent to note the observation of Dr. B.R.Ambedkar about judicial review in the following words,[116]

"If I was asked to name any particular Article in the Constitution as the most important, it is Article 32 without which the Constitution would be a nullity- it would not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the house had realized its importance."

This observation tells us that the importance of Court and its plenary power to oversee all actions, executive or legislative, and ensure that they do not

[116] CAD Volume VII p.953

transgress the law. Without judicial review there will be no governance of laws and rule of law would become a testing illusion and a promise of unreality.[117]

According to the significance of judicial review in a written Constitution, Prof. Bernard Schwartz[118]observed that a Constitution is empty words if the courts cannot enforce it. It is judicial review that makes Constitution a provision more than mere maxim of political morality. In practice there can be no Constitution without judicial review. It provides the adequate safeguard that has been invented against unconstitutional legislation. It is truth, the sine qua non of the Constitutional structure.[119]

Importance of judicial review and significance of entrusting it to the Supreme Court and High Court, the "integrated judiciary", have been stressed by the judiciary time and again in various cases.[120]In *Madras v. V.G.Row.*[121]Chief Justice Patanjali Sastri pointed out that "our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive power of reviewing legislative acts under the cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments.[122]

Judicial review is also recognized as a basic feature forming an indestructible part of the basic structure of the Constitution pursuant to the decision in *Keshavananda Bharti's case.*[123]As held in *Sampath Kumar's* case, the judiciary is constituted as 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, the limits on the exercise of such power

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[117] 1987(1) SCC 124 at 129 Bhagwati(J)
[118] Prof. Bernard Schwartz '*Constitution Law*", 3 (1972)
[119] See, P.Ravi Jashuva and Shahin Shaik, '*the Necessity of Accountability in Judicial Review Power'* published in Indian Bar Review, Vol.29 (3&4) 2002, p.206.
[120] See K.P Krishna Shetty '*Judicial Review and imposter institution'* published in CULR (1996) p.12.
[121] AIR 1952,SC196
[122] *Ibid*., para 13
[123] AIR 1973 SC 1461

under the Constitution and whether any action of any branch transgresses such limits.[124]

2.17 Scope of Judicial Review in Ninth Schedule

Scope of Judiciary to review the laws placed in the Ninth Schedule is very limited. As the researcher discussed in the history of Ninth Schedule, the verdict in *Kameshwar* case brings the Parliament into trouble to implement the agrarian reform laws in various States. Judiciary being a guardian of Fundamental Rights protected the property right (which was Fundamental Right) of the zamindar by ignoring land reforms. As a result, in order to give an effect to the agrarian reforms laws and to overcome from the decision given in the case of *Kameshwar*, Parliament brought first amendment by inserting Art.31-B read with Ninth Schedule. These provisions empower Parliament to provide immunity of Fundamental Rights to the laws included in the Ninth Schedule. That is, once the laws passed by the legislature are placed in the Ninth Schedule of the Constitution, they instantly become immune from any judicial challenge on the ground that they violate any of Fundamental Rights enumerated in Part III of the Constitution.

Following are the main causes for keep out judicial review from Ninth Schedule:

- Right to property
- Agrarian reforms
- Patna High Court verdict

At the time of commencement of Constitution of India, framers recognized right to property in list of Fundamental Right. But at the same time Constitution conferred legislative power to all States legislatures to enact laws on the subject matter enumerated in the List II (State List) of Seventh Schedule subject to certain

[124] M.C.Bhandare's '*Four Decades of Indian Demo*cracy' p.20.

limitation that those laws should not be violative of Fundamental Rights guaranteed under Part III of the Constitution.

Land, land tenures, land holdings, consolidation etc. are under the exclusive legislative and administrative jurisdiction of the States as provided in Entry No.18 of List II (State List) in the Seventh Schedule of the Constitution. However, the Central Government has been playing an advisory and co-ordinating role in the field of land reforms since the First Five-Year Plan. Agrarian reforms have been a core issue for rural reconstruction as a means of ensuring social justice to actual tillers and the landless rural poor.

Keeping this goal and to give an effect to agrarian reform, Bihar State government passed Bihar Land Reforms Act 1950. Same was challenged and declared unconstitutional by the Patna High Court. Due to the effect of this case, Parliament curtailed the power of judiciary to question the agrarian reform laws by incorporating Art.31-B and Ninth Schedule. This Schedule was created to exclude the judicial review to question any laws passed and placed in this Schedule.

2.18 Judicial Review and Amendment Power of the Parliament

In *Shankari Prasad* case, question was raised whether the Constitution (First Amendment) Act 1951 which purported to insert Art.31-B read with Ninth Schedule in the Constitution of India by excluding judicial review, was *ultra vires* and unconstitutional, since it fell, according to the petitioners, with in the prohibition of Art.13(2). It was contended that though it may be open to Parliament to amend the provisions in respect of Fundamental Rights contained in Part III, the amendment, if made in this behalf, would have to be tested in the light of the provisions contained in Art.13(2) of the Constitution. The State (Art.12) it was contended includes Parliament and law must include a constitutional amendment. In rejecting the petition by a unanimous verdict, the court made a clear demarcation between ordinary law, which is made in exercise of legislative power, and Constitutional law, which is made in exercise of constituent power, so

that Art.13(2) doest not affect amendments made under Art.368.This view was later affirmed in *Sajjan Singh's* case also.

Supreme Court in *Shankari Prasad* and *Sajjan Singh* case observed that, Parliament under Art.368 has power to bring an amendment even to the Fundamental Rights. In this regard judiciary has no power to direct the Parliament not to bring an amendment to Part III.

But Supreme Court countered few amendments made to Ninth Schedule in 1967 when it ruled in the *Golaknath v State of Punjab* case that Parliament did not have the power to abrogate the Fundamental Rights, including the provisions on private property.

In reaction to Supreme Court decisions, in 1971 Parliament passed the Twenty-fourth Amendment empowering it to amend any provision of the Constitution, including the Fundamental Rights; On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in the *Keshavananda Bharati v the State of Kerala* case that although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the Constitution's "basic structure." C.J. Sikri and JJ. Hegde, Mukherjea and Jagmohan Reddy were of the view that the basic structure theory would apply to laws sought to be included in the Ninth Schedule. Explaining the idea of judicial review Khanna J' observed that,.

"...The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution.... As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees

afforded by those rights are not contravened.... review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions."

This case is the starting point to check the unlimited power of Parliament through basic structure doctrine. Here the researcher observed that, in *Keshavananda* case, Supreme Court made judiciary stronger by introducing the doctrine of basic structure. But unfortunately, ignoring this decision, Parliament placed some controversial laws into the Schedule through 39th Amendment. Thereby, it showed its superciliousness

In *Indira Nehru Gandhi v. Raj Narain*,[125]the Supreme Court has had an event to invoke the theory of Basic Structure when the Parliament passed the Constitution (39th Amendment) Act which included some controversial laws into the Ninth Schedule. 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? It was 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.

2.19 Threat to the Judicial Review in Forty Second Amendment

After the decisions of the Supreme Court in *Keshavnand Bharati and Indira Gandhi* cases the Constitution (42nd Amendment) Act, 1976, was passed

[125] 1975 Supp SCC 1: AIR 1975 SC 2299.

which added two new clauses.[126]These clauses caused a great threat to the principle of judicial review and by inserting these clauses it was made clear that the basic structure of the Constitution could be amended. But this fraud committed by Parliament on Constitution was corrected in the *Minerva Mill's* case.

In *Minerva Mills Ltd. v. Union of India*[127] the Supreme Court by 4 to 1 majority struck down clauses (4) and (5) of Art.368 inserted by the 42nd amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the Constitution. The difficulty in applying the doctrine of Basic Structure was noticed once again when the petitioner *inter alia*, challenged the validity of newly added Clauses (4) and (5) of Art.368. *Chandrachud, CJ.*, striking down the amendment observed:

"Since the Constitution had conferred a limited amending power on the Parliament, the Parliament can not under the exercise of that limited power enlarge the very power into an absolute power. Indeed, a limited amending power is one of the Basic Feature of our Constitution, and therefore, the limitations on that power cannot be destroyed. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."[128]

The doctrine of Basic Structure was further reaffirmed in *Waman Rao v. Union of India*,[129]where the Supreme Court applied the doctrine of prospective overruling to the law declared in *Keshavananda* case by holding that all amendments to the Constitution which were made before April 24, 1973 i.e., the day on which the judgment in *Keshavananda* case was rendered valid and constitutional.

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[126] **368 (4)** provided that no constitutional amendment (including the provision of Part III) or purporting to have been made under Article 368 whether before or after the commencement of the Constitution (42nd Amendment) Act, 1976 shall be called in any court on any ground.
Clause **368 (5)** removed any doubts about the scope of the amending power. It declared 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.
[127] AIR 1980 SC 1789
[128] *Ibid.*
[129] AIR 1981 SC 271, See also *Ambik Prasad Mishra v. State of Andra Pradesh*, AIR 1980 SC 1762

In *S.P.Sampath Kumar v. Union of India*[130] and P.*Sambamurthy v. State of Andhra Pradesh*[131]the judges laid down that the rule of law and judicial review were integral part to the Constitution and therefore constitute the Basic Structure. Effective access to justice is part of the 'Basic Structure' according to the decision in *Central Coal Fields Ltd. v. Jaiswal Coal Co.*[132]In *Bhim Singhji v.Union of India,*[133]*Krishna Iyer and Sen, JJ.,* asserted that the concept of social and economic justice – to build a welfare state forms a part of the Basic Structure. Arts.32, 136,141 and 142 of the Constitution conferring power on the Supreme Court were held as a Basic Structure in *Delhi Judicial Service Assn. v. State of Gujrat.*[134]The independence of judiciary within the limits of the Constitution[135] Judicial Review under Arts.32, 226 and 227 of the Constitution, Independence of Judiciary,[136] Secularism,[137]are all declared to be the Basic Structure of the Constitution. The power of the High Court to exercise Judicial Superintendence over the decision of all courts within their respective jurisdiction is also part of Basic Structure.[138] In *All India Judge's Association v. Union of India*[139] an independent and efficient judicial system was held to be the part of the list of Basic Structure.

According to Prof. Baxi, the fact that the judiciary has a say in the matter of amendment of the Constitution is the most notable aspect of the doctrine of Basic Structure.[140]In *M. Nagraj v. Union of India*[141]the court observed that the

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[130]AIR 1987, SC 368
[131] AIR 1987, SC 663
[132] 1980 Supp. SCC 471
[133] (1981) 1 SCC 166 : AIR 1981 SC 234, Para 81 & 82
[134] (1991) 4 SCC 406 at 452
[135] *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268; *Gupta S.P. v. Union of India*, AIR 1982 SC 149, *State of Bihar v. Bal Mukund Sah* (2000) 4 SCC 640
[136]*Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213; *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296
[137] *Bommai S.R. v. Union of India*, AIR 1994 SC 1918
[138] *Chandrakumar L. v. Union of India*, AIR 1997 SC 1125
[139] AIR 2002 SC 1752
[140] U. Baxi: *Courage, Craft and Conten*tion, 64ff (1985) cited in V.N.Shukla, " *Constitution of India"* at 897 (Reprint July, 06)
[141] AIR 2007 SC 71 (Para 25 &33)

amendment should not destroy constitutional identity and it is the theory of Basic Structure only to judge the validity of constitutional amendment. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution.

The researcher has discussed Basic structure doctrine in detail in Fifth Chapter. It is submits that, When Supreme Court considered Judicial Review as basic structure, some how, judiciary has got power to direct the Parliament not to include non-agrarian laws into the Schedule. But Supreme Court ever did not make any attempt to say laws in Ninth Schedule which are violative of basic structure are subjected to judicial review except in a very recent judgment *I.R.Coelho v. State of Tamil Nadu.*[142] As the researcher discussed earlier, in this case, after 34 years from the decision of *Keshavananda's case*, Supreme Court said that,

"All amendments to the Constitution made on or after 24th 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 or essential features of the Constitution as reflected in Art.21 read with Art.14, Art.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 provision 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 pertains or pertain to the Basic Structure."

After examining all the cases starting from *the Keshavananda Bharati to I.R. Coelho,* the researcher submits that, when judicial review has been considered as a basic structure in *keshavananda's* case itself in 1973, the court could have declared Art.31-B and Ninth Schedule unconstitutional since these provisions exclude the judicial review. But judiciary did not do so because the Schedule was

[142] AIR 2007 SC 861

created to protect the agrarian laws. During the period of internal emergency, it is unimaginable to think how this Ninth Schedule was misused and abused by incorporating controversial laws which have no concern to the agrarian reforms. This shows parliamentary hegemony to keep its supremacy for continuing its illegality. In order to stop its illegality, same Parliament during the period of Morarji Desai Government deleted the right to property from the list of fundamental rights through Forty-fourth Amendment with a sole object that not to affect the agrian reform laws and for some other reason. But along with this great step taken by the Janatha Government, simultaneously they could also have brought an amendment to the Art. 31-B read with Ninth Schedule to remove the exclusion clause of judicial review to question the laws of Ninth Schedule. Further, they could have carried an amendment to Art.31-B by fixing definite criterion or standards like Art.31-A is having. They did not do so. Ignoring these, Parliament even after 1978, keep on continue to place contentious laws into the Schedule (example Tamil Nadu Reservation Act)

Further the researcher raises an important issue that, the Ninth Schedule and Art.31-B introduced and excluded judicial review because land reform laws were directly violating right to property which was considered earlier as Fundamental Right. But now after deletion of right to property, do we really still need to exclude the judicial review from questioning the laws of Ninth Schedule? This question needs to be addressed very importantly. Why does Parliament exclude the judicial review from Ninth Schedule even after deletion of right to property, answer is simple, Parliament wanted to show its supremacy by making controlled Constitution into uncontrolled like U.K Parliament. This is really great betrayal committed by Parliament against to the values and principles of Constitution. This attitude of Parliament not only affects the fundamental principle of Constitutionalism but also great threat to the democracy.

So relooking on provision of Ninth Schedule is the need of hour even after the verdict in *I.R.Coelho* case. No doubt there is no importance to the Constitution as well as to the doctrine of basic structure without judicial review.

2.20 Conclusion

From the above discussion, it is clear that the Constitution framers had deliberately excluded the concept of judicial review to question the constitutional validity of the laws passed by the legislatures and placed in the Ninth Schedule of the Constitution of India. The reason is that, Right to property was recognized as a Fundamental Right when the Constitution came into force. But the real problem started when the First amendment was made to the Constitution and whereby the Ninth Schedule and Arts.31-A and 31-B were incorporated. Those inserted provisions and Schedule are protecting the laws relating to Agrarian reforms and were affecting the Fundamental Right to property. Right to property and land reforms are sworen enemies. If law makers enact laws on land reforms, definitely, those laws were violating the Fundamental Right to property at the time of commencement of our Constitution. That is why just to avoid this conflict and make those land reforms laws as constitutionally valid, the framers inserted Ninth Schedule read with 31-B and made them an exception to Art.13(2) of the Constitution of India.

Art.31-B read with Ninth Schedule of the Constitution was originally introduced to protect certain land reform laws from judicial scrutiny in earlier years of independence to uphold social justice and to promote social change. Now it is being expanded to introduce such draconian laws like MISA, COFEPOSA and Representation of People Act etc. in order to shield them from being challenged as violative of Fundamental Rights. Whereas scope of Art.31-A is limited to property related laws only, the scope and ambit of Art.31-B is not clearly defined thereby giving blanket power to Parliament to include any law in

the Ninth Schedule as it considers fit and proper. Therefore Art.31-B has a far grater possibility of its abuse and misuse.

Abuse of Ninth Schedule was started from Fourth amendment where, out of seven laws, three laws were unrelated to land reforms. Thereafter in 39th, 40th and 76th Amendments, Schedule was misused indiscriminately to accommodate the hybrid laws into the Schedule. Exercise of amending power by invoking Art.31-B "is no longer a mere exception" limited to land reforms only. Thereby the efficacy of Schedule stands reduced. Indiscriminate use of Art.31-B and Ninth Schedule resulted in destroying and damaging the principle of Constitutionalism.

Many amendments were also brought to the Constitution with sole object to protect some land reforms laws. These amendments were challenged right from *Shankari Prasad case* to *Keshavanandha Bharathi* case and after 44th amendment to *I.R. Cohelho* case. However judiciary has also made many attempts in the above cases to balance the individual interest of right to property with the social interest of land reforms. Though the principle of judicial review recognized under Constitution system, judiciary did not obstruct the legislature when it was including various other statutes in the Schedule which were even incompatible with this basic objectives.

The researcher opined that, after 44th amendment when the Parliament deleted the right to property from the list of Fundamental Right by exercising their constituent power, it could have brought an amendment to the Ninth Schedule also in the same 44th amendment by conferring judicial review to question the unrelated laws placed in the Schedule instead of allowing the Schedule to exclude the judicial review. But the Parliament did not make such an attempt as it wanted to retain its supremacy from the interference of judiciary. But judiciary in *I.R. Cohelho* case has taken a different view by saying that, the laws placed in Ninth Schedule which are violative of basic structure of the Constitution are always subjected to judicial review effecting from *Keshavananda Bharathi* to the present.

By saying so Supreme Court has reaffirmed the verdict of *keshavanandha Bharathi* case. Our Constitution is controlled one, but parliamentarians are making controlled Constitution into uncontrolled Constitution through Ninth schedule by excluding the judicial review which is considered as basic structure of the Constitution as well as part and parcel of the principle of Constitutionalism.

Finally the researcher observes, if the framers had not recognized the right to property as a Fundamental Right in the original Constitution itself, they would have avoided this conflict and in that event, there would not have arisen any situation to exclude the concept of judicial review in the Ninth schedule with respect to questioning the constitutional validity of land reforms laws and even there would not have been a need for inserting and introducing provisions like Arts.31-A and 31-B read with Ninth Schedule of the Constitution.