



BELLING THE CAT: THE CURIOUS CASE OF THE NINTH SCHEDULE IN THE INDIAN CONSTITUTION

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Abstract—Article 31B, and, correspondingly, the Ninth Schedule, was inserted by the Constitution (First Amendment) Act, 1951 as a measure to protect land reform laws from potential challenges on the touchstone of Fundamental Rights. The Supreme Court in *I.R. Coelho v. State of T.N.* qualified this protection by subjecting such laws to judicial review on the ground of abrogation of the Basic Structure. While *Coelho* has led to several inadvertent consequences which have been analyzed in this paper, its subsequent clarification in *Glanrock Estate (P) Ltd. v. State of T.N.*, I submit, has resolved the debate with respect to determining the validity of the Ninth Schedule laws by toeing the line of the text of Article 31B while ensuring conformity with the Basic Structure. I further argue for the irrelevance of the Ninth Schedule today in light of its meandering focus and potential for abuse. Finally, I propose two alternatives to contain the deleterious effects of Article 31B.

I. THE CONUNDRUM OF THE NINTH SCHEDULE

A. Background, Context and Relevance of the Ninth Schedule

The enactment of the Constitution (First Amendment) Act, 1951 (hereinafter “First Amendment”) led to the insertion in the Constitution of India, 1950 (hereinafter “Constitution”), of one of the most controversial provisions in Indian constitutional history—Article 31B and, correspondingly, the Ninth Schedule.¹ Article

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¹ The validity of Article 31B was upheld in *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89.

31B validates legislations from the day they are placed in the Ninth Schedule, although, such legislations or its provisions may contravene Part III of the Constitution that provides for Fundamental Rights.² Further, such validation is notwithstanding any judgment, decree or order of any court or tribunal upholding the constitutional invalidity of the said legislation or its provisions³ and Article 31A.⁴

In a bid to free India from the scourge of the zamindari system⁵, the Constitution framers enacted Article 31B with the intention of protecting land reform laws from judicial review on the touchstone of the fundamental right to property (as it existed then).⁶ Initially, the Ninth Schedule consisted of thirteen laws, each aimed at land reforms; today, it consists of a myriad collection of two hundred and eighty-four laws covering reservation, industries, trade and mines, to name a few,⁷ earning the Ninth Schedule the reputation of a ‘Constitutional Dustbin’.⁸ At the last count, the Constitution (Seventy-Eighth Amendment) Act, 1995 added twenty-seven state-specific land reform legislations in the Ninth Schedule. It is to be noted that Article 31B does not have an indicia of the kind of laws that can be inserted in the Ninth Schedule and, although, is independent of Article 31A, the Legislature has conveniently resorted to granting fictional immunity to purportedly unconstitutional laws by inserting them in the Ninth

² Dhirubha Devisingh Gohil v. State of Bombay, AIR 1955 SC 47 : (1955) 1 SCR 691.

³ Jagannath v. Authorised Officer, (1971) 2 SCC 893; State of U.P. v. Brijendra Singh, AIR 1961 SC 14 : (1961) 1 SCR 362.

⁴ Article 31B uses the words, “Without prejudice to the generality of the provisions contained in article 31A...”; therefore, Article 31B operates in addition to, irrespective of and without prejudice to the laws for the acquisition of estates by the State which are protected from Article 14 (Equality before Law) and Article 19 (Right to Freedom, for instance, right to free speech and right to freedom of trade) under Article 31A. Further, also note, Article 31C immunizes laws giving effect to the Directive Principles of State Policy from the purview of Articles 14 and 19 (as above).

⁵ A.G. Noorani, *Ninth Schedule and the Supreme Court*, 42 ECON. & POL. WKLY 731 (2007). Jawaharlal Nehru commenting on the narrow scope of laws belonging to the Ninth Schedule: “It is not with any great satisfaction or pleasure that we have produced this long schedule. We do not wish to add to it for two reasons. One is that the schedule consists of a particular type of legislation, (land reform laws) generally speaking, and another type should not come in. Secondly, every single measure included in this schedule was carefully considered by our president and certified by him.” *id.* at 731.

⁶ Article 19(1)(f) was repealed by the Constitution (Forty-Fourth Amendment) Act (1978) (with effect from Jun. 20, 1979).

⁷ For instance, Industries (Development and Regulation) Act (1951) (entry 88); Mines and Minerals (Regulation and Development) Act (1957) (entry 90) and Foreign Exchange Regulation Act (1973) (entry 100). See V. Venkatesan, *Frontline articles on I.R. Coelho (the Ninth Schedule case) and Raja Ram Pal (the MPs expulsion case)*, LAW AND OTHER THINGS, (Feb. 7, 2007), <http://lawandotherthings.blogspot.com/2007/02/frontline-articles-on-ir-coelho-ninth.html> (Progressive laws can be placed in the Ninth Schedule if necessitated by urgent circumstances and if beneficiaries of the legislation, i.e., those intended under the Directive Principles, can’t wait for the judiciary to resolve challenges.)

⁸ Rajeev Dhavan, *Constitutional Dustbin*, TIMES OF INDIA, (Jan. 22, 2007), <http://timesofindia.india-times.com/edit-page/Constitutional-Dustbin/articleshow/1359898.cms>.

Schedule; although, it must be acknowledged and as is stated above, the last addition to the Ninth Schedule was in 1995.

The Supreme Court in its seminal judgment of *I.R. Coelho v. State of T.N.*⁹ dealt with the ramifications of the fictional immunity granted by Article 31B and threw open the doors to judicial review of the constitutional amendment inserting the unconstitutional law in the Ninth Schedule, including, of such laws, on the touchstone of Part III and abrogation of the Basic Structure (hereinafter “Impact Test”). The ratio decidendi of *Coelho* was further clarified in *Glanrock Estate (P) Ltd. v. State of T.N.*¹⁰ wherein the Supreme Court reaffirmed the two-prong *Coelho* Impact Test for determining the constitutional validity of the Ninth Schedule laws, that is, only laws which violate Part III and, consequently, the Basic Structure will be deemed to be unconstitutional. This test, however, was not applied by Justice Dalveer Bhandari in his dissenting opinion on severing the word ‘unaided’ from Article 15(5) in *Ashoka Kumar Thakur v. Union of India*¹¹ which was subsequently rebutted by Justice B. Sudershan Reddy in *Indian Medical Assn. v. Union of India*¹² who applied a variation of the Impact Test, that is, the Essence of Rights Test and upheld the validity of Article 15(5) in its entirety. These differing interpretations of *Coelho* revealed the staggering fissures in the judgment and although *Glanrock Estate* provided some much required perspicuity it didn’t quite resolve the issues pioneered by *Coelho*, which is perceptible in *K.T. Plantation (P) Ltd. v. State of Karnataka*.¹³

B. Foundational Premise and Hypothesis

The aim of this paper is to examine the ratio decidendi of *Coelho* and its subsequent application and interpretation by various High Courts and the Supreme Court. Such a study is essential to understand the potential ramifications of *Coelho*; specifically, to ascertain whether *Coelho* did in fact remodel the law on the judicial review of Ninth Schedule laws or whether it was merely old wine in a new bottle as constitutional amendments were in any event subject to the Basic Structure. I argue that the novelty in *Coelho* was the subjection of the Ninth Schedule laws to the Basic Structure albeit through the Part III test (as clarified in *Glanrock Estate*) - a kind of reversal, rather, nullification of Article 31B. Based on my analysis in Section B, I conclude that the *Glanrock Estate* clarificatory test of *Coelho* is appropriate to determine the validity of Ninth Schedule laws.

In Section C, I also challenge the notion of the relevance of the Ninth Schedule today and conclude with two alternatives to contain the effects of

⁹ *I.R. Coelho v. State of T.N.*, (1999) 7 SCC 580 (hereinafter “*Coelho*”).

¹⁰ *Glanrock Estate (P) Ltd. v. State of T.N.*, (2010) 10 SCC 96 (hereinafter “*Glanrock Estate*”).

¹¹ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 (hereinafter “*Ashoka Kumar Thakur*” or “93rd Amendment Case”).

¹² *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179 (hereinafter “*IMA*”).

¹³ *K.T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1 (hereinafter “*K.T. Plantation*”).

Article 31B, that is, (i) repeal Article 31B, validate land reform laws under Article 31A and insert a separate schedule in the Constitution containing such protected laws; and (ii) amend Article 31B to include an indicia of the nature of laws that can be protected under the said provision.

II. THE INFAMOUS COELHO AND ITS AFTERMATH

A. Coelho: As delivered in 2007

The Constitution (Thirty-Fourth Amendment) Act, 1974 and the Constitution (Sixty-Sixth Amendment) Act, 1990 (hereinafter “Amendment Acts”) inserted the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (hereinafter “Janmam Act”) and West Bengal Land Holding Revenue Act, 1979 (hereinafter “West Bengal Act”) in the Ninth Schedule (entries 80 and 250, respectively). The Janmam Act vested certain lands, including forest land, in the Janmam Estate, in the State of Tamil Nadu¹⁴ and such provision was held violative of the Constitution in *Balmadies Plantations Ltd. v. State of T.N.*¹⁵ as such vesting of land was not deemed to be a measure of agrarian reforms under Article 31A. Similarly, Section 2(c) of the West Bengal Act defining the word ‘area’ was struck down as unconstitutional by a division bench of the Calcutta High Court in *Paschimbanga Rajya Bhumijibi Sangha v. State of W.B.*¹⁶ as it didn’t provide for a valid determination of ‘area’ for the assessment of land revenue. In light of the above judgments, the petitioner challenged the constitutional validity of the Amendment Acts as the Ninth Schedule effectively validated the Janmam Act and the West Bengal Act although they violated Part III, thereby, immunizing them from judicial review and thus violating the Basic Structure. The constitution bench noted the decision of the Supreme Court in *Waman Rao v. Union of India*¹⁷ which held that constitutional amendments made after April 24, 1973 (the date of the *Kesavananda Bharati* verdict¹⁸) would be open to judicial review on the ground of violation of the Basic Structure while acknowledging that certain apparent inconsistencies in the said judgment will have to be considered by a larger bench of the Supreme Court. The constitution bench therefore referred these issues to a nine-judge bench of the Supreme Court.

The aforesaid bench held that laws, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, which abridge or abrogate Part III and therefore violate the Basic Structure are susceptible to judicial scrutiny. The actual effect and impact of the law on Part III will determine whether it violates the Basic Structure as certain Fundamental Rights form a part of the Basic

¹⁴ Janmam Act, § 3 (1969).

¹⁵ (1972) 2 SCC 133.

¹⁶ 1986 SCC OnLine Cal 87 : (1986) 90 CWN 1108.

¹⁷ (1981) 2 SCC 362.

¹⁸ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (hereinafter “*Kesavananda Bharati*”).

Structure¹⁹ (as defined above, “Impact Test”). Therefore, constitutional amendments made on or after April 24, 1973 whereby the Ninth Schedule is amended would be open to judicial review purely on the ground of violation of the Basic Structure which is reflected in Articles 14, 19 and 21, and the principles underlying the said articles.²⁰ Further the fictional immunity of Article 31B would not prevent it from being tested on the touchstone of the Basic Structure. *Glanrock Estate*’s ratio takes this stipulation a step further by differentiating between mere violations of Part III and those violations of Part III, which impact the Basic Structure. Therefore, violations of Part III, which necessarily impact the Basic Structure, will be held unconstitutional. The modus operandi of arriving at such a determination as per *Coelho* is by applying the Impact Test (also known as the “Rights Test”) and the Essence of Rights Test (explained hereinafter). The Court further directed the appeal on the facts to be presented before a three-judge bench while negating challenges to Ninth Schedule laws that had already been upheld by the Court and to actions taken and transactions finalized as a result of the impugned legislations.

While a literal reading of *Coelho* blurred the distinction between ordinary legislation and a constitutional amendment, *Glanrock Estate* clarified that while an ordinary law can be challenged on the touchstone of the Constitution²¹, amendments will have to conform to the Basic Structure. However, do laws form a part of the Constitution merely by being inserted in the Ninth Schedule via constitutional amendments or do they owe their validity to the exercise of the amending power?²² It is essential to note that *Glanrock Estate* acknowledges that such laws are also open to being tested on the ground of legislative competency, which implies that Ninth Schedule laws are not a part of the Constitution. This leads to the question of the separation of the law from the body of the amendment; as the constitutional amendment in respect of the Ninth Schedule is the law itself, the actual implication of *Coelho* would now be that Ninth Schedule laws are therefore subject to the Basic Structure although they are per se not a part of the Constitution and have not been enacted under the constituent power of

¹⁹ See the clarification by Justice Khanna in *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 (hereinafter “*Indira Gandhi*”), ¶ 251 of his opinion in *Kesavananda Bharati on Fundamental Rights* being a part of the Basic Structure.

²⁰ Subhash Kashyap, *Ninth Schedule Can’t Help*, TRIBUNE INDIA, (Jan. 29, 2007), <http://www.tribuneindia.com/2007/20070129/edit.htm#4>. (“Rights such as ‘equality’, ‘freedom’ and ‘life’ are considered ‘fundamental’ and therefore are not bamboos that will bend to accommodate passing political winds.”)

²¹ See the opinion of Justice Chandrachud in *Indira Gandhi*, 1975 Supp SCC 1, at ¶ 691 wherein he had stated that the validity of ordinary laws can be tested on the basis of: (i) legislative competency; and (ii) Articles 13(1) and 13(2) of the Constitution. As the Basic Structure is an extra-constitutional creation and does not fall within the purview of the above two grounds, it sets the foundation for examining the validity of constitutional amendments only and not ordinary laws, as decided by the Supreme Court majority of 3:1 in *Indira Gandhi*.

²² H.M. SEERVAI, CONSTITUTION OF INDIA 30-48 (4th ed. 2013).

the Parliament.²³ In a way *Coelho* can be viewed as a triumph of Part III albeit through the device of the Basic Structure.²⁴ Adversely, however, *Coelho* gave birth to new superfluous concepts, which are examined subsequently.

B. The 93rd Amendment Case: The New Interpretation of Coelho

An apposite yet simplistic application of *Coelho* is seen in Justice Dalveer Bhandari's dissenting opinion in the *93rd Amendment Case*.²⁵ The Supreme Court (among other issues) had to determine whether a citizen's right to carry on occupation under Article 19(1)(g) was abrogated due to the imposition of reservations by the State on private unaided non-minority educational institutions thereby allegedly violating the Basic Structure.²⁶ In the absence of a challenge by the said institutions, the Chief Justice K.G. Balakrishnan chose not to rule on the issue; however, Justice Bhandari determined that the reference to 'unaided' in Article 15(5) should be severed as it was ultra vires the Constitution. It is relevant to note that the Supreme Court was also required to determine the validity of Article 15(5) on the touchstone of the Basic Structure. The Chief Justice upheld Article 15(5) stating as follows:

“If any Constitution amendment is made *which moderately abridges or alters the equality principle or the principles under Article 19(1)(g), it cannot be said that it violates the basic structure of the Constitution*²⁷ (emphasis supplied).”

²³ Kamala Sankaran, *From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure*, 49 J.I.L.I. 240, 248 (2007).

²⁴ For subsequent applications of *Coelho*, see also *Prem Singh v. State of H.P.*, 2012 SCC OnLine HP 4249 (The Court entertained a challenge to a provision of the Himachal Pradesh Ceiling on Land Holdings Act (1972) (entry 73) on grounds of violation of Articles 14, 19 and 21. However, the petition was dismissed as the appellants could not provide any tangible argument on the violation by the provision of the Basic Structure); *Musamiya Imam Haiderbux Rizvi v. State of Gujarat*, (2010) 13 SCC 752 (the Court upheld the validity of the Constitution (Sixty-Sixth Amendment) Act, 1990 inserting the Gujarat Devasthan Inams Abolition Act (1969) and Gujarat Devasthan Inams Abolition (Amendment) Act (1977) (entries 213 and 215, respectively, in the Ninth Schedule); *Har Narain Devi v. Union of India*, 2009 SCC OnLine Del 2864 : ILR (2010) 1 Del 728 (DB) (The Court resisted a challenge to Section 50(a) of the Delhi Land Reforms Act (1956) (entry 61) as the said legislation had been placed in the Ninth Schedule prior to April 24, 1973).

²⁵ *Ashoka Kumar Thakur*, (2008) 6 SCC 1, at ¶ 477-527.

²⁶ The challenge in *Ashoka Kumar Thakur* was to The Central Educational Institutions (Reservation in Admission) Act (2006) (hereinafter “CEI Act”) enacted pursuant to Article 15(5) inserted via the Constitution (Ninety-Third Amendment) Act (2005) (hereinafter “93rd Amendment”) which set out reservations of fifteen percent seats for Scheduled Castes, seven percent seats for Scheduled Tribes and twenty-seven percent seats for Other Backward Classes leading to the imposition of a total reservation of forty-nine in Central Educational Institutions (as defined in the above statute).

²⁷ *Ashoka Kumar Thakur*, (2008) 6 SCC 1.

The Chief Justice did not delve into the italicized portion but based his rationale solely on defining the contours of a constitutional amendment and the Basic Structure, which did not in any manner supplement or corroborate his rationale above. While not explicitly stated by the Chief Justice, it is pertinent to note that although Article 15(4) was already used by states to reserve seats in aided educational institutions,²⁸ the statement of objects and reasons of the 93rd Amendment (hereinafter defined) stated that Article 15(5) was enacted with the specific purpose of introducing reservations in unaided educational institutions as, “...at present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions”. Therefore, although the question before the Supreme Court was with respect to the validity of Article 15(5), which included a reference to unaided private educational institutions, the Court ruled solely on the validity of Article 15(5) vis-à-vis State-aided educational institutions.

In the backdrop of the larger public interest,²⁹ Justice Bhandari dealt with the issue by testing Article 15(5) on the basis of the following test:

- (i) Does the law affect a facet of the Basic Structure?
- (ii) If so, is the effect such as to alter the said facet’s original identity?

An implication of the test, therefore, is that that the form of the amendment is irrelevant; the consequence or its impact on the Basic Structure is the real indicator of its validity.³⁰ The consequence or impact is determined by whether the law “abridges” or “abrogates” the Basic Structure - a matter of degree, this arbitrary determination seeks to answer the question of the effect of the law on the Basic Structure. Thus, a certain “abridgement” is permissible, that is, certain Fundamental Rights may be violated by the law but such violation should not in any manner affect the sanctity of the Basic Structure. Without delving into the rhetoric surrounding the Golden Triangle (Articles 14, 19 and 21), Article 15(5) was held by Justice Bhandari to be infringing Article 19(1)(g), thus affecting a facet of the Basic Structure³¹ as it eliminated the freedom of each citizen under the aforementioned provision. Consequently, the second limb of the inquiry was whether Article 15(5) “abridged” or “abrogated” Article 19(1)(g). Relying on Justice Chandrachud’s opinion in *Minerva Mills Ltd. v. Union of*

²⁸ Vivek Reddy, *The Eight Fatal Sins of Ashoka Kumar Thakur v. Union of India*, LAW AND OTHER THINGS, (May 4, 2008), <http://lawandotherthings.blogspot.in/2008/05/eight-fatal-sins-of-ashok-kumar-thakur.html>.

²⁹ Ashoka Kumar Thakur, (2008) 6 SCC 1, at ¶ 477-478.

³⁰ Coelho, (1999) 7 SCC 580, at ¶ 81.

³¹ See P.A. Inamdar v. State of Maharashtra, (2004) 8 SCC 139 (hereinafter “Inamdar”) wherein a seven-judge bench of the Supreme Court held that the State cannot impose quotas on unaided (minority and non-minority) institutions as this would lead to nationalization of seats in the institution. As opined in *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179, at ¶ 73, it was to overcome this obstacle that Article 15(5) was introduced in the Constitution.

*India*³² that, “[a] total deprivation of fundamental rights, even in a limited area, can amount to abrogation of fundamental right just as a partial deprivation in every area can”, Justice Bhandari held that Article 15(5) abrogated every citizen’s and every unaided educator’s right under Article 19(1)(g) and therefore the reference to ‘unaided’ under Article 15(5) should be severed as being ultra vires the Constitution.³³

It may be argued that Justice Bhandari’s application of *Coelho* in *Ashok Kumar Thakur* was: (i) unnecessary as there was no challenge by the private unaided non-minority educational institutions; (ii) a re-affirmation of *Inamdar* and, thus, an attempt at foiling the legislature’s intention expressed through Article 15(5); (iii) an exposition of the importance of Article 19(1)(g) with respect to each individual’s right to freedom of occupation vis-à-vis the other important Fundamental Rights, such as, the right to free speech under Article 19(1)(a); (iv) a celebration of ‘merit’ though such concept is unfounded in our Constitution; and (v) a way to justify his policy decision against reservations in the said institutions³⁴, however, it can’t be criticized as an incorrect application of the Impact Test, although it can be characterized as repackaging the Impact Test. *Coelho*’s Impact Test as further clarified in *Glanrock Estate* was centered around a violation of Part III leading to an abrogation of the Basic Structure; however, Justice Bhandari’s Impact Test first examines the violation of a ‘facet’ of the Basic Structure (which includes elements besides the principles underlying the Part III rights) and subsequently its effect of altering the said facet’s original identity, which therefore implies that Justice Bhandari had in fact not applied the *Coelho* Impact Test³⁵ but generally the Basic Structure to test constitutional amendments.

C. IMA: Rebuttal to Justice Bhandari

The division bench of the Supreme Court in *IMA*, however, was not persuaded by Justice Bhandari’s opinion. The Court disagreed with the application of the Impact Test on the basis of the lack of clarity on the word ‘law’ as used in *Coelho*, that is, whether it implied a constitutional amendment under Article 368 or a constitutional amendment placing a statute in the Ninth Schedule. Although it may be acceded that *Coelho* is a Ninth Schedule-centric judgment, the Court has in its conclusion taken great care to specify that while using the term ‘law’

³² *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625 ¶ 64.

³³ *See Sudha Tiwari v. Union of India*, 2011 SCC OnLine All 253 : (2011) 2 ADJ 819, ¶ 23 (Pursuant to Article 141, the High Courts are bound by the decisions of the Supreme Court) and *Sanjeet Shukla v. State of Maharashtra*, 2014 SCC OnLine Bom 1672 : (2015) 2 Bom CR 267, ¶ 85 *cf.* *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1, ¶ 93 [Article 19(1)(g), as such, is not a facet of the Basic Structure].

³⁴ It is relevant to note that Justice Bhandari was adjudicating on Article 15(5) and not the CEI Act. *See also* M.P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, 1 NUJS L. Rev. 199, 203 (2008).

³⁵ It is to be noted that due to the added emphasis on Part III, the Impact Test was also known as the ‘Rights Test’.

in either sense, i.e., ‘whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule’,³⁶ the Impact Test would be dispositive (as was applied, somewhat differently, by Justice Bhandari).

In this respect, however, Justice B. Sudershan Reddy minutely notes that *Coelho* states in its first principle that the validity or invalidity of the ‘law’ will be tested on the principles in the judgment and draws specific reference to paragraph 76 of *Coelho* wherein the Court has held that the Essence of Rights Test³⁷ will not be a satisfactory indicia to determine the validity of constitutional amendments that eliminate the applicability of an entire chapter of the Constitution. Such constitutional amendments will have to be tested on the basis of the Impact Test. The distinction between the Basic Structure and the Essence of Rights appears to be unclear and begs the answer whether the Basic Structure is anything if not a concept encapsulating the principles underlying the Fundamental Rights in addition to those aspects that constitute its identity. *M. Nagaraj v. Union of India*³⁸ (hereinafter “*Nagaraj*”) based the Basic Structure on the concept of ‘constitutional identity’ or the ‘personality’ of the Constitution and postulated that a constitutional amendment cannot destroy such identity/personality and consequently abrogate the Basic Structure.³⁹ While the concept of ‘constitutional identity’ is essentially the Basic Structure, is ‘essence of rights’ a superficial concept manufactured in *Coelho* and inadvertently attributed to *Nagaraj* to capture the foundational values of Part III and the Rights Test, a direct reference to the Fundamental Rights in Part III? I argue that it is technically impossible to differentiate between the Essence of Rights Test and the Rights Test; further, that the Court in *Ashok Kumar Thakur* has faltered in its application of *Coelho* as well. According to Justice Reddy’s rationale, therefore, the appropriate test for determining the validity of Article 15(5) was the Essence of Rights Test and that since the truncation of “*a small portion of one of the activities of one particular occupation in the entire field of occupations*”,⁴⁰ does not lead to changing the identity of the Constitution or its over-arching principles which can be gleaned across the equality, freedom and judicial review codes⁴¹ or, principally, its Basic Structure, Article 15(5) with respect to private unaided non-minority educational institutions, was constitutionally valid. It is an open question, whether violation of one individual’s right under Article 19(1)(g) to determine his/her admission policy violates its essence or is merely a grain in the sand in the field of occupations that it doesn’t subvert Article 19(1)(g).

³⁶ *Coelho*, (1999) 7 SCC 580, at ¶ 81.

³⁷ While the Court attributes the genesis of the ‘Essence of Rights’ test to *Nagaraj*, it is to be noted that such phraseology is not used in the said judgment. *Nagaraj* uses the ‘width test’ and the ‘test of identity’ in the application of the Basic Structure.

³⁸ (2006) 8 SCC 212.

³⁹ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, at ¶ 22 (hereinafter “*Nagaraj*”).

⁴⁰ *Indian Medical Assn.*, (2011) 7 SCC 179, at ¶ 78.

⁴¹ *Indian Medical Assn.*, (2011) 7 SCC 179, at ¶ 81.

In a way Justice Reddy's rationale reintroduces the lost focus on Part III by admitting that although there is a subversion of Part III, such 'truncation' doesn't amount to a violation of the Basic Structure and, thus, leading to a proper application of *Coelho*. *Coelho*, unintentionally, and its applications subsequently, have differentiated between the tests to determine the validity of constitutional amendments and those constitutional amendments that place laws in the Ninth Schedule; that, while the former is to be tested on the touchstone of the Basic Structure, the latter has to answer to a Part III violation leading to an abrogation of the Basic Structure. Further, it is interesting that *Glanrock Estate* applies the Rights Test, that is, that the alleged violation of the law has to directly correspond to a right in Part III and not merely the 'essence' of the Fundamental Right in Part III, as was also observed by Justice Reddy in *IMA*.

D. Coelho Clarified: Glanrock Estate

The *Glanrock Estate* verdict of 2010 was deemed to have solved the riddle that was *Coelho*. As referred by the nine-judge bench in *Coelho*, the issue before the three-judge bench was the validity of the Constitution (Thirty-fourth Amendment) Act, 1974 via which the Janmam Act was inserted in the Ninth Schedule under Article 31B of the Constitution. The Court determined that the Tamil Nadu Legislature was competent to enact the Janmam Act under Entry 18, List II of the Constitution, and, applying the Impact Test, narrowed the issue in the present case as below:

- (i) whether the vesting of the forest land in the Janmam estate to the State violated any rights under Part III of the Constitution; and
- (ii) whether such violation led to altering the identity of the Constitution, that is, its Basic Structure?

With respect to the first test, the petitioner alleged violation of Articles 14, 19 and 300A of the Constitution. While the grounds of attack on the basis of Article 19 are unclear⁴² and Article 300A merely sets out a constitutional right to property, which deprivation can be justified by authority of law,⁴³ the petitioners attempted an Article 14 violation on the basis of the non-application of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 (hereinafter "Ceiling Act"), as before the ceiling could be determined and compensation could be paid under the said statute, the forest lands were vested in the State pursuant to the Janmam Act.

⁴² While the Constitution (Forty-Fourth Amendment) Act (1978) (with effect from Jun. 20, 1979) omitted Article 19(1)(f) providing for a fundamental right to property, it also inserted Chapter IV containing Article 300A providing for the constitutional right to property.

⁴³ The inadequacy of compensation due to the non-application of the Land Acquisition Act, 1894 was alleged to be a violation of Article 300A.

The Court clearly demarcated the sphere of influence of the Ceiling Act and the Janmam Act stating that while the latter was enacted to acquire the rights of janmis in Janmam estates and to introduce ryotwari settlement; the former was aimed at fixing a ceiling of agricultural land holding and to distribute the excess lands to the landless and agricultural population. Therefore, the ‘similarly situated’ test will not have any applicability in such a situation; consequently, Article 14 is not violated in any manner. Since the first test has been answered in the negative, the question of testing the amendment on the touchstone of the Basic Structure therefore does not arise.

E. K.T. Plantation: Piercing the Basic Structure

In the backdrop of the controversy with respect to the legal right to property⁴⁴ the Government of the State of Karnataka via Notification No. RD 217 LRA 93 dated March 8, 1994 (hereinafter “Notification”) under Section 110 of the Karnataka Land Reforms Act, 1961 (hereinafter “Karnataka Act”) brought lands used for linaloe cultivation under the purview of the said statute; such lands being previously exempt from its provisions under Section 107 of the Karnataka Act.⁴⁵ While the appellant company attempted to obtain the benefit of such an exemption and claimed ownership over the said lands (although the title of the lands itself was in dispute), the respondent State taking recourse to the provisions of the Karnataka Act⁴⁶ claimed that the lands stood vested in the State as with effect from the Karnataka Amendment Act, no ‘person’ other than a person cultivating the land personally was entitled to hold the land. Being a Ninth Schedule statute and exempt from Part III, the appellants claimed that the powers granted to the State to broaden the purview of the Karnataka Act by including lands used for cultivating linaloe were excessive and, therefore, Section 110 and the Notification were unconstitutional. The Court held that the Legislature in its wisdom had exempted certain lands from the application of the Karnataka Act under Section 107 but had subjected it to Section 110 which in turn granted the State powers to remove such an exemption and thus it was not a matter of the will of the delegated, rather, legislative will. Another ground asserted by the appellant before the five-judge bench was that the Notification was not laid before the State Legislature as was prescribed in the Karnataka Act. This was held not to affect the validity or the effect of the Notification.

⁴⁴ CONSTITUTION OF INDIA art. 300A.

⁴⁵ Karnataka Act, § 107(2) also provided for a conditional exemption for lands used for linaloe cultivation and stated that notwithstanding the non-application of the Karnataka Act to such lands, no person shall, after the date of commencement of the Karnataka Land Reforms (Amendment) Act (1973) (hereinafter “Karnataka Amendment Act”) acquire in any manner for the cultivation of linaloe, land of an extent which together with the land cultivated by linaloe, if any, already held by him exceeds ten units. The Karnataka Amendment Act is entry 140 in the Ninth Schedule.

⁴⁶ Karnataka Act, § 79B(1).

It is interesting that the appellant attempted to permeate the thick layer of protection granted by Article 31B by resorting to the ground of excessive delegation of power which is usually seen in Administrative Law. Additionally, the company had also contended that the enactment of the Notification necessitated a hearing on lines of due process, however, the Court ruled that it was evident from the wordings of the statute that the Legislature had deemed it fit to delegate such power to the State Government. The Court in fact framed the question in such a manner so as to test the validity of Section 110 and the Notification on the grounds of the Basic Structure so as to trigger *Coelho*. It is pertinent to note that the rigours in testing the validity of a constitutional amendment will not be applicable in the present case; however, neither is Part III available as a viable ground. It then leads to the question whether excessive delegation of powers necessarily violates the Basic Structure and by this, is the Court then determining new facets of the Basic Structure thereby leading to the expansion of an indefinable concept?

The Court tested the validity of the Karnataka Act on the touchstone of Article 300A which provided for deprivation of property by the ‘authority of law’. Needless to say that such law has to be constitutionally valid and further, in the present case, the said legislation was protected under Article 31A providing for acquisition of estates by the State and thus immune from challenge under Articles 14 and 19. The ground of attack was then mounted on the ‘Rule of Law’ – a much recognized aspect of the Basic Structure. The Court in its endeavour to fortify the presence of the Rule of Law in India and in its desperate bid to encourage foreign investment⁴⁷ interpreted Article 300A to include the two facets of eminent domain, that is, deprivation of property for public purpose in return for compensation which the State has to justify taking into account the legislative policy, object and purpose of the Legislature and other related factors. It is to be noted that *K.T. Plantation* is not a strict application of *Coelho* and *Glanrock Estate* and tests the validity of a Ninth Schedule legislation on the basis of the Basic Structure itself.

F. Gopal Singh: Negating Challenges to Article 14

Although Article 31B explicitly immunizes legislations from Part III, courts are open to entertaining challenges to the said legislations if there appears to be a hint of a challenge to the Basic Structure. In the case at hand, the State had acquired the surplus land of Gopal Singh (the appellant) in 1976; after appeals by both the State and the appellant which were ordered in favour of the appellant in 1995, the State finally compensated him in 1998 and levied simple interest at the rate of interest of two and a half percent per annum on the amount of

⁴⁷ See Indira Jaising, *Ninth Schedule: What the Supreme Court Judgment Means*, REDIFF, (Jan. 11, 2007), <http://www.rediff.com/news/2007/jan/11indira.htm> wherein she had stated that “[w]e live in times when the Supreme Court believes that liberalisation, privatisation and globalisation are good for the country and any law that hinders these will violate fundamental rights and hence, the basic features of the Constitution”.

compensation. The appellant contested that the said rate of interest was arbitrary, illusory and unjust, particularly, as the State had withheld payment for a substantial period of time; therefore, that Section 19(6) of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (hereinafter “Rajasthan Act”) (entry 79), a Ninth Schedule law violated Article 14 leading to a denial of economic justice, thus violating the Basic Structure. While the division bench refused to examine the issue of laches, it dismissed the writ holding that Section 19(6) had to be placed in the context of its related provision which provided for acquisition of surplus land and the object of the Rajasthan Act, that is, agrarian reforms and equitable distribution of resources. The levy of interest under Section 19(6) vis-à-vis a higher rate of interest under other laws, such as those providing for compulsory acquisition of land, is a reasonable and valid classification based on intelligible differentia having a rational relation with the object of the Rajasthan Act. Mere hardship cannot be a ground for claiming denial of economic justice, rather, the enactment of such a socio-economic legislation was viewed as strengthening the Basic Structure, according to the Court. The appellant had also attempted to argue deprivation of the right to property due to the delay in the payment of compensation by the State, however, this was held untenable as the right to property was now merely a constitutional right and not a part of the Basic Structure.⁴⁸

III. THE NINTH SCHEDULE AND ITS NINE LIVES

A. Ninth Schedule and its Lost Focus

The validity of Article 31B is indisputable; while it was enacted with the sole intention of immunizing land reform laws, the said intention is not reflected in the Ninth Schedule as it stands today. I analyze two Ninth Schedule legislations below and argue that the Ninth Schedule: (i) is being utilized as a tool to protect potentially litigious legislations; (ii) is and has been prone to abuse; and (iii) contains laws which are redundant today making it a ‘Constitutional Dustbin’ in the true sense of the term.

(a) The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993 (hereinafter “Tamil Nadu Act”)

The Tamil Nadu Act (entry 257A) inserted by the Constitution (Seventy-Sixth Amendment) Act, 1994 (hereinafter “Seventy-Sixth Amendment”) provides for sixty-nine percent reservation in educational institutions and government positions, that is, nineteen percent more than the fifty percent reservation that has

⁴⁸ See Pushpaben v. State of Gujarat, 2014 SCC OnLine Guj 9756 : AIR 2015 Guj 31.

been stipulated by the nine-judge bench of the Supreme Court in *Indra Sawhney v. Union of India*.⁴⁹

As per the statement of objects and reasons of the Seventy-Sixth Amendment, while Article 31C amply protected the Tamil Nadu Act from Articles 14 and 19, the Legislature sought to dodge the Article 15 challenge by inserting it in the Ninth Schedule which provides blanket protection against Part III, thereby successfully evading *Indra Sawhney* as well. The question is, whether Article 31C has been properly applied in the first instance? Article 31C reads as follows:

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy ...*⁵⁰ (emphasis supplied).

Two points ought to be given consideration here:

The underlined portion in the provision was a substitution for the words “*the principles specified in clause (b) or clause (c) of article 39*” by section 4 of the Constitution (Forty-Second Amendment) Act, 1976. The aforesaid section 4 was declared invalid by a 4:1 majority constitution bench in *Minerva Mills Ltd. v. Union of India*⁵¹.

The italicized portion of the provision was declared invalid in *Kesavananda Bharati*.

While the above portions of Article 31C were declared unconstitutional, they are still retained in the text of the Constitution and in a way have effectively nullified Article 31C. Arguendo, assuming that the application of Article 31C by the Tamil Nadu legislature was apposite, the actual question then is, whether sixty-nine percent reservation vis-à-vis fifty percent or eighty percent guarantees an equal social order? It is also pertinent to note that the Constitution framers did not exclude an Article 15 protection from Article 31C.

While respecting the Tamil Nadu Act, the Supreme Court by its interim order dated August 18, 1994 (hereinafter “Order”) created additional seats for general category candidates that were equal to the number of seats which the general category candidates would have been originally allotted had the fifty

⁴⁹ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477 (hereinafter “*Indra Sawhney*”).

⁵⁰ CONSTITUTION OF INDIA art. 31C.

⁵¹ (1980) 3 SCC 625.

percent reservation rule been applied in the first instance. The Supreme Court by its order dated July 22, 1996 further directed the applicability of the Order for the academic year 1996-1997 as well. The State of Tamil Nadu requested for a modification of the Order in order to implement the Tamil Nadu Act in *Voice (Consumer Care) Council v. State of T.N.*⁵² The division bench of the Supreme Court in *Voice* observed that backward class candidates were availing eighty percent of the seats even in those seats set aside additionally for the general category candidates on the basis of their merit. This was leading to a situation whereby the interim Order was virtually ineffective as the backward class candidates were still being allotted a bulk of the seats. Admitting that the legal issues at hand were referred to a constitution bench, the Supreme Court negated the State's request for modifying the Order.⁵³

(b) *The Industries (Development and Regulation) Act, 1951*

The Constitution (Thirty-Ninth Amendment) Act, 1975 (hereinafter "Thirty-Ninth Amendment") inserted the Industries (Development and Regulation) Act, 1951 as entry 88 in the Ninth Schedule as "*progressive legislation conceived in the interests of public was imperiled by litigation*" (such as the challenge to the nationalization of coal).⁵⁴ Incidentally, the Thirty-Ninth Amendment also inserted the Representation of the People Act, 1951, the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 in the Ninth Schedule and introduced Article 329A in the Constitution in an attempt to oust judicial review in relation to election matters of the Prime Minister, Mrs. Indira Gandhi.

Indira Gandhi held certain portions of Article 329A as unconstitutional and the Constitution (Forty-Fourth Amendment) Act, 1978 repealed the provision entirely with effect from June 20, 1979. In the backdrop of the emergency of 1975, the Thirty-Ninth Amendment further inserted The Monopolies and

⁵² *Voice (Consumer Care) Council v. State of T.N.*, (1996) 11 SCC 740 (hereinafter "Voice").

⁵³ See also, ET Bureau, *Revisit quota laws, SC tells TN, Karnataka*, ECONOMIC TIMES, (Jul. 14 2010), http://articles.economictimes.indiatimes.com/2010-07-14/news/28443555_1_quota-law-tamil-nadu-backward-classes-apex-court (A three-judge bench of the Supreme Court asked the Tamil Nadu government to place available quantifiable data in respect of reservations before the State Backward Class Commission and restrained the Karnataka government from implementing its proposed reservation policy of seventy-three percent.); Maneesh Chhibber, *In Fact: Why Rajasthan's new reservation laws face tough court challenge*, INDIAN EXPRESS, (Sept. 23 2015), <http://indianexpress.com/article/explained/why-rajasthan-reservation-may-run-afoul-of-constitution/#sthash.IBPvDDtg.dpuf> (The Rajasthan Assembly has passed the Rajasthan Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Bill (2015), and the Rajasthan Special Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Bill (2015) which will lead to instituting sixty-eight percent reservation in educational institutions and government positions, that is, eighteen percent more than the fifty percent mark prescribed in Indra Sawhney.).

⁵⁴ Constitution (Thirty-ninth Amendment) Act, Statement of Objects & Reasons.

Restrictive Trade Practices Act, 1969 (entry 91), The Maintenance of Internal Security Act, 1971 (entry 92) and The Coking Coal Mines (Nationalisation) Act, 1972 (entry 94), to name a few, in the Ninth Schedule.

The Thirty-Ninth Amendment was a perfect example of the abuse of the Ninth Schedule and exposes the deleterious effects of having such an open ended provision in the Constitution. Further, even to this day, the Ninth Schedule has not been altered to adequately reflect the ground realities⁵⁵ and remains akin to a spam folder.

B. Basic Structure: Not so ‘basic’ anymore

The Basic Structure remains an omnipresent and indefinable concept often accompanied by the word ‘etc.’ to signify that it is impossible to indicate all the core features of the Constitution. The Indian judiciary has used the basic structure doctrine mostly to protect judicial power. The basic structure doctrine proceeds upon a distrust of the democratic process, which itself must surely be part of the basic structure. In limiting the amending power, the basic structure doctrine in fact stifles democracy, a basic feature.⁵⁶

Champions of the Basic Structure would argue that it is essential that an evolving democracy such as India should possess a flexible judicial shield with which to combat and restrict any (imminent or otherwise) potential excess of power by the Legislature. They would argue that the constitutional scheme and its identity be protected “*to ensure continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day*”⁵⁷. It is to protect and promote the will of the people who have given themselves the Constitution and to ensure preservation of their rights and freedoms that it becomes relevant and extremely crucial to have the Basic Structure, especially, in an era of vote bank politics. Besides, what good did precision and perfection ever lead to?

C. How to bell the cat?

Article 31B was enacted with the sole intention of protecting land reform legislations. What is surprising then is that although the Constitution contained the simplistic Article 31A, the Constitution framers felt the need to protect land reform legislations under Article 31B. For instance, the Janmam Act could have been covered under Article 31A(1)(a) providing for “*the acquisition by the*

⁵⁵ Foreign Exchange Regulation Act (1973) (entry 100) was repealed by the Foreign Exchange Management Act, § 49(1) (1999); Monopolies and Restrictive Trade Practices Act (1969) (entry 91) was repealed by the Competition Act, § 66(1) (2002).

⁵⁶ V. Venkatesan, *Act of Foresight*, FRONTLINE, (Feb. 9, 2007), <http://www.frontline.in/static/html/fl2402/stories/20070209005101200.htm>.

⁵⁷ Nagaraj, (2006) 8 SCC 212, at ¶ 22.

State of any estate or of any rights therein or the extinguishment or modification of any such rights". Admittedly, Article 31B provides for a broader protection against Part III than Article 31A which merely provides protection against Articles 14 and 19; however I argue that land reform legislation themselves cannot possibly be examined on the touchstone of any other Part III provision other than Articles 14 and 19. Furthermore, with the right to property no longer being a Fundamental Right, save and except for a far-fetched Article 19(1)(g) challenge to practise any profession, or to carry on any occupation, trade or business, land reform laws do not require protection from Article 19. From Section B.F, it is evident that challenges to Article 14 with respect to land reform laws are usually weak and are negated by the courts as they usually stem from inadequacy in compensation.

However, the Constitution framers deemed it fit to enact another provision to specifically cushion agrarian legislations in which case the Ninth Schedule today deserves a clean-up by the removal of those laws that don't specifically deal with land reforms. An alternative proposal would be to amend Article 31B by introducing specific indicia on the kind of land reform legislations that could be granted the now limited protection of the Ninth Schedule. A more straightforward approach would be to repeal Article 31B, to save land reform laws under the purview of Article 31A and to introduce a separate schedule in the Constitution to specify the legislations that are being shielded by Article 31A.

With all its foibles and errors, *Coelho* has considerably altered the understanding of judicial review and highlighted the importance of the Basic Structure more so in this day and age when Part III is no longer sacrosanct. Finally, I submit that the Ninth Schedule is a creature of the 1950s, and, today, it requires a thorough revisit and holistic revamp. The cat may have just outlived its nine lives.