CHAPTER VI

ANALYSIS OF THE IMPORTANT CASES DECIDED BY THE SUPREME COURT ON THE AMENDMENT OF THE NINTH SCHEDULE

Introduction

The various amendments made in the Ninth Schedule, which were later challenged in the court on the ground of violation of Fundamental Rights, were especially for the implementation of the land reforms for the abolition of Zamindari System, the main objective of the Prime Minister Pt. Jawahar Lal Nehru Government. With these Amendments a lot of contradiction has been faced between the Part III and Part IV of the Constitution (Fundamental Rights and the Directive Principles) resulting into a tussle between the Judiciary and the Legislature. This had led to a lot of debate on the role of Judiciary in reviewing the law passed by the Legislature. The debate kick started from the speech which Pt. Jawahar Lal Nehru as the Prime Minister of India gave at the time of First Constitutional Amendment in 1951, which showed his will to overrule the power of Judicial Review of the Supreme Court of India. He said: “we can’t wait for years to see what fate the Supreme Court gives to the land reform”. The Amendment which carried out and created the Ninth Schedule was subsequently challenged in the case of Kameshwar Singh v. State of Bihar.  

We just take a view of the various Constitutional Amendments in the Ninth Schedule, among which were challenged in the court starting with the First Amendment Act 1951, the question regarding

\[AIR\ 1952\ SC\ 252.\]
the power of Judicial Review of laws passed by Legislature whether to be declared null and void or be declared valid.

**Table I**

**Amendment to Ninth Schedule at Glance**

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### 6.1 Fundamental Rights: Social Reform versus “Due Process” at the Time of framing of the Constitution

At the time of framing of the Constitution the framers had to battle with the question as to in what way and to what degree these rights are to be limited for the good of society as a whole. Granville Austin writes that the classic Statement of the right to ‘due process’ is that of the Fifth Amendment of the American Constitution . . . nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. India was no exception it had to deal with the conflict between “social reform” and “due process”. Since 1787 every people who have extended to give themselves a written Constitution have had to decide what are the citizens right to life, liberty and property, and within the context of their own aims and experience in what may and to what degree and to what degree these rights are to be limited for the good of society as a whole. So, the framers of the Constitution of India approached the conflict “due process” between the principles of abstract justice and the desire of all good men to be just and fair, and on the other hand, the need to solve the pressing problems of Social reform and State security.
(stability being a prerequisite to reform) as a means to advance the common good.²

Although many Assembly members first approached the due process issue as if it were one simple issue, experience in Constitution making soon taught them that it was intimately connected with two very important problems with the expropriation of property, and compensation for it, and with preventive detention. It took Assembly members nearly three years to decide how to treat these matters in the Constitution.

One of the member of Constituent Assembly K.M Pannikkar had expressed the views to the Rights sub-committee that ‘... the Judiciary should be the guardian, the upholders, and the champion of the rights of the individual, (but) it should not be entrusted with powers restricting the legislative powers of the union except to the barest extent possible and solely for the purpose of resisting the encroachments of the State on the liberty of the individual.’³

Both the Nehru Report and the Karachi Resolution used the phrase that liberty and property were the individual’s save in accordance with the law’. it would be argued subsequently in the Assembly that ‘save in accordance with the law’ permitted Judicial Review because it meant natural law, whereas review could be blocked by using the phrase ‘according to procedure established by law’, which meant law as laid down by the Legislature.⁴ B.N. Rau’s advice to the Assembly and the committees had been to dispense with the powers altogether. In his precedent series he had explained that due process in the Fifth and Fourteenth Amendments to the American Constitution had been conceived as a limitation on legal procedure,

³ *Id.* at 86.
but came to apply to substantive question as well. He warned the assembly that:

The court, manned by an irremovable Judiciary not so sensitive the public needs in the social or economic sphere as the representatives of a periodically elected legislative, will, in effect, have a note on legislation exercisable at any time and at the instance of any litigant.5

After the Fundamental Rights sub-committee had included the due process Clause in its report to the Advisory Committee, B.N Rau reiterated his warning. Forty percent of the litigation before the U.S. Supreme Court during the post fifty years had centred around due process, he wrote, and due process means only what the court say it means. To include it in the Constitution right open to litigation tenancy and property laws as well as laws concerning debt, moneylenders, and minimum wages. ‘It must be admitted’, he continued, that the Clauses are a safeguard against predatory legislation, but they may also stand in the way of beneficent social legislation’. He concluded that it might be a wise idea to steer a middle course and to adopt the device in the lush Constitution, which provided that the exercise of certain rights ‘be regulated by the principles of social justice’.6

6.1.1 Due Process and Property

By the decision of the Advisory Committee to remove from private property the protection of due process the Legislature had gained in power at the expense of the Judiciary and perhaps of abstract justice. This trend would become even more marked. The day after the Advisory Committee took this action, it moved to restrict further the power of the court to review property legislation.

5 Ibid
6 Id. at 87.
On April 22, the Advisory Committee took up the Rights Sub-Committee's draft Clause that property could be acquired for public use only on the payment of just compensation – 'just' being the word that clearly left the provision open to judicial interpretation. Opening the meeting, Pant asked if 'public use' meant tenancy legislation M.A Ayyar replied that it did not. Patel then called for a note on the Clause. He announced that eighteen members framed its retention, and that it would be kept as worded. Dr. B.R Ambedkar, however, was more cautious. What 'public use' meant, he wondered. Pant then said: suppose the Government acquires Zamindari rights and then abolishes them or what if the Government takes over Connaught Place (the central shopping and office area of New Delhi) and then redistributes the buildings to the tenants? The first stage is acquisition is acquisition. Does that come under this Clause? To M.A Ayyar's answer of 'certainty', Pant replied that he opposed the wording if it reasons that the Government would not be free to determine the compensation it would have to pay. If this Clause covers all cases of acquisition, said Rajgopalachari, then the question of the justices of compensation will go to the court such to the result that Government functioning will be paralysed'. Therefore “just” is dropped. 'Yet the matter was not so early solved. Two years would elapse before the Assembly completed drafting the provision. The Assembly greeted the committee's actions favourably. Only two members opposed the provisions on the grounds that it did not provide for 'just' compensation; others sharing this attitude may have decided to hold their peace, however, rather than publicly support such an unpopular cause. The Speakers demanded that positive action be taken to protect the tiller of the soil, that 'landlordism' and capitalism must be abolished, and that if compensation were paid to an expropriated Zamindar the debaters concerned themselves wholly

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7 Id. at 88.
with agricultural land – it should be normal, perhaps enough for a few years maintenance for himself and his family. The Zamindars were subjected to such intense criticism partly because they were popularly associated with support for the British Rajasthan, a belief that had some justification in fact, and partly because they had, generally speaking, rarely improved the land and had rack rented their tenants for generations. In some areas anti-zamindari sentiment also had a communal aspect, in parts of Bihar and the United Provinces, for example, many Hindu peasants had Muslim landlords, a situation easy to exploit politically, particularly at this time.

Sardar Patel closed the debate with a speech that sounded like a requiem for landlords. Patel began by saying that the Clause was not directed primarily at Zamindars, although land and ‘many other things may have to be acquired’. Moreover, compensation would be paid for property taken; there would be no expropriations. But, he continued, Zamindars could not protect their interests with speeches in the Assembly for before the Constitution came into effect ‘most of the Zamindaris will be liquidated’. Legislation was already being framed in many provinces to eliminate Zamindaris, ‘either by paying just compensation or adequate compensation or whatever the Legislature these think fit’. Despite Patel’s assurances that landlordism was all but finished, and that the provisions under discussion had little to do with it anyway, Assembly members continued to think primarily in these terms.\(^8\)

The property provisions in the Draft Constitution appeared briefly before the Assembly in November and December, 1948 during the year long debate on the Draft Constitution. The first of the two provisions considered was the right ‘to acquire, hold and dispose of property’.\(^8\)  

\(^8\)  *Id.* at 89.
The first of the two provisions considered was the right ‘to acquire, hold and dispose of property’. This Article dated from the Advisory Committee’s Interim Report, and the Assembly adopted it with little debate. As part of the omnibus freedoms Article, this right was liberalised by ‘reasonable’ restrictions either in the public interest or the interests of Scheduled Tribes.9

The Section 299 of the Draft Constitution was amended and provided that no one could be deprived of his property except by law and the law must name the compensation or the principles on which it was to be paid. A third Clause provided that property acquisition Bills must have presidential assent before becoming law. Clause (s) provided for the State’s police power relative to property. Clause (4) and (6) laid down that property legislation enacted in a State one year (later changed to eighteen months) before the inauguration of the Constitution and certified by the President within three months of its inauguration, and property legislation pending at the inauguration of the Constitution, later enacted and then asserted to by the President, could not be questioned in court on the grounds of the compensation or principles named in the law.10

Further, Pt. Jawahar Lal Nehru also informed the Assembly that ‘eminent lawyers’ have told us that on a proper construction of Clause 2, normally speaking the Judiciary shall not and does not come in’. He added that, ‘no Supreme Court and no Judiciary can stand in judgment over the Sovereign will of Parliament representing the will of the entire community’. Nehru also made clear the Congress’s longstanding programme to abolish Zamindari and its promise of equitable compensation. But equity, he said, applied to the community as well as to the individual. ‘No individual can override ultimately the rights of the community at large. No

9 Id. at 98.
10 Ibid.
community should injure and invade the rights of the individual unless it before the most urgent and important reasons. Patel remained silent. He knew the provision would be adopted and he had already achieved his aims. Ayyar summed up the debate with sentiments appropriate to the occasion. He spoke of the law ‘as an instrument of social progress’. The law, he said, ‘must reflect the progressive and social techniques of the age’. Dharma and the duty the individual owed to society were the basis of India’s social framework, he continued; capitalism as practised in the must was ‘alien to the root idea of our civilisation. The sole end of property in Yojna and to serve a social purpose’, he concluded. The Assembly adopted the new provision, which became Article 31 of the Constitution.11

6.1.2 Scope of Amendment of Article 31 Arised

The first move to amend Article 31 began within five months of Patel’s death, and there have been several subsequent amendments to the property provision.

Dr. B.R Ambedkar, speaking as Law Minister, explained that Article 31 was intended: “to permit a State to acquire what are called estates . . . (it) not only removes the operation of the provision relating to compensation, but also removes the Articles and relating to discrimination . . . It does not apply to acquisition of land. It applies to the acquisition of estates in land, which is a very different thing.12

The First Amendment Act (1951) was aimed primarily at Zamindars and rent farmers, although it also extended the State’s police power. The Act added Articles 31A, 31B and the Ninth Schedule to the Constitution. Article 31A allowed the State despite

11 Id. at 99.
12 Id. at 100.
any inconsistency with Articles 14, 19 or 31, to legislate for the acquisition of estates, the taking over of property by the State for a limited period in the public interest, and the extinction or modification of the rights of directors or stockholders of corporation.13

6.2 The Pre-Kesavananda Bharti Position before 1973

In 1951, the Parliament’s power to amend the Constitution, particularly the Part III i.e. the Fundamental Rights was challenged. This was result of the ruling party’s electoral promise of Socialistic goals under Article 39(b) and (c), Article 46 i.e. equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few and welfare of weaker Sections. The land reforms related to abolition of Zimindari system violated the Part III and hence the First Constitution Amendment 1951 and the Fourth Constitution Amendment 1952 were enacted.

The Ninth Schedule was added which immunised the land reforms from the scope of Judicial Review. The right to property came in way of these laws and therefore they were added to the Ninth Schedule. Many cases were filed in the Supreme Court which are discussed in the earlier chapter i.e. Sankari Prasad Singh Deo v. Union of India,14 Sajjan Singh v. State of Rajasthan,15 Golak Nath v. State of Punjab,16 A.K. Gopalan v. State of Madras.17

6.2.1 Amending power and basic features

During the period 1950-1972, the question of the amendability of Fundamental Rights came before the Supreme Court in three

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13 Ibid.
14 AIR 1951 SC 458.
15 AIR 1965 SC 845.
16 AIR 1967 SC 1643.
17 AIR 1950 SC 27.
different cases, namely, Shankari Prasad v. Union of India\textsuperscript{18}, Sajjan Singh v. State of Rajasthan,\textsuperscript{19} Golak Nath v. State of Punjab\textsuperscript{20}. Until the Supreme Court decision in the Golak Nath case, the law was as follows:

(i) Constitution Amendment Acts are not ordinary laws and are passed by the Parliament in exercise of its constituent powers as contradistinction from ordinary legislative powers. There is no separate constituent power also being vested in ‘Parliament’. (Later- as late as in 1981- the Supreme Court confirmed that the amending power under Article 368 is a constituent power independent of the scheme of the distribution of legislative powers under the Seventh Schedule (\textit{Sasanka v. Union of India}\textsuperscript{21}).

(ii) There is no limitation placed upon the amending power, that is to say, there is no provision of the Constitution which cannot be amended. The terms of Article 368 are perfectly general and empower the Parliament to amend the Constitution without any exception whatever.

(iii) Fundamental Rights guaranteed under the Constitution (Part III) are subject to Parliament’s power to amend the Constitution.

In the Golak Nath case, the Supreme Court by a 6:5 majority reversed its earlier decisions and held that the Fundamental Rights enshrined in the Constitution were transcendental and immutable, that Article 368 of the Constitution laid down only the procedure for amendment and did not give the Parliament substantive power to

\textsuperscript{18} Supra note 14.
\textsuperscript{19} Supra note 15.
\textsuperscript{20} Supra note 16.
\textsuperscript{21} AIR 1981 SC 522.
amend the Constitution or any constituent power distinct or separate from its ordinary legislative power.

6.3 Kesavananda Bharti case: Emergence of Basic structure Doctrine

The case of Kesavananda Bharti Sripadagalwaru v. State of Kerala,22 propounded the “Doctrine of Basic structure” which provided a shield of protection to the spirit of Indian Constitution to save it from the onslaught of the Parliament’s power of amendment. Hon’ble Judges were Justice S.M. Sikri, Chief Justice of India, Justice A.N. Grover, A.N. Ray, D.G. Palikar, H.R. Khanna, J.M. Shelat, K.K. Mathew, K.S. Hegde, H.H. Beg, P. Jagmoharn Reddy, S.N. Dwivedi, A.K. Mukherjee, Y.V. Chandrachud. The Supreme Court reviewed the decision in the Golaknath Nath case. Ten out of the 13 Judges held that Article 368 itself contained the power to amend the Constitution and that ‘law’ in Article 13(2) did not take in a Constitutional amendment under Article 368. The law declared in Golaknath Nath case was accordingly overruled. On the question whether the amending power under Article 368 is absolute and unlimited, seven Judges, constituting a majority, held that the amending power under Article 368 is absolute and unlimited, seven Judges, constituting a majority, held that the amending power under Article 368 was subject to an implied limitation; a limitation which arose by necessary implication from its being a power to “amend the Constitution”. By a majority of 7:6 the court ruled that “Article 368 does not enable Parliament to alter the ‘basic structure’ or framework of the Constitution”. What constituted the basic structure was, however, not clearly made out by the majority and remained an open question.

22 AIR 1973 SC 1461.
Nine Judges signed a summary Statement which records the most important conclusions reached by them in this case. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the Judges and the opinions expressed by them in their separate Judgements. Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict. All Judges upheld the validity of the Twenty-Fourth Amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the *Golaknath* case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution. However they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2). It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

1) It can make laws for the country by exercising its legislative power and

2) It can amend the Constitution by exercising its constituent power.

Constituent power is superior to ordinary legislative power. Unlike the British Parliament which is a Sovereign body (in the absence of a written Constitution), the powers and functions of the Indian Parliament and State Legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. The Parliament and the State Legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. The Parliament alone is given the power to make changes to this framework under Article
368. Unlike ordinary laws, amendments to Constitutional provisions require a special majority vote in Parliament. Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the Legislatures and the Executive. Parliament and the State Legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The Executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned State Legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the Fundamental Right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power. Most importantly seven of the thirteen Judges in the Kesavananda Bharati case, including Chief Justice Sikri who signed the summary Statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

In this case a batch of six writ petitions challenging validity of Twenty-Fourth, Twenty-Fifth and Twenty-Ninth Amendments of the Constitution was before the court and the majority upheld validity of Twenty-Fourth Amendment which inserted Clauses (3) and (4) in Article 13 - all Judges opined that by virtue of Article 368 as amended by twenty-fourth Amendment the Parliament had power to
amend any or all provisions of the Constitution including those relating to Fundamental Rights although the same was not unlimited. Further the majority were of view that power of amendment under Article 368 was subject to certain implied and inherent limitations - in exercise of amending power the Parliament cannot amend basic structure or framework of the Constitution. The right to property did not form part of the basic structure. Whereas individual freedom secured to citizens was basic feature of the Constitution - grant of power is always qualified by implications of context and considerations arising out of general scheme of statute - inherent limitations under unamended Article 368 would still hold true even after amendment of Article 368 - Sections 2 (a) and 2 (b) and first part of Section 3 of Twenty-Fifth Amendment held valid. The majority invalidated second part of Article 31-C introduced by Twenty-Fifth Amendment which excluded jurisdiction of court to inquire whether law protected under that Article gave effect to policy of securing Directive Principles mentioned therein - validity of Twenty-Ninth Amendment which inserted Kerala Land Reforms (Amendment) Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 was upheld.

All the six writ petitions involved common questions as to the validity of the Twenty-Fourth, Twenty-Fifth and Twenty-Ninth Amendments of the Constitution. A few facts in Writ petition No. 135 of 1970, it was filed by the petitioner on March 21, 1970 under Article 32 of the Constitution for enforcement of his Fundamental Rights under Articles 25, 26, 14, 19(1)(f) and 31 of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act 1969 (Act 35 of 1969) be declared unconstitutional, ultra vires and void. He further prayed for an
appropriate writ or order to issue during the pendency of the petition. The court issued rule nisi on March 25, 1970.

The Supreme Court cited some interpretation of the *Golak Nath's Case*\(^{23}\). Like the court held that the provisional Parliament is competent to exercise the power of amending the Constitution under Article 368. The fact that the said Article refers to the two Houses of the Parliament and the President separately and not to the Parliament, does not lead to the inference that the body which is invested with the power to amend is not the Parliament but a different body consisting of the two Houses. The words "all the powers conferred by the provisions of this Constitution on Parliament" in Article 379 are not confined to such powers as could be exercised by the provisional Parliament consisting of a single chamber, but are wide enough to include the power to amend the Constitution conferred by Article 368. The court further held:

The view that Article 368 is a complete code in itself in respect of the procedure provided by it and does not contemplate any amendment of a Bill for amendment of the Constitution after it has been introduced, and that if the Bill is amended during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed by Article 368 and would be invalid, is erroneous. Although "Law" must ordinarily include Constitutional law there is a clear demarcation between ordinary law which is made in the exercise of legislative power and Constitutional law, which is made in the exercise of constituent power. In the context of Article 13, "Law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of

\(^{23}\) [1967]2 SCR 762.
constituent power with the result that Article 13(2) does not affect amendments made under Article 368.

The court concluded *Golak Nath's* judgment as following:

That *Golak Nath's case* declared that a Constitutional amendment would be bad if it infringed Article 13(2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.

That *Golak Nath's case* did not decide whether Article 13(2) can be amended under Article 368 or determine the exact meaning of the expression “amendment of this Constitution” in Article 368.

That the expression “amendment of this Constitution” does not enable the Parliament to abrogate or take away Fundamental Rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits the Parliament can amend every Article.

That the Constitution (Twenty-Fourth Amendment) Act, 1971, as interpreted by, has been validly enacted.

That Article 368 does not enable the Parliament in its constituent capacity to delegate its function of amending the Constitution to another Legislature or to itself in its ordinary legislative capacity.

That Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, as interpreted is valid.

That Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is void as it delegates power to Legislatures to amend the Constitution.
That the Constitution (Twenty-Ninth Amendment) Act, 1971 is ineffective to protect the impugned Acts if they abrogate or take away Fundamental Rights. The Constitution Bench will decide whether the impugned Acts take away Fundamental Rights or only abridge them, and in the latter case whether they effect reasonable abridgements in the public interest.

Further, it was next contended that there are implied or inherent limitations on the amendatory power in the very structure of the Constitution, the principles it embodies, and in its essential elements and features (described briefly as essential features). They are alleged to be so good and desirable that it could not have been intended that they were liable to be adversely affected by amendment. Some of the essential features of the Constitution were catalogued as follows:

1. The supremacy of the Constitution;
2. The Sovereignty of India;
3. The integrity of the country;
4. The Democratic way of life;
5. The Republican form of Government;
6. The guarantee of basic human rights referred to in the Preamble and elaborated as Fundamental Rights in Part III of the Constitution;
7. A secular State;
8. A free and Independent Judiciary;
9. The dual structure of the Union and the States;
The balance between the Legislature, the Executive and the Judiciary;

A Parliamentary form of Government as distinct from Presidential form of Government;

The amendability of the Constitution as per the basic scheme of Article 368.

Mr. N. Palkhivala, the Counsel for the petitioners, listed some of the essential features of the Constitution before the court and said that they cannot be substantially altered by the amendatory process.

The Supreme Court observed that a question of very wide importance was raised by the submission. So far as the present case was concerned, the Twenty Fourth Amendment does no more than give effect to the Parliament's acceptance of the view taken in Sankari Prasad's case, the majority in Sajjan Singh's case and the minority in Golak Nath's case with regard to the nature of the amending power in relation to Fundamental Rights. It is clarification of the original Article 368. What was implicit in Article 368 is now made explicit and the essence of Article 368 is retained. Therefore, there can be no objection to the Twenty Fourth Amendment on the ground that any essential feature of the Constitution is affected.

The court further said that the Twenty Fifth Amendment introduces some abridgement of the Fundamental Right to property. Right to property has been subject to abridgement right from the Constitution itself as in Article 31(4) & (6)) and the Twenty Fifth Amendment is a further inroad on the right to property. In Golak Nath's case, the first, fourth and the seventeenth amendments were held by the majority as having contravened Article 13(2). Nevertheless the amendments were not struck down but permitted to continue as if they were valid. The court came to the conclusion that
Article 13(2) does not control an amendment of the Constitution; it must be held that all previous amendments to the Constitution, so far made, could not be challenged on the ground of repugnancy to Article 13(2). It follows that any amendment of the Constitution cannot be challenged on that ground, and that would be true not only of the Twenty Fourth Amendment but also the Twenty Fifth amendment, and the Twenty Ninth Amendment.

The question whether the Twenty Fifth Amendment and the Twenty Ninth Amendment are invalid arose because it was contended by Mr. N. Palkhivala, that an essential feature of the Constitution was substantially affected. The argument proceeded on the assumption that in the absence of any express limitation on the power of amendment, all the provisions in the Constitution are liable to be amended. It was agreed, on this assumption, that even Fundamental Rights may be somewhat abridged if that is necessary. In this connection, referred to the First amendment by which Articles 15 and 19 were amended and in both these cases the amendment did abridge the Fundamental Rights. Similarly conceded that Articles 31A and 31B were amendments whereby the rights in landed estates were extinguished or substantially affected, but that was in the interest of agrarian reform, a fact of supreme importance in the Indian polity which could not have been ignored for long and to which the ruling party was committed for a long time. Thus although there had been amendments which abridged Fundamental Rights, these amendments did not go to the length of damaging or destroying the Fundamental Rights. They had not reached the 'core' of the rights. In other words, the submission was that there are some very good and desirable things in the Constitution. One of them is Fundamental Rights, and though these Fundamental Rights could be abridged somewhat, it was not permissible to affect by amendment the core of the Fundamental Rights, including the core of the right to property. For this argument
Mr. N. Palkiwala relied on the basic scheme of the Constitution as first promulgated and contended that any Amendments made thereafter, including the Twenty Fourth Amendment, would not affect his argument, because, according to him, every one of them, must be evaluated on the principles and concepts adopted in that basic scheme. His further submission was that if such a core of a Fundamental Right is damaged or destroyed by an amendment, such an amendment is illegal and, therefore, liable to be struck down by this court as the guardian of the Constitution. It necessarily followed from the submission that Mr. N. Palkhivala wanted the court to decide whether by any particular amendment the core of an essential feature like a Fundamental Right has been damaged or destroyed—undoubtedly a terrifying responsibility for the court was to be undertaken. The court observed that it appeared as very odd that while the framers of the Constitution did not think it necessary to expressly exclude even one provision of the Constitution from being amended, they still intended that the court, as the guardian of the Constitution, should make parts of it unamendable by implying limitations on the amending power. Indeed the Supreme Court is a guardian of the Constitution in the sense that it will not permit its contravention by any of its instrumentalities, but it cannot constitute itself a guardian against change Constitutionally effected.

The court said that though the argument had a wide sweep, namely, that the several essential features catalogued by Mr. N. Palkhivala were not liable to be damaged or destroyed, in the ultimate result the case really boils down to whether the core of the Fundamental Right to property has been damaged or destroyed principally by the Twenty Fifth Amendment, and, if so whether there was any implied or inherent limitation on the amending power which prohibited such an amendment. The court said several essential features listed by Mr. Palkhivala do not come into the picture in the
present case. It is not the case that by the recent Twenty Fifth Amendment either the Sovereignty of India is affected or the Republican form of Government has been destroyed. One of the several essential features listed were Fundamental Rights. Amongst Fundamental Rights also most were untouched by the amendment. The Twenty Fifth Amendment dealt principally with property rights and Articles 14, 19 and 31 in relation to them. By that amendment chiefly two things were sought to be accomplished (1) There shall be no right to receive 'compensation', as judicially interpreted, for a State acquisition for a public purpose, but only to receive an 'amount', (2) A law made to achieve the aims of equitable distribution of community resources or for the prevention of concentration of wealth and means of production shall not be challenged on the ground of repugnancy to Articles 14, 19 and 31. Since it was not the practice of the court to decide questions which were not in immediate controversy it would not have been proper to pronounce whether this or that particular so-called essential feature can or cannot be damaged or destroyed by amendment. But since it was argued on behalf of the State that there can be no limitations on the amending power except those expressly provided in the Constitution and since that would affect decision as to the Twenty Fifth Amendment, it became important for the court to deal briefly with the question of implied and inherent limitations with special reference to Fundamental Rights including property rights.

Further court observed that whatever one could say about the legitimacy of describing all the rights conferred in Part III as essential features, one thing is clear. So far as the right to property is concerned, the Constitution, while assuring that no-body shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition (Article 31(1) & (2)), expressly declared its determination, in the interest of the
common good, to break up concentration of wealth and means of production in every form and to arrange for redistribution of ownership and control of the material resources of the community (Article 39(b) & (c)). If anything in the Constitution deserved to be called an essential feature, this determination is one. That is the central issue in the case, however dexterously it may have been played down in the course of an argument which painted the gloom resulting by the denial of the Fundamental Rights under Articles 14, 19 and 31 in the implementation of that determination. The Constitution had not merely stopped at declaring this determination but actually started its implementation from the commencement of the Constitution itself by incorporating Clauses (4) & (6) under Article 31, the first two Clauses of which spelt out the Fundamental Right to property. Apart from what Pandit Jawaharlal Nehru said about the Article in the Constituent Assembly Debates-and what he said was not at all sympathetic to Mr. Palkhivala's argument before the court -the Fundamental Right to receive compensation under Clause (2), as then framed, was completely nullified by Clauses (4) & (6) in at least one instance of concentration of wealth and material resources viz. Zamindaris and landed estates. These Clauses were deliberately inserted in the original Article 31 leaving no manner of doubt that Zamindaris and estates were sought to be abolished on payment of even illusory compensation. The various States had already passed laws or were in the process of passing laws on the subject, and specific provision were made in the two Clauses, securing such laws from challenge on the ground that they were not acquired by the State for a public purpose or that adequate compensation was not paid. The first case under the Bihar Land Reforms Act, 1950, State of Bihar v. Kameshwar Singh case shows that the law was highly unjust (from the prevailing point of view of 'justice') and the compensation payable was in some cases purely
illusory and the court said that yet by virtue of Article 31(4) there
could be no challenge to that Act and other similar laws on those
grounds. By oversight, challenge to such laws under Articles 14 and
19 had not been expressly excluded, and so when the case was
pending in this court, the First Amendment Act was passed inserting
Articles 31A and 31B by which, to take no chances, so a challenge
based on all Fundamental Rights in Part III was wholly excluded.
The court said that the course taken by the Constitution and its First
Amendment leaves no doubt that Zamindaris and estates were
intended to be expropriated from the very beginning and no 'core'
with regard to payment of compensation was sought to be
safeguarded. By the time the Fourth Amendment was made in 1955,
it became apparent that the challenge to any scheme of redistribution
or breaking up of concentration of property was confined generally to
Articles 14, 19 and 31, and hence Article 31A was amended. By the
amendment all intermediaries, including small absentee landlords,
were permitted to be eliminated and challenge to Article 31A was
excluded only under Articles 14, 19 and 31. In short, rights in landed
agricultural property were extinguished without a thought to the
necessity of paying fair compensation. In a real sense concentration
of wealth in the form of agricultural lands was broken and
community resources were distributed. On the other hand, a
protectionist economic system, reinforced by controls, followed in
the realm of trade and industry with a view to achieve greater
production of goods and services led to other forms of concentration
of wealth and means of production in the wake of Independence. So
came the Twenty Fifth Amendment, the object of which was the same
viz implementation of Article 39(b) & (c). It had made clear that
owners of property when it is acquired for a public purpose are not
entitled to compensation as interpreted by the court, and any law
made with the aforesaid object cannot be challenged on the grounds
arising out of Articles 14, 19 and 31. In principle, there was no difference in Article 31A and the new Article 31C inserted by the Twenty Fifth Amendment.

The court observed that the word "amendment" in Article 368 carried the same meaning whether the amendment relates to taking away or abridging Fundamental Rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection was taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in the opinion of Chief Justice Sikri, was hold good when it dealt with amendment relating to Fundamental Rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with Fundamental Right and the scope and width of that power when it deals with provisions not concerned with Fundamental Rights.

In this judgment the Supreme Court while dealing with the Directive Principles has quoted Granville Austin as he writes:

In the Directive Principles, however, one finds an even clearer Statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves. By establishing these positive obligations of the State, the members of the Constituent Assembly made it the responsibility of future Indian Governments to find a middle way between
individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'. The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the Democratic institutions of the Constitution) had assumed economic as well as political control of the country, and that Indian capitalists should not inherit the empire of British colonialists.

The court referred to what Pt. Jawahar Lal Nehru, in the course of his speech in support of the Constitution (First Amendment) Bill, said:

And as I said on the last occasion the real difficulty we have to face is a conflict between the dynamic ideas contained in the Directive Principles of Policy and the static position of certain things that are called 'fundamental' whether they relate to property or whether they relate to something else. Both are important undoubtedly. How are you to get over them? A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has past its use.

Again in the course of his speech in support of the Constitution (Fourth Amendment) Bill, Pt. Jawahar Lal Nehru said:
But, I say, that if that is correct, there is an inherent contradiction in the Constitution between the Fundamental Rights and the Directive Principles of State Policy. Therefore, again, it is up to this Parliament to remove that Contradiction and make the Fundamental Rights subserve the Directive Principles of State Policy.

The court observed that it cannot, therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and the poor was a recent phenomenon. On the contrary, the above material showed that this had been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. The material further indicates that the approach adopted was that there should be no reluctance to abridge or regulate the Fundamental Right to property if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles.

The court observed that the Supreme Court in the well-known *Golak Nath's case* reversed, by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to Fundamental Rights. According to the court the result of the judgment was that Parliament was considered to have no power to take away or curtail any of the Fundamental Rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution. It was, therefore, considered necessary to provide expressly that Parliament had power to amend
any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.

The Bill for the Twenty fourth Amendment sought to amend Article 368 suitably for the purpose and made it clear that Article 368 provided for amendment of the Constitution as well as procedure therefore. The Bill further provided that when a Constitution Amendment Bill passed by both Houses of Parliament was presented to the President for his assent, he should give his assent thereto. The Bill also sought to amend Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368.

Section 2 of the Bill which was ultimately passed as the Constitution (Twenty fourth Amendment) Act added a Clause in Article 13 that nothing in that Article would apply to any amendment of the Constitution made under Article 368. As a result of Section 3 of the Amendment Act, Article 368 was re-numbered as Clause (2) thereof and the marginal heading now read as "Power of Parliament to amend the Constitution and procedure thereof". Non-obstante Clause (1) inserted in the Article to emphasize the fact that the power exercised under that Article is constituent power, not subject to the other provisions of the Constitution, and embraces within itself addition, variation and repeal of any provision of the Constitution. Amendment also made so as to make it obligatory for the President to give his assent to the Amendment Bill after it was passed in accordance with the Article. Clause (3) further added in Article 368 to the effect that nothing in Article 13 would apply to an amendment made under Article 368. Although considerable arguments were addressed before the court in Kesavananda Bharti case on the point as to whether the power of amendment under Article 368 includes the power to amend Part III so as to take away or abridge Fundamental Rights, it was not been disputed before the court that the Constitution
(Twenty Fourth Amendment) Act was passed in accordance with the procedure laid down in Article 368 of the Constitution as it existed before the passing of the said Act. The court said that it finds no infirmity in the Constitution (Twenty Fourth Amendment) Act and therefore, the court upheld the validity of the said Act.

The court further dealt with the Constitution (Twenty Fifth Amendment) Act, 1971. The Twenty Fifth Amendment made three material changes:

It amended Article 31(2) in two respects.

(1) It substitutes the word "amount" for the word "compensation" for property acquired or requisitioned.

(2) It provided that the law for the purpose of acquisition or requisition shall not be called in question on the ground that the whole or any part of the "amount" is to be given otherwise than in cash.

It provided that the Fundamental Right to acquire, hold and dispose of property under Article 19(1) (f) cannot be invoked in respect of any such law as referred to in Article 31(2).

It inserted Article 31C as an overriding Article which made the Fundamental Rights conferred by Articles 14, 19 and 31 inapplicable to certain categories of laws passed by the Parliament or by any State Legislature.

The court ruled that both the lines of thought which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge if it is relevant to the determination of compensation and is a recognized principle applicable in the determination of compensation for property compulsorily acquired and the principle is
appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *P. Vajravelu Mudaliar’s case or in Shantilal Mangaldas’s case* the Act, the court in its judgment is liable to struck down it as it fails to provide to the expropriated banks compensation determined according to relevant principles.

The Supreme Court held that Judicial Review has thus become an integral part of our Constitutional system and this power has been vested in the High Court and the Supreme Court to decide about the Constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any Article of the Constitution, which are the touchstone for the validity of all laws, the Supreme Court and the High Court are empowered to strike down the said provisions. The court said that the one sphere where there was no Judicial Review for finding out whether there has been infraction of the provisions of Part III and there is no power of striking down an Act, regulation or provision even though it may be inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution is that incorporated in Article 31B taken along with the Ninth Schedule. Article 31B was inserted, as mentioned earlier, by the Constitution (First Amendment) Act. According to Article 31B, none of the Acts and regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that such Act, regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III of the Constitution. The one thing significant to be noted in this connection, however, is that the power under Article 31B of exclusion of Judicial Review, which might be undertaken for the purpose of finding whether there has been contravention of any provision of Part III, is exercised not by the Legislature enacting the impugned law but by
the authority which makes the Constitutional amendment under Article 368, viz., the prescribed majority in each House of Parliament. Such a power is exercised in respect of an existing statute of which the provisions can be scrutinized before it is placed in the Ninth Schedule. It is for the prescribed majority in each House to decide whether the particular statute should be placed in the Ninth Schedule, and if so, whether it should be placed there in its entirety or partly. As against that, the position under Article 31C is that though Judicial Review has been excluded by the authority making the Constitutional amendment, the law in respect of which the Judicial Review has been excluded is one yet to be passed by the Legislatures. Although the object for which such a law can be enacted has been specified in Article 31C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the court but in the very Legislature which passes the law. The vice of Article 31C is that even if the law enacted is not for the object mentioned in Article 31C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited Judicial Review which is permissible under Article 31A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31A has also been done away with under Article 31C. The effect of the declaration mentioned in Article 31C is to grant protection to the law enacted by a Legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the objects mentioned in Article 31C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of Judicial Review in a Legislature, including State
Legislature, contemplated by Article 31C, in opinion of the court strikes at the basis structure of the Constitution. The second part of Article 31C thus goes beyond the permissible limit of what constitutes amendment under Article 368.

To sum up the judgment the view by the majority in the writ petitions of this case was as follows:

Golak Nath's case was over-ruled and it was held that Article 368 does not enable Parliament to alter the basic structure of framework of the Constitution. Section 2(a) and (b) of the Constitution (Twenty-fourth Amendment) Act, 1971 are valid. The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such Policy" is invalid. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid. The Constitution Bench was to determine the validity of the Constitution (Twenty-Sixth Amendment) Act, 1971 in accordance with law.

Justice Khanna observed that the Parliament could not change our Democratic Government into a dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State could not, likewise, be done away with.

Six learned Judges (Justices Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud), who upheld the validity of Twenty Ninth Amendment did not subscribe to basic structure doctrine. The other six learned Judges (Chief Justice Sikri, and Justices Shelat, Grover, Hegde, Mukherjee and Reddy) upheld the Twenty Ninth Amendment subject to it passing the test of basic structure doctrine. The 13th learned Judge (Justice Khanna), though subscribed
to basic structure doctrine, upheld the Twenty Ninth Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. Therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of Twenty Ninth Amendment unconditionally or were alive to the consequences of basic structure doctrine on Twenty Ninth Amendment.

Six learned Judges otherwise forming the majority, held Twenty Ninth Amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who were in minority in *Kesavananda Bharati's case*, insofar as it relates to laying down the doctrine of basic structure, held Twenty Ninth Amendment unconditionally valid.

While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Justice Khanna opined that the Fundamental Rights could be amended abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the Twenty Ninth Amendment as unconditionally valid. Thus, it cannot be inferred from the conclusion of the seven Judges upholding unconditionally the validity of Twenty Ninth Amendment that the majority opinion held Fundamental Rights chapter as not part of the basic structure doctrine. The six Judges which held Twenty Ninth Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held Twenty Ninth Amendment valid subject to it passing the test of basic structure doctrine.

Each Judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either. Chief Justice Sikri, explained that the concept of basic structure included:
(1) Supremacy of the Constitution

(2) Republican and Democratic form of Government

(3) Secular character of the Constitution

(4) Separation of Powers between the Legislature, Executive and the Judiciary

(5) Federal character of the Constitution

Further Justice Shetal, and Justice Grover, added two more basic features to this list:

(1) The mandate to build a welfare State contained in the Directive Principles of State Policy

(2) Unity and integrity of the nation

And Justice Hegde, and Justice Mukherjea, identified a separate and shorter list of basic features:

(1) Sovereignty of India

(2) Democratic character of the polity

(3) Unity of the country

(4) Essential features of the individual freedoms secured to the citizens

(5) Mandate to build a welfare State

And Justice Jaganmohan Reddy, stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

(1) Sovereign Democratic Republic

(2) Parliamentary Democracy
He said that the Constitution would not be itself without the fundamental freedoms and the Directive Principles. Only six Judges on the Bench (therefore a minority view) agreed that the Fundamental Rights of the Citizen belonged to the basic structure and Parliament could not amend it.

In the above mentioned features it becomes clear that the concept of welfare State is one of the important features of the Constitution and therefore the power to make a welfare State rests with the Parliament and the Executive to make such laws and implement the same which help in making a welfare State. So, this points towards harmony between the Fundamental Rights and the Directive Principles. None of them can be ignored or superseded by each other.

The minority view delivered by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior Judges, soon after the pronouncement of the Kesavananda case verdict, was widely considered to be politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that Golak Nath case had been decided wrongly. They upheld the validity of all three amendments challenged before the court. Justice Ray, held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368.

In summary the majority verdict in Kesavananda Bharati recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic
structure. But there was no unanimity of opinion about what appoints to that basic structure.

The present State of the doctrine of basic structure is that so long as the decision in Kesavananda Bharti case is not overturned by another full Bench of the Supreme Court, any amendment to the Constitution is liable to be interfered with by the court on the ground of affecting one or other of the basic features of the Constitution.

6.2.2 Waman Rao v. Union of India

The case of Waman Rao v. Union of India,24 decided on 13.11.1980 by the Bench consisting of Chief Justice Y.V. Chandrachud, Justice A.P. Sen, Justice P.N. Bhagwati, Justice V.D. Tulzapurkar and Justice V.R. Krishna Iyer. The case was related to the Constitutional amendment including Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, Constitution (Forty Second Amendment) Act, 1976 and the Constitution Fortieth Amendment Act. In the note of the judgment of the case it is written that the provisions which were challenged were with retrospective effect valid and did not damage the basic feature of the Constitution of India. It was therefore held that all amendments made before 24.04.1973 and by which Ninth Schedule to Constitution of India was amended was valid amendment made on or after 24.04.1973 were open to challenge as they effect basic feature of Constitution of India Act included in Ninth Schedule if saved by Articles 31A or 31C to be challenged on ground that amendment damages essential features would become otiose.

1) Facts of the Case

This case includes various Constitutional amendments as mentioned earlier which were challenged before the court. A ceiling

on agricultural holdings was imposed in Maharashtra by the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 27 of 1961, which was brought into operation on January 26, 1962. The ceiling fixed by that Act (the Principal Act), was lowered and certain other amendments were made to that Act by Acts 21 of 1975, 47 of 1975 and 2 of 1976. The validity of these Acts was challenged in the Bombay High Court in a large group of petitions. A Division Bench of the High Court sitting at Nagpur repelled that challenge by a judgment dated August 13, 1976, in Vithalrao Udhaorao Uttarwar v. State of Maharashtra. The High Court held that provisions of the aforesaid Acts were not open to challenge on the ground that they were inconsistent with or took away or abridged any of the rights conferred by Part III of the Constitution, since those acts were placed in the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 and the Constitution (Fortieth Amendment) Act, 1976, and also because of the proclamation of Emergency as a result of which the rights under Articles 14 and 19 of the Constitution could not be enforced. The High Court also repelled the challenge to the validity of the Article 31B itself by holding that far from damaging the basic structure of the Constitution, the Constitution (First Amendment) Act, 1951, which introduced Article 31B into the Constitution, fortified that structure by sub serving a fundamental Constitutional purpose. Certain provisions of the Principal Act and of the Amending Acts; particularly the concept of 'family unit' were challenged before the High Court on the ground, inter alia, that they were outside the purview of Article 31A. The High Court rejected that challenge too on the ground that those provisions formed a part of an integral scheme of agrarian reforms under which large agricultural holdings had to be reduced and the surplus land distributed amongst the landless and others. Later, the appeals filed against the decision of

the Bombay High Court were dismissed by this court by a judgment dated January 27, 1977 in *Dattatraya Govind Mahajan v. State of Maharashtra*. The point involved in those appeals was void being violative of the second proviso to Article 31A (1), in so far as it created an artificial ‘family unit’ and fixed the ceiling on the agricultural holdings of such family units. The argument was that the violation of the particular proviso deprived the impugned laws of the protection conferred by Article 31A. That argument was rejected by the court on the view that even if the impugned provisions were violative of the second proviso, it was violative of the second proviso; they would receive the protection of Article 31B by reason of the inclusion of the Principal Act and the Amending Acts in the Ninth Schedule. The court considered whether, in fact, the provisions of the improved acts were violative of the second proviso and held that it was entirely for the Legislature to decide what policy to adopt for the purpose of restructuring the agrarian system and the court could not assume the role of economic adviser for pronouncing upon the wisdom of such policy. The second proviso of Article 3(A)(1) was therefore held not to have been contravened. The judgment by the Supreme Court in the appeals above was delivered on January 27, 1977 during the proclamation of emergency was in operation.

So, later when the proclamation of emergency was revoked, petitions were filed again in the Supreme Court by the appellants praying for the review of the judgment in *Dattatraya Govind Mahajan’s case* on the ground that several contentions which were otherwise open to them for assailing the Constitutional validity of the impugned acts, could not be made by reason of the emergency and that they should be permitted to make those contentions since the emergency was lifted. Fresh writ petitions were also filed in the court in which those contentions were made. The court accepted the

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petition for the review of the judgment in *Dattatraya Govind Mahajan's case*.

2) **Article 368: Power of the Parliament to amend to the Constitution**

The first question which was to be addressed in *Waman Rao v. Union of India*, by the Supreme Court was whether in enacting Article 31A(1)(a) by way of amendment of the Constitution, the Parliament transgressed its power of amending the Constitution. Article 31A was inserted in the Constitution by Section 4 of the Constitution (First Amendment) Act, 1951 with retrospective effect from the Constitution.

The court further said that by Section 7 of the Constitution (Forty Fourth Amendment) Act, 1978 the reference to Article 31 was deleted from the concluding portion of Article 31A(1) with effect from June 20, 1979 as consequence of this, by Section 2 of the (Forty Fourth Amendment) the Clause (f) of Article 19(1) which gave the citizens the right to acquire, hold and dispose of property. The deletion of right to property will not deprive the petitioners of the arguments which were available to them prior to the coming into force of the Forty Fourth Amendment.

There is no doubt that the Agricultural Lands Ceiling Acts which are impugned in these proceedings fall within term of Clause (a) of Article 31A(1).

Further, the validity of the Constitutional amendment by which Article 31A(1)(a) was introduced was challenged by the petitioners on the ground that it damages the basic structure of the Constitution by destroying one of its basic features, namely, that no law can be made by the Legislature so as to abrogate the guarantees afforded by

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27 Supra note 24.
Articles 14, 19 and 31. The withdrawal of the application of certain Articles in Part III in respect of laws of a defined category is not total abrogation of the Articles because they will continue to apply to other situations and other laws.

In this case Chief Justice Chandrachud observed that: what is decisive is whether, in so far as the impugned law is concerned, the rights available to persons affected by that law under any of the Articles in Part III is totally or substantially withdrawn and not whether the Articles, that application of which stands withdrawn in regard to a defined category of laws, continue to be on the statute book so as to be available in respect of laws of other categories. We must therefore conclude that the withdrawal of the application of Article 14, 19 and 31 in respect of laws which fall under Clause (a) is total and complete, that is to say, the application of those Articles stands abrogated, not merely abridged, in respect of the impugned enactments which indubitably call within the ambit of Clause (a) of 31A. Emphasis was given and added that every case in which the protection of a Fundamental Right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution. The court further referred the case of Kesavananda Bharti v. Union of India,28 where it was held that in the exercise of the power conferred by Article 368, the Parliament cannot amend the Constitution so as to damage or destroy the basic structure of the Constitution. The seven learned Judge’s conclusion as effectively and eloquently as languages can do. But, at this distance of time any controversy over what was meant what they said is plainly sterile.

28 Supra note 22.
The court said that at 'this distance of time', because though not more than a little less than eight years have gone by since the decision was rendered, those few years were full of Constitutional events of great magnitude. Applying the ratio of the majority judgments in that epoch making decision, this court has since struck down Constitutional amendments which would otherwise have passed muster, for example, in *Smt. Indira Gandhi v. Raj Marain*,\(^{29}\) Article 329A (4) was held by the court to be beyond the amending competence of the Parliament since, by making separate and special provision as to elections to Parliament of the Prime Minister and the Speaker, it destroyed the basic structure of the Constitution. Chief Justice Ray based his decision on the ground that the Thirty Ninth Amendment by which Article 329A was introduced violated the Rule of Law. Justice H.R Khanna based his decision on the ground that Democracy was a basic feature of the Constitution, that Democracy contemplates that elections should be free and fair and that the Clause in question struck at the basis of free and fair elections; Justice Mathew, struck down the Clause on the ground that it was in nature of legislation and hominem and that it damaged the Democratic structure of the Constitution.

Justice Chandrachud held that the Clause was bad because it violated the Rule of Law and was an outright negation of the principle of equality which is a basic feature of the Constitution. In *Minerva Mills case*,\(^{30}\) Clauses (4) and (5) of Article 368 itself were held unconstitutional by a unanimous court, on the ground that they destroyed certain basic features of the Constitution like Judicial Review and a limited amending powers, and thereby damaged its base structure. The majority also struck down the amendment introduced to Article 31C by Forty Second Amendment Act, 1976.

\(^{29}\) AIR 1975 SC 229.

\(^{30}\) AIR 1980 SC 625.
The period between April 27, 1973, when the judgment in *Kesavananda Bharti case* was delivered and is a short span in our Constitutional history but the occasional challenges which evoked equal responses have helped settle the controversy over the limitations on the Parliament's power to amend the Constitution. Justice Khanna was misunderstood to mean that Fundamental Rights are not a part of the basic structure of the Constitution when he said, "I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various Articles including those relating to Fundamental Rights.

Later, Justice Khanna clarified the true position in the *Election case* that subject to the retention of the basic structure or framework of the Constitution, the power of amendment was plenary. The law on the subject of the Parliament’s power to amend the Constitution must now be taken as well settled, the true position being that thought the Parliament has the power to amend each and every Article of the Constitution including the provisions of Part III, the amending power cannot be exercised so as to damage or destroy the basic structure of the Constitution.

3) **Object of the Constitutional First Amendment Act, 1951: Abolition of Zamindari**

Chief Justice Chandrachud observed in this judgment that the answer to the question of the validity of the Amendment by which Article 31A was introduced lies in the history i.e. the Statement of objects and reasons of the first amendment which were aimed to amend Article 19 and to insert provisions fully securing the Constitutional validity of Zamindari abolition laws in general and certain specified State Acts in particular. In *Shankari Prasad v.* AIR 1975 SC 2299.
Chief Justice Patanjali Sastri, explained the reasons that led to the insertion of Articles 31A and 31B by the First Amendment thus: “What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State legislative as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zamindari Abolition Acts. Certain Zamindars, feeling themselves aggrieved attacked the validity of those Acts in court of law on the ground that they contravened the Fundamental Rights conferred on them by Part III of the Constitution. The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Court at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those decisions are pending in this court. Petitions filed in this court by some other Zamindars seeking the determinations of the some question are also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a Bill to amend the Constitution, which after undergoing amendments in various particulars, as passed by the requisite majority as the Constitution (First Amendment) Act, 1951.

4) Parliamentary Debates: Jawaharlal Nehru: Constitution First Amendment Act, 1951

Further the court also referred to the speeches made by Jawaharlal Nehru in the Parliament in 1951. The important of
speeches in the Parliamentary Debates relevant extracts Jawaharlal Nehru said:

The real difficulty which has come up before us is this. The Constitution lays down certain Directive Principles of State Policy and after long discussion we agreed to them and they point out the way we have got the travel. The Constitution also lays down certain Fundamental Rights. Both are important. The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to pressure certain rights which exist. Both again are right. But somehow and sometime it right so happened that dynamic movement and that static standstill do not quite fit into each other. So, how are we to meet this challenge of the times? How are we to answer the question? For last 10 or 20 years you have said, we will do it. Why have you not done it? It is not good for us to say: we are helpless before fats and the situation which we are to face at present. Therefore, we have to think in terms of these big changes, and changes and the like and therefore we thought of amending Article 31. ultimately we thought it best to propose additional Article 31A and 31B and in addition to that there is a Schedule (Schedule XI) attached of a number of Acts passed by State Legislatures, some of which have been challenged or right be challenged and we thought it best to same term

from long delays and these difficulties, so that this process of change which has been initiated by the State should go ahead.

Further he said:

That is why I said that the amendments I have placed before the House are meant to give effect to this Constitution. I am not changing the Constitution by an iota; I am merely making it stronger. I am merely giving effect to the real intentions of the framers of the Constitution and to the wording of the Constitution, unless it is interpreted in a very narrow and legalistic way.

Therefore, the Supreme Court regarded the First Amendment Act, 1951 as a measure which has strengthened the Constitution and not impaired it.

5) Article 39(b) (c): Importance of Directive Principles

In this judgment the Supreme Court has also emphasised the importance of Directive Principles Article 39(b)(c). Article 39 directs that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These twin principles of State policy were a part of the Constitution as originally enacted and it is in order to effectuate the purpose of these Directive Principles that the first Amendment and 4th Amendments were passed.

The Report of the Committee of the panel on Land Reforms (Government of India, Planning Commission, 1959), the policy of
imposition of ceiling on agricultural land fulfils the following objectives:

1) Meeting the widespread desire to process land;

2) Reducing glaring inequalities in ownership and use of land;

3) Reducing inequalities in agricultural incomes; and

4) Enlarging the spheres of self employment.

The First Amendment has thus made the Constitutional ideal of equal justice a living truth. It is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot destroy and damage the basic structure of the Constitution. Therefore, it is valid and upheld on its own merits.

6) Article 31A, 31B, 31C: Validity Question

Article 31A upheld when the First Amendment is held valid by the court. In Shankari Prasad v. Union of India,34 the validity of the First Amendment which introduced Articles 31A & 31B was assailed on six grounds, the fifth being that Article 13(2) takes in not only ordinary laws but Constitutional amendments also. This argument was rejected and the first amendment was upheld. In Sajjan Singh v. State of Rajasthan,35 the court refused to reconsider the decision in Shankari Prasad case, with the result that the validity of the First Amendment remained unshaken. In Golaknath case,36 it was held by a majority of 6:5 that the power to amend the Constitution was not located in Article 368. The inevitable result of this holding should

34 (1952) 1 SCR 89.
35 (1965) 1 SCR 933.
36 Supra note 23.
have the striking down of all Constitutional amendments since; according to the view of the majority the Parliament had no power to amend the Constitution in pursuance of Article 368. But the court resorted to the doctrine of prospective overruling and held that the Constitutional amendments which were already made would be left undisturbed and that its decision will govern the future amendments only. As a result, the First Amendment by which Articles 31A and 31B were introduced knowledge that Golak Nath case was overruled in Kesavananda Bharti case in which it was held unanimously that the power to amend the Constitution was to be found in Article 368 of the Constitution. The Constitution Twenty Fourth, Twenty Fifth and Twenty Ninth Amendments were challenged. The validity of the First Amendment was not questioned. Justice Khanna, however, held while dealing with the validity of the unamended Article 31C that the validity of Article 31A was upheld in Shankari Prasad case that its validity could not be any longer questioned because of the principle of stare decisis and that the ground on which the validity of Article 31A was sustained will be available equally for sustaining the validity of the first part of Article 31C.

Justice Krishna Iyer said in this Judgement that: “thus we get the statutory perspective of agrarian reform and so, the Constitutionality of the Act has to be tested on the touchstone of Article 31A which is the relevant protective armour for land reform laws. Even here, we must State that while we do refer to the range of Constitutional immunity Article 31A confers on agrarian reform measures we do not rest our decision on that provision”. The court upheld Article 31A.

Now, coming to Article 31B, this court said that Article also contains a device for saving laws from challenge on the ground of violation of Fundamental Rights. Putting it briefly, Article 31B
provides that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The provisions of the Article are expressed to be without prejudice to the generality of the provisions in Article 31A and the concluding portion of the Article supersedes any judgment, decree or order of any court or tribunal to the contrary. This Article was introduced into the Constitution by Section 5 of the Constitution (First Amendment) Act 1951 and 31A by Section 4 of the same Amendment.

The court further observed that Article 31B has to be read along with the Ninth Schedule because it is only those Acts and Regulations which are put in that Schedule that can receive the protection of that Article. The Ninth Schedule was added to the Constitution by Section 14 of the Amendment Act, 1951. The device or mechanism which Sections 5 and 14 of the First Amendment have adopted is that as and when Acts and Regulations are put into the Ninth Schedule by Constitutional Amendments made from time to time, they will automatically, by reason of the provisions of Article 31B, received the protection of that Article. Items 1 to 13 of the Ninth Schedule were put into that Schedule when the First Amendment was enacted on June 18, 1951. These items are typical instances of agrarian reform legislations. They, relate mostly to the abolition of various tenures like Maleki, Taluqidari, Meheosie, Khoti, Paragana and Kulkarni Watsons and of Zamindaris and Jagirs. The place of pride in the Schedule is occupied by the Bihar Land Reforms Act, 1950, which is item no. 1 and which led to the enactment of Article 31A and to the some extent of Article 31B. The Ninth Schedule is becoming densely populated and it would appear that some planning is imperative. But that is another matter. If so far as the validity of Article 31B read with the Ninth Schedule is
concerned, we hold that all Acts and Regulations included in the Ninth Schedule prior to April 24, 1973 will receive the full protection of Article 31B. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. The Acts and Regulations, which are or will be included in the Ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31B for the plain reason that in the face of the Judgment in *Kesavananda Bharti case* there was no justification for making addition to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various Constitutional amendments, by which addition were made to the Ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31B for the plain reason that in the face of the judgment in *Kesavananda Bharti case* there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various Constitutional amendments, by which addition were made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution.

Next is Article 31C, which was introduced by Constitution (Twenty Fifth Amendment) Act, 1971. Initially, it sought to give protection to those laws only which gave effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 of the Constitution. No such law could be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14, 19, 31.

Further, if Article 31A is upheld then Article 31C should also be valid. The unamended portion of Article 31C is not like an unchartered ship. It gives protection to a defined and limited
category of laws which are passed for giving effect to the policy of the State towards securing the principles specified in Article 39(b)(c). These Clauses of Article 39 contain Directive Principles which are vital to the well being of the country and the welfare of its people. Whatever said in respect of the defined category of laws envisaged by Article 31A must hold good, perhaps with greater force, in respect of laws passed for the purpose of giving effect to Clause (b)(c) of Article 39. It is impossible to conceive that any law passed for such a purpose can at all violate Article 14 or Article 19. Article 31 is out of harm’s way. In fact, far from damaging the basic structure of the Constitution, laws passed truly and bonafide for giving effect to Directive Principles contained in Clauses (b) and (c) of Article 39 will fortify that structure. The challenge to the validity of the first part of unamended Article 31C fails.

7) Conclusions of the judgment:

In the conclusion of the judgment some specific points are laid down as:

Firstly, the Constitution (First Amendment) Act, 1951 which introduced Article 31A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which substituted a new Clause (1), sub-Clauses (a) to (e), for the original Clause (1) with retrospective effect, do not damage any of the basic or essential features of the Constitution or its basic structure and are valid and Constitutional, being within the constituent power of the Parliament.

Secondly, Section 5 of the Constitution (First Amendment) Act, 1951 introduced Article 31B into the Constitution. In Kesavananda Bharti case, it was held by the majority that the Parliament has no power to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure.
Therefore the court held that all amendments to the Constitutional amendments to the Constitution made before April 24, 1973 and by which the Ninth Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein are valid and Constitutional amendment to the Constitution made on or after April 24, 1973 by which the Ninth Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein, are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure. This court do not pronounce upon the validity of such subsequent Constitutional amendments except to say that if any Act or Regulation included in the Ninth Schedule by a Constitutional amendment made on or after April 24, 1973 is saved by Article 31A, or by Article 31C as it stood prior to its amendment by the Forty Second Amendment. The challenge to the validity of the relevant Constitutional amendment by which that Act or Regulation is put in the Ninth Schedule, on the ground that the Amendment damages or destroys a basic or essential features of the Constitution or its basic structure as reflected in Articles 14, 19 or 31 will become otiose.

Thirdly, Article 31C of the Constitution, as it stood prior to its amendments by Section 4 of the Constitution (Forty Second Amendment) Act, 1976 is valid to the extent to which its Constitutionality was upheld in Kesavananda Bharti case. Article 31C, as it stood prior to the Constitution (Forty Second Amendment) Act does not damage any of the basic features of the Constitution.

Fourthly, all writ petitions and review petitions relating to the validity of the Maharashtra Agricultural Lands Ceiling Act, dismissed.
6.3.2 Minerva Mills v. Union of India

In Minerva Mills v. Union of India case the Bench consisted of Chief Justice Y.V. Chandrachud, Justices A.C. Gupta, N.L. Untwalia, P.N. Bhagwati and P.S. Kailasam.

The provisions of the Constitution of India which were challenged in the court were Articles 13, 14, 19, 31-A, 31-B, 31-C, 32, 38, 141, 226, 352, 352(1), 368, 368(4) and 368(5), Constitution of India (Forty Second Amendment) Act, 1976 - Sections 4 and 55; Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1975; Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1976; Sick Textile Undertakings (Nationalization) Act, 1974; Constitution of India (Twenty-ninth Amendment) Act, 1972; Constitution of India (Fortieth Amendment) Act, 1976; House of People (Extension of Duration) Act, 1976.

The Constitutional amendment regarding Articles 13, 14, 19, 31-A, 31-B, 31-C, 32, 38, 132, 133, 134, 141, 226, 352 and 368 of the Constitution of India and vires of Article 368(4) and 368(5) introduced by Section 55 of Constitution of India (43rd Amendment) Act were under challenge. The court held that Article 368(5) conferred upon Parliament unlimited power to amend the Constitution, Article 368(4) deprived court of its power of Judicial Review over Constitutional amendments and Article 368(5) struck down as Parliament had only limited amending power and such limited power cannot be enlarged into absolute power by expanding its amending powers Parliament cannot destroy its basic structure. The Donee of limited power cannot convert such power into unlimited one and Article 368(4) prohibiting Judicial Review violates basic structure. So, it was held, Articles 368(4) and 368(5) are unconstitutional.

37 AIR SC 1789
It was held by the court that whether Directive Principles can have supremacy over Fundamental Rights merely because Directive Principles are non-justifiable it does not mean that they are subservient to Fundamental Rights and destroying Fundamental Rights in order to achieve goals of Directive Principles amounts to violation of basic structure. Therefore giving absolute primacy to one over another disturbs harmony and goals of Directive Principles should be achieved without abrogating Fundamental Rights. Directive Principles enjoy high place in Constitutional scheme and both Fundamental Rights and Directive Principles to be read in harmony. It was held, amendments in Article 31C introduced by Section 4 of Forty Second Amendment Act as unconstitutional.

The court held that, it was clear from the majority decision in *Kesavananda Bharati's case* that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognised by it and defines the limits of those powers. The Constitution is *supreme lex*, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the Executive or the Legislature or the Judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the
Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by Constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. It will therefore be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.

The court held that the Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. The court has quoted Granville Austin in this judgment saying that yet despite the permeation of the entire Constitution by the aim of national renascence, "the core of the commitment to the social revolution lies . . . in the Fundamental Rights and the Directive Principles of State Policy." These are the conscience of the Constitution and, according to Granville Austin, they are designed to be the Chief instruments in
bringing about the great reforms of the socio-economic revolution and realising the Constitutional goals of social, economic and political justice for all. The Fundamental Rights undoubtedly provide for political justice by conferring various freedoms on the individual, and also make a significant contribution to the fostering of the social revolution by aiming at a society which will be egalitarian in texture and where the rights of minority groups will be protected. But it is in the Directive Principles that we find the clearest Statement of the socio-economic revolution. The Directive Principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best salves. The Fundamental Rights are no doubt important and valuable in a Democracy, but there can be no real Democracy without social and economic justice to the common man and to create socio-economic conditions, in which there can be social and economic justice to everyone, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our Democracy, provide strength and vigour, to it and attempt to make it a real participatory Democracy which does not remain merely a political Democracy but also becomes social and economic Democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate! There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any
individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to fake positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the Constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

In the last declared Section 55 of the Constitution (Forty-second Amendment) Act, 1976 which inserted Sub-Sections (4) and (5) in Article 368 as unconstitutional and void on the ground that it damages the basic structure of the Constitution and goes beyond the amending power of Parliament. But so far as Section 4 of the Constitution (Forty-second Amendment) Act, 1976 concerned, and
held that, on the interpretation placed on the amended Article 31C by court, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and therefore declared the amended Article 31C to be Constitutional and valid.

6.3.3 I.R Coelho v. Union of India

Now discussing the case of I.R. Coelho v. State of Tamil Nadu, which was decided by a Bench of nine Judges including Chief Justice Y.K. Sabharwal, and Justices Ashok Bhan, Dr. Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, and D.K. Jain.

Important points of the case were that Article 32, Power of Judicial Review of Supreme Court forms an integral part of basic structure and cannot be abrogated by any Act. The Supreme Court is the ultimate interpreter of Constitution. The Supreme Court is duty bound to uphold Constitutional values and enforce Constitutional limitations. The Constitutional provisions includes principle of Constitutionalism which ensures that Democratic principles are not destroyed. The Constitution of India in nature is controlled Constitution and not framed by Parliament. The Articles 14, 19, 21 represent foundational values – These are principles of Constitutionality which form basis of Judicial Review apart from Rule of Law and Separation of Powers. The Constitution of India Articles 246, 14, 13 for validity of law and possibility of abuse are not a test to determine validity. The Article 368, Part III amendment of the Constitution, Power of Parliament, and Fundamental Rights amendment is permissible subject to limitation of doctrine of basic structure. Article 368 and Part III are in the basic structure doctrine

38 AIR 2007 SC 861-893.
and these provisions are touchstone, to test extent of Parliament power to amend Constitution. In application of the doctrine Part III plays a key role. The Parts III, IV in which Fundamental Rights have to be balanced with Directive Principles and balance can be titled in favour of public good. However, cannot be overturned by completely overriding individual liberty. The Articles 368, 32, the Ninth Schedule which is protective umbrella of Article 31B in its Scope does not totally abridge judicial scrutiny of laws placed in Ninth Schedule. Any law put in Ninth Schedule if infringes basic structure can be struck down. In Articles 368, 31B, Ninth Schedule the power of amendment of the Constitution is not equal to the power to frame the Constitution. The Amending power is limited by basic structure doctrine and then that is so Article 31B cannot go beyond limited amending power. The Article 368, the power of Amendment of the Constitution with the use of expression ‘constituent power’ the Parliament does not become original Constituent Assembly. Limitations of basic structure doctrine would continue to apply. Under Article 32, Article 31B and the Ninth Schedule which place law under protective umbrella comes under Judicial Review and to determine validity direct impact and effect test i.e., rights test is applied.

1)  **Part III of the Constitution**

The Supreme Court in this case said that since the basic structure of the Constitution includes some of the Fundamental Rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the Fundamental Rights or another aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.
Further the supremacy of the Constitution mandates all Constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz. the Judiciary. Fundamental Rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power. Through Article 13, it is provided that the State cannot make any laws that are contrary to Part III.

The Parliament has power to amend the provisions of Part III so as to abridge or take away Fundamental Rights, but that power is subject to the limitation of basic structure doctrine. Some of the Fundamental Rights are part of the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from Judicial Review, the abrogation of the principle on the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31B. It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense.

While laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of Fundamental Rights. Every insertion into the Ninth Schedule does not restrict Part III, review; it completely excludes Part III at will.

2) Article 368

The power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints; it is primary power, a real plenary power. The latter power, however, is derived from the former. It has constraints of the document viz.
Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, the Parliament. The question before the court was not about power to amend Part III after Twenty Fourth April, 1973. As per Kesavananda Bharati, power to amend exists in the Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the ‘rights test’ as part of the basic structure doctrine has to apply.

It would be incorrect to assume that social content exist only in Directive Principles and not in the Fundamental Rights. Article 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the Rule of Law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination.

Rights test which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

3) Important Task

Chief Justice Y.K. Sabharwal himself and on behalf of Justices Ashok Bhan, Arjit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan. Altamas Kabir, D.K. Jain, in these matters were confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short, the ‘Constitution’) to the laws added to the Ninth Schedule by amendments made after Twenty Fourth April, 1973. The relevance of this date is for the reason that on this date judgment in His Holiness
Kesavananda Bharati, Sripadagalvaru v. State of Kerala and Anr., was pronounced propounding the doctrine of Basic structure of the Constitution to test the validity of Constitutional amendments.

4) Facts

The order of reference was made more than seven years ago by a Constitution Bench of Five Judges is reported in I.R. Coelho (Dead) by LRs. v. State of Tamil Nadu, (14.09.1999). The Gudalur Janmam estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act), insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by this court in Balmadies Plantations Ltd. and Anr. v. State of Tamil Nadu, because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act, in its entirety, was inserted in the Ninth Schedule. By the Constitution (Sixty-sixth Amendment) Act, the West Bengal Land Holding Revenue Act, 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject matter of challenge before a Five Judge Bench.

The Constitution Bench observed that, according to Waman Rao and Ors. v. Union of India and Ors., amendments to the Constitution made on or after Twenty Fourth April, 1973 by which

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39 (1973) 4 SCC 225.
41 (1972) 2 SCC 133.
the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decision in Minerva Mills Ltd. and Ors. v. Union of India and Ors.,\textsuperscript{43} Maharao Sahib Shri Bhim Singhji v. Union of India and Ors.,\textsuperscript{44} were also noted and it was observed that the judgment in Waman Rao's case needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this court to be violative of one or more of the Fundamental Rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a Constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine Judges. This is how these matters were placed before the court.

5) **Broad Question**

The fundamental question was whether on and after Twenty Fourth April, 1973 when basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from Fundamental Rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of Judicial Review of the court.

\textsuperscript{43} (1980) 3 SCC 625.
\textsuperscript{44} (1981) 1 SCC 166.
6) Common Law Constitutionalism

The court asserted that the protection of fundamental Constitutional rights through the common law is main feature of common law Constitutionalism.

The Supreme Court quoted Dr. Amartya Sen:

The justification for protecting Fundamental Rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.

Further quoted Lord Steyn:

Judiciary is the best institution to protect Fundamental Rights, given . . . its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law. Under the controlled Constitution, the principles of checks and balances have an important role to play.

7) Principles of Constitutionality

There is a difference between Parliamentary and Constitutional Sovereignty. Our Constitution is framed by a Constituent Assembly which was not the Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the Rule of Law. These are the principles of Constitutionality which form the basis of Judicial Review apart from the Rule of Law and Separation of Powers. If in future, Judicial Review was to be abolished by a constituent amendment, as Lord
Steyn says, the principle of Parliamentary Sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati's case* has to apply.

Granville Austin has been extensively quoted and relied on in *Minerva Mills case*. Chief Justice Chandrachud observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental Rights occupy a unique place in the lives of civilized societies and have been described in judgments as “transcendental”, “inalienable” and “primordial”. They constitute the ark of the Constitution. The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution.

Chief Justice Chandrachud in *Indira Gandhi’s case* said that for determining whether a particular feature of the Constitution is part of its basic structure, one has to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country’s governance

8) Separation of Powers

The Separation of Powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in *Kesavananda Bharati’s case* by the majority. Later, it was reiterated in *Indira Gandhi's case*. A large number of judgments have reiterated that the Separation of Powers is one of the basic features of the Constitution.
In fact the court said that it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In his Federalist, James Madison details how a Separation of Powers preserves liberty and prevents tyranny. In Federalist, Madison discusses Montesquieu's treatment of the Separation of Powers in the Spirit of Laws. There Montesquieu writes, "When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... Again, there is no liberty, if the judicial power be not separated from the legislative and Executive". Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of Government should not be entirely in the hands of another department of Government.

Montesquieu finds tyranny pervades when there is no Separation of Powers:

> There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Further relying upon the clarification of Justice Khanna, as given in *Indira Gandhi's case*, in respect of his opinion in *Kesavananda Bharati's case*, the court said that it is no longer correct to say that fundamental rights are not included in the basic structure. Therefore, the contention proceeded that since Fundamental Rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structure shall have to be examined on the Fundamental Rights test.
The key question before the court, however, was whether the basic structure test would include Judicial Review of Ninth Schedule laws on the touchstone of Fundamental Rights. Thus, it was necessary to examine what exactly was the content of the basic structure test. According to the petitioners, the consequence of the evolution of the principles of basic structure is that Ninth Schedule laws cannot be conferred with Constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its Constitutional validity would have to be adjudged by applying the 'direct impact' and 'effect test' which means the form of an amendment is not relevant, its consequence would be determinative factor.

The contention was that the abrogation of Article 32 would be per se violative of the basic structure. It was also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the power under Article 32 is removed and, on the other hand, the said power is exercised by the Legislature itself by declaring, in a way, Ninth Schedule laws as valid.

In Kesavananda Bharati's case which also upheld the Constitution Twenty Ninth Amendment unconditionally and thus there can be no question of Judicial Review of such legislations on the ground of violation of Fundamental Rights chapter.

9) Validity of 31B

There was some controversy on the question whether validity of Article 31B was under challenge or not in Kesavananda Bharati case. The First Amendment by which Articles 31A and 31B were introduced remained inviolate. It is trite knowledge that Golak Nath
case was overruled in Kesavananda Bharati case in which it was held unanimously that the power to amend the Constitution was to be found in Article 368 of the Constitution. The petitioners produced before the court a copy of the Civil Misc. Petition which was filed in Kesavananda Bharati case by which the reliefs originally asked for were modified. It appeared there form that what was challenged in that case was the Twenty Fourth, Twenty Fifth and the Twenty Ninth Amendments to the Constitution. The validity of the First Amendment was not questioned Justice Khanna, however, held-while dealing with the validity of the unamended Article 31C that the validity of Article 31A was upheld in Shankari Prasad case, that its validity could not be any longer questioned because of the principle of stare decisis and that the ground on which the validity of Article 31A was sustained will be available equally for sustaining the validity of the first part of Article 31C.

After the court examined various opinions in Kesavananda Bharati’s case but unable to accept the contention that Article 31B read with the Ninth Schedule was held to be Constitutionally valid in that case. The validity thereof was not in question. The Constitutional amendments under challenge in Kesavananda Bharati’s case were examined assuming the Constitutional validity of Article 31B. Its validity was not in issue in that case. Be that as it may assume Article 31B as valid. The validity of the First Amendment inserting in the Constitution, Article 31B is not in challenge before us.

10) Point in Issue

The real crux of the problem is as to the extent and nature of immunity that Article 31B can validly provide. To decide this intricate issue, it is first necessary to examine in some detail the
judgment in *Kesavananda Bharati's case*, particularly with reference to Twenty Ninth Amendment.

The contention urged on behalf of the respondents that all the Judges, except Chief Justice Sikri, in *Kesavananda Bharati's case* held that Twenty Ninth Amendment was valid and applied *Jeejeebhoy's case*, is not based on correct ratio of *Kesavananda Bharati's case*. Six learned Judges Justices Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud, who upheld the validity of Twenty Ninth Amendment did not subscribe to basic structure doctrine. The other six learned Judges Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Reddy upheld the Twenty Ninth Amendment subject to it passing the test of basic structure doctrine. The 13th learned Judge (Justice Khanna), though subscribed to basic structure doctrine, upheld the Twenty Ninth Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine.

Six learned Judges otherwise forming the majority, held Twenty Ninth Amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who were in minority in *Kesavananda Bharati's case*, insofar as it relates to laying down the doctrine of basic structure, held Twenty Ninth Amendment unconditionally valid.

While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Justice Khanna opined that the Fundamental Rights could be amended abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the Twenty Ninth Amendment as unconditionally valid. Thus, the court said that it cannot be inferred from the conclusion of the seven Judges upholding unconditionally the validity of Twenty Ninth Amendment that the majority opinion held Fundamental Rights chapter as not part of the basic structure.
doctrine. The six Judges which held Twenty Ninth Amendment unconditionally valid did not subscribe to the doctrine of basic structure.

Justice Khanna upheld the Twenty Ninth Amendment in the following terms:

We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act.

On the issue of how Twenty Ninth Amendment in Kesavananda Bharati case was decided, in Minerva Mills case, Bhagwati, J. has said thus:

The validity of the Twenty-ninth Amendment Act was challenged in Kesavananda Bharati case but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, J. (as he then was) it was held to be valid. Since all the earlier Constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in Sankari Prasad case and Sajjan Singh's case and were accepted as valid in Golaknath Nath case and the Twenty Ninth Amendment Act was also held valid in Kesavananda Bharati case, though not on the application of the basic structure test, and these Constitutional amendments have been recognised as valid over a number of years and moreover, the
statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts referred to above, I do not think, we would be justified in re-opening the question of validity of these Constitutional amendments and hence we hold them to be valid. But, all Constitutional amendments made after the decision in *Kesavananda Bharati case* would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation on its amending power.

To the court, it felt that the position is correctly reflected in the aforesaid observations of Justice Bhagwati and that Chief Justice Ray was not correct in the conclusion that Twenty Ninth Amendment was unanimously upheld. Since the majority which propounded the basic structure doctrine did not unconditionally uphold the validity of Twenty Ninth Amendment and six learned Judges forming majority left that to be decided by a smaller Bench and upheld its validity subject to it passing basic structure doctrine.

In order to understand the view of Justice Khanna in *Kesavananda Bharati case*, it is important to take into account his later clarification. In Indira Gandhi, Justice Khanna made it clear that he never opined that Fundamental Rights were outside the purview of basic structure and observed as follows:

There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in *Kesavananda Bharati’s case* that Fundamental Rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should
deal with the contention advanced by learned Solicitor General that according to my judgment in that case no Fundamental Right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no Article of the Constitution is immune from the amendatory process because of the fact that it relates to a Fundamental Right and is contained in Part III of the Constitution . . .

Thus, after aforesaid clarification, the court concluded that it was not possible to read the decision of Justice Khanna in Kesavananda Bharati case so as to exclude Fundamental Rights from the purview of the basic structure. The import of this observation is significant in the light of the amendment that he earlier upheld. It is true that if the Fundamental Rights were never a part of the basic structure, it would be consistent with an unconditional upholding of the Twenty-ninth Amendment, since its impact on the Fundamental Rights guarantee would be rendered irrelevant. However, having held that some of the Fundamental Rights are a part of the basic structure, any amendment having an impact on Fundamental Rights would necessarily have to be examined in that light. Thus, the fact that Justice Khanna held that some of the Fundamental Rights were a part of the basic structure has a significant impact on his decision regarding the Twenty-ninth amendment and the validity of the Twenty-ninth amendment must necessarily be viewed in that light. His clarification demonstrates that he was not of the opinion that all the Fundamental Rights were not part of the basic structure and the inevitable conclusion is that the Twenty-ninth amendment even if treated as unconditionally valid is of no consequence on the point in issue in view of peculiar position as to majority abovenoted.
The court said that we are unable to accept the contention urged on behalf of the respondents that in Waman Rao’s case Justice Chandrachud and in Minerva Mills case, Justice Bhagwati have not considered the binding effect of majority judgments in Kesavananda Bharati’s case. In these decisions, the development of law post-Kesavananda Bharati’s case has been considered. The conclusion has rightly been reached, also having regard to the decision in Indira Gandhi’s case that post-Kesavananda Bharati’s case or after Twenty Fourth April, 1973, the Ninth Schedule laws will not have the full protection. The doctrine of basic structure was involved in Kesavananda Bharati’s case but its effect, impact and working was examined in Indira Gandhi’s case, Waman Rao’s case and Minerva Mills case. To say that these judgments have not considered the binding effect of the majority judgment in Kesavananda Bharati’s case is not based on a correct reading of Kesavananda Bharati. On the issue of equality, the court did not find any contradiction or inconsistency in the views expressed by Justice Chandrachud in Indira Gandhi’s case, by Justice Krishna Iyer in Bhim Singh’s case and Justice Bhagwati in Minerva Mills case. All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of the basic structure of the Constitution.

Next, the court examined the extent of immunity that is provided by Article 31B. The principle that Constitutional amendments which violate the basic structure doctrine are liable to be struck down will also apply to amendments made to add laws in the Ninth Schedule is the view expressed by Chief Justice Sikri. Substantially, similar separate opinions were expressed by Justices Shelat, Grover, Hegde, Mukherjea and Reddy. In the four different opinions six learned Judges came to substantially the same conclusion. These Judges read an implied limitation on the power of
the Parliament to amend the Constitution. Justice Khanna also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld Twenty Ninth Amendment and did not say, like remaining six Judges, that the Twenty-Ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that Fundamental Rights chapter is not part of basic structure.

The rights and freedoms created by the Fundamental Rights chapter can be taken away or destroyed by amendment of the relevant Article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post Kesavananda Bharati's case which has limited the power of the Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure.

11) Extent of Judicial Review in the context of Amendments to the Ninth Schedule

The question as to the extent of Judicial Review permissible in respect of Ninth Schedule laws in the light of the basic structure theory propounded in Kesavananda Bharati's case. In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution.

The power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints; it is primary power, a real plenary power. The latter power, however, is derived from the former. It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body
constituted, namely, the Parliament. The question before the court was not about power to amend Part III after Twenty Fourth April, 1973. As per Kesavananda Bharati, power to amend exists in the Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the ‘rights test’ as part of the basic structure doctrine has to apply.

In Kesavananda Bharati’s case, the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution.

Kesavananda Bharati’s case laid down a principle as an axiom which was examined and worked out in Indira Gandhi’s, Minerva Mills, Waman Rao and Bhim Singh cases.

As already stated, in Indira Gandhi’s case, for the first time, the Constitutional amendment that was challenged did not relate to property right but related to free and fair election. As is evident from what is stated above that the power of amending the Constitution is a species of law making power which is the genus. It is a different kind of law making power conferred by the Constitution. It is different from the power to frame the Constitution i.e. a plenary law making power as described by H.M.Seervai in Constitutional Law of India.

The scope and content of the words ‘constituent power’ expressly stated in the amended Article 368 came up for consideration in Indira Gandhi’s case. Article 329-A(4) was struck down because it crossed the implied limitation of amending power, that it made the controlled Constitution uncontrolled, that it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19.45

45 See also Minerva Mills case.

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The court said that the question can be looked at from yet another angle also. Can the Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in the Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in Kesavananda Bharati's case as a result of which secularism, separation of power, equality, etc. to cite a few examples would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the Rule of Law, secularism etc. would fail. That is why Justice Khanna held that some of the Fundamental Rights like Article 15 form part of the basic structure.

If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31B cannot be so used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with the Kesavananda Bharati's case. Therefore Article 31B after Twenty Fourth April, 1973 despite its wide language cannot confer unlimited or unregulated immunity.

To legislatively override entire Part III of the Constitution by invoking Article 31B would not only make the Fundamental Rights overridden by Directive Principles but it would also defeat fundamentals such as secularism, Separation of Powers, equality and also the Judicial Review which are the basic feature of the
Constitution and essential elements of Rule of Law and that too without any yardstick/standard being provided under Article 31B.

12) Application of Doctrine of Basic structure

In Kesavananda Bharati's case, the discussion was on the amending power conferred by unamended Article 368 which did not use the words 'constituent power'. The court noted difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words 'constituent power' in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words 'constituent power' is inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to the Parliament. It is on this premise that Clauses 4 and 5 inserted in Article 368 by 42nd Amendment were struck down in Minerva Mills case.

The relevance of Indira Gandhi's case, Minerva Mills case and Waman Rao's case lies in the fact that every improper enhancement of its own power by Parliament, be it Clause 4 of Article 329A or Clause 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like Judicial Review. They made Directive Principles en bloc a touchstone for obliteration of all the Fundamental Rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that the court had to examine the power of immunity bearing
in mind that after *Kesavananda Bharati’s case*, Article 368 is subject to implied limitation of basic structure.

The question examined in *Waman Rao’s case* was whether the device of Article 31B could be used to immunize Ninth Schedule laws from Judicial Review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of Ninth Schedule laws as it makes the entire Part III inapplicable at the will of the Parliament. This results in the change of the identify of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of Judicial Review is to be examined having regard to these factors.

The object behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or Judicial Review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the ‘essence of right’ test but also the ‘rights test’ has to apply, particularly when *Keshavananda Bharti* and *Indira Gandhi cases* have expanded the scope of basic structure to cover even some of the Fundamental Rights.

There is also a difference between the ‘rights test’ and the ‘essence of right test’. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring
limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test as applied in *M. Nagaraj's case* will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate. The court further explained that we may also note that in *Minerva Mills and Indira Gandhi's cases*, elimination of Part III in its entirety was not in issue and we are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied. In *Indira Gandhi's case* it was held that for the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. Regarding Articles 31A and 31C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these Articles have an indicia which is not there in Article 31B.

Part III is amendable subject to basic structure doctrine. It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to right of citizen to assail it on the enlarged Judicial Review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the court after the enunciation of the basic structure doctrine.

The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered in cases
relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of a standard is an important exercise required to be undertaken by the court in applying the basic structure doctrine and that has to be done by the court and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of Judicial Review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles there under.

The power to amend the Constitution is subject to aforesaid axiom. It is, thus, no more plenary in the absolute sense of the term. Prior to Kesavananda Bharati, the axiom was not there. Fictional validation based on the power of immunity exercised by the Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the Constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This court being bound by all the provisions of the Constitution and also by the basic structure doctrine have necessarily to scrutinize the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the
basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule Law. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to Kesavananda Bharati upholding the validity of Article 31B is a surest means of a drastic erosion of the Fundamental Rights conferred by Part III.

The court came to the conclusion that a law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of Judicial Review power of the court. The validity or invalidity would be tested on the principles laid down in this judgment.

The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new Constitutional amendment to be Judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

All the amendments to the Constitution made on or after Twenty Fourth April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act
is put in the Ninth Schedule by a Constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the Fundamental Right or rights taken away or abrogated pertains or pertain to the basic structure.

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

This was the answer of the court to the question referred to it vide Order dated 14th September, 1999 in *I.R. Coelho v. State of Tamil Nadu*.46

If the validity of any Ninth Schedule law has already been upheld by the court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after Twenty Fourth April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge. We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a Three Judge Bench for decision in accordance with the principles laid down herein.

The Supreme Court held a law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of Judicial Review power of the court. The validity or invalidity would be tested on the principles laid down in this judgment. The majority judgment in Keshavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new Constitutional amendment to be Judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge. All amendments to the Constitution made on or after Twenty Fourth April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the Fundamental Right or rights taken away or abrogated pertains or pertain to the basic structure. Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the
nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the “rights test” and the “essence of the right” test taking the synoptic view of the Articles in Part III as held in Indira Gandhi’s case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

The Supreme Court held that if the validity of any Ninth Schedule law has already been upheld by this court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law is held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after Twenty Fourth April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder. The Supreme Court further held that the actions taken and transactions finalized as a result of the impugned Acts shall not be open to challenge, and directed that the petitions/appeals be placed for hearing before a three Judges Bench.

The nine Judges deciding the issue of validity of laws put by Constitutional amendment in Ninth Schedule, has discussed many important cases in the judgment namely Shri Shankari Prasad Singh Deo v. Union of India and State of Bihar,47 Sajjan Singh v. State of Rajasthan,48 I.C. Golak Nath v. State of Punjab,49 His Holiness Kesavananda Bharti Sri Pada Galvaru v. State of Kerala,50 Woman

47 (1952) SCR 89.
48 (1965) 1 SCR 933.
49 Supra note 23.
50 (1973) 4 SCC 225.
Rao v. Union of India,\textsuperscript{51} Minerva Mills Ltd. v. Union of India,\textsuperscript{52} Maha Rao Sahib Shri Bhim Singh Ji v. Union of India,\textsuperscript{53} Smt. Indira Nehru Gandhi v. Raj Narain,\textsuperscript{54} and L. Chandra Kumar v. Union of India.\textsuperscript{55}

The Supreme Court relied upon Dr. Amartya Sen, Lord Steyn, and Granville Austin in holding primacy of Fundamental Rights not on the assumption that they are higher rights but that their protection is the best way to promote a just and tolerant society and the right of Judiciary to protect Constitutionalism and further to declare that Art.14, 19 and 21 represent the foundational values, which form the basis of Rule of Law. These are principles of Constitutionality, which form the basis of Judicial Review apart from the Rule of Law and Separation of Powers. Anything that destroys the balance will ipso facto destroy the essential elements of the basic structure of the Constitution. The court also relied upon James Madison, Federalist in which he discusses Montesquieu's treatment of the Separation of Powers in the spirit of laws in which he writes that when the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again there is no liberty, if judicial power be not separated from legislative and Executive. Montesquieu finds tyranny pervades where there is no Separation of Powers and Supreme Court found that Separation of Powers is part of basic structure of the Constitution.

The judgment is not in the adversial form in which the counsels raised arguments and the court decided issues. It is rather a judgment of affirmation of the right of Judicial Review as the basic feature of the Constitution and to do away with the fictional immunity given by Art.31-B to the laws put in the well of the Ninth

\textsuperscript{51} Supra note 41.
\textsuperscript{52} Supra note 42.
\textsuperscript{53} Supra note 43.
\textsuperscript{54} (1975) Supp. 1 SCC 1.
\textsuperscript{55} (1997) 3 SCC 261.
Schedule. The judgment seeks to lay down the supremacy of the Judicial Review of the laws by court and none else and Separation of Powers and to guard the Fundamental Rights. It may be argued that in 2007 there is no threat to the private property rights as the country has shifted its stand from Socialism to neo capitalism and that the goals have shifted from equal distribution of wealth to accumulation of wealth by the nation through the individuals, organizations and corporations, for economic growth without compromising with Socialistic pattern of society. With weak Governments at the centre there is no real or apparent threat abrogating the Fundamental Rights by Constitutional amendments. The judgment in fact comes by way of affirming of the judicial powers of review of all the laws on the touchstone of rights guaranteed in Part III and thereafter basic structured doctrine. The unanimity of the judgment is a unique feature. So far all the cited judgments were delivered with divided opinions. It may be argued that since the law is fairly settled, there was no cause for division of opinion. But for the scholars of law the unanimity of opinion amongst Judges even to establish law, is an encouraging feature of the strength of Judiciary.