AMENDMENTS OF NINTH SCHEDULE: LIMITATION AND JUSTICIABILITY

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ABSTRACT

Every amendment to the Constitution whether it be in the form of amendment of any Article or amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15 etc. The fundamental and broad question which I wish to propose through this research paper is whether on and after 24th April, 1973 when basic structure doctrine of Indian Constitution was propounded in Kesavananda Bharati case it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them through Constitutional amendments into the Ninth Schedule and, if so, what is the effect on the power of Judicial Review of the Court which has been held itself as a basic feature of the Constitution.

As stated, laws included in the Ninth Schedule do not become part of the Constitution; they derive their validity on account of the exercise undertaken by the Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of the Parliament.

INTRODUCTION

Article 31B read with Ninth Schedule was inserted in the Constitution of India by the Constitution (First Amendment) Act, 1951. The main object of the amendment was to fully secure the constitutional validity of Zamindari Abolition Laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people.Laws under Ninth Schedule are beyond the purview of judicial review even though they violate fundamental rights enshrined under part III of the Constitution. This amendment is retrospective in nature that is when a statute is declared unconstitutional by a court and later it is included in the Ninth Schedule, it is to be considered as having been in that Schedule from its commencement. Thus it provides blanket immunity to all laws under the Schedule. Since 1951, the Ninth Schedule has been expanded constantly through various Constitutional Amendments, so much that today 284 Acts are included therein. By the First Constitution (Amendment) Act, 1951 thirteen Acts were added to the Ninth Schedule. It was again amended by Fourth Constitutional (Amendment) Act, 1955 and six more Acts were added. By the Seventeenth (Amendment) Act, 1964, added forty four more Acts. The Constitution Twenty Ninth (Amendment) Act, 1972 added twenty more Acts. The Constitution Thirty Ninth (Amendment) Act, 1975 added thirty eight more Acts. The Constitution Forty Second (amendment) Act, 1976 further added sixty four Acts to

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the Ninth Schedule. The Forty Seventh Constitutional (Amendment) Act, 1984 added fourteen Acts and the number of Acts in the Ninth Schedule rose to 202. Again in The Sixty Six (Amendment) Act, 1990 inserted fifty five Land Reforms Acts into the Schedule and the number of Acts in the Ninth Schedule rose to 257. The Constitutional Seventy Sixth (Amendment) Act, 1994 has been passed by the Parliament to accommodate Tamil Nadu Government's Legislation in the Ninth Schedule to take the legislation out of the ambit of the judicial review, which provided 69 per cent reservation for backward classes which was against the 50% limit as ruled by the Supreme Court in Indra Sawhney case. The Constitutional Seventy Eighth (Amendment) Act, 1995 again amended the Ninth Schedule and added twenty seven Land Reforms Laws, taking the total number of Acts to 284. The rationale for Article 31-B and the Ninth Schedule was to protect legislation dealing with agrarian and land reform laws and not any other type of legislation. But, in practice, Article 31-B has been used to invoke protection for many laws not concerned with agrarian and land reform laws in anyway. Article 31-B is thus being used beyond the socio-economic purposes as enshrined in our Constitution.

PARLIAMENTARY AND CONSTITUTIONAL SOVEREIGNTY

There is difference between Parliamentary and Constitutional sovereignty. Our Constitution is framed by a Constituent assembly which was not the Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19 and 21 represent the foundational values which form the basis of the rule of law. It is in such cases that doctrine of basic structure as propounded in Kesavananda Bharati's case has to apply. These are the principles of constitutionality which form the basis of Judicial Review apart from Rule of Law and separation of powers.

The principle of constitutionalism underpins the principle of legality which requires the Court to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes. Fundamental rights occupy a unique place in the lives of civilized societies and have been described in various judgments as “transcendental”, “inalienable” and “primordial”. They constitute the ark of the Constitution. Fundamental rights are limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedom to which all persons in the State are to be entitled is to be given a generous and purposive construction.

The power to make any law at will which transgresses part III in its entirety would be incompatible with the basic structure of the Constitution. To emasculate Article 32 in its entirety- if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of part III, Article 32 would stand abrogated qua the Ninth Schedule laws. The contention is that the abrogation of Article 32 would be per se violative of the basic structure of the Constitution. It is

also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different form the power to exercise judicial power. The impact is that on the one hand the power under Article32 is removed; on the other hand, the said power is exercised by the legislature itself by declaring, in a way, Ninth Schedule laws as valid.

The power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of 31B is not in question. It has been examined by the Supreme Court, various opinions in Kesavananda Bharati's case but is unable to accept the contention that Article 31B read with Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge Kesavananda Bharati's case were examined assuming the constitutional validity of Article 31B. Its validity was not in issue in that case. Be that as it may, we will assume Article 31B as valid.

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

If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.

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

to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law.Indeed, if Article 31B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise. The parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case.

Dealing with Articles 14, 19 and 21 in Minerva Mill's case, it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. These Articles stand on altogether different footing. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard cannot be subjected to judicial scrutiny as a result of the bar created by Article 31B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations form full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or on the ground that part III provisions are into available as a result of immunity granted by Article 31B.

The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure then it will be stuck down. The extent of abrogation and limit of abridgement shall have to be examined in each case.

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

POWER TO AMEND THE CONSTITUTION OF INDIA

The power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints; it is primary power, a real plenary power. The latter power, however, is derived from the former. It has constraints of the document viz. Constitution which created it. This derivative

power can be exercised within the four corners of what has been conferred on the body constituted, namely, the Parliament. The question before us is not about power to amend Part III after 24th April, 1973. As per Kesavananda Bharati, power to amend exists in the Parliament but it is subject to the limitations of doctrine of basic structure. The fact of validation of laws based on the exercise of blanket immunity eliminates Part III in entirety hence the 'rights test' as part of the basic structure doctrine has to apply. If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31B cannot be so used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with the Kesavananda Bharati's case. Therefore Article 31-B after 24th April, 1973 despite its wide language cannot confer unlimited or unregulated immunity. Further, it would be incorrect to assume that social content exist only in Directive Principles and not in the Fundamental Rights. Articles 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc. and yet is permits classification for certain classes, hence social content exists in Fundamental Rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws.

CONCLUSION

In conclusion we may hold that every amendment to the Constitution whether it be in the form of amendment of any Article or amendment by insertion of an Act in the Ninth Schedule has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15 etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution; they derive their validity on account of the exercise undertaken by the Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of the Parliament.

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