FROM BROODING OMNIPRESENCE TO CONCRETE TEXTUAL PROVISIONS: *IR COELHO* JUDGMENT AND BASIC STRUCTURE DOCTRINE

THE SUPREME court judgment in the *IR Coelho*[1] case decided on 11.1.07 has been widely publicised and discussed. Decided by a nine-judge bench,[2] the case arose out of an order of reference made by a constitution bench in 1999.[3] The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969, that vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by the Supreme Court in *Balmadies Plantations Ltd. & Anr.* v. *State of Tamil Nadu*[4] as it was found to be outside the scope of protection provided to agrarian reforms under article 31-A of the Constitution. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act was inserted in the ninth schedule, which was challenged. In its referral order, the constitution bench noted that, according to *Waman Rao & Ors.* v. *Union of India & Ors*,[5] amendments to the Constitution made on or after 24.4.1973 (the date of the *Kesavananda Bharati*[6] judgment) inserting various laws in the ninth schedule were open to challenge on the ground that such amendments are beyond the constituent power of Parliament since they damage the basic structure of the Constitution. The referral order further stated that the judgment in *Waman Rao* needs to be reconsidered by a larger bench so that it is made clear "whether an Act or regulation which, or a part of which, is or has been found by the courts to be violative of one or more of the fundamental rights conferred by articles 14, 19 or 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".[7]

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1. *I.R. Coelho (Dead) by LRs* v. *State of Tamil Nadu*, AIR 2007 SC 861.
2. YK Sabharwal CJI, Ashok Bhan, Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, D.K. Jain JJ. Judgment delivered by YK Sabharwal CJI.
3. *I.R. Coelho (Dead) by LRs.* v. *State of Tamil Nadu* (1999) 7 SCC 580.
4. (1972) 2 SCC 133.
5. (1981) 2 SCC 362.
6. *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
7. *Supra* note 3 at 583.

The reasons for constituting a nine-judge bench (*Waman Rao* was a five-judge bench) become relevant and the implications of this judgment, as they unfold, may make it clear why this was done. What is striking is the fact that a nine-judge bench of the court rendered a unanimous decision on such a crucial point of law. This is perhaps the one of the rare occasions where such homogeneity of views has been present on the bench.[8]

The focus in this paper is on the tests that have been laid down by the court in this case to determine the scope and extent of judicial scrutiny of a constitutional amendment that places a law in the ninth schedule by virtue of article 31-B and the degree of immunity, if at all, such an amendment, and by implication the law that it thus immunises, enjoys.

Absolute immunity not available

At the very outset, the *IR Coelho* court clearly states that the question whether article 31-B is valid or not has not been settled by *Kesavananda Bharati* but goes on to state "Be that as it may, we will assume Article 31-B as valid. The validity of the 1st Amendment inserting in the Constitution, Article 31-B is not in challenge before us."[9] This is because the referral order to constitute a nine-judge bench did not raise the validity of article 31-B as an issue to be decided.[10]

In any event, the court ruled that the power to grant absolute immunity at will is not compatible with the basic structure doctrine

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8. Another instance of a nine-judge bench speaking with one voice is *Attorney General of India* v. *Amratlal Prajivandas* (1994) 5 SCC 54. Unanimity on the bench is not an unmitigated virtue. At a general level it could be stated that debate and discussion strengthen, and do not weaken the day.

9. *Supra* note 1 at 879. Noting the nature of Art. 31-B and the ninth schedule, the court states that the original intent of the First Amendment that inserted Art.31-B was only to protect limited laws dealing with land reforms, but that exercise of this power had resulted in numerous laws covering various aspects to be placed within the Ninth Schedule. The *Final Report of the National Commission to Review the Working of the Constitution* in Chapter 3 recommended that in Art 31-B, the following proviso should be added at the end, namely :-

"Provided that the protection afforded by this article to Acts and Regulations which may be hereafter specified in the Ninth Schedule or any of the provisions thereof, shall not apply unless such Acts or Regulations relate –

(a) in pith and substance to agrarian reforms or land reforms;

(b) to reasonable quantum of reservation under articles 15 and 16;

(c) to provisions for giving effect to the policy of the State towards securing all or any of the principles specified in clause (b) or clause (c) of article 39."

and, therefore, after 24.4.1973 (the date of the *Kesavananda Bharati* judgment) the laws included in the ninth schedule would not have absolute immunity. The *IR Coelho* court held that after the 24.4.1973 the laws that were inserted into the ninth schedule could not escape scrutiny by the courts based on the rights contained in part III of the Constitution and such laws are "consequently subject to the review of fundamental rights as they stand in Part III."[11] In addition, the court has also gone on to state that the tests of validity of such laws will have to pass a higher bar – those aspects of the basic structure that overlap with the fundamental rights. In the words of the court, "since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgement shall have to be examined in each case."[12]

'Basic structure' and creation of a heirarchy of fundamental rights

There have been several decisions relating to what constitutes the basic structure over the years.[13] Commentators too have written widely on this issue.[14] There have been considerable attempts on the part of

10. One could thus still debate the question of whether the decision in *Waman Rao* that upheld the first amendment on the basis of *stare decisis* and also on its own merits since it satisfied the test of basic structure was correct, and that therefore the validity of Art 31-B was no longer *res integra*, or whether as stated by Krishna Iyer J in his supplementing judgement in *Waman Rao* the leading judgment by Chandrachud J in that case was wider than necessary, and that thus the question of the validity of Art.31-B is still an open one.

11. *Supra* note 1 at 887.

12. *Id.* at 886.

13. *Kesavananda Bharati* v. *State of Kerala*, 1973 (4) SCC 225; *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; *Minerva Mills Ltd.* v. *Union of India*, AIR 1980 SC 1789; *Waman Rao* v. *Union of India*, (1981) 2 SCC 362; *S.R. Bommai* v. *Union of India*, (1994) 3 SCC1; *M. Nagaraj* v. *Union of India*, AIR 2007 SC 71.

14. See generally, H.M. Seervai, *Constitutional Law of India* (1999); Upendra Baxi, "The Constitutional Quicksands of *Kesavananda Bharati* and the Twenty-Fifth Amendment" (1974) SCC (*Jour*) 45-67; Upendra Baxi, "A Pilgrim's Progess: The Basic Structure Revisited" in *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (1985); Pratap Bhanu Mehta, "The Inner Conflict of Constitutionalism: Judicial Review and the 'Basic Structure'" in Zoya Hasan, E. Sridharan and R. Sudarshan (eds.) *India's Living Constitution* (2002); R. Dhavan and

the courts to operationalise this expression and indicate what the 'basic structure' of the Constitution would comprise. That its contours are constantly unfolding and being revealed in successive judgments, explains the fuzzy yet concrete nature of the concept of basic structure, that is far broader and underpins several textual provisions of the Constitution. Mathew J in the *Indira Gandhi* case had perceptively stated: [15]

> The concept of a basic structure as brooding omnipresence in the sky apart from specific provisions of the constitution is too vague and indefinite to provide a yardstick for the validity of an ordinary law.

The *IR Coelho* case is the latest milestone in the judicial delineation of what constitutes the basic structure of the Constitution. The *IR Coelho* court has developed further on the five-judge bench decision delivered a couple of months earlier in the *M. Nagaraj* case.[16] There, the court had been mindful of the debate between the need to interpret the Constitution textually, based on the original intent on the one hand, and the indeterminate nature of the constitutional text that permits of different values to be read into the Constitution. In *Nagaraj,* the court noted that the basic structure need not be found in constitutional text alone and explained that there are:[17]

> [S]ystematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of Constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as 'essential features' or part of the 'basic structure' of the Constitution, that is to say, they are not open to amendment.

These were identified in the principles of secularism, federalism, socialism and reasonableness, which give coherence to the Constitution

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"*Kesavananda Bharati* v. *State of Kerala*: Who wins?" in *Fundamental Rights Case: The Critics Speak* (1975); Raju Ramachandran, "*The Supreme Court and the Basic Structure Doctrine* in B.N. Kirpal *et al* (eds.) *Supreme but not Infallible* (2000); Rajeev Dhavan, Juristic Ethnology of *Kesavananda's* Case, 19 *JILI* 489-97 (1977); D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration" 6-7 *Delhi Law Review* 1-23 (1977-78); "Basic Structure of the Constitution and Constitutional Principles" 3 *Law and Justice* 99-114 (1996).

15. *Indira Gandhi* v. *Raj Narain supra* note 13 at 2388-2389.

16. *M. Nagaraj, supra* note 13.

17. *Id.* at 83.

and bind it as an organic whole. The *Nagaraj* court reiterated that they were part of the constitutional law even if they were not part of the constitutional text. This distinction is developed further by the *IR Coelho* court that notes that both textual provisions and such overarching values could form part of the basic structure. The court articulated a distinction between what is termed as the "essence of the rights test" and the "rights test" corresponding to the distinction between the foundational value behind an express right and the express right provided for in the constitutional text in this context.

The court in *IR Coelho* has spent considerable time in establishing whether the rights contained in part III of the Constitution are indeed a part of the basic structure of the Constitution or not. One of the reasons for this was the strongly urged contention that the effect of the overruling of *Golaknath's* case[18] in the *Kesavananda Bharati* case meant that fundamental rights could be amended and hence, could not be part of the basic structure. Revisiting the debate in the light of the clarification on this vexed question by Khanna J. in the *Indira Gandhi* case, the court in *IR Coelho* noted that that such a contention was to read Khanna J in too broad a manner, and quoted the learned judge: [19]

> The above observations clearly militate against the contention that according to my judgement fundamental rights are not a part of the basic structure of the Constitution. I also deal with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution.

Thus, the *IR Coelho* court observed that the judgment in the *Kesavananda Bharati* could not be read to hold that fundamental rights are *not* a part of the basic structure. This then afforded the way for the court to develop its theme further. The *IR Coelho* court usefully cites *Nagaraj* to hold that fundamental rights are not gifts of the state, but that individuals possess them independent of the state. Part III merely confirms their existence and grants them protection. Therefore according to the court every fundamental right in part III has "foundational value".

This reading is useful because it opens up the question that the court seems keen to develop further. Could all fundamental rights *per se* be equated with the basic structure or not? And if not, as noted in the argument developed by Khanna J and cited approvingly by the *IR*

18. *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1943.
19. Quoted in the *IR Coelho* judgment, *supra* note 1 at 881.

Coelho court above, which are those rights which can be so identified?

The court identifies article 32 as part of the basic structure. Then citing *Minerva Mills*[20] the court reiterates that articles 14, 19 and 21, the 'golden triangle' identified by the court, are certainly a part of the basic structure of the Constitution.

The court then cites the concept of 'egalitarian equality' developed in *M. Nagaraj* to identify what further fundamental rights could be treated as part of the basic structure. It goes on to note the interconnectedness of fundamental rights to hold "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) (4A) (4B) etc."[21]

A considerable lack of certainty prevails about the number of rights that fall within the basic structure. For instance, the court identifies only few articles as constituting core values of the Constitution: [22]

> The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.

The synoptic view would perhaps indicate what are the *core values* (read: basic structure). It is important to note that in the synoptic view of part III the court identifies *only* the values of equality, freedom and article 32 as the essence of part III.

This brings us to the choice of what constitutes core values. One can readily notice that while equality is stated as a core value it is elaborated by the court through articles 15, and in places by 16(4)(4A) and (4B), but not article 17. (This, surprisingly, in the elaboration of what the court has termed 'egalitarian equality'). Similarly articles 23 and 24 are quite conspicuous by their absence, in the elaboration of essence of freedom. One could of course argue that articles 15 and 16(4) are only an elaboration of the core essence of equality, and that not much should be read into the more detailed equality provisions enumerated and those that were not. But in the author's opinion the

20. *Supra* note 13.
21. *Supra* note 1 at 887.
22. *Id.* at 890.

silence of the court in not mentioning all the equality provisions but only a selective few is indicative of its attempt to create a hierarchy of rights within part III of the Constitution; of identifying rights which have in some mysterious way greater foundational significance than those the court chose not to enumerate as the basic structure/core values. As noticed above, the court has cited *M. Nagaraj* to choose articles 16(4), 16(4A) and 16(4B) also as part of the basic structure.

The question of whether special provisions such as articles 16(4) and (4A) can be characterised as 'rights' *strictu sensu* or better characterised as a matter of policy has been a question of debate for long.[23] The court in *Ajit Singh II*[24] settled the matter and took the view that such special provisions are enabling provisions and they were not rights in the sense that they impose constitutional duties upon the state. This has now been affirmed by *M. Nagaraj*. This of course leaves the question of how an enabling provisions can be treated as a part of the basic structure, which the court never quite addressed directly in *M. Nagaraj*.[25]

This characterisation creates a hierarchy among fundamental rights between rights that are core and non-core. This hierarchy assumes importance given the recent court rulings as evidenced in the judgment in *Indra Sawhney* v. *Union of India* in 1999.[26] Here the court has held that any challenge to the constitutional validity of a *law* (as distinguished from a constitutional amendment) could also be tested on the touchstone of basic structure. The implication of this judgment is that in a challenge under article 13(2) of the Constitution, in addition to scrutiny for violation of *any* right under part III, the court could also test the validity of the law vis-à-vis the basic structure. This is an aspect which has been developed in the *IR Coelho* judgment and is discussed below.

In *IR Coelho*, to distinguish between part III rights and those that partake of the quality of the basic structure, the court is compelled to develop and distinguish the 'rights test' and the 'essence of rights'

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23. See M.P. Singh, "Do Articles 15(4) and 16(4) confer Fundamental Rights?" (1994) *SCC* (*J*) 33 and Parmanand Singh, "Fundamental Right to Reservation: A Rejoinder" (1995) 3 *SCC* (*J*) 6 SCC.

24. *Ajit Singh* v. *State of Punjab II*, AIR 1999 SC 3471. Also see *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn.* v. *State Bank of India,* (1996) 4 SCC 119.

25. This is not to deny that such potential rights could never be a part of the basic structure. After all, few may disagree that some of the directive principles of state policy while not incorporating claim rights in an Hohfeldian sense are no less a part of the basic structure than, say, the foundational rights of part III.

26. (2000) 1 SCC 168.

test. The court states:[27]

> We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it completely excludes Part III at will. For this reasons, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.

Thus, if a law were placed in the ninth schedule the scrutiny of all fundamental rights would be available (the rights test). Yet the court also states that every amendment that places the law in the ninth schedule after 24.4.1973 would have to satisfy the basic structure or 'essence of rights' test. The implication is that the laws that are placed in the ninth schedule, are not a formal part of the Constitution, and would have to undergo the 'rights test' after 24.4.1973 notwithstanding article 31-B. However, the constitutional amendment that so placed these laws in the ninth schedule would have to undergo an 'essence of rights test', that is, the basic structure as relates to part III of the Constitution. Looking at this a little closely, it appears to be an impossible task to separate the laws which constitute the body of the amendment from the amendment itself. For one can ask - what is the amendment, apart from the laws that it places in the ninth schedule, an empty shell surely, and if so, what would be the content of such a amendment law that would remain to be tested on the essence of rights test, if one were to remove the laws that it seeks to immunise? Reading these two positions in the judgment together, one could then hold that for all practical purposes the basic structure, at least for the purposes of laws which are placed in the ninth schedule and are now under challenge, equals all the rights in part III of the Constitution. Could then one not argue that, at least with respect to constitutional amendments that seek to use the route of article 31-B, we are, in effect, back to a near *Golak Nath* position? Not quite, a modified *Golak Nath* situation at best. Modified, because in *Golak Nath* any abridgement of part III would be invalid, but here the degree of invasion would be examined by the courts in the light of tests subsequently developed to test the infringement of fundamental rights.[28] The court

27. *Supra* note 1 at 887.

28. *R. C. Cooper* v. *Union of India,* AIR 1970 SC 564;*Haradhan Saha* v. *State of West Bengal,* AIR 1974 SC 2154 and *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248.

has held that the constitutional validity of the ninth schedule laws could be adjudged by applying the direct impact and effect test, *i.e.*, rights test, which requires that it is not the form of a law, but its effect, that would be the determinative factor. It is the court that is to decide if this interference is justified, and if does or does not amount to violation of the basic structure.[29] As stated, the role of the court is "determination by court whether invasion was necessary and if so to what extent".[30] This position then serves to shift the determination of the need for the law from the Parliament to the courts for decision. It also allows the courts the flexibility of both the rights test and the essence of rights test in dealing with the validity of such cases. The determination of the effect of the infringement in either case would be for the courts to determine. This ultimately may be the key point in the judgment.

In conclusion, one must also dwell on some issues that could have been raised but were not. The interesting question of the implication for the doctrine of eclipse, subsequent to laws placed in the ninth schedule after being struck down by the courts for violating article 13(2), and which subsequently fail the 'rights test' but pass the 'essence of rights test' remains. A future decision of the court on this point is awaited.

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29. It must be remembered that in *Waman Rao* the court held that mere abridgement and not only abrogation *i.e.* total deprivation, is enough to produce the consequence for Art 13 (2), and thus Arts 14, 19 and 31 stand abrogated with respect to a law under Art. 31-A (1) (a), though these articles may be available for other laws on the statute book.

30. *Supra* note 1 at 892.

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