I.R. Coelho Vs. State of Tamil Nadu & Ors [2007] Insc 31 (11 January 2007)

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[With WP (C) Nos.242 of 1988, 751 of 1990, CA Nos.6045 & 6046 of 2002, WP (C) No.408/03, SLP (C) Nos.14182, 14245, 14248, 14249, 26879, 14946, 14947, 26880, 26881, 14949, 26882, 14950, 26883, 14965, 26884, 14993, 15020, 26885, 15022, 15029, 14940 & 26886 of 2004, WP (C) Nos.454, 473 & 259 of 1994, WP (C) No.238 of 1995 and WP (C) No.35 of 1996] Y.K. Sabharwal, CJI.

In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short, the 'Constitution') to the laws added to the Ninth Schedule by amendments made after 24th April, 1973. The relevance of this date is for the reason that on this date judgment in His Holiness Kesavananda Bharati, Sripadagalvaru v. State of Kerala & Anr. [(1973) 4 SCC 225] was pronounced

propounding the doctrine of Basic Structure of the Constitution to test the validity of constitutional amendments.

Re : Order of Reference The order of reference made more than seven years ago by a Constitution Bench of Five Judges is reported in I.R.

Coelho (Dead) by LRs. v. State of Tamil Nadu [(1999) 7 SCC 580] (14.9.1999) . The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act), insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by this Court in Balmadies Plantations Ltd. & Anr. v. State of Tamil Nadu [(1972) 2 SCC 133] because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act, in its entirety, was inserted in the Ninth Schedule. By the Constitution (Sixty-sixth Amendment) Act, the West Bengal Land Holding Revenue Act, 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject matter of challenge before a Five Judge Bench.

The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been

struck down, could not have been validly inserted in the Ninth Schedule.

In the referral order, the Constitution Bench observed that, according to Waman Rao & Ors. v. Union of India & Ors. [(1981) 2 SCC 362], amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decision in Minerva Mills Ltd. & Ors. v. Union of India & Ors. [(1980) 3 SCC 625)], Maharao Sahib Shri Bhim Singhji v. Union of India & Ors. [(1981) 1 SCC 166] were also noted and it was observed that the judgment in Waman Rao needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine Judges. This is how these matters have been placed before us.

Broad Question The fundamental question is whether on and after 24th April, 1973 when basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court.

Development of the Law First, we may consider, in brief, the factual background of framing of the Constitution and notice the developments that have taken place almost since inception in regard to interpretation of some of Articles of the Constitution.

The Constitution was framed after an in depth study of manifold challenges and problems including that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State's welfare obligations in Part-IV. The Constitutions of various countries including that of United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The Fundamental Rights Chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitutions of most of the other countries, the Supreme Court was vested with original jurisdiction as contained in Article 32.

The High Court of Patna in Kameshwar v. State of Bihar [AIR 1951 Patna 91] held that a Bihar legislation relating 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 had filed appeals before the Supreme 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 Parliament amended the Constitution by adding Articles 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 contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunizing 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.

Articles 31A and 31B read as under :

31.A "Saving of laws providing for acquisition of estates, etc.

Notwithstanding anything contained in article 13, no law providing for:-

the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

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

the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 :

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent :

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

In this article:-

the expression "estate", shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include

any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;

any land held under ryotwary settlement;

any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub- proprietor, under-proprietor, tenure- holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

31B. Validation of certain Acts and Regulations.:-

Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force." The Constitutional validity of the First Amendment was upheld in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar [(1952) SCR 89].

The main object of the amendment was to fully secure the constitutional validity of Zamindari Abolition Laws in general

and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. Upholding the validity of the amendment, it was held in Sankari Prasad that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of constituent power. The Constitution Bench held that to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament.

The Constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in Sajjan Singh v. State of Rajasthan [(1965) 1 SCR 933] the law declared in Sankari Prasad was reiterated. It was noted that Articles 31A and 31B were added to the Constitution realizing that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that the genesis of the amendment made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, it would be clear that the Parliament is

seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy viz. a policy in which the party in power believes. The Court further noted that the impugned act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. It noted that the object of the Act was to amend the relevant Articles in Part III which confer Fundamental Rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provision of clause (b) of that proviso. The Court, however, noted, that if the effect of the amendment made in the Fundamental Rights on Article 226 is direct and not incidental and if in significant order, different considerations may perhaps arise.

Justice Hidayattulah, and Justice J.R. Mudholkar, concurred with the opinion of Chief Justice Gajendragadkar upholding the amendment but, at the same time, expressed reservations about the effect of possible future amendments on Fundamental Rights and basic structure of the Constitution. Justice Mudholkar questioned that "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?" In I.C. Golak Nath & Ors. v. State of Punjab & Anr.

[(1967) 2 SCR 762] a Bench of 11 Judges considered the correctness of the view that had been taken in Sankari Prasad and Sajjan Singh (supra). By majority of six to five, these decisions were overruled. It was held that the constitutional amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void. It was declared that the Parliament will have no power from the date of the decision (27th February, 1967) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

Soon after Golak Nath's case, the Constitution (24th Amendment) Act, 1971, the Constitution (25th Amendment) Act, Act, 1971, the Constitution (26th Amendment) Act, 1971 and the Constitution (29th Amendment) Act, 1972 were passed.

By Constitution (24th Amendment) Act, 1971, Article 13 was amended and after clause (3), the following clause was inserted as Article 13(4) :

"13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368." Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.

The Constitution (25th Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring

or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31B of the Constitution, Article 31C was inserted, namely :

"31C.Saving of laws giving effect to certain directive principles.

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy :

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent." The Constitution (26th Amendment) Act, 1971 omitted from Constitution Articles 291 (Privy Purses) and Article 362 (rights and privileges of Rulers of Indian States) and inserted Article 363A after Article 363 providing that recognition granted to Rulers of Indian States shall cease and privy purses be abolished.

The Constitution (29th Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala

Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65 Kerala Land Reforms Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66 Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).

These amendments were challenged in Kesavananda Bharati's case. The decision in Kesavananda Bharati's case was rendered on 24th April, 1973 by a 13 Judges Bench and by majority of seven to six Golak Nath's case was overruled. The majority opinion held that Article 368 did not enable the Parliament to alter the basic structure or framework of the Constitution. The Constitution (24th Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31C was also held to be valid. However, the second part of Article 31C that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" was declared unconstitutional. The Constitution 29th Amendment was held valid. The validity of the 26th Amendment was left to be determined by a Constitution Bench of five Judges.

The majority opinion did not accept the unlimited power of the Parliament to amend the Constitution and instead held that Article 368 has implied limitations. Article 368 does not enable the Parliament to alter the basic structure or framework of the Constitution.

Another important development took place in June, 1975, when the Allahabad High Court set aside the election of the

then Prime Minister Mrs. Indira Gandhi to the fifth Lok Sabha on the ground of alleged corrupt practices. Pending appeal against the High Court judgment before the Supreme Court, the Constitution (39th Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329A after Article 329. Sub-clauses (4) and (5) of Article 329A read as under :

"No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4)." Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the

Ninth Schedule. Many of the Entries inserted were unconnected with land reforms.

In Smt. Indira Nehru Gandhi v. Raj Narain [1975 Supp. (1) SCC 1] the aforesaid clauses were struck down by holding them to be violative of the basic structure of the Constitution.

About two weeks before the Constitution Bench rendered decision in Indira Gandhi's case, internal emergency was proclaimed in the country. During the emergency from 26th June, 1975 to March, 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal emergency, Parliament passed Constitution (40th Amendment) Act, 1976.

By clause (3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted. Many of these entries were unrelated to land reforms.

Article 368 was amended by the Constitution (42nd Amendment) Act, 1976. It, inter alia, inserted by Section 55 of the Amendment Act, in Article 368, after clause (3), the following clauses (4) and (5) :

"368(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." After the end of internal emergency, the Constitution (44th Amendment) Act, 1978 was passed. Section 2, inter alia, omitted sub-clauses (f) of Article 19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300A in the Constitution.

Articles 14, 19 and 21 became enforceable after the end of emergency. The Parliament also took steps to protect fundamental rights that had been infringed during emergency.

The Maintenance of Internal Security Act, 1971 and the Prevention of Publication of Objectionable Matter Act, 1976 which had been placed in the Ninth Schedule were repealed.

The Constitution (44th Amendment) Act also amended Article 359 of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Articles 20 and 21 could not be suspended.

During emergency, the fundamental rights were read even more restrictively as interpreted by majority in Additional District Magistrate, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521]. The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.

The fundamental rights received enlarged judicial interpretation in the post-emergency period. Article 21 which was given strict textual meaning in A.K Gopalan v. The State of Madras [1950 SCR 88] interpreting the words "according to procedure established by law" to mean only enacted law, received enlarged interpretation in Menaka Gandhi v. Union of India [(1978) 1 SCC 248]. A.K. Gopalan was no longer good law. In Menaka Gandhi a Bench of Seven Judges held that the procedure established by law in Article 21 had to be reasonable and not violative of Article 14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights.

In Minerva Mills case (supra), the Court struck down clauses (4) and (5) and Article 368 finding that they violated the basic structure of the Constitution.

The next decision to be noted is that of Waman Rao (supra). The developments that had taken place post- Kesavananda Bharati's case have been noticed in this decision.

In Bhim Singhji (supra), challenge was made to the validity of Urban Land (Ceiling and Regulation) Act, 1976 which had been inserted in the Ninth Schedule after Kesavananda Bharati's case. The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Articles 14 and 19(1)(f) of Part III. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and as already noted it was

omitted therefrom only in 1978 and made instead only a legal right under Article 300A.

It was held in L. Chandra Kumar v. Union of India & Ors. [(1997) 3 SCC 261] that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of Constitution of India.

Constitutional Amendment of Ninth Schedule It would be convenient to note at one place, various constitutional amendments which added/omitted various Acts/provisions in Ninth Schedule from Item No.1 to 284. It is as under :

"Amendment Acts/Provisions added 1st Amendment (1951) 1-13 4th Amendment (1955) 14-20 17th Amendment (1964) 21-64 29th Amendment (1971) 65-66 34th Amendment (1974) 67-86 39th Amendment (1975) 87-124 40th Amendment (1976) 125-188 47th Amendment (1984) 189-202 66th Amendment (1990) 203-257 76th Amendment (1994) 257A 78th Amendment (1995) 258-284 Omission In 1978 item 92 (Internal Security Act) was repealed by Parliamentary Act.

In 1977 item 130 (Prevention of Publication of Objectionable Matter) was repealed.

In 1978 the 44th amendment omitted items 87 (The Representation of People Act), 92 and 130." Many additions are unrelated to land reforms.

The question is as to the scope of challenge to Ninth Schedule laws after 24th April, 1973 Article 32 The significance of jurisdiction conferred on this Court by Article 32 is described by Dr. B.R. Ambedkar as follows "most important Article without which this Constitution would be nullity" Further, it has been described as "the very soul of the Constitution and the very heart of it".

Reference may also be made to the opinion of Chief Justice Patanjali Sastri in State of Madras v. V.G. Row [1952 SCR 597] to the following effect :

"This is especially true as regards the "fundamental rights" as to which the Supreme Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute." The jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme are settled propositions of Indian jurisprudence [see Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. v. Union of India and Ors.[(1981) 1 SCC 568], State of Rajasthan v.

Union of India & Ors. [(1977) 3 SCC 592], M. Krishna Swami v. Union of India & Ors. [(1992) 4 SCC 605], Daryao & Ors. v. The State of U.P. & Ors. [(1962) 1 SCR 574] and L. Chandra Kumar (supra).

In S.R. Bommai & Ors. v. Union of India & Ors.

[(1994) 3 SCC 1] it was reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution and that its actions are within the confines of the powers given by the Constitution.

It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution.

Principles of Construction The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon

which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

Common Law Constitutionalism The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

According to Dr. Amartya Sen, the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.

According to Lord Steyn, judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law.

Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where

Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

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

Granville Austin has been extensively quoted and relied on in Minerva Mills. Chief Justice Chandrachud observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure.

Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable" and "primordial". They constitute the ark of the Constitution. (Kesavananda Bharati P.991, P.999). The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Part III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy the essential element of the basic structure of the Constitution. [Emphasis supplied] (Para 57). Further observes the learned Chief Justice, that the matters have to be decided not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The observations made in the context of Article 31C have equal and full force for deciding the questions in these matters. Again the observations made in Para 70 are very relevant for our purposes. It has been observed that if by a Constitutional Amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain

unimpaired. But if the protection of those Articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity. These observations are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32, stand excluded without any yardstick.

The developments made in the field of interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine to find out whether there has been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance.

The observations of Justice Bhagwati in Minerva Mills case show how clause (4) of Article 368 would result in enlarging the amending power of the Parliament contrary to dictum in Kesavananda Bharati's case. The learned Judge has said in Paragraph 85 that :

"So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in Kesavananda Bharati's case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it

would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in Kesavananda Bharati case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers." In Minerva Mills while striking down the enlargement of Article 31C through 42nd Amendemnt which had replaced the words "of or any of the principles laid down in Part IV" with "the principles specified in clause (b) or clause (c) and Article 39", Justice Chandrachud said :

"Section 4 of the Constitution (42nd Amendment) Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution." In Indira Gandhi's case, for the first time the challenge to the constitutional amendment was not in respect of the rights to property or social welfare, the challenge was with reference to an electoral law. Analysing this decision, H.M.

Seervai in Constitutional Law of India (Fourth Edition) says that "the judgment in the election case break new ground, which has important effects on Kesavananda Bharati's case itself (Para 30.18). Further the author says that "No one can now write on the amending power, without taking into account the effect of the Election case". (Para 30.19). The author then goes on to clarify the meaning of certain concepts 'constituent power', 'Rigid' (controlled), or 'flexible' (uncontrolled) constitution, 'primary power', and 'derivative power'.

The distinction is drawn by the author between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law making power and a power to amend the Constitution, a derivative power derived from the Constitution and subject to the limitations imposed by the Constitution. No provision of the Constitution framed in exercise of plenary law making power can be ultra vires because there is no touch-stone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it.

For determining whether a particular feature of the Constitution is part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of

the Constitution as a fundamental instrument of the country's governance (Chief Justice Chandrachud in Indira Gandhi's case).

The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years.

It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.

This transition from a set of independent, narrow rights to broad checks on state power is demonstrated by a series of cases that have been decided by this Court. In The State of Bombay v. Bhanji Munji & Anr. [(1955) 1 SCR 777] relying on the ratio of Gopalan it was held that Article 31 was independent of Article 19(1)(f). However, it was in Rustom Cavasjee Cooper v. Union of India [(1970) 3 SCR 530] (popularly

known as Bank Nationalization case) the view point of Gopalan was seriously disapproved. While rendering this decision, the focus of the Court was on the actual impairment caused by the law, rather than the literal validity of the law. This view was reflective of the decision taken in the case of Sakal Papers (P) Ltd. & Ors. v. The Union of India [(1962) 3 SCR 842] where the court was faced with the validity of certain legislative measures regarding the control of newspapers and whether it amounted to infringement of Article 19(1)(a). While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in Bank Nationalization case. The Court examined the relation between Article 19(1)(f) and Article 13 and held that they were not mutually exclusive. The ratio of Gopalan was not approved.

Views taken in Bank Nationalization case has been reiterated in number of cases (see Sambhu Nath Sarkar v.

The State of West Bengal & Ors. [(1974) 1 SCR 1], Haradhan Saha & Anr. v. The State of West Bengal & Ors. [(1975) 1 SCR 778] and Khudiram Das v. The State of West Bengal & Ors. [(1975) 2 SCR 832] and finally the landmark judgment in the case of Maneka Gandhi (supra).

Relying upon Cooper's case it was said that Article 19(1) and 21 are not mutually exclusive. The Court observed in Maneka Gandhi's case:

"The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article.

This proposition can no longer be disputed after the decisions in R. C.

Cooper's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. Now, if a law depriving a person of ''personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given, situation, ex hypothesi it must also' be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in A. K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it "relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, The State of West Bengal v. Anwar Ali Sarkar [1952] S.C.R. 284 and Kathi Raning Rawat v. The State of Saurashtra [1952] S.C.R. 435]"

[emphasis supplied] The decision also stressed on the application of Article 14 to a law under Article 21 and stated that even principles of natural justice be incorporated in such a test. It was held:

"In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive;

otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21".

[emphasis supplied] The above position was also reiterated by Krishna Iyer J., as follows :

"The Gopalan (supra) verdict, with the cocooning of Article 22 into a self contained code, has suffered supersession at the hands of R. C.

Cooper(1) By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietariat have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cyclorarmic review starts from Gopalan, moves on to In re : Kerala Education Bill and then on to All India Bank Employees Union, next to Sakal Newspapers, crowning in Cooper [1973] 3 S.C.R. 530 and followed by Bennet Coleman and Sambu Nath Sarkar. Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions.

Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached." [emphasis supplied] It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee

against excesses by state authorities. Thus post-Maneka Gandhi's case it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of state power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

The approach in the interpretation of fundamental rights has been evidenced in a recent case M. Nagaraj & Ors. v.

Union of India & Ors. [(2006) 8 SCC 212] in which the Court noted:

"This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated.

Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In Sakal Papers (P) Ltd. v. Union of India and Ors. [AIR 1967 SC 305] this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in A.K. Gopalan v. State of Madras. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After

three decades, the Supreme Court overruled its previous decision in A.K. Gopalan and held in its landmark judgment in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees".

[Emphasis supplied] The abrogation or abridgment of the fundamental rights under Chapter III have, therefore, to be examined on broad interpretation, the narrow interpretation of fundamental rights chapter is a thing of past. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure.

Seperation of Powers The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in Kesavananda Bharati's case by the majority. Later, it was reiterated in Indira Gandhi's case. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.

In fact, it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In Federalist 47, 48, and 51 James Madison details how a separation of powers preserves liberty and prevents tyranny. In Federalist 47, Madison discusses Montesquieu's treatment of the separation of powers in the Spirit of Laws (Boox XI, Ch. 6).

There Montesquieu writes, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . Again, there is no liberty, if the judicial power be not separated from the legislative and executive." Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of government should not be entirely in the hands of another department of government.

Alexander Hamilton in Federalist 78 remarks on the importance of the independence of the judiciary to preserve the separation of powers and the rights of the people:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose

duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." (434) Montesquieu finds tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of Constitutional law, the importance of the separation of powers on our system of governance was recognized by this Court in Special Reference No.1 of 1964 [(1965) 1 SCR 413].

Contentions In the light of aforesaid developments, the main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention.

Further relying upon the clarification of Khanna, J, as given in Indira Gandhi's case, in respect of his opinion in Kesavananda

Bharati's case, it is no longer correct to say that fundament rights are not included in the basic structure.

Therefore, the contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structure shall have to be examined on the fundamental rights test.

The key question, however, is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights. Thus, it is necessary to examine what exactly is the content of the basic structure test. According to the petitioners, the consequence of the evolution of the principles of basic structure is that Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.

The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The consequence also is, learned counsel for the petitioners contended, to emasculate Article 32 (which is part of fundamental rights chapter) in its entirety if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of Part III,

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

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in Kesavananda Bharati's case which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The fundamental rights chapter, it is contended, stands excluded as a result of protective umbrella provided by Article 31B and, therefore, the challenge can only be based on the ground of basic structure doctrine and in addition, legislation can further be tested for (i) lack of legislative competence and (ii) violation of other constitutional provisions. This would also show, counsel for the respondents argued, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine.

Further, it was contended that the constitutional device for retrospective validation of laws was well known and it is legally permissible to pass laws to remove the basis of the decisions of the Court and consequently, nullify the effect of the decision. It was submitted that Article 31B and the amendments by which legislations are added to the Ninth Schedule form such a device, which 'cure the defect' of legislation.

The respondents contend that the point in issue is covered by the majority judgment in Kesavananda Bharati's case. According to that view, Article 31B or the Ninth Schedule is a permissible constitutional device to provide a protective umbrella to Ninth Schedule laws. The distinction is sought to be drawn between the necessity for the judiciary in a written constitution and judicial review by the judiciary.

Whereas the existence of judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of the Parliament under Article 368, the power of judicial review of the judiciary can be curtailed over certain matters. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be established in Kesavananda Bharati's case, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. However, in every case where the constituent power excludes judicial review, the basic structure of the Constitution is not

abrogated. The question to be asked in each case is, does the particular exclusion alter the basic structure. Giving immunity of Part III to the Ninth Schedule laws from judicial review, does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The effect of placing a law in Ninth Schedule is that it removes the fetter of Part III by virtue of Article 31B but that does not oust the court jurisdiction. It was further contended that Justice Khanna in Kesavananda Bharati's case held that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and will include within itself the power to add, alter or repeal various articles including taking away or abridging fundamental rights and that the power to amend the fundamental rights cannot be denied by describing them as natural rights. The contention is that the majority in Kesavananda Bharati's case held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and, therefore, the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if fundamental rights can be amended, which is the effect of Kesavananda Bharati's case overruling Golak Nath's case, then fundamental rights cannot be said to be part of basic structure unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of

the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31B read with Article 368 of the Constitution. In Kesavananda Bharti's case, the majority opinion upheld the validity of the Kerala Act which had been set aside in Kunjukutty Sahib etc. etc. v.

The State of Kerala & Anr. [(1972) 2 SCC 364] and the device used was that of the Ninth Schedule. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine. In State of Maharashtra & Ors. v. Man Singh Suraj Singh Padvi & Ors. [(1978) 1 SCC 615], a Seven Judge Constitution Bench, post-decision in Kesavananda Bharati's case upheld Constitution (40th Amendment) Act, 1976 which was introduced when the appeal was pending in Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31B and the Ninth Schedule cured the defect, if any, in the regulations as regards

any unconstitutionality alleged on the ground of infringement of fundamental rights.

It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31B is not in question before us. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power.

Validity of 31B There was some controversy on the question whether validity of Article 31B was under challenge or not in Kesavananda Bharati. On this aspect, Chief Just