CHAPTER V

SCOPE OF JUDICIAL REVIEW TO THE NINTH SCHEDULE

Introduction

The laws added in the Ninth Schedule were for the implementation of the agrarian policy of the Government and therefore agrarian laws were saved in the Ninth Schedule to protect them from Article 13. As it was understood that Directive Principles in Part IV of the Constitution are to be implemented by the Government for social and economic development of the country, the Parliament created Ninth Schedule to immune laws from Fundamental Right to property in Part III. The laws added in the Ninth Schedule are added through the ‘Constitutional processes’ under Article 368 through various Constitutional amendments. The Constitution of India establishes three main organs of the State- the Legislature, the Executive and the Judiciary – defines their powers, delimits their jurisdictions, demarcates their responsibilities and regulates their relationships with each other and with the people. Like USA but unlike the United Kingdom, India has a written Constitution. The positions, powers and functions of each organ of the State, therefore, are only as ordained by the Constitution under its scheme of checks and balances. Each has to discharge its duties only within the domain assigned to it.

Talking about the Directive Principles of State Policy embodied in Part IV are a unique features of our Constitution. The basic inspiration for the Directive Principles chapter came from the concept of a welfare State. While seeking to protect the basic rights of the individual, the framers of the Constitution also wanted it to become an effective instrument for social revolution. The State shall implement Part IV of the Constitution for the common welfare of the people of the State. As
in *Minerva Mills v. Union of India*, the majority Judges insisted that Fundamental Rights occupy a unique place in the lives of civilised societies; they constitute the ‘ark’ of the Constitution. “. . . the Indian Constitution is founded on the bedrock of the balance between Part III and IV and establish the harmony between the two and not to give absolute primary to one over the other. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. Fundamental Rights and Directive Principles together constitute the core of the Indian Constitution and combine to form its conscience. Therefore we need to highlight the importance of Directive Principles in the realisation of Fundamental Rights.

In India, the High Court and the Supreme Court set up by the Constitution as parts of an Independent Judiciary, form a single integrated judicial structure with jurisdiction over all laws – Union, State, Civil, Criminal or Constitutional. Unlike the United States, we do not have separate Federal and State court systems. The entire Judiciary is one hierarchy of court. It not only adjudicates disputes and acts as the custodian of individual rights and freedoms but may from time to time need to interpret the Constitution and review legislation to determine its *vires vis-à-vis* the Constitution. The word of the Supreme Court is the final law of the land binding on all lower court unless its interpretation is reviewed or reversed by the Supreme Court itself or the law or the Constitution is suitably amended by the Parliament. The Supreme Court also functions as the arbiter of any disputes in regard to jurisdiction and distribution of powers between the Union and the States in the context of the federal structure *inter alia* powers of legislation divided between the Union Parliament and State Legislatures.

\[^1\] AIR 1980 SC 1787.
In a Parliamentary polity, the Executive also is part of the Legislature. It comes out of the Legislature, remains responsible to it and exercises powers of governance only on its behalf. Under the scheme of the Constitution of India, the Parliament is not Sovereign and the Supreme Court is not supreme except in its own domain. The Parliament and the Judiciary come into contact with each other in many ways. Their interface and inter-relationship, therefore, assumes greater significances.¹

Here I would like to quote Lord Denning who said⁴: “they say: it’s not for me to alter the law, let Parliament do that.” But I say, why wait for Parliament? They can’t ever correct the particular case. You’ve got to wait three or four years or whatever it is, but the particular person who suffered the injustice will never get it right.”

5.1 Constitution of the court by the Parliament

Parliament has the power to make laws regulating the Constitution, organisation, jurisdiction and powers of the court. It was laid down in the Constitution that the number of Judges than the Chief Justices would not be more than seven. The Parliament was, however, empowered to prescribe a larger number of Judges by Law (Article 124). Under this provision, it has been possible for Parliament to raise the number of Judges to 25.⁵

Parliament may by law:

1) Extend the jurisdiction of a High Court to or exclude the jurisdiction of a High Court, from any Union Territory;

2) Establish a common High Court for two or more States or for two or more States and a Union Territory; and

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¹ Id. at 5.
⁵ Supra note 2 at 5.
3) Constitute a High Court for a Union Territory or declare any court in any such territory to be a High Court for all or any of the purposes of the Constitution (Article 241).

5.2 Judicial Review and Due Process

In the British Parliamentary system, the Parliament is by tradition supposed to be supreme and Sovereign. The Parliament in United Kingdom consists of The Queen, the House of Commons, and the House of Lords. The Parliament can make or unmake any law and no law made by the Parliament can be questioned in any court of law. There are no limitations on its powers, at least in theory, in as much as there is no written Constitution and the Judiciary has no power of Judicial Review of legislation. In the United States System, the Supreme Court with its power of Judicial Review and of interpreting the Constitution has assumed supremacy; virtually no limits are recognised on the scope of Judicial Review and judicial pronouncements on the legality of legislation are final.6

In India, the Constitution has arrived at a middle course and a compromise between the British Sovereignty of Parliament and American judicial supremacy. We are governed by the Rule of Law and Judicial Review of administrative action is an essential part of Rule of Law. Courts in India are also endowed with powers of Judicial Review of legislation. Incorporation of a chapter on Fundamental Rights in the Constitution of India makes Judicial Review especially relevant. Article 12 guarantees Fundamental Rights against all State action and ‘State’ under this Article has been defined to include the Government and the Parliament of India and the Government and the Legislatures of each of the States and all Local or other authorities within the territory of India or under the control of the Government. Under Judicial Review if an Act of the Parliament is set aside by the Judiciary as ultra-vires or violative

6 Id. at 6.
of the Constitution, the Parliament can re-enact it after removing the defects from which it was set aside. Also, the Parliament may, within the limits of its constituent powers, amend the Constitution in such a manner that the law no longer remains unconstitutional (Article 368 of the Indian Constitution discussed in Chapter II).\(^7\)

The United States Constitution (Constitutional Amendments) provides that a man cannot be deprived of his right to liberty and property except according to due process of law. The due process of law gives wide scope to the Supreme Court to grant protection to the rights of its citizens. It can declare laws violative of these rights void not only on substantive grounds of being unlawful, but also on procedural grounds of being unreasonable. Our Supreme Court, while determining the Constitutionally of a law, however is expected to examine only the substantive question, i.e., whether the law is within the powers of the authority concerned or not. It is not expected to go into the question of its unreasonableness, suitability or policy implication.\(^8\)

In the Constituent Assembly, there was considerable discussion on the desirability or otherwise of incorporating in the Constitution the “due process of law” Clause. The founding fathers, after due deliberation, decided against adopting the American precedent and opted in favour of the formulation “in accordance with the procedure established by law”. However, the Supreme Court by its verdict (Maneka Gandhi \textit{v.} Union of India\(^9\)) has practically brought the due process Clause back into the Constitution. This goes against the basic scheme of Constitution under which Judiciary cannot make laws or amend the Constitution through any innovative or creative interpretation.

\(^7\) Ibid.
\(^8\) Ibid.
\(^9\) AIR 1978 SC 597.
5.2.1 Judicial Review in America

Chief Justice John Marshall’s opinion in the case of Marbury v. Madison,\textsuperscript{10} has pointed the importance of Judicial Review and its claim that the written Constitution is included within that law which it is “the province and duty of the judicial department to say what the law is”.\textsuperscript{11} The extent to which Marshall’s assertion reflected a shared agreement has yet to be conclusively determined, while powerful criticism of the Marbury’s case reasoning made over succeeding centuries stands unanswered and especially Alexander M. Bickel in his book a classic critique- ‘The least dangerous Branch’ has criticised Marbury’s case.

In America, discussion of Judicial Review started with William Blackstone, the leading legal authority in the Colonies and independent States. Blackstone within the English context as a defender of Parliamentary supremacy in the aftermath of the English Revolution and in opposition to older judicial claims to declare legislation void. English Common law Judges, most prominently Sir Edward Coke, had at one time claimed right to reject legislation contrary to common reason, but this claim was not widely maintained after the revolutionary settlement of 1688. By the time Blackstone’s commentaries appeared, support for judicial power over legislation was a distinctly minority position, and the commentaries constituted an unchallenged Statement of existing expectations.\textsuperscript{12}

During the times of emergence of doctrine of Judicial Review, it contained elements of positive law and natural law but was not a direct manifestation of either tradition. The prominent positive law feature of period and Judicial Review was its connection to a written

\textsuperscript{10} Marbury v. Madison, 5 U.S. (1Cr.) 37, 177 (1803).
\textsuperscript{12} Id. at 13.
Constitution. Its positive law side was bolstered by the conflict of laws analogy, its confinement to regular lawsuits, and its insistence that judicial enforcement of the Constitution was a necessary part of the Judiciary's common law responsibility to ordinary law. This period drew its main ideas from the natural law tradition.

5.2.2 Judicial Review and the claims involving the Property

As we are discussing the power of Judicial Review and its effects on the Ninth Schedule (discussed in Chapter III) of the Constitution of India, the claims involving the property were also witnessed in the west which involved the question of Judicial Review of the laws for the confiscation of the property by the State. In Bayard v. Singleton, the North Carolina court declared void a law that dispensed with trial by jury for claims involving property confiscated during the war. Although jury trial was explicitly protected in the North Carolina Constitution, the opinion did not quote or cite this provision directly. The relevant part of the opinion read: "That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by Jury". The court went on to discuss limited Government in general: "for that if the Legislature could take away the right, and require him to stand condemned in his property without a trial, it might with as such authority require his life to be taken away without trial by Jury, and that he should stand condemned to die, without the formality of any trial at all".

Marbury's case later opened next period in the evolution of Judicial Review, but it did so with a restatement of the earlier argument. In form, substance, and wording it repeated what had already received

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13 Id. at 65.
14 1 N.C.5, 7 (1787).
15 Supra note 11 at 67.
widespread support. It is thus not surprising that there was no particular response to *Marbury*’s assertion of judicial authority over unconstitutional acts.\(^{16}\)

In *Marbury*’s case, Marshall divided the issue of Judicial Review into its standard two parts. The first was “whether an act, repugnant to the Constitution, can become the law of the land”. The second inquiry, as stated in *Marbury*’s case, was, “Does [an act which is void] notwithstanding its invalidity, bind the court and oblige them to give it effect”?\(^{17}\)

5.2.3 Social and Economic rights relate to Democracy

As we see *Marbury v. Madison*, has given a very important doctrine, which has given our Indian Constitution a very sound foundation where the social, economic rights of the people are protected. In the Democratic pyramid, the Fundamental Rights which secure employment, housing, food, an adequate living standard, education and other needs are treated as constituting the essential foundation of civil society. The satisfaction of the basic human need to survive is a necessary platform if Democracy is to function. These same rights are also embodied as Directive Principles of State Policy in Part IV of the Constitution. Like Article 21 is a good example where Directive Principles are implemented as part of Fundamental Rights by the Supreme Court.

5.2.3.1 Does Democracy require private property?

Private property can thus be seen as a central institution of civil society and as a protection for political liberty. It does not follow, however, that every State intervention in private property rights should

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\(^{16}\) Id at 109.

\(^{17}\) Id at 110.
be resisted as a threat to individual freedom. The institution of private property is itself premised upon a socially determined and, in principle, be subject to legislative variation as circumstances themselves vary. In short, the use of property may be a legitimate concern of public policy. Although the principle of private property, therefore, is important to Democracy, it cannot be a natural or absolute right, but only on terms and within limits that are collectively agreed. The Ninth Schedule was added in the Constitution of India to bring the Land Reform Laws at the time when India had come out of the British Raj and Land holdings were continuing as from the times of British.

2.2.3.2 Is Democracy compatible with economic inequality?

This question cannot be answered with a simple ‘yes’ or ‘no’, but is a matter of degree. The greater the economic inequalities in a society, the more difficult it becomes to have effective political equality, since accumulations of wealth can be used as a significant resource to determine political outcomes. In the most extreme cases, the wealthy will see the votes of the poor as a potential threat to their interests, which justifies their manipulating or subverting the electoral process. On the other side, if the poor cannot see any prospect of improving their lot through Democratic means, they will not find Democracy worth supporting. Here it is not just a question of quality of Democracy, but of its sustainability in any form.

However, some degree of economic inequality may be both inevitable and justifiable in a market economy. The concern of democrats should be to minimize the political impact or significance of such inequalities as do occur. At one end of the scale there should be strict legislation: limiting the amount of money that can be spent on election campaigns by both parties and individual candidates; preventing concentrations of media ownership; and requiring the disclosure of sources of funding for parties and public campaigning of all kinds. At
the other end of the scale all Citizens should be guaranteed those minimum necessities of life that are the condition for the exercise of any effective Citizenship. Today if we see the politicians are indulging into politics of money for votes this is showing the vast inequalities which still persist in our country even after 64 years of independence. The right to property was repealed by the Forty Fourth Amendment Act 1978. After this Amendment the scope of Ninth Schedule has decreased but later it was used for putting those laws which were outside its main objective.

2.2.4 Constitutional Theory and Justification

The moot question is when the Parliament asserts that it exercises' the will of the people so, whatever law it makes it should not be challenged on the ground of violation of Part III of our Constitution because the Part IV of the Constitution is to be implemented in the welfare State. Under the Constitutionalism of our written Constitution all the organs of the State have to work under the system of checks and balances on their Separation of Powers. This is true that Part IV cannot completely override Part III of the Constitution. In Democracy Fundamental Rights of people are inalienable and at the same time Directives Principles have to be implemented in such a way that the larger public interest is fulfilled.

Here it will be useful to refer to the theory of justice propounded by the great 20th Century Rawls’s original thought is that equality, or a fair distribution of advantages, is to be addressed as a background matter by Constitutional and legal provisions that structure social institutions. While fair institutions will influence the life chances of everyone in society, they will leave individuals free to exercise their basic liberties as they see fit within this fair set of rules. To carry out this central idea, Rawls takes as the subject matter of Theory of Justice “the basic structure of society”, defined as “the way in which the major
social institutions fit together into one system, and how they assign Fundamental Rights and Duties and shape the division of advantages that arises through social cooperation”. Rawls’s suggestion is, in effect, that we should put all our effort into seeing to it that “the rules of the game” are fair. Once society has been organized around a set of fair rules, people can set about freely “playing” the game, without interference.

If we extend the Rawlsian philosophy of justice to the working of Indian Constitution we find there is no contradiction between individual rights and social justice. Fundamental Rights and Directive Principles are not at cross purposes rather in the larger design they are mutually complimentary to ensure individual freedom as well as social distribution of justice which is in line with Socialistic outlook of Indian Democracy.

A Constitutional theory justifies its prescription about controversial issues by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed upon principles to decide the cases or issues on which people disagree. This is the conception of justification given by John Rawls in *A Theory of Justice*.  

“Justification is argument addressed to those who disagree with us or to ourselves when we are of two kinds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded. Being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common.... The argument. . . proceed(s) from some consensus. This is the nature of justification”.

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So, it is important to have harmony between the ideals of Part IV and Part III of the Constitution.

2.2.5 Constitutional Legitimacy

The problem of Constitutional legitimacy is to establish why anyone should obey the command of a Constitutionally valid law. A law making system is legitimate if there is a prima facie duty to obey the laws it makes. Neither “consent of the governed” nor “benefits received” justifies obedience rather, a prima facie duty of obedience exists either (a) if there is actual unanimous consent to the jurisdiction of the law maker or, in the absence of consent, (b) if laws are made by procedures which assure that they are not unjust. In the absence of unanimous consent, a written Constitution should be addressed as one component of a law making system. To the extent a particular Constitution establishes law making procedures that adequately assure the justice of enacted laws; it is legitimate even if it has not been consented to by the people. This account of Constitutional legitimacy does not assume any particular theory of justice, but rather is intermediate between the consent of justice and the concept of legal validity.19

The legitimacy flows from the fact that “we the people” have consented to this Constitution, a view commonly referred to as the “consent of the governed “or” popular sovereignty”.20 So, when Parliament enjoys the will of the people then Judiciary also enjoys the will of the people too because both have derived their power from the people of India, as they are the ultimate source of our Constitution.

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20 Id. at 112.
5.3 State of Judiciary at the Time of Framing of Indian Constitution

If we trace back the history of the Supreme Court of India, the suggestion to set up a Supreme Court in India was contained in the Nehru Report of 1928: but in official thinking the idea of a Federal Court first took practical shape when, following three round table conference in 1930, 1931 and 1932, the British Government evolved a federal scheme of India’s Constitution. The white paper proposals of 1933 recommended the establishment of two courts at the centre. The Federal Court was to be the ultimate judicial tribunal for the interpretation of the Constitution as well as all questions concerning the respective sphere of the federal and provincial authorities and of the Indian States.21

The idea of setting up two court was, however, subsequently, given up and the Government of India Act of 1935 set up a single Federal court with original, appellate and advisory powers. The British Government exercised administrative control over the Federal court in several ways. All Judges were to be appointed by the Crown.22

Further, the Federal court was not a court of final jurisdiction and appeals could lie to the Privy Council in Britain. The position of the Supreme Court under the Constitution came up for consideration before the Constituent Assembly at a very early stage. Almost simultaneously with the appointment of the Union Constitution Committee, a special Committee was set up to consider and report on the Constitution and powers of the Supreme Court. This Committee consisted of S. Varadachariar, a former Judge of the Federal court, Alladi Krishnaswami Ayyar, and B.C. Mitter, K.M. Munshi (all three of them advocates of distinction) and B.N. Rau, the Constitutional Advisor. The

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22 Id. at 482.
Committee sent its report on May 21, 1947: its recommendations were mainly based on the provisions of the Act of 1935. A Supreme Court with jurisdiction to decide upon the Constitutional validity of Acts and laws should be regarded as a necessary implication of any Federal scheme; but this jurisdiction need not belong exclusively to the Supreme Court, and any such question of law might be permitted to be raised in any court. In other words, the Supreme Court was to have a final and appellate jurisdiction on questions relating to the Constitutional validity of laws.

The provision for Judicial Review was included in the Draft of Articles on the Fundamental Rights (March 11, 1947) submitted to the sub-committee on Fundamental Rights provided that: All existing laws in force inconsistent with the Fundamental Rights and duties shall be abrogated to abolish such inconsistency and further, no restriction on Fundamental Rights may be imposed unless in the manner provided by this chapter and unless it is general in character and applicable to all persons within the same class in the interest of public order, morality, health or general welfare, the correlative duty to respect the right of others, and national defence.\cite{23}

5.4 **Extent of Judicial Review in the Context of Amendments to the Ninth Schedule**

The question as to the extent of Judicial Review permissible in respect of Ninth Schedule laws in the light of the basic structure theory was propounded in the case of *Kesavanand Bharti v. State of Kerela* \cite{24}(discussed in detail in chapter V). In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution (Article 368 discussed in chapter III). The question was not about power to amend Part III after April 24, 1973. As per *Kesavanand*

\cite{24} AIR 1973 SC 1461.
Bharti case, the power to amend exists in the Parliament but it is subject to the limitations of doctrine of basic structure. The fact of violation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the basic structure doctrine has to apply.

In Kesavanand Bharti’s case, the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution. Kesavanand Bharti’s case laid down a principle as an axiom. It is Kesavanad Bharti’s case read with clarification of Justice H.R Khanna in Indira Gandhi v.Raj Narain case which takes us one step forward, namely, that Fundamental Rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with Article 16(4), 16(4A), 16(4B) etc. Kesavanand Bharti and Indira Gandhi’s cases have to be read together and if so read the position in law is that the basic structure as reflected in the above Articles provides a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

Since the power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a Constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals of the Constitution. Secularism is one such fundamental; equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Article 14 and 15 or abrogate or en bloc eliminate these Fundamental Rights. To further illustrate the point, it may be noted that the Parliament can make

25 AIR 1975 SC 2299.
26 Supra note 23 at 1.
additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure. The question can be looked at from yet another angle also. Can the Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious; Article 368 does not vest such a power in the Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in Kesavanand Bharti's case as a result of which secularism, separation of power, equality, etc. to cite a few examples would fall beyond the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the Rule of Law, secularism etc. would fail.

2.5 Analysis of Article 13

Article 13(1) declares all pre-Constitution laws void to the extent of their inconsistency with the Fundamental Rights enshrined in Part III. Article 13(2) enjoins the State not to make any law that contravenes the Fundamental Rights and declares such laws to be void to the extent of inconsistency. Article 13(3) of the Article defines 'laws' to include any ordinances, order, rule, regulations, etc. and 'laws in force' to include all the existing pre-Constitution laws. The Article thus provides for Judicial Review of all legislations in India whether past or present though Acts done before the commencement of the Constitution in contravention of the provision of any law which becomes void by virtue of Part III are not affected retrospectively.

The principles well established include:

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27 Ibid.
28 Ibid.
29 Supra note 23 at 462.
1) Fundamental Rights come into operation only with the commencement of the Constitution w.e.f. January 26, 1950. Inconsistency of existing laws under Article 13(1) cannot, therefore be retrospective.

2) Whether pre-Constitution or post-Constitution laws are void not in full but only to the extent of their being violative of Fundamental Rights.

3) A Constitution Amendment Act by removing the inconsistency law but would not apply to post-Constitution laws found to be in contravention of Part III and as such void ab initio.

4) Clause (4) of Article 13 makes it clear that the term “Law” in that Article does not cover Constitutional amendments made under Article 368 and therefore validity of a Constitutional amendment cannot be questioned on the ground of its being violative of Fundamental Rights unless a Fundamental Right is held to be part of the basic feature, of the Constitution.

2.6 Grounds of Challenge of Laws included in the Ninth Schedule

If we follow the history of the First Constitutional Amendment we will find that there were long standing commitments predating independence and the Constitution given by the nationalist movement in favour of land reforms, abolition of Zamindari etc. Almost every time an order for acquisition of land came up before the court, it was struck down mainly on the ground of differential treatment being accorded to landowners on the matters of the payment of compensation and that the rights to equality under Article 14 is violated, making it impossible to pursue the policy of land reforms. The High Court of Patna in
Kameshwar Singh v. State of Bihar, held that Bihar legislation to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved filed appeals before the Apex court. At the same time, certain Zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that the Parliament amended the Constitution for the first time and added Article 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they disregard the Fundamental Rights of the citizens. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen items all relating to land reforms laws, immunising these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13 inter alia, 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.

Prof. K.T. Shah, member of Constituent Assembly, opposed the creation of Ninth Schedule in order to "uphold the sanctity of the Supreme Court". He was not in opposition to the Ninth Schedule, but urged that the laws to be inserted in the Schedule only after it is consider by the Apex court on the reference of the President. But Prime Minister Jawahar Lal Nehru was unambiguous and definite in his argument stating that "millions wait and have been waiting for decades". He urged that petty legal arguments should not come in way of these millions.

Dr. B.R Ambedkar, the then law minister was more aggressive in his approach and explained to the house that the Irish law (from where

\[ ^{30} \text{AIR 1951 Patna 91.} \]
Ninth Schedule was borrowed) had appointed a separate board with the power to acquire land to break up holdings.

Therefore, it is quite clear that it was not the fear of the Judiciary striking down the land reforms that compelled the State as envisioned by Pt. Jawahar Lal Nehru to keep such laws outside the judicial purview, but it was the extraordinary amount of impatience with the attitude of opposing change by the Judiciary that forced them to do so.

5.6.1 Various major Challenges made to Ninth Schedule

There are only some Constitutional Amendments in the Ninth Schedule which were challenged and the challenge was on the grounds based on Part III of the Constitution. Those Amendments were as follows:

5.6.2 Curtailing the Fundamental Right to property in 1951

The first amendment in 1951 curtailed the Fundamental Right to property under Article 31, with the objective of implementing agrarian reform passed by the State Legislature by protecting them from Judicial Review. It added two new Articles 31A and 31B and the Ninth Schedule, abolition the Zamindari system, by making them unchallengeable in the court.

The first amendment was brought by Prime Minister Pt. Jawahar Lal Nehru Government to immunise the Zamindari abolitions land reforms from the Judicial Review because they were challenged, like the Bihar legislation was declared unconstitutional by Patna High Court on ground of Article 14 and the matter was before the Supreme Court regarding the validity of similar laws though the High Court of Allahabad and Nagpur had held similar laws valid.

The worst affected rights by these land reforms were right to property under Article 31, 19, 14. The basic trends of amendments has
been to immunize to some extent, State interferences with property
rights from challenge under Articles 14, 19, 31 as well as to seek to
exclude the question of compensation for acquisition or requisitioning of
property by the State from judicial purview.

In Shankari Prasad Singh v. Union of India, the first case on
amendability of the Constitution, the validity of the Constitution (First
Amendment) Act, 1951, 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.

Here was thus posed a conflict between Article 13 and 368. Adopting
the literal interpretation of the Constitution, the Supreme
Court upheld the validity of the First Amendment. The court rejected the
Contention and limited the scope of Article 13 by ruling that the word
‘law’ in Article 13 would not include within its compass a Constitution
amending law passed under Article 368. The court held that the terms of
Article 368 are perfectly general and empower Parliament to amend the
Constitution without any exception. The Fundamental Rights are not
excluded or immunized from the process of Constitutional amendment
under Article 368. These rights could not be invaded by legislative
organs by means of laws and rules made in exercise of legislative
powers, but they could certainly be curtailed, abridged or even nullified
by alterations in the Constitution itself in exercise of the constituent
power. Both Articles 13 and 368 are widely phrased and conflict in
operation with each other. To avoid the conflict, the principle of

31 AIR 1951 SC 458.
33 Id. at 1621.
harmonious construction should be applied. Accordingly, one of these Articles ought to be read as being controlled and qualified by the other. In the context of Article 13, it must be read subject to Article 368. Therefore, the word ‘law’ in Article 13 must be taken to refer to rules and regulation made in exercise of 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 368.34

The court thus disagreed with the view that the Fundamental Rights are inviolable and beyond the reach of the process of constituent amendment. The court, thus ruled that Article 13 refers to a ‘legislative’ law, i.e, an ordinary law made by Legislature, but not to a constituent law, i.e., a law made to amend the Constitution. The court thus held that Parliament could by following the ‘procedure’ laid down in Article 368 amend any Fundamental Right.35

2.6.3 Again amendment of Fundamental Right to property in 1964

The Seventeenth 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 immunised from Judicial Review.

In Sajjan Singh v. State of Rajasthan,36 the court was called upon to decide the following questions:

(1) Whether the amendment of the Constitution in so far as it purported to take away or abridged the Fundamental Rights was within the prohibition of Article 13(2); and

34 Ibid.
35 Ibid.
36 AIR 1965 SC 845.
Whether Articles 31A and 31B (as amended by the Seventeenth Amendment) sought to make changes to Articles 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 agreements was that the amendment in question reduced the area of Judicial Review (as under the Ninth Schedule many statutes had been immunised 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 last half of the States ought to have been secured for the amendment to be validly effectuated. Such an argument had also been raised in the Shankari Prasad Case but without success. The Supreme Court again rejected the agreement by a majority of 3 to 2. The majority ruled that the 'pith and substance' of the amendment was only to amend the Fundamental Right so as to help the State Legislatures in effectuating the policy of the agrarian reform.37

The conclusion of the Supreme Court in Shankari Prasad case as regards the relation between Article 13 and 368 was reiterated by the majority. It felt no hesitation in holding that the power of amending the Constitution conferred on Parliament under Article 368 could be exercised over each and every provision of the Constitution. The majority refused to accept the argument that Fundamental Rights were “eternal, inviolate, and beyond the reach of Article 368”.38 The minority consisting of Justice Hidayatullah and Justice Mudholkar, in separate judgments, expressed some reservations on the question whether Article 13 would not control Article 368? “I would require stronger reasons than those given in Shankari Prasad's case”, observed Justice Hidayatullah,

37 Supra note 32 at 1622.
38 Ibid.

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“to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the States”, because, “the Constitution gives so many assurances in Part III that it would be difficult to think that they were play things of a special majority”.

Justice Mudholkar, felt reluctant “to express a definite opinion on the question whether the word ‘law’ in Article 13(2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part III of the Constitution”. But Justice Mudholkar, argument was set in such broader frame. His basic argument was that every Constitution has certain fundamental features which could not be changed.39

In *I.C. Golak Nath v. State of Punjab*,40 again the Constitutional validity of the Constitution (Seventeenth Amendment) Act was challenged in a very vigorous and determined manner. The question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under Article 368 was raised again in *Golak Nath case* in 1967. Eleven Judges participated in the decision and they divided 6 to 5.

The majority now held, overruling the earlier cases of *Shankari Prasad and Sajjan Singh* that the Fundamental Rights were non-amendable through the Constitutional amending procedure set on in Article 368, while the Minority upheld that line of reasoning adopted by the court in the two earlier cases.41

The majority now took the position that the Fundamental Rights occupy a “transcendental” position in the Constitution. Overruling the

39 Ibid.
40 AIR 1967 SC 1693.
41 Supra note 32 at 1623.
position adopted by the court in *Shankari Prasad and Sajjan Singh*, it was now ruled that the term ‘law’ in a comprehensive sense would include Constitutional law as well. Article 13(2) gives an inclusive definition of ‘law’ which would take in even Constitutional law. The court formulated its position as follows:

"An amendment of the Constitution is law within the inclusive definition of law under Article 13(2) of the Constitution and as the entire scheme of the Constitution postulates the inviolability of Part III thereof; Article 368 shall not be construed as to destroy the structure of our Constitution".

Under Article 368, a Constitutional amendment is to be enacted by following a procedure which is very similar to the procedure for making laws. The fact that a larger majority, and in case of amendment of some Articles even ratification by State Legislature, are provided for, would not make the Constitutional amendment any the less a ‘law’. Therefore, the amendment made under Article 368 is ‘law’ and is subject to Article 13. The Constitution Amendment Act in question was thus held void inasmuch as it abridged the Fundamental Right. Thus, the majority ruled that the Fundamental Rights would fall outside the amendatory process if the amendment sought to abridge or take away any of these right.\(^{42}\)

At this stage, the five Judges took recourse to the doctrine of ‘prospective overruling’ because of two reasons. First, the power of Parliament to amend the Fundamental Rights and the First and the Seventeenth Amendments specifically, has been upheld previously by the body of legislation had been enacted bringing out an agrarian

\(^{42}\) *Ibid.*
revolution in India. This legislation was based on the premise that Parliament had authority to amend Fundamental Rights.\(^43\)

If the Supreme Court was now to give effect, to its view of non-amendability of Fundamental Rights with retrospective effect and rules to hold the Seventeenth Amendment void, it would affect the Constitutional validity of this legislation, introduce chaos and unsettle conditions in the country. Therefore, the present decision was not to invalidate the amendments made so far to the Fundamental Rights. But, in future, the Parliament would have no power to take away or abridge any of the Fundamental Rights.\(^44\)

The following four major propositions can be drawn from the majority opinion in *Golak Nath*.\(^45\)

1. The substantive powers to amend is not to be found in Article 368, the Article only contains the procedure to amend the Constitution;

2. A law made under Article 368 would be subject to Article 13(2) like any other law;

3. The word ‘amend’ envisaged only minor modification in the existing provisions but not any major alterations therein;

4. To amend the Fundamental Rights, a Constituent Assembly ought to be convened by the Parliament.

According to M.P. Jain:\(^46\)

What can, therefore, be said with some definitions is that Article 368 does not permit an entire rewriting of the Constitution. If ever that

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\(^{43}\) *Ibid.*

\(^{44}\) *Id.* at 1624.

\(^{45}\) *Id.* at 1625.

\(^{46}\) *Id.* at 1626.
is deemed necessary some other method will have to be thought of. What that method will be, is not clear at present. Even calling of a Constituent Assembly for the purpose, as has been suggested by the majority, has this logical flaw that such a body could be called only by the Parliament and if the source, or the parent body, viz., the Parliament, cannot do something by itself, can its creature, i.e., the Constituent Assembly, do the same? A law passed by the Parliament authorising the Constituent Assembly to rewrite the Constitution could plausibly be challenged on the ground of exercise delegation. Also how can the Assembly have a broader basis of franchise than the adult suffrage on which Parliament is elected?"

**Golak Nath case** raised an acute controversy in the country. One school of thought applauded the majority decision as a vindication of the Fundamental Rights, while the other School criticised it as creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society.47

**Golak Nath case** threw a great responsibility on the court for, if the Fundamental Rights were to be unamendable in a formal manner, then it would be for the court to so interpret the relevant Constitutional provisions as to cause minimum hindrance in the way of enactment of legislation designed to ameliorate the condition of the poor masses. In such a context, the institution of Judicial Review as a method of adapting and adjusting the Constitutional text to the contemporary socio-economic needs of the country would assume a far greater significance then it had ever commanded hitherto when the Fundamental Rights could have been formally amended with ease. That the court

47 Ibid.
could have coped with such a demand on them is very aptly illustrated by the history of the Judicial Review in the U.S.A.

5.6.4 Amendment of Article 13 and 368 in 1971

Member of Parliament Nath Pai introduced a private member’s bill in the Lok Sabha on April 7, 1967, for amending Article 368, so as to make it explicit that any Constitutional provision could be amended by following the procedure contained in Article 368. The proposed bill was justified as an assertion of the “supremacy of Parliament” which principle implied “the right and authority of Parliament to amend even the Fundamental Rights”.48

However, the bill was taken and criticised as “an affront to the dignity of Supreme Court” and as placing the Fundamental Rights at the “mercy of a transient majority in Parliament” and further also the bill if enacted would be challengeable in the court declaring it unconstitutional.49

In 1971, Congress won the general elections with huge majority in the Lok Sabha and wanted to undo the effect of Golaknath Nath case. According to Twenty Fourth Amendment 1971 was enacted by modifying Article 13 and 368.50

The following changes were made in Article 13 and 368:51

1) It was now clarified that Article 13 would not stand in the way of any Constitutional amendment made under Article 368. This was sought to be achieved by adding a Clause to Article 13 declaring that Article 13 shall not apply to any Constitutional amendment made under Article 368.

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48 Id. at 1621.
49 Ibid.
50 Ibid.
51 Ibid.
2) As a matter of abundant caution, a Clause was added to Article 368 declaring that Article 13 shall not apply to any Constitutional amendment made under Article 368.

3) The heading to Article 368 was changed from “procedure for amendment of the Constitution” to power of Parliament to amend the Constitution and procedure therefore”. In *Golak Nath’s case* the majority asserted by reference that Article 368 provided only the procedure for Constitutional amendment and did not confer the power. This was clarified in the amendment that Article 368 provides power of Constitutional Amendment and not merely the procedure.

4) In Article 368 a Clause added to Article 368 saying that the Parliament may in its exercise of its constituent power amend by way of addition, variation or repeals any provision of this Constitution in accordance with the procedure laid down in this Article.

5) In *Golak Nath’s case* the view was expressed that there was no difference between an ordinary law made under legislative process, and Constitutional amendment made under constituent power. To prove this point, it had been pointed out that the presidential power to assent, or not to assent, was similar in both cases – an ordinary law as well as a law passed under Article 368. With amendment it was clarified that once a Constitution Amendment Bill is passed by both Houses of the Parliament by the requisite majority in accordance with the procedure laid down in Article 368, the President would have no option but to give his assent to it.
Following the Bank's Nationalisation case, the Twenty-fifth Amendment, the following features were included:

1) The word "amount" was substituted for the word "compensation" in Article 31(2). This was done to remove any contention that the Government was bound to give adequate compensation for any property acquired by it.

2) Article 19(1)(f) was delinked from Article 31(2);

3) A new provision, Article 31C, was added to the Constitution saying:
   
i) That Articles 14, 19 and 31 would not apply to a law enacted to effectuate the policy underlying Articles 39(b) and (c), and

   ii) That a declaration in the law that it was enacted to give effect to the policy under Articles 39(b) and (c) would immunise the law from such a challenge in the court.

A State law could claim immunity from challenge only after receiving the assent of the President. The Twenty Fifth Amendment thus further diluted the right to property.

In case of Kesavanand Bharti v. State of Kerala, the Twenty Fourth Amendment, Twenty Fifth Amendment, Twenty Sixth Amendment and Twenty Ninth Amendment (Ninth Schedule) were challenged, though Twenty Sixth Amendment were not related to the Amendments in the Ninth Schedule – no law from the Ninth Schedule was challenged in these Amendments, but still it related to the question of basic structure with Fundamental Rights we need to understand the

52 AIR 1970 SC 564.
53 Supra note 24.

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grounds of Judicial Review of these amendments. The Twenty Sixth Amendment 1971 to get over the ruling in *Madhav Rao SclIndia v. Union of India*, this amendment was made which terminated the privileges and privy pursues of the ex-rulers of the former Indian States Article 363A. The Constitutional validity of this Amendment was challenged but the Supreme Court upheld the same in *Raghunath Roy v. Union of India*. The court ruled that this Amendment did not infringe any basic structure of the Constitution.

The Twenty Ninth Amendment 1972 inserted, two Kerala Acts dealing with land reforms in the Ninth Schedule to the Constitution. These Acts thus received the protection of Article 31B. These Acts were challenged in the *Kesavanand Bharti Case*.

The question of validity of these Amendments was challenged in the Supreme Court through on Article 32 writ petition in *Kesavanand Bharti v. State of Kerala*, by Swami Kesavanand Bharti, a Mutt Chief of Kerala. The matter was heard by a bench consisting of all the 13 Judges of the court because *Golak Nath’s case*, a decision by a bench of 11 Judges was under review.

Wide ranging arguments were advanced before the court for over 60 days both for and against the validity of the Amendments. Eleven opinions were delivered by the Judges on April 24, 1973.

1) The court now held that the power to amend the Constitution is to be found in Article 368 itself. It was emphasised that the “provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution.

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54 AIR 1971 SC 530.
55 AIR 1993 SC 1267.
56 Supra note 24.
57 Supra note 32 at 1629.
Justice Hegde and Justice Mukherjee, found it difficult to believe that the Constitution makers had left the important power to amend the Constitution hidden in Parliament’s residuary power. On this point, therefore, the views expressed in Shankari Prasad case and Sajjan Singh case were endorsed and the view expressed in Golaknath Nath case that the power to amend the Constitution was not to be found in Article 368 was overruled.

2) Further, the court recognised that there is a distinction between an ordinary law and a Constitutional law.

Justice Hegde and Justice Mukherjee, stated in this connection: “An examination of the various provisions of our Constitution shows that it has made a distinction between the ‘Constitution’ and ‘the law’. It was asserted that the Constitution makers did not use the expression “Law” in Article 13 as including “Constitutional law”. This would thus mean that Article 368 confers power to abridge a Fundamental Right or any other part of the Constitution. To this extent, therefore, Golak Nath’s case was now overruled.

3) Kesavananda Bharti’s case did not concede an unlimited amending power to Parliament under Article 368. The amending power was now subjected to one very significant qualification, viz., that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic or fundamental features of the Constitution. A Constitutional amendment which offends the basic structure of the Constitution is ultra vires.

4) Some of the features regarded by the court as fundamental and thus, non-amendable are:

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(i) Supremacy of the Constitution.

(ii) Republican and Democratic form of Government.

(iii) Secular character of the Constitution.

(iv) Separation of Powers between legislative, Executive and the Judiciary.

(v) Federal character of the Constitution.

5) This, therefore, means that while Parliament can amend any Constitutional provision by virtue of Article 368, such a power is not absolute and unlimited and the court can still go into the question whether or not an amendment destroys a fundamental or basic feature of the Constitution. If an amendment does so, it will be Constitutionally invalid. The 2/3 majority in Parliament may not represent majority of the votes of the people in the country.

6) What is a fundamental feature of the Constitution is a moot point. The list given above is not final. It is for the court to decide as and when a question arises whether a particular amendment of the Constitution affect any “basic” or “fundamental” feature of the Constitution or not. The question of basic features has to be considered in each case in the context of the concrete problem.

The ruling in this case has improved the formulation made in Golak Nath's case, in at least two significant respects:

i) It has been stated earlier that there are several other parts of the Constitution which are as important, if not more, as the Fundamental Rights, but Golak Nath’s case formulation only confined itself to
Fundamental Rights and did not cover these parts. This gap has been filled by *Kesavananda Bharti's case* by holding that all ‘basic’ features of the Constitution are non-amendable.

ii) *Golak Nath's case* made all Fundamental Rights as non-amendable. This was too rigid a formulation. *Kesavananda Bharti's case* introduces some flexibility in this respect. Not all Fundamental Rights in bloc are now to be regarded as non-amendable as constituting the “basic” features of the Constitution.

According to *Kesavananda Bharti case*, even a Fundamental Right can be amended or altered provided the basic structure of the Constitution is not damaged in any way. It is for the court to decide from case to case as to which Fundamental Right is to be treated as a ‘basic’ feature. The right of property has not been treated as such and so the Fundamental Right to property has been abrogated.

Theoretically, *Kesavananda Bharti's case* is, therefore, a more satisfactory formulation as regards the amendability of the Constitution than *Golak Nath's case* which gave primacy to only one part, and not to other parts, of the Constitution.

7) *Kesavananda Bharti's case* also answers the questions left unanswered in *Golak Nath's case*, namely, can Parliament under Article 368, rewrite the entire Constitution and bring in a new Constitution? The answer to the question is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.
The immediate application of the Kesavananda Bharti's case principle as regards the amendability of the Constitution was made to assess the Constitutional validity of the Twenty-Fourth and Twenty-Fifth amendments. The entire Twenty-Fourth Amendment was held valid. From one point of view, overruling of Golak Nath's case restored the status quo ante making the amendment unnecessary and restoring the power of amending the Fundamental Rights to the constituent body. As some Judges pointed out that the Twenty-Fourth amendment made explicit what was already implicit in the unamended Article 368. Parliament could amend a Fundamental Right subject to, however, to the overall restrictions of non-amendability of a basic feature of the Constitution.

As regards the Twenty-fifth amendment, it was upheld subject to the following qualifications:

1) Although ‘amount’ was not the same concept as ‘compensation’, and while the court could not go into the question of adequacy of ‘amount’ payable for property acquired or requisitioned, yet the ‘amount’ could not be ‘illusory’ or ‘arbitrary’. The ‘amount’ need not be the market value of the property acquired, but it should still have some reasonable relationship with the value of the property in question. Thus, a limited Judicial Review of the amount payable for property acquired was still possible.

2) The non-application of Article 19(1) (f) to a law enacted under Article 31(2) was held to be Constitutionality valid. In a way, the amendment only restored the status quo ante before Golak Nath's case when the Supreme Court had regarded Article 31(2) and 91(1)(f) as mutually exclusive.

3) The first part of Article 31C was upheld chiefly on the basis that it identified a limited class of legislation and exempted
it from the operation of Articles 14, 19 and 31. Hence no delegation of amending power was required. But the second proviso of Article 31C was held to be invalid. The purport of this ruling is that while a law enacted to implement Articles 39(b) and 39(c) may not be challenged under Articles 14, 19 and 31, nevertheless, the court shall have the power to go into the question whether the impugned law does in fact achieve the objectives inherent in Articles 39(b) and (c) or not.

4) A legislative declaration to this effect cannot be conclusive. No Legislature by its own declaration can make a law challenged proof. When a law is challenged the court will have the power to consider whether the law is question can reasonably be described as one to give effect to the policy of the State towards the said objectives.

The Twenty Ninth Amendment was held to be valid which included the land reforms, i.e. Kerala Land Reforms Amendment Act, 1969 and Kerala Land Reforms Amendment Act, 1971. As these laws were included in the Ninth Schedule serving the purpose for which this Schedule was inserted in the Constitution.

The Twenty Sixth Amendment was left to be determined by a Constitution Bench of five Judges. This Act was again challenged but the Supreme Court upheld the same in Raghunath Rao v. Union of India.\textsuperscript{56} The court ruled that Twenty Sixth Amendment did not infringe any basic structure or essential feature of the Constitution. It was basically to get over the Supreme Court ruling in Madhav Rao ScIndia v. \textsuperscript{58}

\textsuperscript{56} AIR 1993 SC 1267.
Union of India. The Constitution (Twenty Sixth Amendment) Act was enacted in 1971. By this amendment, the anomaly of having ‘rulers’ in a Democratic setup was done away with. The amendment terminated the privileges and privy purses of the ex-rulers of the former Indian States. Article 291 provides payment of privy purses, and Article 362 personal rights, privileges and dignities of the princes were omitted. Article 363A abolishing the institution of rule and privy purses payable to them, was added to the Constitution.

5.6.5 Amendment of Article 329 relating to the election of Prime Minister Indira Gandhi

Next case related to the Judicial Review of the Ninth Schedule was Indira Gandhi v. Raj Narain, in which the most controversial the Thirty Ninth Amendment of 1975 was challenged. In this the Supreme Court applied Kesavananda Bharti’s case ruling regarding the non-amendability of the basic features of the Constitution. In June 1975, the Allahabad High Court had set aside the election of Prime Minister Mrs. Indira Gandhi to the Lok Sabha on the ground of alleged corrupt practices. During the pendency of the appeal in the Supreme Court, the Constitution (Thirty-Ninth Amendment) Act, 1975 was passed which inserted Article 329A.

This amendment sought to do three things:

One, to withdraw the election of the Prime Minister and a few other Union officials from the scope of the ordinary judicial process; two, more specifically, to void the High Court decision declaring Indira Gandhi’s election to the Lok Sabha as void; and three, to exclude the Supreme Court’s jurisdiction to hear any appeal. Clause 4 of the Amendment was challenged as destroying the basic feature of the

59 AIR 1971 530.
60 Supra note 25.
61 Supra note 24.
62 Supra note 32 at 1632.
Constitution insofar as it constituted a gross interference with the judicial process. This Clause wiped out the High Court judgment, but even the election petition and the law relating thereto. The constituent power had discharged a judicial function in deciding the election dispute against the Prime Minister and in doing this it had followed no procedure and applied no law. 63

The Supreme Court upheld the contention and declared Clause 4 as unconstitutional. The first part of Clause 4 was regarded to violate three "essential features" of the Constitution. Justice Mathew, said "it destroyed an essential Democratic feature of the Constitution, viz., the resolution of an election dispute "by ascertaining the adjudicative facts and applying the relevant can for determining the real representative of the people" and further, "if Article 329(b) envisages the resolution of an election dispute by judicial process by a petition presented to an authority as the appropriate Legislature may by law provide, a Constitutional amendment cannot dispense with the requirement without damaging an essential feature of Democracy". Democracy could function only when there are free and fair elections. This was vitiated by the amendment in question. 64

Justice Chandrachud said, "Clause 4 violated the principle of Separation of Powers to the extent incorporated in the Constitution viz., a purely judicial function being exercised by the Legislature and also opined that 'equality of status and opportunity', being an "essential feature" of the Constitution, the same was being violated by Clause 4, as there was no rational reason for creating a privileged regime for the election of the Prime Minister. The court took exception to the voiding of a judicial pronouncement and declaring it ineffective by the second

63 Ibid.
64 Ibid.
part of Clause 4; a judicial decision by itself could not, however, be
voided by Parliament.65

A more substantial ground against the proposed amendment was
that the decision of a specific election dispute was a judicial function.
When the constituent body declared that the election of the Prime
Minister would not be void, it discharged a judicial function. Justice
Mathew emphasised”, the resolution of an election dispute by the
amending body could not be regarded as ‘law’. Article 329A Clause (4)
and (5) States that election before the Constitution Thirty Ninth
Amendment Act, 1975 shall continue to be valid in all respects
irrespective of any findings and it shall not deemed to be void and
disposal of pending appeal shall be according to the amended Sections.66

Chief Justice Ray, emphasised that so far as the validation of the
election in the instant case was without applying any law, the principle
of Rule of Law, which was a basic feature of the Constitution, was
offended. The constituent body can exercise judicial power but it has to
apply some law for the purpose.67

Justice Khanna stated: “To put a stamp of validity on the election
of a candidate by saying that the challenge to such a election would be
valid and immune from any challenge runs counter to accepted norms of
free and fair elections in all Democratic countries” and another point
which emerged out of various opinions of Judges was that the principle
of the ‘basic feature’ was applicable only to a Constitutional amendment
and not to an ordinary legislation.68

Chief Justice Ray stated: “The theory of basic structure is an
exercise in imponderables basic structures or basic features which are
indefinable. The legislative entries are the fields of legislation. The pith

65 Id. at 1633.
66 Ibid.
67 Ibid.
68 Ibid.
and substance doctrine has been applied in order to find out legislative competency and eliminate encroachment on legislative entries. If the theory of basic structures or basic features is applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be an encroachment on the Separation of Powers".69 According to M.P. Jain this argument of the Judges seems to be illogical. If an amendment of the Constitution (which is a higher law made in the exercise of the constituent power) cannot affect the basic features of the Constitution, then it stands to reason as to how a simple law (which is of a lower order as made in the exercise of the legislative power) can be allowed to affect the basic features of the Constitution.70 It was also stated by several Judges in Indira Nehru Gandhi case that Judicial Review was not a basic feature of the Constitution and that a Constitutional amendment could exclude Judicial Review of a matter. The same is true of the principle of equality embodied in Articles 14, 15 and 16. But these propositions have been overruled. Both Judicial Review as well as equality are regarded as the basic features of the Constitution.71

5.6.6 Later Developments

In Minerva Mills v. Union of India,72 the issue of “Basic structure” was again considered by the Supreme Court. The court again reiterated the doctrine that under Article 368, Parliament cannot so amend the Constitution as to damage the basic or essential features of the Constitution and destroy its basic structure (discussed in detail in Chapter IV).

69  Id. at 1634.
70  Ibid.
71  Ibid.
72  AIR 1980 SC 1789.
In the instant case, the petition was filed in the Supreme Court challenging the taking over of the management of the Mill under the Sick Textile Undertaking (Nationalisation) Act, 1974, and an order made under Section 18A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the Constitutional validity of Clauses (4) and (5) of Article 368, introduced by Section 55 of the Forty Second Amendment. If these Clauses were held valid then the petitioners could not challenge the validity of the Thirty Ninth Amendment which had placed the Nationalisation Act, 1974, in the Ninth Schedule. The Section 55 of the Constitution (Forty-second Amendment) Act, 1976, inserted sub Section (4) and (5) in Article 368. This was held to be beyond the amending power of the Parliament and void for it removed all limitations on the power of the Parliament to amend the Constitution and confer a power on the Parliament to amend Constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these Clauses was to remove the limitations imposed on the Parliament’s power to amend the Constitution in *Kesavananda Bharti’s Case*.  

The court stated in this connection:

Our Constitution is founded as a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, their duty to pronounce upon the validity of laws.  

Depriving the court of the power of Judicial Review will mean making Fundamental Rights “a mere adornment”, as they will be rights without remedies. A ‘controlled’ Constitution will become ‘uncontrolled’. This very amendment sought to demolish the very pillars on which the Preamble rests by empowering the Parliament to exercise...
its constituent power without any limitation whatever. This Clause even empowered Parliament to “repeal the provisions of the Constitution”. Parliament can thus abrogate Democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a Democracy by other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals, “the power to destroy is not a power to amend”.75

The Forty Second Amendment also amended the Preamble. By this amendment, ‘Sovereign Democratic Republic’ becomes a ‘Sovereign Socialist Secular Democratic Republic’ and the resolution to promote the ‘Unity of the Nation’ was elevated into a promise to promote the ‘Unity and Integrity of the Nation’. No exception could be taken to this Amendment, as it furnishes “the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution”.

Section 4 of the Forty Second Amendment amended Article 31C as well. As already stated, the unamended Article 31C was upheld in Kesavananda Bharti case up to an extent and was valid. But this amendment vastly expanded the scope of Article 31C and this was now declared to be invalid as beyond the amending power of Parliament since it destroyed the basic or essential features of the Constitution, insofar as it totally excluded a challenge in a court to any law on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by, Article 14 or 19, if the law was for effectuating any of the Directive Principles.76

75 Ibid.
76 Id. at 1638.
The Majority of Judges in Minerva Mills’s case insisted that Fundamental Rights occupy a unique place in the lives of civilised societies; they constitute the ‘ark’ of the Constitution. “. . . the Indian Constitution is founded on the bedrock of the balance between Part III and IV and establish the harmony between the two and not to give absolute primary to one over the other. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. Fundamental Rights and Directive Principle together constitute the core of the Indian Constitution and combine to form its conscience.

In the minority judgement view, Justice Bhagwati agreed with the majority in holding amendments to Article 368 as invalid and unconstitutional on the ground of damaging the basic structure of the Constitution. In his view, Clause (4) of Article 368 was unconstitutional as the consequence of Judicial Review of Constitutional amendments would be to enlarge the amending power of Parliament contrary to the decision in Kesavananda Bharti case and destroy the basic structure of the Constitution. Clause (5) could not remove the doubt which did not exist, and so it was outside the amending power of Parliament. The two Clauses (4) & (5) were interlinked.77

Justice Bhagwati failed to appreciate “how Parliament, which has only a limited power of amendment and which cannot alter the basic structure of the Constitution, can expand the power of amendment so as to confer upon itself the power to repeal or abrogate the Constitution or to damage or destroy its basic structure; or to convert it into an absolute and unlimited power”. Justice Bhagwati explained, “Judicial Review of the Constitutional amendments is a cardinal principle of our Constitution that no one however highly placed and no authority however lofty can claim to be the sold judge of its powers and the

77 Ibid.
Constitution or whether its action is within the confines of such power laid down by the Constitution. The Judiciary is the interpreter of the Constitution and to the Judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the Judiciary to uphold the Constitution values and to enforce the Constitutional limitations. That is the essence of Rule of Law...”.

Further, the amendment to Article 31C was held valid by Justice Bhagwati, subject to the gloss put by him thereon. He argued that where protection was claimed for a statute under the amended Article 31C, the court would first determine whether there is a “real and substantial connection” between the law and Directive Principle and that the predominant object of the law is to give effect to such Directive Principle. If the answer to this question turns out to be ‘yes’, the court would then consider which provisions of the law are basically and essentially necessary for effectuating the Directive Principle and only such provisions would be protected under Article 31C. If the court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that though seemingly a part the general design of the main provisions of the statute, its dominant objective is to achieve an unauthorised purpose, it would not be protected under Article 31C. In this formulation, the court would have discharged a much more overt policy making role which the court do not usually relish.

Justice Bhagwati’s observation is:

It is possible that in a given case, even an abridgment of a Fundamental Right may involve violation of the basic structure. It would

78 Id at 1639.
79 Ibid.
all depend on the nature of the Fundamental Right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic value of the Constitution. Take for example, right to life and personal liberty enshrined in Article 21. This stands on an altogether different footing from other Fundamental Rights. I do not wish to express any definite opinions, but I may point out that if this fundamental right is violated by any legislation, it may be difficult to sustain a Constitutional amendment which seeks to protect such legislation against challenge under Article 21.

In the case of *Waman Rao v. Union of India,* the Supreme Court considered the Constitutional validity of the Maharashtra Agricultural Lands (ceiling on holdings) Act, 1961 (discussed in chapter 5). The Act imposed ceiling on agricultural holdings in the State. As the Act had been placed in the Ninth Schedule, the Constitutional validity of Articles 31A, 31B and the unamended Article 31C (as it existed before the Forty Second Amendment) was also challenged on the ground of damaging the “basic structure” of the Constitution. The proposition that Parliament cannot, under Article 368, so amend the Constitution as to destroy its basic features was again reiterated and applied by the Supreme Court in *Waman Rao’s case.* The case ruled that First and the Fourth Amendment Acts, introduced in 1951 and 1955 did not damage any basic structure of the Constitution and were thus valid and Constitutional being within the Constitutional power of the Parliament. The First Amendment was aimed at removing social and economic disparities in the agricultural sector.

The first amendment introduced Article 31A into the Constitution with retrospective effect as well as Article 31B. The Fourth Amendment amended the First amendment. Article 31A (1) obliterates Articles 14,

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80 AIR 1981 SC 271.
19 and 31 totally and completely for the laws falling within its scope. In this connection, the court stated:

... Every case in which the protection of a Fundamental Right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution.

About Article 31A the court said:

... If Article 31A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually deflected and that by the First amendment, the edifice was not impaired but strengthened.\(^\text{81}\)

The First and Fourth Amendments, according to the court, “were made so closely on the heels of the Constitution that they ought indeed to be considered as a part and parcel of the Constitution itself”. These Amendments were passed to effectuate Article 39 Clause (b) and Clause (c). The court concluded that the First and Fourth Amendments strengthened rather than weakened the basic structure of the Constitution. They made the ideal of equal justice a living truth. The First Amendment aimed at removing social and economic disparities and it, therefore did not damage or destroy the basic structure of the Constitution.

Article 31B contains a device for saving laws from challenge on the ground of violation of Fundamental Rights. Article 31B is to be read along with the Ninth Schedule. Article 13(2) of the Constitution invalidates a law inconsistent with a Fundamental Right. Article 31B extends a protective umbrella to such a law if it is included in the Ninth

\(^{81}\) AIR 1981 SC 283-284.
Schedule. Article 31B is, in substance and reality, a Constitutional device employed to protect State laws from being declared void under Article 13(2). Parliament can insert a State law in the Ninth Schedule by passing a Constitutional amendment under Article 368.82

The court declared in Waman Rao’s case that all Acts and Regulations included into the Ninth Schedule till the landmark case of Kesavananda Bharti case (April 24, 1973) will receive the full protection of Article 31B. Since the Ninth Schedule is a part of the Constitution, no additions or alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. Therefore, the Acts and Regulations included in the Ninth Schedule after Kesavananda Bharti case (April 24, 1973) will not receive the protection of Article 31B for the plain reason that in the face of the Kesavananda Bharti judgment, there is no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various Constitutional amendments by which additions were made to the Ninth Schedule on or after April 24, 1973 will be held valid only if they do not damage or destroy the basic structure of the Constitution.83

These laws would not receive the protection of Article 31B ipso facto. Each law has to be examined individually for determining whether the Constitutional amendments, by which it has been, put in the Ninth Schedule damages or destroys the basic structure of the Constitution in any manner. If however any such Act is protected by Article 31A or 31C (as it stood prior to the Forty Second Amendment) then the Act will be valid.84

Article 31C as it stood prior to the Forty Second amendment made in 1976 is valid to the extent its Constitutionality has been upheld in

82 Supra note 32 at 1640.
83 Ibid.
84 Ibid.
Kesavananda Bharti case. Laws passed truly and bona fide for giving effect to the Directive Principles in Clauses (b) and (c) of Article 39 will fortify that structure”. The court expressed a hope that Parliament would utilise to the maximum its potential to pass laws genuinely and truly related to the principles contained in Clause (b) and (c) of Article 39.\(^8\)

However, in *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*,\(^8\) the Supreme Court had dissented from *Minerva Mills case* as regards the validity of Article 31C as amended by the Forty Second Amendment. But the Sanjeev coke’s case ruling is more in the nature of an obiter dicta as the Act in question pertained to Articles 39(b) and (c) and could be held valid under the original Article 31C as held valid in *Kesavananda Bharti’s case*.\(^8\)

In the case of *I.R. Coelho v. State of Tamil Nadu*,\(^8\) the Constitution (Thirty Fourth Amendment) Act, and the Constitution (Sixty-Sixth Amendment) Act inserted the Janman Act and the West Bengal Land Holding Revenue Act, 1979 in its entirely in the Ninth Schedule. These insertions were challenged before a five Judges bench on two Counts:

1. Judicial Review is a basic structure of the Constitution and to insert in the Ninth Schedule an Act which or part of which has been struck down as unconstitutional in exercise of the power of Judicial Review is to destroy or damage the basic structure of the Constitution.

2. To insert in the Ninth Schedule after April 24, 1973, an Act which, or part of which has been struck down as being

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\(^8\) *Ibid.*

\(^8\) AIR 1983 SC 239.

\(^8\) *Supra* note 32 at 1640.

\(^8\) AIR 2007 SC 881.
The Supreme Court has held that if the validity of any Ninth Schedule law has already been upheld by this court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law is held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after April 24, 1973, such a violation infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying there under may be argued that in 2007 there is no threat to the private property rights as the country has shifted its stand from Socialism to new capitalism and that the goals have shifted from equal distribution of wealth to accumulation of wealth by the Nation through the individuals, organisations and corporations, for economic growth without compromising. We refer to what Prime Minister Nehru said in a debate in Parliament on May 18, 1951:

The question of land reform is under Article 13(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 Bihar High Court held that view, but the Allahabad and Nagpur High Court held a contrary view. There is confusion and doubt. As 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 repealed appeals in the court are dangerous to the State, from the security point of view, from the food production point of view, and from the individual point of view, whether it is that of the Zamindar or the tenant or any intermediary.89

There was no lack of conservatives who opposed the Ninth Schedule Prof. K.T. Shah a member of the Constituent Assembly, appealed against it in order to “uphold the sanctity of the Supreme Court”, and urged the Government to validate laws to be placed under the Ninth Schedule after the Supreme Court considered them on a reference by the President. But Prime Minister Nehru was categorical. He replied to the debates: “Millions wait and have been waiting for decades. Are we to submit to things and wait till some great resolution comes to change the condition of things?” And the people who talk about mailing do not know what is striving the hearts of those millions outside.90

5.6.7 Fundamental Rights: Test Constitutionality

In the various landmark judgments which were the result of challenge of the Constitutional amendments mentioned above were primarily based on the question of violation of Fundamental Rights. In the case of Shankari Prasad v. Union of India,91 Sajjan Singh v. State of Rajasthan,92 Golaknath’s case93 and the most importantly Kesavananda

90 Ibid.
91 Supra note 31.
92 AIR 1965 SC 933.
93 AIR 1967 SC 1643.
In all these cases the Constitutional validity of Article 31 has been recognised, directly or indirectly.

The insertion of Article 31A, 31B, 31C and the Ninth Schedule were related to the Fundamental Rights under Articles 14, 19, 31. So, the basic points of challenge were based on these Fundamental Rights which questioned the Parliament about its power of Constitutional amendment. Basic points involved were like:

1. Whether Article 31A(1) transgressed power of Constitutional amendment?
2. Whether Article 31A(1) give protection from challenge on ground of violation of Fundamental Rights?
3. Whether Ninth Schedule can be challenged on ground of violation of Fundamental Rights?
4. Whether the Parliament under Article 368 has unlimited power to amend Constitution?
5. Whether Parliament can prohibit Judicial Review or transgress the basic structure of the Constitution?
6. Whether the Directive Principles can have supremacy over Fundamental Rights or basic structure?

5.7 Relationship between Directive Principles and Fundamental Rights: possibility of Conflict and issue of Superiority

Fundamental Rights incorporated in Part III and the Directive Principles in Part IV form an organic unit. They were divided into two parts for the sake of convenience, because it was thought that the Directive Principles by their very nature cannot be made justiciable through court. It was not easy for the framers of the Constitution to

\[94\text{ Supra note 24.}\]
classify certain rights as Fundamental Rights and others as Directive Principles. The Sapru Committee found the task difficult and left the same to the Constitution making body. At one stage, the Constituent Assembly placed the duty of the State to provide compulsory primary education to its citizens in Part III and the provisions relating to equality in Part IV. This illustrates the difficulty in drawing the line between the Fundamental Rights and Constitution deals with the area of individual freedom and the extent to which State can restrain the freedom and Part IV deals with the positive duties cast upon the State to attain the ideals set out in the Preamble to the Constitution.

It may be observed that the declaration made in Part IV of the Constitution under the head ‘Directive Principles of State Policy’ are in many cases of a wider importance than the declarations made in part III as ‘ Fundamental Rights’. Hence, the question of priority in case of conflict between the two classes of provisions may easily arise.

As we have discussed a number of cases in the earlier part of this chapter, in which the decision of the Supreme Court since independence related with the question of priority between Directive Principles and Fundamental Rights. Hence, it is apt here to make a review of relationship between Fundamental Rights and the Directive Principles in the perspective of various court decisions and Constitutional amendments meant to establish the priority of the Directive Principles. The whole story can be divided into the following five stages:

1. First stage 1950-1966: Directive Principles as subsidiary or subordinate to Fundamental Rights:

   During the initial period of the working of the Constitution, the trend of judicial pronouncements showed emphasis on the aspect of justiciability or otherwise of the

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Fundamental Rights. The Directive Principles were accorded a more subsidiary and subordinate position than was contemplated by the founding fathers of the Constitution. The court enunciated the principle that in the event of a direct conflict between individual rights and social necessities, the social good was preferable only if the individual’s Fundamental Rights were not immediately infringed. The basic approach of the court was that the Directive Principles of State Policy are subordinate to the Fundamental Rights.

2. Second stage 1972-1971: Fundamental Rights are sacrosanct:

In this period, the judgment of the Supreme Court in the *Golak Nath’s Case*96 is historical. The majority of the Judges declared that the first and the Seventeenth Amendment Acts abridged the scope of the Fundamental Rights and were, therefore, void under Article 13(2) of the Constitution. The implication of the majority judgment in *Golak Nath’s case* is that any amendment of Part III could be made only in so far as it did not take away or abridge any of the rights conferred by that part. The majority of the Judges’ did not indicate as to what would happen when Parts III and IV of the Constitution came into conflict with Part III. Thus, after this judgment of the Supreme Court, the Fundamental Rights could not be amended even for the implementation of the Directive Principles which according to Article 37 are fundamental in governance of the country. Supreme Court put more emphasis on the individual’s rights than on social good. Justice Hidayatullah concluded his

judgment with remarks: “it cannot be conceived that in following the Directive Principles, the Fundamental Rights can be ignored. If it is attempted, the action is capable of being struck down”.

3. Third stage 1972-1975: Fundamental Rights can be amended to implement Directive Principles:

To overcome the difficulties created by *Golaknath and Bank Nationalisation case*, Twenty Fourth and Twenty Fifth Amendments to the Constitution were made in December 1971. By the Twenty Fourth Amendment 1971 it was declared that the Parliament has power to amend any provision of the Constitution, including those contained in Part III. The Amendment became necessary in order to give effect to the Directive Principles and for the attainment of the objectives set out in the Preamble to the Constitution. The Constitution Twenty Fifth Amendment Act, 1971 was adopted with a view to surmount the difficulties placed in the way of giving effect to the Directive Principles by the interpretation of the Supreme Court of Article 31 of the Constitution in *Bank Nationalisation case* regarding the word ‘compensation at the market price’. In that case, the court held that the Constitution guarantees right to compensation, that is, the equivalent in money of the property compulsorily acquired. Thus, in effect, the adequacy of compensation and the relevancy of the principles laid down by the Legislature for determining the amount of compensation virtually became justiciable since the court could go into the question whether the amount paid to the owner of the property was reasonable as compensation for loss of property. The court also held that
a law which seeks to acquire or requisition for property for a public purpose should satisfy the requirements of Article 19(1)(f) of the Constitution. By the Amendment the word ‘compensation’ in Article 31(2) was replaced by the word ‘amount’. It was also clarified that Article 19(1)(f) shall not apply to any law relating to acquisition or requisitioning of property for public purpose. The amendment also introduced a new Article 31(c) to the Constitution which provides that if any law is passed to give effect to the Directive Principles contained in Clauses (b) and (c) of Article 39 and contains a declaration to that effect, such law shall not be deemed to be void on the ground that it takes away or abridges any of the rights contained in Article 14, 19 or 31 and shall not give effect to those principles. As we have discussed earlier in detail these amendments, they were challenged in the Keasavanada Bharti’s case and the Supreme Court declared Twenty Fourth Amendment as valid, first part of Article 31C added by Twenty Fifth Amendment was held valid. The court held that Parliament’s amending power is limited. Parliament cannot in the exercise of its amending power, alter the basic structure or framework of the Constitution and further the court’s jurisdiction cannot be ousted as is sought to be done by Article 31C. In this case it has been expressly held that the right to property is not a part of the basic structure of the Constitution and therefore any amendment can be made to the Constitution in total disregard of the right to property.

In 1976, in the period of emergency, the Parliament passed the controversial Forty Second Constitutional Amendment Act. The Act inter alia gave preponderance to the Directive Principles of State Policy over the Fundamental Rights. Notwithstanding, the decision of the Supreme Court in *Kesavananda Bharti case*, the Forty Second Amendment amended Article 31(c) and Fundamental Rights guaranteed by Articles 14, 19 and 31 were subordinated to all the Directive Principles of State Policy mentioned in Part IV. This was a fundamental change in the Constitution because it has completely changed the relationship between Fundamental Rights and Directive Principles.

5. Fifth stage 1980-2009: Superiority of Fundamental Rights:

The Forty Second Amendment has provided superior position to the Directive Principles. It stated that no law passed to give effect to all or any of the Directive Principles of the State policy enumerated in Part IV of the Constitution could be challenged in any court even if it infringed Articles 14, 19 and 31 provisions dealing with the right to equality, right to seven freedoms and right to property. The blanket manner in which the Directive Principles were given precedence over the Fundamental Rights was criticised. Therefore, the Janata Government made an attempt to restore the balance that had been upset in this respect. The Forty Fifth Constitution Amendment Bill (1978) sought to restore the Constitutional position as it existed before the emergency with regard to the Directive Principles. But due to the Congress dominance in the Rajya Sabha, it could not be carried out.
In *Minerva Mills case* some of the provisions of the Forty Second Amendment were challenged in the Supreme Court. While leaving untouched the validity of the substantive part of Article 31C as originally enacted, the Supreme Court in its judgment stuck down Section 4 of the Forty Second Amendment Act which in effect provided that all laws which have a nexus with any Directive Principles of State Policy in Part IV of the Constitution could with impunity ride roughshod over the Fundamental Rights conferred by Articles 14 and 19. The Supreme Court held that to abrogate the Fundamental Rights which purporting to give effect to the Directive Principles is to destroy one of the essential features of the Constitution.

After studying all these stages, it is clear that Part III and Part IV apart from the question of their balance has often resulted into the controversy regarding the Separation of Powers between the Executive, the Legislature and the Judiciary. In our Constitution we have system of checks and balance over the three organs of the State. So, Judiciary has been the watchdog of the Part III of the Constitution. Therefore such issues arise when these rights are infringed by the other two organs of the State.

If we see the Part IV of the Constitution even though non-justifiable, the Directive Principles have thus far guided the Union and the State Legislatures in enacting social reform legislation, the court’s have cited them in support of their interpretation of Constitutional provisions and the Planning Commissions have accepted them useful guidelines for determining their approach to national reconstruction and rejuvenation. Some of the important directives relate to promotion of educational and economic interests of Schedule Castes, Schedule Tribes and Other Weaker Sections (Article 46); duty of the State to raise the level of nutrition and the standard of living and to improve public health (Article 47); organisation of village Panchayats (Article 40);
separation of Judiciary from the Executive (Article 50); Uniform Civil Code (Article 44); protection of national monuments (Article 49); promotion of international peace and security, international relations (Article 51). There are many other Directive Principles which have been realised as Fundamental Rights like free and compulsory education Article 21A, right of healthy environment is in Article 21, free legal aid is in Article 21, reservation for backward classes Article 15, abolition of untouchability Article 17 are included in part III. These rights were interpreted by the court because the State failed to provide such governance to the people. They came to the Judiciary when they were suffering due to the neglect of the State in implementation of these Directive Principles and then the court interpreted these as Fundamental Rights.

A distinction is sought to be made between what may be called ‘positive rights’ and ‘negative rights’. Broadly speaking, while Part III deals with areas of individual freedom and the extent to which the State can restrain it, Part IV deals with positive duties cast upon the State to attain the ideal of social and economic justice. Even among the Fundamental Rights, however there are some positive injunctions which seek to protect the interests of the society and the rights of the poor citizens from encroachment by entrenched Sections. Thus, Article 17 abolishes untouchability and makes its practice in any form an offence punishable by law. Article 15 inter alia provides that no citizen shall be discriminated against in use of public places like shops, wells, roads, eating houses etc. On account of his religious, race, caste, sex or place of birth. Article 23 prohibits another great social evil that the Fundamental Rights of the citizens do not degenerate into liberties of the few against the interests of the many. If the State implements the Directive Principles effectively all the discriminations which still exist in the society even after having these Fundamental Rights, will surely be a true realisation of Part III of the Constitution. Many directives have
been enforced after being made Fundamental Rights. To remove such evils from society the Parliament should have freedom to make such laws which are for true realisation of welfare State. They can be protected in the Ninth Schedule only if they are of larger public good.

As discussed in the earlier chapters that the power of Judicial Review in our written Constitution is one of the most important features of our Constitution and it cannot be abrogated by any law passed by the Parliament, even for the implementation of Directive Principles of State Policy.

After discussing the developments in the Ninth Schedule it is clear that the purpose of its addition in the Constitution was served when the Zamindari system was abolished. If we say the Parliament has the ultimate power of people in their hands because they represent the people in the Parliament then it will become little unreasonable because no power can be exercised absolutely. Every organ of the State in Democracy should be accountable to the people. Ultimately, no institution, however supreme, is above the Constitution. Neither of the three the Executive, the Legislature and the Judiciary – can arrogate to itself a position superior to the collective Sovereign will of the people to which they are and must at all times remain totally responsible and accountable for the discharge of their duties. No power within or outside the country- not even the Supreme Court – can prevent the people of India from bringing about any desirable reforms if at any time, in exercise of their Sovereign powers, they decide to do so.

It can be very well see that the fundamental questions have been discussed by the Supreme Court from time to time whenever question of Fundamental Rights was raised. Starting with the First Amendment relating to Agrarian reforms, which included the Ninth Schedule and Articles 31A, 31B, 31C in the Constitution started the debate. This was basically done to abolish Zamindari system and implement Land Reform.
Laws which violated Articles 14, 19, 31 to give effect to Directive Principles in Article 39(b),(c) and so they were included in the Ninth Schedule to make them immune from challenge on the ground of violation of Fundamental Rights.

Now in the case of *I.R. Coelho v. State of Tamil Nadu*, the Constitution Bench observed according to *Kesavananda Bharti, Minerva Mills and Waman Rao cases*, the contentions which arose were: firstly whether it is permissible to make Ninth Schedule immune for Judicial Review. Secondly, whether basic structure test applies to Ninth Schedule. Thirdly, whether Ninth Schedule laws can be challenged on ground of violation of Fundamental Rights.

In reply, the Constitution Bench, upheld the 'Basic structure Doctrine' and applied the power of Judicial Review to the laws included in the Ninth Schedule and laid down the underlying principles of Articles 14, 19, 21. The court asserted that the Ninth Schedule cannot be made immune from Judicial Review because the power of the Judicial Review is part of the basic structure of the Constitution.

Therefore, it any amendment of the Constitution transgress the boundaries of the limitations which are imposed by the Constitution will be declared *ultra vires* through Article 32, so, the Ninth Schedule being part of the Constitution has to comply with the structure within the Constitution.

At last, the 'Basic structure Doctrine' is applied to the laws included in the Ninth Schedule on the touchstone of Articles 14, 19 and 21 of the Constitution. Since the basic structure includes Fundamental Rights, so if a law infringes the essence of any of the Fundamental Rights or any other aspect of basic structure then it will be struck down. It will not be to the nature of law which will be considered but the effect

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97 *Supra* note 88 at 861-893.
of such law on Fundamental Rights shall be considered to judge its validity i.e. the essence of rights test shall be applied. Chief Justice, Y.K. Sabharwal said that if the validity of Ninth Schedule law Supreme Court (in its earlier judgments) it would not be open to challenge such law again on the principles declared by this judgement. However, if a law is held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule of after April 24, 1973, such a violation of infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying there under.

The external inspiration for Ninth Schedule came from Ireland, where in the Irish Constitution stated that the exercise of the right on land should be regulated by the principles of social justices. Further, Dr. B.R. Ambedkar, as the law minister explained to the House, the Irish law had appointed a separate board with the power to acquire land, to break up holdings, to equalise land and to make uneconomic holdings economic ones by taking land from a neighbouring owner, and the right to assign compensation was given to this board. Dr. B.R Ambedkar underlined the point that there was no judicial authority to interpret the action of this board and there was no appeal against the board’s decision. “Some people took appeals to the court, but they held that no appeals lay with any court”.

The Supreme Court, at last in the *I.R. Coelho’s case,*98 has made clear that the Ninth Schedule is no doubt part of the Constitution but if the laws included in it violate the Fundamental Rights on touchstone of Articles 14, 19, 21 then that law shall be violating the “essence of Rights test” and hence shall be *ultra vires*.

So, the creation of the Ninth Schedule was for the implementation of the Directive Principles of State Policy as in Article 39. It is right to

extent of the laws which were for the common good and welfare of the landless people. These laws are held valid by the court. The right to property was made legal right. So far as the welfare of the people is concerned the laws which are for the welfare of the people should be protected in Ninth Schedule. The Parliament should have the freedom of making such laws but in exercise of such power the ‘larger public good’ should be kept in mind.

It is agreed that objective of Ninth Schedule is justified so far if it does not violates the “Rights test” because Parliament cannot be allowed to change the permanent character of the Constitution. The implementation of the important Directives in Part IV by the State will lead to a social and economic welfare State, which will ultimately lead to the realisation of Part III in true sense.