CASE NO.:
Appeal (civil) 1344-45 of 1976

PETITIONER:
I.R. Goelho (Dead) By LRs

RESPONDENT:
State of Tamil Nadu & Ors

DATE OF JUDGMENT: 11/01/2007

BENCH:
Y.K. Sabharwal Ashok Bhan Arijit Pasayat B.P. Singh, S.H. Kapadia C.K. Thakker & P.K. Balasu bramanyan Altamas Kabir D.K. Jain

JUDGMENT:
J U D G M E N T

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

Y.K. Sabharwal, CJI.

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

Re : Order of Reference

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

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

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

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

Broad Question

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

Development of the Law

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

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

The High Court of Patna in Kameshwar v. State of Bihar [AIR 1951 Patna 91] held that a Bihar legislation relating to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain Zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that Parliament amended

the Constitution by adding Articles 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunizing these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, inter alia, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void.

Articles 31A and 31B read as under :

"31A. Saving of laws providing for acquisition of estates, etc.\027 [(1) Notwithstanding anything contained in article 13, no law providing for\027

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

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

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

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

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 :

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

Provided further that where any law

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

(2) In this article,\027

(a) the expression "estate", shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include\027

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

(ii) any land held under ryotwary settlement;

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

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

31B. Validation of certain Acts and Regulations.\027Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and

Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

The Constitutional validity of the First Amendment was upheld in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar [(1952) SCR 89]. The main object of the amendment was to fully secure the constitutional validity of Zamindari Abolition Laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. Upholding the validity of the amendment, it was held in Sankari Prasad that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of constituent power. The Constitution Bench held that to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament.

The Constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in Sajjan Singh v. State of Rajasthan [(1965) 1 SCR 933] the law declared in Sankari Prasad was reiterated. It was noted that Articles 31A and 31B were added to the Constitution realizing that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that the genesis of the amendment made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, it would be clear that the Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy viz. a policy in which the party in power believes. The Court further noted that the impugned act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. It noted that the object of the Act was to amend the relevant Articles in Part III which confer Fundamental Rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provision of clause (b) of that proviso. The Court, however, noted, that if the effect of the amendment made in the Fundamental Rights on Article 226 is direct and not incidental and if in significant order, different considerations may perhaps arise.

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

In I.C. Golak Nath & Ors. v. State of Punjab & Anr. [(1967) 2 SCR 762] a Bench of 11 Judges considered the

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

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

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

"13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.

The Constitution (25th Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31B of the Constitution, Article 31C was inserted, namely :

"31C.\027Saving of laws giving effect to certain directive principles.\027 Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy :

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

The Constitution (26th Amendment) Act, 1971 omitted from Constitution Articles 291 (Privy Purses) and Article 362 (rights and privileges of Rulers of Indian States) and inserted Article 363A after Article 363 providing that recognition granted to Rulers of Indian States shall cease and privy purses be abolished.

The Constitution (29th Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65 \026 Kerala Land Reforms

Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66 \026 Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).

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

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

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

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

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

Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the Ninth Schedule. Many of the Entries inserted were unconnected with land reforms.

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

About two weeks before the Constitution Bench rendered decision in Indira Gandhi's case, internal emergency was proclaimed in the country. During the emergency from 26th June, 1975 to March, 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal emergency, Parliament passed Constitution (40th Amendment) Act, 1976. By clause (3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted. Many of these entries were unrelated to land reforms.

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

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

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

After the end of internal emergency, the Constitution (44th Amendment) Act, 1978 was passed. Section 2, inter alia, omitted sub-clauses (f) of Article 19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300A in the Constitution. Articles 14, 19 and 21 became enforceable after the end of emergency. The Parliament also took steps to protect fundamental rights that had been infringed during emergency. The Maintenance of Internal Security Act, 1971 and the Prevention of Publication of Objectionable Matter Act, 1976 which had been placed in the Ninth Schedule were repealed. The Constitution (44th Amendment) Act also amended Article 359 of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Articles 20 and 21 could not be suspended. During emergency, the fundamental rights were read even more restrictively as interpreted by majority in Additional District Magistrate, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521]. The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.

The fundamental rights received enlarged judicial interpretation in the post-emergency period. Article 21 which was given strict textual meaning in A.K Gopalan v. The State of Madras [1950 SCR 88] interpreting the words "according to procedure established by law" to mean only enacted law,

received enlarged interpretation in Menaka Gandhi v. Union of India [(1978) 1 SCC 248]. A.K. Gopalan was no longer good law. In Menaka Gandhi a Bench of Seven Judges held that the procedure established by law in Article 21 had to be reasonable and not violative of Article 14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights.

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

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

In Bhim Singhji (supra), challenge was made to the validity of Urban Land (Ceiling and Regulation) Act, 1976 which had been inserted in the Ninth Schedule after Kesavananda Bharati's case. The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Articles 14 and 19(1)(f) of Part III. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and as already noted it was omitted therefrom only in 1978 and made instead only a legal right under Article 300A.

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

Constitutional Amendment of Ninth Schedule

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

"Amendment
Acts/Provisions
added
1st Amendment (1951)
1-13
4th Amendment (1955)
14-20
17th Amendment (1964)
21-64
29th Amendment (1971)
65-66
34th Amendment (1974)
67-86
39th Amendment (1975)
87-124
40th Amendment (1976)
125-188
47th Amendment (1984)
189-202
66th Amendment (1990)
203-257
76th Amendment (1994)
257A
78th Amendment (1995)
258-284
Omission
In 1978 item 92 (Internal Security Act)
was repealed by Parliamentary Act.
In 1977 item 130 (Prevention of

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

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

Further, it has been described as "the very soul of the
Constitution and the very heart of it".
Reference may also be made to the opinion of Chief
Justice Patanjali Sastri in State of Madras v. V.G. Row
[1952 SCR 597] to the following effect :
"This is especially true as regards the
"fundamental rights" as to which the
Supreme Court has been assigned the
role of a sentinel on the qui vive. While
the Court naturally attaches great weight
to the legislative judgment, it cannot
desert its own duty to determine finally
the constitutionality of an impugned
statute."

The jurisdiction conferred on this Court by Article 32 is
an important and integral part of the basic structure of the
Constitution of India and no act of Parliament can abrogate it
or take it away except by way of impermissible erosion of
fundamental principles of the constitutional scheme are
settled propositions of Indian jurisprudence [see Fertilizer
Corporation Kamgar Union (Regd.), Sindri & Ors. v. Union
of India and Ors.[(1981) 1 SCC 568], State of Rajasthan v.
Union of India & Ors. [(1977) 3 SCC 592], M. Krishna
Swami v. Union of India & Ors. [(1992) 4 SCC 605],
Daryao & Ors. v. The State of U.P. & Ors. [(1962) 1 SCR
574] and L. Chandra Kumar (supra).
In S.R. Bommai & Ors. v. Union of India & Ors.
[(1994) 3 SCC 1] it was reiterated that the judicial review is a
basic feature of the Constitution and that the power of judicial
review is a constituent power that cannot be abrogated by
judicial process of interpretation. It is a cardinal principle of
our Constitution that no one can claim to be the sole judge of
the power given under the Constitution and that its actions
are within the confines of the powers given by the
Constitution.
It is the duty of this Court to uphold the constitutional
values and enforce constitutional limitations as the ultimate
interpreter of the Constitution.
Principles of Construction
The Constitution is a living document. The constitutional
provisions have to be construed having regard to the march of
time and the development of law. It is, therefore, necessary
that while construing the doctrine of basic structure due
regard be had to various decisions which led to expansion and
development of the law.
The principle of constitutionalism is now a legal principle
which requires control over the exercise of Governmental
power to ensure that it does not destroy the democratic

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

Common Law Constitutionalism

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

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

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

Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

Principles of Constitutionality

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

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

Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable" and "primordial". They constitute the ark of the Constitution. (Kesavananda Bharati \026 P.991, P.999). The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the

means provided for by Part III. It is in this sense that Part III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy the essential element of the basic structure of the Constitution. [Emphasis supplied] (Para 57). Further observes the learned Chief Justice, that the matters have to be decided not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The observations made in the context of Article 31C have equal and full force for deciding the questions in these matters. Again the observations made in Para 70 are very relevant for our purposes. It has been observed that if by a Constitutional Amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those Articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity. These observations are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32, stand excluded without any yardstick.

The developments made in the field of interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine \026 to find out whether there has been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance.

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

"So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in Kesavananda Bharati's case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in Kesavananda Bharati case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the

limits of its powers."

In Minerva Mills while striking down the enlargement of Article 31C through 42nd Amendemnt which had replaced the words "of or any of the principles laid down in Part IV" with "the principles specified in clause (b) or clause (c) and Article 39", Justice Chandrachud said :

"Section 4 of the Constitution (42nd Amendment) Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."

In Indira Gandhi's case, for the first time the challenge to the constitutional amendment was not in respect of the rights to property or social welfare, the challenge was with reference to an electoral law. Analysing this decision, H.M. Seervai in Constitutional Law of India (Fourth Edition) says that "the judgment in the election case break new ground, which has important effects on Kesavananda Bharati's case itself (Para 30.18). Further the author says that "No one can now write on the amending power, without taking into account the effect of the Election case". (Para 30.19). The author then goes on to clarify the meaning of certain concepts \026 'constituent power', 'Rigid' (controlled), or 'flexible' (uncontrolled) constitution, 'primary power', and 'derivative power'.

The distinction is drawn by the author between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law making power and a power to amend the Constitution, a derivative power \026derived from the Constitution and subject to the limitations imposed by the Constitution. No provision of the Constitution framed in exercise of plenary law making power can be ultra vires because there is no touch-stone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it.

For determining whether a particular feature of the Constitution is part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance (Chief Justice Chandrachud in Indira Gandhi's case).

The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court

as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on state power is demonstrated by a series of cases that have been decided by this Court. In The State of Bombay v. Bhanji Munji & Anr. [(1955) 1 SCR 777] relying on the ratio of Gopalan it was held that Article 31 was independent of Article 19(1)(f). However, it was in Rustom Cavasjee Cooper v. Union of India [(1970) 3 SCR 530] (popularly known as Bank Nationalization case) the view point of Gopalan was seriously disapproved. While rendering this decision, the focus of the Court was on the actual impairment caused by the law, rather than the literal validity of the law. This view was reflective of the decision taken in the case of Sakal Papers (P) Ltd. & Ors. v. The Union of India [(1962) 3 SCR 842] where the court was faced with the validity of certain legislative measures regarding the control of newspapers and whether it amounted to infringement of Article 19(1)(a). While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in Bank Nationalization case. The Court examined the relation between Article 19(1)(f) and Article 13 and held that they were not mutually exclusive. The ratio of Gopalan was not approved.

Views taken in Bank Nationalization case has been reiterated in number of cases (see Sambhu Nath Sarkar v. The State of West Bengal & Ors. [(1974) 1 SCR 1], Haradhan Saha & Anr. v. The State of West Bengal & Ors. [(1975) 1 SCR 778] and Khudiram Das v. The State of West Bengal & Ors. [(1975) 2 SCR 832] and finally the landmark judgment in the case of Maneka Gandhi (supra). Relying upon Cooper's case it was said that Article 19(1) and 21 are not mutually exclusive. The Court observed in Maneka Gandhi's case:

"The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R. C. Cooper's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. Now, if a law depriving a person of ''personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given, situation, ex hypothesi it must

also' be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in A. K. Gopalan's case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it "relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, The State of West Bengal v. Anwar Ali Sarkar [1952] S.C.R. 284 and Kathi Raning Rawat v. The State of Saurashtra [1952] S.C.R. 435]"

[emphasis supplied]

The decision also stressed on the application of Article 14 to a law under Article 21 and stated that even principles of natural justice be incorporated in such a test. It was held: "\005In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

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

[emphasis supplied]

The above position was also reiterated by Krishna Iyer J., as follows :
"The Gopalan (supra) verdict, with the cocooning of Article 22 into a self contained code, has suffered

supersession at the hands of R. C. Cooper(1) By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietariat have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cyclorarmic review starts from Gopalan, moves on to In re : Kerala Education Bill and then on to All India Bank Employees Union, next to Sakal Newspapers, crowning in Cooper [1973] 3 S.C.R. 530 and followed by Bennet Coleman and Sambu Nath Sarkar. Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

[emphasis supplied]

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

The approach in the interpretation of fundamental rights has been evidenced in a recent case M. Nagaraj & Ors. v. Union of India & Ors. [(2006) 8 SCC 212] in which the Court noted:

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

Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In Sakal Papers (P) Ltd. v. Union of India and Ors. [AIR 1967 SC 305] this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in A.K. Gopalan v. State of Madras. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan and held in its landmark judgment in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated

guarantees".
[Emphasis supplied]

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

Seperation of Powers

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

In fact, it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In Federalist 47, 48, and 51 James Madison details how a separation of powers preserves liberty and prevents tyranny. In Federalist 47, Madison discusses Montesquieu's treatment of the separation of powers in the Spirit of Laws (Boox XI, Ch. 6). There Montesquieu writes, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . Again, there is no liberty, if the judicial power be not separated from the legislative and executive." Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of government should not be entirely in the hands of another department of government.

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

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."
(434)

Montesquieu finds tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of Constitutional law, the importance of the separation of powers on our system of governance was recognized by this Court in Special Reference No.1 of 1964 [(1965) 1 SCR 413].

Contentions

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

Further relying upon the clarification of Khanna, J, as given in Indira Gandhi's case, in respect of his opinion in Kesavananda Bharati's case, it is no longer correct to say that fundament rights are not included in the basic structure. Therefore, the contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structure shall have to be examined on the fundamental rights test.

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

The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The consequence also is, learned counsel for the petitioners contended, to emasculate Article 32 (which is part of fundamental rights chapter) in its entirety \026 if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of Part III, Article 32 would stand abrogated qua the Ninth Schedule laws. The contention is that the abrogation of Article 32 would be per se violative of the basic structure. It is also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the power under Article 32 is removed and, on the other hand, the said power is exercised by the legislature itself by declaring, in a way, Ninth Schedule laws as valid.

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in Kesavananda Bharati's case which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The fundamental rights chapter, it is contended, stands excluded as a result of protective

umbrella provided by Article 31B and, therefore, the challenge can only be based on the ground of basic structure doctrine and in addition, legislation can further be tested for (i) lack of legislative competence and (ii) violation of other constitutional provisions. This would also show, counsel for the respondents argued, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine.

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

The respondents contend that the point in issue is covered by the majority judgment in Kesavananda Bharati's case. According to that view, Article 31B or the Ninth Schedule is a permissible constitutional device to provide a protective umbrella to Ninth Schedule laws. The distinction is sought to be drawn between the necessity for the judiciary in a written constitution and judicial review by the judiciary. Whereas the existence of judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of the Parliament under Article 368, the power of judicial review of the judiciary can be curtailed over certain matters. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be established in Kesavananda Bharati's case, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. However, in every case where the constituent power excludes judicial review, the basic structure of the Constitution is not abrogated. The question to be asked in each case is, does the particular exclusion alter the basic structure. Giving immunity of Part III to the Ninth Schedule laws from judicial review, does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The effect of placing a law in Ninth Schedule is that it removes the fetter of Part III by virtue of Article 31B but that does not oust the court jurisdiction. It was further contended that Justice Khanna in Kesavananda Bharati's case held that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and will include within itself the power to add, alter or repeal various articles including taking away or abridging fundamental rights and that the power to amend the fundamental rights cannot be denied by describing them as natural rights. The contention is that the majority in Kesavananda Bharati's case held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and, therefore, the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if fundamental rights can be amended, which is the effect of Kesavananda Bharati's case overruling Golak Nath's case, then fundamental rights cannot be said to be part of basic structure unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially

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

To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31B read with Article 368 of the Constitution. In Kesavananda Bharti's case, the majority opinion upheld the validity of the Kerala Act which had been set aside in Kunjukutty Sahib etc. etc. v. The State of Kerala & Anr. [(1972) 2 SCC 364] and the device used was that of the Ninth Schedule. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine. In State of Maharashtra & Ors. v. Man Singh Suraj Singh Padvi & Ors. [(1978) 1 SCC 615], a Seven Judge Constitution Bench, post-decision in Kesavananda Bharati's case upheld Constitution (40th Amendment) Act, 1976 which was introduced when the appeal was pending in Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31B and the Ninth Schedule cured the defect, if any, in the regulations as regards any unconstitutionality alleged on the ground of infringement of fundamental rights.

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

Validity of 31B

There was some controversy on the question whether validity of Article 31B was under challenge or not in Kesavananda Bharati. On this aspect, Chief Justice Chandrachud has to say this in Waman Rao :

In Sajjan Singh v. State of Rajasthan [(1965) 1 SCR 933], the Court refused to reconsider the decision in Sankari Prasad (supra), with the result that the validity of the 1st Amendment remained unshaken. In Golaknath, it was held by a majority of 6 : 5 that the power to amend the Constitution was not located in Article 368. The inevitable result of this holding should have been the striking down of all constitutional amendments since, according to the view of the majority, Parliament had no power to amend the Constitution in pursuance of Article 368. But the Court resorted to the doctrine of prospective overruling and

held that the constitutional amendments which were already made would be left undisturbed and that its decision will govern the future amendments only. As a result, the 1st Amendment by which Articles 31A and 31B were introduced remained inviolate. It is trite knowledge that Golaknath was overruled in Kesavananda Bharati (supra) in which it was held unanimously that the power to amend the Constitution was to be found in Article 368 of the Constitution. The petitioners produced before us a copy of the Civil Misc. Petition which was filed in Kesavananda Bharati, (supra) by which the reliefs originally asked for were modified. It appears thereform that what was challenged in that case was the 24th, 25th and the 29th Amendments to the Constitution. The validity of the 1st Amendment was not questioned Khanna J., however, held-while dealing with the validity of the unamended Article 31C that the validity of Article 31A was upheld in Sankari Prasad, (supra) that its validity could not be any longer questioned because of the principle of stare decisis and that the ground on which the validity of Article 31A was sustained will be available equally for sustaining the validity of the first part of Article 31C (page 744) (SCC p.812, para 1518).

We have examined various opinions in Kesavananda Bharati's case but are unable to accept the contention that Article 31B read with the Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge in Kesavananda Bharati's case were examined assuming the constitutional validity of Article 31B. Its validity was not in issue in that case. Be that as it may, we will assume Article 31B as valid. The validity of the 1st Amendment inserting in the Constitution, Article 31B is not in challenge before us.

Point in issue

The real crux of the problem is as to the extent and nature of immunity that Article 31B can validly provide. To decide this intricate issue, it is first necessary to examine in some detail the judgment in Kesavananda Bharati's case, particularly with reference to 29th Amendment.

Kesavananda Bharati's case

The contention urged on behalf of the respondents that all the Judges, except Chief Justice Sikri, in Kesavananda Bharati's case held that 29th Amendment was valid and applied Jeejeebhoy's case, is not based on correct ratio of Kesavananda Bharati's case. Six learned Judges (Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud, JJ) who upheld the validity of 29th Amendment did not subscribe to basic structure doctrine. The other six learned Judges (Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Reddy JJ) upheld the 29th Amendment subject to it passing the test of basic structure doctrine. The 13th learned Judge (Khanna, J), though subscribed to basic structure doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. Therefore, it would

not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of 29th Amendment unconditionally or were alive to the consequences of basic structure doctrine on 29th Amendment. Six learned Judges otherwise forming the majority, held 29th amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who are in minority in Kesavananda Bharati's case, insofar as it relates to laying down the doctrine of basic structure, held 29th Amendment unconditionally valid.

While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Justice Khanna opined that the fundamental rights could be amended abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid. Thus, it cannot be inferred from the conclusion of the seven judges upholding unconditionally the validity of 29th Amendment that the majority opinion held fundamental rights chapter as not part of the basic structure doctrine. The six Judges which held 29th Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held 29th Amendment valid subject to it passing the test of basic structure doctrine.

Justice Khanna upheld the 29th Amendment in the following terms:

"We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act."

In his final conclusions, with respect to the Twenty-ninth Amendment, Khanna, J. held as follows:

"(xv) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid."

Thus, while upholding the Twenty-ninth amendment, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implication that the Respondents seek to draw from the above is that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

They have also relied on observations by Ray CJ., as quoted below, in Indira Gandhi (supra). In that case, Ray CJ. observed:

"The Constitution 29th Amendment Act was considered by this Court in Kesavananda Bharati's case. The 29th Amendment Act inserted in the Ninth Schedule to the Constitution Entries 65 and 66 being the Kerala Land Reforms Act, 1969 and the Kerala Land Reforms Act, 1971. This Court unanimously upheld the validity of the 29th Amendment Act\005. The view of seven Judges in Kesavananda Bharati's case is that Article 31-B is a constitutional device to place the specified statutes in

the Schedule beyond any attack that these infringe Part III of the Constitution. The 29th Amendment is affirmed in Kesavananda Bharati's case (supra) by majority of seven against six Judges.

\005.Second, the majority view in Kesavananda Bharati's case is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights."

[Emphasis supplied]

The respondents have particularly relied on aforesaid highlighted portions.
On the issue of how 29th Amendment in Kesavananda Bharati case was decided, in Minerva Mills, Bhagwati, J. has said thus :
"The validity of the Twenty-ninth Amendment 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. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in Sankari Prasad case and Sajian Singh's case and were accepted as valid in Golak Nath case and the Twenty Ninth Amendment Act was also held valid in Kesavananda Bharati case, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts referred to above, I do not think, we would be justified in re-opening the question of validity of these constitutional amendments and hence we hold them to be valid. But, 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 limitation on its amending power."

To us, it seems that the position is correctly reflected in the aforesaid observations of Bhagwati, J. and with respect we feel that Ray CJ. is not correct in the conclusion that 29th Amendment was unanimously upheld. Since the majority which propounded the basic structure doctrine did not unconditionally uphold the validity of 29th Amendment and six learned judges forming majority left that to be decided by a smaller Bench and upheld its validity subject to it passing

basic structure doctrine, the factum of validity of 29th mendment in Kesavananda Bharati case is not conclusive of matters under consideration before us.

In order to understand the view of Khanna J. in Kesavananda Bharati (supra), it is important to take into account his later clarification. In Indira Gandhi (supra), Khanna J. made it clear that he never opined that fundamental rights were outside the purview of basic structure and observed as follows:

"There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in Kesavananda Bharati's case that fundamental rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should deal with the contention advanced by learned Solicitor General that according to my judgment in that case no fundamental right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution\005.

\005.The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part of the basic structure of the Constitution. I also dealt 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, after his aforesaid clarification, it is not possible to read the decision of Khanna J. in Kesavananda Bharati so as to exclude fundamental rights from the purview of the basic structure. The import of this observation is significant in the light of the amendment that he earlier upheld. It is true that if the fundamental rights were never a part of the basic structure, it would be consistent with an unconditional upholding of the Twenty-ninth Amendment, since its impact on the fundamental rights guarantee would be rendered irrelevant. However, having held that some of the fundamental rights are a part of the basic structure, any amendment having an impact on fundamental rights would necessarily have to be examined in that light. Thus, the fact that Khanna J. held that some of the fundamental rights were a part of the basic structure has a significant impact on his decision regarding the Twenty-ninth amendment and the validity of the Twenty-ninth amendment must necessarily be viewed in that light. His clarification demonstrates that he was not of the opinion that all the fundamental rights were not part of the basic structure and the inevitable conclusion is that the Twenty-ninth amendment even if treated as

unconditionally valid is of no consequence on the point in issue in view of peculiar position as to majority abovenoted. Such an analysis is supported by Seervai, in his book Constitutional Law of India (4th edition, Volume III), as follows:

"Although in his judgment in the Election Case, Khanna J. clarified his judgment in Kesavananda's Case, that clarification raised a serious problem of its own. The problem was: in view of the clarification, was Khanna J. right in holding that Article 31-B and Sch. IX were unconconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended? As we have seen, that problem was solved in Minerva Mills Case by holding that Acts inserted in Sch. IX after 25 April, 1973 were not unconditionally valid, but would have to stand the test of fundamental rights. (Para 30.48, page 3138)

But while the clarification in the Election Case simplifies one problem \026 the scope of amending power \026 it raises complicated problems of its own. Was Khanna J. right in holding Art. 31-B (and Sch. 9) unconditionally valid? An answer to these questions requires an analysis of the function of Art. 31-B and Sch. 9\005.Taking Art. 31-B and Sch. 9 first, their effect is to confer validity on laws already enacted which would be void for violating one of more of the fundamental rights conferred by Part III (fundamental rights)\005.

But if the power of amendment is limited by the doctrine of basic structure, a grave problem immediately arises\005.The thing to note is that though such Acts do not become a part of the Constitution, by being included in Sch.9 [footnote: This is clear from the provision of Article 31-B that such laws are subject to the power of any competent legislature to repeal or amend them \026 that no State legislature has the power to repeal or amend the Constitution, nor has Parliament such a power outside Article 368, except where such power is conferred by a few articles.] they owe their validity to the exercise of the amending power. Can Acts, which destroy the secular character of the State, be given validity and be permitted to destroy a basic structure as a result of the exercise of the amending power? That, in the last analysis is the real problem; and it is submitted that if the doctrine of the basic structure is accepted, there can be only one answer. If Parliament, exercising constituent power cannot enact an amendment destroying the secular character of the

State, neither can Parliament, exercising its constituent power, permit the Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result. To hold otherwise would be to abandon the doctrine of basic structure in respect of fundamental rights for every part of that basic structure can be destroyed by first enacting laws which produce that effect, and then protecting them by inclusion in Sch. 9. Such a result is consistent with the view that some fundamental rights are a part of the basic structure, as Khanna J. said in his clarification. (Para30.65, pages 3150-3151)

In other words, the validity of the 25th and 29th Amendments raised the question of applying the law laid down as to the scope of the amending power when determining the validity of the 24th Amendment. If that law was correctly laid down, it did not become incorrect by being wrongly applied. Therefore the conflict between Khanna J.'s views on the amending power and on the unconditional validity of the 29th Amendment is resolved by saying that he laid down the scope of the amending power correctly but misapplied that law in holding Art. 31-B and Sch. 9 unconditionally valid\005. Consistently with his view that some fundamental rights were part of the basic structure, he ought to have joined the 6 other judges in holding that the 29th Amendment was valid, but Acts included in Sch. 9 would have to be scrutinized by the Constitution bench to see whether they destroyed or damaged any part of the basic structure of the Constitution, and if they did, such laws would not be protected. (Para30.65, page 3151)"

The decision in Kesavananda Bharati (supra) regarding the Twenty-ninth amendment is restricted to that particular amendment and no principle flows therefrom. We are unable to accept the contention urged on behalf of the respondents that in Waman Rao's case Justice Chandrachud and in Minerva Mills case, Justice Bhagwati have not considered the binding effect of majority judgments in Kesavananda Bharati's case. In these decisions, the development of law post-Kesavananda Bharati's case has been considered. The conclusion has rightly been reached, also having regard to the decision in Indira Gandhi's case that post-Kesavananda Bharati's case or after 24th April, 1973, the Ninth Schedule laws will not have the full protection. The doctrine of basic structure was involved in Kesavananda Bharati's case but its effect, impact and working was examined in Indira Gandhi's case, Waman Rao's case and Minerva Mills case. To say that these judgments have not considered the binding effect of the

majority judgment in Kesavananda Bharati's case is not based on a correct reading of Kesavananda Bharati.

On the issue of equality, we do not find any contradiction or inconsistency in the views expressed by Justice Chandrachud in Indira Gandhi's case, by Justice Krishna Iyer in Bhim Singh's case and Justice Bhagwati in Minerva Mills case. All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of the basic structure of the Constitution.

Next, we examine the extent of immunity that is provided by Article 31B. The principle that constitutional amendments which violate the basic structure doctrine are liable to be struck down will also apply to amendments made to add laws in the Ninth Schedule is the view expressed by Chief Justice Sikri. Substantially, similar separate opinions were expressed by Shelat, Grover, Hegde, Mukherjea and Reddy, JJ. In the four different opinions six learned judges came to substantially the same conclusion. These judges read an implied limitation on the power of the Parliament to amend the Constitution. Justice Khanna also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld 29th Amendment and did not say, like remaining six Judges, that the Twenty-Ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that fundamental rights chapter is not part of basic structure. Justice Khanna, however, does not so say in Kesavananda Bharati's case. Therefore, Kesavananda Bharati's case cannot be said to have held that fundamental rights chapter is not part of basic structure. Justice Khanna, while considering Twenty-Ninth amendment, had obviously in view the laws that had been placed in the Ninth Schedule by the said amendment related to the agrarian reforms. Justice Khanna did not want to elevate the right to property under Article 19(1)(f) to the level and status of basic structure or basic frame-work of the Constitution, that explains the ratio of Kesavananda Bharati's case. Further, doubt, if any, as to the opinion of Justice Khanna stood resolved on the clarification given in Indira Gandhi's case, by the learned Judge that in Kesavananda Bharati's case, he never held that fundamental rights are not a part of the basic structure or framework of the Constitution.

The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant Article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post-Kesavananda Bharati's case which has limited the power of the Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure.

To decide the correctness of the rival submissions, the first aspect to be borne in mind is that each exercise of the amending power inserting laws into Ninth Schedule entails a complete removal of the fundamental rights chapter vis-'-vis the laws that are added in the Ninth Schedule. Secondly, insertion in Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III in so far as Ninth Schedule legislations

are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz. the judiciary.

While examining the validity of Article 31C in Kesavananda Bharati's case, it was held that the vesting of power of the exclusion of judicial review in a legislature including a State legislature, strikes at the basic structure of the Constitution. It is on this ground that second part of Article 31C was held to be beyond the permissible limits of power of amendment of the Constitution under Article 368.

If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no dobt 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.

Regarding the status and stature in respect of fundamental rights in Constitutional scheme, it is to be remembered that Fundamental Rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. The object of the Fundamental Rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting Fundamental Rights and Directive Principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.

Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power. Through Article 13, it is provided that the State cannot make any laws that are contrary to Part III. The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting ability of majority to intrude upon them. That wall is the 'Basic Structure' doctrine. Under Article 32, which is also part of Part III, Supreme Court has been vested with the power to ensure compliance of Part III. The responsibility to judge the constitutionality of all laws is that of judiciary. Thus, when power under Article 31B is exercised, the legislations made completely immune from Part III results in a direct way out, of the check of Part III, including that of Article 32. It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution. In Waman Rao's case, while discussing the application of basic structure doctrine to the first amendment, it was observed that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original; you cannot by an amendment transform the original into opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law.

Indeed, if Article 31B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power,

the number having gone from 13 to 284, shows that it is no longer a mere exception. 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.

It is also contended for the respondents that Article 31A excludes judicial review of certain laws from the applications of Articles 14 and 19 and that Article 31A has been held to be not violative of the basic structure. The contention, therefore, is that exclusion of judicial review would not make the Ninth Schedule law invalid. We are not holding such law per se invalid but, examining the extent of the power which the Legislature will come to possess. Article 31A does not exclude uncatalogued number of laws from challenge on the basis of Part III. It provides for a standard by which laws stand excluded from Judicial Review. Likewise, Article 31C applies as a yardstick the criteria of sub-clauses (b) and (c) of Article 39 which refers to equitable distribution of resources.

The fundamental rights have always enjoyed a special and privileged place in the Constitution. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism etc. As held in Nagaraj, egalitarian equality exists in Article 14 read with Article 16(4) (4A) (4B) and, therefore, it is wrong to suggest that equity and justice finds place only in the Directive Principles.

The Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. Take the example of freedom of Press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of respondents contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the Press and, thus, destructive of the basic structure. Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various Articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. Therefore, one has to take a synoptic view of the various Articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the Articles in Part III. It is not necessary to multiply the illustrations.

After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. Justice Khanna in Kesavananda Bharati's case was considering the right to property and it is in that context it was said that no Article of the Constitution is immune from the amendatory process. We may recall what Justice Khanna

said while dealing with the words "amendment of the Constitution". His Lordship said that these words with all the wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. The opinion of Justice Khanna in Indira Gandhi clearly indicates that the view in Kesavananda Bharati's case is that at least some fundamental rights do form part of basic structure of the Constitution. Detailed discussion in Kesavananda Bharati's case to demonstrate that the right to property was not part of basic structure of the Constitution by itself shows that some of the fundamental rights are part of the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle on the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31B.

In Indira Gandhi,s case, Justice Chandrachud posits that equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our constitution.

Dealing with Articles 14, 19 and 21 in Minerva Mills case, it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three Articles of our constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These Articles stand on altogether different footing. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the 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. It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in Kesavananda Bharati's case clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in Indira Gandhi case.

The history of the emergence of modern democracy has also been the history of securing basic rights for the people of other nations also. In the United States the Constitution was finally ratified only upon an understanding that a Bill of Rights would be immediately added guaranteeing certain basic freedoms to its citizens. At about the same time when the Bill

of Rights was being ratified in America, the French Revolution declared the Rights of Man to Europe. When the death of colonialism and the end of World War II birthed new nations across the globe, these states embraced rights as foundations to their new constitutions. Similarly, the rapid increase in the creation of constitutions that coincided with the end of the Cold War has planted rights at the base of these documents. Even countries that have long respected and upheld rights, but whose governance traditions did not include their constitutional affirmation have recently felt they could no longer leave their deep commitment to rights, left unstated. In 1998, the United Kingdom adopted the Human Rights Act which gave explicit affect to the European Convention on Human Rights. In Canada, the "Constitution Act of 1982" enshrined certain basic rights into their system of governance. Certain fundamental rights, and the principles that underlie them, are foundational not only to the Indian democracy, but democracies around the world. Throughout the world nations have declared that certain provisions or principles in their Constitutions are inviolable.

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.

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.

The result of the aforesaid discussion is that 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 other aspect of basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.

We may also recall the observations made in Special Reference No.1/64 [(1965) 1 SCR 413] as follows :

"...[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and there functions are normally confined to legislative functions, and the function and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of

any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country."

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 reason, 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.

Extent of Judicial Review in the context of Amendments to the Ninth Schedule

We are considering the question as to the extent of judicial review permissible in respect of Ninth Schedule laws in the light of the the basic structure theory propounded in Kesavananda Bharati's case. In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution.

We have earlier noted that the power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints, it is primary power, a real plenary power. The latter power, however, is derived from the former. It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, the Parliament. The question before us is not about power to amend Part III after 24th April, 1973. As per Kesavananda Bharati, power to amend exists in the Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the 'rights test' as part of the basic structure doctrine has to apply.

In Kesavananda Bharati's case, the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution.

Kesavananda Bharati's case laid down a principle as an axiom which was examined and worked out in Indira Gandhi's case, Minerva Mills, Waman Rao and Bhim Singh.

As already stated, in Indira Gandhi's case, for the first time, the constitutional amendment that was challenged did not relate to property right but related to free and fair election.

As is evident from what is stated above that the power of amending the Constitution is a species of law making power which is the genus. It is a different kind of law making power conferred by the Constitution. It is different from the power to frame the Constitution i.e. a plenary law making power as described by Seervai in Constitutional Law of India (4th Edn.).

The scope and content of the words 'constituent power' expressly stated in the amended Article 368 came up for consideration in Indira Gandhi's case. Article 329-A(4) was

struck down because it crossed the implied limitation of amending power, that it made the controlled constitution uncontrolled, that 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 also Minerva Mills case).

It is Kesavananda Bharati's case read with clarification of Justice Khanna in Indira Gandhi's case which takes us one step forward, namely, that fundamental rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with Article 16(4) (4A) (4B) etc. Bharti and Indira Gandhi's cases have to be read together and if so read the position in law is that the basic structure as reflected in the above Articles provide a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

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

The question can be looked at from yet another angle also. Can the Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in the Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in Kesavananda Bharati's case as a result of which secularism, separation of power, equality, etc. to cite a few examples would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the rule of law, secularism etc. would fail. That is why Khanna, J. held that some of the Fundamental Rights like Article 15 form part of the basic structure.

If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31B cannot be so used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with the Kesavananda Bharati's case. Therefore Article 31-B after 24th April, 1973 despite its wide language cannot confer unlimited or unregulated immunity.

To legislatively override entire Part III of the Constitution by invoking Article 31-B would not only make the Fundamental Rights overridden by Directive Principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also the judicial review which are the basic feature of the Constitution and essential

elements of rule of law and that too without any yardstick/standard being provided under Article 31-B. Further, it would be incorrect to assume that social content exist only in Directive Principles and not in the Fundamental Rights. Article 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, 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. 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, hence social content exists in Fundamental Rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws.

Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

Realising that it is necessary to secure the enforcement of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. 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 \026 rule of law, separation of power \026 the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

On behalf of the respondents, reliance has been placed on the decision of a nine Judge Constitution Bench in Attorney General for India & Ors. v. Amratlal Prajivandas & Ors. [(1994) 5 SCC 54] to submit that argument of a violation of Article 14 being equally violative of basic structure or Articles 19 and 21 representing the basic structure of the Constitution has been rejected. Para 20 referred to by learned counsel for the respondent reads as under :

"Before entering upon discussion of the issues arising herein, it is necessary to make a few clarificatory observations. Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said Amendments - effected after the decision in Keshavananda Bharati v. State of Kerala [1973] Suppl. SCR 1 - infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the

Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This simplistic argument overlooks the reason d'etre of Article 31B - at any rate, its continuance and relevance after Bharati - and of the 39th and 40th Amendments placing the said enactments in the IXth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati constitutional amendments placing Acts in the IXth Schedule, the protection of Article 31-B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are, i.e., we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14."

It is evident from the aforenoted passage that the question of violation of Articles 14, 19 or 21 was not gone into. The bench did not express any opinion on those issues. No attempt was made to establish violation of these provisions. In Para 56, while summarizing the conclusion, the Bench did not express any opinion on the validity of 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. These Acts were assumed to be good and valid. No arguments were also addressed with respect to the validity of 42nd Amendment Act. Every amendment to the Constitution whether it be in the form of amendment of any Article or amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15 etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by the Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of the Parliament.
In Waman Rao, it was accordingly rightly held that the Acts inserted in the Ninth Schedule after 24th April, 1973 would not receive the full protection.
Exclusion of Judicial Review compatible with the doctrine of basic structure \026 concept of Judicial Review

Judicial review is justified by combination of 'the principle of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review' (Democracy through Law by Lord Styen, Page 131).
The role of the judiciary is to protect fundamental rights.

A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. According to Lord Styen, it is job of the Judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

Application of doctrine of basic structure

In Kesavananda Bharati's case, the discussion was on the amending power conferred by unamended Article 368 which did not use the words 'constituent power'. We have already noted difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words 'constituent power' in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words 'constituent power' are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to the Parliament. It is on this premise that clauses 4 and 5 inserted in Article 368 by 42nd Amendment were struck down in Minerva Mills case.

The relevance of Indira Gandhi's case, Minerva Mills case and Waman Rao's case lies in the fact that every improper enhancement of its own power by Parliament, be it clause 4 of Article 329-A or clause 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure 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. They obliterated important elements like judicial review. They made Directive Principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that we have to examine the power of immunity bearing in mind that after Kesavananda Bharati's case, Article 368 is subject to implied limitation of basic structure.

The question examined in Waman Rao's case was whether the device of Article 31-B could be used to immunize Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of Ninth Schedule laws as it makes the entire Part III inapplicable at the will of the Parliament. This results in the change of the identify of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors.

The object behind Article 31-B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the 'essence of right' test but also the 'rights test' has to apply, particularly when Keshavananda Bharti and Indira Gandhi cases have expanded the scope of basic structure to cover even some of the Fundamental Rights.

The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 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.

There is also a difference between the 'rights test' and the 'essence of right test'. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test as applied in M. Nagaraj's case (supra) will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate. We may also note that in Minerva Mills and Indira Gandhi's cases, elimination of Part III in its entirety was not in issue. We are considering the situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunization at will by the Parliament which, in our view, is incompatible with the implied limitation of the power of the Parliament. In such a case, it is the rights test that is appropriate and is to be applied. In Indira Gandhi's case it was held that for the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. Regarding Articles 31-A and 31-C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these Articles have an indicia which is not there in Article 31-B.

Part III is amendable subject to basic structure doctrine. It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to right of citizen to assail it on the enlarged judicial review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine.

The constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations 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.

The power to grant absolute immunity at will is not compatible with basic structure doctrine and, therefore, after 24th April, 1973 the laws included in the Ninth Schedule would not have absolute immunity. Thus, validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles.

It has to be borne in view that the fact that some Articles in Part III stand alone has been recognized even by the Parliament, for example, Articles 20 and 21. Article 359 provides for suspension of the enforcement of the rights conferred by Part III during emergencies. However, by Constitution (44th Amendment) Act, 1978, it has been provided that even during emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended. This is the recognition given by the Parliament to the protections granted

under Articles 20 and 21. No discussion or argument is needed for the conclusion that these rights are part of the basic structure or framework of the Constitution and, thus, immunity by suspending those rights by placing any law in the Ninth Schedule would not be countenanced. It would be an implied limitation on the constituent power of amendment under Article 368. Same would be the position in respect of the rights under Article 32, again, a part of the basic structure of the Constitution.

The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. 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. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

The power to amend the Constitution is subject to aforesaid axiom. It is, thus, no more plenary in the absolute sense of the term. Prior to Kesavananda Bharati, the axiom was not there. Fictional validation based on the power of immunity exercised by the Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinize the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule Law. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to Kesavananda Bharati upholding the validity of Article 31B is a surest means of a drastic erosion of the fundamental rights conferred by Part III.

Article 31B gives validation based on fictional immunity. In judging the validity of constitutional amendment we have to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where Judicial Review comes in. The greater the invasion into

essential freedoms, greater is the need for justification and determination by court whether invasion was necessary and if so to what extent. The degree of invasion is for the Court to decide. Compatibility is one of the species of Judicial Review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.

The result of aforesaid discussion is that the 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., rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

In conclusion, we hold that :

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide Order dated 14th September, 1999 in I.R. Coelho v. State of Tamil Nadu [(1999) 7 SCC 580].

(v) If the validity of any Ninth Schedule law has already been

upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law 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 Article14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge.

We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a Three Judge Bench for decision in accordance with the principles laid down herein.