DISSERTATION

Justiciability of Ninth Schedule and its Implication on Power of Judicial Review: A Study.

SUBMITTED TO

INSTITUTE OF LAW, NIRMA UNIVERSITY

AS A PARTIAL FULFILLMENT OF REQUIREMENT FOR THE

DEGREE OF MASTER OF LAWS (LL.M)

UNDER THE GUIDANCE OF

DR. Madhuri Parikh

HEAD OF POST-GRADUATE LEGAL STUDIES

INSTITUTE OF LAW, NIRMA UNIVERSITY

SUBMITTED BY

AISHVI SHAH

19ML002

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DECLARATION

I, Aishvi Shah, bearing roll no. 19ML002, do hereby declare that the dissertation submitted is original and is the outcome of the independent investigations/ research carried out by me and contains no plagiarism. The dissertation is leading to the discovery of new facts/ techniques/ correlation of scientific facts already known. This work has not been submitted to any other University or body in quest of a degree, diploma or any other kind of academic award.

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_____

Name: Aishvi Shah

Roll no. 19ML002

Course: Constitution Law

Institute of law

Nirma University

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This is to certify that the dissertation entitled "Justiciability of Ninth Schedule and its Implication on Power of Judicial Review: A Study" has been prepared by Aishvi Shah under my supervision and guidance. The dissertation is carried out by her after careful research and investigation. The work of the dissertation is of the standard expected of a candidate for Master of Laws [LLM] in Constitutional Law and I recommend it be sent for evaluation.

Date:

_____

DR. MADHURI PARIKH
HEAD OF POST-GRADUATE LEGAL STUDIES
INSTITUTE OF LAW, NIRMA UNIVERSITY
AHMEDABAD

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Place: Vadodara

Date: 3rd August 2020

- Aishvi Shah

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ABBREVIATIONS

AIR	All India Reporter
Art.	Article
C.J	Chief Justice
C.J.I	Chief Justice of India
Const.	Constitution of India
DPSP	Directive Principle of State Policy
Ed.	Edition
F.R.	Fundamental Rights
Govt.	Government
H.C.	High Court
J.	Justice
p.	Page
P.M.S.C.	Prime MinisterState
St.	Supreme Court
UOI	Union of India

CHAPTER 1

1. Synopsis

1.1 Introduction

The Constitution of a country is a supreme law of the land and Constitutionalism is a process of governance under which the power of the organs of the State is limited. All three organs of the State have to follow the mandate given under the Constitution. Constitutionalism accepts the need to restrict the concentration of power to one organ for protecting the rights of society. A well-written Constitution must possess fundamental limitation and check on the power to legislate and govern. Moreover, power can sometimes make the situation adverse and corrupt. Thus, unlimited or absolute power is conferred to one organ then absolute corruption of power would take place and dictatorship will prevail.

Separation of power is one of the important facets of Constitutionalism. All three government or State organs: Legislative, Judiciary, and Executive, are independent and have supreme power in their field. Legislative make laws, Executive execute the law, and Judiciary interprets the law. When one organ of State overreaching and invading the domain of organ is called misusing its power or arbitrating its power for supremacy, so check and balance is important. Moreover, "Doctrine of Check and Balance" and "Doctrine of Separation of Power" go hand in hand and are essential for limiting the organ from misusing their power.

A well-drafted must provide the "Power of Judicial Review over the constitutional and legislative amendment." Bhagwati J. stated that to protect the democracy and rule of law, one feature of the Constitution which is must fundamental is Judicial Review

which is certainly part of the "Basic Framework of the Constitution" and a part of "Basic Structure of the Constitution".

Law enacted by Parliament or the state legislative, both laws are to be purview under Judicial Review. And the law which is harming the provision of the Constitution is void. Moreover, Indian S.C doesn't have suo-motto power of judicial review like the USA that was the reason that Parliament could introduce the 9th Schedule[1] to immunize the laws.

The 9th Schedule was a progressive step of the Parliament to bring agrarian reform. In those days, the right to property was part of Fundamental Rights and it was becoming difficult for the Parliament to abolish the Zamindari system because of it. Therefore, the 9th Schedule was added by the 1st Amendment Act, 1951. Any law kept in the 9th Schedule would be out of the purview of the Judiciary's power of review. Moreover, the problem began when the Parliament did misuse 9th schedule by adding irrational, illogical, and non-reasonable laws that were not related to the property after a few years. For e.g. inclusion of the Tamil Nadu Reservation Act[2] which provided a 69% reservation against the direction of IndraSawhney[3] judgment. The list of 13 Acts presently has become 284 Acts in the 9th Schedule.

The present study mainly focuses on the 9th Schedule and its judicial and legislative implications. To study the impact of the 9th Schedule on the power of Judicial Review. It is an analysis of the judgments from Sankri Prashad[4] to the recent judgment of Union of India v. State of Maharashtra[5] and its impact on the 9th Schedule. The present

[1] 9th Schedule was added by the 1st Amendment Act. 1951, Section 14.

[2] Tamil Nadu Act 45 of 1994.Added by 67th Amendment.

[3] AIR 1993 SC 477

[4] AIR 1951 SC 458

[5] MANU/SC/1351/2019, AIR 2019 SC 4917

research investigates, "The justiciability of the 9th Schedule and its implications on Judicial Review". At this juncture, the researcher has attempted this chapter to give an introduction to the subjects and discuss research questions, aims and objectives, research methodology, and so on.

1.2 Statement of Problem

The dispute between the Judiciary and the Parliament was the most fundamental dispute which was over the constitutional custody. The major question being that the amending powers of Parliament under Article 368 was absolute and unrestrained. In the initial decade of the Indian independence, its stronger central government with most far-reaching powers has assumed importance to drive socio-political revolution.

9th Schedule was introduced into the constitution reflected the union's concern to centralized power through the constitution and enact property legislation by the 1st Amendment Act. This research emphasizes the implication of the 9th Schedule on the power of judicial review. Analysis of interpretation of the Courts' judgments and amendments related to the 9th Schedule. With the same amendment to the Constitution "Art. 31A and 31B" were added, it saved laws from being unconstitutional and inconsistent with the fundamental rights.

The history of the Indian Constitution has evolved witnessing the number of landmark constitutional amendments. The fundamental right to property was protected under fundamental rights until the 44th amendment in 1978. The right to property enjoys a unique distinction in our Constitution as the most amended provision. There was constant conflict between the protection of existing property rights and the desire to

move towards the more agrarian society which would involve the re-distribution of the land.

The present study focuses on specific reference to the 9th Schedule of the Constitution of India. It inquires the impact of the 9th Schedule amendment which was inserted in the Constitution on the power of judicial review.

1.3 Literature Review

1. **Milan Dalal, "India's New Constitutionalism (Two Cases That Have Reshaped Indian Laws)", Boston College International and Comparative Law Review, Art. 4, Volume 31, Issue 2 (2008).**

   In this paper two recent judgements which reviews the Parliament's constituent power and legislative powers. The two cases are Coelho and Raja Ram Pal cases establish the S.C is boarding on a new era of judicial review. This paper examines the historic background of Indian Const. with respect to "judicial review", the 9th Schedule laws, Indian S.C's 1973 ruling on what kind of laws could be questioned, political corruption, and Parliament's power to remove Representatives.

2. **Pathik Gandhi, "Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)", 4 Indian J. Const. L. 47 (2010).**

   In this paper the researcher had discussed the evolution of "Doctrine of Basic Structure", he write it with an angle of jurisprudential interpretation of the doctrine. He have discussed the cases of Golakhnath, Election case and I.R. Coelho case in length and analysed the views of different jurist in his paper.

3. **Gagrani Harsh, "9th Schedule in the Light of the I.R.Coelho Judgment".**

In this paper the researcher cover the whole journey of 9th Schedule from amendment till I.R. Coelho with judicial pronouncements and constitutional amendments.

4. **Kamala Sankaran, "From Brooding Omnipresence To Concrete Textual Provisions: I.R. Coelho Judgment And Basic Structure Doctrine, Indian Law Institute Journal", Vol. 49, No. 2 (April-June 2007), pp. 240-248.**

The focus in this paper is on the tests which have been laid down by the Court in this case to determine the scope and extent of judicial scrutiny of a constitutional amendment that places a law in the 9th Schedule by virtue of Art. 31B and the degree of immunity, if at all, such an amendment, and by implication the law that it thus immunises, enjoys.

5. **Virendra Kumar, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance."**

In this paper the condition is discussed which prevails continuously with varying degrees of focus until the S.C's judgment in the Coelho case, in which the constitutional bench of nine judges sought to lay down the specific conditions for the implementation of the principle of "simple structure." How did they do it, and to what degree they managed to do it by suppressing other misgivings about it.

6. **M. P. Jain, "Indian Constitutional Law", (7th Edison, LexisNexis 2014).**

7. **Karishma D. Dodeja, "Belling the Cat (The Curious Case of the 9th Schedule in the Indian Constitution.)"**

In this paper is to examine the ratio decidendi of Coelho and its subsequent application and interpretation by various H.C and the S.C. Such a study is essential to understand the potential ramifications of Coelho; specifically, to ascertain whether Coelho did in fact remodel the law on the judicial review of 9th Schedule laws or whether it was merely old wine in a new bottle as constitutional amendments were in any event subject to the "Basic Structure". I argue that the novelty in Coelho was the subjection of the 9th Schedule laws to the "Basic Structure" albeit through the Part III test (as clarified in Glanrock Estate) - a kind of reversal, rather, nullification of Art. 31B. based on my analysis in Section B, I conclude that the Glanrock Estate clarificatory test of Coelho is appropriate to determine the validity of 9th Schedule laws.

8. **Ishwara Bhat, "Fundamental Rights; a Study of their Interrelationship**."

The authors of this book have explained and focused on the doctrinal and philosophical interrelationship among fundamental rights with latest decided cases with comparative study of different countries Constitution. They examined the important issues pertaining to Right to Property, 9th Schedule, "Basic Structure", Amendment power and Judicial review etc. and noted the changes proposed to the Constitution Provisions by Review of Working of Constitution of India Committee headed by Former C.J. M.N. Venkatachaliah and opined that, the misuse of 9th Schedule affected the very fabric of Part III values and Rajeev Dhavan, Senior S.C Advocate opined after the verdict given in the case of I.R.Coelho, that the Parliament should abolish 9th Schedule since this Schedule has given scope even

to non-agrarian reforms. But the researcher meticulously observed in his research that, since agrarian reform legislation is still a requirement for the country, Art.31B read 33 with 9th Schedule should be retained and on the subject of justisiability of the 9th Schedule, as such, no research work has been done with the approach adopted by the present researcher i.e. the researcher's concern is, screening and examining all the 284 laws placed in the 9th Schedule and few legislations deleted from the list as they were unconnected with agrarian reforms.

9. **Hm Seervai, "Constitutional Law of India: A Critical commentary (Universal Law Publishing 1988)."**

These are the standard constitutional law commentaries, which discuss judicial review in India in detail with case laws. The give a complete jurisprudential understanding on the subject. They shall assist the author to coherently understand the development of judicial review over time.

10. **Sorabjee, S. J. (1999). "Introduction to judicial review in India." Judicial Review, 4(2), 126-129.**

In this Art. the author has concluded in 24 points that how the judicial review does was followed in Indian Legal System and what are the basic characteristics along with its applicability as per Indian Constitution.

11. **Sathe, S. S. "Judicial review in India: Limits and policy." Ohio State Law Journal, 35(4), 870-899.**

In this paper the author has stated the detailed historical development of the doctrine of judicial review law in India and discussed all the major cases with their critical

analysis. In addition to this, it also states the limitations being imposed while interpreting the doctrine it also states the guidelines where it cannot be exercised.

12. Sarkar, A. "Standard of judicial review with respect to socio-economic rights in India. Journal of Indian Law and Society", 2(2), 293-312.

In this paper how standard of judicial review of the judiciary is most suitable with regards to socio-economic rights, is explained.

13. V. N. Shukla, "Constitution of India", (Twelfth Edition, 2016)

14. Sanjay Satyanarayan Bang, "Judicial Review of Legislative Action".

This paper seeks to establish that judicial review of legislative actions is the court's power to determine the legislature's constitutionality of the actions. Legislation that is beyond the control of the law making body cannot be permitted to be in effect because it vitally affects the rights of those governed.

15. Venkatesh Nayak, "The Basic Structure of the Indian Constitution".

In this paper the author talks about two eras of India, scenario pre- Keshvanandan and developments post Keshvanandan case. Development in the "Doctrine of Basic Structure" and in the situations between Parliament and Judiciary.

16. P.Ishwara Bhat, "Limit of the 9th Schedule's openness"

This paper attempts at such an evaluation by focussing on conceptual difficulties involved in the 9th Schedule mechanism, its purposive genesis, its extraordinary character, the practices and conventions in the sphere and types and extent of limitations on its openness. It also incidentally compares 9th Schedule with the

American dilemma of "strict constitutionalism" and the "override clause" of the Canadian Charter of Rights and Freedom 1982 to understand the efficacy of the policy of self-restraint. Finally, it discusses an important contextual issue, whether the incorporation of reservation law into 9th Schedule is constitutional at all.

17. Abhinav Sharma & Pawan Kumar Varshney, "A Tug of War between Parliament and Judiciary: A Constructive Appraisal to the Game of Supremacy".

This research paper identifies and deals exhaustively with such conflicts between Judiciary and Parliament in context of evolution of the constitutional dogmas.

18. Vaibhav Kumar Shah, "Judicial Review: A Shield and Not a Sword".

In this paper, an attempt is also made to understand the limitations on the extent of judicial review. This analysis is made predominantly in the light of the legal position in the United States; the prevailing legal position in other legal systems is also analysed.

19. Sumit Agarwala, "Judicial Activism and the Role of Indian Courts".

A bird's view of the above material would reveal to us under what great mental agony the court was labouring when it was faced with the necessity to explain or interpret the word like 'State' under Art. 12 of the Const. or the phrase 'due process of law' or the Right to Life under Art. 21 of the Constitution. The concept of judicial activism has strengthened the Court's power in a manner that no other organ of the Government could have ever done that when the field of imparting justice comes

into being in the world's largest Democracy and second largest populated country in the World.

20. Rupal Sinha, "Judicial Activism: An Impact on Government".

This paper emphasizes on the impact of an active role of the judiciary on the government as the judicial activism concept assures the decisive power of the court with a reformist interpretation, conferring to the changing time and mind sets, which helps to maintain the law, as well as the ethical values of the society.

21. Dr. N.Sathish Gowda, "Constitutional Basis for Basic Structure Doctrine: Effects and Applicability".

In this paper an attempt was made to analyse the reasons for the Supreme Court's creation of this doctrine and to know what constitutes the Constitution's "basic structure." However, paper discusses whether this doctrine contradicts the principle of power separation which is also one of the fundamental characteristics of the Indian Constitution.

22. Dr. Sandeep S. Desai, "The Basic Structure Doctrine Post-Globalization: A Critique".

The author in his paper has made a hierarchy of the cases or events that took place in relation to the "Basic Structure" Doctrine and has critiqued on the same. He has also related it to the constitutional amendment and economic development in the country.

23. Akash Saroha, "Art. 368: Boon or Bane".

In the paper importance of Art. 368 is talked about wherein researcher evaluated that Art. 368 is a very important part of the Constitution and due to this our Constitution has taken the present form and Honourable S.C keeps it protected from any kind of uncontrolled attempt of the parliament and keep it preserve so that our Constitution serves till eternity.

24. Setu Gupta, "Vicissitudes and Limitations of the Doctrine of Basic Structure".

This paper aims to examine what various S.C judges have claimed in their decisions about the applicability of the "Basic Structure" doctrine to ordinary legislations, and finally ends with some observations and suggestions.

25. Virendra Kumar, "Statement of Indian Law: S.C of India through its Constitution Bench Decisions since 1950. A Juristic Review Of Its Intrinsic Value And Juxtaposition", Journal of the Indian Law Institute, April - June 2016, Vol. 58, No. 2 (April - June 2016), pp. 189-233

The aim of this review paper is to analyse the author's comments critically research widely recognized by many respected judges; S.C jurists and senior lawyers in their pre-publication remarks. Nevertheless, the main emphasis of this analysis is to objectively figure out the inherent meaning and the juxtaposition with respect to the Indian Constitution and the constitutional order.

1.4 Aim of Study

The present study aim has a following objectives:

- To analyse the objectives behind inclusion of the 9th Schedule in Constitution of India.
- To study the impact of 9th Schedule on the power of Judicial Review.
- To study implication of 9th Schedule through judicial cases and amendments.
- To examine the relevance of Fundamental Rights in the light of 9th Schedule of Constitution.
- To study and analyse the impact of I. R. Coelho case and other judicial pronouncement on power of judicial review with relation to 9th Schedule..

1.5 Significance of Study

This research paper will give a clear view on the study on relationship between 9th Schedule and the power of Judicial Review. The study analyses a lot of Supreme Court landmark judgements with this regard. The study tries to give an insight into the concepts by Supreme Court in a nutshell. This would lead to understand the concepts for the upcoming judgements on the same issues. The present work is more helpful for the legislatures, policy makers and policy implementers. There is still an important constitutional question as to what 'right test' means what are essential features of "Doctrine of Basic Structure", these concepts are still evolving. So, it gives the chance to grab upon the subject and its importance.

1.6 Scope of Study

The scope of this research refers to a summary of the 9th Schedule's origins and evolution from the time it was implemented i.e. first amendment, 1951 until now, and an overview of the problems surrounding interpretation and implementation. In particular, the issues discussed the purpose of the 9th Schedule and its development with correct textual interpretation of the Art. 31B. this study will also include the grounds on which some laws are inserted to the 9th Schedule can be proved unconstitutional and invalid by reviewing all the related judicial proceeding. Further, this study focuses the effect of the 44th Amendment on the effectiveness of the 9th Schedule. Addressing of these issues in the recent verdict of S.C in Coelho case, an attempt has been made to find out the solution for the issue relating to the need of 9th Schedule even after the removal of fundamental right to property from the list III and limitation on the amendment power of the Parliament under Art.368 of the Constitution. Finally, the researcher has limited his study to examine the Constitutional validity of the 9th Schedule in the light of recent judgements of the S.C.

1.7 Research Questions

i. What is the purpose of inserting 9th Schedule in the Constitution of India?
ii. What is the impact of 9th Schedule on power of Judicial Review?
iii. What are the implications of inserting 9th Schedule of the Constitution?
iv. What is the relevance of Fundamental Rights in the light of 9th Schedule of the Constitution?

v. What is the impact of I. R. Coelho and other judicial pronouncement in relation to the 9th Schedule?

1.8 Hypothesis

- The initial purpose of introducing 9th Schedule to the Constitution was to gives immunity to the Acts from the judicial review for bring agrarian reforms which was later misused or rather abused by the Parliamentarians.
- Implication of including 9th Schedule is that because of it there were constitutional crises arise between the legislatures and the executives on one hand and judiciary on the other.
- Approach of the Court was exceeding of its power by creating hierarchy of fundamental rights, when no such thing is specified in the Constitution. Constitution is Supreme.
- The 9th Schedule has lost its significance after the I. R. Coelho judgement.

1.9 Research Methodology

The study would be doctrinal in as much as it pertains to build the conceptual understanding of the evolution of the fundamental principles of India and the present scenario of the same. The doctrinal research would involve a study of the relevant contexts of Constitution law in regards with power of its organs, tussle between the judiciary and legislation; and series of case laws and amendment thereunder.

It would also be analytical, qualitative and explanatory in nature.

Analytical – The study will analyse the series of cases of landmark cases which led the development of the Doctrine of "Basic Structure" and its implementation with respect to 9th Schedule.

Qualitative- The study will find the reasons about why the 9th Schedule still prevails in the constitution even after Keshvanadan case and 44th Amendment.

Explanatory – The study will explain about the existing situation.

Primary data would be Constitution, Statues, Rules, Regulations, Legislations, Policies, Orders, and Notifications. The scholarly writings in the form of Articles, anthologies, excerpts, blogs etc. are available on the common domain of the worldwide internet would be the secondary data. For the modifications that Indian conditions require for the legal implants, various books, Articles and writings of scholars are considered and analysed as part of the larger doctrinal study. Research sources would also cover Newspapers, brochures of law schools, magazines etc.

1.10 Chapterisation

The entire study comprises of six chapters including the introduction and conclusion:

The **First Chapter** completely focuses on "General Introduction" which deals with origin of the topic. This will include the objectives and aims, hypothesis, research question, research methodology and a brief overview on what is research study all about.

The **Second Chapter** entitled "Introduction to Power of Judicial Review and Historical Background of 9th Schedule" discusses the Evolution of the concept of the judicial review. Moreover, research will discuss historical background of 9th schedule and its objectives and development.

The T**hird Chapter** entitled "Implication on Power of Judicial Review after Inclusion of 9th Schedule to the Constitution of India". The researcher will be focusing on the scope and importance of the "Doctrine of Basic Structure" with regards to 9th schedule and Article 31B, 13. Analysis on judicial review in the light of 9th schedule with cases from Sajjan Singh to Keshvanda Bharti.

The **Fourth Chapter** focuses on "Justiciability of 9th Schedule in the light of I. R. Coelho case", where the researcher will analyse the cases and discuss the judgment after Keshvanada Bharti till I.R. Coelho.

The **Fifth Chapter** focuses on "Working of "Right Test" via recent Judicial Pronouncements". Here the researcher will analyse the cases after I.R. Coelho.

The **Sixth Chapter** and final chapter of this work is devoted for "Conclusion and Suggestions" where the researcher proposes many recommendations, findings and observations of the research and suggestions. Even the utility of 9th Schedule in the present scenario.

CHAPTER 2

2. Introduction to Power of Judicial Review and Historical Background of 9th Schedule:

2.1 Introduction:

Just like the concept of Const.alism is moving from thin to thick as we are growing and developing, the researcher is also trying to do the same in this chapter by first writing about the broad area of the topic and then will slowly move towards the main part of the research.

In this chapter what is Judicial Review is discussed by the researcher in brief and then slowly will connect and move towards the main topic. Later in this chapter 'background of 9th Schedule' is discussed by the researcher.

2.2 The origin of the Judicial Review.

Judicial Review is a judicially developed concept. It was first inserted in the USA Const. after the judicial pronouncement of landmark case Marbury V. Madison[6] in 1803. Marshallian statesmanship found its first and best expression in Marbury v. Madison which has been regarded as "the rib of the Const."[7] and "an example of Const.al law making at its very highest level of both doctrinal and political significance."[8] Whereas in India, we adopted this concept from the USA at the time of

[6] 5 U.S 137 (1803)

[7] Glenden A. Schubert, Const.al Politics 178 (I960).

[8] Ibid.

making the Const. did envisage in the Const. in Articles 13, 32, 226, 245, 372 of the Const. clearly establish the power of judicial review.

2.3 Relation of "Separation of Powers with Judicial Review":

Three pillars of the State are in the form of three-tier filtration check, if the Legislature acts in defiance of the Const., the President can deny his assent to a particular legislative enactment, in case of failure of exercise of such power by the President, when it comes to the execution of the law, the Court will stand as a guard against acting in contravention to the Const.al principle[9] this is called judicial review of state actions, upholding the idea of Const.alism. So, in this manner the effective check is guaranteed against any infringement of Const.al principles. Now, how far the courts can go when it sit to judge the actions by the other two branches of the government, will be analysed in due course.

Review by judiciary is defined as the court's power to determine Const.ality of an act of any State organized body.[10]In English law this only applies to the executive, and Parliament's will cannot be questioned by any court,[11] even though efforts were made by Justice Coke in Bonham's case, where he said that, 'even the parliament cannot go against the well settled principles of common law' still this preposition was never used to overrule a legislature enactment.Everything was due to the US Supreme Court ruling

[9]Marbury v. Madison, 5 U.S. 137 (1803); A.K. Gopalan v. The State of Madras 1950 AIR 27.

[10] Craig R. Ducat, Const.al Interpretation 3-4 (8th edition 2002).

[11] A. V. Dicey, AN "Introduction to the Study of the Law of the Const." 34-35 (10th edition 5th Indian reprint, 2008, Macmillan Press 1897).

in Marbury v. Madison.[12]This great case had its history in the colonial past and its taproots in Englishmen's declaration of F.R. back to Magna Carta (1215).[13]

Marbury v. Madison[14], inaugurated judicial review, finding justification in terms of Const. itself, as Justice Marshall pointed out "It is the province and the judiciary's responsibility that what the law is ... and the federal judiciary is the supreme officer under the supreme law (Const.) under the authority of Article VI, paragraph 3, that uphold the Const.."[15] But the question as regards the manner and extent of such exercise and the interpretation of the Const. was left open. There have been frequent contractions and extensions in this field as per the situations and circumstances governing it, as Cardozo says, the tending inclination of the Court depends largely on the social conditions prevalent at that point of time.[16]

2.3.1 Judicial Approach in United States of America:

The concept of judicial review has always been there in American Const.al system[17] even though it is said to be established in "Marbury v. Madison[18]." Earlier scrutinising Const.ality of a particular act, courts confined themselves in determining whether the legislative policy is in consonance with the Const.al policy but now they even go the

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[12] Supra note 1.

[13] Warren E. Burger, "The Doctrine of Judicial Review, Mr Marshall, Mr Jefferson, and Mr Marbury, Views from the bench" 7 (Asian Books reprint, Chatham House Publisher 1987) 1985.

[14] Supra note 1.

[15] U.S. CONST. art III, 1; INDIAN CONST. art 141; Malbury v. Madison 5 U.S. 137, 177-178 (1803).

[16] Leonard W. Levy & Kenneth L. Karst, Encyclopedia of the American Const., Volume I, 1449(2d. edition. 2000)

[17]Kamper v. Hawkins I Virginia Cases 20, 38 (1793); Van Horne Lessee v. Dorrance 2 Dallas 304, 309 (1795); Bowman v. Middleton, I.Bay 252, 254 (1792); Chisholm v. Georgia 2 U.S 419 (1793).

[18] Madison, supra note 3.

extent of suggesting or justifying their own political ideologies in terms of the Const.al policies thereby holding an act of legislature as Const.al or unConst.al.Chief Justice Marshall never meant the said approach of the court in Marbury v. Madison.[19]

The doctrine was evolved in Lochner v. New York, where the Court struck down by a majority a state law restricting the maximum hours of bakery workers to sixty a week and ten a day.[20] The court being least bothered with the intent of the legislature, struck down the law for violating liberty of contract. While Court agreed that workers' hours could be controlled solely to protect the interests of police authority - health, safety, security, or morality but also refused to grasp the essence of the law made in the furtherance of police authority.This court approach was not only illogical, but it also created a false perception that court is more of a better judge of the need of the citizens (popularly a basis for 'policy decision') than the legislature.Contrary to the court's opinion in Lochner case, one of the most powerful opinions was given by Justice Holmes in his dissent, where he said,

"A Const. is not intended to embody a particular economic theory of Herbert Spence. It is made for people of fundamentally differing views…….and the legislature is the best judge of the people's need and not the court. The purpose of the court is not to suggest what the court thinks to be an appropriate policy but to check whether the said policy even though harsh is made in the exercise of police power":[21]

In the light of above observations, a major concern still left unanswered is, when should the court exercise judicial review irrespective of the policy adopted by the legislature.

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[19] Id.

[20] Id.

[21] Id. at 75-76.

To this there is no exact or certain answer but then the circumstances and the situation prevalent will determine how and to what extent the power can be exercised in policy questions, sometimes in the interest of justice the courts may feel compelled to overstep their boundaries. Works of Louis Hinkins on Const.alism can be referred even though it is on a different concept. However, he believes that courts should exercise judicial review in policy matters where there is a direct breach of basic human rights such as abortion, reproductive rights and discrimination, without any rational distinction.It may also exercise its power where there is violation of "rule of law, democratic principles and separation of power even though the matter relates to policy." Contemporary Const.al changes existing in the society not recognised by the legislature can also be answered by the judiciary by means of judicial activism. These grounds are not exhaustive but mere illustrative and any ground can be added but it should be ejusdum-generiesin gravity to the grounds stated above.

2.3.2 The Nature of "Judicial Review in India":

In India, judiciary in its initial days exercised a greater degree of judicial restraint than seen after 1970s.[22]It was a Parliament's continuous unConst.al action (word used in the sense of Const.al spirit rather than Const.al provisions) that leads to the creation by the court of various theories in Const.al law to restrict the government's power.[23] The problem of drawing a line between judicial and legislative power is always a difficult one in any legal system wherein the Courts as ultimate arbiter has a power to preview legislative actions. On one hand, there may a danger of judiciary overstepping its boundaries and on the other there may be a scenario wherein the judiciary may become

[22] A.KGopalam v. St. Of Madras, AllIndiaRepoter1950SC27; R.C.Cooper v. UOI, 1970SC564; ManekaGandhi v. UOI, AIR 1978SC597.

[23]Kesavananda Bharti v. St. of Kerala, A.I.R. 1973 SC 1461

so subservient to the legislative will so as to render nugatory the Const.al safeguards to individual liberty. After more than 60 years of working of the Indian Const. there is still a need to strike a harmony between these two extreme positions. The inception of problem manifested itself from the very beginning in India in 1951 with the arrival of 1st amendment. The First Amendment Act was introduced within year and half of its working to nullify certain judicial decisions and forestall future judicial action. The Courts never shied away from asserting authoritatively that in case of grave Const.al violation by the Legislature the Court are well within their powers to intervene and declare such act to be invalid. Way back in the year 1950 itself in A.K Gopalan v. State of Madras, the Supreme Court held that,[24]

"The inclusion of Article 13(1) and (2) in the Const. appears to be a matter of abundant caution. Even in their absence, if any of the F.R. was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."[25]

Such illustration where the situation forced the Court to take a stance against Legislature is not just confined to amending power, the Court in S.R Bommai v. Union of India[26] established judicial review in cases falling within the purview of Art 356, and the Court held that,

"President cannot exercise this power under the Const. on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature if there be no basis or

[24] Supra no. 21, A.K Gopalam.

[25] Id, 34.

[26] S.R Bommai v. Union of India, AIR 1994 SC 1918.

justification for the order under the Const., the Courts will have to perform their duty cast on them under the Const.. While doing so, they will not be entering in the political arena."[27]

Furthermore, in St. of Raj. v. UOI[28], the Court propounded that

"The guiding principles should be the welfare of the people at large and the intention to strengthen and preserve the Const.. Clause (5) of Article 356 of the Const. does not imply a free licence to the Central Government to give any advice to the President and get an order passed on reasons which are wholly irrelevant or extraneous or which have absolutely no nexus with the passing of the Order. To this extent the judicial review remains."[29]

In RajaRamPal v. The Hon'ble Speaker, LokSabha&Orthers[30], the Court duly extended the authority of judicial re-evaluation to issues relating to parliamentary privileges:

"It should be a matter of presumption, that Parliament would always perform its functions and exercise its powers in a reasonable manner. But, at the same time there is no scope for a general rule that the exercise of powers by the legislature is not amenable to judicial review. This is neither the letter nor the spirit of our Const.. We find no reason not to accept that the scope for judicial review in matters concerning Parliamentary proceedings is limited and restricted."[31]

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[27] Id.

[28] St. of Raj. v. UOI A.I.R. 1977 S.C. 1361.

[29] Id. 1441.

[30] Raja Ram Pal v. The Honourable Speaker, LokSabha& Others (2007) 3 SCC 184.

[31] Id. 360.

Furthermore, it was pointed out that the

"In case of gross illegality or violation of Const.al provisions is shown, the judicial review will not be inhibited."[32]

In Kehar Singh's case[33]Chief Justice Pathak argued that the President's order could not be subject to judicial review on its merits except under the strict limits set out in the case ofMaru Ram[34], in which it was cited that,

"It is the pride of our Const.al order that all power, whatever its source, must, in its exercise, anathematise arbitrariness and obey and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power."[35]

In E.P.Royappa v. St.of T.N[36], Justice Bhagwati, explaining the scope of executive power and concept of equality stated:

"Equality is a complex principle with many facets and dimensions and within conventional and doctrinaire boundaries it cannot be 'cribbed cabined and restricted.' In a positivism context, equality is antithetical to arbitrariness. Yes, equality and

[32] Id. 362.

[33] (1989) 1 SCC 204, 217.

[34] AIR 1980 SC 2147, 2169, 2170.

[35] Id.

[36] All India Reporter1974SC555.

arbitrariness are sworn enemies; one belongs to the rule of law in a republic, the other to an absolute monarch's whim and caprice."[37]

In Ashok Kumar Thakur v. UOI[38], S.C. expressed discontent to contention of respondent that the Courts cannot enter into policy question. In IndraSawhney v. UOI[39], Whereby S.C. did not refrain from defining the reservation quantum, such action was all the more complimented by the failure on part of the Legislature to reach a justified position in this regard. In B.RKapur v. St.of T.N.[40], however S.C. initially refrained from entering into the political thicket, still went further and added that if such question relates to a Const.al interpretation, the Court will decide the issue irrespective of the actuality that answer to such query will have a political impact.

More activist approach by the courts can be seen in cases relating to environmental matters, starting from Rural Litigation and Entitlement Kendra v. State of U.P[41] down the line till ICELA v. UOI[42], the S.C. has taken a stern approach as regards failure on the part of the State and lack of seriousness with respect to implementation of environmental laws. In A.K. Gopalan v. St. of Madras[43], the phrase "procedure established by law" was interpreted by judge to mean as "procedure prescribed by law

[37] Id 583.

[38] 2008 6SCC1.

[39]All India Reporter 1993 SC 477.

[40] 2001 7 S.C.C. 231.

[41] Rural Litigation and Entitlement Kendra v. State of U.P AIR 1985 SC 652.

[42]Enviro-Legal Action v. Union of India AIR 1996 SC 1446.

[43] Supra no. 21, A. K. Gopalan.

of the state".Nevertheless, same term was interpreted in Maneka Gandhi v. Union of India[44] as meaning due process of law, which means right, just and fair procedure.[45]

Every case is unique in itself, and on the basis of decisions above mentioned one can easily conclude that a decision should not be analysed in isolation, there may be instances where judicial intervention is not required but judiciary oversteps its boundaries and equally there may be instances that to undo the miscarriage of justice the judiciary will have to come to go beyond the black letter of law to ensure justice to the people. The separation of powers is complimented and supplemented by checks and balances, and therefore the organs of the State, though separate, act as a brake on each other.

2.3.3 Conclusion

Judicial power has always been the weapon of the last resort. It is generally resorted to as a weapon of defence and not of attack. When the legislature and the executive, on whom lies the primary responsibility to dispense justice, fail, that is when the judiciary steps in, to approximate 'is' (fact) to the 'ought' (law). The above discussion clearly highlights this fact. It however, also shows that things become complicated when in the process of approximating 'is' (fact) to the 'ought' (law), the Courts start playing the

[44] Supra no. 21, Maneka Gandhi.

[45]Fazl Ali, J. Dissenting in A.K.Gopalan v. St. of Madras; S.B v. Delhi Administration, All India Reporter1978SC1675.

role of law-makers. This is a temptation hard to resist, but which needs to be avoided, for the judge must decide a case with regard to the principle and not to the policy.[46]

2.4 Background of 9th Schedule

The Const. of India can be referred as a document which states a shift from the colonial power. The Const. was designed to create an organic framework that would preserve the independence and freedom of the government, armed with resources for the social revolution. The Const. was expected to take account of multiple conflicts, which may be the reason that our Const. was built on a history of multiple conflicts. Freedom of speech and national integration, personal rights and political peace, preferential treatment for some parts of society and equal treatment for all, and so on. If there is uncertainty and dispute in the key source of power, it will certainly generate instability in the organs that derive power from the same.

The amendment of Const. since the beginning has always been made for the political purposes only as well as to cancel or alter the judicial decisions. Moreover, the sanctity of the Const. as an organic instrument is compromised by too many changes and often generate vagueness. For example, the 42nd amendment made some important changes, such as F.R. devalued in relation to Directive Principles. The 43rd and 44th amendments have stripped-out many of the provisions of the 42nd amendment. Rather than being static, the mechanism of amendment has proven to be too mouldable. There is no separate parliamentary body to amend, and Parliament, the ordinary legislative body of the Union, performs this role. The Const. may be amended in accordance with Article

[46] Ronald Dworkin, Taking rights Seriously (4th Reprint India, Universal Law Publication 2008)

368 and the ordinary legislation of the Parliament referred to in Articles 2, 3 and 4 as well. Apart from this standard process, civil procedures, agreements and by legal definitions.

India became independent from Britishers in 1947[47]. Right after that, in 26th January 1950, Indian Cont. came into force; the lengthiest written Const. in the world.[48] All legislations enacted by the law-making divisions must comply with its terms, as with most compositions.[49] After the ratification of the Const., Parliament saw a justification to change the Const..[50]Pandit Nehru observed that the Indian Const. had no permanence since it would put an end to domestic growth. The Const.al amendment will be reinstated only in the case of serious consequences or emergency or exceptional contingency. Novel Const. Of India assured its citizens the "right to property" for the very first time. While Jawahar's main policy for equal relocation of land were soon challenged in the courts by the landowners. Initial rulings by court stated that reforms for land legislation "infringed the Const.ally guaranteed fundamental right to property."[51]

Upon response, on 29 May 1951, Prime Minister Nehru introduced the First Amend. to the "Indian Const.", that created a popular "9th Schedule"[52],establishing Article

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[47] Cambridge Illustrated History: British Empire 386 (P.J. Marshall ed., 2006).

[48] Soli J. Sorabjee, Const.alism and Rights: The Influence of the United States Const. Abroad 97 (Louis Henkin& Albert Rosenthal eds., 1990).

[49] See Supreme Court of India, Const. of Supreme Court of India, http://supreme courtofindia.nic.in/news/Const..htm (last visited May 5, 2020).

[50] See A.G. Noorani, 9th Schedule and the Supreme Court, Econ. & Pol. Wkly., March 3, 2007, at 731.

[51]VenkateshNayak, The Basic Structure of the Indian Const. 1 (2006), available at http://www.humanrightsinitiative.org/publications/const/the_basic_structure _of_the_indian_Const..pdf.

[52]Const. (1st Amend.) Act 1951

31B,[53] defining the 9th Schedule, and incorporated into Part 3 of the Const.[54] Initially made up of 13 rules, the 9th Schedule was designed to barely exclude reforms on land legislation from review of judiciary.[55]

Since the time of the 1st amendment and the 9th Schedule implementation of reforms for land rules, a long story followed in court.[56] Between 1951 and 1967, landowners opposed legislation and Const.al amendments including laws on land reforms in the 9th Schedule[57]. These legislations were at first challenged as breach of Art. 13(2) of the Indian Const., that provides for a derogation from F.R.[58] In case of Shankri Prasad v. Union of India[59], and Sajjan Singh v. Rajasthan[60] the complainants were making a parallel between the Const.al amendments to the law and argued that the changes opened up the F.R. to land and were illegal U/A 13(2). In both rulings, however, the

[53]Article 31B: "Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the 9th Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force."

[54]See Const. (1st Amend.) Act, 1951.

[55] 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 [land reform laws], generally speaking, aSnd another type should not come in. Secondly, every single measure included in this schedule was carefully considered by our president and certified by him."

[56]See id. At 731–33.

[57] Id.

[58] India Const. art. 13, § 2. Article 13(2) reads: "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." Id.

[59] AIR. SC 458 (1951)

[60] AIRSC 845 (1965)

Indian S.C. dismissed the claims of Article 31B[61] and "strengthened the Const.al validity."

Yet the Supreme Court reversed its decision in the year 1967. It held, by a narrow majority of 6-5, that the amendments were 'laws' under ambit of Art. 13 of Indian Const..[62] This was an important judgment as for the very first time, the court ruled that "there were implicit restrictions on the power of Parliament to alter the Const". The S.C. thus said that "Parliament won't have any authority to change any of the provisions of Part III since the decision came (27 Feb. 1967) to abolish the F.R.." However, the court observed that if legislative body wanted to change F.R., it would have to assemble a Constituent Assembly.

Subsequent to this important verdict, the govt. continued its "liberal steps" on the communal frontage, again fated to conflict with the courts.[63] Primary goals of the then Prime Minister, Indira Gandhi, were to reduce expenses to princes needed by the government.[64] Taking into account the peaceful acquisition of their provinces to the Indian Union at the time of their independence from the United Kingdom, the Const. provided the displaced princes with regular expenses, known as "privy purses."[65] However, people did not like these payments and Indira Gandhi was gritty to accumulate $6 million a year to the treasury by removing these privileges. Therefore in Sept. 1970, Indira abolished an amendment into the legislative bottom to

[61] Ibid

[62] 2 SCR 762 (1967).

[63] Ibid

[64] Katherine Frank, Indira 323 (2001).

[65] Ibid

"discontinue privy purses."[66] While the vote in the rajya sabha was acknowledged by sizeable precincts, it had been rejected by single vote in the lok sabha.[67] Following this parliamentary failure, Indira told her friend, President V.V. Giri, by means of a presidential declaration "recognize" the princes, and unConst.ally revoke their salaries and the rights to the monarchy.[68]

In early December 1970, the Supreme Court invalidated the Princes' de-recognition as unlawful "along with a contemporaneously enforced public banks".[69] As one columnist put it, "It was now clear that the Supreme Court and Parliament had loggerheads over the basic position of F.R.." [70]

In the reaction to this S.C. strike, Indira suspended the assembly. She held re elections in Feb. 1971. Mrs Gandhi won that election with 2/3rd majority and returned to power by becoming most successful Indian P.M. in the history of an Independent India.[71] After coming into power Mrs Indira Gandhi was willing to change the Const..[72] Between 1971 and 1972, Parliament conceded many vital lawful alterations which includes a series of amendments like 24th Amendment (the assembly has the "supreme authority to modify and revise every segment of the Const., including part 3 dealing with F.R."), the 26th amendment (removal of privy purses of princes) and the 29th amendment (insertion of unique land reforms).

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[66] Ibid

[67] Ibid The vote in the rajya sabha was 339-154. Id.

[68] Ibid

[69] Frank, supra note 34, at 323; Nayak, supra note 30.

[70]Nayak, supra note , at 30.

[71] Ibid at 327. The new majority in the lower house of Parliament gave the Congress Party 325 seats—seventy more seats than in the previous Parliament. Id.

[72] Ibid at 328

Again, the Const. amendments and land reforms legislation were challenged in the court of law. The famous judgment was declared namely Kesavananda Bharati case,[73] in which the Supreme Court's thirteen-judge bench released the judgment of 800 pages[74] and a full volume of Supreme Court Case Report. The court also released many influential decisions.

S.C. reversed GolakhNath case, in which it was propounded that the Parliament lacks the authority to alter existing F.R. without a Const.al convention. Furthermore, by a vote of 13 to 0, "the court upheld the 24th amendment, which stipulated that the Parliament had the right to change some or all of the provisions of the Const."[75] Though, by decision of seven-six, the S.C made one caveat: since no aspect of the Const. remained un-amended, Parliament could not remove the core framework i.e. basic structure of the Const. by simple amendment which is the backbone of the Const.. The court also defended the 29th amendment, holding "Kerala land reform" legislations beyond the purview of judicial scrutiny, as found in the 9th Schedule.[76]

Therefore, though the court upholds "Parliament's amendments, the court added the power of judicial review for it by finding that amendments, changing the Const.'s basic structure, do not withstand judicial scrutiny".[77]

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[73]KesavanandaBharati, All India Reporter 1973SC1461

[74] Ibid

[75] All India Reporter 1967SCR(2)762

[76] Ibid

[77] Ibid

While the government challenged Kesavananda Bharati's fundamental structure dogma, the ruling of the same was upheld in subsequent decisions.[78] Therefore, legislature was able to work by altering the Const. for over thirty years till it did not affect the fundamental structure of the Const.[79]

[78] "Smt. Indira Nehru Gandhi v. Raj Narain, 1975 Supp (1) S.C.C. 1 (India) (invalidating clauses of Thirty-9th Amend. as inconsistent with basic structure of Const.); see also Minerva Mills Ltd. v. Union of India, 3 S.C.C. 625 (1980) (India) (striking down clauses 4 and 5 inserted into article 368 of the Const. by the Forty-second Amend. as inconsistent with basic structure doctrine)."

[79] Ibid

CHAPTER 3

3 Implication on Power of Judicial Review after Inclusion of 9th Schedule to the Constitution of India:

3.1 Introduction

In general terms basic means base or pillar. It the pillar is detached then the whole build will collapse if the base is removed. "The Basic Structural Doctrine refers to the basic features of the Constitution, which cannot be changed/amended".[80]

"Basic Structure" was first referred was in Sajjan Singh judgement[81], the Court observed that "formulated a solemn and dignified preamble which appears to be an epitome of the constitution's basic features. Could it not be argued that these are signs of the Constituent Assembly's intention to give the constitution basic features a permanence?" The doctrine was first introduce in landmark case of Keshavananda Bharti,[82] where underlining the crux of the "Basic Structure", the S.C held that "every provision of the Constitution may be amended, provided that the basic foundation and structure of the Constitution remain the same as the result." The definition of "Basic Structure" as such gives a Constitution strength and consistency because it has a certain inherent power in it. Inspired by the "Basic Structure" doctrine treasured in Articles 1 to 19 of the 1949 Germany's Constitution ("Grundgesetz für die the Federal Republic of Germany").

[80] Dr. Justice B S Chauhan, Doctrine of "Basic Structure": Contours, 2018.

[81] All India Reporter 1965SC845.

[82] Supra no. 73.

According to the German Constitution, the laws deal with freedoms, which are not simply principles, but are equal and able to be interpreted. Therefore, such principles place on the State a constructive obligation to ensure its accomplishment. The rights and freedoms must be protected by the State.

After understanding what is the doctrine of "Basic Structure" and its origin in India and where this concept is taken from, now the question rise why do we need to study in our research? Answer to it is that "the Doctrine of Basic Structure" was introduce in our country because of the 9th Schedule. 9th Schedule was introduced for the erosion of the fundamental right to property. 9th Schedule was like a magic box that cannot be touched by the Judiciary even if it is harming personal rights or the constitution as a whole. So for putting a line on Parliament's want of supremacy of power Doctrine of "Basic Structure" was brought forward as a solution.

"Basic Structure" Doctrine was evolved in into three different phases, 1st phase – Prelude Keshvananda Bharti case, 2nd phase Struggle of Supremacy of between Judiciary and Parliament, and moving towards Keshvananda Bharti. 3rd phase is development in the "Basic Structure" from Keshvananda Bharti till I. R. Coelho's case. 4th phase is from I.R. Coelho till today, the importance of the 9th Schedule. 4th Phase would be decided in the fifth chapter.

3.2 Phase 1- Prelude Keshvananda Bharti:

Prelude means events serving as an introduction to something more important. In our case the main events were as follows:

- In our country, the situation was such that property (land) was unevenly distributed among the citizens of the country.

- On one side there was Right to Property which was included in our Part III i.e. Fundamental Rights, in our Constitution.
- On other side the State wanted to confiscate the land from the people who had more than 20 acre and distribute it to the poor farmers by abolishing zamindari system and bringing agrarian reforms. Thus, Parliament brought 9th Schedule for bringing agrarian reform.

Talking about global Human Rights, it states that "Everyone has the right to own property individually and in conjunction with others. No one shall be arbitrarily deprive of his property."[83]

Moreover, the State possesses prominent rights over private property, however, the concept of private property must be discussed in brief. Private property institution has been a debateable subject with has contradicting views, one of which fully supports the right of the State and the other supports private property ownership.

An individual's property rights are, however, a natural and fundamental right. Most of the liberal constitutions have acknowledged the right to private property, excluding those of communist countries. Citizens are therefore entitled to own and possess the land. This right of the citizen is in conflict with a State's right to obtain the land. State can possess the land under the due process of law.

Therefore, "no individual will be deprived of his property except by the authority of law."[84] Nevertheless, concerning the "right to property" the kind of protection we get, is provided under Art. 300A in our constitution. We adopt it via the US Constitution.

[83] UDHR, Section 17.

[84] As per the Indian Constitution.

For a better understanding of Section 19(1)(f) and 31 along with amendments to the Const. and Art. 31(2) of the Const. provides for compulsory acquisition of land.

In the State of Bihar v. Kameshwar Singh[85], the S.C pointed out that "Art. 31(2), as it stood before the amendment, did not expressly make the presence of a public intent a condition precedent to the acquisition power, but it was an important component to an eminent domain, and the provision continued on the premise that the acquisition could be for a public purpose. After the authorities examined, Das J. in Kameshwar Singh's case, he argued that no hard and fast definition of the republic object can be laid down for its meaning, it has changed rapidly in all countries, he proposed as a working definition that whatever promotes the general interest of the society, as opposed to the individual's particular interest, must be regarded as a public purpose."[86]

3.3 Phase 2 – Struggle of Supremacy:

9th Schedule is the reason for introducing the concept of "Doctrine of Basic Structure". Any law kept in 9th Schedule was immune from the Judicial Review of the Judiciary. 9th Schedule was initially proposed with a good cause for the development of the country and for bringing agrarian reform in the country by abolishing the zamindari system which was prevailing at that time. But later on, the same Schedule was used availing supremacy over the Judiciary and there was the tussle began.

[85] AIR 1952 Pat 417.

[86] Id.

This battle between the parliament and the judiciary gave birth to one of the important doctrines, which is known as the doctrine of the "Basic Structure". Absolute or unlimited amending power of the Parliament under Art. 368 is limited by the doctrine. This doctrine was established in landmark case of Keshvananda Bharti v. the state of Kerala.[87] Widely known as the 'Fundamental Rights Case' which prevented Parliament to amend the "Basic Structure or Framework" of the Const. using Art. 368. Though Art. 368 is silent about the width of the amending power of Parliament, this judicially created doctrine limits the amending power.

The Constitutional amendments that were related to the land reform and were placed in the 9th Schedule were challenged by the private property owner saying that it violates Art. 13(2) before the S.C. Nearly, two decades have gone by for a long journey in carving an implied limitation on the Legislature's amending power under Art. 368 in the form of "Basic Structure" doctrine.

The tussle between Parliament and Judiciary on 9th Schedule went for long time, ever from passing of 1st amendment till Keshavnanda Bharti. The Struggle for Supremacy of both the organs are divided into three rounds.

Round 1 includes two cases:

- Shankari Prasad v. UOI[88]
- Sajjan Singh v. St.of Raj.[89]

[87] AIR 1973 SC

[88] 1952 1SCR 89

[89] All India Reporter 1965 SC 845

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Round two includes:

- Golaknath v. State of Punjab[90]

Round 3 includes:

- 24th Amendment Act, 1971

3.3.1 Round 1 – First two cases:

"Law" specified under Art. 13(3) a list which are included as law and the list is not an exclusive list. It is an inclusive term but it did not include "constitutional amendment" at that time. Even in present time, it is not expressly written the amendment is also included in law as it is judicial interpretation. In these two cases law does not include amendment but in later cases it will be and these cases will be over-ruled.

F.R of the citizens are given under Art. 13(2). Parliament and the state legislatures are specifically forbidden from creating laws which can revoke or abridge the constitutional rights that are granted to the citizens of the country. There was argument between the Parliament and the Judiciary that every constitutional amendment had the status of a statute as provided for in Art. 13(2). It was challenged first time before the S.C in 1952, in SankariPrasad v. UOI.[91] It was held by Patanjali Shastri J., on behalf of the Bench that legislative power and constituent power are different so amendment which comes under the constituent power does not comes under the Art. 13 of the

[90] All India Reporter 1967 SC 1643

[91] Supra no.

Constitution. Moreover, the F.R don't fall outside the control of Parliament and F.R can be amended. Mostly after ten years, Parliament's representative authority was questioned once again in Sajjan Singh v. St. Of Raj.[92] This time the Court was divide into two on the issue, and Gajendragadkar CJ's majority opinion was followed. The Court's stance in Sankari Prasad that legislative power and constituent power are different, and ruled that "constitutional amendments were not protected by the prohibition listed in Art. 13(2)".[93] Moreover, Hidayutallah J. and Mudholkar had a dissenting opinion and said constitutional amendment do include in Art. 13. This dissenting opinion was a seed of the doctrine of the "Basic Structure".

3.3.2 Round 2: The Golaknath verdict

The conflict between Parliament and Judiciary increased in this phase of year1967-1973. In 1967 a S.C bench of eleven judges modified its place in the tussle and tried to be on the winning side. It was 6:5 majority judgment in the case Golaknath case[94], Subba Rao C.J., put forward the remarkable argument that Art. 368, which included amending provisions, merely laid down the process of amendment. Thus he means that Art. 368 did not grant Parliament the right to amend the Constitution. Whereas, the Parliament's constituent power is stemmed from other provisions in the Constitution like Art. 245, 246, and 248 which gave it the power to make laws. The apex court therefore ruled that Parliament's amending power and statutory powers were practically

[92] 1954 RLW 633

[93] Minority view was given by HidayatullahJ., authored "the fundamantalness of our fundamnertal rights" and held that, "if our fundamental rights were to be really fundamental, they should not become the plaything of a special majority" in the page 862.

[94] All India Reporter 1967SCR (2)762

the same. Consequently, every alteration to the Constitution shall be considered to be law as provided for in Art. 13(2).

Thus, there is limited power for amendment in the Constitution was implied by the majority judgment. Broadly, it meant that Const. gives the citizen's fundamental freedoms a position of permanence. The citizens had reserved the F.R for themselves in granting the Constitution. According to the majority opinion, Art. 13 expressed the restriction on Parliament's powers. Regardless of this scheme of the Const. and the essence of the liberty given under it, Legislature may not alter, limit or harm the fundamental freedoms of the citizens. The judges declared that the f.rs. Were so inviolable and inspirational in nature that they cannot be limited by both houses of Parliament unanimously supported such a change. We observed that Parliament could hold a meeting of a Constituent Assembly with a view to amending the F.R if necessary.

The term "'Basic Structure"' was first coined by M.K. In the Golaknath case, Nambiar and other counsel argued for the petitioners, but it was only in 1973 that the term appeared in the text of the judgement of the S.C.

Thus, in this round the Judiciary wins over the Parliament by stating that "there is no difference between constituent power and legislative power of the Parliament."[95]

3.3.3 Round 3: Parliament fights back

The only solution Parliament felt was to change the Constitution. The 24th Amendment (1971) smoothed the way for Parliament to change every section of the Constitution.

[95] Id.

Twenty-fifth Amendment (1972) concentrated on matters of land. The word 'compensation' was changed to the 'amount'. As the Directive Principles (Art. 39b and c) [96] are used as the guiding principle for laws enacted, "equality before the law (Art. 14)", freedoms referred to in Art. 19, and property matters referred to in Art. 31 are to be subordinated and beyond judicial review, this became Art. 31C (i.e. certain fundamental rights are to be subordinate to the Directive Principles).

Thus Parliament added Art. 13(4), Art. 368(2) and (3) to get back the supremacy over Judiciary.

3.4 Phase 3 – Emergence of the "doctrine of Basic Structure"

After the tussle of two decades then came a deciding case which brought equilibrium between both the organs of the State. Ultimately, a full bench of the S.C of thirteen judges questioned the constitutional validity of those amendments. Their decision is to be contained in 11 different judgments. A summary document of the most significant decisions was signed by nine judges which made the case. Granville Austin held "that there are some variations between the statements in the document signed by the judges and their views in their separate judgments." [97] Nonetheless, in the majority decision the fundamental concept of the Constitution's "Basic Structure" gained acceptance and recognition.

Thus two things were held in this case;

[96] The Constitution (Twenty-fifth amendment) Act 1971.

[97] Austin, "Working of a Democratic Constitution", Page 265.

a. One in favour of Judiciary – As in this case a doctrine was introduce named "Basic Structure" doctrine which limits the amending powers of Parliament. It is also held that the Parliament can amend the whole document but it cannot harm or change the "Basic Structure" of the Constitution.
b. In favour of Parliament – All the judges upheld the 24th amendment's validity, affirming that Parliament has the power to amend any or all of the constitutional provisions. "All the signatories to the report held that the case of Golaknath had been wrongly resolved, and that Art. 368 included both the power and the procedure to amend the Constitution."[98]

It was however aware that a constitutional amendment was not the same as a statute as Art. 13(2) had known.

"The slight disparity that exists between two types of functions performed by the Indian Parliament should be noted:

a. It may legislate for the State by exercising its legislative authority and
b. The Constitution can be changed by using its constituent power."

Parliament and the state governments, under their respective territories, make legislation on different subjects from time to time. Under Art. 368, Parliament alone has the power to make changes to that structure. Unlike ordinary legislation, alteration to const;nal rules allow Parliament to vote by a special majority.

This analogy is useful to illustrate the contrast between the legislative authority of the Parliament and the powers to make legislation. Under Art. 21 of the Constitution it is

[98] Supra no. 73

said that no person in the country may be deprived of his or her life or personal liberty except in compliance with the procedure laid down by law.

The Const. does not specifies the detailed of the procedure, as it is left on legislatures and the executive to do proper amendments as per the situation and need of the country. Parliament and the state legislatures form the laws necessary to classify offensive acts for which a person can be imprisoned. The executive sets out the procedure for applying such rules, and the accused is charged before a judge. Changes to such laws can be enacted in the applicable state legislature by a simple majority vote. The Constitution does not need to be amended to incorporate changes to these laws. Nevertheless, if there is a requirement that Art. 21 be turned into the fundamental right to life by abolishing the death penalty, Parliament will have to amend the Constitution accordingly using its legislative powers.

In the landmark judgement of Kesavnanda Bharti where for the first time thirteen judges did sit (this was so as Golakhnath case had 11 judge bench), seven out of thirteen judges including Sikri C.J. signed a summary statement which stated limits on the constituent power of the Parliament. Under Art. 368, "Parliament must not use its amending powers to 'damage,' 'emasculate,' 'destroy,' 'abrogate,' 'change' or 'alter' the Basic Structure or framework of the constitution."[99]

[99] Under Keshvanada judgement by "Doctrine of Basic Structure".

3.5 "Doctrine of Basic Structure" – In light of Keshvananda judgement:

Judges which gave majority judgement, all did agree on the forming "basic structure" but there was no uniformity and all judges gave different opinion over what should be included in the doctrine.

Sikri, J.C. Explained that the "Basic Structure" definition comprised:

- The most basic in "Basic Structure" doctrine is that there should be supremacy of the Const. and organs of the State should be limited by the constitution.
- The form of government in the State should be republic and democratic.
- The Const. must be secular.
- There should be scheme of separation of power between all the three organs of the State.
- There must be a federal Const.

Addition of two more features was done by Shelat J., and Grover J.:

- Welfare State should be made under the control of the DPSP.
- One important feature of basic structure should be "unity and integrity" of the State.

Moreover, HegdeJ., and MukherjeaJ., didn't follow the above list but made a different list of features of "Basic Structure", which are as under:

- They made a different list but it included almost same items like the State should be “democratic” and there should be “unity and sovereignty” in the country.
- A welfare State should be made under the control of DPSP.
- New addition to the list was that individual freedoms should be secured.

Another judge Jaganmohan who in favour of the “Basic Structure Doctrine” gave some elements from the Preamble as features of the “Basic Structure Doctrine” He said that there should be “Sovereign democratic republic and Parliamentary democracy”. He talked about the F.R and DPSP and gave his view that these are the base of the constitution and constitution cannot be called constitution if there is no F.R or DPSP. Constitution is bundle of rights conferred to the citizen.

3.5.1 The minority view

The other six judges who were possessing a minority view on the bench accepted that the citizens’ constitutional rights doesn’t belonged to the “Basic Structure”, that it could be amended by Parliament.

The minority view was given by Justice A.N. Ray who later was appointed C.J.I. This appointment was controversial because of the same judgment and his appointment superseded three senior judges of the S.C. This was widely regarded as politically motivated. Other than him M.H.Beg,J., K.K.Mathew,J., and S.N.Dwivedi,J., also acknowledged that Golaknath had been wrongly decided.

They re-affirmed that all three amendments which were tested before the court to be correct. A.N.Ray J., held that all aspects of the Const. were necessary and that there could be no distinction among its essential and non-essential aspects. They all accepted that by exercising its powers under Art. 368, Parliament could make fundamental amendments to the constitution.

5.6 Conclusion:

The majority opinion in Kesavananda judgement which introduce "Basic Structure" Doctrine also did identify that Parliament has power to change any or all constitutional provision given that such an act did not undermine "Basic Structure" of the const. Yet there was no common view about what would be included as the features of "Basic Structure". In addition to this, the S.C for enhancing the power of the judicial review had to return to their position of Sankari Prasad i.e. reaffirmed the judgement by restoring the supremacy of Parliament's amending power. More or less like give and take situation.

CHAPTER 4

4 Justiciability of the 9th Schedule in consideration with the Coelho Case.

Doctrine of "Basic Structure" is evolved after the Keshvananda case wherein in this chapter researcher is focusing on the Election case, Coelho case, and other recent judgements.

4.1 The Indira Gandhi Election Case – Doctrine of "Basic Structure" reaffirmed:

This was a controversial case which led to National Emergency for internal disturbance for the first time in the history. Allahabad High Court upheld election victory of the P.M on the grounds of malpractice of winning election of 1975. The judgment of Allahabad High Court was further appealed to the S.C but it was vacation period of the Court so Krishna Iyer,J., granted a stay that would allowed Smt. Indira Gandhi to act as P.M but a condition was kept by the S.C that she cannot receive remuneration and she cannot speak or vote in the Parliament until the case has been decided.

Meanwhile, Parliament passed the 39th Amendment Act, which removed the power or authority S.C to hear appeals concerning election of "President, Vice President, Prime Minister and Speaker of the Lok Sabha". Instead of hearing at the Court, a Parliament-constituted body will have the power to settle these conflicts over elections. Section 4 of the Bill blocked any effort to contest an officeholder's order, holding any of the above-mentioned offices in a Court of law. Apparently, this was a preventive move

which was specially designed to advantage Smt. Gandhi as her election was the object of unsettled dispute.

Later on, Representation of Peoples Acts, 1951 and 1974 was amended and to secure the 39th amendment completely it was then kept into the 9th schedule with that even "Election Laws Amendment Act, 1975" was kept in it. To keep judiciary out of the purview and to save the P.M from the humiliation if an adverse judgement was pronounced by the S.C. The urgency in passing the Thirty-ninth amendment clearly showed the government's mala-fide motive.

The bill was presented and approved on the same day on 7 August 1975 by Lok Sabha. The very next day it was passed by the Rajya Sabha, and two days later the President gave his assent. Moreover, a special session of Parliament was kept on Saturday by the state legislatures to ratify the amendment and on 10 August it was gazetted. Next day when the case was open by S.C for trial, the Attorney General requested the Court to dismiss the case with reference to the new amendment.

Raj Narain who an opponent opposing the election of Mrs Gandhi via his counsel was claimed that the amendment was against the constitution's "Basic Structure". He stated that free and fair election and power of judicial are the features of the "Doctrine of Basic Structure". Thus the amendments were destroying and damaging the "basic structure" and so the election is invalid.

The 39th amendment was upheld by four of the five judges on the bench, but then again only after striking down that portion which sought to limit the judiciary's power i.e.

judicial review to settle in the election dispute.[100] Beg J., one of the judge of the case held that, "The amendment was upheld in its entirety. Mrs Gandhi's election has been declared lawful under the revised electoral legislation. The judges unanimously acknowledged the power of Parliament to pass laws which have a retrospective effect."

4.1.1Doctrine of "Basic Structure" – In Accordance with the Election case:

Again every judge pronounced opinions about what is included in features of "Basic Structure Doctrine":

According to H. R. Khanna J., as we are democratic country and any democratic country's basic feature do includes free and free election so it is one of the feature of "Doctrine of Basic Structure".

K.K.Thomas J., added that we are democratic State so judicial review is vital feature of any democratic country.

Y.V. Chandrachud J., he identified 4 essential fea tures that he considered essential and cannot be amended:

- There should be sovereign democratic republic status in the country
- Equal rights and opportunity for all individual

[100] 39th Amendment Act was struck down by the S.C by Section 4 of the Act, Art. 329A of the Constitution, as of 1975

- There should be freedom of conscience and religion. There should be secularism.
- Rule of law in true sense must be followed; "government of law and not of men".

According to Chief Justice A.N. Ray, Parliament's constituent power was beyond the Constitution itself, and therefore not bound by the principle of separation of powers. Consequently, Parliament may remove laws relating to election disputes from judicial review. Strangely, he claimed that democracy was a core part but not free and fair elections. Ray, J.C. Had maintained that there was no ordinary legislation. Ray, C.J. held that ordinary legislation was not within the scope of basic features

K.K.Mathew J., went along with A.N.Ray C.J., The legislation will not be falling within the scope of "Basic Structure". But he upheld the independence to be a key function, and the judiciary would rule on election disputes on the basis of law and evidence.

Justice M.H. Beg disapproved of Ray, C.J. Since it would be inappropriate to provide a Const. if the constituent powers of the Parliament were to be above it. Judicial powers are inherent power of the S.C, although they were not exercised by the High Courts although Parliament. He claims that in the Kesavananda judgement, supremacy of the Const. and the scheme of separation of powers were vital features as known by most. Begon, J. Stressed that the basic structural doctrine often contained ordinary legislation within its framework.

Regardless of the inconsistency between the judges on what are the features of the "Basic Structure" of the Const., the majority opinion held the idea that the Const. has to be Supreme and no other organs of the State.

4.1.2 The Review bench of Kesavananda Bharti Case:

After the Election case was decided within 3 days a thirteen judge bench had assembled again under Ray C.J., for reviewing the Kesavananda judgment for the trial of variety of appeals which were related to "land ceiling laws" that had suffered in H.C. The appeals contended in violation of the constitution's "Basic Structure" while implementing the ceiling laws. For determination of "whether Doctrine of Basic Structure limits the power of amendment of the Parliament under Article 368."[101]

However, P.M. Indira Gandhi declined to acknowledge "the doctrine of Basic Structure" in a speech in Parliament.

It should be recalled that there was no unique petition seeking a review of the Kesavananda verdict filed before the apex court- a fact noted by many bench members with much displeasure. N.N. Palkhivala, appearing for a coal mining firm, argued articulately against the attempt to revisit the Kesavananda decision. In the end Ray, C.J. After two days of hearings dissolved the bench. Many people have suspected the indirect intervention of the government in this case, trying to overturn an unfavourable judicial precedent set by the Kesavananda decision. However there have been no concerted attempts to investigate the case.

[101] Supra no. 73

F.R included the right to move to the Court against preventive detention was curbed as National Emergency was declared on June 1975.

4.3 The 42nd Amendment and Sardar Swaran Singh (SSS) Committee:

It was a tough time for the citizens as soon after the National Emergency was declared which curtailed all the fundamental rights of the people, the ruling party at that time organized a committee under SSS's chairmanship to research the request of amending the Constitution with reference to the past experiences. The government, introduced many constitutional amendments, like inclusion of the Preamble, into the 42nd amendment as the committee recommended. The amendment includes:

"a) Gave preference to the Directive Principle State Policy over the Fundamental Rights provided for in Art. 14 (right to equality before the law and equal protection of the law), Art. 19 (various freedoms, such as freedom of speech and expression, the right to peacefully assemble, the right to form associations and unions, the right to move and live freely in any part of the country and the right to pursue any trade or profession) and Art. 21(Right to life and liberty). Art. 31C has been amended to prohibit any challenge to the laws of any of the Directive Principles of State Policy;[102]

b) Set that, on any basis, changes to the Constitution made in the past or those likely to be made in the future could not be challenged in any court;

[102] Art. 31C stipulated that legislation passed to enforce the Directive Principles of State Policy could not be contested in court on the basis that it violated any constitutional right. This provision was applicable only to Art. 39(b) & (c) of the Directive Principles, which dealt with the fair distribution of wealth and production resources, until the forty-second amendment.

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

D) Removal of all restrictions on the power of Parliament to amend the Constitution under Art. 368."[103]

4.4 Confirmation of "Doctrine of Basic Structure" in Minerva Mills and Waman Rao cases:

For restoring the amending powers of Parliament to almost absolute terms just within 2 years, the 42nd amendment was challenged in the S.C by the case of Minerva Mills by their owners in Bangalore, it was an industry which was nationalized in 1974 by govt.[104]

Nani. Palkhivala, did pick not to question the conduct of the govt. merely as a breach of the fundamental right to land. Instead, he presented the issue with respect to the authority of Parliament to change the Constitution.

Had put the unlimited power of amendment in Parliament's possession. In the Kesavananda case and in the Election case, "the attempt to immunize constitutional amendments from judicial review breached the Doctrine of Basic Structure accepted by the S.C."[105] Moreover, he debated that the amendment of Art. 31C was legally poor

[103] Sardar Savan Committee report

[104] 1980 3SCC 625.

[105] Election Case, 1975 SCR(3)333

because it is violative of the F.R of citizens and Preamble of the Const. It also takes away the purview of Judiciary for "judicial review".

Chandrachud C.J, upheld both appeals, issuing a majority judgment (4:1). The majority opinion maintained the right to review amendments of the Const. judicially. "They maintained that clauses (4) and (5) of Art. 368 gave Parliament unlimited power to amend the Constitution. They said these courts were deprived of the right to challenge the amendment even though it damaged it or destroyed the Constitution's Basic Structure."

Chandrachud C.J., and other judges who were in the same opinion has ruled that there is limitation of power of amending of Parliament and that "it is a basic and fundamental feature of the Const".

Bhagwati,J. with a dissenting opinion also accepted that no authority is above the Const., and no matter how powerful if there is sole judge to claim the judgement he has to act under the provision of the Const. as it is Supreme.

Moreover the majority bench held that constitutional amendment of Art. 31C to be unconstitutional as it was "harming the harmony and balance between the F.R and DPSP. F.R and DPSP are the essential or basic feature of the Const." As the Parliament has not repealed the amendment it remains as a dead text until then. However, cases under it are resolved, as they existed before the 42nd amendment.

Moreover, in another case the S.C held that "all constitutional changes made after the date of the Kesavananda judgment were subject to judicial review".[106] "All laws placed

[106]Waman Rao v. UOI 2SCC 362 1981.

in the 9th Schedule after the date of the Judgment of Kesavananda Bharati were also open for review in court. They could be questioned on the basis that they are beyond the constituent power of Parliament, or that they have violated the constitution's Basic Structure." The S.C, in spirit, formed a balance between Law Makers and Law Interpreters.

4.5 Conclusion:

From above three judgements, it can be concluded that though "Doctrine of Basic Structure" has been introduce a decade back but still final judgement that this particular things can be included in the doctrine is left to be decide by the Court. Final word on "the Basic Structure Doctrine" is left but it is most likely to come in the near future. Fortunately, "the sovereign, democratic and secular" nature of government, the "rule of law", the "independence of the judiciary", the "fundamental rights of people", etc., are some features of Const. which are important have appeared repeatedly in the verdicts of the S.C. judges. One guarantee that evolved and came out after the years of conflict between Parliament and the Judiciary is that all laws and constitutional amendments including of 9th Schedule are now under the purview of the Judiciary by judicial review. Laws that violate or go beyond the limit of the "Basic Structure" would be void, unconstitutional and would be struck down by the S.C. Fundamentally, now the Parliament do have power to amend the whole constitution but it should not be violative of the "Basic Structure". Thus, Parliament don't have absolute power and S.C is the final decider or interpreter of the constitutional amendments.

4.6 I.R. Coelho v. St. of T.N.

In the landmark case of Coelho which is even known as 9th Schedule case, a nine judge bench ruled on the same issues as per cases of Waman Rao, Election Case, and Minerva Mills. We can say this to be the deciding case as in this case the features which were to be included in the "Basic Structure Doctrine" was decided. Mathew J.'s opinion of Election Case was upheld, the issues were revived for consideration before the S.C and held that, "even though a constitutional amendment introduces a Law in the 9th Schedule, its provisions will be subject to attack on the ground that they undermine or harm the Basic Structure if the fundamental right or rights withdrawn or abrogated apply to or applies to the Basic Structure."[107]

It can be understood by the above opinion that decision of Coelho gives us the scope of the applicability of the "Doctrine of the Basic Structure" with respect to the 9th Schedule of the Constitution. Determining the degree of immunity provided under Art. 31B with respect to the 9th Schedule was the main issue before the S.C.[108]

"The IR Coelho Court explicitly states at the very outset that the decision in the case is based on the premise that Art. 31B is valid and will not look into the same. [109] The Court held that the laws included in the 9th Schedule do not avoid review by the courts on the basis of the rights found in Part III of the Constitution after 24 April 1973 and these laws consequently subject to the review of fundamental rights as they stand in Part III.[110] Nevertheless, the test is not confined to this level, as some of the

[107] IR Coelho v. State of Tamil Nadu, AIR 2007 SC 861 (Sabharwal C.J., 81).

[108] Coelho Case, 43.

[109] Coelho Case, 42.

[110] Coelho Case, 63.

constitutional rights are included in the basic framework of the Constitution, any law given 9th Schedule protection needs to be checked against those principles. If the legislation infringes the nature of any of the fundamental rights, or some part of the Basic Structure, then it will be struck down. In each case, the extent of the elimination and the scope of the abridgement must be evaluated."[111]

Over the years, many decisions have been taken about what forms the "Basic Structure".[112] The case of IR Coelho represents landmark in the constitutional definition of what constitutes the "Basic Structure". SabharwalJ., was aware of the judgement of M.Nagaraj Case issued a few months earlier.[113] In view of M.Nagraj the discussion "between the need to interpret the Constitution textually on the basis of original intent on one hand and on the other hand, the indeterminate nature of the Constitutional text which allows for the reading of different values in the Constitution", the Court held that the Constitutional text is not the only medium to find "Basic Structure".[114] In IR Coelho Case, this interpretation of the Court was found echoed in which the S.C held that "textual provisions and such overarching values could both form part of the Basic Structure".

In-spite of what stated above, the S.C faced with the challenge of addressing the questions below: are all F.R included in the doctrine of the "basic structure?" If

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[111] Coelho Case, 62.

[112] Kesavananda, All India Reporter 1973 SC 1461; Election case, All India Reporter 1975 SC 2299; Minerva Mills v. UOI, All India Reporter 1980 SC 1789; Waman Rao v. UOI, All India Reporter 1981 SC 781, S.R.Bommai 1994 2SCC 1; M.Nagaraj, All India Reporter 2007SC 71.

[113] Coelho Case, 76.

[114] "This was explained in the following words: Systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of Constitutional Law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Arts. 14, 19, and 21."

explanation is not in conformity, then the S.C has to decide which F.R can be defined as part of the "Basic Structure".

While discussing the hierarchy it has formed among the F.R, the Court responds to distinction between "right tests" and "essence of the test of rights" At this stage, the Court's held his view that: "Once Art. 32 is triggered then though the law is added in 9th schedule still it has to undergo the test of F.R. or the "right test". All the Acts which are inserted in the 9th Schedule will not limit reviewing of part III.[115]

"Right Test" would include all reviewing all the F.R when a law is inserted in the 9th Schedule. Moreover the Court suggest the laws to pass the "Basic Structure" test which are inserted in the 9th Schedule on and after 24th April 1973. So it can be said that 9th Schedule laws are not an official part of the Const. as they are blurred out after the introduction of the "Basic Structure Doctrine".

4.6.1 To Sum-up the Coelho case the conclusion set by Sabharwal CJ., can be taken in consideration:

"All Constitutional amendments made on or after 24th April, 1973 and are related to the laws which are kept in 9th Schedule via amendment would be tested on the yardstick of the "Basic Structure" or important features of Art. 21 r.w.a. 14, 19, 15 and their underlying principles. In other words, even after keeping an Act in the 9th Schedule by an amendment to the const. That Act would be open to review by the judiciary on the ground of "Basic Structure". Provision of the Act should not destroy or damages the

[115] Id.

"Basic Structure" i.e. it should not abrogate or take away the F.R of the citizens pertain to "Basic Structure"."[116]

[116] MANU/SC/0595/2007, AIR2007SC861

CHAPTER 5

5. Working of "Right Test" via recent Judicial Pronouncements

5.1 Cases after I. R. Coelho:

Here in this chapter the researcher has discussed the implication of I. R. Coelho case with recent judgments on 9th Schedule. What test does the Acts have to pass which are now kept in 9th Schedule after the Coelho case. It is answered below:

5.2 Glan rock Estate Pvt Limited v. State of T.N:

After Coelho case the S.C has explained meaning and application of the "Basic Structure" doctrine in the judgement of Glan rock Estate Pvt Ltd v. St. of T.N[117].

In this case Articles 31B and 368, 14, 19, 21, 300A, 31(2), 48A, 51A, Part IV and Schedule IX were triggered. In this case Court decides about the immunity against breach of constitutional provision in respect of Acts which are included in 9th Schedule with respect to 31B via amendments before Keshvananda Bharti verdict. Court stated that such immunity is available only against breach of ordinary constitutional principle and not amount to breach of "Basic Structure" Doctrine.

In the judgement of I. R. Coelho the Court had explained certain concepts like:

1. "Egalitarian Equality",
2. Reading Art. 21 with Art. 14 and
3. Over-Arching Principle.

Within this relation the so-called "Right test" must be held within mind. Finally, in implementing the above-mentioned three principles, the degree of abrogation and

[117] MANU/SC/0689/2010, JT 2010(9) SC 568.

the degree of elevation of the ordinary principle of equality to the level of the overarching principle or principles must be considered. One must note that challenge is not to the ordinary laws like Contract law, Property law and so on. The challenge is amendment of the Indian Constitution. The difficult task for Parliament is to practice power in Art. 368 of the Constitution for including Janmam Act[118]. There are two limits for exercising the rights under Art. 368 after Keshvananda Bharti case i.e.

- Doctrine of "Basic Structure"
- Lack of Legislative Competency

Judiciary introduced "the doctrine of Basic Structure" for keeping its power intact of judicial review. Art. 31B only protects laws which are breaching ordinary principle of equity and not breach of "Basic Structure" of the const. However, amendments of the const. and its rationality must be tested on three criteria as discussed above. Starting with Over-arching – When a impugned Act is created via constitutional amendment and that Act is without any classification, without any rational nexus which disrupt the concepts like secularism, democracy, power of judicial review, separation of power. Such Act can be declared to be violative of Art. 14.

In the same way, "Egalitarian Equality" is a wide concept. Doctrine of sustainable development, Polluter Pays principle, Precautionary principle are egalitarian equality. Acts which are destroying the environment or harming the public at large are invalid

[118] Janman Act, Act 24 of 1969 as item no. 80 in the 9th Schedule of the Constitution via Thirty-fourth Amendment Act, 1974.

and unconstitutional even if there are kept in the 9th Schedule of the Const. 31B does not protect such amendment.

Moreover, Court has read Art. 21 with 14 means if the concept of equality is violated and is undermining the "basic structure" of the Const. then Acts under 9th Schedule will not get shelter under Art. 31B. Nevertheless, any violation under Art. 14 is considered unconstitutional then it won't be protected under Art. 31B, there will be no point of defence under Art. 31B. Does the Parliament have a power to amend the Act. 368 and give itself absolute and unlimited power of amending the whole Const. including F.R? Principle of equality being violated which have intent to further violate the core of constitutional framework then it cannot have immunity under Art. 31B read with 9th schedule. Violating the principle of equality is characterised as violating the core constitutional framework so it won't be covered under Art. 31B. In Parliament such power is not granted under Art. 368. This will not remove all restriction but instead limit the amending power of the Parliament. This is the consequences of the Keshavnanda decision. Challenge to 9th Schedule could never succeed simply by claiming that every fundamental right has been violated. But, in such a challenge the State must justify its acts on the yardstick of the "doctrine of Basic Structure" of Const. Violating the F.R. do not, "ipso facto", violates "the doctrine of Basic Structure", but a statute that violates the "Basic Structure" necessarily violates certain fundamental rights.

5.3 Prem Singh v. State of Himachal Pradesh and Others

Again in this judgment the Court discussed "Basic Structure" Doctrine and it is stated by the court that after the law is inserted in the 9th Schedule, the validity of the Act has to be tested on the touchstone of the Doctrine. It was held that 9th Schedule and Art. 31B, does the work of resolving the defect, in any, in the Acts, when the Acts are violating the F.R of the Const. It resolves the Acts' unconstitutionality and make it valid by keeping it in the 9th Schedule.

The real issue in this case was till what extend immunity can be provided to the Act keep in the 9th Schedule under 31B? And what would be the nature of the immunity which would be constitutionally valid. To answer this the Court referred Keshvandanada Bharti judgement and with that other Indira Gandhi and Minerva Mills. The Court stated that all these judgments indicates that violation needs to be tested in this particular case. Check whether by violating equality test does it leads to damage of "the Doctrine of Basic Structure". So here also the Court talks about the "right test".

It was stated by Sikri, C.J. that the laws which are already in the 9th Schedule i.e. the laws which are kept in the Schedule prior to Keshvananda case will also be liable to struck down if it breaches the "Basic Structure" Doctrine but only the new amendment done in that law would be liable not the whole law. The new addition of the part or new amendment is brought in those Acts would be tested on the touchstone of the Doctrine and not the whole Act. Substantially, similar opinion was also given by Setat J., Grover J., Hedge J., Mukherjea J., and Reddy J. They all came on the same conclusion read an implied limitation on the amending power of the Parliament. They even stated that "Constitution is Supreme and not any organ of the State and Constitution mandates all these organs to comply the provisions of the Constitution. And it is Constitution which

mandates a mechanism for testing the validity of the legislative acts through an independent organ i.e. The Judiciary"[119].

5.4 UOI v. St. Of Maharashtra and othrs.

This case also it talks about the validly of the law on the touchstone of doctrine of "Basic Structure". The Court states that "it is an error, as has been pointed out, to find that Art. 31B read with the 9th Schedule limits judicial review in the matter of fundamental rights violations. Art. 31B has the effect of eliminating a worldly desire on the Parliament's ability to enact a law in violation of fundamental rights. According to Art. 31B, the grounds for the violation of fundamental rights are not available because the fetter imposed on legislative power by Part III is eliminated and is non-existent. Non-availability of cause of action based on violation of fundamental right cannot be viewed as exclusion or exemption from judicial review. The application of Art. 31B read with the 9th Schedule does not include an opportunity for judicial review to be practiced. But there is no issue of judicial review being excluded or removed."[120]

5.6 Conclusion:

Three principles were given concerning the "Right test" which are "Egalitarian Equality", "reading Art. 21 with Art. 14" and "Over-Arching Principle". Court also stated in this case that even if there is amendment in the Acts which are immune in 9th

[119] MANU/SC/1351/2019

[120] Supra no. 3

Schedule then that amendment would be tested on the touchstone of "Basic Structure" doctrine. Moreover, Parliament don't have absolute power of amendment as Principle of equality being violated which have intent to further violate the core of constitutional framework then it cannot have immunity under Art. 31 B read with 9th schedule. S.C. Summing-up, main aim of the cases after Keshavanada Bharti till the recent judgments are, violation of F.R do not, "ipso facto", violates the "Basic Structure", but a statute that violates the "Basic Structure" necessarily violates certain fundamental rights.

CHAPTER 6

6.1 CONCLUSION

In Nani Palkivala's words, "Constitution Represents charter of power granted by liberty and not by the charter of liberty granted by power." Our history of the Constitutional drafting is loaded with anecdotes which illustrates that there was an attempt by the framers to stake ownership over that document. The dispute between the Judiciary and the Parliament was the most fundamental dispute which was over the constitutional custody. The major question being that the amending powers of Parliament were absolute and unrestrained from the insertion of the 9th Schedule in our Constitution.

When the legislature and the executive, on whom the primary responsibility for providing justice rests, fail to approximate 'is' (fact) to the 'ordered' (law) that is when the judiciary steps in. Moreover, judicial power has always been the weapon of the last resort. It is generally resorted to as a weapon of defence and not of attack. Things became complicated sometimes while delivering justice and the Courts start playing the role of law-makers. This is a temptation hard to resist, but which needs to be avoided, for the judge must decide a case concerning the principle and not to the policy. This was concluded in the second chapter of the research paper which is true as nor Judiciary or Legislative is supreme but the Constitution is above all the organs. Thus, all the organs of the State needs follow the provisions of the Const.

If we look into history then we will find that the amendment of the Constitution since the beginning has always been made for political purposes only as well as to cancel or alter the judicial decisions. 9th Schedule was a tool of the Parliament to keep its acts out of the purview of the Judiciary. Within the 9th Schedule were incorporated various

laws that the Parliament decided for holding out from the purview of Judiciary. Before at the time of insertion of 9th schedule there were just 13 laws which could not be reviewed by the Judiciary but now there are 284 Acts in the 9th Schedule including Schedule Caste and Schedule Tribes for giving reservation beyond the ceiling limit of 50% and other such laws. The motive behind abusing the power of amendment was to gain more votes in elections.

There is no need for such blanket protection to every law which is introduced in the 9th Schedule. Such a situation is alarming and threatening to the constitutionalism of the constitution. Such a situation is disturbing and dangerous to the country and increases the demand to reverse the steps required to prevent the phenomenon from recurring. To prevent the abuse mentioned above, the judiciary decided to put a limitation on the amending power of the Parliament under Art.368 of the Const. by invoking "Basic Structure" doctrine. The S.C. via Golaknath, Kesavananda, tried to give some implied limitations to the amending power, and also claimed that constitutional amendments that violate those limitations are invalid under the doctrine test of "Basic Structure." This was concluded in chapter three of the paper.

Moreover, Kesavananda Bharti's judgment which introduces the "Basic Structure" Doctrine also did recognize Parliament's power to change any or all constitutional provision given that such an act will not undermine "Basic Structure" of the Const. Thus, the S.C. for enhancing its power of the judicial review had to return to the place where it was all started i.e. Sankari Prasad case where it was held that Parliament can amend the whole Const.; but there was a catch, Legislature cannot amend the "Basic Structure" of the Constitution. The things that were included "the Doctrine of Basic Structure" were defined in latter cases like Election case, Waman Rao, Minerva Mills'

case and so on. The final list of things included in the Doctrine of "Basic Structure" was decided in I.R. Coelho. Justiciability of the Acts in 9th Schedule must pass through a fundamental test of a "Right Test was given in I. R. Coelho. Acts introduced in 9th Schedule after 24th April 1973, would be unconstitutional if it violates the Article 19, 15 and 14 of the Constitution. This was concluded in Chapter four.

In chapter five, other recent judgments after I.R. Coelho are discussed wherein, various parliamentarians opposed the judgment of I.R. Coelho because it was far beyond the power of the judiciary to make changes to any legislation or to amend certain laws. Art. 31B clearly held the Acts and Regulations referred to in the 9th Schedule will not be deemed void on the ground that Part III of the Constitution is in contravention of that same.

It was also argued that the presence of Art. 31B in the Const. will not be useful when "rights test" proposed in the case of M.Nagraj and Coelho been applicable to the 9th Schedule Acts. On this the researcher submits that a law is a living organic will, it constantly changes and evolves as per the situations and circumstances. When Art. 31B was introduced at that time Indian economy needed agrarian reforms but now after 1991 it is not.

Moreover, in later years Parliament started misusing the 9th Schedule in the fascination of becoming supreme that is also wrong. Rule of law is main essence of Constitutionalism which says that the Const. should be supreme and only the Const. has authority to grand Liberty. It should be the other way round that organs of the State gives authority to Const. to grant liberty i.e. the charter of liberty granted by the power. Finally, it was stated that amendment in 9th Schedule would be verified on the yardstick of Doctrine of "Basic Structure" on & after 24th April 1973 as stated in Coelho case.

The Acts included in the Schedule should not harm, destroy or damages the "Basic Structure".

Later after Coelho's case, another judgment came in 2010 on the same lines in Glanrock Estate (P) Ltd v. State of Tamil Nadu. In this case, three principles were given concerning the "Right test" which are "Egalitarian Equality", "reading Art. 21 with Art. 14" and "Over-Arching Principle". Court also stated in this case that even if there is amendment in the Acts which are immune in 9th Schedule then that amendment would be tested on the touchstone of "Basic Structure" doctrine. Moreover, a question was asked in the same case that: Does the Parliament have a power to amend the Act. 368 and give itself absolute and unlimited power of amending the whole Const. including F.R? Principle of equality being violated which have intent to further violate the core of constitutional framework then it cannot have immunity under Art. 31 B read with 9th schedule.

In Prem Singh v. State of Himachal Pradesh and in Union of India v. the State of Maharashtra, the other two recent cases also stated the same thing about the touchstone of the "Basic Structure" doctrine and the right test for the amendment in the 9th Schedule. The issue in the case was till what extend immunity can be provided to the Act keep in the 9th Schedule under 31B? And what would be the nature of the immunity which would be constitutionally valid? Wherein the Court referred Keshvananda with the Indira Gandhi case and Minerva mills case and stated to check whether there is abuse of power and equality which leads to harm of the "Basic Structure" doctrine.

Sikra C.J., and other judges of the case also stated that the Constitution is Supreme, and not any organ of the State. Moreover, Const. mandates all these organs to comply with its provisions. Testing of validity of legislative acts is a basic function of the scheme

of separation of power and it is mandated by the Cont. to do the same by an independent organ.

Summing-up, main aim of the cases after Keshavanada Bharti till the recent judgments are, violation of F.R do not, "ipso facto", violates the "Basic Structure", but a statute that violates the "Basic Structure" necessarily violates certain fundamental rights.

The researcher wants to submit that all the hypothesis are been proven right as per the above reasoning and they are as follows:

9th Schedule was misused or rather abused by the Parliamentarians for achieving their selfish motive behind it which resulted in Constitutional crises arise between the legislatures and the executives on one hand and judiciary on the other. The 9th Schedule of the Const. has damaged and destroyed the judiciary's power of review. This Schedule has violated the fundamental principles of Constitutionalism. The 9th Schedule loses its significance when laws which are made by either Parliament or State legislatures are put into the 9th Schedule and they do not promote social justice.

Moreover, it is argued that the S.C has established a hierarchy of rights on the basic of their importance by incorporating a basic structure including few fundamental rights from all fundamental rights. The researcher agrees to this, based on the Constitution, for such arbitrary classification. The Constitutional text makes no mention of such a distinction. But the Court has developed artificial hierarchies between the Arts. Of F.R by giving expressly highlighting Art. 19, 15, 14 which is wrong. All fundamental rights are equal and it cannot be ranked.

Concerning the issue of whether or not the 9th Schedule is needed in the present situation, the researcher would argue that it is not now needed for the following two

reasons: firstly, the 9th Schedule has been enacted and its laws have been held immune from the judicial review because the laws kept in that schedule though were progressive and were for agrarian reforms, those laws even violated the fundamental right to property. The property right, however, is no longer a fundamental right and therefore poses no danger to the 9th Schedule laws. Secondly, there was a drastic shift in policies of Govt. after 1991 in the centre. Govt. have shifted from progressive reforms to leaving the gains of economic progress should be "trickle-down" to the poorest. The 9th Schedule thus is irrelevant as regards the original intent of its inclusion.

Moreover, a considerable danger prevails that it could be misused to support certain purposes, which was solved by the Coelho case. Our founding fathers defined and specified the function of the Executive, the Legislature, and the Judiciary. They had not imagined a condition where the Parliament or the S.C can claimed to be supreme. Only the Constitution can be said to be sovereign, and its people. As long as an organ of the State stays within its permissible domain of authority, any dispute or confrontation will be out of the question. Therefore the researcher will conclude her findings by accepting the judgment provided in the Coelho case because it would not be possible for the parliament to use the 9th Schedule to suit its own needs. The independent organ i.e. judiciary would be there to monitor the Acts placed in 9th Sch. as per Sikri C.J. in Prem Singh v. State of Himachal Pradesh.

6.2 Suggestion

1. Art. 13B and 9th Schedule must have clear standards and parameters. 9th Schedule have harmed the Constitution severely and it's high time to set

parameters for a law when incorporated in the 9th Schedule. Hence there is need of redefining Art. 31B read with 9th Schedule.

2. To review the non-agrarian laws set out in the Schedule, Parliament must give the judiciary power to review certain laws in the specific provision of the Const. in the light of doctrine of "Basic Structure".
3. To have control over the entry of legislation into the 9th Schedule should be appointed a high-level scrutiny Committee. This committee will be composed of members of all the organs from Judiciary, Legislative and Executive. So if there are representatives of different fields then there is a possibility of less misuse of this schedule.
4. The above Committee should examine the justiciability of the laws before putting them in the 9th Schedule and the Committee should review the laws of the 9th Schedule in the light of the principles of equality, justices and social progress laid down in the Constitution. Moreover, the legislation on immunity to the 9th Schedule should only be granted for a fixed temporary duration.
5. Immunity should not be given for laws that cause chaos and confusion in the country, such as laws on reservation 'quota' in field of education and jobs. Such laws should not be introduce in the 9th Schedule.
6. While the principle of "public interest" is of the utmost importance when it comes to the state's acquisition of land, fair compensation should be provided to the persons involved rather than the property acquired by the State. The sum should not be illusory or meaningless but should be very close to the property's market value, although it may not be possible for the state to offer the equivalent of full and equal money.

7. The government must aim at achieving objectives of Preamble and of Directive Principle, government must amend policies to ensure proper implementation.
8. Parliament must enact an amendment to Art. 31B reading with the 9th Schedule which avoids promoting unconstitutional laws declared by the Court.
9. Judiciary and Legislative both should not build ground for confrontation with one another. Otherwise each of this organ will lose their importance in people's mind.
10. Judge must decide the case as a with regards to the principle and not to the policy i.e. judges should not exceed their power and make laws.

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