After discussing the power of Judicial Review in the previous chapter it becomes clear that this power enables the Supreme Court to protect the spirit of our Constitution. Constitution is our Grundnorm, the supreme law of the land therefore it requires special protection. In this chapter we shall discuss the exceptions which were created by the Government to escape from Judicial Review by bringing various Constitutional amendments and also supremacy of the Parliament to amend the Constitution and to enact laws including Directive Principles of State Policy. As it is well known that Indian Constitution was framed after an in depth study of manifold challenges and problems including that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State’s welfare obligations in Part-IV. The Constitution of various countries including that of United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The Fundamental Rights chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitution of most of the other countries, the Supreme Court was vested with original jurisdiction as contained in Article 32. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen Acts, all relating to land reforms laws,
immunizing these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, *interalia*, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void. This amendment was made to give effect to Directive Principles contained in Article 39(b) and (c). Prof. Upendra Bakshi, has said that the First Amendment of the U.S Constitution (which included the Bill of Rights: the text says “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances) gave heart to its Constitution whereas First Amendment of the Indian Constitution (which included Article 31A, 31B and Ninth Schedule) took away the heart of its Constitution.

This amendment was made for the implementation of Part IV of the Constitution which lays down certain Directive Principles of State Policy for the State for establishing a welfare State. These are complimentary and supplementary to the Fundamental Rights contained in Part III of the Constitution because they aim for a welfare State. The welfare State is for the people where all the rights of its people are secure. The public good is the objective of a welfare State.

2.1 Emergence of Conflict between Fundamental Rights and Directive Principles

Before independence, the Congress Party had promised to abolish Zamindari estates and large landholdings, and redistribute land to the farmers or tillers. Prime Minister Pt. Jawahar Lal Nehru

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1 Commented while answering a question on the Ninth Schedule during his visit in March 2010 to the Department of laws, Panjab University.
called himself a Socialist and a Republican. Indeed, Socialism was the preferred policy in several countries and was seen to be the best way for the equitable distribution of wealth and to attain social justice. After independence Prime Minister Pt. Jawahar Lal Nehru wanted to implement a Socialistic pattern and therefore wanted to bring agrarian reforms for reorganisation of land holdings. Aim was to remove the Zamindari system. At that time right to property was big hurdle in the implementation of land reforms. The important portions added in the Constitution were the Preamble and the chapters on Fundamental Rights and Directive Principles of State Policy. The chapter on Fundamental Rights was perhaps the most glorious chapter of the Constitution, which also provided for an elaborate judicial system to protect these rights. Prime Minister Pt. Jawahar Lal Nehru felt that these socio-economic programmes would be slowed down by litigation regarding violation of Part III (i.e. right to property Article 19(f) and 31) and wrote to the Chief Ministers of various States telling them that the Constitution would have to be amended if it came ‘in our way’ for Article 39(b), (c). One suggestion was that land reform legislation should not be subject to judicial scrutiny by any court whatsoever. While these amendments to the Constitution were being considered, the Patna High Court struck down the Bihar Land Reforms Act, 1950. The Petition had been filed by the Maharaja of Darbhanga. Less than a fortnight later, the Calcutta High Court struck down certain acquisition proceedings in the Bela Banerjee v. State of West Bengal,2 case. Pt. Jawahar Lal Nehru asked the then Law Minister, Dr. B.R Ambedkar, to prepare necessary amendments to the Constitution. Dr. B.R Ambedkar suggested that the question of compensation should not be reviewed in any court if Presidential assent had been given for acquisition of property. President Rajendra Prasad raised several doubts and Sardar

Vallabhai Patel, who was in Bombay, also wrote to Jawahar Lal Nehru asking for some further time till the doubts raised by the President were considered by the Law Ministry. The judgment of the Patna High Court was in appeal before the Supreme Court. It is believed that Pt. Jawahar Lal Nehru threatened to resign if President Rajendra Prasad did not give Presidential assent to the amendment. The President signed the Bill but expressed his unhappiness at the urgency. At this stage, the former Advocate General of Madras V. K. Thiruvenkatachari, in a letter to the Law Secretary, K.V.K. Sundaram suggested that a new Schedule could be added to the Constitution. All Acts pertaining to land reform laws could be certified by the President and inserted in this new Schedule. These laws would be deemed to be valid retrospectively and could not be challenged for violating any provision of the Constitution. Granville Austin has labelled the Ninth Schedule a ‘genie that would have a profound impact on the Constitutional governance of the country.’ V.K. Thiruvenkatachari’s suggestion was later translated into Articles 31 A, 31 B and the Ninth Schedule. Under Article 31 A, laws that related to acquisition of estates, nationalisation of industries, extinguishment of mineral leases or their premature termination could not be challenged on the ground that they violated Article 14 (right to equality), Article 19.3

2.2 The Beginning of the Constitutional Amendments in 1951 to give effect to Directive Principles

The amendment of the Constitution started with the first amendment in 1951, which was against the Fundamental Rights given in the Part III of the Constitution i.e. Article 14, 19, 31. There was a clear confrontation between the Judiciary and the Parliament over the issue of amendment of the Part III of the Constitution. The Directive

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Principles of the State Policy were overriding the Fundamental Rights with this first amendment of the Constitution. At that time for bringing Socialist reforms the need was felt to bring the land reform laws for the landless people. It was in the objective of welfare State as given in the Preamble and the Directive Principles.

2.2.1 The First Constitutional Amendment Act 1951

This amendment was made to remove difficulties created by several decisions of the Supreme Court, viz., Romesh Thapper v. State of Madras,4 Brij Bhushan v. State of Delhi,5 and Moti Lal v. State of Uttar Pradesh.6 The First Amendment added two new Articles 31-A and 31-B, to validate certain Land Reforms Laws (Zamindari Abolition Law). The newly added Ninth Schedule made Acts named therein beyond the challenge of court for infringement of Fundamental Rights guaranteed in Article 14, 19 and 31. A new Clause (4) was added to Article 15 which empowers the State to make special provisions for advancement of the socially and educationally backward classes of Citizens. It was necessitated due to the decision of the Supreme Court in Champakam Dorairajan v. State of Madras.7

The Constitution (First Amendment) Act, 1951, was enacted within a year of the commencement of Constitution. The First Amendment made several modifications in a few Fundamental Rights.8

It added the following three more heads to Article 19(2) 'public order', 'friendly relations with foreign States', and 'incitement to an offence'. Thus, the Legislature became entitled to

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4 AIR 1950 SC 124.
5 AIR 1950 SC 129.
6 AIR 1951 All 257.
7 AIR 1957 SC 257.
8 M.P. Jain, Indian Constitutional Law, 1653 (2009).
restrict the freedom of speech and expression in respect of these three heads also in to the heads originally mentioned in Article 19(2).9

The phrase ‘a friendly relation with foreign States’ was needed to curb issue against Pakistan which was then going on in a rather virulent form. Addition of the expressions ‘public order’ and ‘incitement to an offence’ were deemed necessary as the court had held that ‘security of State’ was a restricted concept as compared with ‘public order’ and ‘public safety’ so that freedom of speech could not be curtailed merely for maintaining ‘public order’ and ‘public safety’ unless the ‘security of State was also threatened. On this basis, several laws were declared *ultra vires* as they restricted the freedom of speech for maintaining ‘public order’ and not ‘security of State’.10

The Madras High Court had decided in *Srinivas v. State of Madras*,11 that even incitement of a single case of murder, or cognisable offence involving violence, might have a tendency to overthrow the State and thus affect its security. Hence, Article 19(2) was amplified to enable the Legislature to make laws to restrict freedom of speech in the interests of ‘public order’ or put a restraint upon ‘incitement to violence’.

In one respect, Article 19(2) was improved by the First amendment. Originally, Article 19(2) did not contain the word ‘reasonable’ before the word ‘restrictions’, and so the court could not assess the reasonableness of the restrictions imposed on the right guaranteed by Article 19(1)(a). Article 19(2) thus differed from Articles 19(3) to 19(6) in which the expression ‘reasonable

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9 Substituted by the Constitution (First Amendment) Act, 1951, Section 3, for Clause (2) (with retrospective effect).
11 AIR 1951 Mad 70.
restrictions' had been used. The word 'reasonable' was now introduced in Article 19(2) thus making restrictions on the freedom of speech and expression justiciable. This was a major gain.

The Amending Act added Clause to Article 19(6) to make it clear that the freedom of trade and commerce guaranteed by Article 19(1)(g) was not to invalidate any scheme of nationalisation undertaken by the State. The need for this amendment was felt because of certain remarks made by the Judges of the Allahabad High Court in Motilal v. State of Uttar Pradesh, which arose out of nationalisation of motor transport.

The first Amendment Act curtailed the Fundamental Right to property guaranteed by Article 31 with a view to achieve quick implementation of important measures of agrarian reform passed by the State Legislature by immunising the same against attack in the court. This amendment added two new Articles 31A and 31B, and the Ninth Schedule, so as to make laws acquiring Zamindaris unchallengeable in the court.

The Patna High Court had declared the Bihar legislation unconstitutional under Article 14, while the High Court of Allahabad and Nagpur had held similar laws valid. Before, however, the Supreme Court could give its verdict on the validity or otherwise of this type of legislation, the Central Government under Pt. Jawahar Lal Nehru became restive at the delay being caused by litigation in furthering the programme of agricultural land reform, and thought of short circuiting the judicial process.

Pt. Jawahar Lal Nehru was an ardent supporter of agrarian reform which is regarded as a process of social reform and social

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12 Supra note 8 at 1653.
13 Supra note 6.
14 Supra note 8 at 1653.
engineering. The Centre wanted to remove any possibility of such laws being declared invalid by the court and hence the amendment was made in the Constitution.16

The Ninth Schedule was an interesting, innovation in the area of Constitutional amendment. A new technique of by-passing Judicial Review was initiated. Any Act incorporated in the Schedule became fully protected against any challenge in a court of law under any Fundamental Right. Even an Act declared invalid by a court becomes valid retrospectively after being incorporated in the Schedule.17

To begin with, only Acts abolishing Zamindari were included in the Schedule. Thus, only thirteen State Acts named therein were put beyond any challenge in the court for contravention of Fundamental Rights. But Ninth Schedule has swelled and swelled in course of time as all kinds of statutes have been included therein to protect them from Judicial Review contains as many as 284 entries.18

Articles 84 and 87 were amended so as to do away with the summoning of Parliament twice a year and the requirement of the President addressing the two Houses at the commencement of each session. Now, the provision is that not more than six months are to elapse between the last day of one session and the first day of the following session. The houses are now prorogued only once a year and the President addresses the Houses of Parliament only at the commencement of the first session each year.19

Corresponding amendments were also made in Article 174 and 176 for the State Legislature. A few other minor amendments were made by the First Amendment in Articles 341, 342, 372.

16 Supra note 8 at 1654.
17 Ibid.
18 Ibid.
19 Ibid.
The Constitutional validity of the First Amendment was challenged in the Supreme Court. The court upheld the validity of the amendment in the famous case of Shankari Prasad v. Union of India.\(^{20}\)

The First Constitution Amendment Act, 1951 brought many changes in the Constitution which includes Articles 15, 19, 31A, 31B, 85, 87, 174, 176, 341, 342, 376 and the Ninth Schedule.

For Reservation\(^{21}\) nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedule Castes and the Scheduled Tribes.

For restrictions on Fundamental Rights\(^{22}\): Nothing in sub-Clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-Clause in the interest of [the Sovereignty and integrity of India,] \(^{23}\) the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

For saving of laws providing for acquisition of estates, etc.\(^{24}\)

(1) Notwithstanding anything contained in Article 13, no law providing for:

\(^{20}\) Shankari Prasad Singh v. Union of India, AIR 1951 SC 458.

\(^{21}\) Article 15(4) added by the Constitution (First Amendment) Act, 1951.

\(^{22}\) Article 19(2) substituted by the Constitution (First Amendment) Act, 1951 for Clause (2) (with retrospective effect).

\(^{23}\) Inserted by the Constitution (Sixteenth Amendment) Act, 1963.

\(^{24}\) Article 31A inserted by the Constitution (First Amendment) Act, 1951 (with retrospective effect).
(a) The acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights; or

(b) The taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations; or

(d) The extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature term in nature or cancellation of any such agreement, lease or licence.

Shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by (Article 14 or 19)\textsuperscript{25} provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his asset.

\textsuperscript{25} Substituted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 7 for Articles 14, 19, or 31 (w.e.f. 20.06.1979).
For Validation of certain Acts and Regulations: Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

For sessions of Parliament, prorogation and dissolution:

(1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The President may from time to time:

(a) Prorogue the Houses or either House;

(b) Dissolve the House of the People.

For Scheduled Castes

(1) The President [may with respect to any State (or Union Territory)], and where it is a State [*, *], after

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26 Article 31B.
27 Article 85 Substituted by the Constitution (First Amendment) Act, 1951, Section 6 for Article 85 (w.e.f. 18.06.1951).
28 Article 341.
29 Substituted by the Constitution (First Amendment) Act, 1951, Section 10, for “may after consultation with the Governor or Rajpramukh of a State”.
30 Inserted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule.
consultation with the Governor 32[* * *], thereof by public notification,33 specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of this Constitution be deemed to be Scheduled Castes in relation to that State 34[or Union Territory, as the case may be].

For Scheduled Tribes35

(1) The President 36[may with respect to any State 37[or Union Territory], and where it is a State 38[* * *], after consultation with the Governor 39[* * *] thereof], by public notification,40 specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State 41[or Union Territory, as the case may be].

For Continuances in force of existing laws and their adaptation42

(2) Nothing in Clause(2) shall be deemed:

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31 Omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule.
32 Omitted by the Constitution (Seventh Amendment) Act, 1956 Section 29 and Schedule.
33 See the Constitution (Scheduled Castes) Order, 1950.
34 Substituted by the Constitution (Seventh Amendment) Act, 1956.
35 Article 342.
36 Substituted by the Constitution (First Amendment) Act, 1951, Section 4, for “ray, after consultation with the Governor or rajpramukh of a State”.
37 Inserted by the Constitution (Seventh Amendment) Act, 1956, Section 29 & Schedule.
38 Omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 & Schedule.
39 Omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 & Schedule.
40 See the Constitution (Scheduled Tribes) order, 1950 (C.O. 22) 1.
41 Inserted by the Constitution (Seventh Amendment) Act, 1956 & Section 29.
42 Article 372.
(a) To empower the President to make any adaptation or modification of any law after the expiration of 43[three years] from the commencement of this Constitution; or

For Provisions as to Judges of High Court44

(1) Notwithstanding anything in Clause (2) of Article 217, the Judges of High Court in any province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.45 [Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court].

Added Ninth Schedule46

A new Schedule (the Ninth Schedule) was inserted to protect the agrarian reform laws. The list of 13 Acts included in this Schedule by the First Amendment in 1951 has since grown to as many as 284 Acts. Of these, three entries were omitted by later amendments. The additions have been made by the Fourth, Seventeenth, Twenty-Ninth, Fortieth, Forty-Seventh, Sixty-Sixth, Seventy-Sixth and Seventy-Eighth amendments.

43 Substituted by the Constitution (First Amendment) Act, 1951 & Section 12 for "two years.
44 Article 376.
45 Added by the Constitution (First Amendment) Act, 1951, Section 13.
46 Added by the Constitution (First Amendment) Act 1951, Section 14.
2.2.2 The Fourth Constitutional Amendment Act 1955

The Constitution (Fourth Amendment) Act, 1955, again amended Article 31 in several respects.\textsuperscript{47} In the first place, Article 31(2) was modified. Secondly, a new Article 31(2) (A) was added. The purpose of these amendments was to reinstate more precisely the State’s power of compulsory acquisition and requisitioning of private property and to distinguish it from deprivation of property by the operation of regulatory or prohibitory laws. The amendments made it clear that it is only for the former, and not the latter, that compensation becomes payable for any ‘deprivation of property’ even by a purely regulatory law. The actual position, however, was somewhat different from the one this Statement sought to make one. What the Supreme Court had held was that compensation was payable in case of ‘substantial dispossession’ or ‘serious impairment’ of the property right. However, the Centre was not satisfied even with this and wanted to restrict payment of compensation only to a situation when there was acquisition involving transfer of ownership, or requisition involving transfer of the right to possession, to the State. The right to private property, therefore, became very much circumscribed by the Fourth Amendment and much came to depend on the goodwill of the Legislature. Article 31(2), as it stood prior to the Fourth amendment, did not in so many words provide that no acquisition of property could be made save for a public purpose. By a verbal amendment of Article 31(2), the Fourth Amendment now brought out more specifically than before that no private property was to be compulsorily acquired or requisition except for a “public purpose”.\textsuperscript{48}

The Constitution (First Amendment) Act, had added Article 31A to protect the Zamindari abolition laws from being challenged

\textsuperscript{47} \textit{Supra} note 8 at 1655.

\textsuperscript{48} \textit{Ibid.}
under Article 14, 19 and 31. Article 31A was now expanded in scope with a view to extend the same immunity to other types of social welfare and regulatory legislation affecting private property. The Fourth Amendment also added a few more Acts to the Ninth Schedule thus immunizing these Acts from attacks under Fundamental Rights. These acts covered a wide canvass as they related to such matters as land acquisition for rehabilitation of refugees, insurance, railway companies, taking over of management of industrial understandings under the provisions of the Industries (Development and Regulation) Act the land development and planning. The Fourth Amendment also redrafted Article 305. The main purpose of this exercise was to protect laws creating State monopolies or nationalising any undertaking from the operation of Article 301.49

2.2.3 The Seventeenth Constitutional Amendment Act 196450

This amendment again circumscribed property rights guaranteed in Article 31. This was the third amendment in the series, the earlier ones being the first and fourth. The Kerela Agrarian Relations Act 1961, was struck down by the Supreme Court in its application to Ryotwari lands, as well as by the Kerela High Court in relation to lands other than ‘Estates’ in the Malabar area on the ground that it transgressed Articles 14, 19 and 31, because the protection of Article 31A was not available to the lands in question as those were not ‘Estates’. Under Article 31A as it stood at the time, protection of Article 31A was available only in respect of such tenures as were ‘Estates’ on the 26th January 1950, when the Constitution came into force.51

49 Id. at 1656.
50 Added by the Constitution (17th Amendment) Act, 1964.
51 Supra note 8 at 1662.
The expression ‘EState’ bore different meanings in different States, and sometimes in different parts of the same State. Moreover, many of the land reform enactments related to lands which were not included in an estate. It thus became necessary to expand the scope of the word ‘EState’ so as to protect all these legislations. Accordingly, the Seventeenth Amendment was undertaken. It changed the definition of the word ‘EState’ by bringing within its scope Ryotwari lands as well as other lands in respect of which provisions are normally made in land reform enactments. Therefore, Article 31A (2)(a) was redrafted so as to give it its existing form.

The Ninth Schedule was further expanded by including therein forty-four State enactments with view to immunize them from any attack in a court of law on the ground of breach of any Fundamental Right. It further came to have 64 Acts inscribed therein which could not be challenged under any Fundamental Right. These Acts covered a very wide field, e.g. ceiling on agricultural holdings, abolition of certain types of tenures, acquisition of land belonging to religious and charitable endowments, fixation of rent of tenants from eviction, etc.

2.2.4 The Twenty Ninth Constitutional Amendment Act, 1972

By the Constitution (Twenty-Ninth Amendment) Act, 1972 two Kerala Acts dealing with land reforms were included in the Ninth Schedule of the Constitution. These acts thus received the protection of Article 31B.52

2.2.5 The Thirty Fourth Constitutional Amendment Act, 1974

By the Constitution (Thirty-fourth Amendment) Act, 1974, twenty State Acts concerning land ceiling and land tenure reforms were added to the Ninth Schedule of the Constitution, so as to put

52 Id. at 1666.
them under the protection of Article 31B. These laws thus have been given immunity from challenge in the court on the ground of violation of Fundamental Rights.53

2.2.6 The Thirty Ninth Constitutional Amendment Act, 1975

The election to Lok Sabha of Prime Minister Indira Gandhi was declared void by the Allahabad High Court in 1975 on the petition of Raj Narain which led to the enactment of the Constitution (Thirty-ninth Amendment) Act, 1975. The Amendment introduced changes in the method of deciding election disputes relating to the four high officials of the country, viz., President, Vice-President, Prime Minister and the Speaker of Lok Sabha. The basic change regarding the President and Vice President was that jurisdiction was taken away from the Supreme Court to decide any doubts and disputes arising in connection with their election. Under the new Article 71(2), Parliament by law was to establish some ‘authority’ or ‘body’ for deciding such disputes and its decision was not to be challengeable in any court.

Elections of the Prime Minister and the speaker to the Parliament were also taken out of the election dispute settling mechanism envisaged in Article 329. The election of any such person was not be called in question, except before such ‘authority’ or ‘body’, and in such manner, as was to be provided for by or under any law made by Parliament.

The effect of Clauses (1) and (2) of the new Article 329A thus was that the election of the Prime Minister and the speaker to a House of Parliament or Lok Sabha respectively would be governed

53 Id. at 1667.
by one law, while election of the other members of Parliament would be governed by another law.54

The Thirty-ninth Amendment did not stop here. It went further and sought to nullify the High Court decision voiding the election of Prime Minister Indira Gandhi and declare it to be valid. The main provision made for this purpose was Clause 4 in Article 329A which consisted of four parts:55

1. No law made by Parliament before the commencement of the Constitution (Thirty Ninth Amendment) Act, 1975, insofar as it related to the election petitions was to apply, or be deemed ever to have applied, to the election of the Prime Minister or the Speaker to Parliament;

2. Such election was not to be deemed to be void or ever to have become void, on any ground on which such election could be declared to be void, or has been declared to be void under any such law;

3. Notwithstanding any court order declaring such election to be void, it was to continue to be valid in all respects;

4. Any such order any finding on which such order was based was to be deemed always to have been void and of no effect.

This part of Article 329A validating an election already held void by the High Court was declared to be unconstitutional by the Supreme Court in Indira Gandhi v. Raj Narain.56 The court criticised the Thirty-Ninth Amendment as negation of Rule of Law, anti-Democratic, lawless and one which denied equality before law.

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54 Id. at 1670.
55 Ibid.
No one can imagine a greater misuse of the power to amend the Constitution than what is represented by the Thirty Ninth Amendment, when just to validate the election of one person, the Constitution was drastically amended. The Supreme Court rendered a yeoman service to the Constitution by vetoing such a distorted law.⁵⁷

The case provides sterling testimony to the worth of the doctrine that the fundamental features of the Constitution could not be amended. There always lurks the danger that the ruling party with the help of its majority in the two Houses of Parliament may introduce distortions in the Constitution to suit its own political agenda and to keep herself in power, Prime Minister Indira Gandhi even imposed the emergency on the country in 1975.⁵⁸ On merits, however, the Supreme Court accepted the appeal of the Prime Minister against the High Courts Judgement and held her election to Lok Sabha to be valid.

The Thirty-Ninth Amendment also extended immunity to a number of statutes from judicial purview on the ground of infringement of Fundamental Rights by including them in the Ninth Schedule.⁵⁹

2.2.7 The Fortieth Constitutional Amendment Act, 1976

The Constitution (Fortieth Amendment) Act, 1976, extended immunity to 64 Central and State statutes by including them in the Ninth Schedule. These statutes pertained to land reform, urban ceiling, and prevention of publication of objectionable matter.⁶⁰

This amendment also substituted a new Article 297 for the old one with a view to enlarge the scope of India’s Sovereign rights over

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⁵⁷ Supra note 8 at 1670.
⁵⁸ Ibid.
⁵⁹ Ibid.
⁶⁰ Ibid.
sea wealth and include therein the concept of exclusive economic zone. All resources in the exclusive economic zone have been vested in the Union.

2.2.8 The Forty-Seventh Constitutional Amendment Act, 1984

The Constitution (Forty-Seventh Amendment) Act was passed in 1984. This Amendment adds 14 State Acts dealing with land to the Ninth Schedule.61

2.2.9 The Sixty-Sixth Constitutional Amendment Act, 1990

The Constitution (Sixty-sixth Amendment) Act, 1990 was enacted to put a number of statutes passed by the State Legislatures, mostly in relation to land reforms in the Ninth Schedule. The total number of statutes now included in this Schedule stands at 257. All these statutes stand immunised from being challenged on the ground of infringement of any Fundamental Right.62

2.2.10 The Seventy-Seventh Constitutional Amendment Act, 1994

The Constitution (Seventy-Sixth Amendment) Act, 1994 added the Tamil Nadu Backward Classes, Scheduled Castes, and Scheduled Tribes (Reservation of Seats in Educational Institutions and or appointments or posts in services under the State) Act, 1993, enacted by the Tamil Nadu Legislature, to the Ninth Schedule so as to give protection to the State Act under Article 31B. This followed the decision of the Supreme Court in Indira Sawhney's case fixing total reservations under Article 16(4) to not more than 50%. The State forwarded the Act to the Centre under Article 31C.

61 Ibid.
62 Ibid.
2.2.11. The Seventy-Eight Constitutional Amendment Act, 1994


2.3 Procedure for the Amendment of the Constitution

The framers of our Constitution were so inspired by the need for the Sovereignty of the Parliament elected by universal suffrage to enable it to achieve a dynamic national progress. They therefore prescribed an easier mode for changing those provisions of the Constitution which did not primarily affect the federal system. This was done in two ways-

Firstly, by providing ‘ordinary process’ of amendment by simple majority to those provisions which were not deemed to be amendment of the Constitution.

Secondly, by providing ‘constituent process’ of amendment by special majority and in case of certain provisions further ratification is required by half of the State Legislatures which are mentioned in Article 368.

An Amendment can be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each house by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.
But ratification is also required if Bill seeks to amend any of the following provisions:

- Article 54-55 manner of the election of the President.
- Article 73-162 extent of the Executive power of the Union and the States.
- Article 241, Chapter IV of Part V, Chapter I of Part XI.
- Any of the lists in the Seventh Schedule.
- Representation of States in Parliament Fourth Schedule.
- Provisions of Article 368 itself.

The law included in the Ninth Schedule if it is a Union law then as mentioned in the amendment process should be passed by both the houses of the Parliament by required majority and should receive the assent of the President and if it is an ‘entrenched provision’ then it requires ratification by half of the States. Further, if the law is a State law then it is drafted by the State and passed by the majority members in the State Legislature and then send to the Union Cabinet for approval and then the President’s assent is required which is very important for its final enactment and inclusion in the Ninth Schedule.

2.3.1 Issue of Amendment of the Part III or any other part of the Constitution

The issue of amendment of Part III of the Constitution began with the First Amendment Act of 1951 (as already discussed) in which violation of Fundamental Rights was involved. In *Golak Nath v. State of Punjab*, the court overruled its earlier decisions in

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64 AIR 1967 SC 1643.
Shankari Prasad v. State of Bihar, and Sajjan Singh v. State of Rajasthan, by concluding that Fundamental Rights included in part III of the Constitution are not subject to Article 368 and the power to amend the Constitution is a legislative power conferred by Article 245 of the Constitution, so that a Constitution Amendment Act was also a ‘law’ within the purview of Article 13(2). After this decision the Parliament sought to supersede it by amending Article 368 itself, by the Constitutional Twenty Fourth Amendment Act 1971, as a result of which an amendment of the Constitution passed in accordance with Article 368, will not be ‘law’ within the meaning of Article 13 and the validity of a Constitution amendment act shall not be open to question on the ground that it takes away or affects a Fundamental Right [Article 368(3)]. Even after this specific amendment of the Constitution, the controversy before the Supreme Court did not cease because the validity of the Twenty Fourth Amendment Act itself was challenged in a case of Kesavanand Bharti v. State of Kerela (discussed in the next chapters in detail). In this case the validity of the Twenty Fourth Amendment Act was upheld and the case of Golak Nath v. State of Punjab was overruled. The question has thus been settled in favour of the view that a Constitution Amendment Act, passed by the Parliament, is not ‘law’ within the meaning of Article 13. The majority in Kesavanand Bharti case upheld validity of Clause (4) of Article 13 and a corresponding provision in Article 368(3), which had been inserted by the Constitution Twenty Fourth Amendment Act 1971 read as: “Nothing in this Article (i.e Article 13), shall apply to any amendment made under Article 368”. In the result Fundamental Rights in India can be amended by an Act passed under Article 368, and the validity of a

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65 Supra note 20.
66 AIR 1965 SC 845.
67 AIR 1973 SC 1461.
68 Supra note 64.
Constitution Amending Act cannot be questioned on the ground that Act invades or encroaches upon any Fundamental Right. Though it overruled *Golak Nath’s case* that Fundamental Rights cannot be amended under Article 368, it has affirmed another preposition asserted by majority in *Golak Nath’s case*, namely, that: there are certain basic features of the Constitution of India, which cannot be altered in exercise of the power to amend it, under Article 368. If, therefore, a Constitution Amendment Act seeks to alter the basic structure or framework of the Constitution, the court would be entitled to annul it on the ground of *ultra vires*, because the word ‘amend’, in Article 368, means only changes other than altering the very structure of the Constitution (important cases are discussed in chapter V).  

2.3.2 Effects of inclusion of an Act in the Ninth Schedule

Ninth Schedule was added in the Constitution with the objective of excluding certain laws (i.e. Land Reform laws) from the purview of Judicial Review. When a law is put in this Schedule it becomes immune from challenge on the ground of violation of Fundamental Rights. Some of the effects are mentioned below.

1. In view of Article 31B, the inclusion of an act in the Ninth Schedule validates it with retrospective effect from the date of its enactment, irrespective of its inconsistency with any Fundamental Right and of any declaration of unconstitutionality of any court on such ground.

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69 Supra note 63 at 157-158.
2. In the result the Constitutionality of such protected Act cannot be challenged except on the ground of want of legislative competence.\textsuperscript{71}

3. But as to the Acts included in the Ninth Schedule by amendments made on or after 24.04.1973, the foregoing proposition is to be read subject to the decision in \textit{Keshvananda Bharti's case}.\textsuperscript{72}

By the judgment delivered on that date (i.e. 24.04.1973) in that case, it was laid down that any amendment of the Constitution which sought to destroy or damage the basic features or the basic structure of the Constitution would be unconstitutional and void. Hence, any amendment of the Constitution made after 24.04.1973 would be open to challenge on the ground that the Amendment Act destroyed or damaged the basic features of the Constitution.\textsuperscript{73} If that challenge succeeds, the inclusion of the offending Act in the Ninth Schedule would be void and it would be open to the further challenge of violation of Articles 14, 19 and 31, unless saved by Article 31A or 31C (as it stood prior to its amendment by Forty Second Amendment Act). In short, Acts added to the Ninth Schedule on or after 24.04.1973 will not receive the protection of 31B. They will be valid only if they do not damage or destroy the basic structure of the Constitution.

It may be pointed out, in this context, that all the Acts specified in Entries 67 onwards (by Thirty Fourth Amendment Act, 1974, the Thirty Ninth Amendment Act, 1975, the Forieth Amendment Act, 1976, the Sixty Sixth Amendment Act, 1990 and the Seventy Sixth Amendment Act, 1994) are all editions subsequent to 29.04.1973.

\textsuperscript{71} Sansaka \textit{v. Union of India}, AIR 1981 SC 22.
\textsuperscript{72} Supra note 67.
\textsuperscript{73} Woman Rao \textit{v. Union of India}, AIR 1981 SC 271.
4. But additions to the Ninth Schedule made prior to 24.04.1973 will not be hit by the doctrine of ‘basic features’ and would, therefore, be completely protected by Article 31B.74

5. The inclusion of an Act would not retrospectively affect any right which accrued prior to the inclusion of the Act in the Ninth Schedule.75

6. The protective umbrella of Article 31A cannot be extended to orders and notifications issued under the Act included in the Ninth Schedule, prior to its inclusion.76

2.3.3 Amendments to Protected Acts

The protection offered by the Ninth Schedule is confined to the Acts and Regulations mentioned in that Schedule and the provisions thereof. It cannot be extended to provisions which were not included therein, irrespective of the fact whether the provision to which the protection is sought to be extended deals with new substantive matters or it deals with matters which are incidental or ancillary to those already protected.77

2.3.4 Constitutional Amendments in the Ninth Schedule: Classification of Laws

If we take a look at the Ninth Schedule, we find that several laws relate to Land reforms and nationalisation but number of other Acts have nothing to do with land reforms like election, mines and minerals, industrial relations, requisition of property, monopolies, coal or copper, general insurance, sick industries, The Essential Commodities Act, FERA, MRTP, COFEPOSA, SAFEMA, Tamil

75 Ajay v. Union of India, AIR 1984 SC 1130.
76 Prag Mills v. Union of India, AIR 1978 SC 1296.
Reservation for BCs, SCs, STs Act 1993, are included, which clearly shows the deviation from the objective of Pt. Jawahar Lal Nehru’s Socialistic approach. The worst misuse by the Executive was during emergency period by Prime Minister Smt. Indira Gandhi, she got Thirty Ninth Amendment 1975 Act, regarding her election passed through special Amendment procedure (along with ratification from ⅔ of the States) in the Parliament to save her unconstitutional election from Judicial Review in the Ninth Schedule. If we see the amendment process in the Ninth Schedule, it is clear that an amendment which is made in Ninth Schedule is put by the exercise of ‘constituent power’ of the Parliament. All the Constitutional amendments put in it are passed by each house by a majority of the total membership to that house and by not less than 2/3 of the majority of that house present and voting and after the assent of the President. The Acts which are passed by State the Legislatures are also required to obtain the assent of the President after having been passed by the Legislative Assembly and Governor reserves it for the assent of the President. It receives immunity from Ninth Schedule only after assent from President which is customary because in original practice will of the real Executive prevails and nominal Executive has to give assent.

Following are the various Constitutional Amendments which added/omitted various Acts/provisions in Ninth Schedule from item No. 1 to 284.

<table>
<thead>
<tr>
<th>Amendment</th>
<th>Acts/Provisions Added</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Amendment, 1951</td>
<td>1 – 13</td>
</tr>
<tr>
<td>4th Amendment, 1955</td>
<td>14 – 20</td>
</tr>
</tbody>
</table>

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2.4 Constitutional Amendments which were challenged:

The Constitutional amendments made in the Ninth Schedule were challenged in the court because some parts or whole of the amendments were regarded as unconstitutional. They have led to a lot of controversy in regard to Part III and Part IV of the Constitution.

2.4.1 The First Amendment 1951

The First Amendment 1951 as mentioned earlier in this chapter was to remove difficulties created by several decisions of the Supreme Court, in *Romesh Thapper v. State of Madras*,78 *Brij Bhushan v. State of Delhi*,79 *Moti lal v. State of Uttar Pradesh*.80 This

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78 Supra note 4.
79 Supra note 5.
amendment was challenged in the case of *Shankari Prasad v. Union of India*, the first case on the amendability of the Constitution, curtailing the right to property guaranteed by Article 31 was challenged. The argument against the validity of the first amendment was that Article 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights, that the word ‘law’ in Article 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe. The court upheld the validity of the First Amendment. The court stated on this point that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368. Therefore, the word ‘law’ in Article 13 must be taken to refer to rules and regulations made in the exercise of the ordinary legislative power, and not to Constitutional amendments made in the exercise of the constituent power under Article 368 with the result that Article 13(2) does not affect amendments made under Article 368.

2.4.2 Seventeenth Amendment 1964 was challenged

Seventeenth Amendment 1964 was challenged in the case of *Sajjan singh v. State of Rajasthan*. For thirteen years after the *Shankari Prasad case*, the question of amendability of Fundamental Rights remained dormant. This amendment again adversely affected the right to property. By this amendment, a number of statutes affecting property rights were placed in the Ninth Schedule and were thus immunized from court review. The court was to decide that whether the abridgement of Fundamental Right was within the

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80 *Supra* note 7.
81 *Supra* note 20.
82 AIR 1965 SC 845.
prohibition of Article 13(2); and whether Article 31A and 31B, as amended by Seventeenth Amendment sought to make changes to Article 132, 136 and 226, or in any of the lists in the Seventh Schedule of the Constitution, so that the conditions prescribed in the proviso to Article 368 had to be satisfied? One of the arguments was that the amendment in question reduced the area of Judicial Review (as under the Ninth Schedule, many statutes had been immunized from attack before a court); it thus affected Article 226 and, therefore, could be made only by following the procedure prescribed in Article 368 for amending the ‘entrenched provisions’, that is, the concurrence of at least half of the States ought to have been secured for the amendment to be validly effectuated. The Supreme Court again rejected the argument by a majority of 3:2. The majority ruled by applying the rule of ‘pith and substance’ and held that the amendment was only to amend the Fundamental Rights so as to help the State Legislatures in effectuating the policy of the agrarian reform. If it affected Article 226 in an insignificant manner, that was only incidental; it was an indirect effect of the Seventeenth Amendment and it did not amount to an amendment of Article 226. It does not change it in any way. The court drew distinction between an ordinary law and Constitutional law made in exercise of ‘constituent power’ and held that only former, and not latter, fell under Article 13.

Again, Seventeenth Amendment was challenged in *I.C. Golakh Nath v. State of Punjab,* in more vigorous manner. This time 11 Judges with majority of 6 to 5 overruled the earlier cases of *Shankari Prasad and Sajjan Singh case* and held the Fundamental Rights were non-amendable through the Constitutional amending procedure set out in Article 368, while the minority upheld the line of reasoning adopted by the court in the two earlier cases. The Constitutional amendment is ‘law’ within the meaning of Article 13 of the

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Supra note 64.
Constitution and therefore, if it takes away or abridges the rights conferred by Part III it is void. It was declared that the Parliament will have no power from the date of decision (27th Feb. 1967) to amend any of the provision of Part III of the Constitution so as to take away or abridge Fundamental Rights. The minority held that the power of amendment is not subject to any express or implied restrictions. If the Constitution-makers had wanted to make the Fundamental Rights unamendable, they could have easily made an express provision in the Constitution to that effect. These Judges also refused to accept the doctrine of prospective overruling.

2.4.3 Twenty Fourth (1971), Twenty Fifth (1971) and Twenty Ninth (1972) Constitutional Amendments were challenged

Twenty Fourth (1971), Twenty Fifth (1971) and Twenty Ninth (1972) Constitutional Amendments were challenged in the case of Kesavanand Bharti Sripadgalavaru v. State of Kerela\textsuperscript{84} batch of six writ petitions challenging validity of Twenty-fourth, Twenty-fifth, Twenty Sixth Amendment and Twenty-Ninth Amendments of Constitution - the petitioner on March 21, 1970 filed petition 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, \textit{ultra vires} and void. He further prayed for an appropriate writ or order to issue during the pendency of the petition. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971) was passed which received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional

\textsuperscript{84} \textit{Supra} note 67.
grounds and to impugn the Constitutional validity of the Kerala Land Reforms (Amendment) Act 1971 (Kerala Act No. 25 of 1971).

The majority upheld validity of Twenty-Fourth Amendment which inserted Clauses (3) and (4) in Article 13. All the Judges opined that by virtue of Article 368 as amended by Twenty-Fourth Amendment Parliament had power to amend any or all provisions of Constitution including those relating to Fundamental Rights although the same was not unlimited. The majority were of view that power of amendment under Article 368 was subject to certain implied and inherent limitations. In the exercise of amending power Parliament cannot amend basic structure or framework of Constitution. The right to property did not form part of basic structure and individual freedom secured to citizens was basic feature of Constitution. The grant of power always qualified by implications of context and considerations arising out of general scheme of statute. The inherent limitations under unamended Article 368 would still hold true even after amendment of Article 368. The Sections 2 (a) and 2 (b) and first part of Section 3 of Twenty-Fifth Amendment held valid - 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. The validity of Twenty-Ninth Amendment which inserted Kerala Land Reforms (Amendment) Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 was upheld. It was heard by a Bench consisting of all the 13 Judges of the court because Golak Nath case decision by a Bench of 11 Judges was under review. Wide arguments were advanced before the court for over 60 days. Eleven opinions were delivered by the Judges on April 24, 1973.
2.4.4 Thirty Ninth Amendment 1975

Thirty Ninth Amendment 1975 was challenged in the case of Indira Gandhi v. Union of India, in which the Supreme Court had occasion to apply the Kesavanand Bharti's ruling regarding the non-amendability of the basic features of the Constitution. Here the question involved was about the validity of Clause 4 of the Constitution Thirty Ninth Amendment Act 1975. This amendment was sort to withdraw the election of the Prime Minister and a few other Union officials from the scope of the ordinary judicial process; and more specifically, to void the High Court decision declaring Indira Gandhi's election to the Lok Sabha as void; and, to exclude the Supreme Court's jurisdiction to hear any appeal. Further in Minerva Mills v. Union of India, the question regarding the Constitutional validity of this amendment is discussed in which the Sick Textile Undertakings Nationalization Act, 1974 was added in the Ninth Schedule was challenged.

2.4.5 Fortieth amendment Act, 1976

Fortieth amendment Act, 1976 was challenged in the case of Waman Rao v. Union of India, along with Section 4 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Articles 13 (2), 14, 19, 31, 31 (2), 31-A (1), 31-B, 31-C, 83 (2), 352 and 368 of Constitution of India, Section 4 of Constitution of India (First Amendment) Act, 1951, Section 3 of Constitution of India (Fourth Amendment) Act, 1955, Section 2 of House of the People (Extension of Duration) Act, 1976, Constitution of India (42nd Amendment) Act, 1976 and Constitution of India (40th Amendment) Act were challenged. The court held that the Act of 1951 introduced Article 31-A with retrospective effect and Section 3

85 Supra note 56.
86 AIR 1980 SC 1789.
87 AIR 1981 SC 271.
of Act of 1955 submitted new Clause for original Clause (1) with retrospective effect which was valid as it did not damage basic feature of Constitution of India and 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 and Act included in Ninth Schedule if saved by Articles 31-A or 31-C to be challenged on ground that amendment damages essential feature would become otiose. In Minerva Mills case this amendment has also been discussed.

2.4.6 Thirty Fourth Constitution Amendment Act 1974 and Sixty Sixth Amendment Act, 1990

Thirty Fourth Constitution Amendment Act 1974 and Sixty Sixth Amendment Act, 1990 was challenged in the case of I.R.Coelho v. State of Tamil Nadu, in which order of reference dated 14\textsuperscript{th} September 1999 was made by five Judges’ Bench seven years ago. In this, matters were related to a very important task of determining the nature and character of protection provided by Article 31-B of the Constitution to the laws added in the Ninth Schedule by amendments made after Twenty Fourth April 1973.

2.4.7 Seventy-Sixth Constitution Amendment Act 1994

Seventy-Sixth Constitution Amendment Act 1994 added 257A in the Ninth Schedule which puts Tamil Nadu Back ward Classes, Schedule Castes, Schedule Tribes (Reservation of seats in Educational Institutions and of appointments or posts in the services under the State) Act, 1993, in the Ninth Schedule. The matter regarding its Constitutionality exceeding 50% limit of reservation to 69% is before the Supreme Court and still pending to be disposed

\textsuperscript{88} AIR 2007 SC 861-893.
finally. On 13 July 2010\textsuperscript{89} Supreme Court ruled that Karnataka and Tamil Nadu can exceed 50 % quota and has asked both the States to collect data to revisit reservation issue provided they had “quantifiable data” on BCs and OBCs population. The three member Bench headed by Chief Justice S.H. Kapadia asked the two States to collect data and submit it to their Commission for BCs to revisit reservation issue. Tamil Nadu raised 68% in 1981 and 69% in 1990. The 70% quota of Karnataka is under stay order which is now extended to 1 more year and Tamil Nadu no stay ordered and allowed to continue for 1 more year. After 1 year again have to reply to the court.

2.5 Procedure Adopted

There are laws included in the Ninth Schedule by various Constitution Amendment Acts and these amendments were made under Article 368. Since 1951, questions have been raised about the scope of the Constitutional amending process contained in Article 368.\textsuperscript{90}

The basic question raised has been whether the Fundamental Rights were amendable so as to dilute on take away any Fundamental Rights through a Constitutional amendment? Since 1951, a number of amendments have been effectuated in the Fundamental Rights. The cumulative effect of these amendments has been to curtail, to some extent, the scope of some of these rights.\textsuperscript{91}

The worst affected Fundamental Right has been the right to property contained in Article 31 which has been amended several times. The basic trend of these amendments has been to immunise, to some extent, State interference with property rights from challenge

\textsuperscript{89} The Times of India, 13 July 2010.
\textsuperscript{90} Supra note 8 at 482.
\textsuperscript{91} Ibid.

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under Articles 14, 19 and 31 as well as to seek to exclude the question of compensation for acquisition or requisitioning of property by the State from Judicial Review. The Constitutional validity of these amendments has been challenged a number of times before the Supreme Court.92

2.5.1 Legislative procedure for Laws passed by State Legislature in Ninth Schedule

Like in the Parliament, the Bill for amendment can be introduced in the either House and as this falls under 'constituent power' of amendment under Article368, the Bill is passed by 2/3 majority of the members present and voting and receives the assent of the President. State Legislature in Bihar, Maharashtra, Madhya Pradesh, Karnataka and Uttar Pradesh is bi-cameral having two Houses. In all other States, the State Legislature is unicameral having only one House. The Bill can be introduced in either of the House where there are two Houses and it is passed by majority of the 2/3 members present and voting and then Governor reserves the Bill for the assent of the President. After the Bill is passed by the State Legislature it is then considered by the Cabinet at the Centre and if it thinks fit only then it is included in the Constitutional amendment of the Ninth Schedule. The final consent of the President is very essential for the State laws.

2.5.2 Distribution of Legislative Powers

The distribution of legislative powers between the Centre and the regions is the most important characteristic of a federal Constitution. The whole structure of the federal system continues to revolve around this central point. Usually certain powers are allotted exclusively to the Centre; certain powers are allotted exclusively to

92 Ibid.
the regions, and there may be a common or concurrent area for both to operate simultaneously. A basic test applied to decide what subjects should be allotted to the one or the other level of Government is that functions of national importance should go to the Centre, and those of local interest should go to the regions. This test is very generally, a sort of ad hoc formula, and does not lead to any uniform pattern of allocation of powers and functions between the two tiers of Government in all federal Countries.93

2.5.3 The Three Lists

The Indian Constitution contains a very elaborate scheme of distribution of power and functions between the Centre and the State. The framers of the Indian Constitution took note of the developments in the area of federal State allocation of powers in other federations. They surveyed the area of the functioning of the modern Government. They noted the modern scientific and technological developments as well as the contemporary political philosophies and keeping all these factors in the mind, they appointed functions between the Centre and the States in a way so as to suit the peculiar circumstances and exigencies of the country.94

The obvious tendency of the Indian Constitution is towards centralisation within a federal pattern and framework. The scheme of the Constitution is to secure a Constitutionally strong Centre having adequate powers both in extent and nature so that it can maintain and protect the unity and integrity of the country.95

The Indian Constitution seeks to create three functional areas:

(i) An exclusive area for the Centre;

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93 Ibid.
94 Ibid.
95 Ibid.
(ii) An exclusive area for the States; and

(iii) A common or concurrent area in which both the Centre and the States may operate simultaneously, subject to the overall supremacy of the Centre.

The Scheme of Article 246 is as follows:

(i) Article 246(1) confers on Parliament an ‘exclusive power’ to make laws with respect to any of the matters in the Union List (List I in the Seventh Schedule). The entries in this List are such as need a uniform law for the whole country. The States are not entitled to make any law in this area.  

(ii) Article 246(3) confers an exclusive power on the States to make laws with respect to the matters enumerated in the State List (List II in the Seventh Schedule). These are matters which admit of local variations, and, from an administrative point of view, are best handled at the State level and, therefore; the Centre is debarred from legislating with respect to these matters.

(iii) A unique feature of the India scheme of division of powers is the existence of a large concurrent field for the Centre and the State. Article 246(2) confers a concurrent power of legislation on both the Centre and States with respect to the matters enumerated in the Concurrent List (List III) in the Seventh Schedule.

\[96 \text{ Ibid.} \]
\[97 \text{Id. at 483.} \]
2.5.4 Central Control Over State Legislation

There are a few provisions in the Constitution as stated below which prescribed assent of the President i.e., the Central Executive before a Bill passed by a State can become legally effective. This legislative mechanism is part of the scheme of checks and balances insofar as the Centre is able to keep under its control certain types of State legislation.98

Article 31(A)(1) (Ninth Schedule) provides that a law regarding acquisition of estates will not be invalid even if it is inconsistent with Article 14 or 19. However, under the first proviso to Article 31A(1) the exemptions granted to some categories of acquisition law from Articles 14 and 19 cannot be available unless the relevant State law has been reserved for the consideration of the President and has received his assent. In this way, the Centre can ensure that the States make only justifiable use of their power to deviate from the Fundamental Rights.99

The proviso enables the Central Executive to keep some check on State laws falling under Article 31A (1), so that there is some uniformity among the State laws and that there is no undue curtailment of the Fundamental Rights guaranteed by Articles 14 and 19. The Centre can also ensure that the State does not use its legislative power for a purpose extraneous or collateral to the purposes mentioned in Article 31(A)(1). This is a safeguard against undue, excessive and indiscriminate abridgement of Fundamental Rights by State legislation.100

(a) Article 31C (Ninth Schedule) gives overriding effect to the Directive Principles over Fundamental Rights

98 Id. at 556.
99 Ibid.
100 Ibid.
guaranteed by Article 14 or Article 19, but a State law can claim this effect only if the President gives his assent to it. This is also a safeguard against undue, excessive and indiscriminate abridgement of Fundamental Rights in the name of implementation of Directive Principles. It may be appreciated that Article 31C confers very drastic power on State Legislatures and so some safeguard is necessary against unwise or inappropriate laws being enacted and claiming exemption from Fundamental Rights guaranteed by Article 14 or Article 19.  

(b) Under the second proviso to Article 200, a State Governor has been ordained not to assent to, but to reserve for the consideration of the President, any Bill passed by a State Legislature which, in his opinion, would, if it became law, so derogate from the powers of the High Court as to endanger the position which that court is by the Constitution designed to fill. For the proper functioning of a Democratic System, governed by Rule of Law, an Independent Judiciary is an integral and indispensable part of the Constitutional system. This provision is intended to preserve the integrity of the High Courts which are designed to be strong instruments of justice. It is a safeguard against a State passing any law which may adversely affect the powers, jurisdiction or status of the High Court. The Centre can intervene in a fit case and preserve the High Courts Constitutional status.

101 Id. at 557.  
102 Ibid.
(c) Under Article 288(2), a State law imposing, or authorising imposition of a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by law made by Parliament for regulating or developing any inter-State river or river valley, has no effect unless it has reviewed the assent of the President.103

(d) Article 301 declares that trade; commerce and intercourse shall be free throughout India. However, under Article 304(b), a State Legislature may impose reasonable restriction in public interest on the freedom of trade, commerce or intercourse with or within the State, but no such Bill is to be moved in the State Legislature without the previous sanction of the President. This proviso is also a safeguard to ensure that State laws do not unduly disrupt the economic unity of the country. The Centre can ensure that States do not make laws to unnecessarily curtail freedom of trade and commerce.

In the absence of prior sanction of the President, the defect can be cured under Article 255 by subsequent assent of the President to the State law in question.104

(e) Then, there is Article 254(2) under which repugnancy between a State law and a Central law with respect to a matter in the Concurrent List may be cured by the assent, of the President to the State legislation.105

103 Ibid.
104 Ibid.
105 Ibid.
(f) When a proclamation of financial emergency is in operation under Article 360(1), the President, i.e., the control Executive can direct the States to reserve all money Bills or Financial Bills for the President’s consideration after they are passed by the State Legislature.106

(g) Besides the above specific situations where State legislation compulsorily needs Central assent for its validity, there is Article 200 which makes a general provision enabling the State Governor to reserve a Bill passed by the State Legislature for presidential consideration and assent.107

The implications of this provision appear to be that the Governor may also reserve a Bill, in situations other than those mentioned above, but it is not clear in what situations and circumstances the Governor may do so. No norms have been laid down in the Constitution as to when the Governor can exercise this power, or when the President can refuse to give his assent to a State Bill. On its face, it appears to give a blank cheque to the Governor and as already discussed, he would exercise this power in his discretion.108

The Governor should exercise his discretionary power to reserve a Bill for President’s assent not liberally but exceptionally, i.e., only in rare and exceptional cases. The reason for taking this view is that if the Governor interprets his power too liberally, it will result in too many State Bills being reserved for the Centre’s assent.

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106 Ibid.
107 Ibid.
108 Ibid.
and this will jeopardise the system of Parliamentary Democracy in the State.\textsuperscript{109}

Some of the situations when the Governor may be justified in reserving a State Bill are:

(i) When the State Bill suffers from patent unconstitutionality;
(ii) When the State Bill derogates from the scheme and framework of the Constitution so as to endanger the Sovereignty, unity and integrity of the country;
(iii) When the State Bill \textit{ex facie} comes in conflict with a central law;
(iv) When the legitimate interests of another State or its people are being adversely affected.

Mere policy differences between the Governor and the State Government do not justify reservation of State Bills by the Governor for President’s assent. It may also be stated that unconstitutionality can arise in several situations, e.g., the State Legislature may exceed its legislative competence which may happen when the Bill in question relates to a matter in List I and not to List II or List III; when the Bill infringes a Fundamental Right or its infringes some other Constitutional provision or limitation.\textsuperscript{110}

The Articles 200 and 201 provide the necessary mechanism for making operational the various Constitutional provisions, noted above, which require certain types of States Bills to be reserved for the President’s consideration and assent.\textsuperscript{111}

\textsuperscript{109} \textit{Id.} at 558.
\textsuperscript{110} \textit{Ibid.}
\textsuperscript{111} \textit{Ibid.}
There is the corresponding question that once the State Bill referred to the President under Article 200, what are the consideration which the Central Government applies to examine the Bill. The formal power of the President are laid down in this connection in Article 201, but what tests should the Central Government, apply to access the State law is not laid down in Article 201. Prima facie, Article 201 confers an unrestricted power on the Central Government to examine the reserved State laws. The Central Executive is entitled to examine the State law from all angles, such as, whether or not it is in conformity with the Constitution or the central policies whether it is inconsistent with any central law etc.\textsuperscript{112}

A few illustrations to show the practical working of these provisions may be noted here.

Punjab passed the temporary tax Bill levying a surcharge of 1 percent on sales tax and an increased passenger and freight tax. The Centre refused its assent to the Bill as its effect was to buy 8 percent tax on luxury goods as against the ceiling of 7 percent fixed by the Chief Minister conference. Another objection was that the Bill levied a tax of 3 percent on goods declared essential on which only a 2 percent sales tax was permissible under the Central Sales Tax Act, 1956. The Centre also sought an assurance from Punjab that it would share the enhanced revenue from the passenger tax with the Union Territory Himachal Pradesh. The Centre signified its assent to the Bill when all these lacunae were removed.

In 1961, the Centre refused to assent to the Madhya Pradesh Panchayati Raj Bill, 1960, because it provided for nominated village Panchayats to be set up for a year, and the Centre took the view that

\textsuperscript{112} \textit{Ibid.}
the system of nominations was a negation of the concept of Panchayats. The most typical case in this area is in Re Kerala Education Bill. The Kerala Legislative passed a Bill in 1957 to provide for the better organisation and development of educational institutions in the State. Its provisions raised a bitter public controversy in the State. The Governor reserved the Bill under Article 200 for consideration of the President who sought the advisory opinion of the Supreme Court under Article 143. The Supreme Court held that some of the provisions of the Bill offended Article 30(1), pertaining to the right of minorities to establish and administer educational institutions. The President returned the Bill to the State for necessary amendments therein in the light of the Supreme Court’s opinion. It is clear that the Centre sought the advice of the Supreme Court so as to keep itself above the accusation of partisan politics as the Central and State Governments belonged to different political parties.

Under Article 255, no Act of Parliament or of a State Legislature is to be invalid by reason only that the recommendation or previous sanction of the President required by the Constitution was not given, if assent is given to it by the President subsequently. An interesting case in the area is Jawaharmal v. State of Rajasthan. Rajasthan enacted a law levying a tax. The law needed presidential assent but it was not secured. Later, Rajasthan enacted another law declaring that the earlier law would not be deemed to be invalid by reason of the fact that presidential assent had not been secured. This law later secured presidential assent. The Supreme Court held that it

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113 Ibid.
115 Supra note 8 at 559.
could not cure the infirmity of the earlier law. That infirmity could be cured only by presidential assent and not by any legislative fiat. Even the presidential assent to the later law cannot cure the defect of the earlier law.\textsuperscript{117}

So, it becomes clear that even in the sphere allotted to the States, the Centre exercises appreciable control over their legislation. Every year a large number of State Bills come to the Centre for assent under various provisions of the Constitution mentioned above. According to the report of the Sarkaria Commission during the period from 1977 to 1985, 1130 State Bills were reserved for the consideration of the President. Most of them originate under Article 254(2) so as to validate an inconsistency between a State law and a Central law in the concurrent list. The President assented to most of these Bills; the assent was withheld only in 31 cases. The norms on which the Centre acts in exercising its powers are not clear. However, on the whole, it appears that the Centre is circumspect in exercising its controlling powers over the State legislation. It is only in a very few cases that presidential assent is refused to State laws. Some of the grounds on which such assent has been refused are: there was already a central law in existence (in the concurrent list) the lies between the exclusive jurisdiction of the Centre; the Centre is contemplating action itself; exclusion of Union property from State taxation; non-conformity with the policies of the Central Government unconstitutionality; lack of procedural safeguards, etc.\textsuperscript{118}

Sarkaria Commission stated that it is “intended to sub serve the broad purpose of co-operative federalism in the realm of Union State legislative relations” while commenting on Constitutional scheme of reserving State laws for the President’s assent; it is “designed to

\textsuperscript{117} Supra note 8 at 559.

\textsuperscript{118} Ibid.
make our system strong, viable, effective and responsive to the challenges of a changing social order. "9

The Constitutional provisions regarding Central over State legislation existing in India do undoubtedly detract to some extent from State autonomy.

However, the Central control over State legislation is justified in some situations. There are consideration of uniformity of law and uniformity of approach in certain basic matters.120

Centre’s assent in certain cases confers a immunity on the State laws from being challenged under the Fundamental Rights. On the whole, however, if past practice in any guide, the Centre is vary of controlling State legislation unless it is demonstrably against national interest, or is unconstitutional, or is against well established national policies, and perhaps mere difference of approach is not the determining factor.121

In the USA and Australia, the Centre exercises no control over the State legislation. In Canada, however, the Lt. Governor of a province may reserve as Provincial Bill for the consideration of the Governor-General, a provision analogues to Article 200 in India. Also, the Centre in Canada has power to disallow a Provincial law (after it has been assented to by the Lt. Governor and has thus came into operation) within a year of its enactment. There is no power in the Central Government in India to disallow a State Act after it has come into operation as there is in Canada.122

119 Ibid.
120 Id. at 560.
121 Ibid.
122 Ibid.

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2.6 Justification for Inclusion

When provisions of the Constitution of India were being debated in the Constituted Assembly, some provinces then had passed the laws abolishing Jagirdaris and Zamindaris systems, in the agricultural properties. Some other States passed such law immediately after the coming into force of the Constitution. Obviously, the Fundamental Right to property was first asserted in the Supreme Court by the landowners. State and Union Governments passed more laws for the regulation of Right to property in the general public interest. Therefore, the Government’s policy regarding land reforms had been dragged into litigation as it was in direct conflict with citizen’s Fundamental Right to property (confrontation between Directive Principles of State Policy and the Fundamental Rights). In this regard Pt. Jawahar Lal Nehru expressed his apprehension and remarked:

Within limits no Judge and no Supreme Court can make itself a third chamber. No Supreme Court and no Judiciary can stand in judgment over the Sovereign will of the Parliament representing the will of the entire community and Nation. Legislature is supreme and must not be interfered into by the court of law in such recourse of social reforms. And if the Judiciary interfered, he pointed out; the prescription was, to change the Constitution.

The right to property at that time had been guaranteed under Article 19(1)(f) and 31 of the Constitution. Article 19(1)(f) had prohibited the State from making any law which might affect the

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123 As Indian States were known at that time.
124 The main plank for the congress victory in the first general election was the declaration that Zamindari would be abolished and that quota shall be fixed for socially and educationally backward class of citizens. As soon as the Governments were formed in States, law relating to Zamindari abolition and other agrarian reforms were passed by different States. But these laws were challenged before various High Court on the ground of violation of Fundamental Right to property.
citizens right to acquire, hold and dispose of property while Article 31 provided that no person shall be deprived of his property except the authority of law. Both these Articles were included in the Part III of the Constitution and Parliament’s power to enact laws in derogation of Fundamental Rights was restricted under Article 13. It restrains Legislatures to enact any law which take away or abridge the rights conferred by Part III of the Constitution and Apex court can declare any law made in contravention of this Clause, to that extent void. Hence both the organs of the Government i.e. Parliament and Judiciary have been given independent power with ample scope to dominate each other with regard to the legislations and amendment to the Constitution.

It all started when the Bihar High Court had struck down Zamindari abolition law and held it void on the ground that the law was against the Fundamental Rights. As a consequence the first amendment was passed in 1951 by the interim Parliament. It inserted, inter alia Article 31A and Article 31B and Ninth Schedule with a view to taking away all land reforms from the purview of Judicial Review. It is interesting to note that Ninth Schedule has proved to be a vital provision, and Parliament has from time to time included various laws in it to immune from Judicial Review and now till date there are 284 statutes in Ninth Schedule.

2.6.1 Objectives of the Ninth Schedule

The philosophy underlying our Constitution goes back to the historic objective underlined by the makers of the Constitution, which inspired the shaping of the Constitution through all its subsequent stages. It observed.

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126 Resolution by the Constituent Assembly on January 22, 1947.
127 Resolution by the Constituent Assembly on January 22, 1947.
The guarantee and security to all the people of India, justice, social, economic and political; equality of status of opportunity, before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality was the objectives for drafting the Constitution.

The preamble embodied these objectives. The sociality pattern of society was visible in the entire document. The word ‘Socialist’ was, however, added to the preamble later on. The Governments are directed to work for general welfare of the people in their larger public interest but at the same time the Supreme Court and High Court are made the guardians of the Fundamental Rights which are guaranteed to the individuals. To avoid any conflict between Directive Principles and Fundamental Rights former are made unjustifiable and non-enforceable in the court. However, it did not solve the problem and conflict started even before the Constitution came into force on January 26, 1950. The policies of the Governments regarding land reforms were dragged to the court. In this regard Pt. Jawahar Lal Nehru’s speech was remarkable:

This question of land reform is under Article 31(2) and this Clause tries to take it away from the purview of the court and somehow Article 14 is brought in. That kind of thing is not surely the intention of the framers of the Constitution. Here again, I may say that the High Court has taken a contrary view. There is confusion and doubt. Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? If there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Therefore, these long arguments and these repeated appeals in court are dangerous to the State, from the security point of

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128 42nd Amendment Act in 1976.
129 His speech in the Lok Sabha on May 18, 1951.
130 Bihar High Court had taken view against land reforms but the Allahabad and Nagpur High Court held a contrary view.
view, and from the food production point of view and from the individual point of view, whether, it is that of the Zamindar or the tenant or any intermediary.

Our Constitutional system works on the basis of institutions Legislature, Executive and Judiciary which are clearly defined and delimited by the Constitution. The Legislature represents the people, controls the Executive and makes laws and no one can interfere with its freedom and authority to do so. The courts have to adjudicate disputes, interpret the Constitution, declare the law and pass the necessary orders for doing complete justice.

The Supreme Court is the final authority or interpreting and pronounces on the validity of a law. Any law which is violative of Constitutional provisions is invalidated. The power of Judicial Review has always been given to court in general and the Supreme Court in specific. It cannot be taken away in normal circumstances.

Therefore, Ninth Schedule was created with a view to give effect to social justice principles contained in the Part IV of the Constitution. Granville Austin remarked that the specific issues addressed in the first Amendment were the individual's right to enjoy his/her property versus the Government authority to take it under its 'police power' or for social revolutionary purposes.

2.7 Relationship between Directive Principles and Fundamental Rights

The root of controversy started with the conflict between these two concepts. Fundamental Rights were given preference over the Directive Principles by the Constitution itself. But the Parliament

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132 Power under the Article 142.
133 *Supra* note 63 at 120.
wanted to reverse it. Primary intention of the framers of the Constitution in providing a comprehensive scheme of Fundamental Rights in Part III and the Directive Principles in Part IV was to balance the rights of the citizens on one side with the limitations on the part of the State and further to lay down certain allowed objectives to the State in general and to the Legislature in particular, so that proper and necessary legislation may be made at the appropriate time to implement the Directive Principles.135

In so far as the Fundamental Rights are concerned, numerous amendments have been made. Some of the most notable changes have been the abolition of the Fundamental Rights to property Article 19(1)(f) and Article 31 of the Constitution,136 and addition of Article 31-A, B and C in order to impose certain limitations on Fundamental Rights and also to define the relationship between certain provisions of Part III and IV of the Constitution.137

It may be mentioned that the Judiciary has also played a pivotal role in implementing the Directive Principles. Some decisions of the Supreme Court can be notice in this regard. In Mohammad Hanif Qureshi v. State of Bihar,138 the Apex court upheld prevention of the cow slaughter prohibition legislation in deference to principle contained in Article 48. In re Kerala Education Bill, 1957139 had a pointed to the fact that the State intruded to give effect to principle of right to education contained in Article 45.140 The ideal of distributive justice enshrined in Article 39(b) and (c) was given the

136 By the Constitution Forty Fourth Amendment Act, 1978.
137 By the Constitution Twenty Fifth Amendment Act, 1971.
138 AIR 1958 SC 731.
139 Supra note 67.
140 Provision for free and compulsory education for children – the State shall endeavor to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until the complete the age of 14 years.
highest priority by the Supreme Court when it upheld the validity of Bihar Land Reforms Act, 1956 in State of Bihar v. Kameshwar Singh.\textsuperscript{141} It is rightly observed by the Apex court in Minerva Mills Ltd. v. Union of India,\textsuperscript{142} that significance of the perception that Part III and IV together constitute the core of commitment to social revolution and they together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, one no less important than the other. Snap one and the other will lost its efficacy. They are like a twin formula for achieving the social revolution, an ideal, which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution.

2.8 Constitutional Amendments and Judicial Review of Ninth Schedule

Article 31B of the Constitution of India ensured that any law in the Ninth Schedule could not be changed in court and Government can rationalise its programme of social engineering by reforming land and agrarian laws. In other words, laws under Ninth Schedule are beyond the purview of Judicial Review even though they violate Fundamental Rights enshrined under Part III of Constitution. On the one hand considerable power was given to Legislature under Article

\textsuperscript{141} AIR 1952 SC 352.

\textsuperscript{142} AIR 1980 SC 1789.
31B and on the other hand the power of Judiciary was curtailed, this was the starting point of tussle between Legislature and Judiciary.

2.8.1 Pre Keshavanand Bharti Position

The Constitutional validity of the First Amendment was upheld in the *Sankari Prasad v. Union of India*. The Supreme Court while upholding the validity of the Amendment observed that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of the constituent power of the Parliament. The court held that to make a law which contravenes of the Constitution, the Constitutional validity was a matter of Constitutional amendment and as such it falls within the exclusive power of Parliament. In *N.B. Jeejeebhoy v. Assistant Collector, Thane*, the Supreme Court held that Article 31B represents novel, innovative and drastic technique of amendment. Legislative enactments are incorporated into the Constitution and immunised against all attacks on the grounds of breach of any of the Fundamental Rights.

Later, the Seventeenth Amendment Act, 1964 was challenged in the *Sajjan Singh v. State of Rajasthan*. Petitions were filed under Article 32 of the Constitution. It was noted that Article 31A and 31B were added to the Constitution realising that legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenges in the court of law on the ground that they contravene the Fundamental Rights guaranteed to the citizen by Part III. The court’s view in these two cases was in conformity and similar with that of the Legislature. The Supreme

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143 Supra 15.
144 The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in Constitution.
145 AIR 1965 SC 1096.
146 Supra note 82.
Court viewed that there was no threat from the enhanced power of the Legislature and that the radical agrarian reform were necessary to curb down the menace of poverty and change the system of unequal distribution of land holdings in the countryside. In addition the insertions of various laws in the Ninth Schedule also supported the faith of the court on the Statecraft of the leaders like Pt. Jawahar Lal Nehru and Lal Bhadur Shastri. However, the co-ordination between the Judiciary and the Legislature did not last long. With the coming into power of Indira Gandhi Government; the power granted under Article 31B was widely expanded by the Legislature to achieve their political ends. This provoked Judiciary to control the enhanced legislative power of the Legislature.

In *I.C. Golak Nath v. State of Punjab*, a bench of eleven Judges considered the correctness of the view that had been taken in *Shastari Prasad case*, and *Sajjan Singh case*. The Supreme Court by the majority of six to five overruled both previous decisions. It was held that the Constitutional amendment was law within the meaning of Article 13 and therefore if it takes away or abridges the rights conferred by Part III therefore, it is void. In other words, Parliament has no power to amend or take away the Fundamental Rights enshrined under part III of the Constitution.

**2.8.2 Right to Property: Pre-1978 Position**

Before 1978, there existed mainly two Articles to protect private property, viz., Articles 19(1)(f) and 31. Both these Constitutional provision were repealed by this Constitutional

147 Supra note 67.
148 Supra note 82.
149 Supra note 20.
Amendment, and, thus, left private property defenceless against legislative onslaught.150

It may not be out of place to mention that the natural law jurists regarded protection to property along with life and liberty of a person, as being of paramount necessity in a free society. It is for this reason that the U.S. Constitution in the Vth Amendment ordains: “No person can be deprived of his life, liberty or property without due process of law”. In India, on the other hand, the policy makers under the impact of the Socialist philosophy started devaluing the institution of private property almost from the very day the Constitution came into force.151

In independent India, no Fundamental Right has caused so much trouble, and has given rise to so much litigation between the Government and the Citizens, as the right to property. While the Supreme Court has sought to expand the scope and ambit of many Fundamental Rights including the right to property, this right has been progressively curtailed through Constitutional amendments.152

There are some locus classics cases in Indian Constitutional law which have arisen in the area of property rights. The reason for such a development is that the Central and State Governments have enacted massive legislation to regulate property rights.153 First, the Government undertook to reconstruct the agrarian economy, by trying to confer rights of property on the tiller, abolition of Zamindaris, giving security of tenure to tenants, fixing a ceiling on personal holding of agricultural land and redistributing the surplus land among the landless.

150 Supra note 8 at 1253.
151 Ibid.
152 Ibid.
153 Id. at 1254.
Secondly, in the area of urban property, measures have been initiated to provide housing to the people, clearance of the slums and town planning, control rents, acquire property and impose a ceiling on urban land ownership, etc. Thirdly, the Government has undertaken regulation of private enterprise and nationalisation of some commercial undertakings.154

These various legislative measures have been undertaken to effectuate some of the Directive Principles of State Policy as well as to usher in the accepted goal of establishing a Socialist pattern of society in India.155 Important Constitutional battles have been bought around this question and the Constitution has been amended several times to get over some inconvenient judicial rulings.

Two trends, rather inconsistent, hold out in this area. On the one hand, generally speaking, the court have leaned towards protecting property rights and payment of adequate compensation for property rights acquired by the State. On the other hand, the State has progressively, by amending the Constitution, reduced the occasions when compensation is payable for disturbance of property rights and has sought to minimise intervention by the court in this area. The action and interaction thus produced between the Legislature and judicial processes from an extremely fascinating chapter in India’s Constitutional development, so much so that the enactment of the First and the Seventeenth Amendments curtailing property rights even led to the raising of the critical question of the amenability of the Constitution itself.156

154 Ibid.
155 Ibid.
156 Ibid.
2.8.3 Eminent Domain

It is regarded as an inherent right of the State, an essential incident of its Sovereignty to take private property for public use (The Land Acquisition Act, 1894). This power, known as Eminent Domain, depends on the superior domain of the State over all property within its boundaries it is supposed to be based upon an implied reservation by the State that property acquired by its citizens under its protection may be taken, or its use controlled, for public benefit irrespective of the wishes of the owner incident of this power, however, is that property shall not be taken for public use without first compensation.\(^\text{157}\)

The power of eminent domain just has been described by the U.S. Supreme Court thus: “when public need requires acquisition of property, the need is not to be denied because of an individual is unwillingness to sell. When the need arises, individuals may be required to relinquish ownership of property so long as they are given just compensation which the Constitution requires. The power of eminent domain can, therefore, be defined as the power of the State to take property for public use, without the owner’s consent upon making just compensation to him.\(^\text{158}\)

The two essential ingredients of eminent domain are:

1. Property is taken for public use;
2. Compensation is paid for the property taken.

To start with the Constitution had Article 19(1)(f) and Article 31 to protect property right. In course of time, Article 31 came to be modified drastically through several Constitutional amendments. Ultimately, in 1978, by the Constitutional 44\(^{th}\) Amendment, Article

\(^{157}\) *Chiranjit Lal Chaudhary v. Union of India*, AIR 1951 SC 41.

\(^{158}\) *Supra* note 8 at 1255.
19(1)(f) and 31 were abrogated since the 44th Amendment is not retrospective\textsuperscript{159} and Articles 19(1)(f) and 31 have been deleted with effect from June 20, 1979 all laws enacted earlier are still subject to these Articles.

Articles 31A, 31B and 31C as well as Article 300A are the existing Constitutional provisions concerning private property, Article 300A has been added by the 44th Amendment.

2.8.4 Article 31

Article 31(1) laid down that no person could be deprived of his property without the authority of law. This provision has been repealed through the 44th Amendment but it appears as Article 300A. Article 31(2) as it stood before its abrogation in 1978 ran as follows:

No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.

The original Article 31(2) ran as follows:

No property . . . shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles

\textsuperscript{159} Monoel Francisco v. Collector of Daman, AIR 1984 Bom 461.
on which, and the manner in which the compensation is to be determined and given.\textsuperscript{160}

Four concepts were involved in Article 31(2):

(1) Property

(2) Compulsory acquisition and requisitioning by the State;

(3) Amount; and

(4) Public purpose.

\textbf{2.8.5 Law Enacted by a State}

In addition to the above mentioned conditions imposed by Article 31(2), a law made by a State Legislature, and falling within the purview of Article 31(2), was to fulfil yet another condition, viz., it was not to be effective until it had been reserved for the President’s consideration and had received his assent. This was effect of Article 31(3).

A State law falling within the purview of Article 31(2), but not reserved for President’s assent under Article 31(3), had no legal effect. The purpose underlying Article 31(3) was to bring under central control the State legislation acquiring or requisitioning property so as to ensure that no unjust expropriatory legislation was enacted by a State. The Central Government could ensure that the States follow some uniform norms for payment of compensation for similar property. Such a precaution was necessary because the question of adequacy of amount payable for land acquired bay outside the judicial purview.\textsuperscript{161}

\textsuperscript{160} Id. at 1264.
\textsuperscript{161} Id. at 1276.
Article 31(2) did not remove the bar of Article 14. A law could be challenged on the basis of discrimination in the matter of payment of compensation. Article 31(2) precluded challenge to the adequacy of amount but not a challenge on the basis of discrimination, if any, made between owners of land under like circumstances and conditions. For example, a person whose land was acquired for construction of a hospital or a school could not be paid less amount than one whose land was acquired for any other lucrative project.\(^\text{162}\)

Classification could not be made for the purpose of payment of compensation on the basis of the public purpose for which the land was acquired. As regards the owner, he lost his land and it was immaterial for him whether his land was acquired for one or the other public purpose. Article 14 confers an individual right and a classification can be justified only if there is something to justify a different treatment to this individual right. Similarly no classification could be made for the for the purpose of payment of the amount on the basis of the land acquiring authority.\(^\text{163}\) Whether the land acquired by the State is for an improvement trust, or a municipality, the same principles to assess the amount for the land acquired should apply. For the landowner, it hardly matters as to who acquires the land. Similarly, it is equally immaterial whether the land is acquired under the one or the other statute. Article 14 comes into play if there are two acquisition statutes enabling the State to give one owner different treatment from another equally situated owner. The question concerning the inter-relationship between Articles 19(1)(f) and 31 created difficulties and there were several changes in the judicial view in this area. Initially, the judicial view was that Article 19(1)(f) would not apply to a law ‘depriving’ as distinguished from,

\(^{162}\) Id. at 1276.

\(^{163}\) Ibid.
restricting a citizen of his property and that the validity of a law depriving a person of his property could be adjudged only under Article 31 and not under Article 19(1)(f). The rationale of the view was that Article 19(1)(f) "postulates the existence of property which can be enjoyed and over which rights can be exercised" because otherwise the reasonable restrictions contemplated by Article 19(5) could not be brought into play; Article 19(1)(f) dealt substantial and substantive rights and not with illusory phantoms of title, when every form of enjoyment which normally accompanied an interest in property was taken away leaving only the husk of title, Article 19(1)(f) was not attracted.\(^{164}\) If an acquisition law was valid under Article 31(2), the acquisition of property would be justified under the law, and once the property was acquired there was no property theft in respect of which Article 19(1)(f) could apply.

This view underwent a change in *K.K. Kochunni v. State of Madras case*.\(^ {165}\) The factual situation was that the petitioner was the holder of the Kavalappara Sthanam having extensive properties attached to it. These properties constituted an impartible estate in which the members of the family had no interest. The Madras Legislature enacted a law declaring that Sthanam property having certain characteristics would be deemed to be Trawad property.\(^ {166}\) The validity of the Act was challenged under Article 19(1)(f). The Supreme Court held that the Act by treaties Sthanam property, by a fiction of law, as Trawad property, deprived the Sthanees of their properties without compensation. The law was thus expropriatory in character and on its face stamped with unreasonableness. Also, no

\(^{166}\) 'Trawad' is a Marumakkathayam family based on matriarchal system which prevails on the West coast in the South India. The Trawad property is owned by all its members but is managed by the oldest male member.
public interest was served by the law. Thus, it was held bad under Article 19(1)(f) and was not saved by Article 19(5).\textsuperscript{167}

The Supreme Court explained the reasons to apply Article 19(1)(f) to deprivation of property falling under Article 31(c) as follows:

The Amendment of Article 31(2) by the Fourth Amendment of the Constitution in 1955 had changed the position. Before the amendment, Articles 31(1) and (2) were regarded as not mutually exclusive in scope and content, but as dealing with the same subject matter viz., acquisition or taking possession of property referred to in Article 31(2).

The ruling in \textit{Kochunni case} denoted a correct approach and became the accepted norm. The \textit{Kochunni case} view as a consequence of watering down the efficacy of Article 31 by the Fourth Amendment. Article 19(1)(f) and 31(1) both dealt with property and, therefore, in the very nature of things, they should have been treated as ‘supplementary’ and ‘co-ordinate’ to, and not ‘isolated’ from, each other.

A curious result of \textit{State of Bombay v. Bhanji Munji},\textsuperscript{168} ruling was that while the freedom of the Legislature to affect enjoyment and possession of property was regulated by Article 19(1)(f), and that to acquire and requisition property was controlled by Article 31(2), it could freely deprive a person of his property under 31(2). The \textit{Kochunni case} ruling meant that the legislative power to deprive a person of his property came to be controlled by Article 19(1) (f) and

\textsuperscript{167} Supra note 1 at 1277.
\textsuperscript{168} AIR 1955 SC 41.
the reasonableness of the law could be adjudged under Article 19(5).169

‘Deprivation’ does affect the right to hold, acquired possession of property. The biggest advantage of Article 19(1) (f) was that procedural norms of a law depriving a person of his property could be adjudged for their reasonableness, and the law could be declared void if it lacked proper procedural safeguards against the exercise of administrative power.170

*Kochunni case* represents a judicial attempt to interpret Fundamental Rights somewhat liberally, and restraints on these rights narrowly. Article 31(1) gave practically an unlimited right to a Legislature to deprive a person of his property, and so the court sought to invoke Article 19(1)(f) to impose some limitations on that power. In *Gopalan case*, the Supreme Court had refused to apply Article 19 to the area of preventive detention falling under Articles 21 and 22.171

*Bhanji Munji case* followed this approach and excluded the operation of Article 19(1)(f) from the area of Article 31(1). This approach denoted a literalistic, and not a liberal approach to the process of Constitutional interpretation. With the liberal approach adopted in *Kochunni case*, the court also came to adopt a similar approach to the relationship of Article 19 with Article 21 and 22, a matter which has already been discussed earlier.

*Kochunni case* did not extend Article 19(1)(f) to the area of acquisition and requisition covered by Article 31(2). *Bhanji Munji case* was a case on acquisition of property; *Kochunni case* dealt with deprivation and not with acquisition. Therefore, *Kochunni case* did

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169 Supra note 8 at 1276.
170 Ibid.
171 Ibid.
not ipso facto overrule *Bhanji Munji case*. This petition was reiterated in several judicial pronouncements.172

The Supreme Court sought to do away with this anomaly in the elaborated *Bank Nationalisation case*. Overruling its previous pronouncement, the court held that Article 19(1)(f) would apply to acquisition of property falling under Article 31(2) and therefore, an inquiry into the reasonableness of the procedural provisions of an acquisition law was not excluded. Thus, “if a tribunal is authorised by the Act to determine compensation of property compulsorily acquired without having the owner, the Act would be liable to be struck down under Article 19(1)(f). Thus, an acquisition law had to pass the test of procedural reasonableness. The challenge to an acquisition law under Article 19(1)(f) was limited to the question of procedural unreasonableness.173

This, no doubt, was a very justifiable, view to take. It was the culmination of the trend initiated by the court in *Kochunni case*. But, this view could not last very long. By the Twenty Fifth Constitutional Amendment, a new Clause, Article 31(2) (A) was added to say that nothing in Article 19(1)(f) “shall affect any law as is referred to in Article 31(2)”. The idea was to ensure that a law enacted to acquire any property by the Government would not be tested with reference to Article 19(1)(f). A law of acquisition was only to be adjudged under Article 31(2). But Article 19(1)(f) could still be invoked in case of deprivation

We can see that various laws included in the Ninth Schedule through various amendments, in which various Central and State laws were inserted in the Ninth Schedule, it becomes clear that abolition of Zamindari system was the main objective of Pt. Jawahar Lal Nehru

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172 *Id.* at 1277.

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i.e establishing a Socialistic pattern of society but after achieving the said objective through Ninth Schedule (Article 31B) the time of deterioration of the said objective started with the inclusion of various laws, which were not the land reforms in the Ninth Schedule, just with the malafide motive of immunizing those laws from the Judicial Review when they abridged the Fundamental Rights. The Constitutional Amendments made from time to time in the Ninth Schedule shows the change in the vision of the Parliamentarians from the Land reforms to the politics of votes.

As I quote Upendra Baxi, when he was on visit to Department of Laws, Panjab University, while answering a short question on the Ninth Schedule he replied “the very First Amendment of the American Constitution, but the First Amendment of the Indian Constitution took away the heart of the Indian Constitution”. So, with this he meant to point out the wrong use made by Parliamentarians of the Ninth Schedule.

The Ninth Schedule when included was justified according to situation of land holdings in the country. The Socialistic pattern was an applauding effort of the Jawahar Lal Nehru vision of India, but later the history shows the intention of the Parliamentarians who have for the sake of votes have brought various amendments in the Constitution. The laws which were included in the Ninth Schedule were inserted through various controversial amendments, some of them which were challenged in the court. The procedure was fine till it was done within the spirit of the Constitution. But when the Parliament and Executive tried to make our controlled Constitution into uncontrolled Constitution, the debate regarding the judicial supremacy over the Executive and the Legislature started which continues till date. The glaring example is the Thirty Ninth Constitutional Amendment 1975 in the time of Indira Gandhi.
Similarly like the Central laws, the States also passed certain laws in the Ninth Schedule under Article 31B, though President’s assent is required for passing laws. The most controversial State has been the Seventy Sixth Amendment Tamil Nadu (Scheduled Castes and Schedule Tribe's Reservation Act 1969) providing 69 % reservation. Whenever attempts are going to be made to break the balance of our controlled Constitution into uncontrolled Constitution, troubles were surely surface and the spirit of Constitution will suffer. Granville Austin has regarded the inclusion of land reforms in the Ninth Schedule as the exercise of police power by the Executive and whenever such attempts are made to surpass the natural rights (right to property also) the trouble in the Constitution will arise.

There was no problem with the Ninth Schedule when it was used for implementing the Directive Principles of State Policy keeping in mind the larger public interest. The Supreme Court upheld the First Amendment as a progressive legislation. Immunity should not be used to shield the invalid. The Directive Principles if implemented in their true spirit it will further help in the realisation of Fundamental Rights.