BASIC STRUCTURE OF THE INDIAN CONSTITUTION: DOCTRINE OF CONSTITUTIONALLY CONTROLLED GOVERNANCE
[From *Kesavananda Bharati* to *I.R. Coelho*]*

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I

THE PRINCIPLE of basic structure of the Constitution was propounded by the Supreme Court in 1973 in *Kesavananda Bharati* v. *State of Kerala and Another*,[1] wherein 13 judges sat for 68 days and produced a cluster of judgments running into over a thousand pages. This was indeed a historic decision, because through their basic structure principle the Supreme Court changed the course of constitutional history by denying the assertion of supremacy of Parliament in matters of amending the Constitution at will solely on the basis of requisite voting strength, quite unmindful of the basic or fundamental rights of the citizens. This principle lays down that henceforth, that is after April 24, 1973, the validity of all constitutional amendments shall be tested on the touchstone of basic structure of the Constitution.

What does this principle of basic structure of the Constitution mean? Speaking jurisprudentially, the Constitution of a country represents the *Grundnorm* – the basic norm – comprising of fundamental principles,
laying down the foundation of a civil society. However, when we refer to the basic structure of such a basic document, we seem to mean that we are essentially thinking of some fundamentals of the fundamentals, or some basic features of the basic document. What are these basic

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1. AIR 1973 SC 1461: (1973) 4 SCC 225. Hereinafter cited as *Kesavananda Bharati*.

During the past more than three decades since the inauguration of the principle of basic structure in 1973, the Supreme Court has invoked and applied this principle in several cases, but often experiencing difficulty about the true scope and extent of this principle, necessitating the intervention of constitutional benches. In this respect, mention may be made of the following cases in which the principle of basic structure was closely examined and worked out: *Indira Nehru Gandhi* v. *Raj Narain*,[2] *Minerva Mills Ltd. and Others* v. *Union of India and Others*,[3] *Waman Rao and Others* v. *Union of India and Others*, [4] and *Maharao Sahib Shri Bhim Singh ji* v. *Union of India and Others*.[5] In these cases, and many more thereafter, attempt was made to expound the basic structure principle, and provide some measure of concrete basis for its application, but, nevertheless, the position still remained hazy – perhaps the same as was depicted by Mathew J in *Indira Nehru Gandhi* in 1975:[6]

> 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.

More or less, this situation, with varying degree of emphasis, continued to prevail till the judgment of the Supreme Court in *IR Coelho (dead) by L.Rs* v. *State of Tamil Nadu*,[7] in which the nine-judge constitutional bench have attempted to lay down the concrete criteria for the application of the basic structure principle. How have they done it, and the extent to which they have succeeded in doing it by removing very many misgivings about the application of this principle is the focus of this article.

II

The task in *IR Coelho* in providing concrete basis of the basic structure principle was not easy. It was shrouded with two major difficulties. The first major difficulty was in the nature of the very 'fragile' existence of the basic structure principle at the very time of its birth in *Kesavananda Bharati*, which seriously affected its future

2. AIR 1975 SC 2299. Hereinafter cited as *Indira Gandhi*.
3. AIR 1980 SC 1789. Hereinafter cited as *Minerva Mills.*
4. AIR 1981 SC 271. Hereinafter cited as *Waman Rao*.
5. AIR 1981 SC 234.
6. *Indira Gandhi* at 2389.
7. AIR 2007 SC 861, *per* Y.K. Sabharwal CJI (for himself and behalf of Ashok Bhan, Dr. Arijit Pasayat, B.P. Singh, S.H. Kapadia, C.K. Thakker, P.K. Balasubramanyan, Altamas Kabir, and D.K. Jain JJ) Hereinafter *I.R. Coelho.*

growth and development. This was owing to the fact that the 13-judge constitutional court was deeply divided on the issue, whether or not there really exists the basic structure of the Constitution apart from the Constitution itself. Six judges led by Sikri CJI (Shelat, Grover, Hegde, Mukherjea, and Reddy JJ) – in four different opinions – reached substantially the same conclusion: they propounded the principle of basic structure of the Constitution by reading an implied limitation on the power of the Parliament to amend the Constitution. On the other hand, the other group of six judges led by Ray J (Phalekar, Mathew, Beg, Dwivedi, and Chandrachud JJ) did not subscribe to any such principle in the name of the basic structure of the Constitution. The 13th judge, namely, Khanna J, tilted the balance by eventually joining the group led by Sikri CJI in subscribing to the basic structure principle. This is how the principle of basic structure of the Constitution came to be evolved in *Kesavananda Bharati* by a slender majority of 7:6!

However, that was not the end of the 'fragile' existence of the principle of basic structure. Further weakening was caused to this principle again in *Kesavananda Bharati* itself, when the issue of constitutional validity of the 29th amendment of the Constitution came to be considered.[8] The group led by Sikri CJI upheld the constitutionality of the twenty-ninth amendment but only *'conditionally'*, by stating that it was valid only if the legislation added to the ninth schedule did not violate the basic structure of the Constitution. On the other hand, the other group of six judges led by Ray J upheld the constitutionality of the same amendment *'unconditionally'*, and Khanna J joined them. This created a position of ambivalence, which was bound to generate confusion in subsequent cases while expounding the basic structure principle.

For instance, Ray CJI (as he later became) in *Indira Gandhi* observed that the constitutional validity of the 29th amendment was upheld in *Kesavananda Bharati "unanimously,"*[9] whereas Bhagwati J, in *Minerva Mills*[10] held: "The validity of the Twenty-ninth Amendment

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8. The 29th amendment sought to introduce two land reform laws into the ninth schedule of the Constitution by inserting entries 65 and 66.

9. *Indira Gandhi*, para 152.

10. *Minerva Mills*, at 1831 (para 97). Khanna J upheld the constitutional validity of the 29th amendment by stating specifically that in his view it "does not suffer from any infirmity." The unequivocal holding that the 29th amendment suffers from no constitutional "infirmity", in our view, includes passing the test of the basic
structure doctrine though it has not been so demonstrated. This is so because the inclusion of the two land reform laws into the ninth schedule of the Constitution, *prima facie*, could be taken as not violating the basic structure of the Constitution in any conceivable sense. It seems to be inconceivable that Khanna J, while agreeing to the existence of the basic structure principle would be unmindful

Act was challenged in *Kesavananda Bharati* case but by a majority consisting of Khanna J and the six learned judges led by Ray J (as he then was) it was held to be valid…." This implies that according to his reading of *Kesavananda Bharati*, the 29th amendment was held valid by a majority of 7:6, and not 'unanimously'. This shows that there was a clear mixing of the 'conditional' with the 'unconditional' upholding. This kind of confusion created by a closely divided court in *Kesavananda Bharati* was bound to affect the subsequent development of the basic structure principle. However, the nine-judge bench took note of this confusion, and straightened it by observing that Ray CJI was not right in stating in *Indira Gandhi* that the issue of the constitutionality of the 29th amendment was decided 'unanimously' by obliterating the distinction between 'conditional' and 'unconditional' upholding.

The second major difficulty presented before the nine-judge bench in streamlining the basis of the principle of basic structure of the Constitution was in respect of article 31-B read with the ninth schedule of the Constitution.

Article 31B, introduced by the Constitution (First Amendment) Act, 1951 (w.e.f. 8-6-1951) provides for " Validation of certain Acts and Regulations":

> Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulations 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.

Simply abstracted, article 31-B provides a 'protective umbrella' by granting 'fictional immunity' of fundamental rights enumerated in part III of the Constitution to all those laws that are included in the ninth schedule. The constitutional validity of the first amendment had already been upheld by the Supreme Court in *Sankari Prasad*[11] and *Sajjan Singh*[12] cases. This meant that Parliament had unlimited power to amend the Constitution.

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11. *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*, AIR 1951 SC 458.

12. *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845.

The unlimited amending power of Parliament, however, came to be curtailed by the Supreme Court in *Golak Nath*.[13] In this case, a constitutional bench of eleven judges considered the correctness of the view earlier taken in *Sankari Prasad* and *Sajjan Singh*. By a majority of six to five, the court overruled its earlier view, and held that constitutional amendment through the amending Act is a '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. This implied that from the date of decision, namely, February 27, 1967, Parliament's unlimited amending power stood diminished *vis-à-vis* fundamental rights.

The decision of the eleven-judge bench in *Golak Nath* led to a spate of constitutional amendments. The Constitution (24th Amendment) Act, 1971, on the one hand, amended the most problematic article 13 by inserting clause (4), which provides that nothing in that article "shall apply to any amendment of this Constitution made under article 368," and on the other, amended article 368 by inserting words "in exercise of its constituent power" in clause (1).

The Constitution (25th Amendment) Act, 1971, amended the provision of article 31 dealing with compensation for acquiring or acquisition of properties for public purpose so that only the amount fixed by law need to be given, and this amount could not be challenged in court on the ground of inadequacy of the amount or it was not in cash. This amendment also introduced a new article 31C, which specifically provides for saving of laws giving effect to directive principles of state policy contained in part IV of the Constitution:[14]

> 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*.

The Constitution (26th Amendment) Act, 1971 omitted from the Constitution article 291 (Privy Purses) and article 362 (Rights and

13. *I.C. Golak Nath and Others* v. *State of Punjab and Another*, AIR 1967 SC 1643.

14. Emphasis added. There is appended a proviso to bring uniformity in respect of laws enacted by the legislature of a state by providing that "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."

Privileges of Rulers of Indian States) and inserted article 363A 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 of the Constitution by inserting therein two Acts, the Kerala Land Reforms Amendment Act, 1969 (No. 35 of 1969) as entry 65 and the Kerala Land Reforms Amendment Act, 1971 (No. 35 of 1971) as entry 66.

These amendments came to be challenged before the thirteen-judge constitutional bench in *Kesavananda Bharati*. The 24th amendment was upheld as valid. So was the case with the 25th amendment excepting the italicized part of article 31C, which was declared unconstitutional. The validity of the 26th amendment was left to be determined by a constitution bench of five judges. The 29th amendment was also upheld as valid.[15]

The principle of inviolability of fundamental rights laid down in *Golak Nath* was reversed. Thenceforth, that is, after April 24, 1973, Parliament shall have the power to amend each and every part of the Constitution, including fundamental rights, but subject only to the principle that in the exercise of such power basic features or basic structure shall not be damaged or destroyed. The basic structure of the Constitution has, thus, become the juristic principle for effectively controlling the unlimited power to amend the Constitution.

However, still there remained another major conflict problem: on one side is the zealous protection of constitutional rights, including fundamental rights, through the newly propounded principle of basic structure of the Constitution; on the other side is the empowerment of Parliament by article 31B to confer 'fictional immunity' of fundamental rights to all those laws inserted into the ninth schedule by amending the Constitution. How to resolve such a patent conflict?

In this respect the specific issue that came up for adjudication before the 5-judge constitutional bench in1999 in *I.R. Coelho* v. *State of Tamil Nadu*[16] was, whether the basic structure principle applied only to constitutional amendments to a limited extent of examining, such as the competency of the legislature; or whether it would also apply to the laws that are added to the ninth schedule on the touchstone of fundamental rights – the rights against which the immunity is provided under that very schedule. For an authoritative resolution, such an issue about the limits of the basic structure principle was, however, desired to be decided by a larger constitutional bench. It is that issue, which has been taken up recently by the decision of the nine judge constitutional

15. See part II, *supra*.
16. (1999) 7 SCC 580.

bench of the Supreme Court,[17] which, puts the principle of basic structure of the Constitution on firmer footing. What was initially propounded as a principle in *Kesavananda Bharati* has now become, as a result of successive juristic developments culminating into the nine judge bench decision in *I.R. Coelho*, an axiom or a definite doctrine with a reasonably clear resonance.[18]

III

What is the core concern of the doctrine of basic structure of the Constitution? What is its singular objective? Since this doctrine emerged as an antidote to Parliament's unlimited amending power, we may crystallize the core concern of the basic structure doctrine by stating:

> The Parliament's amending power under Article 368, in pursuance of Article 31B read with the Ninth Schedule of the constitution, granting that it has the power to amend every part of the Constitution, including Part III that incorporates fundamental rights, cannot be absolute, unlimited, uncontrolled or uncontrollable.

What are the rationale for reaching this principle? In the light of the 'concerns' reflected in the post-*Kesavananda Bharati* cases,[19] at least the following four rationale may be culled out:

The first rationale of limiting the unlimited amending power of Parliament under the basic structure doctrine flows from the principle of separation of powers, invariably sanctified through the written Constitution. This principle gives effect to the strategy of checks and balances. It is a strategy to preserve liberty and protection against tyranny.[20] In functional terms, it means that there is a diffusion of power by dispersing it amongst the three centres of decision-making, namely, legislature, executive, and judiciary. Each one of these is quite independent of the others in one's own area demarcated by the Constitution. Under this separation of power principle, the review-role of the exercise of amending power by the legislature, usually propped up by the executive, is clearly entrusted to the judiciary. On this score, the principle of separation of powers is well entrenched and there does not seem to be any disagreement. Such a stand is clearly reiterated and affirmed by the nine-judge bench in *I.R. Coelho* by citing the

17. *I.R. Coelho, supra* note 7.
18. *Id.*, at 891 (para 146).
19. See *supra* notes 2, 3, 4, and 5.
20. See, *I.R. Coelho*, at 876 (paras 64 -68).

observations from *Special Reference*[21] to the effect "whether or not there is distinct and rigid separation of powers under the Indian Constitution," one principle clearly stands out: whenever the constitutional validity is challenged, the legislature cannot be allowed to take the plea that such an issue "can be decided by the legislature themselves."[22] "Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country."[23] The core conflict, however, is only to the extent to which the judicial review could be extended for containing the amending power of Parliament under article 368. The crux of constitutionalism premised on the principle of separation of powers, thus, is that that the power of Parliament is not unlimited inasmuch as it is subject to review by the courts on the touchstone of the Constitution. It is inconceivable that the authority to enact law and to decide the constitutional validity of the same should vest in one and the same authority, namely, the legislature.[24]

The second rationale of limited amending power is that under article 368 the power of amending the Constitution is not truly and essentially a 'constituent power' – the 'plenary' or 'absolute' power, which is exercised to make or unmake a Constitution, a power that has "no limitations or constraints."[25] Such a power was vested, for instance, in the Constituent Assembly, which framed our Constitution in the first instance. Against this, as pithily stated in *I.R. Coelho*:[26]

> [T]he power of amending the constitution is a species of the law making power, which is the genus.

This is a very significant statement depicting the true character of the amending power. Just as murder is a species of crime, or patent law a species of intellectual property, likewise 'the power to amend the constitution' is only a division of 'law making power', and not a 'constituent power' by itself. It is indeed a "derivative power" – a power which is derived from the Constitution.[27] The clear implication of this analogy is that the amending power under article 368 of the Constitution is also subject to the same constitutional constraints or limitations as are spelled out in the Constitution for 'the law making power.' It is on this premise, the Supreme Court struck down clause

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21. *Special Reference No. 1/64*, AIR 1965 SC 745 (para 42).
22. *I.R. Coelho* at 886-887 (para 115).
23. *Id.* at 887 (para 115).
24. *Id.* at 891 (para 143).
25. *Id.* at 887 (para117).
26. *Ibid.* (para 121).
27. *Id.*, at 873 (para 55), citing H.M. Seervai, *Constitutional Law of India* (4th ed.).

(4) of article 329-A in *Indira Gandhi*, as 'it made the controlled constitution uncontrolled' by overriding or eliminating the principles underlying articles 14, 19, and 21, which are collectively described as the 'golden triangle'.[28] On the strength of the same reasoning, clauses (4) and (5) inserted into article 368 by the 42nd amendment of the Constitution were struck down by the Supreme Court as unconstitutional in *Minerva Mills Ltd.*[29] This was done despite the fact that the expression "constituent power" had been introduced into clause (1) of article 368.[30]

The third rationale of limiting the amending power is that the very idea of 'amendment' carries its own rough and ready measure. Such a measure was deciphered by the Supreme Court in *Waman Rao*[31] by invoking the analogy of 'permissibility of an amendment of a pleading', that is, how far the amendment of a pleading is consistent with the original. In this respect, emphasized the apex court, you cannot by an amendment transform the original into opposite of what it is. Obviously, for this purpose a comparison is undertaken to match the amendment with the original. Such a comparison, counselled the court, can yield fruitful results even in the 'rarified sphere of constitutional law.'[32] This proposition stands affirmed in *I.R. Coelho*: "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."[33] For instance, Parliament, in the exercise of amending power under article 368, can make additions in the three legislative lists, but it cannot abrogate all the lists as it would abrogate the federal structure, which is one of the basic features of the Constitution.[34]

The fourth rationale of the core concern of the basic structure doctrine is the 'Judicial Review', which is its integral or inseparable part. In this sense, without judicial review, the basic structure doctrine is simply inoperable or non-functional. That is, by taking away the component of judicial review, we would be denying the very existence of the doctrine of basic structure, which is simply impermissible. This perspective needs to be distinguished from the two other perspectives that are in vogue. One perspective of judicial review operates as a part of the principle of separation of powers, effectuating the mechanism of checks and balances. Referring to the consequence of insertion of

28. *Id.* at 887 (para 122).
29. See *supra* note 3.
30. See also *I.R. Coelho* at 890 (para 136).
31. See *supra* note 4.
32. See *I.R. Coelho* at 884 (para 103).
33. *Id.* at 887-888 (para 123).
34. *Id.* at 888 (para 123).

clause (4) in article 368, which permits Parliament to amend the Constitution by excluding the provision of judicial review, Bhagwati J, observed in *Minerva Mills* that "in effect and substance, the limitation on 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."[35] The second perspective of judicial review is when it is taken as a feature of the basic structure doctrine, as distinguished from its being an integral part of the basic structure principle itself. To cite Bhagwati J in this context, he again stated that withdrawal of judicial review from the ambit of amending power of Parliament under article 368 "would undoubtedly damage the basic structure of the Constitution, because the 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 examine whether any authority under the constitution has exceeded the limit of its powers."[36]

A perusal of the rationale of the core concern of the basic structure doctrine clearly reveals that the exercise of amending power by Parliament in pursuance of article 31B read with the ninth schedule of the Constitution cannot be unlimited. This supervening stand obviously requires re-reading of article 31B along with the ninth schedule, because on the very face of it, the very provisions of this article do permit Parliament to have unlimited power to amend the Constitution.

IV

The provisions of article 31B along with the ninth schedule of the Constitution were introduced by the very first amendment of the Constitution.[37] Plainly read, these provisions empower Parliament to provide immunity of fundamental rights to the laws included in the ninth schedule. That is, once the laws passed by the legislature are placed in the ninth schedule of the Constitution, they instantly become immune from any judicial challenge on the ground that they violate any of the fundamental rights enumerated in part III of the Constitution. Such immunity was granted in the first instance only to 13 laws that related to land reforms.[38] However, in due course of time, the provisions

35. *Minerva Mills* (1980), para 85, cited in *I.R. Coelho* at 872 (para 52).

36. *Ibid.*

37. See *supra* part II, particularly notes 11 and 12, and the accompanying text.

38. Items from number 1 to 13 were added by the first amendment of the Constitution in 1951.

of article 31B have been invoked several times and the number of laws placed under the protective umbrella of the ninth schedule has risen to 284 items[39] from mere 13, and for diverse purposes, of course including land reforms.[40] This power gets still more augmented because the courts could not locate any criterion controlling it in the provisions of article 31B. This position is clearly incompatible with the very concept of constitutionalism, because it is inconceivable that the fundamental rights that are specifically sought to be protected would themselves be put aside and ignored through the invocation of the provisions of article 31B read with the ninth schedule of the Constitution. Such a situation, in the absence of full power of judicial review to determine the constitutional validity of amending power would mean "destruction of constitutional supremacy and creation of parliamentary hegemony."[41] It is to avoid this upsetting, the Supreme Court pointedly asked in *Waman Rao* whether invocation of article 31B that permits the immunization of the ninth schedule laws from judicial review by making the entire part III inapplicable to such laws is required to be tested on the basis of basic structure doctrine.[42] This question was answered in the affirmative, because non-application of the basic structure doctrine would make the "controlled constitution uncontrolled."[43]

Thus, the crux of the whole conflict situation is: Article 31B read with the ninth schedule of the Constitution tends to confer uncontrolled power on the legislature by excluding judicial review in the exercise of its amending power; whereas the doctrine of basic structure of the Constitution empowers the courts to control that uncontrolled power through judicial review, including the amending power exercised by the legislature in pursuance of article 31 B read with the ninth schedule of the Constitution. This is imperative for maintaining the basic premise of constitutional supremacy. It is true that by the superimposed basic structure doctrine, "efficacy of Article 31B" stands reduced, "but that

39. The last addition from item number 258 to 284 was made by the 78th Amendment of the Constitution in 1995.

40. Some of the entries that were unrelated to land reforms, for instance, were subsequently omitted from the ninth schedule: item no. 87 (The Representation of People Act) and item no. 92 (Internal Security Act) were omitted by the Constitution (Forty-fourth Amendment) Act, 1978; item no. 130 (Prevention of Publication of Objectionable Matter) was repealed in 1977. However, there are still very many entries that have nothing to do with land reforms.

41. *I.R. Coelho* at 884 (para 104): "The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise."

is inevitable in view of the progress the laws have made post-*Kesavananda Bharati's* case."[44] Since the constitutional validity of the first amendment of the Constitution introducing article 31B has already been upheld, for retaining its legitimacy, subject of course to the overriding provision of basic structure doctrine, it requires re-reading or re-defining.

V

For re-reading or re-defining the ambit of article 31B, the constitutional bench in *I.R. Coelho* has approached the whole issue *de-novo* in the light of first principles of constitutionalism as evolved by the court in *Kesavananda Bharati* and expounded thereafter in its subsequent decisions. The following principles may be abstracted:

(a) *The amending power of Parliament under Article 368 after the decision of Kesavananda Bharati is no more unlimited*. In the matters of amendments, the crucial question the nine-judge bench of the Supreme Court has asked, and then responded itself, is: [45] "Can the Parliament increase the amending power by amendment of Article 368 to confer on itself 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 *Kesavananda Bharati's case*." In other words, the amending power under article 368 after April 24, 1973 can be exercised to amend any part of the constitution, including part III, but only subject to the limitation of the basic structure doctrine.[46]

(b) *Despite the 'wide language' of article 31B,*[47] *the amending power under article 368 remains limited, albeit prospectively*.

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44. *Id.* at 883 (para 98).

45. *Id.* at 888 (para 124).

46. *Id.* at 887 (para 126). See also at 887 (para 119).

47. Each exercise of amending power inserting laws into the ninth schedule entails complete removal of fundamental rights chapter *vis-à-vis* the laws that are added in that schedule, and that article 31B provides no defined criterion or standards by which the exercise of power may be evaluated. By this design, the amending power
of Parliament seems to be augmented enormously. See *I.R. Coelho* at 883 (para 99). *Cf.* Article 31A, which provides for a standard by which laws stand excluded from judicial review. Article 31A excludes judicial review of certain laws from the

Article 31B does not carry "any defined criteria or standards by which the exercise of [amending] power may be evaluated" for inserting laws into the ninth schedule of the Constitution.[48] Nevertheless, as a logical corollary to the principle that if the "constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31B cannot be used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. This power of amendment has to be compatible with the limits of the power of amendment. This limit came with *Kesavananda Bharati's case*. Therefore Article 31B *after 24th April, 1973* despite its wide language, cannot confer unlimited or unregulated immunity."[49]

(c) *Legitimacy of article 31B read with the ninth schedule of the Constitution is preserved by redefining the scope of judicial review under basic structure doctrine*. The extent or scope of judicial review in this context has been considered by the nine-judge bench by formulating the "Broad Question": "The fundamental question is whether on and after 24th April, 1973 when basic structure 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."[50] The Supreme Court has

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from challenge on the basis of part III. It is for this reason, the provisions of article 31A have been held to be "not violative of the basic structure." *Id.* at 884 (para 105). Likewise, article 31C carries its own criteria. It applies as a yardstick the criteria of sub-clauses (b) and (c) of article 39, which refers to equitable distribution of resources, *ibid.* However, when the ambit of article 31C was enlarged by the Forty-second Amendment of the Constitution, vesting the power of the exclusion of judicial review in the legislature, such an addition was held to strike at the basic structure of the Constitution, and, therefore, "beyond the permissible limits of the power of amending the constitution under Article 368." *Id.* at 883-84 (para 100).

48. *Ibid.*

49. *Id.* at 888 (para 125). Emphasis added. The principle of basic structure of the Constitution propounded by the Supreme Court has prospective operation. This seems to be just and fair, because it is judicially engrafted principle, and cannot be read as 'deemed' to be so from the very beginning. Such an approach also attaches
sanctity to the upholding the constitutionality of the first amendment of the Constitution till that date.

50. *Id.* at 865 (para 5). This broad question emerged out of the reference made

answered the question by stating that "if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/ infraction shall be open to challenge on the ground that it destroys or damages the basic structure …."[51] This means that mere violation of fundamental rights by the laws incorporated into the ninth schedule by virtue of the exercise of amending power in pursuance of article 31B is not a ground for invalidating the constitutional amendment *ipso facto*: "We are not holding such laws *per se* invalid but, examining the extent of the power which the Legislature will come to possess," clarified the bench.[52] These would be void only if it is also held that they are violative of the basic structure of the Constitution.[53] This is the wide extent of judicial review for examining power of the Parliament to grant immunity of fundamental rights to the ninth schedule laws.[54]

(d) *The issue of determining whether the ninth schedule laws are immune of fundamental rights in the exercise of power under article 368 in pursuance of article 31B cannot be left to the discretion of Parliament*. The reason adduced by the Supreme Court is that "if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendment, it would disturb the checks and balances in the Constitution. The authority to enact the law and decide the legality of the limitation cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely the judiciary."[55]

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51. *Id.* at 893 [para 148(v)].

52. *Id.* at 884 (para 105).

53. For determining whether in a given case the basic structure doctrine has been damaged or not, the following factors need to be kept in mind: (a) the placement of the violated right in the scheme of the Constitution; (b) the impact of the offending law on that right; (c) the effect of the exclusion of that right from judicial review; and (d) the abrogation of the principle on the essence of that right. Fictional immunity granted by article 31B is no bar to undertake such an examination after *Kesavananda Bharati's* case. *Id.* at 885 (para 108).

54. The focus of the nine-judge constitutional bench was to examine Parliament's power to grant immunity of fundamental rights to the laws included into the ninth schedule "bearing in mind that after *Kesavananda Bharati's case* article 368 is subject
to implied limitation of basic structure." *Id.* at 890 (para 137).

Thus, the whole logic of this interpretative exercise may be abstracted as follows:

(i) Parliament under article 31B has the power to confer 'fictional immunity' on the laws passed by it.

(ii) Such immunity could be conferred by including those laws into the ninth schedule of the Constitution.

(iii) Inclusion of those laws into the ninth schedule, however, could be done only by amending the Constitution.

(iv) The Constitution could be amended by the exercise of amending power under article 368 of the Constitution.

(v) The exercise of amending power under article 368, not being the constituent power, is a limited power. It is a derivative power, derived from the Constitution.

(vi) The exercise of limited amending power under article 368, therefore, cannot confer unlimited power even in pursuance of article 31B read with the ninth schedule of the Constitution.

VI

After redefining the ambit of article 31B read with the ninth schedule of the Constitution within the sweep of basic structure doctrine, from where do we bring in the concrete criteria, as distinguished from the abstract principle, to apply this comprehensive, 'catholic,' doctrine, which is stated to be "too vague and indefinite to provide a yardstick for [examining] the validity of an ordinary law"?[56] One way to look at this issue is that, since article 31B, unlike articles 31A and 31C, provides no standard from within,[57] Parliament is intended to have unlimited power of granting immunity of fundamental rights to the ninth schedule laws. However, the fructification of such an interpretation has already been foreclosed and denied categorically since the decision of the apex court in *Kesavananda Bharati* that formally propounded the basic structure doctrine.

There is still another way of locating the criteria for testing the validity of the ninth schedule laws. This can be done by realizing the proximity of article 31B to the core objectives of articles 31A and 31C, both carrying their internal standards for the exercise of amending power. Looked from this angle, the juxtaposition of article 31B indicates that it needed to be invoked mainly to immunize land reform legislations

56. See *supra* note 6 and the accompanying text.

57. See part V (b), *supra*.

from the discipline of fundamental rights, particularly the fundamental right to property, as it existed under article 31 prior to the 44th amendment of the Constitution in 1978, whereby article 31 was bodily lifted from part III and resurrected as article 300A in part XII under newly created chapter IV (right to property). Since the land reform legislations directly impinged upon the fundamental right to property of the big landlords, this right proved to be the biggest obstacle in implementing land reforms. Such an obstacle was removed through the incorporation of article 31B along with ninth schedule by the very first amendment of the Constitution. Thus, speaking truly and contextually, the singular objective "behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or judicial review."[58] The objective was essentially to accelerate the process of land reforms.

The first amendment was upheld as constitutional, because seemingly it was designed to provide "restricted immunity" of fundamental rights "only to protect a limited number of laws" – initially 13 in number – all relating to land reforms.[59] This was perhaps "the basis for the initial upholding of the provision."[60] If the invocation of amending power in pursuance of article 31B would have remained confined to land reforms, there seemed no difficulty either to seek the basis of the basic structure of the Constitution, which was formally enunciated in *Kesavananda Bharati*, or to its application on the principle of exception. However, subsequent developments show that the legislature did not think it wise to confine the ambit of article 31B only to the land reform laws. After the formal inauguration of the basic structure principle in the year 1973, perhaps the most drastic departure was made when immunity of fundamental rights was sought for the electoral laws by putting them into the ninth schedule through the exercise of amending power under article 368 in pursuance of article 329-A.[61] In fact the number of laws added to the ninth schedule has swelled from 13 to 284, indicating that the exercise of amending power by invoking article 31B "is no longer a mere exception" limited to land reforms only.[62] If this indiscriminate use of article 31B were allowed, it would surely result in destroying the basic principle of constitutionalism. Instead of constitutional supremacy,

58. *I.R. Coelho* at 890 (para 139).

59. *Id.* at 884 (para 104).

60. *Ibid.*

61. In *Indira Gandhi*, article 329-A inserted by the 39th amendment in 1975 was struck down as unconstitutional (and subsequently repealed by the 44th amendment in 1978), because it crossed the implied limitation of amending power, and made the controlled Constitution uncontrolled. That is, "it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19." See, *id.* at 887 (para 122).

62. *Ibid.*

we would have "parliamentary hegemony."[63] The absence of constitutional criteria under article 31B for the regulation of the amending power even on the basis of basic structure principle, therefore, prompted the Supreme Court to discover the concrete basis for the application of this doctrine.

VII

How to assess or determine whether or not the basic structure of the Constitution is affected by the exercise of amending power in pursuance of article 31B under article 368? This is perhaps the most crucial question in the application of basic structure doctrine, and it is this question that has been squarely answered by the nine-judge constitutional bench of the Supreme Court unanimously in *I.R. Coelho*. Prior to this decision, there was a lot of lingering over the applicable criteria of the basic structure principle that prompted a distinguished commentator of Indian constitutional law to say that the principle enunciated by the doctrine is right. However, its wrong application would not make the right principle wrong.[64]

Principally, the basic structure doctrine is conceived in terms of certain basic principles or values underlying the basic document, namely, the Constitution. What are these principles or values on the basis of which the structure of the Constitution itself has been raised? By implication, such principles or values may be termed as 'pre-constitutional'. What are these values'?

The 'pre-constitutional' values are universally perceived in terms of certain 'basic human rights' that are considered essential for the very existence of a human being. These are assumed and assimilated as some "intrinsic" or "foundational" values,[65] which exist as such in the scheme of nature. Such values are not "a gift from the State to its citizens," but exist "independently of any constitution by reason of the fact that they are members of human race."[66] These are invariably crystallized in the Constitution in the form of fundamental rights, which "occupy a unique place in the lives of civilized societies."[67] This is the perspective with which the apex court has expounded the nature of fundamental rights contained in part III of our Constitution as the very

63. *Ibid.*

64. See, *id.* at 881-82 (para 93), citing Seervai's analysis in his work, *Constitutional Law of India* (4th ed., Vol. III).

65. *I.R. Coelho*, at 875 (para 62), citing *M. Nagaraj and Others* v. *Union of India and Others* (2006) 8 SCC 212. Hereinafter cited as *M. Nagaraj*.

66. *Ibid.*

67. *Id.* at 872 (para 50), citing Chandrachud CJI in *Minerva Mills*.

basis of the basic structure principle:[68]

(a) "Part III of the Constitution does not confer fundamental rights. It (merely) confirms their existence and gives protection."[69]

(b) The fundamental rights in part III have been described as 'transcendental,' 'inalienable,' and 'primordial.'[70]

(c) The purpose of part III of the Constitution is to withdraw fundamental rights "from the area of political controversy to place them beyond the reach of majority and officials and to establish them as legal principles to be applied by the courts."[71]

(d) "Every foundational value is put in Part III as fundamental right as it has intrinsic value."[72] If it has no 'intrinsic value', as is the case in relation to right to property, the same could be excluded from part III.[73]

(e) "A right becomes a fundamental right because it has a foundational value."[74]

(f) "Fundamental rights in Part III are limitations on the power of the State," so that the citizens could enjoy those rights in "the fullest measure."[75]

(g) "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."[76]

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68. On general principles for determining whether a particular feature of the Constitution (including fundamental right) is part of the basic structure or not, the issue is to be examined in each individual case by finding out the place of that particular feature in the scheme of the Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. *Id.* at 873 (para 56), citing Chandrachud CJI in *Indira Gandhi*.

69. *I.R. Coelho* at 875 (para 62).

70. *Id.* at 872 (para 50).

71. *Id.* at 875 (para 62).

72. *Ibid.*

73. Perhaps, it is on the strength of this logic, Khanna J in *Indira Gandhi* clarified that the fundamental right to property is not a basic feature of the basic structure doctrine. See, *id.* at 881 (para 91). See also, *id.* at 885 (para 108): "Detailed discussion in *Kesavananda Bharati case* demonstrate that right to property was not part of basic structure of the constitution."

74. *I.R. Coelho* at 875 (para 62).

75. *Id.* at 876 (para 63).

76. *Id.* at 872 (para 50). This observation made by Chandrachud CJI in *Minerva Mills* in the context of constitutionality of article 31C has been considered to have "equal and full force" for deciding the ambit of amending power under article 368 in pursuance of article 31B read with the ninth schedule of the Constitution, *ibid.*

(h) Fundamental rights need to be protected not only because they are 'superior' or 'higher' rights, but for the reason that their protection is the best way to promote "a just and tolerant society."[77]

(i) For the protection of fundamental rights, the remedial right under article 32 of the Constitution, has itself been made the fundamental right. On account of its critical importance in the constitutional scheme, this remedial right is called "the very heart and soul of the constitution,"[78] or the "sentinel on the qui vive."[79]

In the light of this exposition, the nine-judge bench states unequivocally: "If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine."[80]

VIII

It is indeed true that the fundamental rights incorporated in part III, reflecting the foundational values or core bases of the basic structure principle, bear a special status in the whole scheme of the Constitution. This is evident from the clear and categorical provisions made in article 13 and strategically supported by article 32 of the Constitution. But, does this imply that the inviolability of the basic structure principle - connoting that you cannot amend the Constitution in such a manner as would damage or destroy its basic structure - is to be inferred from the inviolability of fundamental rights? This is the first issue to be considered. Another issue that needs exploration is, that given the fundamental rights enumerated in part III constitute the very basis of the basic structure of the Constitution, how to expound the ambit of the protection of fundamental rights? The answer to these two related issues would enable the Supreme Court to answer the reference, namely, how to determine constitutionality of the amendment that included laws in the ninth schedule of the Constitution in pursuance of article 31B even after they had been held to be violative of fundamental rights on the

77. *Id.* at 871 (para 46), citing the Nobel Laureate Amartya Sen.

78. *Id.* at 871 (paras 37 and 38). This characterization of article 32 has been extended to all the rights enumerated in part III of the Constitution; see, *id.* at 886 (para 110).

79. *Id.* at 871 (para 39).

80. *Id.* at 884 (para 101).

touchstone of the basic structure principle? In other words, what kind of comprehensive judicial review is envisaged under the basic structure principle?

IX

The nine-judge bench in *I.R. Coelho* considered the ambit of judicial review under the basic structure principle by faithfully following the entrenched common law tradition, which it has eloquently summarized and presented for itself by stating:[81]

> The protection of fundamental constitutional rights through common law is the main feature of common law constitutionalism.

It is indeed interesting to examine how this common law tradition has been explored by the nine-judge bench for the resolution of conflict issue, *whether inviolability of the basic structure mean inviolability of fundamental rights*. The affirmative answer to this proposition, however, does not seem to reflect the correct position, because *Kesavananda Bharati*, which propounds the basic structure principle, itself permits the amendment (including addition, variation or repeal) of fundamental rights. The question, therefore, is: how to reconcile the violability of fundamental rights with the inviolability of the basic structure of the Constitution?

The approach of the Supreme Court for the resolution of this conflict may be illustrated by taking a concrete instance. The Supreme Court has held that 'equality', being the foundational value, is an essential feature of the basic structure of the Constitution, and yet the fundamental
right to equality is not inviolable:[82]

> It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure – rule of law, separation of powers – the fact that limited exceptions are made for limited purpose, to protect certain kinds of laws, does not mean that it is not part of the basic structure.

The sum and substance of this statement is that notwithstanding

81. *Id.* at 871 (para 45).
82. *Id.* at 888-889 (para 129).

14 (stipulating the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India), that by itself would not amount to violation of the foundational principle of equality, which is one of the features of the basic structure. It is on this ground, despite the denial of equality under article 14, the constitutional validity of article 31A and 31C had been upheld.[83] Jurisprudentially, however, such an apparent conflict could be cogently explained by employing the principle of 'abstraction'.

Various foundational values are made to reflect in fundamental rights enunciated in the Constitution. Once the Constitution has been framed, it is equally logical to state that those foundational values could be abstracted or derived from those fundamental rights. This is how the majority in *Kesavananda Bharati* is said to hold that "the principles behind fundamental rights are part of the basic structure of the constitution."[84] Acting on this premise, the nine-judge bench in *I.R. Coelho* holds:[85]

> Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect the basic features of the Constitution as indicated by *the synoptic view of the rights in Part III*.

Speaking jurisprudentially again on the principle of abstraction, there is differentiation between the values abstracted from fundamental rights *and* the fundamental rights from which those values have been abstracted. The abstracted values are of much wider ambit than the concrete sources (the sources from which those values have been derived or abstracted). They have an overarching influence and cover situations that hitherto remained uncovered by the enunciated fundamental rights. On the basis of this differentiation, it is possible to hold that violation of a fundamental right in certain situations, may not affect the

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83. *Id.* at 891 (para 141). In *I.R. Coelho* the Supreme Court has made a reference to the unanimous nine-judge bench decision in *Attorney General of India and Others* v. *Amratlal Prajivandas and Others*, (1994) 5 SCC 54. In this case mention was made that the 39th and 40th amendments of the Constitution that put COFEPOSA and SAFEMA into the ninth schedule tended to violate the provisions of articles 14,
19 and 21. Since those articles are considered as part of the basic structure, those amendments should be held as violative of the basic structure doctrine. However, the court assumed those amendments as constitutionally valid, because the counsel did not make any effort to establish in what manner the said amending Acts violated article 14. In this context, the Supreme Court in *I.R. Coelho* at 888-89 (para 129) has gone to the extent of saying that even if it is established that article 14 is violated, even then it would not cease to a part of the basic structure doctrine.

84. *Id.* at 886 (para 110).

foundational value derived from that very right in the larger social interest. Such a differentiation is of immense functional importance: it makes our Constitution much more accommodative by broadening its base.[86] The resonance of such a functional importance is found when the nine-judge bench observes with a sanguine self:[87]

> Our constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the *principles behind our fundamental rights*.

The second cognate issue dealt with by the nine-judge bench is that, realizing that fundamental rights enumerated in part III constitute the very basis of the basic structure of the Constitution, how to expound the ambit of the protection of fundamental rights? In this respect, adopting the principle from *M. Nagaraj* the nine-judge bench in *I.R. Coelho* states:[88]

> A constitution, and in particular that of it which protects and which entrenches fundamental rights and freedom to which all persons in the State are to be entitled is to be given a *generous and purposive construction*.

The 'generous and purposive construction' of the Constitution, and particularly of fundamental rights because of their special significance, essentially reflects the sociological approach to law, in which the core concern of the court is to realize the 'actual effect' of the impugned law on the guaranteed fundamental rights. In this respect, the nine-

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86. The italicized expression, "the synoptic view of Part III" unmistakably conveys that the values derived or abstracted from all the fundamental rights enumerated in part III of the Constitution (with the exception of right to property, which was not considered a fundamental right notwithstanding its earlier inclusion in
part III) constitute the essential features of the basic structure. However, such statements as "Article 21 is the heart of the Constitution," [*Id.* at 890 (para 139)], "Article 15, Article 21 read with Articles 14 and 19, which constitute the core values which if allowed to be abrogated would change completely the nature of the
Constitution [*Id.* at 890 (para 140)] seem to give the impression that there is differentiation amongst fundamental rights themselves: some are superior than the others. Even Parliament seems to put articles 20 and 21 on a higher level than other articles in the Constitution by providing through 44th amendment that these articles cannot be suspended even during emergency [see, *Id.* at 891 (para 145)]. However, such a differentiation is of no consequence in the application of the basic structure principle, because it does not envisage the inviolability of any of the provisions in the Constitution, including fundamental rights.

judge bench recalls the approach of the apex court in *Sakal Papers (P) Ltd.* v. *Union of India and Others*:[89]

> [W]hile 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.[90]

The shift from 'literal' approach to 'liberal and purposive construction' of the Constitution has enabled the apex court to realize 'the fundamentalness of the fundamental rights,'[91] and thereby discovering new dimensions of the protection of fundamental rights that were hitherto remained unexplored. Through their creative genius, they re-interpreted, for instance, article 21 that ordains: 'No person shall be deprived of his life or personal liberty except according to the procedure established by law.' Instead of 'literal and narrow interpretation' of article 21 as adopted earlier in *A.K. Gopalan* v. *State of Madras*,[92] the apex court in its landmark judgment in *Maneka Gandhi* v. *Union of India*,[93] has clearly and resolutely held that 'the procedure established by law' should be in conformity with the principles of natural justice, and that 'law' envisaged under this Article should be informed by the 'test of reasonableness.'[94] Moreover, the expression 'life' in this article does not merely mean 'physical' or 'animal' existence; the right to life includes right to live with human dignity.[95]

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89. AIR 1962 SC 305, cited in *I.R. Coelho* at 875 (para 62). In this case, the Supreme Court was faced with the issue of validity of certain legislative measures regarding the control of newspapers, and whether such measures amounted to infringement of the right to freedom of speech and expression under article 19(1)(a). While examining these questions, the court emphasized that the actual effect of the impugned law on the right guaranteed must be taken into account.

90. This approach was subsequently adopted by the apex court in *Rustom Cavasjee Cooper* v. *Union of India*, AIR 1970 SC 564 (popularly known as *Bank Nationalization* case), in which it was found that article 31 and article 19(1)(f) were not mutually exclusive, and thereby disapproved the *ratio* of *A.K. Gopalan* case.

91. See, *I.R. Coelho* at 873 (para 57).

92. AIR 1950 SC 27. In this case, article 21 was treated as if it were a 'self-contained' code. It has, as if, no proximity with article 19 of the Constitution.

93. AIR 1978 SC 597. In this case, the Supreme Court held that depriving a person of his right to go abroad without a reasonable case is arbitrary, and arbitrariness inheres inequality, which is prohibited by article 14, for 'equality and arbitrariness are sworn enemies.'

94. See the analysis in *I.R. Coelho* at 875-876 (para 62).

Likewise, the freedom of press, which though not separately and specifically guaranteed in part III of the Constitution, nevertheless, has been read as an integral part of the right to freedom of speech and expression under article 19(1)(a).[96] The 'right to vote' and the 'right to know the antecedent of the election candidates' have also been read within the ambit of article 19(1)(a) as an essential attribute of the right to freedom of speech and expression.[97] In this wise, the court has found that "fundamental rights are deeply connected," and that each right "supports and strengthens the work of the other."[98]

The 'purposive' and 'integrative' interpretation of the fundamental rights also reveals their comprehensive character. Although fundamental rights are often known as 'civil' and 'political' rights, as distinguished from the directive principles of state policy that are described as 'social and economic' rights, they are not devoid of "social content."[99] For instance, "egalitarian equality" is implicit in article 14 read with article 16(4), (4A) and (4B),[100] and, therefore "it is wrong to suggest that equity and justice find place only in Directive Principles;"[101] whereas article 16(1) inheres "formal equality which is the basis of the rule of law."[102] In other words, there cannot be a rule of law if there is no 'equality before the law,' or the state arbitrarily discriminates one against another.[103] Likewise, "the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination."[104] "Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc. and yet it permits classification for certain classes."[105] "All these are relevant considerations to test the validity of the Ninth Schedule laws".[106]

The exploration of fundamentalness of fundamental rights has, in turn, helped in broadening the base of the basic structure doctrine by

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96. *Id.* at 885 (para 107).

97. See the author's article, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies" 47 *JILI* 135-157 (2005).

98. *I.R. Coelho* 886 (para 110). See also at 887 (para 123), wherein it is observed that the propounding of *Kesavananda Bharati's* case read with the clarification of Khanna J, in *Indira Gandhi*, we find 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."

99. *Id.* at 888 (para 127).

100. *Id.* at 884 (para 106).

101. *Ibid.*

102. *Id.* at 888 (para 127).

103. *Id.* at 888 (para 128).

104. *Ibid.*

105. *Ibid.*

106. *Ibid.*

adding new basic features, which are not so specifically mentioned in part III. This is done "on the principle that certain unarticulated rights are implicit in the enumerated guarantees"[107] on the one hand, and settling the broader issue of 'justice and law' in the light of "the actual impairment [of fundamental rights] caused by the [impugned] law,"[108] on the other. The fundamental rights, thus, make the basic structure doctrine perhaps "the most significant constitutional control on the Government,"[109] and thereby "a comprehensive guarantee against the excesses by State authorities."[110]

X

The comprehensive basis of the basic structure doctrine along with judicial review, both as its integral part and as one of the most essential features of modern constitutionalism based on the principle of separation of powers,[111] has led the nine-judge bench to evolve the technique of how to apply this doctrine in concrete fact situations. This doctrine applies to every amendment of the Constitution, be it in the form of amendment of any of its provision or amendment by way of insertion of any law (Act or Regulation) into the ninth schedule of the Constitution in pursuance of the provisions of article 31B.[112]

Prior to the propounding of the basic structure doctrine in 1973, the role of judicial review in respect of the ninth schedule laws was of somewhat limited character: it was limited to examining only the issue of legislative competency and not the constitutionality of the inserted laws, for they were taken as a part of the Constitution itself – inserted into the Constitution in the exercise of constituent power under article 368 in pursuance of the provisions of article 31B. This is how the two conflicting positions - on the one hand, the prohibition expressed in article 13 read with article 32 of the Constitution, and on the other hand, the empowerment of Parliament to pass legislation in pursuance of article 31B and grant them immunity of fundamental rights by

107. *Id.*, at 876 (para 62), citing *M. Nagaraj*.
108. *Id.* at 874 (para 57)
109. *Id.* at 873 (para 53).
110. *Id.* at 875 (para 61).
111. For different nuances of the concept of judicial review, see *supra* part IV.
112. See, *I.R. Coelho* at 889 (para 132).
113. The apparent conflict situation is brought out when the court asks ponderingly: "It cannot be said that the same Constitution that provides for a check on legislative power [implication of article 13 read with article 32 of the Constitution] will decide whether such a check is necessary or not [implication of article 31B]. It would be a negation of the Constitution." See, *id.* at 884 (para 103).

providing the shelter of ninth schedule - seemed to be reconciled.[113]

However, this position underwent a change after the formal introduction of the basic structure doctrine in1973, with 'judicial review' as one of its most critical features. This raises a critical question afresh about the extent or sweep of the power of judicial review. The issue is whether under the basic structure doctrine, it is open to consider the constitutionality of the ninth schedule laws on the basis of full judicial review, or judicial review would continue to remain limited and confined to the issue of legislative competency. The nine-judge bench has responded by stating that "every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of fundamental rights as they stand in Part III."[114] In other words, the legislature "cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after enunciation of the basic structure doctrine."[115] This has been termed as the "enlarged judicial review concept."[116] It involves the application of two tests within the ambit of the basic structure doctrine for examining the constitutional validity of the enacted laws: the 'rights test' and the 'essence of the rights test'.[117]

XI

The 'rights test' requires the court to determine "the direct impact and effect," and not just "the form," of an amendment on the enumerated fundamental rights. To this end, the nine-judge bench states:[118]

> [T]he constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test, i.e., the form of amendment is not relevant factor but the consequence thereof would be determinative factor.

The underlying reason for extending judicial review on the touchstone of fundamental rights is the realization that the ninth schedule laws do not become part of the Constitution (as was earlier assumed), because "they derive their validity on account of exercise undertaken by

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114. *Id.* at 887 (para 116).

115. *Id.* at 891 (para 142).

116. *Ibid.*

117. *Id.* at 892-893 [para 150(iv)], wherein both the tests have been conceived as forming part of the basic structure doctrine: "….the basic structure doctrine as reflected … by application of the 'rights test' and 'the essence of the right' test…."

118. *Id.* at 892 (para 149).

Parliament to include them into the Ninth Schedule."[119] As such, the court shall apply "the principle of compatibility" by examining "the effect of the impugned law," on the one hand and the "exclusion of part III in its entirety at the will of the Parliament," on the other.[120] Thus, the clear implication is that "the Acts inserted in the Ninth Schedule after 24th April, 1973 would not receive full protection."[121]

The 'essence of the rights test' requires the court to take into account "the synoptic view" of fundamental rights enumerated in part III, or "the principles underlying thereunder."[122] This test, being abstract in nature, is of much wider ambit, because that includes even the undefined rights and values, as for instance, the courts have been able to read or derive the hitherto undefined rights, such as 'the right to vote' and 'freedom of press' from the underlying principle of the defined 'right to freedom of speech and expression' under article 19(1)(a) of the Constitution.[123]

This perspective of the 'rights test' and 'essence of rights test' has enabled the nine-judge bench to answer the specific reference made to it by the 5-judge constitutional bench in 1999.[124] At first blush, the duality which is sought to be resolved through the larger constitutional bench seems to be indistinguishable: how can you judge the constitutional validity of an amending Act on the touchstone of basic structure doctrine without considering the 'contents' of that amending Act itself? However, on the basis of these two tests the constitutional validity or invalidity of the ninth schedule law on the touchstone of fundamental rights can be differentiated from the constitutional validity or invalidity of the amendment introducing that very law into the ninth schedule of the Constitution by the exercise of amending power under article 368 read with article 31B. On a conjoint consideration of the application of these two tests, it is possible to hold that if a law held to be violative of any rights in part III (on the basis of 'rights test') is subsequently incorporated in the ninth schedule after April 24, 1973 in the exercise of amending power under article 368 in pursuance of article 31B, that would not *ipso facto* make the amendment

120. *Ibid*.

121. *Id.*, at 889 (para 133), citing *Waman Rao*.

122. *Id.*, at 893 [para 150(iv)].

123. See also, *supra* notes 96-98, and the accompanying text.

124. *I.R. Coelho* at 865 (para 4): "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

void. That would be void only if it further damages or destroys the basic structure of the Constitution on the basis of 'the essence of rights test', which is applied on the basis of the 'synoptic view of Part III' or 'synoptic view of the Constitution'.[125]

Such a differentiation clearly carves out the operational area for the legislature under article 31B read with the ninth schedule of the Constitution, albeit a restricted one after the introduction of the formal introduction of basic structure doctrine in 1973.

XII

In retrospect, we find that the doctrine of basic structure of the Constitution is a great constitutional concept that has been formally engrafted upon the Constitution by the judiciary sheerly through the exploitation of interpretative processes. This doctrine is a tribute to the creative genius of the judges. In one single stroke, they have changed the course of our constitutional history: the unlimited amending power of Parliament under article 368 in pursuance of article 31B read with the ninth schedule to grant 'fictional validation' to laws passed by the legislature is no more available. After 24th of April, 1973, there is no

125. See, *id.* at 893 [para 150 (v)]: "However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and *the principles underlying thereunder*." Emphasis added.

In this context, some issues of constitutional import "that could have been raised but were not" raised in *I.R. Coelho*, has been noted by Kamala Sankaran, in her very useful comment on the *I.R. Coelho* case under the title, "From Brooding Omnipresence to Concrete Textual Provisions: *I.R. Coelho* Judgment and the Basic Structure Doctrine," 49 *JILI* 240 at 248 (2007). She has stated in her concluding remarks: "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." Though a categorical statement to this effect is desirable, nevertheless, in the meanwhile, such a lacuna could be explained by observing that the two processes, one of law making in the exercise of ordinary legislative power, and the other of granting 'fictional immunity' of fundamental rights to laws added to the ninth schedule by resorting to amendment of the Constitution, are quite separate and apart. The latter course envisages the insertion of those laws that either have already been declared unconstitutional for violating article 13(2) or have the clear potential of such a violation, else the protective umbrella would not have been required for them.
If so, then considering the latter course complete in itself, would not require the invocation of the doctrine of eclipse. For this purpose, the distinction between

more blanket power. The exercise of amending power is made subject to the basic structure doctrine. Thenceforth, the laws that are included in the ninth schedule – the protective umbrella for granting 'fictional validation' – "have to be examined individually for determining whether the constitutional amendment by which they are put in the ninth schedule damage or destroy the basic structure of the Constitution."[126]

One of the singular features of this doctrine is that it has proved to be prophetic in nature. As if, the judges in their propounding of this doctrine in 1973 had the premonition of indiscriminate use of the unlimited amending power in future. This is clearly borne out by the holdings of the Supreme Court in such cases as *Indira Gandhi*, *Minerva Mills* and *Waman Rao*. In these cases "every improper enhancement of its own power by Parliament, be it clauses 4 and 5 of Article 329A, or Section 4 of Forty-second Amendment, have been held to be incompatible with basic structure doctrine, as they introduced new elements which altered the identity of the Constitution, or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded."[127] For instance, Parliament excluded judicial review, and made directive principles en-bloc a touchstone for overriding all fundamental rights and provided insertion of laws in the ninth schedule "which had no nexus with the agrarian reforms."[128] All such attempts were annulled on the basis of basic structure doctrine.

The other singular feature of the basic structure doctrine is that it is in consonance with the concept of constitutionalism, which represents the strategy of controlling government through the discipline of fundamental rights.[129]

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126. *I.R. Coelho* at 891-92 (para 147).

127. *Id.* at 890 (para 137).

128. *Ibid.*

129. The Supreme Court has cited [*id.* at 886 (para 111)] the classic instance of the Constitution of the USA, where the Constitution was finally ratified only upon the understanding that a Bill of Rights would be immediately added, guaranteeing certain basic freedoms to its citizens. Likewise, when the Bill of Rights was being ratified in America, the French Revolution declared the Rights of Man in Europe. The new nations emerging from the clutches of colonialism across the globe embraced basic human rights as the foundation of their respective constitutions. In other countries committed to common law tradition, it is being realized that despite their deep commitment to preserve fundamental values/rights, they could not be left
'unstated'. The United Kingdom, for instance, adopted the Human Rights Act, which gave explicit effect to the European Convention on Human Rights; in Canada, the Constitutional Act of 1982 incorporated certain basic rights into their system of governance. This is how the movement towards 'inviolable' human

XIII

The nine-judge constitutional bench in *I.R. Coelho* has made a distinct contribution towards the development of the basic structure doctrine. One, it has provided the clear basis for the operation of this doctrine by resting it on the bedrock of fundamental rights. This has been achieved through the formulation of two tests – the 'rights test' and the 'essence of rights test'. Such a concretion removes the hitherto prevailing haziness in the perception and application of this doctrine. In short, it de-mistifies the doctrine to a great extent by providing a strong linkage with fundamental rights.

Two, it has broadened the base of the basic structure doctrine. Instead of simply saying that such and such articles of the Constitution would constitute the basic features of the Constitution, the violation of which would be the violation of the basic structure, it has shifted the focus from the 'rights' to the 'essence' or 'underlying principles' of those rights.[130] "If the [impugned] law infringes the essence of any of the fundamental rights or any other aspect of basic structure, then it will be struck down."[131]

Three, the widened basis of the basic structure doctrine instantly makes it more dynamic and accommodative, because that enables it to include even some unarticulated rights based on abstracted values.[132]

Four, it helps in removing the popular misgiving; namely, whether the basic structure doctrine shifts the 'centre of gravity' or the 'centre of policy decision-making,' from Parliament to the Supreme Court or from the legislature to the judiciary. By founding the basic structure doctrine concretely on the bedrock of fundamental rights and the

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130. See, *id.* at 886 (para 113): "Other countries having controlled Constitution, like Germany, have embraced the idea that there is a basic structure to their Constitutions and in doing so have entrenched various rights as core constitutional commitments. India's constitutional history has led us to include the essence of each
of our fundamental rights in the basic structure of our Constitution."

131. *Id.* at 886 (para 114).

132. In this respect, the emphasis reflected in *Minera Mills* may be compared. In that case, while dealing with articles 14, 19, and 21, the Supreme Court observed that "these clearly form part of the basic structure of the Constitution and cannot be abrogated." These "three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to be awakened abyss
of unrestrained power." "These Articles stand on altogether different footing.....If some of the fundamental rights constitute the basic structure, it would not be open to immunize those legislations from full judicial scrutiny on the ground that *fundamental rights are not part of the basic structure* or on the ground that Part III provisions are not available as a result of immunity granted by Article 31B."

principles underlying them, the decision of the nine-judge bench has supplied the reasonably objective basis for confirming the 'supremacy of the Constitution', which somehow or the other had got deflected earlier owing to the indiscriminate use of the amending power under article 368 in pursuance of article 31B. Truly speaking, the basic structure doctrine is neither about the supremacy of Parliament, nor about the supremacy of the Supreme Court. It is Constitution-centric. It is entirely a different matter that in the application of this doctrine, the judiciary is destined to play a critical role. But this is due to the role assigned to the judiciary by the Constitution, which is based on the principle of separation of powers.[133] Otherwise also, the judges, by virtue of the special role and responsibility of rendering justice, especially steeped in the common law tradition, they are truly trained and equipped to take the 'holistic view' of things in each case presented before them,[134] and they are required to support their conclusions in terms of the basic values of the Constitution. On the other hand, recognizing that fundamental rights are not inviolable in the larger interest of society, the state is required "to justify the degree of invasion of fundamental rights," because the legislature is presumed "to legislate compatibly with fundamental rights."[135] "The greater the invasion into essential freedoms, [the] greater is the need for justification, and determination by the court whether invasion was necessary and if so to what extent."[136]

Five, it answers the question that is often in vogue: whether the basic structure doctrine is a resurrection of *Golak Nath*. Apparently it seems to be so, because *Kesavananda Bharati* on the one hand overrides the decision in *Golak Nath* to the effect that fundamental rights are no more un-amendable, on the other hand provides that their violation might amount to the violation of the basic structure of the Constitution, because the fundamental rights and the principles underlying them constitute the very basis of the basic structure doctrine. In other words, the basic structure doctrine forbids the amendment of the fundamental

133. In *I.R. Coelho* at 891 (para 146), emphasizing the need for discovering the applicable standard, it is observed: " ... the point to be noted is that the application of a standard is an important exercise required to be undertaken by the court in applying the basic structure doctrine, and that has to be done by the courts and not by prescribed authority under Article 368."

134. In the common law tradition, parliamentary sovereignty is made to operate on the basis of common law constitutionalism, in which Parliament in the exercise of sovereign powers is not permitted to oust the principle of judicial review, which is the very basis of the rule of law. See, *I.R. Coelho* at 872 (para 49).

135. *Id.* at 892 (para 148)

rights, and this takes us back to *Golak Nath*.

Such an inference or a conclusion is rather superficial, because there is a critical 'functional' difference between the two situations. *Golak Nath* says that you cannot adversely amend fundamental rights at all; whereas *Kesavananda Bharati* lays down that abrogation of fundamental rights may or may not violate the basic structure doctrine.[137] If they violate the basic structure doctrine, then violation of fundamental rights is not permissible; if their violation does not violate the basic structure doctrine, then their violation is permissible. In this respect, we may quote Chandrachud CJI when he stated in *Minerva Mills* to the effect that "if by 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."[138] This implies that in certain situations certain rights or freedoms "may justifiably be interfered with," as for instance, in cases of "terrorism."[139] Such an approach saves us from treating the fundamental rights in the nature of 'static', instead of 'dynamic', values.

Six, the judgment in *I.R. Coelho* has put the basic structure doctrine on firmer footing. It is unique in many ways, including for its analysis, and also for its unanimity. By reason of being a unanimous judgment of the nine judges, it instantly precludes or at least radically reduces the possibility of differing interpretations of the law laid down by it. This, in turn, makes the judgment certain, definite, clearly understood and easily applicable,[140] which indeed is the true unifying role of the apex

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137. See, *id.* at 892 [150(i)]: Under the basic structure doctrine, if a law "that abrogates or abridges rights governed by Part III of the Constitution may violate basic structure doctrine or it may not."

138. Cited in *I.R. Coelho* at 872 (para 50). The nine-judge bench considered these observations "very relevant" in deciding the reference before it, *ibid.* Again: "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." *Ibid.*

139. *Id.* at 891 (para 146).

140. The nine-judge bench clearly crystallized the steps that are required to be taken for determining whether the ninth schedule law is violative of part III in a given case. If such examination reveals that it does violate a fundamental right, the further inquiry is to be made to determine, whether such a violation is found to be destructive of the basic structure on the basis of synoptic view of the Constitution.
If the answer is still in the affirmative, that would result in the invalidation of the ninth schedule law. After getting the result of this simple test, there is no need to recall how the issue of constitutionality of article 31B was upheld in

court envisaged under article 141 of the Constitution, the role of declaring "the law."[141]

XIV

Very recently, Fali S. Nariman participating in the debate on *India at Sixty* published an article under the title, "Constitution under threat."[142] While reflecting on 60 years of India's independence, he said:

> We have waited – 60 years, and it is still not certain how it will all come out. But one thing is certain. Our Constitution has survived – and that is a plus point.

If Nariman's concluding statement were to be substantiated that "Our Constitution has survived – and that is a plus point", one would unhesitatingly name *the basic structure doctrine*, as the single most factor that has made the survival of our Constitution possible in its pristine form. It has served us well by effectively foreclosing the possibilities of uncalled for tampering of the Constitution. If this doctrine is based on the concept of implied limitations on the power of Parliament – the limitations that exist right from the very beginning as a sequel of constitutionalism despite the presence of article 31B,[143] may we venture to suggest that the principle of basic structure of the Constitution was

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erosion of fundamental rights conferred by Part III," states the nine-judge bench assertively in *I.R. Coelho* at 892 (para 147).

141. Article 141: "*The law* declared by the Supreme Court shall be binding on all courts within the territory of India." Emphasis added.

142. See, *The Tribune*, August 15, 2007.

143. The exceptional power conferred on the first Parliament through the insertion of article 31B along with the ninth schedule by the very first amendment of the Constitution in 1951 was directed to meet the exceptional problem, namely, the problem of implementing land reforms without let and hindrances of judicial intervention on the ground of violating fundamental rights, particularly the right to property. The proximity of article 31B with article 31A and 31C clearly suggests that its avowed purpose was to effectuate land reforms, and not to use this power for any other extraneous purposes. Looked from this perspective, the protective umbrella of the ninth schedule was never meant to be invoked, say, for saving the election of the Prime Minister by inserting entry 87 into the ninth schedule through the 39th amendment in 1975, which was annulled by the Supreme Court in *Indira Gandhi* and subsequently removed from the statute book through the 44th amendment
of the Constitution in 1978. The nine-judge bench takes note of this development by observing that in *Indira Gandhi*, "for the first time, the constitutional amendment that was challenged did not relate to property right, but related to

inherent *ab initio* in the Constitution itself: *Kesavananda Bharati* has merely made it expressed what was hitherto implied.[144]

Long live the Basic Structure Doctrine!

144. See the rationale for making the operation of basic structure doctrine prospective in the statement of Bhagwati J in *Minerva Mills*, cited in *I.R. Coelho* at 891 (para 89): "all constitutional amendments made after the decision in *Kesavananda Bharati* case would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitations on its amending power."