CHAPTER VIII
CONCLUSION AND SUGGESTIONS

India after a long freedom struggle got independence and the biggest task for the leaders was to frame such a Constitution as would fulfill the aspirations of the people of the country and meet the challenges of the time. Framers borrowed the best features of the various Constitutions around the world which were suitable to our country’s conditions. The power of Judicial Review of the Supreme Court and the High Court in our Constitution is one of such important features and it invites lot of interest among the researchers of law. This topic has been inspired by the increasingly relevant role of Judicial Review in maintaining the sanctity of the Constitution. The Judiciary and Parliament are often in confrontation due to what is called ‘judicial overreach’.

The conclusions of various chapters are discussed in the respective chapters earlier but for clarity and brevity they are reproduced here again. In the first chapter an introduction about the major areas which are covered in the research is given. This research was carried out with the objective of analyzing the power of Judicial Review of the Judiciary under Article 13 of the Constitution for the enforcement of Fundamental Rights with reference to the Ninth Schedule, besides observing the effects it has on the Parliamentary sovereignty in our Democracy. The power of law making and the amendment of the Constitution under Article 245 and 368 is the work of the Parliament and power of Judicial Review is a check over the exercise of power by Parliament and Executive. Under Article 13 and 32 the Supreme Court has the power to protect and enforce Fundamental Rights Part III of the Constitution against the State. There has been a long history of conflictual positions between the
Parliament and the Judiciary whenever there is a question regarding the Constitutional amendment of the Constitution and especially the Part III and Part IV of the Constitution. The first step taken by the Parliament was the First Constitutional Amendment 1951 in which Article 31A and 31B along with the Ninth Schedule were added in the Constitution. This was such a step which violated the Fundamental Right to property of the people. The Ninth Schedule was given complete immunity from Judicial Review. This led to the beginning of confrontation between the Judiciary and the Parliament.

I have focused on the area of Judicial Review and the Constitutional amendments restricted to the area of Ninth Schedule, which brought both the Judiciary and the Parliament in conflict with each other. The creation and addition of Ninth Schedule was to abolish the Zamindari system and bring land reforms by giving land to the landless. These principles were embodied in the Directive Principles of State Policy in Article 39 (b) and (c) for bringing socio-economic reforms in the country. The question here arose that when such Constitutional amendments are passed by the Parliament, the Judiciary has a right to declare those amendments *ultra vires* which are against the Part III of the Constitution and with this mechanism a doctrine of basic structure was created by the Supreme Court to protect the basic spirit of the Constitution. The judgment in I.R. Coelho’s case is further exposition of this doctrine which covers all the judgments so far regarding the basic structure doctrine in which Part III and Part IV of the Constitution are among the important features of the Constitution. The question whether Ninth Schedule is justified or not is covered in this research work and the hypothesis focuses that Separation of Powers is very essential for prevention of tyranny and preservation of liberty and at the same time independence of Judiciary is to preserve the Separation of Powers and the rights of the people. The law making power is entrusted to the Parliament in the
same manner as responsibility of interpreting and protecting the Constitution is entrusted to the Judiciary. Mere possibility of abuse of ninth schedule is not a relevant test to determine the validity of a provision but it is the spirit of the Constitution which should prevail. When both Part-III and Part-IV of the Constitution are declared as important features then how they are to be balanced when there is a confrontation between them. All these areas are covered in the further chapters of my research work.

In the second chapter it is discussed that after the enforcement of the Constitution in 1950, various problems arose before the Government in the implementation of the Land Reforms for the abolition of the Zamindari System. India had long been under the British rule and there were unequal land holdings continuing from the past and Prime Minister Pt. Jawaharlal Nehru in his speech in the Parliament at the time of passing the First Amendment Act 1951 envisioned a fair distribution of land holdings to the tiller on the pattern of Socialistic concept. Socialistic concept was embodied in the Directive Principles of State policy in Part IV of the Constitution. Therefore according to the need of the time the Ninth Schedule was included in the Constitution by the First Constitutional Amendment. The laws which were included in the Ninth Schedule were inserted through various controversial amendments; some of them were challenged in the court. So, far as the socialistic spirit behind the abolition of Zamindari system is concerned, we are again reminded of John Rawls theory of justice, where he uses the ‘difference principle’ which meant to frame laws, policies etc. to the maximum advantage of the least advantaged, thereby justifying the idea of ‘justice as fairness’. The objective of the Ninth Schedule was justified so far as it was in line with distributing social and economic justice without violating the spirit of the Constitution. But when the Parliament and the Executive tried to make our ‘controlled
Constitution' into 'uncontrolled Constitution', like including laws like COFEPOSA, MISA, RPA in the Ninth Schedule, the debate regarding the Judicial Supremacy over the Executive and the Legislature started which continues till date. In a Democratic Polity the controlled Constitution is bound by the prescribed limits in the Constitution. In our Democratic written Constitution the spirit of the Constitution lies in the will of the people because as stated in the Preamble we have given to ourselves this Constitution. So, neither the Judiciary nor the Legislature or Executive can supersede the spirit of the Constitution. It is true that, the social, economic and political aspects of justice should be left primarily to the law-makers and it should be assumed that the entire legislative process (or for that matter Executive or Administrative function of the State) is influenced by the considerations of justice, reason and fairness. The legislative process in India, which is predominantly a rule of majority rather than reason, fails to satisfy the ends of justice. After all, the majority does not have the monopoly of being always right, far less being just. Therefore, it is but natural that the Judiciary takes a rather proactive role in interpreting the real spirit of the law in the larger public interest. Whenever attempts are made to break the balance of our controlled Constitution into uncontrolled Constitution problems are going to arise. Of course the Parliament in our Democratic polity enjoys the power to make laws and amend the Constitution but this power is circumscribed by the written Constitution itself. Whenever the Parliament makes a law or amends the Constitution which is violative of the basic spirit of the Constitution, the Judiciary has to intervene and review any such law or amendment to protect the basic spirit of the Constitution. In case the Parliament resorts to the Ninth Schedule to do any such act as infringes the basic spirit of the Constitution, the Judiciary has to step in to prevent the misuse of the Ninth Schedule. The justification of
Ninth Schedule is only to the extent justified so far it is used to protect the laws which implement the Directive Principles of State policy and are harmoniously for the strict enforcement of the Fundamental Rights. Part III of the Constitution provides various Fundamental Rights which are enforceable. There are many other examples which show that though the rights are guaranteed in Part III of the Constitution still they are meaningless for the downtrodden and people are struggling for their daily needs. Poor cannot have access to education though right to education is a guaranteed right. (now we have Right to Education Act, 2009). Article 21A provides compulsory education. People who are struggling to survive in acute poverty for them rights are meaningless. For the upliftment and welfare of the society it is very important to implement the Directive Principles of State Policy. The Ninth Schedule should be used to protect those laws which are strictly for the welfare of the downtrodden and for public purpose at large. Abolition of Zamindari is not enough still a lot has to be done for true realization of welfare State. For this both the Fundamental Rights and Directive Principles of State policy should be implemented. Even if Directive Principles are given primacy for the common good of public it will definitely lead to true realization of Fundamental Rights as whole. The Judiciary has interpreted some of the Directive Principles as Fundamental Rights like the right to education in Article 21A because the State had failed to implement this directive of providing free primary education to the children in the past. The State should focus on strictly adhering to the Directive Principles to make a welfare State. Fundamental Rights are important for an equal, just and tolerant society. Both the Judiciary and Parliament should give primacy to ‘public purpose’ whenever any law is made and whenever it is reviewed. The Ninth Schedule has served its purpose well. The abolition of Zamindari System is a good example of its contribution.
Therefore, it is suggested that the purpose of the Ninth should be clearly mentioned by the Parliament. An amendment should be made in the Schedule which clearly mentions its purpose and aim so that there is no confusion left about the laws included in the Ninth Schedule.

The criteria for including a law in the Ninth Schedule should also be clearly laid down by the Parliament. The criteria most important should be regarding the implementation of Directive Principles on the basis of larger public interest.

The use of Ninth Schedule should be only for the laws regarding the implementation of the Directive Principles.

The main objective should be to implement larger public interest even if it obstructs individual interest. It’s only then the inclusion of law in the Ninth Schedule will be justified.

The Parliament should mention the type of laws which can be saved in the Ninth Schedule.

Article 20 and 21 are not suspended even during emergency, so these should be expressly excluded from the effect of Ninth Schedule. No law should be included in this Schedule which violates these rights.

There is no threat from rights to property after 1978 when it was omitted from Part III by Forty Fourth Amendment Act 1978. Therefore now all the three Articles should be repealed and only one Article along with Ninth Schedule should be kept for the implementation of Part IV.

The meaning of public good should be clearly defined by the Parliament so that the law which is for public good can be saved easily in the Ninth Schedule without any controversy.
The Parliament should define the extent to which a challenge to the constitutionality of a law is excluded, demarcating the farthest limit of exclusion.

The basic structure should be defined clearly by the court or the Parliament can take the initiative to lay down clearly the essential features of the constitution which cannot be amended to save its permanent character.

It is suggested that all judge-made laws should be temporary, pending legislation by the Legislature. If the Constitutionality of any Constitutional amendment is in question, the issue should go to the Constitutional bench.

All cases involving the striking down of duly enacted legislation or the quashing of Executive orders or the giving of directions to the Executive should require a confirmation by the Constitutional bench, not with reference to the merits of the case, but on the question whether the scope of Judicial Review is being unduly expanded.

All Constitutional amendments should require a two-thirds majority of the total membership of both Houses, sitting separately or together, and acceptance by at least half of the State Legislatures. Their Constitutional acceptability should be confirmed by the Constitution bench before they become effective.

The basic structure/features of the Constitution should be spelt out and incorporated in the Constitution itself through an amendment, after securing a national consensus through a referendum. The basic structure/features so determined should be unamendable except through another referendum.

A Commission should be appointed to check the implementation of Directive Principles.
The third chapter deals with A.V. Dicey’s Rule of Law, which was made the basis of our Supreme law of the land. People of the country were made the source of power in the Parliamentary Democracy through Universal Adult Franchise, which granted them the right to vote. Independence of Judiciary through the power of Judicial Review borrowed from U.S was included in the Constitution; it gave teeth to the Fundamental Rights and makes them justifiable. Separation of Powers among the three organs of State i.e. Executive, Legislature and Judiciary was adopted but it was accompanied by system of checks and balances. Rigid Separation of Powers was avoided because the framers of the Constitution felt that absolute power can corrupt the user of that power absolutely. It is now clear that Rule of Law, Separation of Powers, and Independence of Judiciary from Legislative and Executive control form the basis of Democratic Polity. Rule of Law includes Supremacy of Law and Independence of Judiciary. There would be no Rule of Law, if there is no Equality before Law. This echoes the first principle given by John Rawls’s which forms the basis of his theory of justice. Rule of Law and Equality before Law would be useless if their violation was not subject to Judicial Review and it would not possible if the Executive, Legislative, judicial powers are vested in one organ. Therefore it is the duty of the Judiciary to see whether the limits of powers are transgressed or not. The doctrine of ‘Judicial Review’ was established by former Chief Justice of U.S Supreme Court Lord John Marshall in *Marbury v. Madison* case in 1803 as discussed in chapter one and two. Lord Marshall was of the view that supremacy of Judiciary is important over two organs of the State on the ground that if any act of the Legislature or Executive contravened any Part of the Constitution, Judiciary can declare such an act as *ultra-vires* of the Constitution.
The fourth chapter is an analysis of the laws included in the Ninth Schedule. There is no denying the fact that the amendments' regarding property rights can be justified, to some extent of giving effect to Directive Principles of State of policy. But the addition of the Ninth Schedule immunizing as many as 284 State acts from judicial scrutiny does not seem to be warranted if they are not related to the Directive Principles of State policy. To begin with, it was envisaged that Ninth Schedule would be used to give immunity only to land laws, but, in course of time, all kinds of State laws have been added to the Schedule and granted immunity from Judicial Review. Like Motor Vehicles Act 1939, Maintenance of Internal Security Act 1977, Representation of People's Act, COFEPOSA, SAFEMA, etc, were included in the Ninth Schedule. The need of the Ninth Schedule is not clear in Article 31B. It does not mention what kind of laws can be included in the Ninth Schedule. It can be seen in the objective of the First Constitutional Amendment 1951 which specially was passed to implement the land reforms. Originally 13 Acts were included in the Ninth Schedule, then later it was again amended by the Constitution Fourth and Seventeenth Amendment Acts of 1955 and 1964 respectively by which certain more acts were added to the Ninth Schedule. The Constitution (Twenty Ninth Amendment) Act 1972 added Kerala land reforms Acts, 1969 and the Kerela reforms Act, 1971, to the Ninth Schedule. The validity of this Amendment was upheld by the Supreme Court in Kesavananda Bharti case. The Constitution (Thirty Fourth Amendment) Act, 1974, amended the Ninth Schedule for the fourth time and added 17 land reforms laws.

It was again amended by the Constitution (Thirty Ninth Amendment) Act 1975, which added 38 Acts to the Schedule. The important Central Acts included in the Schedule by this Amendment were the Representation of the People's Act 1951, and the Election Laws Amendment Act 1970 and the Maintenance of Internal Security
Act 1970 (now repealed). During the discussion on the Bill in Parliament, some members criticized the inclusion of the above Acts in the Ninth Schedule. It was justified in the Parliament that Article 31 B provides protection not only to laws of agrarian reforms but also to those which are progressive and required in the public interest. On the apprehension expressed by some members that inclusion of these Acts was not justified and was likely to be misused, the law minister said that there was no possibility because adequate safeguards were provided in the Act. It is submitted that these laws were not laws providing for agrarian reforms and therefore their inclusion was desirable and justified. On the basis of progressive legislation any law can be included in the Ninth Schedule and thus the very purpose of Judicial Review as provided in Article 13 for the protection of Fundamental Rights would be frustrated. The Constitution Forty Second Amendment Act 1976, further added 64 Central and State Land Reforms Laws to the Ninth Schedule.

The Forty Fourth Amendment Act, 1978 again amended the Ninth Schedule and omitted Entry 87 (Representation of People’s Act 1951) and Representation of People’s Amendment Act 1974, the Election Laws Amendment Act 1975, the Entry 92 MISA and Entry 130 Prevention of Publication of Objectionable Matters Act 1976. These Acts were repealed because the experiment of the Government proved fatal to the public good. The question is how the State can be allowed to experiment by bringing such laws which are against the public welfare. Aren’t they accountable for such blunders? The answer is if the Parliament had thoughtfully exercised to implement Directive Principles then such blunders could have been avoided. These laws are not in the Directive Principles in Part IV of the Constitution. If the Parliamentarians understand their responsibility honestly then they should honestly implement Part IV which supplements Part III of the Constitution.
The Part III deals with areas of individual freedom and the extent to which the State can retrain it, Part IV deals with positive duties cast upon the State to attain the ideal of social and economic justice. Even among the Fundamental Rights there are some positive injunctions which seek to protect the interests of the society and the rights of the poor citizens from encroachment by entrenched sections. Thus, Article 17 abolishes untouchability and makes its practice in any form an offence punishable by law. Article 15 inter alia provides that no citizen shall be discriminated against in the use of public places like shops, wells, roads, eating houses etc. on account of his religious, race, caste, sex or space of birth. Article 23 prohibits another great social evil, that of forced labour. The whole effort has been to ensure that the Fundamental Rights of the citizen do not degenerate into the liberties of the few against the interests of the many. But these group rights can only be realized truly after the implementation of Directive Principles of State Policy.

The National Commission to review the working of the Constitution (2002) inter alia recommended:

1) A strategic plan of action to create a large number of employment opportunities,

2) Setting up a National Education Commission every five years to report on compulsory education etc,

3) Establishing a high status body to review the implementation of Directive Principles.

The need to implement the Directive Principles is important because if the State fulfills its responsibility of establishing a welfare State and provides social and economic justice to the people then maximum realization of Part III is possible. Otherwise people will
keep suffering and they will be left with only one hope for justice and that is the Judiciary.

**In Kesavanada's case** it has been expressly held that the right to property is not a Part of the basic structure of the Constitution and, therefore, any amendment can be made to the Constitution in total disregard of the right to property. The only restriction on the amending power of the Parliament is that the power cannot be used to alter or destroy the basic structure or framework of the Constitution. In subsequent cases the Supreme Court can decide for itself whether a Particular amendment alters or destroys the basic structure or framework of the Constitution. Logically speaking the limit to the amending power should be that the Constitution cannot be made to suffer a loss of identity through the amending process. The identity of the Constitution is the sum of its essential features. If the Constitution is not to suffer a loss of identity, each of its essential features has to be preserved.

The judgments of the Supreme Court give the impression that there is a confrontation between Parliament and the Judiciary. The confrontation is certainly unfortunate. The Parliament should enact laws with greater restraint and the restraint is all the more necessary in case of amending the Constitution. The amending power should not be used for political stunts and maneuverings. The Judiciary too should realize that it will not be in a position to defend the doctrine of basic structure for long, if the people and their Government do not want it. When the Indian electorate becomes politically alert and conscious of their rights, the Government of the day will not be able to destroy the basic structure of the Constitution, through the process of amendment.

In the fifth chapter deals with that if any amendment of the Constitution transgresses the boundaries of the limitations which are...
imposed by the Constitution then it will be declared *ultra vires* through Article 32. The Ninth Schedule being Part of the Constitution has to comply with the structure within the Constitution. No power can be exercised absolutely. The Parliament cannot exercise the power absolutely which is given to it by the people. It has to remain accountable to the sovereign will of the people. The will of the people favors the welfare laws which are for the common good, which fulfill public purpose at large. The objective of the Ninth Schedule was to implement the Directive Principles of Part IV under Article 39 (b)(c). This led to the issue of supremacy between Part III and IV of the Constitution and also between the Parliament and the Judiciary. The role of the independent Judiciary is of the protector of the Constitution. The Directive Principles which were not implemented by the Government were with the passage of time interpreted as Fundamental Rights for example free legal aid, right to education etc. the important thing here is that if these directives had already been implemented earlier by the State, the people would not have gone to knock the door of Judiciary. Truth is if all the important directives are implemented by the State then it will ultimately result into the realization of Part III of the Constitution. The inception of Ninth Schedule according to those times was justified but later its misuse like in 1975 by Prime Minister Indira Gandhi to validate her election will not be justified by the spirit of the Constitution. It is held clearly and unanimously by the Constitution bench in I.R. Coelho’s case that the objective of the Ninth Schedule is justified so far if it does not violate the “rights test” because Parliament cannot be allowed to change the permanent character of the Constitution. The court’s function is not only to identify the ‘meaning’ of the Constitution but is to implement the Constitution successfully. In service of this mission, the court often must craft doctrine that is driven by the Constitution. This is true but at the same time that
Parliament should have the freedom to make laws which are for implementation of Directive Principles. When the Directive Principles are implemented in true spirit then those laws which are made by the Parliament can surely pass through the “rights test”. There will be no need to declare them void.

The courts have always not come in the way of implementation of Directive Principles. In fact, of late, in many cases, the Supreme Court has not only supported the need for speedy implementation of the Directive Principles but has itself taken the initiative for the same. M.V. Plyee observes, “the court has been adopting a policy of judicial activism by which it uphold the spirit of Directive Principles in several of its decisions”.

Nevertheless, the issue of Fundamental Rights versus Directive Principles of State policy needs to be clarified. In the well-known case of A.K. Gopalan Fundamental Rights were held as paramount. The Supreme Court described them as ‘inalienable and inviolable’. In case of conflict between Directive Principles and Fundamental Rights, the latter are enforced by the courts. But several Directive Principles have not been implemented. To that extent, the aim of an egalitarian society has not been achieved. Steps should be taken to make implementation of more and more Directive Principles obligatory.

In the sixth chapter we have discussed the landmark cases related to the topic. Golak Nath case reversed the decision in Shankari Prasad and Sajjan Singh case held that Parliament cannot amend Part III of the Constitution because Fundamental Rights are transcendental and immutable. Article 368 does not give Parliament the constituent power of amendment and it lays down only the procedure which is ordinary legislative power. Then after this came Kesavananda Bharti 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 Golak Nath case was accordingly overruled. 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.

The Six learned Judges did not subscribe to basic structure doctrine. The other six learned Judges upheld the 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 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 are 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 who 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 the Separation of Powers between the three organs of the State as one of the basic features of the Constitution.

Further Justice Shelat and Justice Grover added to this list of basic features the mandate to build a welfare State contained in the Directive Principles of State Policy. Now this feature is very significant. Though in minority, the two judges have made a very significant addition to the basic features which form the basic structure doctrine. This is significant because it was the vision of the founding fathers of the nation to build a nation where every one of its citizens had the basic needs provided for so that he or she would live with dignity and have a stake in the emerging nation.

Justice Hegde and Justice Mukherjea identified a separate and shorter list of basic features in which the mandate to build a welfare State was included as one of the basic features of the Constitution. This is important to note because this cannot be achieved without implementing the Part IV of the Constitution.

Justice Jaganmohan Reddy stated that elements of the basic features were found in the Preamble of the Constitution and the provisions into which they translated such as Sovereign Democratic Republic, Parliamentary Democracy, Three organs of the State. He said that the Constitution would not be itself without the fundamental freedoms and the Directive Principles of State Policy. This important to see because it is very important for the State to implement these
ideals given in Part IV for the true realization of Democracy, where the individuals get social and economic justice.

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.

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 *Golaknath 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 appertains to that basic structure.

In *Waman Rao’s case*, as it was in *Kesavananda Bharti*, it was held by the majority that 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 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. The court did not pronounce upon the validity of such subsequent Constitutional amendments except to say that if any Act 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 feature of the Constitutional or its basic structure as reflected in Articles 14, 19 or 31 will become otiose.

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

Now, here the court declared the Land reforms included in the Ninth Schedule as valid by prescribing a time limit to the period of amendments made so far i.e., before 24th April 1973. So, laws included after this date were open to challenge in the court.

In *Minerva mills case* the court held that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognized by it and defines the limits of those powers. The Constitution is 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.

Further the court explained the importance of Directive Principles of State policy along with Fundamental Rights. 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 vigor, 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 fertilize 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 take 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 be thus 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.

So, in this judgment the importance of Directive Principles cannot be ignored. They are indispensable for the true growth of the State.

In the judgment of I.R Coelho's case the court has unanimously agreed that the power of the Parliament is not unlimited. There is a unanimous opinion of the judges in this judgment regarding the importance of Fundamental Rights. In earlier judgments there has been uncertainty regarding the answer to the question that what is a basic structure? The Supreme Court held 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 *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 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in 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 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in 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.

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’s 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.
So, it is clear beyond doubt that all the three organs of the State should strive towards excellence by implementing the vision of the founding fathers. The vision is evident in Part III and IV of the Constitution. Whatever is done for public good at large that is accepted by the people provided the benefit reaches to the least disadvantaged in the State. The creation of Ninth Schedule is never questioned by the Judiciary. Nowhere Article 31A, B and C and the creation of Ninth Schedule is declared unconstitutional by the Supreme Court. It has only declared the laws which were against the larger public good as *ultra vires*. The Supreme Court has made clear many a time that the question of policy matters is the work of the Parliament but the question of legality is decide by the court. If the Parliament works responsibly and implement the directive principles as its sacred duty then the maximum problems which are faced in the Parliamentary Democracy will end. The Directive Principles cannot be ignored when there is a question regarding the enforcement of rights. The public interest is a paramount consideration in both the cases.

In the Seventh Chapter we have discussed the position between the Parliament, Executive and the Judiciary. It was observed that in a nation dedicated to Rule of Law, the Judiciary had great responsibilities and aroused great expectations. The Judiciary therefore has much to be proud of, as it later repelled attempted subversion and direct attacks from its Constitutionally co-equal branches of Government. It has struck down infringements of the Fundamental Rights and unwise changes in other Constitutional provisions, notably using the 1973 basic structure doctrine and subsequent reaffirmations of it.

Constitution, if we see, has served India’s needs. The inadequacies in fulfilling its promise should be assigned to those
working it and to conditions and circumstances that have defied greater economic and social reform during the short sixty-four years since Indians began governing themselves. Indian society is a seamless web. Conflict between this web’s Democracy and social revolution strands is inevitable. Absence of Government efforts to bring about social-economic reform will engender conflict as the have-lessees, frustrated, struggle for opportunity; so, too, will Government efforts at change result in conflict, for the have-mores will resist them as the have-lessees capitalize upon them. Efforts toward long-term harmony between the strands make short-term conflict inevitable. Democratic behavior and social revolutionary aspirations are destined to conflict. Article 14 of the Fundamental Rights says that ‘the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India’. The words in this article after the ‘or’ seem to place upon Government the positive responsibility to give the have-lesses access to those rights they previously have been powerless to exercise.

Today, corruption has weakened the foundations of the three organs of the State. As the framers of the Indian Constitution intended to make Independent Judiciary, it has undoubtedly led to the tussle between the three organs of the State and till date it continues and is always in the news. Separation of Powers cannot be strictly followed because now the State is a ‘Welfare State’ and for this all the three organs need to work in coordination within the spirit of our controlled Constitution. The present Indian political scenario is one of great turmoil with the news of corruption cases like CWG, Radia Tapes, 2G Spectrum, CVC Appointment. Such cases have resurrected the term ‘crony capitalism’ which is a big blow to the ideals of our Constitution included in the Preamble. Public money is drained down. Such incidents are undermining not only economic life but Democracy and political accountability too. Judiciary has been a
forerunner in the field of protection of rights of the citizens. Whenever in the history there has been a threat to Constitutional principles, it has upheld the sanctity of the spirit of the Constitution e.g. in Shankari Prasad case, Kesavananda Bharti case, Indira Gandhi case, Minerva Mills case, Waman Rao case, I.R. Coelho’s case. It has time and again prevented the usurpation of the Constitution by the Legislature and the Executive by not allowing them to overrun the “basic principles of our Constitution” and thereby distort Indian Democracy.

Judicial activism should be appreciated and welcomed. Moreover, it is not a new phenomenon and not different from the Rule of Law and Constitutionalism. It is an integral Part of the interpretative process and the quality of its creative interpretation provides dynamism to our Constitution. The only issue is about its limits. Our Constitution embodies Separation of Powers introducing the system of checks and balances. The powers are separately marked for the three organs. But in the process of dispensation of justice, the Judiciary has to decide matters which relate to the Executive and the Legislature.

So, in the case of I.R. Coelho, it has been observed that according to Kesavananda Bharti, Minerva Mills and Waman Rao cases, the Constitution Bench upheld the ‘Basic Structure Doctrine’ and applied the power of Judicial Review to the laws included in the Ninth Schedule and laid down the underlying principles of Articles 14, 19, 21. The court asserted that Ninth Schedule cannot be made immune from Judicial Review because Judicial Review is Part of the basic structure of the Constitution. Parliament cannot be allowed to change the permanent character of the Constitution.

Granville Austin has rightly said that the courts have the power to decide what the basic features of the Constitution are, and this
power would result in a harvest of legal wrangles. Accordingly, a
nine judge bench of the Supreme Court in *I.R.Coelho case*
authoritatively laid down the ambit of the basic structure doctrine
through a unanimous judgment. For rendering justice, mere
denouncing the “overreach” approach is an awfully inadequate
response for suggesting a solution to the problem posed. It is one
thing to say that the court cannot arrogate to itself the power to say,
“Creation of posts”, but quite another to answer the question, “who
will undo the wrong in the case of an Executive inaction or
arbitrariness and legislative lapses or dysfunction”? It has been
rightly said that the burden is to be discharged by the Judiciary by
still remaining within the confines of the Constitution. Apex court
under Article 141 of the Constitution should exercise function
showing how the delicate balance envisaged by our Constitution
between the three basic institutions could be maintained. This could
easily be done through a Constitution bench in the light of a
comprehensive review of the hitherto decided cases, especially the
ones that tend to destroy the delicate balance.

**Fundamental Rights and Directive Principles**

While seeking to protect the basic rights of the individual, the
framers of the Constitution also wanted it to become an instrument
for social revolution. The Directive Principles *inter-alia* envisaged
an end to economic exploitation and staggering inequalities and cast
upon the State the duty to secure a just social order. Articles 36 to 51
constitute an operative part of the Constitution and an important part
at that, for through them the Constitution seeks to achieve the ideal
of a democratic welfare State set out in the Preamble and to bring
about the social and economic revolution of which the founding
fathers of our republic dreamt. Directive Principles of State Policy
may not be binding through courts but the onus lies on the
Government to implement them. Therefore these Directive Principles come into conflict with Fundamental Rights when in the protection of individual liberty; the State also protects individual or group inequality. Broadly, Part III deals with areas of individual freedom and the extent to which the State can restrain it, Part IV deals with positive duties cast upon the State to attain the ideal of social and economic justice. Like the First Constitutional Amendment Act 1951 which added Article 31A and 31B along with the Ninth Schedule in the Constitution was a first step by the Government to give effect to the Directive Principles. Here the individual rights of the Zamindars or the land holders clashed with the Government’s effort to bring land reforms for economic and social regeneration of the group which comprised landless people i.e., the socially and economically weaker sections.

This is well understood that Directive Principles aim to establish a welfare state where the basic prerequisites are that everyone is entitled to minimum material well being such as food, clothing and decent housing. But the problem of conflict between Part III and Part IV also arises when the State fails to implement these directives and the people are forced to move the court for the enforcement of their basic human rights under Part III. This is true that the Judiciary cannot enforce all the Directives in Part IV as Fundamental Rights. Part IV is entirely the responsibility of the State to implement for establishing a welfare state and once the welfare state is truly established the fundamental rights of the individual will be automatically realized.

Article 31A, 31B, 31C and the Ninth Schedule

The new Articles 31A and 31B along with the Ninth Schedule were added by the First Constitutional Amendment Act of 1951 were deemed necessary to save certain land reform legislation for
acquisition of estates etc, from invalidation by courts on the ground of violation of some fundamental rights.

So, the Article 31A saves the type of laws as mentioned in clause (i) to (vii) only from some Fundamental Rights i.e., Article 14 and 19 whereas 31B saves any type of law from the whole Part III of the Constitution. Article 31B lays down nothing regarding the type of laws to be included in the Ninth Schedule and is immune from the whole of Part III. Even a law declared invalid is put in the Ninth Schedule for protection.

Article 31C was added by Twenty Fifth Amendment because of the necessity to surmount the difficulties placed in the way of giving effect to the Directive Principles in Part IV. The laws were saved from Article 14 and 19 for implementing the Directives in Article 39(b) and (c). The Part of 31C which provided that no law declared to be for implementing any of the Directive Principles shall be called in question in any court, was declared invalid in the Minerva Mills case.

Therefore, I would strongly suggest that Judicial Review should always be in keeping with the larger public good and not as a point of contention between the Judiciary and Parliament. The Parliament should have its legislative sovereignty over public good laws in the Ninth Schedule from Judicial Review, even when they are perceived to be interfering with the fundamental rights of the individual all the while being mindful of the basic spirit of the Constitution.

It is true that the social, economic and political aspects of justice should be left primarily to the law-makers and it should be assumed that the entire legislative process (or for that matter Executive or Administrative function of the State) is influenced by
the considerations of justice, reason and fairness. But unfortunately it does not work in a society which is plagued with corruption, vested interests and deprivation. Also, the legislative process in India, which is predominantly a rule of majority rather than reason, fails to satisfy the ends of justice. After all, the majority does not have the monopoly of being always right, far less being just. Therefore, it is but natural that the Judiciary takes a rather proactive role in interpreting the real spirit of the law in the larger public interest.

For example, recently the Supreme Court in the land acquisition case in *Dev Sharan v. State of U.P.*, ¹ has given the right direction to the Government in regard to the amendment required in the law regarding Acquisition of land for ‘public purpose’. The court held that even though right to property is no longer fundamental and never was a natural right, and is acquired on a concession by the State, it has to be accepted that without right to some property other rights become illusory. The court was considering these questions, especially in the context of some recent trends in land acquisition. The court was of opinion that the concept of ‘public purpose’ in land acquisition has to be viewed from an angle which is consistent with the concept of welfare State. It must be accepted that in construing ‘public purpose’, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people. Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of the people, especially of the common people, defeats the very concept of ‘public purpose’.

¹ 2011 4SCC 769.
In such cases the Supreme Court has looked into the matter deeply because the Government has failed to look after the larger public interest and has thus been found wanting in implementing the Directive Principles. The State will succeed in building a welfare State only if it focuses genuinely on public-centred development and for that purpose the directive principles have to be implemented in letter and spirit. It failed to look into the public good of the public at large. So, if the State implements its policies keeping in mind the larger public good of the common people it will surely succeed in building a welfare State. With this the focus of the Government should be on public-centered development in larger public interest.

So, whereas the Ninth Schedule is concerned it should only be used for the implementation of Part IV of the Constitution in true form and spirit so that there is no need for judicial scrutiny of the laws included in the Ninth Schedule. If it truly serves the public good it will become a major Part of the Constitution without any controversy.

Though John Rawls has no connection with the framing of the great Indian Constitution, a strong Rawlsian case could be constructed for India which could suggest that no just and stable society could be established in India unless it is constructed on the twin principles of equal liberties and consideration to the disadvantaged. This brings the Directive Principles to the centre stage and on an equal footing with the Fundamental Rights, and for the realization of a just and fair Indian society all the three organs of the State have to complement each other to help realize the goals enshrined therein, with the Judiciary acting as the watchdog to ensure that the basic spirit of the Constitution is intact in any event.
It is therefore clear about the contribution of Ninth Schedule in the Constitution. So, it is again suggested that Article 31A and 31C should be repealed and only Article 31B along with Ninth Schedule should be kept in the Constitution only for the implementation of directive principles on the basis of larger public interest.