# Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)

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## 1. Introduction

On 11.1.2007, The Supreme Court delivered a landmark judgment, which some appreciated as they believed that the Court was upholding the *fundamentalness* of fundamental rights, whereas others viewed the same as a complete abrogation of the basic Constitutional principles underlying our Constitution and as a thwart to representative democracy through excessive judicial activism. The former believed that the Supreme Court was fulfilling its duty as the sentinel of fundamental rights within our Constitution, whereas the latter believed that the Court acted in total disregard of the explicit provisions of the Constitution and belied the same.

The Supreme Court has, by extending applicability of the doctrine of Basic Structure to the laws included in the Ninth Schedule in *I.R.Coelho v. State of Tamil Nadu*[1], reopened the debate surrounding one of the most controversial provisions of our Constitution, Article 31B, which was introduced through the First Amendment to the Constitution in 1951. The Court has also reopened another debate as to whether fundamental rights are a part of the Basic Structure and the validity of Constitutional Amendments contravening fundamental rights.

In addition to this, the Supreme Court in *Kuldip Nayar v. Union of India*[2] discussed another issue pertaining to the applicability of the doctrine of Basic Structure to ordinary laws. This has reopened the debate, which existed from the landmark decision of the Court in *Indira Gandhi v. Raj Narain*.[3]

Thus in this paper, the researcher seeks to address the following issues. Firstly, the applicability of the doctrine of Basic Structure to ordinary laws and thereafter the decision of the Supreme Court in the *IR Coelho* case in light of the applicability of the doctrine to laws incorporated in the Ninth Schedule.

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1. AIR 2007 SC 861.
2. AIR 2006 SC 3127.
3. AIR 1975 SC 2299.

The researcher has restricted the scope of his paper to the applicability of Basic Structure to ordinary laws and the laws incorporated in the Ninth Schedule and discusses the evolution of the Basic Structure doctrine, however, in doing so he has refrained from going into the jurisprudential underpinnings of the doctrine. He also has refrained from discussing the *Fundamental Rights case* or the debates surrounding the *Golak Nath Case* at great length. He then focuses on the decision and the individual opinions of the judges in the *Election Case* and traces the consistent dicta with regards to the applicability of basic structure to ordinary legislations. In doing so, he also points out the aberrations of the Court in applying the said dicta. Thereafter he has sought to criticize the dicta based on Kelsen's theory of jurisprudence.

In the next part of this paper, the researcher has discussed the Constitutionality of Article 31B and the Ninth Schedule. He has discussed Mathew J.'s opinion in the *Election Case* and Seervai's critique of the same. The researcher has then analyzed the recent decision of the Court in *IR Coelho case* and has critiqued the judgment on several grounds.

## 2. Applicability of the Basic Structure to ordinary laws

### • Evolution of the Doctrine - Scope of amending power

It is prudent to understand the context and the evolution of the Basic Structure doctrine. The question as regards the extent of amending powers of the Parliament has plagued the Supreme Court since the commencement of the Constitution. The crucial question which the Court has had to answer is whether the Parliament, while exercising its amending power under Article 368, can withdraw the fundamental rights that the people[4] had conferred upon themselves.[5] To answer this question we need to understand that Fundamental Rights are based in Part III of the Constitution. The legal status of any law is determined on the anvil of Article 13. This Article declares that all laws in force in the territory of India before the commencement of the Constitution shall to the extent of their repugnancy with the fundamental rights be void from the date on which the Constitution comes into force and any law made by the State which abridges or takes away the fundamental rights shall be struck down as unconstitutional. It is observed that the word 'law' as defined in Article 13 is an inclusive definition and it fails to mention

4. Popular sovereignty; Preamble: "We the People of India..."
5. Sathe, "Judicial Activism in India", p. 64. He raises this question in order to determine whether *the 'Bill of Rights' that had been settled after long negotiations between various sections of the society and was based on a consensus reflected in the Constituent Assembly could be altered and abrogated through the process of constitutional amendment.*

'constitutional amendment' within its ambit.[6] The question first came before the Supreme Court in 1952, in *Sankari Prasad v. Union of India*[7] when Patanjali Shastri J., speaking for the Bench, brought out the distinction between legislative power and constituent power and held that "law" in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and fundamental rights were not outside the scope of amending power.[8] A decade later the constituent power of the Parliament was again challenged in *Sajjan Singh* v. *State of Rajasthan.*[9] The Court was divided on the issue and the majority opinion expressed by Gajendragadkar C.J., adopted the stand taken by the Court in *Sankari Prasad* and declared that constitutional amendments were not covered by the prohibition expressed in Article 13(2).[10] The Supreme Court in 1967 reconsidered the question in *Golak Nath* v. *State of Punjab*[11] wherein the Court by a majority of 6:5 held that the fundamental rights were unamendable by the Parliament.[12] This decision faced severe criticism from several scholars,

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6. Article 13: Laws inconsistent with or in derogation of the fundamental rights-
   (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
   (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
   (3) In this article, unless the context otherwise requires,-
      (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
      (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. [(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]
7. (1952) S.C.R. 89.
8. The Court unanimously declared that the Constitution (1st Amendment) Act, 1951 was constitutional.
9. AIR 1965 SC 845.
10. As far as the minority is concerned, Hidayatullah J., brought out the fundamentalness of our fundamental rights by observing, *"if our fundamental rights were to be really fundamental, they should not become the plaything of a special majority"* p. 862.
11. AIR 1967 SC 1643.
12. Subba Rao C.J., in the majority opinion (for himself, Sikri, Shelat Shah and Vaidyalingam) and Hidayatullah J., in his concurring opinion reached the same conclusion though they took opposite views as to the source of the amending power. Subba Rao C.J., held that the Article 368 contained only the procedure for amendment, the power to amend was located in the residuary power of legislation (Article 248 read with Entry 97). On the other hand Hidayatullah J., was of the opinion that even though the power of amendment was not a residuary power, it was a *sui generis* legislative power and Article 368 contained a procedure for amendment.

notable among them being H.M.Seervai[13] and P.K.Tripathi.[14] According to Sathe, this case was an example of judicial activism in the late 1960s, which evoked severe reactions from the constitutional pundits which were brought up in the British tradition of legal positivism.[15] He believes that *"Golaknath marks a watershed in the history of the Supreme Court of India's evolution from a positivist Court to an activist Court."*[16]

This decision of the Supreme Court was overruled by all the judges except two[17] in *Kesavananda Bharati* v. *State of Kerala.*[18] In this case, by a majority of 7:6, the Court held that while *Golaknath* stood overruled, the power of amendment was not unlimited. Seven out of the thirteen judges held that Parliament's constituent power under Article 368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment.[19] The researcher does not consider a discussion

13. One of the most vehement critiques of this decision is H.M.Seervai, who is of the opinion that this decision turned on the language of Article 368 as originally enacted. However it is pertinent to note that the significance lies in the fact that, for the first time, the judges had openly taken a political position and was an assertion by the Court of its role as the protector of the Constitution.
14. Tripathi was of the opinion that if Subba Rao J.'s reasoning that the power of amendment is vested in the Parliament as a residuary power under Entry 97 of the Union List is accepted then it would lead to an absurd consequence of rendering Article 368 otiose. P.K. Tripathi, "Kesavananda Bharati v. State of Kerala: Who wins?", (1974) 1 SCC 4.
15. Sathe, "Judicial Activism in India", p. 66. He also goes on to observe that in order to reach the premise of the judgment, the judges had taken recourse to interpretational methods that were traditional and positivist. He explains this from the Courts interpretation that a constitutional amendment was 'law' for the purpose of Article 13 or that Article 368 of the Constitution, which provides for an amendment of the Constitution, did not contain the power of amendment but merely prescribed the procedure and the power was to be located in the plenary legislative power of Parliament contained in the residuary clause.
16. *Ibid.*
17. Sikri C.J., and Shelat J. Chief Justice Sikri said it was not necessary to decide whether *Golaknath* had been rightly decided and according to Justice Shelat, the *Golaknath* decision had become academic because even on the assumption that the majority decision in that case was not correct, the result on the questions now raised...would just be the same. AIR 1973 SC 1461 at p. 1566. Both Chief Justice Sikri and Justice Shelat were parties to the *Golaknath* majority; therefore they might have avoided saying that it was wrong.
18. AIR 1973 SC 1461.
19. These Seven Judges were, Chief Justice Sikri, Justices Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy, and Khanna. The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment. See S.P.Sathe, "Judicial Review in India: Limits and Policy", 35 Ohio State Law Journal, pp. 870-84 (1974). Seervai, in his analysis of the case in his magnum opus, "Constitution of India" states that six of the seven majority judges held that there were implied and inherent limitations on the amending power of the Parliament, which precluded Parliament from amending the Basic Structure of the Constitution. However Khanna J. rejected this theory of implied limitations but held that the Basic Structure could not be amended away. All Seven judges gave illustrations of what they considered Basic Structure comprised of.

on the merits of the decision in the *Fundamental Rights Case* to be within the ambit of this paper. The decision has been discussed by constitutional experts and jurists[20] at great length and their position can be summed up in the following words: "*despite the procedural foibles, however, and the exasperating vagueness of the idea of 'basic structure,' Upendra Baxi was prescient when he described the Kesavananda opinion as "the constitution of the future"* [21]

*The Decision in the Election Case*

The Court for the first time faced the issue of the applicability of the Basic Structure in *Indira Gandhi* v. *Raj Narain*[22] wherein it was contended on behalf of the petitioners that when the amending power cannot be exercised to damage or destroy the basic features of the Constitution or the essential elements of the basic structure or framework thereof, the limitations on the exercise of legislative power will arise not only from the express limitations contained in the Constitution, but also from necessary implication either under articles or even in the preamble of the constitution. This was elucidated by contending that if the democratic way of life through parliamentary institutions based on free and fair elections is a basic feature,[23] which cannot be destroyed or damaged by amendment of the Constitution, it cannot similarly be destroyed or damaged by any legislative measure. The question was whether the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 referred to as the Amendment Acts, 1974 and 1975 are unconstitutional because these Acts destroy or damage basic structure or basic features? The question as to whether Acts incorporated in the Ninth Schedule do not enjoy constitutional immunity because these Acts destroy or damage basic structure or basic features shall be discussed at length subsequently.

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20. Burt Neuborne, "The Supreme Court of India", 1 Int'l J. Const. L. 476; S.P.Sathe, "Judicial Activism: The Indian Experience", 6 Wash. U. J.L. & Pol'y 29; P.P.Rao, "Basic Features of the Constitution", (2000) 2 SCC (Jour) 1; N.A.Palkhivala, "Fundamental Rights Case: A Comment", (1973) 4 SCC (Jour) 57; P.K.Tripathi, "Kesavananda Bharati v. The State of Kerala: Who Wins?", (1974) 1 SCC (Jour) 3; Upendra Baxi, "The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment", (1974) 1 SCC (Jour) 45; Joseph Minattur, "The Ratio in the Kesavananda Bharati Case", (1974) 1 SCC (Jour) 73; David Gwynn Morgan, "The Indian Essential Features Case", 30(2) ICLQ (1981) 307; Upendra Baxi, "Some Reflections on the Nature of Constituent Power", Rajeev Dhavan, "Indian Constitution-Trends and Issues", (1978), p. 122.
21. Burt Neuborne, "The Supreme Court of India", 1 Int'l J. Const. L. 476.
22. AIR 1975 SC 2299.
23. To appreciate the above submission it is not necessary to go into the issue determining whether the doctrine of basic structure extends to free and fair elections and the researcher has not considered it prudent to include the discussion on the same within the ambit of this paper. However in this case, Khanna, Mathew and Chandrachud held that the impugned provision would contravene the principle of democracy.

The Court decided by a majority of 3:1, that ordinary laws are not subject to the test of the Basic Structure of the Constitution and the same is applied only to determine the validity of Constitutional Amendments. The majority opinion comprises of concurring opinions of Ray C.J., Mathew J. and Chandrachud J. Justice Beg dissented, holding that ordinary laws also have to be tested on the touchstone of the Basic Structure and Khanna J., abstained from deciding on the issue, as he did not consider it necessary to do so.[24]

It is necessary to understand the rationale of the individual opinions regarding this issue. As far as the majority is concerned, Chandrachud J., basing on his decision on the ratio in the *Fundamental Rights Case* held that the constitutional amendments have to be tested on the anvil of Basic Structure. In his esteemed view, one cannot logically draw an inference from this ratio that ordinary legislation must also answer the same test as a constitutional amendment.[25] He also justifies his stand on the ground that the amending power is subject to the theory of Basic Structure because it is a constituent power of the Parliament. This essentially refers to the distinction between legislative power and constituent power. Chandrachud brings out this distinction to emphasize the point that *"since the two are not the same a higher power should be subject to a limitation* (read as "Basic Structure doctrine") *which will not operate upon a lower power and there would be no paradox ...same genus, they operate at different fields and are therefore subject to different limitations"*.[26] As far as the opinion of Chief Justice Ray is concerned he believes that ordinary laws shall not be subject to the test of Basic Structure as by doing so one would "*equate legislative measures with Constitution Amendment."*[27] The only relevant test for the validity of a statute made under the plenary power of the Parliament, that is to legislate under Article 245, is

24. *The Election Case*, AIR 1975 SC 2299, ¶ 239: *"Argument has also been advanced that validity of Act 40 of 1975 cannot be assailed on the ground that it strikes at the basis structure of the Constitution. Such a limitation it is submitted, operates upon an amendment of the Constitution under Article 368 but it does not hold good when Parliament enacts a statute in exercise of powers under Article 245 of the Constitution. In view of my finding that the provisions of Act 40 of 1975 with which we are concerned have not been shown to impinge upon the process of free and fair elections and thereby to strike at the basic structure of the Constitution, it is not necessary to deal with the above argument. I would, therefore, hold that the provisions of Act 40 of 1975 with which we are concerned are valid and do not suffer from any constitutional infirmity."*
25. He arrived at this inference based on the principle *"a case is only an authority for what it decides"*. As per Chandrachud J., Ordinary laws have to answer only two tests for their validity: (1) The law must be within the legislative competence of the Legislature and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. Basic Structure is neither a provision in the constitution nor a part of fundamental rights; Para 691 of the Election Case.
26. ¶ 692, *the Election Case*. This was in response to the submission of Shri Shanti Bhushan that it is *paradoxical* that the higher power should be subject to a limitation which will not operate upon a lower power.
27. ¶ 132, *The Election Case.*

whether the legislation is within the scope of the affirmative grant of power or is forbidden by some provision of the Constitution. According to Rai J., if the contention were accepted then the plenary power to legislate would be subject to an additional limitation that no legislation can be made as to damage or destroy basic features or basic structures.[28] He observed that "*this will mean rewriting the Constitution and robbing the Legislature of acting within the framework of the Constitution*".[29] He noted that the Basic Structure is indefinable and the scope of the plenary power is more definite. Thus applying the doctrine of Basic Structure to ordinary laws would *denude* the power of Parliament and State Legislatures of laying down legislative policies, which would amount to a violation of the principle of separation of powers.

Mathew J. also endorsed this opinion and he was of the view than an ordinary law cannot be declared invalid for the reason that it goes against the vague concepts of democracy, justice, etc. The validity can only be tested with reference to the principles of democracy actually incorporated in the Constitution.[30] He also opined negatively on the issue whether the doctrine would apply to these ordinary laws after they are incorporated in the Ninth Schedule after a Constitutional Amendment to that effect.[31] This has been discussed at greater length hereinafter.

Beg J. has expressed his dissent by holding that the "basic structure" of the Constitution tests the validity of both, constitutional amendments as well as ordinary laws. This is because ordinary law-making itself cannot go beyond the range of constituent power. He relies on Kelsen's theory[32] that the norms laid down in the constitution are the supreme/basic norms and the legality of laws, whether purporting to be ordinary or constitutional, is

28. It is also pertinent to note that the distinction between implied limitations on the power of amendment of the Constitution and the theory of Basic Structure. The theory of implied limitations on the power of amendment of the Constitution has been rejected by seven Judges in Kesavananda Bharati's case. (We may just refer to the observations of Palekar J., at page 608, Dwivedi J., at page 916 and Chandrachud J., at page 977. To the same effect is the view expressed by Ray J., as he then was, Khanna J., and others. This theory has repeatedly been rejected by the Courts in England, Australia. See *The State of Victoria and The Commonwealth of Australia* 122 Commonwealth Law Reports 353; *Webb v. Outrim*, (1907) A.C., 81. Our Constitution has also not adopted the due process clause of the American Constitution and thus reasonableness of legislative measures is unknown to our Constitution and cannot be treated as an implied limitation on the Constitution. The crucial point is that unlike the American Constitution where rights are couched in wide general terms leaving it to the courts to evolve necessary limitations our Constitution has denied due process as a test of invalidity of law. In *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27; due process was rejected by clearly limiting the rights acquired and by eliminating the indefinite due process.
29. ¶134, The *Election Case*
30. ¶ 346, *The Election Case*
31. ¶ 353, *The Election Case*
32. Has been substantiated hereinafter.

tested by the norms laid down in the Constitution.

- **Consistent Dicta-Inconsistent Application**

This dicta laid down by the majority in this case has been upheld by the Supreme Court in a plethora of cases, the first opportunity being made available in 1977 in *State of Karnataka* v. *Union of India and Anr*[33] wherein Beg C.J., delivering the judgment for the majority relied on the majority opinion (Justice Chandrachud's opinion) in *the Election Case* and held that in every case where reliance is placed upon the doctrine of Basic Structure, in the course of an attack upon legislation, whether ordinary or constituent, what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution[34] and went on to hold that the doctrine would not apply to determine the validity of ordinary legislations.[35] The Court upheld this principle in a plethora of cases[36] before reiterating the principle recently in, *Kuldip Nayar* v. *Union of India.*[37]

Even though the judicial dicta on the issue is well-settled that ordinary legislations cannot be tested on the grounds of basic structure, the Court has applied the same in a couple of cases. In 1997, the Supreme Court was faced with the task of determining the constitutionality of those Amendments,[38] which deprived the High Court of its jurisdiction under Articles 226 and 227, and also Section 28 of the Administrative Tribunals Act, 1985, providing for *"exclusion of jurisdiction of Courts except the Supreme Court under Article 136 of Constitution"*[39]. The Court in addition to striking down the Amendments to

33. AIR 1978 SC 68.
34. *State of Karnataka v. Union of India,* AIR 1978 SC 68 at ¶ 120.
35. Beg C.J., para, 249: *"Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental back-bone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt. Indira Nehru Gandhi v. Shri Raj Narain, such an argument expressly rejected by this Court."*
36. *State of Andhra Pradesh and Ors. v. McDowell & Co. and Ors.* AIR 1996 SC 1627; *Public Services Tribunal Bar Association v. State of U.P. and Anr.* AIR 2003 SC 1115.
37. AIR 2006 SC 3127: (Sabharwal C.J., ¶ 45).
38. Article 323A(2)(d) and Article 323B(3)(d) introduced by Section 46 of the Constitution (42nd Amendment) Act, 1976.
39. Section 28 of the Administrative Tribunals Act, 1985: "Exclusion of Jurisdiction of courts– On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except–
    (a) the Supreme Court; or
    (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force, Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

the Constitution also struck down Section 28 on the ground that taking away the power of judicial review from the High Courts violated the principle of judicial review which was a part of the basic structure doctrine.[40] The anomaly has been observed by Sabharwal C.J., in *Kuldip Nayar v. Union of India*[41] wherein he gives another instance where the Court has applied the doctrine of Basic Structure to ordinary legislations. In *Indra Sawhney v. Union of India,*[42] decided in 1999, a Bench of 3 Judges of the Supreme Court expressly held that a State enacted law[43] violated the principle of equality which was a part of the Basic Structure of the Constitution and the Court was of the opinion that what the Parliament cannot do in the exercise of its Constituent power, the State Legislatures too cannot achieve.[44]

## • Jurisprudential Critique

The judicial dicta ranging from *the Election Case* in 1975 to *Kuldip Nayar* in 2006 on this issue has faced severe criticism from the Kelsenian School of thought. Before applying the same it is pertinent to understand Kelsen's school of thought. Kelsen propounded a hierarchical structure of the legal order, labeling it Grundnorm. He propounded a hierarchy of norms.[45] Since the validity of one norm depends on the validity of the other norm the relation between the norm that regulates the creation of another norm and the norm created in conformity with the former is that of subordination.[46] Its unity is brought about by the connection that results

40. Ahmadi C.J., ¶ 100.
41. AIR 2006 SC 3127: (Sabharwal C.J ¶ 42).
42. AIR 2000 SC 498
43. Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995.
44. Jagannadha Rao C.J., ¶ 65: "*What we mean to say is that Parliament and the legislatures in this Country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet.) Whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal, Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by Constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."*
45. The same has been recognized by Ray C.J., in the *Election Case.* ¶ 33: *"The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation. Each norm of this order is created according to the provisions of another norm and ultimately according to the provisions of the basic norm constituting the unity of this system, the legal order. A norm belongs to a certain legal order, because it is created by an organ of the legal community constituted by this order. Creation of law is application of law. The creation of a legal norm is normally an application of the higher norm, regulating its creation. The application of higher norm is the creation of lower norm determined by the higher norm."*
46. Kelsen, "The Function of the Constitution", (1986), p.111.

from the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm.[47] Now Kelsen is of the opinion that in a national legal order, the constitution represents the highest level of positive law and classifies the Constitution as the Basic Norm from which legislations derive their validity. This view has been endorsed by the dissenting judges in *the Fundamental Rights Case.*[48] The judges emphasized the distinction between constitutional law and ordinary law by recourse to the "criterion of validity." According to Ray J., the distinction exists in the fact that in the case of the Constitution the validity is inherent and lies within itself and ordinary laws derive their validity from higher norms. Every legal rule or norm owes its validity to some higher legal norm. The Constitution, argues Ray J., is the basic legal norm.[49] He bases his reasoning on the fact that *"the Constitution generates its own validity,"* and does not rely on any higher norm for its validity. In light of this it is pertinent to note that based on Kelsen's theory, there is a difference between superior and inferior legal norms in the mode of creation of the Constitution itself.[50] He is of the opinion that the basic norm is not created by a legal procedure by a law-creating organ because a Constitution being the 'ultimate legal principle'[51] is not created and given validity by a superior norm.[52] However, it is essential to note that a legal procedure[53] and a law-creating organ[54] are both necessary components of the amendment process. Hence, while the criterion of self-generating validity is rightly applied to the Constitution, the same cannot be said to extend to the amendment of the

47. Kelsen, "Pure Theory of Law", (1967), p. 226.
48. Ray, Mathew, Palekar, Chandrachud, Dwivedi and Beg JJ., who were part of the majority of 11 judges who decided to overrule the decision in Golaknath Case.
49. And is supported by P.K.Tripathi, "Some Insights Into Fundamental Rights" (Bombay: University of Bombay, 1972), p.43 and A.Lakshminath, "Justiciability of Constitutional Amendments" in Rajeev Dhavan, (ed.), "Indian Constitution: Trends and Issues", (1978), p. 145. However However, it is Prof. Lakshminath's submission that this cannot assist in the determination of the question whether constitutional law and an amendment to the Constitution, which is adopted pursuant to an express power conferred in that behalf by the Constitution itself, occupy the same status in a legal hierarchy.
50. Kelsen, "The Function of the Constitution", (1986).
51. P.K.Tripathi expressly equated the Constitution to Kelsen's basic norm (Grundnorm), P.K.Tripathi, "Some Insights Into Fundamental Rights" (Bombay: University of Bombay, 1972), p.43. Also see, Andreas Buss, "Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India", 2 Can. J.L. & Soc'y 23 at p. 40.
52. Salmond, "Jurisprudence", 12th ed. 2002, p.83 is of the opinion that a Constitution is first established in fact and then the Courts formally recognize it as valid by common acceptances as a law.
53. Procedure provided in Article 368.
54. The Parliament in the Indian Context.

Constitution, which derives its validity from the Constitution. This proposition can be further substantiated with the argument that the Basic Structure, the anvil on which the Constitutional Amendments are required to be tested post *Kesavananda Bharati*, is itself a part of the Constitution. Thus applying the theory laid down by Kelsen, both ordinary laws and Amendments derive their validity from the Constitution and have been created by the procedure laid down in the higher norm, the Constitution,[55] and thus it is submitted that the proposition that the doctrine of Basic Structure (higher norm) shall apply only to constitutional amendments (lower norm) and shall not extend to ordinary legislations (lower norm) does not hold good.

Even if the presumption lies in the proposition that constitutional amendments are at a higher standard (higher norm) than ordinary legislations, as held by Chandrachud J. in the *Election Case*,[56] it is submitted that the touchstone on which the validity of the higher norm is determined shall extend to determine the validity of the lower norm (ordinary legislation) and thus the doctrine of Basic Structure will extend to ordinary legislations. This leads one to the question as to whether a legislature enacts a constitutional amendment in exercise of constituent power, the nature of which the researcher has discussed subsequently in this paper.

## 3. Basic structure and IX Schedule

Before determining whether the doctrine of Basic Structure applies to the legislations included in the Ninth Schedule, the researcher considers it pertinent to briefly deal with the genesis and evolution of the Ninth Schedule and the constitutional challenge faced by it.

*Article 31B and Ninth Schedule: Scope*

Article 31B[57] and the Ninth Schedule[58] were introduced in the Constitution by the First Amendment[59] to assist the process of legislation to

55. Kelsen, "The Pure Theory of Law", (1967), p. 226: *"a superior norm determines merely the procedure by which another norm is to be created. Since the validity of one norm depends on the validity of the other norm the relation between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super and subordination."*
56. ¶ 692, *The Election Case.*
57. Article 31B. Validation of certain Acts and Regulations- *Without prejudice to the generality of the provisions contained in Article 31A*, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, *or ever to have become void*, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and *notwithstanding any judgment, decree or order of any court or tribunal to the contrary*, each of the said Acts and Regulations shall, *subject to the power of any competent Legislature to repeal or amend it,* continue in force.
58. The Ninth Schedule when incorporated contained 13 Items, all relating to land reform laws immunizing them from challenge on the grounds of Contravention of Article 13 of the Constitution.

bring about agrarian reforms[60] and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights. The effect of Article 31B can be summarized briefly; Article 31B provides that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The provisions of the Article are expressed to be without prejudice to the generality of the provision in Article 31A and the concluding portion of the Article supersedes any judgment, decree or order of any court or tribunal to the contrary. It is extremely unfortunate to note that the number of items in the Ninth Schedule have increased from 13, when initially enacted, to more than 284.[61] Furthermore it is also regrettable to observe that the laws included in the Ninth Schedule are no longer restricted to those enacted to further agrarian and land reforms.[62]

The laws included relate mostly to the abolition of various tenures like Maleki, Taluqdari, Mehwassi, Khoti, Paragana and Kulkarni Watans and of Zamindaris and Jagirs. The place of pride in the schedule is occupied by the Bihar Land Reforms Act, 1950, which is Item 1 and which led to the enactment of Article 31-A and to some extent of Article 31B. The Bombay Tenancy and Agricultural Lands Act, 1948 appears as Item 2 in the Ninth Schedule.

59. Section 5, Constitution (First Amendment) Act, 1951 (June 18, 1951).

60. These provisions were essentially introduced because 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. To immunize these laws from Fundamental Rights, the First Amendment brought in Articles 31A and 31B.

61. The reason the same is unfortunate as it goes against the intent of the Parliament, who in 1951, were the same as the Constitutional-makers. This is evident from the following views of Jawaharlal Nehru while discussing the inclusion of the Ninth Schedule. Chandrachud C.J., in his opinion in *Waman Rao v. Union of India,* (1981) 2 SCC 362 succinctly puts forth Nehru's views as follows; *"We may also mind that Jawaharlal Nehru had assured the Parliament while speaking on the 1st Amendment that there was no desire to add to the 13 items which were being incorporated in the Ninth Schedule simultaneously with the 1st Amendment and that is was intended that the Schedule should not incorporate laws of any other description than those which fell within Items 1 to 13. Even the small list of 13 items was described by the Prime Minister as a 'long schedule."*

62. Entry 17: Sections 52A to 52G of the Insurance Act, 1938; Entry 18: The Railway Companies (Emergency Provisions) Act, 1951; Entry 19: Chapter IIIA of the Industries (Development and Regulation) Act, 1951; Entry 90: The Mines and Minerals (Regulations and Development) Act, 1957; Entry 91: The Monopolies and Restrictive Trade Practices Act, 1969; Entry 95: The General Insurance Business (Nationalization) Act, 1972; Entry 96: The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972; Entry 97: The Sick Textile Undertakings (Taking Over of Management) Act, 1972; Entry 100: The Foreign Exchange Regulation Act, 1973; Entry 104: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Entry 126: The Essential Commodities Act, 1955; Entry 127: The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976; Entry 133: The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976; Entry 216: The Gujarat Devasthan Inams Abolition Act, 1969; Entry 257A: The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993. The above-mentioned legislations are a few instances.

The insertion of laws in the Ninth Schedule at regular intervals can be briefly summarized in the following table:[63]

| 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 |

- **Constitutionality of Article 31B: Judicial Exposition**

The constitutionality of Article 31B and the Ninth Schedule first came up for challenge in *Sankari Prasad v. Union of India*[64] wherein the Court upheld the Constitutionality of the First Amendment.[65] The decision in *Sankari Prasad* was reaffirmed by the Supreme Court in *Sajjan Singh* v. *State of Rajasthan.*[66] In that case, Gajendragadkar C.J., observed that the genesis of the amendment

63. As reproduced by Sabharwal C.J., in *I.R.Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.
64. (1952) SCR 89. The Court also pronounced on the distinction between Amending Power and Legislative Power and stated that Amending power was a Sovereign Power
65. Patanjali Shastri J., speaking for the Court in the unanimous opinion based his reasons for upholding the validity of the First Amendment in the following words, *inter alia*, para 30, *"It was said that they related to land which was covered by item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been started, articles 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power of enacting them... The question whether the latter part of article 31B is too widely expressed was not argued before us and we express no opinion upon it."* It is necessary to understand the political milieu of the day. "When Justice Patanjali Shastri delivered the unanimous judgment in Shankari Prasad, India was witness to the golden years of the Nehru era. Not even his worst critics suspected or distrusted the democrat in Nehru." The courts thus had decided that there was no threat to democracy from the constituent power. Moreover, the judgment was not in any way influenced by the will to undermine the developmental process or to keep a hold over the programmes of planned development. See Mohammed Ghouse, "Conscience Keepers of Status Quo", Indian Bar Review, Vol. 9(1), 1982, p. 4.
66. AIR 1965 SC 845.

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.[67] This Amendment came up for challenge again in the famous *Golak Nath Case*[68] in 1967, wherein it was upheld.[69]

After this case the Parliament passed the Constitution (29th Amendment) Act, 1972 and amended the Ninth Schedule to the Constitution by inserting therein two Kerala Amendment Acts in furtherance of land reforms namely, the Kerala Land Reforms Amendment Act, 1969;[70] and the Kerala Land Reforms Amendment Act, 1971.[71] 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 Judge Bench and, by majority of seven to six, *Golak Nath's case* was overruled. The Constitution 29th Amendment was declared to be valid.[72] In *Kesavananda Bharati's case* the validity of Article 31B was not in question. The constitutional amendments under challenge in *Kesavananda Bharati's case* were examined assuming the constitutional validity of Article 31B. Khanna J. opined that the fundamental rights could be amended, abrogated or abridged so long as the Basic Structure

67. Hidayatullah and Mudholkar JJ., concurred with the opinion of the Chief Justice upholding the amendment but, at the same time, expressed reservations about the effect of possible future Amendments on Fundamental Rights and of the Constitution. Justice Mudholkar questioned, *"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?"* (This has been quoted from *IR Coelho,* ¶ 8 and it is interesting to note that the doctrine of basic structure was envisaged or recognized by Mudholkar way back in 1965.)

68. The researcher does not wish to concern himself in the debate surrounding this case as he considers the same to be beyond the scope of this paper. However, the debate surrounding fundamental rights pre and post *Golaknath* has been discussed exhaustively by Prof. Blackshield in his Articles published in *JILI* in 1966 and 1968.

69. Subba Rao C.J., by a majority of 6:5, rejected the ratio of the Court in *Sankari Prasad case* and in the *Sajjan Singh case* and held that Fundamental Rights are sacrosanct and are beyond the reach of the Amending Power of Parliament. He located Amending Power in the Scheme of Distribution of Legislative Power. He located it in residuary powers found in Entry 97, List I read with Article 248. Hidayatullah J., gave a concurring opinion, however differed with the Chief Justice on the issue of location of Amending Power as considered the same to be *sui generis.*

70. Kerala Act 35 of 1969.

71. Kerala Act 35 of 1971.

72. While understanding this decision it is important to remember that six learned Judges (Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud, JJ) who upheld the validity of 29th Amendment did not subscribe to the Basic Structure doctrine. They held it to be unconditionally valid. 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. The 13th learned Judge (Khanna, J), though subscribed to the doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the 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 the Basic Structure doctrine on 29th Amendment.

of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid.[73] Khanna J. 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.*"[74]

The constitutional validity of all the legislations incorporated in the Ninth Schedule again came up for question in 1981, when the Supreme Court was asked to determine the constitutional validity of all Amendments to the Ninth Schedule in the case of, *Waman Rao* v. *Union of India.*[75] This is because in this case, the Constitution (First Amendment) Act, 1951 which introduced Article 31-A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which added the new clause (1), sub-clauses (a) to (e), for the original clause (1) with retrospective effect was questioned. In addition to this, Section 5 of the Constitution (First Amendment) Act, 1951, which introduced Article 31B was questioned in addition to the constitutionality of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.[76] The Court unanimously upheld the First and Fourth Amendments.[77] This decision is a classical manifestation of "*Judicial Convenience or Judicial Arbitrariness*".[78] Professor

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73. 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.
74. ¶ 1536, *Kesavananda Bharati's Case.*
75. AIR 1981 SC 271. Hereinafter, *"Waman Rao Case".*
76. ¶ 1, *Waman Rao Case.*
77. It must be pointed out here the fluctuating nature of the judicial change. When in the 1950's the Parliament was desperately trying to bring in fast reforms, the court adopted a conservative stance and scuttled all modest attempts on the part of the government. Later in the 1970's it arrogated to itself the role of protecting democracy from the political masters of the day and again sought to scuttle the attempts of the government, though for entirely different reasons. Two divergent and contradictory positions of the political milieu emerge from the facts discussed above: Firstly, the political stage has remained in a state of constant flux, its policies radiating a policy towards change, towards a democratization of economic and thus a greater justice to all. The courts remaining antithetical to the political stance, showing extreme wariness has remained sharply conservative, strangely status-quoist, unwilling to bend to the proclaimed socialist ideal of the government. An even more pertinent question would be why the courts would keep upholding the validity of the Articles 31A & 31B even though it has already shorn them of the umbrella-like protection that they were meant to promote.
78. Views of Professor Errabi.

Errabbi terms it so, because the Supreme Court in this case, drew a line, treating the decision in *Kesavananda Bharati's case* as the landmark. The Acts were put in the Ninth Schedule prior to that decision, that is, 24th April 1973, were immune from challenge. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution.[79] However the laws included thereafter are subject to challenge and can be examined on the touchstone of Articles 14, 19 and 31. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the Basic Structure of the Constitution.[80] The Court upheld Article 31B and the First Amendment and Chandrachud C.J., stated;

> *"The Amendments, especially the 1st, were made so closely on the heels of the Constitution that they ought in deed to be considered as a part and parcel of the Constitution itself. These Amendments are not born of second thoughts and they do not reflect a fresh look at the Constitution in order to deprive the people of the gains of the constitution. They are, in the truest sense of the phrase, a contemporary practical exposition of the Constitution."*

The primary ground on which this case faces criticism is the utter disregard of the judiciary to the explicit text of Article 31B. It is the researcher's submission that the Court failed to take into account the wordings of Article 31B, which does not either explicitly or impliedly prescribe such a date line to distinguish laws incorporated in the Ninth Schedule.

- **The Election Case And Seervai's Analysis**

The issue whether the Basic Structure applies to laws in the Ninth Schedule has to be analyzed in light of Mathew J.'s decision in *the Election Case*. He is against the proposition that a constitutional amendment putting

79. ¶ 51, *Waman Rao Case.*

80. The reasoning of the Court for such a date-line is as follows; (1) The theory that the Parliament cannot exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in *Kesavananda Bharati*, (2) A large number of properties must have changed hands and several new titled must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they were violative of Article 14, 19 and 31. The Court felt it would not be justified in upsetting settled claims and titles and in introducing chaos and confusion into the lawful affairs of a fairly orderly society. (3) The first 66 items in the Ninth Schedule, which were inserted prior to the decision in *Kesavananda Bharati* mostly pertain to laws of agrarian reforms. There are a few exceptions amongst those 66 items, like Items 17, 18, 19 which relate to Insurance, Railways and Industries. But almost all other items would fall within the purview of Article 31A(1)(a).

an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure.[81] He justifies his stand in rejecting the proposition on the grounds that the ratio in *Kesavananda Bharati* v. *State of Kerala* cannot be construed to lead to such a conclusion.[82] This brings us to the question as to whether the validity of a statute incorporated in the Ninth Schedule can be determined on the grounds that it violates any other part of the Basic Structure besides those fundamental rights which pertain to the Basic Structure? Mathew J., relying on Sikri C.J.'s opinion in *the Fundamental Rights Case* came to the conclusion that 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 basic structure. However, the Act cannot be attacked for a collateral reason, namely, that the provisions of the Act have destroyed or damaged some other basic structure, say, for instance, democracy or separation of powers.

Also pertinent to note is Khanna J.'s clarification of his stand in *Kesavananda Bharati Case* that fundamental rights can be a part of the Basic Structure. This clarification, as observed by Seervai raises a few serious problems of its own. "*The problem was: in view of the clarification, was Khanna J. right in holding that Article 31B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended?*"[83] Seervai also notes another problem which will arise if the power of amendment is limited by the doctrine of basic structure, which is that though the Acts included in the Ninth Schedule do not become a part

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81. ¶ 355, *The Election Case.*
82. He relied on Chief Justice Sikri's opinion on this issue: "*the constitution Twenty-ninth Amendment Act, 1971, is ineffective to protect the impugned Acts there if they abrogate or take away fundamental rights. This would not show that the learned Chief Justice countenanced any challenge to an Act on the ground that the basic structure of the Constitution has been damaged or destroyed by its provisions not constituted by the fundamental rights abrogated or taken away."* Furthermore Shelat and Grover, JJ. have said in their judgment that the Twenty-ninth Amendment is valid, but the question whether the Acts included in the Ninth Schedule by that amendment or any provision of those Acts abrogates any of the basic elements of the constitutional structure or denudes them of their identity will have to be examined when the validity of those Acts comes up for consideration. Similar observations have been made by Hegde and Mukherjea, JJ. and by Jaganmohan Reddy, J. Khanna, J. only said that the Twenty-ninth Amendment was valid.
83. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.48. This problem was solved in *Minerva Mills v. Union of India*, AIR 1980 SC 1789, wherein Chandrachud J., held that by holding that Acts inserted in Schedule IX after 25 April, 1973 were not unconditionally valid, but would have to stand the test of fundamental rights.

of the Constitution, by being included in the Ninth Schedule[84] *they owe their validity to the exercise of the amending power.*[85] Thus can these Acts, if for instance they contravene the Basic Feature of Secularism be declared valid as a result of the exercise of amending power? It is Seervai's submission in light of Khanna J.'s clarification that if Parliament, exercising constituent power, cannot enact an amendment destroying the basic feature (eg. Secularism) 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.[86]

- **I.R. Coelho v. State of Tamil Nadu**

This issue was again opened up for discussion before the Supreme Court recently in the landmark case of *I.R.Coelho* v. *State of Tamil Nadu,*[87] wherein a nine judge bench decided on the issue and upheld the stand taken by Mathew J., in *the Election Case* and held that "*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.*"[88]

In light of the above-mentioned observation in the *Coelho case*, it is pertinent to understand the decision given therein in the context of the

84. This is clear from the provision of Article 31B that such laws are subject to the power of any competent legislature to repeal or amend them - 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.
85. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.48.
86. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.65.
87. Decided on 11.01.2007; SC-2007-28; AIR 2007 SC 861. Hereinafter read as the *'Coelho Case'*. It is pertinent to briefly mention the factual matrix surrounding this case. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 vested certain land including forest land in the Janmam Estate in the State of Tamilnadu. The Act was struck down in *Balmadies Plantations Ltd. v. State of Tamil Nadu,* (1972) 2 SCC 133 because the acquisition of forest land was not found to be a measure of agrarian reforms under Art.31 A of the Constitution. Similarly Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down as arbitrary and unconstitutional. The Special Leave Petition by State of West Bengal was dismissed. The 34th Amendment and 66th Amendment to the Constitution inserted these two acts in Ninth Schedule in its entirety. These insertions were challenged before five judges Bench on the ground that portions, which were struck down could not be validly inserted in the Ninth Schedule. By an order passed on 14.9.1999 reported in (1999) 7 SCC 580 a Constitution Bench of Supreme Court referred the matter to the larger bench of nine judges observing that after 24th April, 1973 (the date when *Kesavananda Bharti* judgment was delivered) the inclusion of the acts, which were struck down by the Courts as violative of Part III of the Constitution of India in Ninth Schedule is beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure.
88. *IR Coelho v. State of Tamil Nadu*, AIR 2007 SC 861 (Sabharwal C.J., ¶ 81).

applicability of the Basic Structure to laws included in the Ninth Schedule. The primary issue, which faced the Court, was to determine the extent and immunity that Article 31B provides.[89]

At the very outset, the *IR Coelho Court* clearly states that the decision in the case is based on the presumption that Article 31B is valid and shall not look into the same.[90] The Court held that after the 24th April 1973, the laws that were included in the Ninth Schedule could not escape scrutiny by the Courts based on the rights contained in Part III of the Constitution and such laws are *"consequently subject to the review of fundamental rights as they stand in Part III"*.[91] However, the test is not restricted to this stage, 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 on the essence of any of the fundamental rights or any aspect of the Basic Structure then it will be struck down. The extent of abrogation and limit of abridgement shall have to be examined in each case.[92]

There have been several decisions relating to what constitutes the Basic Structure over the years.[93] The very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its nebulous and ill-defined nature.[94] The *IR Coelho* case is the latest milestone in the judicial description of what constitutes the Basic Structure. Justice Sabharwal was mindful of the decision delivered a couple of months earlier in the *M.Nagaraj Case.*[95] In that case, the Court, while considering the debate between the need to interpret the Constitution textually, based on original intent on the one hand, and the indeterminate nature of the Constitutional text that permits different values to be read into the Constitution, held that the Basic Structure of the Constitution need not be found in the Constitutional text alone.[96] This view of the Court found reiteration in *IR Coelho Case*

89. ¶ 43, *IR Coelho Case.*
90. ¶ 42, *IR Coelho Case.*
91. ¶ 63, *IR Coelho Case.*
92. ¶ 62, *IR Coelho Case.*
93. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *Waman Rao v. Union of India*, AIR 1981 SC 781, *S.R.Bommai v. State of Karnataka*, (1994) 2 SCC 1; *M.Nagaraj v. Union of India*, AIR 2007 SC 71.
94. Mathew J., in *Indira Gandhi v. Raj Narain,* has aptly stated: *"The Concept of a basic structure as brooding omnipresence in the sky apart from specific provisions of the constitution is too vague and indefinite to provide a yardstick for the validity of an ordinary law."*
95. ¶ 76, *IR Coelho Case.*
96 This was explained in the following words: *"Systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic*

wherein the Court noted that textual provisions and such overarching values could both form part of the Basic Structure.[97]

In light of this the Court was faced with the task of answering the following questions: whether all fundamental rights are included in the Basic Structure doctrine? If the answer to the question is in the negative, then the Court is required to determine, which fundamental rights can be identified as part of the Basic Structure.

The Court, while discussing the hierarchy it has created amongst the fundamental rights, takes recourse under the distinction between the 'rights test' and the 'essence of rights test'. At this juncture, the view of the Court warrants mention: *"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 merely excludes Part III at will. For these reasons, every addition to the Ninth Schedule triggers Article 32 as part of the Basic Structure and is consequently subject to the review of the fundamental rights as they stand in Part III"*.[98]

This would mean that if a law was to be included in the Ninth Schedule the scrutiny of all fundamental rights would be available as per the 'rights test'. However, the Court does not stop at this but goes on to say that every amendment that places a law in the Ninth Schedule after 24th April 1973[99] would have to satisfy the Basic Structure test.

A natural implication of this distinction is that the laws placed in the ninth schedule are not a formal part of the Constitution. An ambiguity which is created by drawing this distinction is that the distinction between the amendment and the law that it includes in the Ninth Schedule gets blurred. It becomes impossible to separate the laws, which constitute the body of the amendment from the amendment itself.[100]

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*whole. These principles are part of Constitutional Law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21."*

97 While discussing this issue, the Court articulated a distinction between what is termed as the "essence of the rights test" and the "rights test", that is between the the foundational value behind an express right and the express right provided in the text of the Constitution.

98 ¶ 63, *IR Coelho Case.*

99 In stating this, the Court impliedly upheld the decision in the *Waman Rao Case*.

100 In the opinion of Kamala Sankaran, one would then ask what is the amendment, apart from the laws that it places in the ninth schedule, an empty shell surely, and if so, what would be the content of such an amendment law that would remain to be tested on the essence of rights test, if one were to remove the laws that it seeks to immunize? She is of the opinion that reading the

The decision in *Coelho* can be best summed up in the conclusion given by Sabharwal C.J;

> "*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*".[101]

## 4. Conclusion: Critique Of The I.R. Coelho Case

It is the submission of the researcher that decision in *IR Coelho's case* is in complete disregarded to the explicit text of the concerned Article. Article 31B expressly states that none of the Acts and Regulations mentioned in the Ninth Schedule shall be deemed to be void on the ground that the same contravenes Part III of the Constitution. It is hereby submitted that the very existence of Article 31B in the Constitution would become redundant if the 'rights test' as propounded in *M.Nagaraj* and *I.R.Coelho* is applied to the laws included in the Ninth Schedule. The Supreme Court has created a hierarchy of rights by including a few fundamental rights within the ambit of the doctrine of Basic Structure.[102] The researcher is unable to agree with such an arbitrary classification based on the fundamentalness of the fundamental rights. Such a distinction does not find mention in the Constitutional text.[103]

Sabharwal C.J., also did not appreciate the fact that the doctrine of Basic Structure as it emerged in the *Kesavananda Bharati Case* was restricted

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two positions in the judgment together, one could then hold that for all practical purposes the basic structure, at least for the purpoises for the alws that are placed in the ninth schedule and are now under challenge, equals all the rights in Part III of the Constitution. Kamala Sankaran, "From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure Doctrine" (2007) Vol 49, JILI p. 240-248.

101. ¶ 81, *IR Coelho Case.*

102. Articles 14, 15, 16(4), 19 and 21 are few rights recognized as a part of the Basic Structure. See *IR Coelho Case*, ¶¶ 57-60. (Sabharwal C.J.)

103 Article 31B does not draw such a distinction. It is conceded that the Constitution in Articles 358 and 359 does prioritize a few rights over the others. However such a classification has been made by the Constituent Assembly or by the Parliament in exercise of its Constituent Power under the Constitution.

to test the constitutionality of Constitutional Amendments. It is the submission of the researcher, which has also been recognized by the Supreme Court, that ordinary laws do not become a part of the Constitution by mere inclusion in the Ninth Schedule and thus it is respectfully submitted that the Supreme Court has erred by expanding the scope of the Basic Structure doctrine to Ninth Schedule laws. This is further supported by the proposition that an amendment or repeal of these laws would not attract Article 368 but would be subject to ordinary legislative procedure.[104] This is evident from the text of Article 31B which reads as follows: *"...subject to the power of any competent Legislature to repeal or amend it..."*.

Furthermore, Sabharwal C.J., in the *I.R.Coelho Case* upheld the arbitrary dateline of 24th April, 1973 as created by Chandrachud C.J, in the *Waman Rao Case.* It is the researcher's submission that the reasoning given by Chandrachud C.J., as mentioned hereinabove is not justified and does not find mention, either explicit or implied, in the text of Article 31B. Professor Errabi rightly terms it, *"a classical exposition of judicial convenience and judicial arbitrariness".*[105]

The Courts should exercise restraint and, taking into consideration the text of the Article, restrict the applicability to laws pertaining to land reforms. This can be construed from the language of Article 31B which reads as follows; *"Without prejudice to the generality of the provisions contained in Article 31A..."*. This can be construed to mean that the interpretation of Article 31B should be narrower than that of Article 31A. Furthermore it is essential to take into consideration the context under which Article 31A and 31B was introduced and the legislative intent behind the same. The following quote is an extract from the speech made by Pandit Jawaharlal Nehru while introducing Article 31B in Parliament;[106]

> *"When I think of this Article the whole gamut of pictures come sup before my mind, because this Article deals with the abolition of the Zamindari system, with land lays and agrarian reform ...the whole object of these Articles in the Constitution was to take away and I say so deliberately to take away the question of Zamindari and land reform*

104. In addition to the above grounds, the laws included in the Ninth Schedule can also be declared to be unconstitutional on the ground of "lack of legislative competency" under Article 246.
105. It has been also observed that this is against the doctrine of Separation of Powers. However, the researcher is of the view that the doctrine of Separation of Power does not find strict application in the Indian Context and thus does not merit the observation.
106. The Parliamentary Debates, Part II, Volumes XII and XIII (May 15 - June 9, 1951).

> *from the purview of the courts. That is the whole object of the constitution and we put in some provision...May I remind the House that this question of land reform is most intimately connected with food production. We talk about food production and grow-more-food and if there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Neither the Zamindari nor the tenant can devote his energies to food production because there is instability."*

Therefore we can see that the power under Article 31B is being abused and exercised beyond the scope of the purpose for which it was enacted. The only remedy available to settle this issue is in the form of a Constitutional Amendment restricting the scope of this Article. The creation of hierarchies by the Court also makes it imperative to raise a note of caution. The Court has gone on to create an artificial hierarchy between the fundamental rights themselves, by giving express to emphasis Articles 14, 15, etc. Additionally, in furtherance of this spurt of judicial activism, the Court also creates a hierarchy among different elements of the basic structure doctrine in itself.

Thus, to conclude, it is the researcher's submission that the approach of the Court towards this issue serves as a classic case of Judicial Activism, or Judicial Terrorism.[107] However, in doing so, it is extremely unfortunate to note that the Supreme Court has failed to appreciate the language of Article 31B and the legislative intent behind the same. To conclude, the researcher is of the opinion that the Courts should adopt judicial activism with restraint and circumspect, and in the process pay due regard to the explicit text of the Constitution and the Constitutional ethos.

Regarding the question of whether the Ninth Schedule is necessary today or not, it is the contention of the researcher that the purpose for which the Ninth Schedule was enacted has more or less been met today. Even more importantly, post-1991 there has been a drastic shift in policy in the central government. The government no longer believes in a pro-active policy of social reform, but letting the benefits of economic reform "trickle down" to the poorest. This reflects an underlying assumption on the part of the policy makers that the social milieu today is far more conducive to such a policy, and not one of social revolution. In such a scenario, the Ninth Schedule becomes redundant with respect to the original purpose of its inclusion. There is thus a grave danger of it being misused for serving other means. The judiciary may not be the best safeguard against this misuse,

107. In the words of the renowned scholar, late S.P.Sathe.

seeing the ad-hoc manner in which it has accepted the existence of the Schedule at one point of time and rejected it at other times. The stance taken by the judiciary reflects on its distrust of the policy makers and not of the policy itself.