

- On May 29, 1951, introducing the Constitution First Amendment Bill in the constituent assembly which had enacted the Constitution of India but which now functioned as a provisional Parliament under it, prime minister Jawaharlal Nehru said "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.  
1) The schedule consists of a particular type of legislation, and another type should not come in.  
2) Every single measure included in this schedule was carefully considered by our president & certified by him..." (Proceedings Vol XII, 1951, Column 9632).
- All the 13 Acts included in that schedule then were concerned with the abolition of zamindari & allied matters relating to agrarian reforms.
- It has been amended several times since & now consists of 284 Acts, central and state, such as the Representation of the People Act, the Election Laws Act, the Maintenance of Internal Security Act and the Prevention of Publication of Objectionable Matter Act of the Emergency Era.
- An incongruity, introduced as a result of sheer neglect, became an obscenity created by willful resolve.
- A Planning Commission was in the works even when the Constitution was being drafted. It was set up by an executive order dated March 15, 1950 less than two months after the Constitution came into force & can also be dissolved by a similar executive fiat.
- It wields more power and influence than a constitutional body, the Finance Commission.
- Zamindari abolition legislation was in the air but no thought was given to protecting it in the Constitution itself. Predictable judicial decisions led to predictable panic.
- Article 31-B was inserted in Part III of the Constitution by the Constitution (First Amendment) Act, 1951.
- It added the Ninth Schedule containing 13 items, all relating to land reform laws, immunising these laws from challenge on the ground of contravention of Article 13 of the Constitution, which inter alia, provides that the state shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void.
- It also inserted Article 31A to enable acquisition of estates, take over of property for a time, abolition of managing agencies, etc.
- Article 31B read thus: Article 31B of the Indian Constitution, when read with the Ninth Schedule, ensures that laws listed in the Schedule are not challenged or deemed void for violating any fundamental rights.
- In essence, it provides a shield of protection to certain specific laws, preventing them from being struck down by courts based on fundamental rights arguments.
- Its constitutional validity was upheld in Sankari Prasad Singh Deo vs Union of India (1952)/SCR 89 as well as Sajjan Singh vs State of Rajasthan (1965)/SCR 933.
- However minority opinion by, justice J R Mudholkar said "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?" which provides for amendment of the Constitution.
- In I C Golak Nath & Ors vs State of Punjab & Anr ((1967) 2 SCR 762) a bench of 11 judges by majority of six to five, overruled these decisions.
- It was held that constitutional amendment is "law" within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.
- It was declared that the Parliament would have no power from the date of the decision (February 27, 1967) to amend any of the provisions of Part III so as to take away or abridge the fundamental rights.
- Soon after, the Constitution (24th Amendment) Act, 1971, the Constitution (25th Amendment) Act, 1971, the Constitution (26th Amendment) Act, 1971 and the Constitution (29th Amendment) Act, 1972 were passed.
- By Constitution (24th Amendment) Act, 1971, Article 13 was amended & after clause (3), the following clause was inserted as Article 13(4): "13(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368".
- Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.
- The Constitution (25th Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquisition or properties for public purposes so that only the amount fixed by law needed to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash.

- Further, after Article 31B of the Constitution, Article 31C was inserted: Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.
- Provided that where such law is made by the legislature of a state, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the president, has received his assent.
- The Constitution (29th amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting two Kerala Acts in furtherance of land reforms after Entry 64, namely, Entry 65, Kerala Land Reforms Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66, Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).
- These amendments were challenged in Kesavananda Bharati's case. The decision in Kesavananda Bharati's case was rendered on April 24, 1973 by a 12 judge bench. Golak Nath's case was overruled. The majority opinion held that Article 368 did not enable the Parliament to alter "the basic structure" or framework of the Constitution.
- The Constitution (24th Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31C was also held to be valid. However, the second part of Article 31C that "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" was declared unconstitutional.
- The Constitution 29th Amendment was held valid. The validity of the 26th Amendment was left to be determined by a Constitution bench of five judges.
- The majority opinion did not accept the unlimited power of the Parliament to amend the Constitution and, instead, held that Article 368 has implied limitations.
- It does not enable Parliament to alter "the basic structure" or framework of the Constitution.
- In June 1975, the Allahabad High Court set aside the election of Indira Gandhi to the Lok Sabha on the ground of corrupt practices.
- The Constitution (39th Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329A after Article
- Sub-clauses (4) and (5) of Article 329A reads as under:
  - 39th Amendment Act, 1975, in so far as it relates to election petitions and matters connected therewith
- These clauses aimed to limit judicial review of election disputes related to the Prime Minister and Speaker of the Lok Sabha, but were ultimately deemed unconstitutional.
- In Indira Nehru Gandhi vs Raj Narain (1975) the clauses were struck down as being violative of the basic structure of the Constitution.
- About two weeks before the Constitution bench rendered the decision in Indira Gandhi's case, internal Emergency was proclaimed in the country.
- During the Emergency from June 26, 1975 to March 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 & Articles 14 and 21 by virtue of Article 359.
- During internal Emergency, Parliament passed Constitution (40th Amendment) Act, 1976.
- By clause(3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted, many were unrelated to land reforms.
- Article 368 was amended by the Constitution (42nd Amendment) Act, 1976 — inserted clauses (4) & (5):
  - “(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article shall be called in question in any court on any ground.
- It was hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article. In other words, it nullified the Supreme Court's ruling on "basic structure" of the Constitution.
- The 44th Amendment Act 1978 removed some of the obnoxious provisions and ensured greater protection of the fundamental right.
- In Minerva Mills case (1979) the Supreme Court struck down clauses (4) and (5) of Article 368 finding that they violated the basic structure of the Constitution.
- Suffice it to say that the doctrine of "the basic structure", affirmed in Indira Gandhi's case in 1975, received added affirmation thereafter.
- In each case, the court spelt out features – such as equality & the rule of law as the basic structure.
- It held in L Chandra Kumar vs Union of India (1997) that the power of judicial review is an integral & essential feature of the Constitution
- The jurisdiction so conferred on the high courts & the Supreme Court is also a part of that "basic structure."
- How then could the Ninth Schedule possibly survive that doctrine?
  - The wonder is not that the court ruled as it did on January 11, 2007 that the Ninth Schedule of 284 protected acts, central and state, survived as long as it did after April 27, 1973 when the court propounded the doctrine.

- A fortiori after the court's repeated affirmation of the doctrine. If Parliament may not alter the basic structure directly, surely, it may not afford protection to its violation by exempting the violation from judicial review through the Ninth Schedule inserted in 1951 for limited purpose.
- The Ninth Schedule was, after 1973, a sitting duck awaiting the grapeshot of the judicial gun. As ever, media hype over danger to "progressive" legislation or fear of "judicial activism" blurred a simple issue.
- Prolivity & repetitiveness of the judgment did the rest.
- Over the years the quality of the Supreme Court's judgments has suffered. With chief justice of India Y K Sabharwal it reached rock bottom. He writes of "trite knowledge" and "intellectual debates" in the constituent assembly.
- His judgments in this case & the case of expulsion of MPs could have been reduced by a half – if not two-thirds without any loss to posterity. Quoting Amartya Sen pointlessly helps not a bit.
- What the court ruled in 1973 is that no part of the Constitution is exempt from Parliament's power to amend the Constitution, the fundamental rights included.
- As H R Khanna's explained in Indira Gandhi's case, while fundamental rights may be amended, but if that amendment violates the basic structure, it would be unconstitutional; for example, if it takes away the rights to equality (Article 14) or to freedom of speech (Article 19(1)(a)). This has to be tested in each case – as, indeed, it has been since April 1973.
- This is the simple issue. As chief justice of India Sabharwal puts it neatly :- If Parliament, exercising constituent power cannot enact an amendment destroying the secular character of the state, neither can Parliament, exercising its constituent power, permit the Parliament or the state legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result. To hold otherwise would be to abandon the doctrine of basic structure in respect of fundamental rights for every part of that basic structure can be destroyed by first enacting laws which produce that effect, and then protecting them by inclusion in Schedule.
- He proceeds to point out that Each exercise of the amending power inserting laws into Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added in the Ninth Schedule.
- Secondly, insertion in Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution.
- There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III in so far as Ninth Schedule legislations are concerned.
- The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz, the judiciary. It is a drastic provision (provision unheard of in any other democracy).
- The Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine.
- Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case.
- Take the example of freedom of press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a).
- If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of respondents contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31B.
- The impact of such an amendment shall have to be tested on the touchstone of rights guaranteed by Part III of the Constitution.
- The secular character of our Constitution is a matter of conclusion to be drawn from various Articles ; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution
- Therefore, one has to take a synoptic view of the various articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the articles in Part III.
- In Minerva Mills case the court ruled that Articles 14, 19 and 21 (right to life and liberty) form the part of the basic structure. Thus, each law added to the Ninth Schedule hereafter will be subject to judicial review.
- Can Parliament increase the amending power by amendment of Article 368?
- If constituent power under Article 368 cannot be made unlimited, it follows that Article 31B cannot be so used as to confer unlimited power. Article 31B cannot go beyond the limited amending power contained in Article 368.
- The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. The CJI made a noteworthy remark.

- It would be incorrect to assume that social content exists only in Directive Principles and not in the Fundamental Rights.
- Articles 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law.
- Article 16(4) refers to egalitarian equality. The general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination.
- Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the state by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc, and yet it permits classification for certain classes, hence social content exists in Fundamental Rights as well.
- All these are relevant considerations to test the validity of the Ninth Schedule laws.
- Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law.
- These would be meaningless if the violation was not subject to the judicial review.
- All these would be redundant if the legislative, executive and judicial powers are vested in one organ.
- Action taken and transactions finalised as a result of the impugned Acts shall not be open to challenge.
- The First Amendment added 13 laws to the Schedule.
- Subsequent amendments in 1955, 1964, 1971, 1974, 1975, 1976, 1984, 1990, 1994, and 1999 have taken the number of protected laws to 284.
- Article 31B also has retrospective operation: meaning if laws are inserted in the Ninth Schedule

after they are declared unconstitutional, they are considered to have been in the Schedule since their commencement, and thus valid.

#### JUDICIAL REVIEW

- Asserting its right to judge the validity of any law, the Supreme Court has ruled that Acts placed in the Ninth Schedule of the Constitution by the legislature -- to make them immune to challenge for violation of fundamental rights -- were open to judicial scrutiny.
- A nine-judge constitution bench headed by Chief Justice YK Sabharwal delivered the historic verdict
- The bench said, "Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right.
- The court said the authority to enact a law and decide the legality of the limitations cannot be vested in one organ. "The validity to the limitation on the rights in Part III can only be examined by the judiciary
- The court, however, upheld the validity of Article 31-B of the Constitution, which empowers Parliament to place laws in the Ninth Schedule. But it said that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack "on the ground that they destroy or damage the basic structure, if the Fundamental Rights are taken away or abrogated pertaining to the basic structure".
- While upholding Parliament's power under Article 368 to amend the Constitution and place laws in the Ninth Schedule, the court said it was a limited power, which was subject to judicial review.