The Doctrine of *"Basic Structure"* in the Indian Constitution: A Critique

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I
Introduction

"A hundred years scarce serve to form a state; an hour may lay it in the dust."

—Byron

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of *'we the people'*. The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. The '*Doctrine of Basic Structure*' is a judge- made doctrine[1] to put a limitation on the amending powers of the Parliament so that the '*basic structure of the basic law of the land'* cannot be amended in exercise of its '*constituent power*' under the Constitution. So the question arises, is not there any limitation on the amending powers of the Parliament? If the answer of this question is not in affirmative with a reason that the Constitution makers did not intended for such limitation otherwise they would have provide for such limitation in the Constitution, then another question arises to what extent can the Parliament amend the basic law of the land? And, if there will be no limitation on the amending power of the Parliament, are

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[1] Some have called this doctrine as *"an 'invention' of the Indian Judiciary"* rather it is better to call it as an evolution of the Indian Judiciary. The genesis of this doctrine in India goes to ***Professor Dietrich Conrad***, formerly Head of the Department of Law, South Asia Institute of the University of Heidelberg who delivered his lecture on *"Implied Limitation of the Amending Power"* in the Faculty of Law, Banaras Hindu University in February, 1965 where he elucidated that "any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars of supporting its Constitutional authority". ***M. K. Nambyar*** inspired by Professor Conrad brought this issue of necessary implied restraint to the amendment of the Constitution in ***I. C. Golakh Nath v. State of Punjab***[(1967) 2 SCR 762.] but the Judiciary hesitated to pronounced this notion. Later on it was ***Nani Palkhivala*** who in ***Keshavananda Bharati Sripadagalvaru v. State of Kerala*** AIR 1973 SC 1461***(****popularly known as the* ***'Fundamental Rights Case'*** which was a consolidated case name of the following cases- *Raghunath Rao Ganpati Rao, N. H. Nawab Mohammed Iftekhar Ali Khan vs. Union of India, Shethia Mining and Manufacturing Corporation Limited vs. Union of India* and *Oriental Coal Co. Ltd. vs. Union of India****)*** was able to successfully propounding the doctrine of "Basic Structure of the Constitution". *Basic Structure was* inspired by an exceptional display of ***art, courage and craft*** *(*used by *Upendra Baxi in* "Courage, Craft and Contention - The Supreme Court in Eighties") that the Supreme Court exhibited while evolving this doctrine which counts as one of the greatest contribution of Indian judiciary to theory of institutionalism. *Also See; Noorani, A.G.- "Behind the 'Basic Structure' Doctrine- On India's debt to a German Jurist, Professor Dietrich Conrad"* , Frontline, Volume 18, Issue 09, April 28- May 11, 2001.

there not chances that this power of amendment in the name of *'constituent power'* can be abused?[2] This paper seeks to answer these questions and its scope through judicial pronouncements.

II
Doctrine of *'Basic Structure'*- The Concept

The Constitution is organic. What *Edmund Burke* has said about it that *"a Constitution is an ever growing thing and is perpetually continuous as it embodies the spirit of the nation. It is enriched at present by the past influence and it makes the future richer than the present."* Part XX of the Constitution under Article 368[3] deals with the amendment of the Constitution. It provides for three kinds of amendment i.e., *amendment by simple majority*[4]; *amendment by special majority*[5];

[2]The best example is of former Prime Minister of India, Mrs. Indira Gandhi when she imposed emergency and during that time various amendments were introduced in the Constitution by Forty-Second Constitutional (Amendment) Act, 1976 which was an attempt to change the Constitution. Even *Nani Palkhivala* made this point while arguing in the *Keshavananda Case*, which later on proved true.

[3]Article 368 of the Indian Constitution reads as: "*Power of the Parliament to amend the Constitution and procedure therefor*.- (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution *shall stand amended* in accordance with the terms of the Bill.

Provided that if such amendment seeks to make any change in -

(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(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.

[4]Amendment by simple majority of each house of Parliament- it is like an ordinary bill. Formation of new States, creation or abolition of Legislative Councils (Arts. 4, 169 and 239-A) is made by such procedure. Thus, amendment at the instance of the States, or amendment by State Legislatures, is included in such category. Amendments under this category are expressly excluded from the purview of Article 368.

and *amendment by special majority and ratification by the States*[6]. The Constitution has to be amended at every interval of time. A Constitution which is a static constitution becomes a big hurdle in the path of the progress of the nation. As the time is not static; it goes on changing in the same way the political, economic and social conditions of the people also goes on changing so for that reason provision of amendment of the Constitution is made with a view to overcome the difficulties of *'we the people'* which may encounter in future in the working of the Constitution. If there were no provision made for the amendment of the Constitution, people would have recourse to extra-Constitutional methods like revolution to change the same. Our Constitution-makers were so vigilant about the integrity of India that they gave us a scheme in the Constitution that if a citizen have a claim of even 100 rupees against the government (whether Central or State) one would get a decree against the Government and that decree will be charged on the Consolidated Fund of India and the same shall be payable as a matter of right and no State Legislature or the Parliament has right to vote on that that it will not be paid.[7] What the sense of national integrity and honour of India the Constitution makers had before 65 years ago but today the Parliament is making its every possible effort to keep itself out from the purview of the judiciary which is the shield giver to the Constitution.[8] This doctrine as evolved in the *Keshavananda Bharti*[9] seeks to resolve a legal conundrum which arises in written Constitutions

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[5] Means majority of *'total members of each House' and by a majority of at least two-third 'present and voting'*. All amendments, other than those referred in amendment by simple majority, come within this category, e.g., powers of Election Commission.

[6] The States are given an important voice in the amendment of these matters which are required to be ratified by the legislature of not less than one-half of the States.

[7] Even the Privy Purse was charged on the Consolidated Fund of India but now it has been abrogated.

[8] Madras High Court Judge, *Justice T. Mathivanan* on November 27, 2010 while speaking at the Law Day at Kumbakonam Bar Association said that basic structure of the Constitution can be defined as those parts without which the Constitution may loose its fundamental character. If these are violated, the person can approach Supreme Court. The Constitution authorizes Parliament to impose new restrictions upon law. Restrictions imposed by Parliament are subject to judicial review. The amending power of Parliament is limited to the limit of not violating the basic structure of the Constitution. The basic structure of the Constitution can be amended but not be destroyed. Fundamental rights conferred must be safeguarded, protected and shall not be violated or infringed by any means and the people shall not be discriminated. The basic structure of the Constitution can be amended, not destroyed.

[9] It seems that idea of the doctrine is borrowed from the observation of Supreme Court of the *United States of America* made as early as in the year 1919 in ***State of Rhode Island vs. A. Mitchel Palmer*** which runs as follows *"the decision of the Congress on this question as to whether a particular amendment should be ratified by the State Legislatures or by the State Conventions is final. The Constitution makers must have proceeded on the basis that the Congress is likely to require the amendment of basic elements or Fundamental features of the Constitution to be ratified by State conventions".*

In this observation the terms *"basic elements or fundamental features"* purport to have been used to connote the set of provisions, which may require ratification by states.

out of the interplay between those provisions of the Constitution which guarantees the fundamental rights and those which enable the Parliament to amend the Constitution.[10]

Chandrachud, C.J., in *Minerva Mills case*[11] observed thus, *"the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution."* The rule of law[12] and judicial review was held as basic structure in *Waman Rao,*[13] *Sampath Kumar*[14] and *Sambamurthy*[15]cases. Effective access to Justice is part of the basic Structure, according to the ruling in *Central Coal Fields case.*[16] In *Kihoto Hollohon,*[17] the Supreme Court has declared, *"Democracy is a basic feature of the Constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need of protect and sustain the purity of the electoral process that may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes."* In *Bommai case*[18] *Sawant and Kuldip Singh, JJ.,* have observed: *"Democracy and Federalism are essential features of our Constitution and are part of its basic structure."* In the same case, the Supreme Court has ruled that secularism is a basic or an essential feature[19] of the Constitution.

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[10] Whether a feature is *"basic"* or not is to be determined from time to time by the court as and when the question arises. See, *Jain, M.P.*-Indian Constitutional Law, Sixth edition 2010, reprint 2012, p. 1645.

[11] (1980) 3 SCC 625.

[12]*Rule of law* was also held impliedly asbasic structure in the *Golakh Nath Case* by *Justice Mudholkar*.

[13] *Waman Rao v. Union of India,* (1981) 2 SCC 362.

[14] *S.P. Sampath Kumar v. Union of India* (1987) 1 SCC 124.

[15] *P. Sambamurthy v. State of Andhra Pradesh* (1987) SCC 362.

[16] *Central Coal Fields Ltd. V. Jaiswal Coal co.* 1980 Supp SCC 471.

[17] AIR 1993 SC 412.

[18] *S.R. Bommai v. Union of India* AIR 1994 SC 1918.

[19]In *State of Bihar v. Bal Mukund Sah and Ors. (AIR 2000 SC 1296.),* the Supreme Court observed that the concepts of "Separation of Powers between the legislature, executive and Judiciary" as well as "the fundamental concept of independent judiciary have been now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme"; in *Bhim Singhji v. Union of India (AIR 1981 SC 234.), Krishna Iyer and Sen, JJ.*, asserted that the concept of social and economic justice – to build a welfare state forms a part of the of Basic Structure. Article 32, 136.141 and 142 of the Constitution conferring power on the Supreme Court were held as a Basic Structure in *Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406]*. The independence of judiciary within the limits of the Constitution [see *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441; *Gupta S.P. v. Union of India*, AIR 1982 SC 149., *State of Bihar v. Bal Mukund Sah* (2000) 4 SCC 640.), judicial review under Article 32, 226 and 227of the Constitution (in Chandrakumar L. vs. Union of India AIR 1997 SC 1125.)], Preamble of the Constitution (in *State of U.P. v. Dina Nath Shukla*, AIR 1997 SC 1095.), Independence of Judiciary (*Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213; *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296.), Secularism (see *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011;

In *M. Nagraj v.Union of India*[20] the court observed that the amendment should not destroy Constitutional identity and it is the theory of Basic Structure only to judge the validity of Constitutional amendment. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution.[21]In a recent judgment *I.R. Coelho v. State of Tamil Nadu*[22]the Supreme Court applied this doctrine and held that:

> *"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 provision 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."*

John Marshall, the American Chief Justice on the life of the Constitution has said *"A Constitution is framed for ages to come, but its course cannot always be tranquil."*[23] The amending power could not be exercised in such a manner as to destroy or emasculate the basic or essential features[24] of the Constitution, including the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. As *Justice Chandrachud* had exquisitely laid down-

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Aruna Roy v. Union of India, AIR 2002 SC 3176.); The Constitution of in its Preamble clearly states that India is a secular state but the insertion of Article 290-A by the Constitution (Seventh Amendment) Act 1956, Section 19 raises a question whether it is really a secular state. The Article 290A reads as: Annual payment to certain Devaswom Funds.- A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Tranvancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu, every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the terroteries transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin., *emphasis added;* Federalism (*Bommai S.R. v. Union of India*, AIR 1994 SC 1918.), Separation of Power (*State of Bihar v. Balmukund Sah*, AIR 2000 SC 1296.), free, fair and periodic election (*Kihoto Hollohan v. Zachilhu*, AIR 1993 SC 412.) are all declared to be the Basic Structure of the Constitution.

[20] (2006) 8 SCC 212.

[21] AIR 2007 SC 71.

[22] AIR 2007 SC 861.

[23]*see, Indian Constitution: Sixty Years of Our faith*, Indian Express; 2 February 2010.

[24] opp. cit. M.P. Singh.

"*amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity*".[25]

There is no such exhaustive or exclusive definition of basic structure given by the judiciary. Judicial approach has been on case to case basis to define what basically includes in the doctrine of basic structure. *Justice Mathew* in ***Indira Gandhi case***[26] had perceptively stated "*The concept of basic structure as a brooding omnipresence in the sky apart from specific provisions of the constitution is too vague and indefinite to provide a yardstick for the validity an ordinary law".*

III
The Judicial Journey of *'Basic Structure'*

The *Shankari Prasad Case*[27]

After coming into force the Constitution of India, the problem of validity of the Constitutional amendments arose early essentially on the issue of *'right to property'*.[28] The originally enacted Constitution included such provisions relating to property under Article 19 (1) (f).[29] The Constitution further provided for the protection of right to property under Article 31.[30] The Bihar Land Reform Act, 1950 was declared unconstitutional by the Patna High Court. In *Kameshwar Prasad Singh vs. State of Bihar,*[31]the unconstitutionality of the Bihar Land Reforms Act, 1950 was related to the law being the subject to Article 13(2)[32]. The decision of the Court was lamented by Nehru, that '*somehow, we have found that the magnificent Constitution that we have framed was kidnapped and purloined by the lawyers'*. Different interpretations were made by the some other High Courts.[33]Such conflicting views of the Courts led the Parliament to bring the Constitution (First Amendment) Act, 1951 which introduced new Articles in the Constitution by

[25] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.
[26]AIR 1975 SC 2299.
[27] *Shankari Prasad v. Union of India* A.I.R. 1951 S.C. 2193.
[28] Where several State legislatures carried out certain agrarian reforms in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zamindari Abolition Acts.
[29] Right to acquire, hold and dispose of property which was deleted by the Constitution Forty-Fourth Amendment Act in 1978 and a reasonable restriction was imposed in the interest of the general public..
[30] No person shall be deprived of his property save by the authority of law.
[31]*Kameshwar Singh vs. State* AIR 1951 Pat. 91.
[32] Article 13 (2) reads as : 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.
[33] The Patna High Court held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively.

the saving clause *i.e.*, Articles 31-A[34] and 31-B[35]. It was broadly declared in Article 31-A that any law providing for compulsory acquisition of property aimed at development of the state will not be unconstitutional merely because it is in conflict with Articles 14 and 19. Whereas Article 31-B introduced a new Schedule in the Constitution; the Ninth Schedule which laid down that any law included in this schedule would be immune from challenge in any court.

The First Constitutional Amendment was challenged before the Supreme Court in *Shankari Prasad vs. Union of India*[36] with the main issue whether the Constitution (First Amendment)

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[34] Article 31A: Saving of laws providing for acquisition of estates, etc.- [(1) Notwithstanding anything contained in article 13, no law providing for—

(*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,—(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—

(*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 ryotwari 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.

[35] 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.

[36] A.I.R. 1951 S.C. 2193.

Act, 1951 passed by the provisional Parliament is valid? The amendments were challenged on the ground that the word 'law' under article 13(2) also includes the *'law of the amendment of the Constitution'* and so the Articles 31-A and 31-B are invalid because they abridge the fundamental rights. To the issue that the definition of the word contained under Article 13 (3) (a)[37] did not expressly refer to the *'Constitutional amendments'*, the Court held that although amendment is superior to an ordinary legislation and hence it will not be hit by article 13(2). As the word 'law' under article 13(2) ordinarily includes Constitutional amendment but it must be taken to mean the exercise of ordinary legislative power. Thus amendments made in exercise of the constituent power of the Parliament are not subject to Article 13(2) and such power includes the amendment of the fundamental rights as well. On this point the Court also observed-

> *"We are of the opinion that in the context of Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368."*

The Court using the literal interpretation resolved the conflict and upheld the validity of the First Amendment and also held that Article 368 empowers the Parliament to amend the Constitution without any exception that Fundamental Rights cannot be amended being the exception to Article 368. The Court also disagreed with the view that Fundamental Rights are inviolable. Thus, in this case the Supreme Court kept the 'law of amendment' beyond the scope of Article 13(2) and thereby enabled the process of progress of the nation through the process of acquisition of property.

IV
The *Sajjan Singh Case*[38]

After the *Shankari Prasad* case, the Constitution (Fourth Amendment) Act, 1955 was passed amending some Articles in Fundamental Rights Part, but its validity was never challenged. The Constitution (Seventeenth Amendment) Act, 1964[39] introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review and was

[37] Article 13 (3) (*a*)- "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

[38] *Sajjan Singh v. State of Rajasthan*[1965] 1 SCR 933.

[39]The amendment inserted 44 Acts in the Schedule. It was noted that Articles 31A and 31B were added to the Constitution realizing the State Legislative measures adopted by certain States giving effect to the policy of agrarian reforms have to face serious challenge in the in the Courts of law on the ground that they contravene the Fundamental Rights guaranteed under the Constitution.

challenged before the Court. The majority of the judges in this (*Sajjan Singh*) case on the same logic as held in the *Shankari Prasad* case held that the law of amendment is superior law and is not subject to Article 13(2). It also held that the *Shankari Prasad* case was rightly decided and affirmed that the Parliament under Article 368 can amend any of the provision of the Constitution including the Fundamental Rights and make a suggestion to the Parliament that Fundamental rights should be included in the Proviso of the Article 368.

Justice Hidayatullah and Mudholkar dissented from the majority view and *Hidayatullah J.* expressed his concern as-

> *"The Constitution gives so many assurances in Part III that it would be difficult to think that they were the plaything of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other part and even on a less firm ground than one on which the articles mentioned in the proviso stand. As at present advised, I can only say that the power to make amendment ought not ordinarily to be a means of escape from absolute Constitutional restrictions."*[40]

One of the arguments in this case was the scope of judicial review which was reduced to a great extent, so the amendment should be struck down. The Court rejected this argument and held by majority that the "*pith and substance*" of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226.[41] They minority view on this point was very different, *Justice Hidayatullah* observed-

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[40] *ibid*, P. 962

[41] Article 226: *Power of High Courts to issue certain writs.*- (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
(*a*) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(*b*) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it

"I would require stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the states".

Justice Mudholkar observed that Constitutional amendment be excluded from the definition of law under Article 13 and he also gave an argument that every Constitution has certain basic principles which could not be changed.

The Court said that the decision in *Shankari Prasad* needs reconsideration and observed- *"...if the arguments urged by the petitioners were to prevail, it would lead to the inevitable consequence that the amendment made in Constitution both in 1951 and 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which has been pronounced by the different High Courts ever since the decision of this Court in Shankari Prasad's case was declared, would also be exposed to serious jeopardy. These are considerations which are both relevant and material in dealing with the plea urged by the petitioners before us in the present proceeding that Shankari Prasad's case should be reconsidered."*

Justice Mudholkar concurred with the opinion of the *Chief Justice Gajendragadkar* and questioned *"it is also a matter for consideration whether making a change in the 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?"*

V
The *I. C. Golakhnath* Case[42]

The strong reservations of the minority in *Sajjan Singh*[43] case prompted *Chief Justice Subba Rao* to constitute a larger Bench (eleven judges) to reconsider the Constitutional validity of First, Fourth and Seventeenth Constitutional Amendments in view of the doubts expressed by *Hidayatullah* and *Mudholkar JJ.* The Seventeenth Constitutional Amendment was challenged in

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is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

[42] *I. C. Golakh Nath and Ors. V. State of Punjab*[1967] 2 SCR 762.

[43] See supra n. 63.

the *I. C. Golakhnath case*[44]. By a majority of 6:5 it was held that the *'Parliament had no power to amend the fundamental rights'*. *Subbarao C.J.*, delivered the leading majority judgement (For himself, *Sikri, Shelat, Shah and Vaidyalingam JJ.*) whereas *Hidayatullah J.* delivering a concurring judgement. The two judgements reached the same conclusion although they took the opposite views as to the source of the amending power. *Subbarao, C.J.* held that Article 368 contained only procedure for amendment, the power to amend being located in the residuary power of legislation. As legislative power was "subject to the provisions of this Constitution", Article 13(2) constituted a bar to an amendment abridging or taking away fundamental rights. The majority judgement overruled *Shankari Prasad Case*, and held that there was no distinction between legislative and constituent power.[45]

Justice Hidayatullah held that the power of amendment was not located in the residuary power of legislation. Article 368 provided a procedure which, when complied with, resulted in an amendment of the Constitution. If it could be called a power at all, it was a legislative power, but it was *sui generis*. Since a Constitutional amendment was a law, Article 13(2) barred any amendment which abridged or took away fundamental rights. It is not surprising that the majority shrank from the practical consequences of the judgement. The judgment of the Court in this case probably gave more rise to the already going controversy between the Judiciary and Legislature. The judges in their majority overruled the *Sajjan Singh* case. As there were numerous attacks on the Fundamental Rights since 1950 and because of that the Court was worried if the Parliament would be given an absolute power then a time may come when there will be no fundamental rights and India may lead towards totalitarian regime. The court came forward with some propositions: (i) the substantive power to amend is not to be found in Article 368; (ii) Article 368 contains only the procedure to amend the Constitution; (iii) a law made under Article 368 would be subject to Article 13(2) like other laws; (iv) The word 'amend' envisaged only minor modifications in the existing provisions but not any major alterations therein; (v) to amend the Fundamental Rights, a Constituent Assembly ought to be convened by the Parliament.

Chief Justice Subba Rao put forth the curious position that Article 368 merely lay down the amending procedure. It does not confer upon the Parliament the power to amend the Constitution as the constituent power of the Parliament arose from other provisions contained in the

[44][1967] 2 SCR 762.

[45] See *Seervai, H. M.*- Constitutional Law of India (Vol. 3); Fourth edition 1996, Reprint 2014; p. 3111.

Constitution like Arts. 245[46], 246[47] and 248[48] which gives Parliament, the power to make laws. And the Court also held the 'amending power' and the 'legislative power' of the Parliament were essentially the same. Therefore the amendment of the Constitution must be deemed law as used under Article 13.Now the biggest question before the Court was what to do now with the First, Fourth and the Seventeenth Amendments as they dealt with the critical land reforms and if they will be nullified then it may lead to civil unrest. The Court tried to strike down the balance between the need to prevent future erosion of fundamental rights with the need to protect the amendments which has already been done. The Court while struck down the three amendments and evolved the doctrine of *"Prospective Overruling"* under which the decisions would only have prospective operation and not retrospective and also held that from the date of judgment of this case, the Parliament shall have no power to take away or abridge the fundamental rights. While some dissenting judges like *Justice Wanchoo*[49]expressed his view that no limitation should be implied on the amending power of the Parliament under Article 368. He gave the argument that *"basic feature would lead to the position that any amendment made to any Article of the Constitution would be subject to the challenge before the Courts on the ground that it amounts to the amendment of the basic structure".*

Justice Ramaswami, held that the Constitution makers had not expressly provided any such limitation on the amending power of Parliament and hence there was no inviolability attached to the fundamental rights through the amending process.

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[46] Article 245: *Extent of laws made by Parliament and by the Legislatures of States.*- (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

[47] Article 246: *Subject-matter of laws made by Parliament and by the Legislatures of States.*- (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2[in a State] notwithstanding that such matter is a matter enumerated in the State List.

[48] Article 248: *Residuary powers of legislation.*- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

[49] He had been the part of majority in *Sajjan Singh* case.

The majority of judges who overruled *Golakh Nath Case* did so on one or more of the following grounds:(a) Because of the history of the residuary powers; (b) because residuary power belongs exclusively to the Parliament; whereas the power of amendment does not exclusively belong to Parliament in view of the proviso to Article 386 (c) because draft Article 304 conferred a limited power of amendment on state legislature which had no residuary power; (d) because Article 368 distributes constituent power and the power to amend the Constitution is not mentioned in the distribution of legislative power, for, in a rigid Constitution, there is a vital distinction between legislative and constituent power; (e) because Article 368 is not merely procedural but confers substantive power, for, on the procedure being followed, the product is the substantive amendment of the Constitution; (f) because draft Article 305 showed that when the framers intended to limit the power of amendment, they expressly did so; (g) because there is a fundamental distinction between a rigid and a flexible Constitution. In a flexible Constitution no law can be *ultra vires,* in a rigid Constitution any law violating the Constitution is void. *McCawley's Case* and *Ranasinghe's Case* far from supporting the view that rigid Constitutions can be amended by ordinary legislation, negative such a proposition; (h) because if the express declaration of invalidity contained in Article 13(2) prevents an amendment of fundamental rights, any amend of the other parts of the Constitution would be equally impossible, because of the opening words of Article 245 "Subject to the provisions of this Constitution", since an amendment of the Constitution would contravene the Article to be amended. Either all Articles are amendable or no Article is amendable, which would be absurd in the face of Article 368; (i) because if the amending power was a legislative power, it would not be legally possible to convene a Constituent Assembly for abrogation or abridging fundamental rights.[50]

VI
The Keshavananda Bharati Sripadagalvaru Case[51]

The tussle between the Judiciary and the Legislature took totally a different shape after the decision in the *Golakh Nath case*. The Constitution (Twenty-fourth Amendment) Act was passed to nullify the *Golakh Nath* decision.[52]Four clauses were added in the Article to blanket the

[50] Opp. Cit. Seervai, pp. 3113-3114.

[51]*Keshavananda Bharati Sripadagalvaru v. State of Kerala* [A.I.R. 1973 S.C. 1461; (1973) 4 SCC 225.] was a consolidated case name of the following cases- *Raghunath Rao Ganpati Rao N. H. Nawab Mohammed Iftekhar Ali Khan vs. Union of India, Shethia Mining and Manufacturing Corporation Limited vs. Union of India* and *Oriental Coal Co. Ltd. vs. Union of India*.

[52] The marginal note of the Article 368 was amended to read: *'Power of Parliament to amend the Constitution and Procedure Therefor'*. The procedure for amendment contained in the original Article 368 was incorporated as Article 368(2). Article 368(3) provides- 'Nothing in article 13 shall apply to any amendment made under this

Parliament with an omnibus constituent power. The Constitution (Twenty-fifth Amendment) introduced a new provision Article 31C[53] in the Constitution under which law giving effect to the Directive Principles of the State Policy enumerated under Part IV of the Constitution were deemed automatically be valid despite any inconsistency with the fundamental rights granted under Articles 14[54], 19[55] and 31[56].In this case, His Holiness Kesavananda Bharati Sripadagalavaru of Kerala filed a petition under Article 32 of the Constitution for the enforcement of his Fundamental Rights under Articles 14, 19(1)(*f*), 25, 26, 31(1) and 31(2) of the Constitution. He prayed that the provisions of the Kerala Land Reforms Act, 1963 as amended in 1969 and later in 1971 Twenty-fourth Amendment and Twenty-fifth Amendment be declared ultra vires to the Constitution. The matter was heard by the largest ever constituted Bench consisting of 13 judges[57] to review the decision of the Court in the *Golakh Nath*.

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article." For that very purpose, as a matter of caution similar provision was added in Article 13 (4) which provide- "Nothing in this article shall apply to any amendment of this Constitution made under article 368."

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

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

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.

[54] Article 14 reads as: *Equality before law.*- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[55] Article 1914 reads as:*Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right—*

(*a*) to freedom of speech and expression;

(*b*) to assemble peaceably and without arms;

(*c*) to form associations or unions;

(*d*) to move freely throughout the territory of India;

(*e*) to reside and settle in any part of the territory of India; [and]

(f) Sub-clause (*f*) omitted by s. 2, (Forty-fourth Amendment) Act, 1978, s. 2 (w.e.f. 20-6-1979).

(*g*) to practise any profession, or to carry on any occupation, trade or business.

[56] *Compulsory acquisition of property.Rep. by the Constitution (Forty-fourth Amendment) Act,* 1978, *s.* 6 (*w.e.f.* 20-6-1979).

[57] The Bench was consisted of following judges- *Sikri, C.J., Shelat, Grover, Hegde, Mukherjea, Jagannathan Reddy,JJ.* (they formed the majority opinion with *Justice Khanna*); while *A.N. Ray, Palekar, Mathew, Dwivedi, Beg,* and *Chandrachud, JJ.* were of the minority view. The term basic structure‟ was used only by Justice Khanna, which was lifted by *Chief Justice Sikri* and adopted in his "*view of the majority*."; See T. R. Andhyarujina, The

Eleven issues were raised in this case before the Honourable Supreme Court. The *first issue* before the Court was "what should be the rule of interpretation?" To this issue, the Supreme Court held that if there is any ambiguity, the *'Hyden's Rule'*[58] have to be followed. To the *second issue* "what is meant by the word 'amend' or 'amendment' the Court held that any amendment to the Constitution has to be within the limits of the essence of the Constitution. Indian Constitution is first and foremost a *'Social Document'* and is based upon the socio-economic ideals of the freedom struggle. It was in the course of the freedom struggle that the various promises were made for bringing about a social revolution in the society and these principles are indispensible for the Indian society and accordingly the Constitution also has to be essentially based upon these principles. It is these principles and values, which provide the organic entity and vitality to the Constitution. The Parliament which is a creation of the Constitution cannot rob the Constitution of its vitality. The Constitution has its own identity. The identity relates to the essential principles on which the Constitution is based. The identity of the Constitution cannot be taken away by any process of amendment, in fact, the Constitution does not provide for any mechanism by which the very identity of the Constitution can be taken away. The *third issue* was 'what is the source of amending power?' The Court on this issue held that even in earlier cases, Article 368 was the only source and even after the Constitution (Twenty-fourth Amendment) Act, Article 368 is the only source of the amending power. The *fourth issue* was, "can it be said that the amendment is done by the people of India directly and therefore being a sovereign, the people of India can amend anything in the Constitution?" The Court held that India is a representative democracy and once people have elected their representatives, the amendment has to be done by the Parliament and not by the people directly. There is no system of *referendum* in India and therefore, it is not the people of India who directly amend the Constitution or make any law. The Parliament has to act within the domain of the Constitution. Sovereignty is no doubt vested in the people of India but it is only the political sovereignty. Legal sovereignty is vested in the Constitution of India *i.e.*, the Constitution ids the supreme and not the people of India. Once the people have given the Constitution to themselves, they have

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Keshavananda Baharti Case: The Untold Story of Struggle For Supremacy By Supreme Court And Parliament, Edition 2011, P.47.

[58] (1584) 76 ER 637. which implies to examine what is the mischief that has been aimed at by the provisions and the Constitution, a purposive interpretation has to be followed and the purpose of that provision in light of the overall purpose of the Constitution shall be examined and that interpretation has to be applied which serves that purpose the best. The Constituent Assembly Debates, the examination of all the provisions of the Constitution and the larger purpose of the society shall be examined for that purpose.

declared their promise to adhere to the Constitution and therefore, even the people cannot rise above the Constitution to alter the essence of the Constitution by any constitutional means.

The *fifth issue* was "by declaring the constituent power, has the Parliament acquired for itself, the power to rise above the Constitution and bring about any alteration in the Constitution?" The Court held that the constituent power of the Parliament cannot be equated to the constituent power of the Constituent Assembly. The Constituent Assembly had the original constituent power under which it created the Constitution itself. It was not limited by any pre-existing Constitution as such. On the other hand, the Parliament's constituent power is a derivative power as derived from the Constitution itself. In fact, the Parliament itself is the creation of the Constitution and therefore in the garb of having the constituent power, the Parliament cannot rise above the Constitution so as to acquire those powers for itself which was actually with the Constituent Assembly. Hence, the Parliament in its constituent power of amendment has to act within the limits of the Constitution.

The *sixth issue* was "does Article 13(2) controls Article 368?" *Sikri, J.* did not get into this issue as he observed that otherwise also the effect is same. *Hedge and Mukherjea, JJ.* Held that there is a need for harmonization between Article 13(2) and Article 368. Article 13(2) refers to the ordinary legislative power of the Parliament and the State legislature whereas, Article 368 refers to the constituent power of the Parliament to amend the Constitution and is above the limitation of Article 13(2) though it subject to the *'Doctrine of Basic Structure'*. The Court did not read any conflict between the two, rather it just held that the field of application of the two are just distinct and hence they do not control each other.

The *seventh issue* was "are the Fundamental Rights amendable?" The Court held that Fundamental Rights are amendable but the Basic Structure is not. The wordings used in the various Fundamental Rights in themselves may not be the essence of the Constitution rather the principles behind those words *i.e.*, Articles are the elements of the Basic Structure. An amendment of the word used in the Articles on Fundamental Rights is permissible only to the extent that the basic structure of the Constitution does not adversely get affected.

The *eight issue* was *"does the 'doctrine of implied limitation' apply upon the Indian Constitution?"* The Court answered to this issue in affirmative. The *ninth issue* was "what is the scope of 'judicial review' in reference to Article 368?" The Court held that, it can interfere in any amendment of the Constitution from the perspective of the 'Substantive limitations- basic

structure' and the 'Procedural limitation- Article 268(2) etc.' The *tenth issue* was "what is the scope and extent of the amending power with respect to Article 368?" It was held that Article 368 cannot be amended but the spirit of midway amendment process cannot be taken away. The Constitution neither be made too rigid nor can it be made too flexible. Similarly, on the substantive part, Article 368 cannot be amended to an extent so as to acquire to itself the power to take away or abridge even the basic structure. The last and the *eleventh issue* was "is not the 'Doctrine of Basic Structure' is a vague doctrine?" The Court held that the doctrine of basic structure cannot be said to be vague merely because it cannot be rigidly defined or all the elements of basic structure have not been enumerated. Firstly, the Court is bound to decide only those issues which are actually before it. A decision upon any other issue will amount to an *obiter dictum* and will not be binding. Moreover, it is not possible to enumerate all the elements in one-go and it is not needed as well. The Court also held that merely because a particular concept of law cannot be rigidly defined, it does not cease to be a concept of law. Principles of natural justice and negligence also cannot be rigidly defined still they are effective concept of law. The Court also laid down the test in this regard- *"the ultimate purpose of the Constitution is the conservation of utility and integrity of the nation as also the dignity of the individual. This can be assured only by promoting fraternity. Any principle of law which if taken away from the Constitution would result into a loss of fraternity and unity and integrity of the nation and the dignity of the individual would be considered to be an essential feature of the Basic Structure.*

On the point that the Constituent Assembly would hide the power to amend the Constitution in its residuary power was refused by *Hedge and Mukherjea, JJ*. The view expressed on this point in the *Golakh Nath* was overruled. The Court found a distinction between the term 'Constitutional Law' and 'law' used under Article 13 of the Constitution and held that the term 'Constitutional law' does fall in the purview of 'law' in Article 13. And also held that the amending power of the legislature shall be subject to a doctrine called the doctrine of 'basic structure' and therefore the parliament cannot use its constituent power under Article 368 so as to *'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter'* the 'basic structure' or framework of the Constitution.[59] This decision is a turning point in Constitutional history.

[59] According to the court in this case the word "amend" enjoys a very restrictive connation and the court can look into the validity if it threatens to nullify or destroy any fundamental feature of the Constitution. *Kesavananda* also answered an important question which was left open by *Golak Nath*, as to whether Parliament has the power to rewrite the entire Constitution and bring in a new Constitution. The court answered this by saying that Parliament can only do that which does not modify the basic features of the Constitution.

Nani Palkhivala who was leading the arguments on behalf of the petitioners developed an alternative argument changing the emphasis from the concept of 'law' in Article 13 to the concept of 'amendment' in Article 368. Even if you could amend the Constitution, it would surely mean that you could only 'change' but not 'destroy' it. This was a shift from the technical meaning of the word 'law' to a political theory attached to the concept of 'amendment'. Palkhivala raised a point before the Court in support of his argument that a Constitution given by a people to themselves reserving to themselves certain fundamental rights cannot possibly be radically altered by a Parliament created under that very Constitution. He also argued that even if the Article 368 were construed broadly, the preamble was not amendable and Article 368 could not be read as *'expressing the death wish of the Constitution or as a provision for its legal suicide.'*[60]

On behalf of the respondent, *H. M. Seervai* argued that the amending power of the Parliament was unlimited and has been so recognized until Golakh Nath. In his view, the fundamental rights guaranteed by Part III were not 'human rights' but 'social rights' conferred on citizens by civilized society at a given time and were, therefore, susceptible to change from time to time.

The most important proposition stated in view of the majority (though it was a razor thin majority of 7:6) on the 24th of April, 1973 that the Parliament cannot amend the basic structure. The common answer of the judges in this case on what constitutes the basic structure was the 'judicial review'. There were dissenting observations of the minority, that there is no such limitation on the amending powers of the Parliament.

Chief Justice Sikri observed-

> *"The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article".*[61]

He also relied on the Supremacy of the Constitution, republican and democratic structure, Secular character, Separation of power between the Legislature, Executive and Judiciary, Federal character of the Constitution, Preamble and the basic inalienable rights guaranteed under Part III

[60] Palkhivala's propositions submitted to the Court are reproduced in the 91973) 4 SCC 1.
[61] (1973) 4 SCC 225, 405.

of the Constitution.[62] ***Mukherjea and Hedge JJ.*** observed if the 'basic features' are taken away to that extent the Constitution is abrogated or repealed, the amending power is subject to the implied limitations and Parliament has no power to emasculate or abrogate the 'basic elements' of the Constitution.[63] They considered Sovereignty of India, Democratic character of the polity, unity of the country, essential freedoms of the individual freedoms secured to the citizens and mandate to build a welfare state as the basic structure. ***Grover and Shelat JJ.*** Held that there were implied limitations on the amending power of the Parliament and there were also certain 'basic elements'[64] of the Constitution.[65]They included supremacy of the Constitution, Republican and democratic form of government, Secular character of the Constitution of India, separation of power between the three organs, federal character of the Constitution, the mandate to build a welfare state contained in the Directive principles of state Policy and unity and integrity of the nation in the list of their basic structure. ***Justice Ray*** observed that 'there are no express or implied limitations to the power of amendment' and said 'the power to amend is wide and unlimited'.[66]***Justice Jagmohan Reddy*** observed that 'essential elements constituting the basic structure cannot be amended'.[67]***Justice Palekar*** was of the view that an amendment of the Constitution abridging and taking away a fundamental right conferred by part III of the Constitution is not void and there were no implied or inherent limitations on the Amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment.[68]***Justice Khanna*** held that the limitation on the amending power only arose from the word 'amendment'. He also observed that there is no such inherent or implied limitation on the amending power. He rejected the contention that the fundamental rights and the Preamble of the Constitution could not be amended at all. He also observed-

> "*I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word* "*amendment*" *postulates that the old Constitution*

[62] See (1973) 4 SCC 225, 346-349.
[63] (1973) 4 SCC 225, 462, Para 608
[64] (1973) 4 SCC 225, 512, Para 744(3).
[65] though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features; even if the amending power includes the power to amend Article 13(2), a question not decided in Golak Nath case, the power is not so wide so as to include the power to abrogate or take away the fundamental freedoms; See (1973) 4 SCC 225, 462, Para 608 (b) and (c).
[66] (1973) 4 SCC 225, 593, Para 1064.
[67] Ibid, 637, Para 1159.
[68] Ibid, 726, Para 1333.

survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form… Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of the changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "*amendment of the Constitution*" *with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution*."[69]

Whereas ***Justice Mathew*** also observed that 'the power to amend under Article 368 is plenary in character and extended to all the provisions of the Constitution". And he also on other hand similar to *Justice Ray* affirmed that 'the only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. That limitation flows from the language of the article itself.'[70]***Justice Dwivedi*** observed "*the phrase* "*amendment of this Constitution*" *is the nerve-center of Article 368. The words* "*this Constitution*" *in the phrase embrace the entire Constitution*." Further, "*the denial of power to make radical changes in the Constitution to the future generation would invite the danger of extra Constitutional changes of the Constitution*."[71]

Justice Beg was of the view that there is no such limitation on the amending power of the parliament and went on saying :

"*in such a Constitution as ours, we must strongly lean against a construction which may enable us to hold that any part of the Constitution is exempt from the scope of Article 368 as originally framed*."[72]

[69] Ibid, 767, Para 1426.
[70] Ibid, 897, para 1784.
[71] *ibid*, 930, para 1890; His Lordship went to an extent to put on record that, "*it may be that Parliament may not be able to annihilate the entire Constitution by one stroke of pen. But it can surely repeal or abrogate all provisions in Part III. Article 368 permits Parliament to apply not only the physician*"*s needle but also the surgeon*'*s saw. It may amputate any part of the Constitution if and when it becomes necessary so to do for the good health and survival of the other parts of the Constitution*."; *see,* (1973) 4 SCC 225, 933, para 1899.
[72] Ibid, 910, para 1825.

Justice Chandrachud in his judgment observed that, the word "amendment" in Article 368 has a clear and definite import and it connotes a power of the widest amplitude to make additions, alterations or variations… No express restraint having been imposed on the power to amend the amending power, it is unnecessary to seek better evidence of the width of the power of amendment under our Constitution."[73] Further, "Article 368, manifestly, does not impose any express limitations.…The power of amendment is a safety valve and having regard to its true nature and purpose, it must be construed as being equal to the need for amendment. The power must rise to the occasion."[74]

The term 'basic structure' was used only by *Justice Khanna*, which was lifted by *Chief Justice Sikri* and adopted in his "*view of the majority*."[75] T. R. Andhyarujina in his book wrote that "the 'view of the majority' cannot be the ratio of the Keshavananda Case".[76]

That is why in *Indira Gandhi Case*[77]Chief Justice Ray observed, "*It should be stated here that the hearing has proceeded on the assumption that it is not necessary to challenge the majority view in Kesavananda Bharati case.*"[78]

It was held in this case that the amendments that violate the basic structure of the Constitution are unconstitutional despite the fact that the formal conditions for amendment of the Constitution (laid down in article 368 of the Constitution) had in fact been fulfilled.[79]

But *Justice Khanna* on the other handheld that limitation on the amending power only arose from the word 'amendment'. He observed-

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[73] (1973) 4 SCC 225, 981, para 2059.

[74] Ibid, Para 2060.

[75] See supra n. 80.

[76] *T. R. Andhyarujina*, The *Keshavananda Baharti Case*: The Untold Story of Struggle For Supremacy By Supreme Court And Parliament, Edition 2011, P.56. He wrote, "*If a ratio had to be extracted from the eleven judgments in the Kesavananda case it could not have been done in the manner of asking judges to merely subscribe to* "*The View of Majority*" *paper on the day of pronouncement of the judgments in Court*. *Deriving a ratio from the 11 judgments could have been done only after a full hearing by a later Constitution Bench to which the Petitions were remanded for disposal according to the unanimous Order of the Court*. *No later Constitution Bench to dispose of the petitions was convened to dispose off the petitions*. *Alternatively, the ratio could have been extracted by any later bench from the differing judgments as had been done in other cases*." He further remarks, "*Look whatever way, there was no majority view, no decision and no ratio in Kesavananda case that Parliament could not amend the basic structure or framework of the Constitution*. *This was only the conclusion of Justice Khanna*. *By a strategic roping in of his view in with six other judges* "*The View of the Majority*" *a majority of 7 Judges to 6 was created and approved by nine judges*."

[77] *Indira Gandhi v. Raj Narain;* (1975) Suppl. SCC 1.

[78] Ibid, P. 35.

[79] *Barak, Aharon.*- Unconstitutional Constitutional Amendments, Israel Law Review, [Vol. 44: 321], P. 326.

"We may not deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Questions has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution, The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only the chances has to be made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the changes and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amendment form. What then is meant by the retention of the old Constitution? A mere retention of some provisions of the old Constitution even through the basic structure of framework of the Constitution has been destroyed would not amount to the retention of the old Constitution although, it is permissible under the power of amendment to effect changes, howsoever important, and to adopt the system to the requirements of the changing conditions, it is not permissible or to alter the basic institutional pattern. The words 'amendment of the Constitution' with all their sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution."[80]

VII
Amending Power of the Parliament and the *Ninth Schedule* of the Constitution

One of the reasons of tussle between the Judiciary and the two other organs together has always been the Ninth Schedule.[81]The question is whether a law declared as unconstitutional by the Court can be made Constitutional just by putting that Law or Act in the Ninth Schedule of the Constitution so as to keep that Act away from the judicial scrutiny? If it is so, then what will be the status of the Act, will it not be an ***unconstitutional Constitutional amendment***? One of the members of the Constituent Assembly, *Prof. K.T. Shah* opposed the creation of Ninth Schedule

[80](1973) 4 SCC 225 (767) para 1426, see also p. 776, para 1445.

[81]This probably owes it roots from the Constitution (First Amendment) in *Shankari Prasad, Dhirubha Devisingh Gohil v. State of Bombay*, A.I.R. 1955 S.C.47, *Sajjan Singh v. State of Rajasthan* A.I.R. 1965 S.C.845, *Golakh Nath and Ors. V. State of Punjab* A.I.R. 1967 S.C. 1643, *Indira Nehru Gandhi v. Raj Narain,* A.I.R. 1975 SC 2299, and *Waman Rao v. Union of India,* A.I.R. 1981 S.C. 271 cases.

in order to uphold the sanctity of the Supreme Court. This concept of Ninth Schedule came from Ireland, where land had been unevenly distributed. The judicial attitude as there was no unanimity on the point between the Courts, led to the creation of this Schedule. The Ninth Schedule worked as shield as it given no scope to the judicial intervention.

The substantial question before the Honourable Court in *I. R. Coelho case*[82]was, whether on and after the date of *Keshavananda* judgement, 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, are the courts having any power to review these legislations?

The judgment was delivered by a bench of nine judges. The then Chief Justice of India, ***Y. K. Sabharwal*** observed-

> *"When entire Part III (dealing with Fundamental Rights) is sought to be taken by a Constitutional amendment by the exercise of constituent power under Article 368 by adding the legislations in the Ninth Schedule, the question arises as to the judicial scrutiny available to determine whether it alters the fundamentals of the Constitution."*

The Court held that a law that abrogates or abridges rights guaranteed by Part III of the Constitution may or may not violate the basic structure doctrine. If former is the consequence of law, such law will have to be invalidated in exercise of judicial review power of the Court. The majority judgment in ***Kesavananda Bharti's case*** read with ***Indira Gandhi case*** requires that to judge the validity of each new Constitutional amendment, its effects and impacts on the rights guaranteed under Part III has to be taken into account and then it should be decided whether or

[82]The case arose out of an order of reference made by a five judge constitution bench in 1999. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969, that vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by the Supreme Court in ***Balmadies Plantations Ltd. & Anr*. v. *State of Tamil Nadu****[(1972)***2 SCC 133.***)*** as it was found to be outside the scope of protection provided to agrarian reforms under article 31-A of the Constitution. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act was inserted in the ninth schedule, which was challenged. In its referral order, the constitution bench noted that, according to ***Waman Rao & Ors*. v. *Union of India & Ors.*** [(1981) 2 SCC 362**]**, amendments to the Constitution made on or after 24.4.1973 (the date of the ***Kesavananda Bharati*** judgment) inserting various laws in the ninth schedule were open to challenge on the ground that such amendments are beyond the constituent power of Parliament since they damage the basic structure of the Constitution. The referral order further stated that the judgment in ***Waman Rao*** needs to be reconsidered by a larger bench so that it is made clear "whether an Act or regulation which, or a part of which, is or has been found by the courts to be violative of one or more of the fundamental rights conferred by articles 14, 19 or 31 can be included in the ninth schedule or whether it is only a constitutional amendment amending the ninth schedule which damages or destroys the basic structure of the Constitution that can be struck down".

not it destroys the basic structure of the Constitution. All amendments to the Constitution made on or after 24th April, 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. Therefore, 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. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in Articles 14, 19 and 21 and principles underlying them. Such amendments are not immune from the attack on the ground they destroy or damage the basic structure. The Court will apply the 'rights test' and the 'essence of the rights' test taking synoptic view of Articles in Part III of the Constitution. It was further observed that the Court has to be guided by the 'impact test' in determining whether a basic feature was violated. The Court will first determine if there is violation of rights in Part III by impugned Amendment, its impact on the basic structure of the Constitution and the consequence of invalidation of such Amendment. In respect of the constituent power, the Bench went further saying that:

> *"If constituent power under Article 368, the other name of amending power cannot be made unlimited, it follows that Article 31B cannot be used so 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 limits on the power of the amendment. The limit came with the Kesavananda Bharati case. Therefore, Article 31B after April 24, 1973, despite its wide language, cannot confer unregulated or unlimited immunity."*

Soli Sorabjee, the former Attorney General of India in a Lecture in the Oslo University in October 2008, pointed out that "The judgment clearly imposes further limitations on the constituent power of Parliament with respect to the principles underlying certain fundamental rights. With the utmost respect the judgment is not conducive to clarity. It has introduced nebulous concepts like the essence of the rights test. Besides apart from the express terms of Articles 21, 14 and 19, what are the principles underlying there under? One does not have to be a prophet to visualize further litigation to explain the Coelho judgment which is sure to add to the

prevailing confusion." Thus, there is no certainty or unanimity about what constitutes the essential or basic features of the Constitution.

VIII
The *Pramati Educational and Cultural Trust Case*[83]

A Five Judges[84] Bench in *Pramati* case was called upon to rule on the validity of Articles 15(5)[85] and 21A[86] of the Constitution. The two substantial question of law before the bench were- whether by inserting Clause (5) in Article 15[87]of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution?; and whether by inserting Article 21A[88] of the Constitution by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution?

The Court upheld the Constitutional validity and exempted minority administered institutions from the ambit of the Right of Children to Free and Compulsory Education Act, 2009 (*hereinafter referred to as RTE Act*) in its entirety. The Court referred the *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.,*[89]and held that clause (5) of Article 15 of the Constitution is valid and does not violate the 'basic structure' of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions.[90] But however, the Constitution Bench in *Ashoka Kumar* case left open the question whether clause (5) of Article 15

[83]*Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Others* (2014) 8 SCC 1.

[84] The bench consists of the judges namely- *R.M. Lodha, C.J. and A.K. Patnaik, S.J. Mukhopadhaya, Dipak Misra and Ibrahim Kalifullah, JJ.*

[85] Article 15- *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*- (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

[86]Article 21A; *Right to education.* -The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[87] Clause (5) of Article 25 reads as- Nothing in this5 article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, or other than the minority educational institutions referred to in clause (1) of Article 30.

[88]Article 21A reads as- Right to education.- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[89][(2012) 6 SCC 102.

[90]Insofar as Article 15(5) enables the State to make special provisions relating to admission to educational institutions of the State and educational institutions aided by the State was considered in *Ashoka Kumar Thakur v. Union of India & Ors.* (2008) 6 SCC 1.

was Constitutionally valid or not so far as "private unaided" educational institutions are concerned.The Court held that object of Article 15(5) is to enable the state to give equal opportunity to socially and educationally backward classes of citizens or to Scheduled Castes and Scheduled Tribes to study in all educational institutions other than minority educational institutions. It is to amplify the provisions of Article 15 of the Constitution as that clause (5) has been inserted in Article 15 by the Constitution (Ninety-third Amendment) Act, 2009.[91] As the object of clause (5) of article (15) is to provide equal opportunity to a large number of students belonging to SEBCs/SCs/STs to study in educational institutions and equality of opportunity is also the object of Clauses (1) and (2) of Article 15 of the Constitution. It cannot be said that clause (5) of Article 15 is an exception or a proviso overriding Article 15 of the Constitution, but is an enabling provision to make equality of opportunity promised in the Preamble to the Constitution a reality. And Article 15(5) is not violative of the basic structure or the framework of the Constitution.

The Court went on saying that power under Article 15(5) is a *guided power* and its use in furtherance of its object and purpose is subject to judicial review and element of voluntariness under Article 19(1)(g) is not affected. *Mr. Nariman* argued that clause (5) of Article 15 of the Constitution is violative of Article 14[92] of the Constitution inasmuch as it treats *unequals as equals*.[93]The Court on this point held law made to effectuate Article 15(5) must provide for compensation to the unaided institutions so as not to violate Article 14.The Court on the issue of exclusion of minority educational institutions (aided and unaided) held that they are outside the purview of Article 15(5) and Article 15(5) does not destroys the secular character of the India set out in the Preamble. Mr. Nariman next submitted that in *Mohini Jain (Miss) v. State of Karnataka & Ors.,*[94] this Court has held that the *"right to life"* is a compendious expression with all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life and that the dignity of an individual cannot be assured unless it is accompanied by the right to education. He submitted that under Article 51-A(j) of the Constitution, it is a duty of every citizen of India to strive towards excellence in all spheres of individual and collective

[91](2014) 8 SCC 1, 3 Para c.

[92] Article 14. - *Equality before law.*- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[93]He argued that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to such educational institutions.

[94](1992) 3 SCC 666.

activity so that the nation constantly rises to higher levels of endeavor and achievement. He argued that every citizen can strive towards excellence through education by studying in educational institutions of excellence. He submitted that clause (5) of Article 15 of the Constitution in so far as it enables the State to make special provisions relating to admission to private educational institutions for socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes will affect also this right under Article 21 read with Article 51-A(j) of the Constitution. On this point raised by Mr. Nariman, the Court held that it is not borne out by the experience of institutions which similarly has reserved seats. Besides Article 15(5) promotes fraternity and unit and integrity of the nation contained in the Preamble.

The Court on the validity of Article 21A held that it did not find anything in Article 21A which conflicts with either the right of private unaided schools under Article 19(1)(g) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article 21A may affect these rights under Articles 19(1)(g) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(g) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution. Article 21A, however, states that the State shall by law determine the "manner" in which it will discharge its Constitutional obligation under Article 21A. Thus, a new power was vested in the State to enable the State to discharge this Constitutional obligation by making a law. However, Article 21A has to be harmoniously construed with Article 19(1)(g) and Article 30(1) of the Constitution. Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are Constitutionally valid. The Court held that the 2009 Act is not ultra vires Article 19(1)(g) of the Constitution and declared that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. It clearly keep out the minority institution (whether aided or un-aided) from the purview of the Act of 2009.The issue, whether the balance between Part III and Part IV of the Constitution has been destroyed by Article 15(5) was raised in the *Pramati* case but was not touched by the judges and left unanswered.

IX
The Ninety-Ninth Constitutional Amendment and the *Doctrine of Basic Structure*

The Ninety-Ninth Constitutional Amendment and the National Judicial Appointment Commission Act *(hereinafter referred to as* NJAC Act*)* was proposed to be a constitutional body

to replace the existing system of judicial appointments, whereby the three senior-most judges of the Supreme Court ("*the Collegium*") decide upon the appointments to the Supreme Court, with a nominally consultative role played by the Executive. Through a new Article 124A of the Constitution, they seek to bring into existence a National Judicial Commission, comprising of six members *i.e.*, the Chief Justice of India and two senior-most judges of the Supreme Court, two "*eminent persons*" (who would be nominated by a committee consisting of the CJI, Prime Minister of India and Leader of opposition or leader of single largest party) and the Law Minister. Under a new Article 124B, the NJAC will recommend appointments to the higher judiciary.

The Constitution Ninety-Ninth Amendment was challenged in the *Supreme Court Advocates on Record v. Union of India*.[95] The issue in the case was whether the impugned amendment alters or damages the said basic structure and is void on that ground? The petitioners contended that the primacy of judiciary in appointment of judges and absence of interference by the Executive therein is by itself a part of basic feature of the Constitution being integral part of independence of judiciary and separation of judiciary from the Executive. According to the respondents primacy of judiciary in appointment of judges is not part of independence of judiciary. Even when appointments are made by Executive, independence of judiciary is not affected. Alternatively in the amended scheme, primacy of judiciary is retained and independence of judiciary is strengthened. The amendment promotes transparency and accountability and is a part of needed reform without affecting the basic structure of the Constitution.

The Court rejected the contentions and by a majority of 4:1 held that the new scheme damages the basic structure of the Constitution under which primacy in appointment of judges has to be with the judiciary. Under the new scheme such primacy has been given a go-bye. Thus, the impugned amendment cannot be sustained. Articles 124A, B and C form the backbone of the 99th Amendment, and have been impugned as violating the basic structure by destroying the independence of the judiciary, the separation of powers, and the rule of law.

X
The Test of *'Basic Structure'*

The Doctrine of Basic Structure is vague in the sense that there is no clear cut list given by the Judiciary that such provisions of the Constitution forms the basic structure rather it has been left open before the judiciary to decide the same on the case to case basis. Though the first attempt

[95] WRIT PETITION (CIVIL) NO. 13 OF 2015.

was made to laid down the test of Basic structure in the *Minerva Mills case*.[96] ***H. M. Seervai*** has lamented that, *"[a] precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting the scope of Art 368"*[97] In the case of ***M. Nagraj v. Union of India***[98] the Court has tried to formulate a general test to decide if an amendment is against the basic structure of the Constitution. The Court held that "in the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the *'width test'*[99] and the *'test of identity'*.[100] The Court referred to the judgment in *Keshavanada*[101] case which clarified that not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or one that changes the identity of the Constitution is impermissible.[102]

In *I. R. Coelho case*[103]held in respect of the amendments of the fundamental rights not a change in the particular article but the change in the essence of the right must be the test for the change in the identity. It was further held by the Court that if the "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. The Court also observed that 'rights test' and the 'essence of right' test both forms part of the application of the doctrine of basic structure.

Finally, the *"impact test"* can be used to determine whether any law destroys the basic structure. If the impact of such a law has an effect on any of the rights guaranteed under Part III of the Constitution, then by applying this test, the answer will be in affirmative that such law is in violation of the basic structure.

XI
Conclusion

The doctrine of *'basic structure'* has been subject to an intense debate in the Constitutional field with regard to its genesis. A notion or doctrine in Constitutional sense can only be said Constitutional when it has a Constitutional genesis. But this point raises a point on the issue is the doctrine of basic structure is really basic? *Subhash Kashyap* criticizes the basic structure theory in the words *"if the sovereign people through their representatives cannot bring about*

[96]*Minerva Mills Ltd. and Ors.vs. Union of India and Ors*., AIR 1980 SC 1789.
[97]*Seervai, H.M.*- Constitutional law of India, Edition 2001, PP. 3161-3162.
[98](2006) 8 SCC 212.
[99]That there shall not be any obliteration of any of the Constitutional limitation.
[100] Id, P.268; it means that there should not be any alteration in the existing structure of the equality code.
[101]AIR 1973 SC1461.
[102] ibid. para 102.
[103]A.I.R. 2007 S.C. 861.

their desired change, who will?[104] But of what use this desired change will be to the '*we the people'* at the cost of the Constitution. This doctrine has anti-majoritarian flavor and is of prime importance as it prevents the Parliament from abusing its majoritarian power. It can also be criticized that it has extra Constitutional origin as there is *lack of basic in the basic structure* and what the Supreme Court has done is to assume to itself a power of veto on all Constitutional amendments. But if such limitations on the amending power of the Parliament will not be there, then, a day may come, when it will be made a criminal offence to criticize the government in power and we may not be left with our basic inalienable rights what the Constitution guarantees to us in Part III. Criticizing this doctrine with the argument that the constituent power gets transferred from the elected representatives of the people to the judges of the Supreme Court one should not forget the majoritarian power of which the Parliament is in possession of. The judiciary is the protector and final interpreter of the Constitution and it is also below the Constitution. But it also appeared from the few judicial pronouncements that the Supreme Court has assumed much power in the name of basic structure what may be termed as power of veto to every Constitutional amendments. This doctrine was meant for special use in times when Constitutional amendments threatened the basic framework of the Constitution. This doctrine is subjective and vague. As there is no clear cut list laid down by the judiciary that this constitutes the 'basic structure' and has said that it will be decided on the case to case basis. Probably, the reason may be, the Judiciary is afraid of the Legislature that if they will give a clear cut list of basic structure, then the Parliament may come forward with some other alternatives. Thanks to *Professor Dietrich Conrad* who on his visit to India make us aware that there is some implied inherent limitation on the amending power of the Parliament which Palkhivala successfully propounded in the *Keshavananda* case what ***Mr. M. K. Nambyar*** tried in Golakh Nath but because of judicial hesitation it took about half a decade time after *Golakh Nath* to be approved.

This doctrine protects our basic rights and every acts of the Parliament is now subject to this doctrine, and put a full stop on the *unconstitutional Constitutional amendments game* of the Parliament in *I. R. Coelho* case where the Ninth Schedule was enacted with the purpose to give effect to laws relating to land reforms. The purpose failed and the history clearly shows for what purpose, the Schedule was used. Various enactments were put down in the Schedule to provide them a shield that they will be beyond judicial review though many of them were not related to

[104]*Kashyap, Subhash C.*- Our Constitution, Edition 2011, Reprint 2014, p. 340.

the agrarian reforms.[105] Basic structure doctrine is the reply to the dubious steps adopted to misuse the Ninth Schedule and the judgment as a whole is laudable.[106]

Mr. K. R. Narayanan (the former President of India) once said, *"we have destroyed the Constitution, and Constitution has not destroyed us"* appears true as the Parliament has on many occasions proved this in order to show their power. ***Nani A. Palkhivala*** while delivering his speech on Twenty-Fourth Constitutional Amendment concluded with the words *"...let the Constitution of India be sovereign"*.[107]This doctrine is not the result of an extra judicial effort but what actually led was the attempts which were made by the Parliament many times to bring changes in the Constitution in exercise of its *"constituent power"*, then only judiciary came forward with this theory of 'implied limitation' in the form of basic structure that the Parliament can amend whatever it wants to but cannot amend the basic structure of the Constitution. Why it cannot amend the basic structure of the Constitution owes from the language of Article 368 itself that"*…..the Constitution 'shall stand amended' in accordance with the Bill*". So, the argument of Mr. Pandit Kanahiyya Lal Mishra seems quite strong that amend the Constitution in the light of the provisions contained in the Constitution but in such a way so that the basic structure of the Constitution should remain the same and the Constitution shall "*stand amended*" not "*sit amended*" because if the basic structure of the Constitution will be amended then it is clear that the Constitution will no longer remain "stand amended" rather it will be the opposite of the mentioned one. But since passing of the Constitution in 1949, we are witnessing, how the Parliament is making our Constitution 'stand amended' while attempts has been made to make it sit and because of this there is a tussle between the Judiciary and Legislature on one hand and the Executive on other. It is just like when the Parliament is in doubt it has no other option than to amend.[108] After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men

[105] One of the Act, namely the Tamil Nadu Backward Class Act, 1993 which provide for 69 percent reservation and runs counter to the Apex Court's ruling in the *Mandal case* [1992 Supp (3) SCC 217] which was inserted in the Ninth Schedule by the Seventy-Sixth Amendment, 1994. This clearly shows how the Parliament used this Schedule to avoid the inconvenience of judicial review.

[106] M. Sundra Rami Reddy & V. N. Maya.- Judicial review of Supreme Court Judgment on IX Schedule of the Constitution; http://www.legalserviceindia.com/articles/jud_sc.htm, last retrieved on 02.12.2014.

[107] *"...let the Constitution remain sovereign, and let the people retain their sovereignty by giving these rights into themselves. If that will happen, then alone you will find that the freedom will survive."*

[108]See *Inder Malhotra* -When in doubt, amend; Indian Express; 21 August 2009; Neither the Supreme Court's 'basic structure' judgement nor Indira Gandhi's suspension of judges nor even the proclamation of emergency halted the supremacy between the Parliament and the Supreme Court.

who will have the interest of the country before them.[109] The basic structure doctrine is a mean to give a momentum to the living principles of the 'Rule of Law' and connotes that none is above the Constitution and the Constitution is supreme.

[109] *Justice J. S. Verma* in S. P. Gupta v. Union of India 1993*(4) SCC 441*.