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Understanding Judicialization Of Mega-Politics: The Basic Structure Doctrine And Minimum Core

> *But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. ..., the Court cannot fold its hands in despair and declare "Judicial hands off." This Court is the ultimate interpreter of the Constitution.*[1]

Introduction

Judicialization of politics in India began way back in 1951 when the First Prime Minister Pandit Jawaharlal Nehru introduced the First Amendment in the Parliament to insulate the land reform legislations from the purview of judicial scrutiny by the creation of the Ninth Schedule that immunized the land legislations from the purview of judicial review. With new beginnings in the form of a written Constitution, so conferred by "We the People", in independent India, surely, the founding fathers could not have foreseen a head-on collision between the judiciary and legislature happening the very next year. Beginning therewith, introduction of constitutional amendments in the parliament, and their subsequent challenge in the Supreme Court of India became a common phenomenon. In 1973, with the formulation of the doctrine of Basic Structure by the Supreme Court of India as a threshold for determining the unamendable features of the text, the battle line was clearly drawn.

Thereafter, every "political thicket" question has come to be determined by the court on the basis of this doctrine. The Supreme Court has been accused of "judicial

[1] Justice Bhagwati, Former Chief Justice of India in *State of Rajasthan and Ors.* v. *Union of India and Ors.,* AIR 1977 SC 1361.

overreach" by the executive and the legislature, and of violating the sacrosanct principle of separation of powers by the other two branches of the state. Judicial review of presidential promulgation of declaration of emergency, determining the existence of the strength of a political party to make a claim for forming the government, setting sexual harassment guidelines in the workplace in the absence of a legislation and determination of the existence of a parliamentary privilege are some of the types of political questions being adjudicated by the Supreme Court of India today.

However, this is not a new pattern. For instance, in the case of South Africa, in the constitutional *Certification* judgement[2], the Constitutional Court struck down certain provisions of the post 1996 apartheid constitutional text as being violative of the very equality objective that the Bill sought to promote. In the case of India, the Supreme Court in *Kesavananda Bharthi* explicitly disapproved the amendment of the Constitution by the executive on the ground that the state had no approval from the people to destroy their "collective identity".[3] Judgements involving such political questions have come to be termed as "Judicialization of *Mega-Politics*". Positive theorists explain judicialization as the transfer of power from representative institutions to the judiciaries.[4] For instance, Ran Hirschl defines the phrase to mean the adjudication of "matters of outright and utmost political significance that often define and divide whole polities, such as determination of foundational collective-identity questions, nation-building processes, corroboration of regime change and determination of electoral outcomes.[5] Israel, South Africa, Canada, Britain, Latin America, New Zealand, Australia, Egypt are counted among those countries that have experienced the expansion of such judicial power.

While doing so, the courts have come up with a general doctrine to adjudicate on such political questions. The doctrines have been framed in a manner, which is pretty vague, thus paving the way for considerable controversy regarding the correct interpretation and application. For instance, in *Kesavanada Bharati*, the doctrine of Basic Structure was formulated. The court did not lay down decisively what the basic structure was, thereby leaving it to decide at its discretion on a case by case basis. Following this decision, the Supreme Court has utilized the doctrine in at least 345 of its decisions, with yet no clear delineation of the doctrine. On the other hand, in the case of South Africa, the definition of 'minimum core' has been the most evasive

[2] *Certification of the Constitution of The Republic of South Africa*, [1996] CCT 23/96 (S. Afr.)
[3] AIR 1973 SC 1461
[4] *See* generally, Torbjorn Vallinder, "The Judicialization of Politics. A Worldwide Phenomenon: Introduction," *International Political Science Review*, Vol. 15, No. 2, Apr. 1994, at 91; and Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization*, New York: Oxford University Press, 2002.
[5] Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annu. Rev. Polit. Sci.* , Vol. 11, 2008

with the court rejecting the United Nations definition to dictate its adjudication involving socio-economic policies. Simultaneously, the court has come up with its own explanation of how it would adjudicate upon such issues on the basis of the 'reasonableness' doctrine, which is again quite vague. The reasonableness doctrine has then been utilized for adjudicating upon water, health and housing policies. This space is what I argue has been the most controversial in terms of understanding the relation between the executive and the judiciary. For Ran Hirschl, support from the political sphere is a necessary pre-condition for the judicialization of pure politics. Thus, according to him social and institutional factors alone without "strategic political deference to the judiciary alongside politically astute judicial behavior", does not lead to judicialization of mega-politics. Therefore, "courts hand down decisions that favor the powerless primarily when doing so is consistent with elite values and interests."[6] In the absence of such political support, the result is a significant political backlash like legislative overrides, interference with the judicial appointments, limiting the scope of judicial review, etc.

I do not agree with Hirschl's explanation because it does not give a complete account. This paper instead argues that in the context of the Indian scenario, the doctrine of basic structure was the result of judicialization of mega-politics in India. The paper would explain the background against which the court formulated the doctrine. I would argue that judicialization during this period primarily occurred due to the court standing on behalf of the people for resisting any constitutional change, and thus, acting as the opposition party against the passage of amendments in the parliament. The paper would then trace the post-*Kesavananda* phase to understand the type of cases to which the doctrine was being applied to and the interpretation accorded to the meaning of Basic Structure. It would be argued that the interpretation in *IR Coelho*[7] and the subsequent cases show a paradigmatic shift in the utility of the basic structure doctrine. If after *Kesavananda* the doctrine was being applied in a manner that gave the Supreme Court broad discretion to decide a case which had nothing to do with the application of basic structure doctrine, it will be argued that now the Court has set up a high threshold which needs to be passed before striking a legislation as invalid on the basis of violation of the doctrine. The attribution of the shift will be linked to public mistrust of the executive *and* also the controversy relating to judicial impropriety. It will be argued that even though the Supreme Court continues to place itself strongly in matters of political controversies and adjudicating on government policies, it does so more cautiously. And this cautious behavior cannot be attributed to the reasons of backlash by political elites that Hirschl has offered. Instead, I argue that it is because the judiciary is sensitive of its public image as also because it precisely understands the limits of constitutional adjudication of public policies and political questions. However, even so given, the judiciary due to lessons learnt post-emergency has always been assertive of its independence, even if

[6] *Supra* note 5.
[7] AIR2007SC861

that has meant applying the doctrine of basic structure. Building upon this analysis, it would be argued that an explanation more inclusive than being based on political deference and backlash is required to understand judicialization process. The South African decisions on socio-economic rights will also be considered to show that what seems to be a judicially active branch is actually exercising restraint, which cannot be attributed to the explanation advanced by Hirschl.

Positive Theories on Judicialization of Mega-Politics and the Indian Scenario

"Judicialization" of politics is defined as "infusion of judicial decision-making and of court like procedures into political arenas where they did not previously reside."[8] The theories on judicialization of politics in Eastern Europe and United States[9] have emerged as an attempt to explain the expansion of judicial power in the face of the counter-majoritarian judicial review dilemma and transcending the separation of powers domain. In Europe, scholars explain the judicialization of policy-making or constitutionalizing European law as the intervention of constitutional judges in legislative processes, establishing limits on law-making behavior, reconfiguring policymaking environments, and sometimes, drafting the precise terms of legislation. This phenomenon is explained on the basis of the inclusion of the constitutional rights in the constitutions of the modern European democracies.[10] The other type of theory focuses on the judges having the appropriate personal attitudes and policy preferences or values, which are relative to the values of the decision-makers, for the development of the judicialization of politics.[11]

The third type of theory, which is becoming increasingly dominant today, defines judicialization of politics as the relocation of the legislative power among governmental institutions. There are two main proponents of the transfer of the legislative power to the courts. The first one is by John Ferejohn. According to his hypothesis called the "Fragmentation hypothesis", legislative power is transferred to the courts, due to the increasing fragmentation of power within the political branches,

[8] C. Neal Tate, "Why the Expansion of Judicial Power?," in *The Global Expansion of Judicial Power* (C.
Neal Tate and Torbjorn Vallinder, eds.), New York: New York University Press, 1995, at 27-37.

[9] The decision of *Bush v. Gore*, has been attempted to be explained by this phenomenon by John Ferehohn & Ran Hirschl in their respective works.

[10] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2002

[11] C. Neal Tate, "Why the Expansion of Judicial Power?" in *The Global Expansion of Judicial Power* (Tate and Vallinder, eds.), New York: New York University Press, 1995

resulting in the transfer of policy making power to the courts, in the absence of effective political control over the courts. He qualifies this transfer of power within political constraints that is the courts will not adopt such courses of action that would result in political backlash.[12] The main critique of Ferejohn's theory is by Cornell Clayton, who observes that his model ignores the demand-side of judicial policy-making. According to him, courts make policy only when it is brought to them in the form of cases in the event of a disunified legislature by social movements, interest groups and elites, of the elected branches.[13]

On the other hand, Ran Hirschl explains judicialization of mega-politics as the transfer of matters of utmost political significance defining and dividing the entire nation to the courts. For him, the transfer of such matters is purely intentional, and thus considers political support for such transfer of power a pre-requisite for judicialization of mega-politics. Hirschl assigns a number of reasons for such intentional delegation of policy making to the courts by the politicians – reducing risk to themselves by shifting responsibility upon the courts, to avoid difficult decisions and/or collapse of the coalition government, obstruction to implementing their own policy agenda, threat to losing control over policy-making processes or by the political opposition to harass and obstruct governments. Thus, strategic political deference coupled with concrete political power struggles, the interest of the elites and clashes of policy preferences are the main elements that are required for judicialization of mega-politics. In particular, for him, socio-political groups and their political representatives, that are fearful of losing their grip on political power, encourage the establishment of judicial review and empower the constitutional courts to support judicialization of formative nation-building and collective identity questions. He terms this as "a hegemony preserving maneuver". Thus, the courts support the powerless, only when doing so would be consistent with the values and interest of the powerful elites. Hirschl then asserts that in the absence of such political support for judicialization of mega-politics, the same would result in political backlash against the courts.

As the next part of the paper would illustrate, judicialization of mega-politics did not occur as a result of an intentional delegation of legislative power to the courts by the political regime. No social or political elite group ever had any influence in transferring the legislative power to the court. In the absence of any political support, judicialization of mega-politics in India has been under a political backlash. However, unlike the Hirschl's assertion that such a political backlash would only be observed in the absence of strategic political deference, I contend that the continuous political backlash, in the absence of Hirschl's conditions for judicialization, would have to be explained primarily by the basic structure doctrine that defined the

[12] John Ferejohn, "Judicializing Politics, Politicizing Law", *Law & Contemporary Problems*, vol. 65, 2002, at 41.
[13] *Supra* note 10.

collective self-identity of the nation, against lack of political support. In all these positive theories, judicialization of mega-politics requires democracy, separation of powers and an independent court with the power of judicial review, as pre-requisites. In the next three phases, I would show first, parliamentary democracy in India from the founding of the constitution until now, has created minority representation, and the resultant transfer of power in the courts. Second, how the notion of separation of powers, though not having been explicitly provided for in the constitution, by the Basic structure doctrine was laid down, and subsequently utilized by the court for judicialization. In this context, emphasis would be placed on the utility of separation of powers both as means of adjudicating on political questions, as well as the ongoing phase shows, attempting to exercise judicial restraint.

Founding of the Constitution and the Basic Structure Doctrine

The Founding

> "*Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic. In these circumstances, it is wiser not to trust the legislature to prescribe forms of administration*"[14]

When the Constitution was framed, its draftsmen, Dr. Ambedkar, the leader of the dalits or untouchables, was particularly critical of the congress party leadership comprising of Jawaharlal Nehru as being Brahmin-dominated and ignorant of the interests of the common-man.

It was widely perceived that the Congress party had given the constitution to the country, [15] and that the members of the Constituent Assembly were not the representatives of the people of India, since they were not elected on the basis of

[14] Speech of Dr. B.R. Ambedkar, Chairman of the Draft Constitution, at the time of introduction of the Draft Constitution on November 4, 1948, before the Constituent Assembly.

[15] *See* also the speech of Sri S. Nagappa during the debate on the amendment to the constitution: "*The fact is that although we the Congress Party who are a majority in the Assembly did not act as the party in power or treated others as the Opposition, really speaking it is the Congress Party which has given this Constitution.*" Available at 164.100.47.134/newls/constituent/vol2p1.pdf.

adult suffrage.[16] To validate the proceedings of the Assembly and the source of its authority, Pandit Nehru, in his Objectives Resolution opined, "the Assembly has gathered because of the strength of the people behind us and we shall go as far as the people – not any party or group but the people as a whole – shall wish us to go."[17]

In this background, were conducted the two most important debates regarding the amendment of the constitution and the form of democracy that India would have.

At the time of framing of the constitution, reservation of seats in the legislative assemblies and separate electorates for the adequate representation of the minority communities was debated and finally rejected by the Constituent Assembly as they had the 'taint of communalism', which had divided India during the pre-independence era, where reservation of seats was based upon the communal electorate method. Positively reacting to the rejection, Nehru had observed that, in a democracy the will of the majority would prevail and providing safeguards to the minorities at the expense of the majorities would result in more harm than good. The reservation of seats was argued as a means of enabling the minority groups to protect their distinct cultural identities and reflected a concern that the representatives be directly accountable to their group. However, the same was opposed on national unity concerns. With a traumatic partition due to religion-based separate electorates, political integrity and stability were the main concerns. A second national unity concern was pertaining to common nationhood, where group identities based on caste, creed, and religion was seen with suspicion, and in competition with "common citizenship identities." Thirdly, the content of the group identities was seen as antithetical to the secular democratic norms that were to be established as part of the constitutional text.

Having rejected reservation for the minorities, proportional representation was urged as a means of enabling the representation of minority political opinion, and enabling greater number of representatives to be elected from the minority communities, and thus considered to be more 'democratic' than a First-Past-the-Post system (FPTP) electoral system. Majoritarian tendencies were portrayed as one of the greatest dangers to democracy in a parliamentary system under the FPTP system. It was argued that simple majority would 'make room only for the success of one party'.[18] Thus, proportional representation was defended on the ground that it would make the parliamentary system more democratic by ensuring the majority party was more responsive to the electorate and less prone to disregarding popular preferences

[16] Indeed, the members of the Assembly had been elected on the basis of an indirect electorate through the legislative assemblies provinces, which were themselves elected under the Government of India Act, 1935, that did not provide for universal suffrage.

[17] Objective Resolution, 1947, available at http://parliamentofindia.nic.in/ls/debates/vol4p6b.htm

[18] Mr. Chandrasekhariya. Speech available at http://indiankanoon.org/doc/1126319/.

and the rights of individuals and minorities.[19] Dr. Ambedkar, while rejecting the proportional representation argued that first, it was impracticable in a country where the majority of the electorate was illiterate. Second and more significantly, opined that proportional representation would result in fragmentation of the legislature, and lead to instability in the government since parliament would be divided into factions. Lastly, it was argued that proportional representation would only give the minorities a say in the political affairs but not reservation based on quota system, which would not have been acceptable to the minorities.

The debate on the amendment of the constitution also reflected the same anxiety as regards the representation of the minorities in the nation, and the ability of the constituent assembly members to bind the future parliamentarians, on amending the constitution. The primary issue was the degree of rigidity to be introduced to amend the constitution. It was argued that the constitution in the first few years should remain flexible since the constituent assembly was not based on adult suffrage, while the parliament would be based on adult franchise.[20] Negating the argument, Dr. Ambedkar asserted that the "Constituent Assembly probably had a greater modicum and quantum of knowledge and information than the future parliament was likely to have."[21] In particular, his argument on the partisan motive of a future parliament in the amendment of the constitution is worth noting:

> *"The constituent assembly in making a constitution has no partisan motive… The future parliament if it met as a constituent assembly, its members will be acting as partisans seeking to carry out amendments to the constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none.*[22]

Pandit Nehru and the Social Revolution (1947-64)

In this background, a very important constituent assembly debate took place which was to define the doctrine of Basic Structure for India. This was on the abolition of the Zamindari system.

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[19] Rajeev Bhargava, *Politics and Ethics of the Indian Constitution*, Oxford University Press, 2008, pp. 374

[20] B.N. Rau. Speech available at http://parliamentofindia.nic.in/ls/debates/vol7p5b.htm.

[21] Dr. B.R. Ambedkar, at the meeting of the Constituent Assembly of India Vol. IX (Sep. 17, 1949), available at http://parliament ofindia.nic.in/ls/debates/vol19p37c.htm.

[22] *Constituent Assembly debates*, Vol. XI, pp 785-6.

In British India, land that could be cultivated was divided into three types of systems: (a) a landlord-based system (also known as *zamindari* or *malguzari),* (b) an individual cultivator-based system (*raiyatwari*), and (c) a village-based system (*mahalwari*).

In the landlord areas, the landlord was free to set the terms of revenue for the peasants who were working in his jurisdiction of villages. After paying the revenue demand of the British, the landlord kept the remaining amount. This right of collecting revenue was freely transferable. In this sense, the landlord effectively had property rights on the land. This resulted in unequal distribution of wealth since landlords were given complete liberty to set the terms and conditions for payment of revenue by the tenant.[23] It is observed that since "the nineteenth century was a period of significant productivity growth and inflation, the landlord class grew rich over this period and inequality went up."[24] Further, the right to set the revenue rate and to penalize those who did not pay gave the landlords a substantial degree of political power, thereby creating a class-based resentment.[25]

The congress wanted to abolish the Zamindari system. Pandit Jawaharlal Nehru, who was to become the first Prime Minister of India representing the Congress party, was a Gandhian follower of the principles of socialism. Nehru was against the Zaindari system,[26] for he believed that industrialization in independent India could be achieved only by means of state planning to prevent 'creation of private monopolies and the concentration of wealth' by the abolition of the zamindari system. He was of the view that to establish social and economic conditions, the principal instruments of productions had to be state controlled, and the right to private property had to be restricted, and the profit system replaced by the higher ideal of co-operative service.[27]

After attaining independence, the Election Manifesto, 1946 of the Congress party stated:

> "*The reform of the land system, which is so urgently needed in India, involves the removal of intermediaries between the peasant and the state. The rights of such intermediaries should therefore be acquired on payment of equitable compensation."*[28]

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[23] Abhijit Banerjee and Lakshmi Iyer, "History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India", *The American Economic Review*, Vol. 95, No4, September 2005, pp. 1190-1213(24)

[24] *Ibid.*

[25] *Ibid*.

[26] *See* Ganville Austin, *Working a Democratic Constitution*, Oxford University Press, pp. 121.

[27] Sarbani Sen, *Popular Sovereignty and Democratic Transformations, The Constitution of India*, Oxford University Press, 2007, pp. 81

[28] *Indian Constitution: Property Rights and Social Reform, The Comparative Constitutional Law*, Merillat, YCL Ohio St. LJ 1960

The party emerged as the single largest party by securing 45 per cent of the total votes polled (245 seats) and winning 75.99% of the votes cast. Pandit Jawaharlal Nehru, who became India's first Prime Minister, was a Gandhian follower of the principles of socialism. During the constituent assembly debates, Nehru strongly advocated the abolishment of the zamindari system, and the minimum payment of compensation. Ultimately, a compromise[29] was reached in the form of Article 31 of the Constitution, which provided for the right to property as a fundamental right along with the principle of compensation.[30] The object was to have a series of agrarian reforms through legislations that would abolish the zamindari system and permit the state to take over the land. As a result, the zamindars challenged the legislations in the courts as being violative of their fundamental right to property and equality. [31]

The courts all over the country responded by invalidating the legislations on the ground that such legislations were inconsistent with the constitutional right to property. This resulted in the introduction of the First Amendment by Nehru in 1951 that saved laws providing for acquisition of estates and those included in the Ninth schedule to the constitution from being challenged for violation of the fundamental rights contained in Part III of the constitution. Reacting to the criticism on the amendment as treating the constitution as a "scrap of paper" and that the "government was only too anxious to interfere with such… guarantees… [in the constitution] as soon as these guarantees are found inconvenient',[32] Nehru argued that the amendment was intended to reinforce, "to take away, and I say so deliberately, to take away the question of zamindari and land reform from the purview of the courts."[33]

The Amendment was challenged in the Supreme Court by the zamindars, which after initially upholding the amendment, struck down the Land Reforms Act as being invalid even though it was placed under the Ninth schedule. It is said at this time tensions among the branches of the government resulted in factions among the congress as also suspicion by the judiciary of the executive branch designs on their independence.[34] Next, in a series of decisions in 1953, the court on the issue of

[29] It was called a compromise because in essence the many individuals involved in the Constituent Assembly and the government performed dual functions.
[30] In essence, the article provided that No person could be deprived of his property except by authority of law, and no property including anyone's interest in company, commercial, or industrial undertakings) could be acquired for public purposes unless the law provided for compensation and either fixed the amount of , or specified the principles upon which, the compensation would be determined.
[31] G.C.V. Subbarao, "Fundamental Rights in India Versus Power to Amend the Constitution", *Tex. Int'l L. F.*, vol. 4, 1968, p. 291.
[32] *Ibid.*, pp. 88
[33] *Parliamentary debates*, Vol. 12, part 2, col. 8832, 16 May, 1951.
[34] *Supra* note 26, pp. 99.

compensation in three decisions interfered with the social reforms of the government. Thereafter, the Fourth Amendment was introduced, to put a number of governmental actions relating to acquisition of property, taking over of mismanaged companies, etc beyond the reach of the court. After the introduction of the Bill, Nehru had emphasized the need for the constitution to take into consideration the dynamic nature of the Indian modern society and that even a powerful and independent judiciary could not decide upon political/social/economic questions, the resolution of which was only in the hands of the parliament by means of removal of the contradiction in the fundamental rights, through ordinary law-making. The Supreme Court despite the fourth amendment, still undertook judicial review of two state land reform legislations, and struck down the same. This resulted in the passing of the seventeenth amendment, the last amendment on the abolition of the zamindari system, which came to be challenged in the Supreme Court in *Sajjan Singh v. State of Rajasthan*.[35] However, in this decision, the court, on the ground that the power of amendment under Article 368 included the power to take away the Fundamental Rights under Part III, upheld the amendment.

Deciding upon the validity of amendments per se and the subsequent backlash presents the phenomenon of judicialization of politics extremely early after the enactment of the constitution. In spite of having the powerful social elites against the land reform legislation, Pandit Nehru went ahead with enforcing land reform measures. The powerful social and economic elites, on whom the elected members of the congress banked for support, had been deprived of their fundamental right to property through a string of amendments for nullifying the decisions of the Supreme Court. The Supreme Court intervened on behalf of the elites, not backed by the congress party. In doing so, it faced backlash, in the form of enactment of amendments. However, none of the amendments so enacted were able to improve the conditions of the rural population. [36] It is said that the congress and the state ministers were thus blamed primarily as the reasons behind failure of non-implementation of the land reforms effectively.[37] Thus, the factors for judicialization during this period turned out to be not the result of a strategic political deference towards the court to implement or enact the legislative policies, but rather a failure of organizational weakness and poor administration of the land reform policies by the congress and its state ministers. At the same time, the striking of such amendments made Indira

[35] AIR 1951 SC 845

[36] *See* Nehru's letter to the Chief Ministers dated 5th August 1954: "It came as shock to me that numbers of tenants are still being evicted…It is a fact even now people hold many hundred acres of land, sometimes even a thousand acres or more. This result has not been what we had looked forward to." Available at *supra* note 26, pp. 120. Further *see*, Report of the Subcommittee on Democracy and Socialism: "Nowhere has the gulf between promise and fulfilment been of more serious concern to the material well-being of the common-people than in the rural sector…. And nowhere has this failure been so clearly a result of organizational weakness and inadequacies."

[37] *Supra* note 26, pp. 122

Gandhi believe that the court was an "enemy of socio-economic reform". The Supreme Court approved the 17th Amendment because the institutional integrity of the court was at threat. This was the time when the Congress Working Committee after the series of Supreme Court decisions, had recommended the restriction of judicial authority. Although the amendment had a history of tainted approval by the Parliament and was met with utter criticism by the public and the opposition, the court upheld its validity.[38]

Mrs. Gandhi and the Amendments (1964-77)

The end of Nehru's era brought with his death the reign of Mrs. Indira Gandhi as the Prime Minister. This period is marked by a vibrant sequel of events-both judicial and political that led to judicialization of mega-politics in India, with the formulation of the basic structure doctrine. The consolidation of power of Mrs. Gandhi on the Congress, led the executive branch to dominate the parliament to such a degree, that the parliament virtually lost its own self-identity. The literature on Mrs. Gandhi's regime reveals that the authority within the executive became concentrated in the Prime Minister's Office, and exercised by Mrs. Gandhi, to the exclusion of all but few. Mrs. Gandhi invoked the mandate of the electorate through the elections, promising a social revolution to alleviate the conditions of the poor as a means of attacking the judiciary by overturning its decisions, and introducing amendments to the constitution. With a majority in the parliament, any effective opposition to such amendments was thawed, as the congress could easily muster the required strength to pass the amendment.

Just a day before the result of the 1967 General Elections, where congress lost by a huge margin, the Supreme Court gave its verdict in *Golaknath v. State of Punjab,*[39] wherein the 17th amendment was challenged once again. The party's defeat came as a result of internal factionalism, and the inability to have performed its promises on

[38] The Bill was sent to the Joint Committee that had reportedly received extensive public opinion against the passing of the amendment and also the opposition had given extensive oral testimony against the amendment for placing 124 state land laws under the purview of the Ninth Schedule. When the vote on passing the amendment came for consideration before the parliament, the bill was defeated by narrow margin of 206 noes to 19ayes. However, a special session was convened to reintroduce the bill. This was termed by the opposition as 'contravening the very fundamentals of democracy.' Critics opposed the Bill on procedural and substantive grounds, and that a caretaker government should not decide on such big policy matters. Despite intense public and opposition criticism, the bill was passed 177 to 9, and received the President's assent.

[39] A.I.R. 1967 S.C. 1643.

social reforms. Overruling its previous two decisions[40], wherein the court had held that that Parliament had the power to amend the fundamental rights and that Acts, without being subject to judicial review, the court in a 6:4 decision held that Parliament's power to amend the constitution could not be used to abridge the fundamental rights. The opinion of Justice Suba Rao, the then Chief Justice of India, heading the majority is particularly significant. Terming the fundamental rights as "transcendental", he opined that the people had conferred the fundamental rights upon them. He specifically avoided the argument of fear put forth by the petitioner, according to which, if the parliament had the power to abridge the basic structure of the constitution, then any party in majority could by 2/3rd amendment process rein in total chaos by changing the parliamentary form of republican to a totalitarian state. Succinctly, to avoid political backlash, on the ground that it was we the people and not the court through means of election, who could prevent the majority party from abusing its powers, the Chief Justice resorted to the Article 13 argument instead of Article 368.[41] However, conferring upon itself the final authority to review any such amendment and curbing the power of the parliament to amend the constitution was definitely a judicialization process.

The opinion of the Chief Justice giving primacy to fundamental rights over a social revolution through the amendment of the constitution, was based upon the anxiety shared by the majority of the court members that the congress party had in the last 17 years after independence been able to restrict the right to property, by gaining a 2/3rd majority. Although the Chief Justice in fact rejected the argument of fear, however, the apprehension of misuse of the amendment power by the next party in power in the absence of an effective opposition, underlined the reasoning in the decision on Article 13. The verdict of the General Elections, 1967, came a day *after* the decision of the court. During this pending transition to the next party in power at the Centre, there was an uncertainty prevailing in the political regime, as to how things would shape up, and how effective the opposition party would be in term of its numbers to oppose amendments to the constitution. The court thus took the opportunity to immunize the fundamental rights from the purview of amendment process.

Golak Nath raised an acute controversy in the country. The opposition invited the Chief Justice to run as the President of India, for which the judge resigned from office. One school of thought applauded the majority decision as a vindication of Fundamental Rights, while the other school criticized it as creating hindrances in the

[40] *Sajjan Singh* (1964) and *Shankari Prasad* (1952)

[41] In fact, the minority in the decision had rejected the fear argument on the basis of this very reasoning that it was the electorate by voting and not the court by judicial review that could control the abuse of the amendment power.

way of enactment of socio-economic legislation required to meet the needs of a developing society." [42]

Congress lost the General Elections of 1967. However, in the absence of any other second largest majority after congress, it formed the government, with a minority. Two subsequent decisions [43] of the Supreme Court, that rejected Mrs. Gandhi's nationalization and land reforms involving abolition of privy purses, resulted in an institutional conflict.

Nine days after the last verdict of the court, Mrs. Gandhi called upon the President to dissolve the parliament, and order for fresh elections. Internal dissents and a thin majority in the parliament enabled the court to intervene. If each time, the justification used by Mrs. Gandhi to introduce amendments for overruling the decisions of the court was for creating 'a just social order', it surely did not appeal to her own party members. More importantly, to gain a comfortable majority in the parliament to pass an amendment, she needed to appeal to the people of India – in particular, the poor, who not only constituted the majority of the population, but also would support her "social reforms". With the war between India and Pakistan over, and the huge influx of over two million East Pakistani refugees due to the political and economic destructions in West Bengal, there was widespread poverty and unemployment in India. She coined the term *"Garibi Hatao"* (remove poverty), to appeal to the masses for a victory. Campaigning on an anti-elite platform, the twelve-point election manifesto called for the need to abolish "anachronistic" privileges of

[42] *See* also Sathe, *supra* note 75, at 67, "Golaknath stirred a great controversy regarding the scope of judicial review. For the first time, the judges had openly taken a political position… The Golaknath decision was an assertion by the court of its role as the protector and preserver of the Constitution. Golak Nath marks a watershed in the history of the Supreme Court of India's evolution from a positivist court to an activist court."; *See* also Upendra Baxi, *Indian Supreme Court and Politics, 'Prime Minister's Election case'*, Eastern Bok Company, 1980, at 21, "It appeared to many as a conservative decision as it entrenched the right to property, giving rise to an impression that the court might invalidate legislation embodying the 'progressive' policies of the ruling party. The issue of social philosophy of judges began to be debated as a matter of considerable national importance."

[43] The Supreme Court decision of *Cooper*, involved a challenge to the Bank Nationalization Act as being violative of the right to equality and the right to hold, dispose and acquire property. The majority (10:1) struck down the Act as providing for unreasonable restriction on the right to carry on business and the absence of a just and appropriate compensation for government acquisition of property. *Madhav Rao Scindia* case involved a challenge to the abolishment of the right to receive privy purses, that was originally granted by the Government of India to the rulers in consideration for their derecognition. Having failed to introduce the bill as a constitutional amendment, the President passed an Order to derecognize the rulers. Upholding the maintainability of the petitions, the court struck down the President's order on the ground that the President could not employ the doctrine of paramountancy to abolish the right to receive privy purses, which was a fundamental right to property.

privy purses and the nationalization of the banks, on the basis that 'reactionary forces' were obstructing 'urgent and vitally needed measures' of the people's aspirations of achieving a just society. The manifesto also explicitly mentioned, "such amendments of the constitution [will be enacted] as may be necessary."[44]

The congress party won decisively with an overwhelming majority of 350 seats in the parliament with an electoral participation of 55.27%, and thus winning 43.64% of the total national vote. Armed with a landslide win, Mrs. Gandi introduced the 24th and the 25th Amendments. The amendments sought to overrule *Golak Nath*, and establish parliamentary sovereignty, by conferring upon the parliament the power to amend any part of the constitution including fundamental rights, and thereby excluding judicial review. Terming the 24th amendment as a commitment to change the lives of millions of people, Mrs. Indira Gandhi was successful in enacting the bill by 384 to 23 in the Lok Sabha and 177 to 3 in Rajya Sabha. Similarly, terming the amendment "as a means of bringing economic justice", [45] while ridiculing the apprehension of arbitrary use of power to determine the compensation by the government, Mrs. Gandhi invoked the authority of we the people behind the sanction of the amendment through her electoral win. The Bill was passed overwhelmingly in both the Houses of the parliament. A leading daily described the amendments as '24 Yes, 25 No', appealing for the restoration of the pre-*Golak Nath* constitution. Another leading daily described the Congress as "the ruling party that did not believe in orderly progress on democratic lines."[46] In the meanwhile, the congress party failed to deliver its promises of the election to remove poverty. Though the government significantly increased the expenditure on the poverty eradication program, the same was premised upon the creation of a fictitious amount upon a deficient budget due to the monsoon failure and world oil crisis. In this political background, the Supreme Court scrutinized the constitutionality of the two amendments in *Kesavananda Bharthi v. Union of India* and laid down the Basic Structure doctrine.

Kesavananda Bharati and the Basic Structure Doctrine

Kesavananda Bharthi was the judicialization of mega-politics in India. It defined the collective-identity of we the people that was beyond the amending power of the parliament. The argument of fear was indeed analyzed herein and the doctrine of basic structure that had been rejected by the court in *Golaknath* was finally embraced by a thin razor majority of 7:6.

[44] Available at http://www.hindu.com/fline/fl1714/17140290.htm.
[45] *Supra* note 26
[46] *Ibid.*, pp. 248.

The essence of the decision lies in holding that there existed a basic structure in the constitution that could not be amended by the parliament even by a two-third majority amendment process. While arriving at the basic structure doctrine for insulating the constitution from the amendment process, the reasoning of the majority based upon the past experience of easy amendment with a dominant single majority party without an effective opposition, and thus bringing out the argument of fear explicitly is significant. The majority clearly laid down that the parliament could not be trusted if they were given unbridled power of amending the constitution, and the court by exercising its power of judicial review, must have the final say in deciding the basic structure of the constitution.

The decision of the majority significantly brings out certain drawbacks of the 2/3rd majority amendment process, vis-à-vis the state of the elections in India and the single majority party system. The distrust in the parliamentarians and Indian democracy is explicitly brought out in the decision of Judges Hegde and Mukherjea constituting the majority when the Justices hold:

> *"We have earlier noticed that under our electoral system, it is possible for a party to get a 2/3rd majority in the two Houses of Parliament even if that party does not get an absolute majority of votes cast at the election. That apart, when a party goes to election, it presents to the electorate diverse programmes and holds out various promises. The programme presented or the promises held out need not necessarily include proposals for amending the Constitution. During the General Elections to Parliament in 1952, 1957, 1962 and 1967, no proposal to amend the Constitution appears to have been placed before the electorate. Even when proposals for amendment of the Constitution are placed before the electorate as was done by the Congress Party in 1971, the proposed amendments are not usually placed before the electorate. Under these circumstances, the claim that the electorate had given a mandate to the party to amend the Constitution in any particular manner is unjustified. Further a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet government are such that the people as a whole can have little control in the matter of detailed law-making."*[47]

The first point to be noted herein is that the Justices reject the 2/3rd majority as constituting the will of the people for a constitutional change. This is argued on the fact that every time since independence, when General Elections were held, the

[47] Paragraph 702

electoral participation was less than or equal to 50% of the total population of India,[48] and that though the congress party did not actually represent the entire country, however, in the name of the people it effected constitutional change through the process of amendment. Thus, the 24th and 25th amendment could be passed in the parliament because congress had won 352 seats. However, for the court this constituted a minority government, and thus, could not 'speak on behalf of the entire people of this country', since the congress had won only 43.64% of the total votes cast. Strikingly, this observation questions the very legitimacy of a representative government in India by implying that the government is undemocratic in nature, as in the courts own words, "*a minority of voters can elect an overwhelming majority in Parliament and the Legislatures of the States, while the majority vote is represented by a minority of representatives.*" The court further argues that such a majority vote, effectively rules out the minorities of the country, and thus deprives them of their fundamental rights, for the guarantee of which the representatives of the minorities had given up their special protections at the time of the framing of the constitution. On this premises, the court advances its argument of fear based upon the 17th, 24th and 25th amendment, if such amending power of the parliament is not limited, that by such a 2/3rd majority, the parliament can "*extend its own life indefinitely and also, to amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards.*" The court then holds that the constitution cannot be amended in a manner that would change the original identity that the people through the representatives of the constituent assembly gave to themselves. On this observation, the court attempts to draw a distinction between the constituent assembly duly empowered by the people of India to speak on its behalf to frame the constitution, and the parliament consisting of the representatives, who are elected by the people. The court is at pains to prove that the constituent assembly had the legal authority vested in it by we the people, as enunciated in the Preamble, though elected on the basis of limited adult franchise, as opposed to the parliament elected on the basis of a minority vote, and constituted under the constitution by the constituted assembly, and thus by the people themselves.

Therefore, the collective identity of the entire polity in the opinion of the court could not be changed by any parliament whatsoever that did not ever have the

[48] In 1951, the electoral participation was 44.87% with the Congress winning 44.99% of the votes cast (364 seats). In 1957 the electoral participation was 55.42% with congress winning 47.78% of the votes cast (371 seats). In 1962, the electoral participation was 55.42%, with congress winning 44.72% of the votes cast (361 seats). In 1967, the electoral participation was 61.04% with the congress gaining 40.78% of the votes cast (283 seats), and in 1971, the electoral participation was 55.27% with the congress winning 43.68% of the votes cast (352 seats). In effect, for a constitutional amendment to take effect, 2/3rd of the seats in a parliament comprising of a total number of 545 seats would require 363 parliamentarians to affirm the amendment. In every such amendment that was proposed by the congress, except in the year 1967 after the *Golak Nath* decision, congress was easily able to muster a majority for passing amendments.

sanction of the popular sovereignty. Even with the changing social conditions, though the process of 2/3rd majority could amend the rest of the document, however, the basic feature that was conferred with the enactment of the constitution could never be amended by the future generations. The basic feature is not defined. Instead, the Chief Justice opined that among others Supremacy of the Constitution, Republican and Democratic form of Government, Secular character of the Constitution, Separation of powers between the Legislature, the executive and the judiciary and the Federal character of the Constitution, would constitute the basic structure of the constitution.

The decision of the majority in terms of its reasoning for preserving the identity of the nation through the Basic structure doctrine is strikingly political. Although the constitution of India did not restrict the parliament's power to amend the constitution in a manner so identified by the court through the basic structure doctrine, nevertheless, the court took upon itself the task of ensuring the preservation of the collective identity of the nation. As Richard Albert has argued, by declaring 'constitutional supremacy' as one of the basic features, the judiciary in fact gave to itself the supreme and unreviewable authority to interpret the constitution, as against a democratic set-up consisting of the parliament, thereby, serving as a cloak for judicial supremacy.[49]

This section has argued that judicialization in India began essentially as a result of the amendments enacted to first dilute the right to property, and then to limit the power of judicial review. The support for judicialization did not come from any political group or as a result of a political strategy, but rather from the problem of pluralist democracy and the founding of the constitution. None of the factors that Hirschl points out in his paper explains the phenomenon of judicialization of pure politics in India. The decision of *Kesavananda Bharthi* uniquely demonstrates the concern of the Supreme Court to prevent the consequences of the tyranny of the majority due to the removal of the essential safeguards provided in the constitution in the form of judicial review and assent of the President, by constitutional amendments. The claim that the court makes here is that the original constitution so enacted by the constituent assembly, consists of specific substantive values, which cannot be removed by the amendment procedure provided by in the constitution, and that it is the court's obligation to attend to them. However, as Hirschl asserts that in the absence of political support, there would be a political backlash against the decision of the court.

In a few hours after the delivery of the verdict, Mrs. Indira Gandhi superseded the most senior judges who had delivered the majority decision, to make a minority judge the next Chief Justice of India. If the political backlash was by means of supersession

[49] Richard Albert, "Nonconstitutional Amendments", 22 *Can. J.L. & Juris*. 5.

of the judges, the matter did not end there. The insecurity of the decision resulted in Mrs. Gandhi declaring a state of emergency in India. What followed next was essentially the means of eliminating the judicial branch as such and regaining parliamentary supremacy.

Phase II—Emergency and Beyond

The period from 1975-77 marks the most threatening phase to the very existence of the Supreme Court. This was the time when Mrs. Gandhi declared emergency in 1975, despite a previous emergency still existing due to the 1971 Indo-Pakistan war. The emergency was declared as a result of the decision of a vacation judge of the Supreme Court, who had to decide upon a state High Court ruling. The High Court had held Mrs. Gandhi guilty of having committed corrupt practices for her election under the Representation of the People Act, 1951 , and had disqualified her for a period of six years. The vacation judge, Justice Krishna Iyer, while granting a conditional stay upon the order, had opined that "thus be no legal embargo on her holding the office of the Prime Minister".[50] The condition was that though she could address the parliament as the Prime Minister, however, she could not participate, vote or draw remuneration as a member of the parliament. Following the interim order, Indira Gandhi declared a state of emergency on the ground of "internal disturbances" within the country. Emergency resulted in a complete centralization of power in Mrs. Gandhi.[51] The 39th Amendment was passed that removed from the Supreme Court the authority to adjudicate upon election petitions and nullify retrospectively nullify any election orders that had been previously made by the court.

The Supreme Court in *Indira Gandhi v. Raj Narain,*[52] adjudicated upon the validity of the 39th Amendment. The contention advanced by the government on the question of whether the 39th amendment violated the basic structure was that no essential feature of the constitution was violated. The majority of the judges struck down the amendment, on the ground that it violated the basic structure doctrine. However, the majority on the reasoning that she had not violated the amended Representation of the People's Act, 1951, validated the 1971 election of Mrs. Gandhi. The manner in which the decision was framed was a shrewd attempt on behalf of the court to protect its institutional survival by legitimizing the regime of Mrs. Gandhi. At the same time, the striking down of the amendment on the basis of violation of the basic structure doctrine was a means of retaining its institutional integrity. It is interesting to note that the judges, who comprised the majority in the decision, were

[50] *See*, Upendra Baxi, *Indian Supreme Court and Politics, 'Prime Minister's Election case'*, Eastern Bok Company, 1980, pp. 47.
[51] *Supra* note 26, 297.
[52] AIR 1975 SC 2299

actually the dissenters in *Kesavananda Bharthi*. However, while legitimizing the rule of Mrs. Gandhi, the court maintained the sanctity of the doctrine, thereby reasserting its institutional authority. The decision resulted in the government attempting to overturned *Kesavananda Bharthi* through the new Chief Justice of India. However, as a result of intense opposition by the Bar, the Chief Justice finally dissolved the bench to review the decision.

Both the events resulted in the drafting of a Congress party paper which proposed the setting of a 'Superior Council of the Judiciary' that would be supreme to the Court, thereby, making the executive the final interpreter of the constitution. The attack on the judiciary continued in many ways more than one. The decision of the Supreme Court in the *Habeas Corpus* [53] case, wherein the court upheld the constitutionality of the preventive detentions of the opposition leaders under MISA, provides support for the assertion that the court perceived a serious threat to its survival, if it would have struck down the amendments. The majority (4:1, who had been the dissenters in *Kesavananda Bharthi*), ruled MISA amendment to be constitutionally valid, by observing that no citizen had the fundamental right to move the court for enforcement of its fundamental rights, in particular, the right to life and personal liberty, in lieu of the declaration of emergency. The decision was widely criticized.[54] However, the ruling in favor of the government was due to anxiety of the bench that if it resisted the government, then, it would endanger the existence of the Supreme Court.[55] In fact, the dissent of Justice Khanna in the decision resulted in Mrs. Gandhi superseding him as the Chief Justice.

Unable to repudiate the doctrine of basic structure through the judiciary, the 42nd amendment was enacted. The amendment in every sense reflected the anti-judiciary mood of Mrs. Gandhi. The amendment ousted the jurisdiction of the courts from deciding upon questions of election disputes. It also immunized constitutional amendments from being questioned 'in any court on any ground' and parliament's power to amend the constitution 'by way of addition, variation or repeal' was unlimited.

The amendment was introduced by Mrs. Gandhi in both the Houses as a means of 'throwing aside the constitution', which had in effect been the agitation before the declaration of the emergency.[56] When the Bill was introduced in the Parliament, 370/545 members attended the session, with the entire opposition being in jail due to

[53] A.D.M. Jabalpur (1976)

[54] For e.g., *See* Jain, M.P., *Constitutional Law of India*, Wadhwa Publication: "The Supreme Court failed to fulfil its role as the saviour of the people's rights."; *See* also, Baxi , *supra* note 50, at 79-120.

[55] *See* the interview of Justice Chandrachud with Austin, who described the mood as 'most unpleasant', and that the court was hard-pressed to maintain its independence., *supra* note 26, pp. 343.

[56] *Supra* note 26, pp. 382.

emergency or having boycotted the session. Despite strong opposition against the Bill outside the Parliament, the Bill having garnered the requisite majority received the assent of the President. The amendment was soon to be annulled as a result of Mrs. Gandhi's overwhelming defeat in the 1977 General Elections, which she herself had called for on the ground that the government "must report to the people" and seek sanction for its programs and policies.[57] The massive defeat was a result of the authoritarian rule that had been imposed as a result of emergency that had deprived the citizens of their fundamental rights and resulted in complete press censorship.

Indira Gandhi v. Raj Narain, legitimized Mrs. Gandhi's rule due to the fear of the elimination of judicial branch, but did not repudiate *Kesavananda Bharthi* decision. The attempt to review *Kesavananda* was a further attempt to divest the court of the powers of judicialization. In Ran Hirschl's explanation, this was a political strategy to defer to the court the authority to invalidate the basic structure doctrine, which had resulted in judicialization of mega-politics. However, the strategy backfired primarily because the deference was not to transfer policy-making power to the court or to establish the power of judicial review, even though the judiciary was supportive of Mrs. Gandhi, but to rather remove the power of judicial review by the repudiation of the basic structure doctrine. This stands in sharp contrast to the reasons why the legislature defers to the court that result in the judicialization process. Here, after judicialization by the formulation of the Basic Structure doctrine had taken place, the interim decision only provided a further catalyst for the backlash by the political branch. With the continued attacks against the elimination of the judicial branch, and the prolongation of the emergency, with the opposition in detention, the Supreme Court in the *ADM Jabalpur* case did indeed perceive a serious threat to its existence. Despite ruling in favor of the Government, and receiving the most intense public criticism on the ground that the Supreme Court had failed to stand up as the protector of the fundamental rights of the citizens of the country, the backlash against the judiciary continued.

New Beginnings-Post Gandhi Era:

> *"The government will enact a comprehensive measure… to amend the Constitution, to restore the balance between the people and Parliament, Parliament and the judiciary, the judiciary and the executive, the states and the centre, the citizen and the government…"*
>
> [Acting President in his address inaugurating the new Parliament in 1977]

[57] *Ibid*., pp. 389.

Post Mrs. Gandhi, India for the first time had a coalition government at the Centre, with congress as the major opposition party. The government sought to redeem the promises made in its manifesto, release the people from the 'bondage of fear', lifting the emergency proclamation of 1971 and 1975, repealing Maintenance of Internal Security Act, rescinding the "anti-democratic forty second amendment", restore the fundamental freedoms and to release the emergency detunes. While the repeal of the emergency proclamations and legislation, did not pose a hurdle by the opposition, however, the repeal of the 42nd amendment and the introduction of the 'restoration 44th amendment' illustrates how without the consent of the opposition, a 2/3rd majority could not be gained to pass the amendments. The object of the 44th amendment was two-fold: to restore the constitution to its condition before the emergency amendments and to add safeguards to restrict the executive's emergency and analogous powers." The move to add a referendum to the amending process through the amendment was voted against by the congress. The Janata government favored the referendum as a means of going to the people for approving a much-needed amendment, which it feared that the Supreme Court through the basic structure doctrine would prevent from being passed.

Thus, the parliament still retained unlimited amending power under Article 368 to amend the constitution, with the same being outside judicial scrutiny, including the power to abridge the fundamental rights. The Janata government due to internal defections within the party, within three years of general election went out of power. During this transition with a caretaker government in place, the Supreme Court in *Minerva Mills v. Union of India*[58] invalidated the 42nd Amendment by invoking the basic structure doctrine. The majority judgement written by the Chief Justice of India, who had become the Chief after the supersession of Justice Khanna, opined *"Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed."* Later in the decision, the Chief Justice emphasizing upon the limited parliamentary amendment power as a constitutive feature of Indian democracy, and thus forming a part of the basic structure, held*: "The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power."*

This decision definitely stands as the strongest illustration of the utilization of the doctrine for judicialization. The court struck down a constitutional amendment as unconstitutional on the basis of the basic structure doctrine, the very reason for the enactment of the amendment. Second, this is the only amendment till date that has

[58] AIR 1980 SC 212

been struck down as unconstitutional. The reason for striking it down was obvious. Its repeal in the Parliament, with congress opposition had become impossible. The court perceived the continuance of the amendment as a threat to its judicial independence. Given that the regime of Mrs. Gandhi had ended, and the rise of coalition politics in India, the court sought to retain its institutional authority under the Basic Structure doctrine. At the same time, it also set up an institutional challenge to the new congress regime. The decision came just at the time when the Congress party came to power in 1980, which had pledged to "set the country once again on the path of dynamic, meaningful and orderly social change while ensuring stability."[59] The congress party with Mrs. Gandhi as the Prime Minister pressed for a Presidential form of government to replace the parliamentary form of government. The demand came as a means of opposing the independence of judiciary.[60] There was intense criticism against the idea[61], which due to Mrs. Gandhi's assassination in 1984, was never pursued further.

The new congress regime continued with attempts to subvert the independence of the judiciary. Indeed, with the decision of *Minerva Mills*, the government again saw the judiciary as a threat to its policy-making program, and sought to influence the decision-making process itself. To this effect was introduced the circular by the Law Minister that empowered the government to transfer judges from one state to the other, and the appointment of additional temporary judges. This circular raised a huge public controversy. It was argued that the circular sought to subvert the independence of the judiciary.[62] The matter was brought before the Supreme Court in *S.P. Gupta v. Union of India*,[63] by a group of advocates who had brought the respective writ petitions before the state high courts, challenging the constitutional validity of the circular. The decision is significant for two reasons. First, this was the judgement where the Supreme Court introduced the Public Interest Litigation concept by validating the *locus standi*[64] of the petitioners on the ground that "any member of public having sufficient interest can maintain action for judicial redress for public arising from breach of public duty or from violation of provisions of Constitution." Second, the Supreme Court utilized the Basic Structure doctrine to hold that independence of the judiciary was a basic feature of the constitution. Through the invocation of the doctrine of basic structure, the court immunized itself from executive attacks by the proclamation of its independence.

The legal fraternity criticized the decision.[65] A change in the situation, which gave primacy to the executive in the matter of appointment and transfer of judges,

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[59] *Supra* note 26, pp. 485.
[60] *Supra* note 26, pp. 489.
[61] *Ibid*., pp. 490.
[62] *Ibid*., pp. 517.
[63] AIR 1982 SC 14.
[64] The Government had challenged the petition on the ground that the petitioners
[65] *See Report of the National Commission to Review the Working of The Constitution*, dated 26th September, 2001 available at http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm: "This decision had the effect of unsettling the balance till then obtaining between the executive and

was advocated. It was opined, "neither the image nor the stature of the Supreme Court or of the judiciary as a whole has been improved by the judgement."[66]

The Emergence of an 'Activist' Court

Until now, the doctrine of basic structure was first protected from demolition, and subsequently was used as a tool by the Supreme Court to protect its own powers. Post-emergency, with strong human rights jurisprudence and a Public Interest Litigation movement, the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*,[67] utilized the doctrine of basic structure to elect itself. In the decision it invoked the basic structure doctrine for reaffirming the independence of the judiciary. While doing so, it accorded the consultation given by the Chief Justice of India primacy in both the appointment and transfer of the judges. The majority view in *S.P. Gupta* to the effect that an executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, was rejected by the court on the ground that "Experience has shown that accountability also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign." The 1993 decision was reaffirmed in the *Second Judges* case,[68] in a unanimous opinion rendered by a nine-Judge Bench of the Supreme Court on a reference being made by the President.

Having thus utilized the doctrine to assert its own independence, and thus insulate itself from any external instability, the Court then invoked the Doctrine during a time of intense political instability. Between 1989 and 1992, the country had had a change of three Prime Ministers and a hung parliament twice. It was also the time when the Babri Masjid demolition had taken place, and the President had proclaimed emergency in the state, due to countrywide riots. In *S.R. Bommai v. Union of India and others*,[69] the Court was called upon to adjudicate upon the validity of the emergency. The court invoked the basic structure doctrine to hold that democracy and federalism were part of it. The court gave itself the powers to address the scope of an

judiciary in the matter of appointment. The balance tilted in favour of the executive. Not only the office of the Chief Justice of India got diminished in importance, the role of judiciary as a whole in the matter of appointments became less and less. After this judgement, certain appointments were made by the Executive over-ruling the advice of the Chief Justice of India. Naturally, this state of affairs developed its own backlash."

[66] "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India", in Upendra Baxi (Ed.) *Law and Poverty: Critical Essays*, Bombay: N.M. Tripathi, pp. 387-415.

[67] 1993 (4) SCC 441.

[68] 1998 (7) SCC 739

[69] AIR 1994 SC 1918

executive decision on the ground that the executive was merely a mouthpiece of the cabinet, and thus could not be trusted to have taken decisions in the interest of the state as such.

These decisions are important to show first, that the basic structure doctrine was utilized to assert judicial independence. This is not surprising considering the history from which the court was trying to remove itself. Second, it also shows how the court would seize an opportunity to invoke the basic structure doctrine to assert authority regarding final interpretation of an executive / policy decision.

In what follows, the attempt will be to show the background in which the paradigm decision of *IR Coelho v. State of Tamil Nadu*[70] was delivered, and the consequent impact that it would have on both the executive and the judiciary.

Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Ors[71]: The facts of the case were that eleven members belonging to both Houses of Parliament were caught on camera accepting money from undercover journalists for raising questions in Parliament. A television channel telecast the episode and both the Houses of Parliament set up committees to investigate the matter who recommended expulsion of the members. Both Houses, acting on the recommendations, adopted motions expelling them. Aggrieved, the members approached the Supreme Court alleging, *inter alia*, a lack of jurisdiction to expel, and second, the violation of their fundamental rights. The main question for the court was whether it had the power of judicial review over the internal proceedings of the parliament. Relying upon the basic structure doctrine, the court held that *"The judicial organ of the State has been made the final arbiter of Constitutional issues and its authority and jurisdiction in this respect is an important and integral part of the basic structure of the Constitution of India."*

In *I.R. Coelho v. Union of India*[72], the court revisited the decision in *Kesvavananda Bharthi*. The question before the court was whether it is "permissible for the Parliament under Article 31B[73] to immunize legislation from fundamental rights by inserting them into the Ninth Schedule, and if so, what is its effect on the power of judicial review of the Court". In paragraph 78 of *I.R. Coelho* it was noted that the "real crux of the problem is to the extent and nature of immunity under

[70] AIR2007SC861
[71] (2007)3SCC184
[72] (2007) 2 SCC 1
[73] Article 31B providing for the Ninth Schedule reads as follows: *"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 judgement, 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."* ("This Part" means Part III of the Constitution providing for Fundamental Rights).

Article 31B can validly provide". The question of immediate purport was whether Article 31B provided a blanket protection such that legislative enactments which destroy the basic structure could be included in the Ninth Schedule, and thereby become immune from the test of basic structure itself.

The court considered the scenario when a state legislation that was added to the Ninth Schedule would have the effect of taking away the entire Part III (Chapter on Fundamental Rights) of the Constitution, what would be the extent of judicial scrutiny available. The court held that such an amendment would be void since the fundamental rights consisting of secularism, equality et al would be destroyed. The second scenario that the court looked at was whether the Parliament could increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The court again held in the negative, on the same reasoning. Thus, it opined that the effect of the *Kesavananda Bharati* decision was that secularism, separation of power, equality, etc. would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. In a very pertinent observation, the court held: "Without equality the rule of law, secularism etc. would fail. *That is why Khanna, J. held that some of the Fundamental Rights like Article 15 form part of the basic structure."* (Emphasis supplied)

The court then considered the objective behind Article 31B and observed that:

> *"The object behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the 'essence of right' test but also the 'rights test' has to apply, particularly when Keshavananda Bharti and Indira Gandhi cases have expanded the scope of basic structure to cover even some of the Fundamental Rights.*
>
> *The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III."*

On the extent of judicial review, the court observed:

> *"Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III*

> *and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure."*

Thus, the court made it amply clear that if there were a violation of the fundamental rights by including the state legislation under Ninth Schedule of the constitution, then, the court would under the power of judicial review strike it down as unconstitutional. It is important to note in this context that the basic structure for the court on the basis of the interpretation of *Kesavananda Bharthi* was the Articles themselves in the Chapter on Fundamental Rights.

The next important observation of the court is regarding the difference between the "rights test" and the "essence of rights" test. This is an important part of the judgement since it was subject to debate later on and also formed the central reasoning of the court on the 'impact test'. The court held that "*Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire Chapter is made inapplicable, 'the essence of the right' test will have no applicability. In such a situation, to judge the validity of the law, it is 'right test' which is more appropriate."*

The court was of the opinion that *"It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in Kesavananda Bharati's case clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution."*

This clearly shows that for the court the essence of the right test meant that the principles of equality, separation of powers, federalism, democracy et al that had been enumerated by *Kesavananda Bharati* constituted the essence behind the fundamental rights. However, the court was of the opinion that when the entire fundamental rights chapter was obliterated, in that scenario, the essence could not apply. Instead, it had to be the 'rights test', which the court held to mean that "the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor." Thus, the court concludes: "*The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws can be adjudged by applying the direct impact and effect test i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequences thereof."*

Thus, basic structure was defined in terms of fundamental rights. And if the statute so placed under the Ninth Schedule did violate the basic structure, then the court will strike it down as invalid. It is important to remember that the manner in which the basic structure was interpreted was radically different from how it had been interpreted previously. The reason is obvious. The Ninth Schedule was enacted as a result of the First amendment with the objective of providing protection to the right of property, after the right had been removed from the list of fundamental rights. However, the schedule had been misused by the executive several times, putting

legislations under it which had no nexus with property. Such legislations were actually having an effect on the exercise of the fundamental rights. So, it became important for the court to apply the basic structure doctrine to assert its own authority in reviewing these legislations even though they were beyond the judicial review power of the court. To do this, the only means that was available was to provide the 'impact test'. The test was indeed vague because on the one hand it spoke about the violation of the 'essence' of the principles that had been elaborated in *Kesavananda Bharati* as those underlying the fundamental rights; while on the other hand it spoke about the violation of the rights themselves as violating the basic structure. By formulating the test in this manner, the court gave itself the ultimate authority to scrutinize the legislations that had been intended to be beyond judicial review.

Coelho was delivered on 11th January 2007. The bench comprised of nine judges, the highest number of judges sitting for any constitutional matter. Justice Sabharwal, the then Chief Justice of India, wrote the judgement. Justice Kapadia, the present Chief Justice of India concurred.

Before the two verdicts of *Raja Ram* and *IR Coelho* were to be delivered by the Chief Justice, he had given a speech elsewhere where he had observed:

> *"An independent judiciary is important for preserving the rule of law and is, therefore, most important facet of good governance. The judicial system has an important role to play ultimately in ensuring better public governance."*

The last decade had seen an escalating number of corruption and criminal matters against politicians being adjudicated in courts all over the country.[74] The Supreme Court of India had already convicted two former Prime Ministers of India on charges of corruption. Presently, there are several PIL cases pending in the Supreme Court involving "disproportionate assets" of several Chief Ministers of States.[75] Polls on the opinion of the public on corruption in politics have revealed that the citizens do not trust their politicians, and consider them to be corrupt.[76] The report released by

[74] A PIL that has been filed in the Supreme Court claims that at present about 154 members out of 541 MPs have criminal records and are facing criminal cases pending in various courts as reportedly admitted by them in their own affidavits at the time of filing their nominations. Available at http://expressbuzz.com/nation/pil-in-sc-seeks-suspension-of-tainted-mps-mlas/269177.html.

[75] At present there are those of Tamil Nadu, Bihar and Punjab.

[76] A recent survey done conducted by Centre for the Study of Developing Societies (CSDS) from 1,300 locals in 19 states, indicated that 60 percent of those surveyed felt that the UPA was running a "Very corrupt" or "Somewhat corrupt" government, with urban respondents showing an even higher percentage of disgust at 66 percent. Available at http://www.firstpost.com/politics/stench-of-corruption-has-stuck-to-upa-all-india-survey-2-57473.html

Transparency International measures corruption through the eyes of ordinary citizens. The findings revealed that three out of four Indians believe political parties and the police are extremely corrupt. Similarly, 3/4th of the media representatives felt that elected representatives misuse their power and authority. A survey of 3,182 candidates cutting across party lines during the 2006 general elections revealed that 518 (16.28%) of them had criminal antecedents.[77] It is noteworthy to remember that before *Raja Ram* and *IR Coelho* was delivered, the Supreme Court had convicted several politicians and had received positive publicity by the media observing that the Supreme Court had redeemed itself.[78]

In this background, it has been remarked that the Supreme Court was at an all time high phase of Judicial Activism. In an extremely insightful article, it was argued that the basic structure doctrine as enumerated in *IR Coelho* was a result of the application of principles of 'good governance' given the deficiency of institutional representation of the executive in India and misgovernance by the state.[79]

Chief Justice Sabharwal retired on 14th January 2007, precisely three days after *Coelho* was made public. Five months later, a newspaper accused the Chief Justice of having decided a matter that was clearly a conflict of interest. The Delhi High Court sentenced the journalists to prison on the ground of contempt of court. The judgement attracted media criticism as also criticism from the former Law Minister Mr. Shanti Bhushan and his Son, an Advocate in the Supreme Court. Both of them soon started the Campaign for Judicial Accountability and Reform, an organization that lobbied for legislation in transparency in judicial appointments and disclosure of assets of judges. At present, there are contempt proceedings pending against Prashant Bhushan in the Supreme Court for having alleged that the present Chief Justice of India, Justice Kapadia is corrupt and the last 16-17 Chief Justices have been corrupt.

Three cases at this time attracted intense media and public interest. The first was the Ghaziabad Provident Fund case that reported several judges from the lowest to the High Court to have illegally withdrawn millions of dollars from the provident fund. The second case involved the 'cash for judge' scam in Punjab alleging bribing

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[77] Available at http://www.transparency.org/regional_pages/asia_pacific/newsroom/news_archive2/india_corruption_study_2005

[78] *See*, "Indian judiciary redeems itself", Deepak Kumar, observing that by sentencing the former Union Minister and chief of Jharkhand Mukti Morcha (JMM), Shibu Soren along with four of his other associates for conspiracy, kidnapping and murdering his private secretary Sashinath Jha, and the former cricketer turned politician Navjot Singh Sidhu to three years imprisonment for a road rage killing, the court was repsing the faith of the citizenry in itself as against the politicians. Available at: http://www.merinews.com/catFull.jsp?articleID=123882.

[79] Nick Robinson, "Expanding Judiciaries: India and the rise of the good governance court", *Washington University Global Studies Law Review*, Vol. 8, n°1, 2009.

of a judge of the High Court. The third case involved the allegation of corruption against a sitting Judge of Calcutta High Court.

Also attracting controversy was the refusal of the former Chief Justice of India, Justice Balakrishnan, who succeeded Chief Justice Sabharwal, to bring the judiciary under the purview of the Right to Information Act, 2005 for disclosure of assets on the ground that the court was not a public authority. With internal dissents in the High Courts across the country, criticism by senior advocates and academics, and a judgement by the Delhi High Court to the contrary, the Chief Justice finally agreed to disclose the assets of the judiciary.

In this background of judicial impropriety, Justice Krishna Iyer, who had passed the interim order against Indira Gandhi on the need to review the appointment of Judges in light of the scandals, wrote:

> *"The collegium is a creature of a judicial precedent. It has no constitutional foundation; indeed it is opposed to what Dr. B.R. Ambedkar laid out in the Constituent Assembly. The whole process of the collegium is arbitrary in structure. There is no way of correcting its operation except by a constitutional amendment or assertion of the Franklin Roosevelt type. It is a pity that Parliament has not chosen to amend the Constitution or prescribe a constitutional Code of Conduct for Judges to behave themselves other than through the impractical process of impeachment."*[80]

The judiciary now is battling charges of corruption against itself in the same manner in which the executive is. But it is also clear that the judiciary is sensitive to its public image. In all these cases of corruption in the judiciary that has come before it, the judges have made strong remarks during the proceedings.[81] The Chief Justice also gave approval for the impeachment of the Calcutta Judge. In turn, the executive responded to the public sentiments by drafting the Judicial Standards and Accountability Bill, 2010. The executive continues to enjoy little trust from the people. In the 2010 survey, the Corruption Perceptions Index (CPI) ranked India 87. India's scale rate has remained consistently the same at about 3.5 over the past 5 years. This does show that from the time the judiciary has come under scanner, the faith in the Government has not improved. Recently, India witnessed the Anna

[80] Justice Krishna Iyer, "Issues raised by l'affaire Dinakaran", *The Hindu*, 17th September, 2009,

[81] For instance, Justices Arijit Pasayat, V.S. Sirupurkar and G S Singhvi's during the Ghaziabad judiciary scam proceedings observed: *"The time has come as people have started categorizing some judges as very honest despite it being the foremost qualification of any judge. It's the system. We've to find a mechanism to stem the existing rot."* (Reported in Dhananjay Mahapatra, "SC Concedes rot in judiciary", *The Times Of India*, 10th September, 2008)

Hazare Anti-Corruption movement for introducing the Citizen's Ombudsman Bill, which would consist of members from the civil society with the power to prosecute politicians without the approval of the executive. The movement culminated in the Parliament passing a resolution in favor of introducing the Bill in the House. This was the strongest social movement post the freedom movement in India. This discussion makes it clear that when IR Coelho was delivered the Supreme Court was indeed enjoying complete public trust as against the executive. However, with the corruption in the judiciary being alleged, the next set of decisions of the Supreme Court on the interpretation of the basic structure doctrine has to be understood.

In *Glanrock Estate (P) Ltd. v. The State of Tamil Nadu*[82], Justice Kapadia interpreted *Coelho*. He opined that the 'time had to come to explain certain concepts that had been applied by the court in *Coelho*, like 'over-arching principles', 'egalitarian equality' and thus the essence test. The facts of the case involved a challenge to the constitutional validity of the Constitution (Thirty- fourth Amendment) Act, 1974. By the said Amendment, the Gudalur Janmam Estates Act, 1969 stood inserted in the Ninth Schedule to the Constitution. He was of the opinion that in a case involving a challenge to the legislation in the Ninth Schedule, two things were to kept in mind, first, the doctrine of basic structure and, second, lack of legislative competence. He was of the opinion that the role of the doctrine was to keep the judicial review intact since its violation thereof itself would constitute the violation of basic structure doctrine. He went on to distinguish between challenges to ordinary legislations under the equality clause of the constitution as opposed to challenges to Ninth Schedule legislation under the basic structure doctrine. The Chief Justice opined that a mere violation of Article 14, that is the right to equality did not mean that there was a violation of the basic structure of the doctrine. What would really be a violation of the doctrine would be the abrogation of an overarching principle. Giving the example of Article 14, he was of the opinion that when combined with Article 21, principles like intergenerational equality and sustainable development would be the overarching principles and it was their violation that would abrogate the doctrine.

This clearly has limited the scope of the application of the basic structure doctrine as explained in *Coelho*. By restricting the application only to the violation of the over-arching principles like democracy, federalism et al, instead of extending it to the 'rights' cases, there is certainly a higher threshold to be met for the court to strike down a legislation as unconstitutional. In the instant case, applying the above reasoning, the court refused to strike down the judgement on the ground that first, under the classic tests of reasonableness to scrutinize an Article 14 (equality) violation, the petitioner had failed. In the alternative, even if there was a violation of the equality clause, the legislation was still protected under the Ninth Schedule since there was no violation of any overarching principle.

[82] (2010)10SCC96

KT Plantation v. State of Karnataka[83] came up before a five-judge bench again headed by the Chief Justice of India this year. The two main challenges were whether Sec. 110 of the Karnataka Land Reforms Act (1961), as amended by the Karnataka Land Reforms amendment Act (1973), violated the basic structure of the Constitution, in so far as it conferred power on the Executive Government, without hearing and without reasons, and second, whether Article 300A (compensation for taking of property) if it was held to be providing only for illusory compensation, would violate the rule of law and, would be an arbitrary and unconscionable violation of Article 14 of the Constitution, thus violating the basic structure of the Constitution?

The court answered both the questions in negative. The court interesting made a distinction between the basic structure of the constitution, right to equality under Article 14 and the rule of law. First, it agreed that the Acquisition Act had not been included under the Ninth Schedule. However, it was protected by Article 31A, and thus Article 14 did not apply.[84]

Another very interesting observation was made. The bench asked itself whether a law that violated the rule of law or the basic structure of the constitution was it the law of the land that it would be immune from a judicial review challenge? The bench observed that the rule of law was characterized as a basic structure of the constitution even though there was no such principle present explicitly in the text. It narrowly interpreted the invocation of the principle as a violation of the doctrine. The court held that "*any law which, in the opinion of the Court, is not just, fair and reasonable, is not a ground to strike down a Statute because such an approach would always be subjective, not the will of the people, because there is always a presumption of constitutionality for a statute"* Thus, the court held that rule of law was "*not an absolute means of achieving the equality, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. Rule of law as an overarching principle can be applied by the constitutional courts, in rarest of rare cases, in situations, we have referred to earlier and can undo laws which are tyrannical, violate the basic structure of our Constitution, and our cherished norms of law and justice."*

Post-*Coelho,* this is yet another example of the narrow application of the basic structure doctrine. The rule of law had always been a part of the basic structure doctrine, an over-arching principle which ran through all the fundamental rights, such that a legislation could be struck down just by invoking the rule of law principle. But, by calling it as the 'rarest of the rare' case when the principle would be applied , and

[83] 2011(8)SCALE583

[84] 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 (…) 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.

that rule of law was not just the only means of achieving other principles, the court clearly drew the line of the application of basic structure doctrine in a conservative manner.

Indian Medical Association v. Union of India (UOI) and Ors.[85] Was decided by a two judge bench this year, and was not headed by the Chief Justice of India. It involved the constitutionality of the Army Medical Association's policy on restricting the admission of private students. It was argued that the provisions of Clause (5) of Article 15[86] with respect to unaided private educational institutions were violated and thus the basic structure was violated.

First, the court rejected the argument that the *Nagaraj*[87] test of essence, that is, over-arching principles was actually rejected by the Court in *IR Coelho* and the focus was just on the rights test in the case of violation of fundamental rights. It held that it was wrong to just look at the conclusion of *Coelho*. The judgement had to be looked in its entirety. On this basis, the court held that it was not permissible to apply the direct impact and effects test to evaluate whether Clause (5) of Article 15 provisions with respect to admissions to unaided non-minority educational institutions violate the basic structure. The reasoning was that *Coelho's* decision, which determined the application of the rights test, was only in cases where the amendment would obliterate the entire chapter on fundamental rights. Since, this was not the case here, *Coelho*'s rights test was inapplicable. On this basis, the court referred to *Nagaraj's* essence test, and cited the same:

> *"…. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending powers of Parliament i.e., to form part of the basic structure of the Constitution. This is the standard*

[85] AIR2011SC2365

[86] Article 15 of the Chapter on Fundamental Rights prohibits the discrimination by the state on grounds of religion, race, caste, sex or place of birth. Article 15(5) is an exception to the Article. It reads as follows: "(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". This was introduced by the Amendment in 2006.

[87] *M. Nagaraj and Ors. v. Union of India and Ors.* , (2006) 8 SCC 202. This decision as involved with challenging the constitutional validity of amendments made to Article 16 of the constitution of the fundamental rights chapter whereby the same provided reservation in promotion with consequential seniority for the backward classes. The same was held to be constitutional by the five judge bench comprising of both Chief Justices Justice Sabharwal and Justice Kapadia.

of review of constitutional amendments in the context of the doctrine of the basic structure."

On this reading, the court was of the opinion that “evaluation of whether a particular amendment has amended those "over-arching principles" is the test for basic structure. It was not the specific instances of expression of contents of a fundamental right, as stated by the courts prior to an amendment which are to become the anvil of the test of basic structure when the amending power is exercised and a main element of the provisions of the Constitution is altered. Rather, the courts have to be careful in assessing whether those over-arching principles themselves are abrogated. It is not the change in the identity of any one element of the conspectus of activities of one occupation in a plethora of occupations that itself forms a part of the many different kinds of freedoms that leads to the violation of the basic structure doctrine; but rather whether the over-arching principles, that connect one fundamental right to the other that are so abrogated as to change the very identity of the Constitution which is the true test to evaluate whether a constitutional amendment has violated the basic structure doctrine.”

Applying *Kesavananda Bharati*, the court held that “The prevention of destruction of the "constitutional identity" is the chief rationale in using the basic structure doctrine in instances of constitutional amendment.” The court did admit that “issue of change in identity, and debates about it can take extremely abstract and metaphysical form as with regards to the Ship of These us Plutarch.” On this basis, the court held that even if an essential feature of the constitution that was previously declared by the court had been violated by the enactment of an amendment, the amendment would not be struck down as unconstitutional if there was a positive enactment by such an abrogation. The court held that since the amendment of Article 15(5) was strengthening the principle of social justice, which was a basic feature of the constitution, the amendment was valid.

The decision in *Indian Medical Association* shows how the court put socio-economic rights at a threshold higher than the fundamental rights to overcome the reasoning behind *Coelho* that violation of fundamental rights would be a clear breach of the basic structure doctrine. What cases like *Glanrock, KC Plantation and IMA* reveal is that the overarching principle and impact test has actually enabled the court to exercise judicial restraint even of previously such instances would have been a violation of the basic structure doctrine. Further, it is also interesting to note that even of a higher threshold standard is applied (be it for a Ninth Schedule legislation or for an amendment of the fundamental rights chapter for enforcing socio-economic rights), the court always emphasizes the independence of judiciary and judicial review being itself a basic structure of the constitution.

In essence the case study of the basic structure doctrine from India reveals a different pattern than what has been explained by Hirschl. The doctrine of basic structure has been used to accommodate different objectives at different times in the

history of India. At first, it was used to protect the constitution's very document from being altered at the whims and fancies of the executive. The executive was indeed powerful, and at the danger of being subject to its tyrannical powers, the judiciary even curved out its own independence. When India witnessed corruption and misuse of executive powers, the Supreme Court utilized the doctrine for expanding its own power of judicial review in areas, which had nothing to do with the original formulation of the doctrine, questions that were essentially in the political thicket of things. With its own accountability coming under scanner, the court was quick to turn the application of the doctrine into one that of judicial restraint. Hirschl cannot explain this phenomenon in terms of political strategy of deference to the judiciary. This clearly has a nexus with public opinion, the nature of dialogue of the both the branches with each other and with that of the public.

South Africa

South Africa provides an interesting comparative experience into the judicialization of politics as well as a unique tradition of what has been termed as a strong socio-economic jurisprudence. The country has come out of apartheid past and when its constitution was drafted in 1996, the Framers deliberately included socio-economic rights as justiciable rights as an essential part of a transformative Constitution. The preamble proclaims that the constitution was adopted, inter-alia to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. This is in sharp contrast to the Indian Constitution wherein the Directive Principles of State Policy were made non-justiciable. Initial arguments were mounted against the inclusion of socio-economic rights in the South African Constitution on three basis, first, they were not accepted as fundamental rights; second, they were inconsistent with the separation of powers as the judiciary would have to encroach upon the proper terrain of the legislature and the executive; and, third, the budgetary implications surrounding the realisation of socio-economic rights compromised their justiciability. As has been opined by Chief Justice Langa of South Africa, "Socio-economic rights lend themselves to disagreement, the first such disagreement in South Africa emerging in relation to the question of whether such rights should be included in the Constitution, as indeed they were."[88]

In the *Certification* judgement, the justiciability of socio-economic rights was put beyond question. The Court reasoned that entrenched civil and political rights would give rise to similar budgetary implications without compromising their justiciability, so there was no good reason to use this as a basis to bar socio-economic rights. The Court went further to say that, "at the very minimum, socio-economic rights can be

[88] Foundation for Law, Justice and Society, 2009

negatively protected from improper invasion."[89]

Finally, in the form of Sec. 26 and 27 the Constitution got its socio-economic rights. Both the sections are qualified by the provision that the state must take reasonable legislative and other measures, *within its available resources* to achieve the progressive realization of the right.

What follows after the Certification decision is interesting. It shows a new court where initially it refuses to enter the policy domain by refusing to enforce socio-economic rights by adopting what has been termed to be an administrative standard of review. The court has also rejected the minimum core argument. Instead, it has adopted a reasonableness standard of review. This standard of review has changed overtime. Whether this can be termed judicial activism or judicial restraint would once again depend upon the circumstances under which the court has been adjudicating upon such rights. Just like the basic structure doctrine that has been used in varying manner, the reasonableness doctrine has also been used in quite contrasting ways. Even if it seems as if the court is actually exercising authority over the executive, by weak remedies and giving the executive a large discretionary judgement over its policies, the court is acting with restraint.

In *Soobramoney v. Minister of Health*[90], the court dealt with determining the right of a diabetic man for a dialysis in a state hospital. The hospital had refused treatment on the ground of shortage of resources and its policy under which the applicant was found to be ineligible for a transplant. The appellant based his claim on violation of Sec. 27(3), that is, "No one may be refused emergency medical treatment", and Sec. 11 which stipulates "Everyone has the right to life." The court rejected the argument on the ground that the right to life could not be expected to confer a positive obligation on the state to provide since it was the *court's duty to apply the obligation as formulated in the constitution.* (Emphasis supplied) The court then opines*:* "In our Constitution the *right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees.* It is dealt with directly in Sec. 27." (Emphasis supplied)

The court while rejecting the Indian jurisprudence on elucidating a positive obligation on the state to provide opines:

> "*Consistently with this approach the rights which are in issue in the present case must not be construed in isolation... but in [their] context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which [they are] part.*"[91] (Emphasis supplied)

[89] Paras 76-78
[90] 1998(1) SA 765
[91] *Ibid*., at para 10.

The above observations by the court makes it clear that the entrenchment of socio-economic right of heath under Sec. 27 was not considered by the court to be a part of the constitution yet which would justify a duty on the court to hold the state responsible to provide it. That is, the court still considered the socio-economic right to be non-justiciable and creating no positive obligation upon the state. This is a typical counter-constitutional problem where the court is perceiving itself to applying the constitutional law by refusing to make the state obligated to provide the treatment on the ground that the right did not have to be interpreted according to the transformation values provided in the preamble and elsewhere of the constitution, but rather to be interpreted in conformity with the pre-constitutional obligation of the state which did not require the state to provide the health treatment to everyone for achieving substantive equality.[92] Thus, for the court it had to avoid treading itself into the realm of politics to save its own legitimacy by refusing to make right to health a socio-economic right that had to be enforced. Thus, the court applies the rational criteria to opine that the "local administration's decision on funding for health care would not be interfered with."

Although, the new constitutional order of achieving substantive equality by holding the state to be obliged to provide the right to health, is accepted by the court but not believed to be a part of its duty to enforce through judicial review since the court is indeed facing the problem of making the transition from politics to law.

The decision was criticized that in light of the argument of resource constraint, the court had actually applied a deferential standard of rational review, which was nothing beyond the test of administrative reasonableness judicial review.[93] As Fredman has observed that "case could be read as endorsing the accountability parameter; but the equality and the deliberative dimensions are missing."[94]

Grootboom[95] specifically dealt with a claim of housing under Sec. 26 by the applicant and others who had been rendered homeless following eviction from their informal homes. The court held that Sec. 26(1) and (2) were interdependent. Thus, to realize the first right, the state was under a positive obligation under (2) to formulate a comprehensive workplan to meet its obligations. This workplan in turn was defined by a three-set criteria: i) the obligation to take reasonable legislative and other measures; ii) to achieve the progressive realization of the right; and, iii) within

[92] Thus, the court opines: "The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society".

[93] Cass R Sunstein, "Social and Economic Rights? Lessons from South Africa", *Constitutional Forum,* Vol. 11, 2001.

[94] Sandra Fredman, *Human Rights Transformed*, OUP, 2009

[95] *Republic of South Africa v Grootboom (1)* 2001 (1) SA 46

available resources. The court opines that what would constitute as reasonable programme of the state would depend upon a clear allocation of responsibilities and tasks to the different spheres of government. The court then lays down the parameters for deciding whether or not the implementation of the programme would be reasonable: i) to consider the housing problem in its social, economic and historical context; ii) to consider the capacity of institutions responsible for implementing the programme; iii) the programme must be balanced and flexible making appropriate provision for attention to housing crisis, and to short, medium and long term needs; iv) a programme that excludes a significant segment of the society cannot be said to be reasonable; v) the programme needs to be continuously reviewed since conditions do not remain static; and, vi) relying on *Soobramoney* on availability of resources, the court opines that there must be a balance between goals and means and the availability of resources would be an important factor in determining what is reasonable to attain the goal expeditiously and effectively. The court then reviews the Housing Policy, and comes to the conclusion that it measures up to all the parameters that it has laid down, except being inflexible to respond to the needs of those in actual crisis. Particular reliance to measure this reasonableness is based on the constitution by Justice Yacoob, when he opines, "It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings." Thus, the court feels empowered on this basis to make a declaratory order that includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need. This standard of reasonableness that is adopted by the court for reviewing the policy of the government is definitely beyond the rationality standard of administrative law. Having determined unreasonableness in the context of depriving the needy from the ambit of the policy, a declaration is made in the form of a remedy to revise the policy to include such marginalized group. As Fredman has observed, the remedy provided by the court left too much at the discretion of the government because there was no "in-built mechanism to prevent the government from reverting to its pre-deliberative stance."[96]

In *Grootboom*, the Court rejected the argument that the social and economic rights in the South African Constitution contain a minimum core which the state was obliged to furnish, the content of which should be determined by the courts. In particular, it refused to understand the minimum core content as provided under the ICESCR on the following reasoning:

> "It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and

[96] *Supra* note 93, pp. 119

> opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. *The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.*" (Emphasis supplied)

Here, the court was aware of the differing approach adopted by the United Nations Committee on Economic, Social and Cultural Rights of Article 2(1) of the ICESCR as including a minimum core obligation.[97] However, in *Grootboom* the Court highlighted the issue of competence that prevented the Court from making such a determination and the differences between its position and that that of the UN.

On the other hand *Minister of Health v Treatment Action Campaign* (TAC),[98] the second major case dealing with health had a different interpretation from *Soobramoney*. Here, the policy of the government to refuse the drug to be administered on a large scale was challenged. The applicants contended that the restriction was unreasonable and the state was under a duty by Sec. 7(2)[99] and 8(1)[100] of the Constitution respectively. The second main issue was whether the government was constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.

Referring to *Soobramoney* and *Grootboom*, the court refused to be bound by them. It thus observes, "*In both cases the socio-economic rights, and the corresponding obligations of the state, were interpreted in their social and historical context. The difficulty confronting the state in the light of our history in addressing issues concerned with the basic needs of people was stressed. The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are*."

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[97] "[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state part. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant" (Para 10, *General Comment* 3, issued 1990.

[98] *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721

[99] The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

[100] The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Thus, the court finally emerges from the pre-apartheid era, and is now ready to enforce socio-economic rights under the transformation constitution. It finds itself no longer a stranger in the realm of politics to adjudicate on socio-economic rights, and indeed does so by adopting the standard of reasonableness to interpret the "progressive realization of the right to health care."

Having thus departed from its precedents on its limited role in imposing a positive duty upon the state to enforce the right to health, the court then lays down the extent of the positive duty of the state on the criteria of reasonableness.

In this regard, the Court refused to accept that Sec. 27 of the Constitution relating to health had a minimum core content. It reasoned:

> "Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. *Minimum core was thus treated as possibly being relevant to reasonableness under Sec. 26(2), and not as a self-standing right conferred on everyone under Sec. 26(1).*" (Emphasis supplied)

A little further on the Court added:

> "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. *The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.* Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance." [101] (Emphasis supplied)

Rejecting the minimum core standard to be applied for giving everyone access to a core service immediately, the court opines that "*the state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society.*"

For the court the use of such standard enables it to evaluate the measures of the state while being aware of its own limitations on adjudicating upon polycentric

[101] *Ibid*., at para 38.

issues. Liebenberg, on the application of the reasonableness criteria for assessing resource allocation by the state opines that the courts must assess whether "there is evidence of serious consideration by the legislative and executive of implementation of their constitutional obligations in relation to socio-economic rights as well as meaningful participation in informing the relevant policy choices."[102] Thus, the standard of scrutiny to be applied under the reasonableness criteria is of a higher threshold than the rational test. At the same time, the concern remains on the type of remedy that should be provided to ensure that deliberation actually takes place. As has been observed by Fredman in the case of *TAC*'s aftermath, though it was able to serve as the vehicle through which the poor and the marginalized could access their rights, however, "what has been conspicuously lacking is the whole-hearted participation of national and provincial health departments and health workers."[103]

Khosa[104] involved a challenge to the constitutionality of Sec. 3(c) of the Social Assistance Act which denied social grants to Mozambican citizens who were naturalized but not South African citizens under Sec. 27 (1) (c) (access to right to security) and right to equality under Sec. 9. Differentiating the US administrative law review standard so attached by Sunstein to the reasonableness standard in the South African context, the court rejects it. Justice Mokgoro opines, "*The test for rationality is a relatively low one. As long as the government purpose is legitimate and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met. I am prepared to assume that there is rational connection between the citizenship provisions of the Act and the immigration policy it is said to support. But that is not the test for determining constitutionality under our constitution. Sec. 27 (2) of the constitution sets the standard of reasonableness which is a higher standard than rationality."* (Emphasis supplied)

Thus, Justice Mokgoro declares the provision to not be a reasonable legislative measure on the ground of interdependence of the values of human life, equality and dignity to providing access to social assistance to all including non-citizens. The court also brings out the equality segment of the reasonableness of citizenship as a criterion of differentiation in the government plan explicitly by its observation that in the absence of a rational connection between a differentiating law and a legitimate government purpose, the law will be in violation of the equality clause. Thus, Court stresses the importance of interpreting Sec. 27 by reference to the context of the Constitution as a whole.

In the recent case of *Mazibuko v. City of Johannesburg and Others*,[105] the court affirmed the reasoning in its previous two decisions on rejecting the minimum core in

[102] S. Liebenberg *Socio-economic rights: adjudication under a transformative constitution* (Juta 2010)
[103] Sandra Fredman, *Human Rights Transformed*, OUP, 2009, p.171
[104] [2004] ZACC 11
[105] 2009 ZACC 28

the context of the South African jurisprudence. Rejecting the argument that the court should define a minimum level of water that the state was obliged to provide under Sec. 27(2) of the constitution, Regan J opined:

> "Those reasons are essentially twofold. The first reason arises from the text of the Constitution and the second from an understanding of the proper role of courts in our constitutional democracy. As appears from the reasoning in both *Grootboom* and *Treatment Action Campaign No 2*, Sec. 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the state. That obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. *It does not confer a right to claim "sufficient water" from the state immediately.* (Emphasis supplied)
>
> At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. *It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life.* (Emphasis supplied)
>
> *Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.* The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable. (Emphasis supplied)
>
> *Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.* This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and

> promises that are subjected to democratic popular choice. (Emphasis supplied)

Thus, an analysis of the case law in the South African context makes it clear that first, there is no *immediate* socio-economic right that a citizen is entitled to claim from the state. Second, the minimum content of a socio-economic right cannot be defined, and it is the prerogative of the state to give content to the right. Due to institutional competence, the court will not have the obligation to provide content to the right, but rather scrutinize the measures taken by the state to give such content to the right. What these decisions show is that the court emphasizes upon the use of the reasonableness rather than the minimum core doctrine. On one hand it can be argued that this is done so as to reduce the positive obligation upon the state by the application of the doctrine of reasonableness. On the other hand, it can be said that by not giving the minimum core, that is, content to the socio-economic right the court is actually giving the executive the flexibility of designing and improving the policy in a progressive way rather than making it static. Seen from this view, the reasonableness standard requires the State to account for its future plans that are aimed at the full realisation of the right. Cases such as *TAC* are testament to the fact that the Court can apply these elements in a rigorous manner, in light of an absence of political will to fulfill rights obligations. O'Regan J makes clear the Court's role and highlights that the purpose of socio-economic rights litigation:

> "..should *be to hold the democratic arms of government to account through litigation...Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution."*

Conclusion

This paper has argued that a doctrine so formulated by a court terms the court to be judicially active might not fit such a description. In the context of India, the basic structure doctrine has been instrumental in giving the judiciary its power of judicial review. However, that power has been actually exercised with judicial restraint with changing political and social circumstances. On the other hand, in the case of South Africa, even though the court started off as being judicially active, however, its decisions do show that the court has exercised much judicial restraint. This judicial

restraint cause is not due to any fear of backlash by the executive against its own decisions, but rather that of limited capacity to adjudicate on matters that are essentially of a policy nature where the court has no expertise. Similarly, even in the case of India exercising judicial restraint is not because of deferring to the executive for fear of backlash but rather to preserve its own public image. And any account of a positive normative theory like that of Hirschl must give an explanation of this phenomenon.

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