

EVOLUTION OF NINTH SCHEDULE WITH RESPECT TO I.R COELHO JUDGEMENT

GURNEET SINGH BUDHIRAJA

CHRIST UNIVERSITY, BANGALORE

Abstract

The Constitution (First Amendment) Act of 1951 added Article 31B and the Ninth Schedule as a safeguard against potential challenges to land reform policies based on the touchstone of Fundamental Rights. In *L.R. Coelho v. State of T.N*, the Supreme Court curtailed this safeguard by referring such legislation to judicial review on the basis of abrogation of the Basic Structure. While Coelho's work has resulted in a number of unintended outcomes, which have been discussed in this paper, its subsequent clarification in *Glanrock Estate (P) Ltd. v. State of T.N*. The aim of the research paper is to settle the issue over the legitimacy of the Ninth Schedule laws by following the text of Article 31B while maintaining conformity with the Basic Structure. The paper goes on to argue that the Ninth Schedule is no longer relevant due to its skewed purpose and potential for abuse.

Key Words: Ninth Schedule, I.R Coelho, Constitution, Basic Structure, Land Reforms

The Ninth Schedule: Its History, Context, and Importance

With the Constitution (First Amendment) Act of 1951, one of the most problematic sections in Indian constitutional history, Article 31B, and the Ninth Schedule, were included into the Constitution of India of 1950. Although such legislations or their provisions may infringe Part III of the Constitution, which provides for Fundamental Rights, Article 31B authorizes them from the day they are included in the Ninth Schedule. Furthermore, any judgement, decree, or order of any court or tribunal upholding the constitutional invalidity of the abovementioned legislation or its provisions, as well as Article 31A, is annulled.¹

The Constitution founders enacted Article 31B to insulate land reform policies from judicial review on the basis of the basic right to property in order to free India from the scourge of the zamindari system.² The Ninth Schedule originally comprised thirteen laws, each targeted at land reform; currently, it contains a bewildering collection of 284 laws encompassing reservation, industries, trade, and mines, to name a few, earning it the nickname of

¹ *Jagannath v. Authorized Officer*, (1971) 2 SCC 893; *State of U.P. v. Brijendra Singh*, AIR 1961 SC 14 : (1961) 1 SCR 36.

² A.G. Noorani, "Ninth Schedule and the Supreme Court", 42 *Econ. & Pol. Wkly* 731 (2007).

"Constitutional Dustbin."³ According to the most recent count, the Constitution (Seventy-Eighth Amendment) Act of 1995 adds 27 state-specific land reform laws to the Ninth Schedule. Despite the fact that Article 31B is separate from Article 31A and does not specify the types of legislation that can be included in the Ninth Schedule, the Legislature has found it very easy to provide fictitious protection to ostensibly unconstitutional laws by including them in the Ninth Schedule.

The Supreme Court, in *I.R. Coelho v. State of T.N.*⁴ dealt with the ramifications of the fictional immunity granted by Article 31B and threw open the doors to judicial review of constitutional amendments inserting unconstitutional laws in the Ninth Schedule, including on the touchstone of Part III and abrogation of the Basic Structure (hereinafter "Impact Test").⁵ The Supreme Court reaffirmed the two-prong *Coelho* Impact Test for determining the constitutional validity of the Ninth Schedule laws in *Glanrock Estate (P) Ltd. v. State of T.N.*⁶, where the Supreme Court reaffirmed the two-prong *Coelho* Impact Test for determining the constitutional validity of the Ninth Schedule laws, that is, only laws that violate Part III of the Constitution.

This test, however, was not applied by Justice Dalveer Bhandari in his dissenting opinion in *Ashoka Kumar Thakur v. Union of India*⁷ on severing the word 'unaided' from Article 15(5), which was later rebutted by Justice B. Sudershan Reddy in *Indian Medical Assn. v. Union of India*⁸, who used a variation of the Impact Test, the Essence of Rights Test, to uphold the validity of Article 15(5) in its entirety. These varying readings of *Coelho* exposed the startling flaws in the judgement, and while *Glanrock Estate* provided some much-needed clarity, it didn't totally eliminate the difficulties raised by *Coelho*, which may be seen in *K.T. Plantation (P) Ltd. v. State of Karnataka*.⁹

The *Coelho* and Its Consequences.

The *Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969*, and the *West Bengal Land Holding Revenue Act, 1979* were inserted in the Ninth Schedule by the Constitution (Thirty-Fourth Amendment) Act, 1974, and the Constitution (Sixty-Sixth Amendment) Act, 1990. The *Janmam Act* vested certain lands, including forest land, in the

³ <https://timesofindia.indiatimes.com/edit-page/constitutional-dustbin/articleshow/1359898.cms#:~:text=The%20dustbin%20was%20of%20limitless,in%20the%20dustbin%20with%20impunity>. (Accessed on 6th November 2021 at 10:26 AM).

⁴ *I.R. Coelho v. State of T.N.*, (1999) 7 SCC 580.

⁵ Karishma D. Dodeja "Belling the Cat : The Curious Case of the Ninth Schedule in Indian Constitution" *National Law School of India Review* (2016) Vol.28 Issue 1 pg. 1-17.

⁶ *Glanrock Estate (P) Ltd. v. State of T.N.*, (2010) 10 SCC 96.

⁷ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

⁸ *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179.

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

Janmam Estate in the State of Tamil Nadu, and this provision was found to be in violation of the Constitution in *Balmadies Plantations Ltd. v. State of TN*¹⁰, because land vesting was not considered an agrarian reform measure under Article 31. Similarly, in *Paschimbanga Rajya Bhumijibi Sangha v. State of W.B.*¹¹, a division bench of the Calcutta high court struck down Section 2(c) of the West Bengal Act, which defined the word 'area,' as unconstitutional because it did not provide for a valid determination of 'area' for land revenue assessment. In light of the preceding decisions, the petitioner questioned the constitutional validity of the Amendment Acts, claiming that the Ninth Schedule effectively validated the Janmam Act and the West Bengal Act despite their violations of Part III, effectively shielding them from judicial review and thus violating the Basic Structure.¹² The constitution bench cited the Supreme Court's decision in *Waman Rao v. Union of India*¹³ in which it was held that constitutional amendments made after April 24, 1973 (the date of the *Kesavananda Bharati* verdict¹⁴) would be subject to judicial review on the basis of violation of the Basic Structure, while acknowledging that certain apparent inconsistencies in the said judgement would have to be addressed by a larger Supreme Court bench. As a result, the constitution bench referred these matters to the Supreme Court's nine-judge bench.

The aforementioned bench decided that laws that abridge or abrogate Part III and thereby contradict the Basic Structure, whether by alteration of any article of Part III or by placement in the Ninth Schedule, are subject to judicial review. Because certain Fundamental Rights are part of the Basic Structure, the law's actual effect and impact on Part III will establish whether it breaches it.¹⁵ As a result, constitutional amendments to the Ninth Schedule enacted on or after April 24, 1973 would be subject to judicial review only on the basis of a breach of the Basic Structure, as expressed in Articles 14, 19, and 21, and the principles underlying the above mentioned articles.¹⁶ Furthermore, Article 31 B's fictitious immunity would not prevent it from being tested on the Basic Structure touchstone. *Glanrock Estate's* ratio goes a step further by distinguishing between simple violations of Part III and violations of Part III that have an influence on the Basic Structure. As a result, violations of Part III, which must affect the Basic Structure, will be declared unconstitutional. According to Coelho, the Impact Test and the Essence of Rights Test are the methods for arriving at such a conclusion. The Court also ordered that a three-judge panel hear the facts-based appeal, omitting objections to

¹⁰ (1972) 2 SCC 133.

¹¹ (1986) 90 CWN 1108.

¹² *Supra* Note 5.

¹³ (1981) 2 SCC 362.

¹⁴ 8 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁵ *Supra* Note 5.

¹⁶ <https://www.tribuneindia.com/2007/20070129/edit.htm#4> (Accessed on 6th November 2021 at 11:52 AM).

Ninth Schedule sections that the Court had already validated, as well as actions taken and transactions completed as a result of the challenged statutes.

While a literal reading of Coelho blurred the line between ordinary legislation and constitutional amendments, Glanrock Estate highlighted that, while ordinary legislation can be challenged on the basis of the Constitution, constitutional modifications must adhere to the Basic Structure.¹⁷ Do laws become part of the Constitution simply by being incorporated into the Ninth Schedule through constitutional amendments, or do they owe their legitimacy to the exercise of the amending power?¹⁸ It's worth noting that Glanrock Estate concedes that such regulations might be challenged on the basis of legislative competence, implying that the Ninth Schedule isn't part of the Constitution. This raises the issue of separating the law from the body of the amendment; because the constitutional amendment relating to the Ninth Schedule is the law itself, Coelho's actual implication now is that Ninth Schedule laws are subject to the Basic Structure, despite the fact that they are not per se part of the Constitution and have not been enacted under the constituent power of the parliament.¹⁹ In some ways, Coelho is a victory of Part III, albeit through the use of the Basic.²⁰

The Case of the 93rd Amendment: Coelho's New Interpretation

Justice Dalveer Bhandari's dissenting opinion in the 93rd Amendment Case²¹ shows an appropriate but unsophisticated application of Coelho. The Supreme Court had to decide whether a citizen's right to work under Article 19(1)(g) was revoked since the State imposed reservations on private unaided non-minority educational institutions, purportedly infringing the Basic Structure. In the lack of a challenge from the aforementioned institutions, Chief Justice K.G. Balakrishnan declined to rule on the matter; nonetheless, Justice Bhandari determined that the reference to "unaided" in Article 15(5) should be removed since it was unconstitutional. It's worth noting that the Supreme Court was also compelled to rule on the constitutionality of Article 15(5) using the Basic Structure as a criterion.

Justice Bhandari's application of Coelho in Ashok Kumar Thakur may be argued to be:

There was no challenge from the private unaided non-minority educational system, thus it was superfluous.

A reaffirmation of Inamdar and, as a result, an attempt to thwart the legislature's goal as represented in Article 15.

¹⁷ *Supra* Note 5.

¹⁸ H.M Seervi "Constitution of India" 4th ed, 2013 pg. 30-48.

¹⁹ Kamala Sankaran, "From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure", 49 J.I.L.I. 240, 248 (2007).

²⁰ *Supra* Note 5.

²¹ 5 Ashoka Kumar Thakur, (2008) 6 SCC 1

A discussion of the significance of Article 19(l)(g) in relation to each individual's right to freedom of occupation in relation to other fundamental Rights, such as Article 19(1)(a) right to free speech.

A celebration of 'merit' despite the fact that such a concept is not supported by our constitution.

A means to defend his anti-reservations policy in the said institution.

Although it can be described as repackaging the Impact Test, it cannot be critiqued as an improper application of the Impact Test. Coelho's Impact Test, as clarified in *Glanrock Estate*, was centered on a violation of Part III leading to the abrogation of the Basic Structure; however, Justice Bhandari's Impact Test first examines the violation of a 'facet' of the Basic Structure and then its effect of altering the said facet's original identity, implying that Justice Bhandari did not use the Coelho Impact Test but rather the Basic Structure to test constitutional amendments.²²

Glanrock Estate in View of Coelho

The *Glanrock Estate* verdict in 2010 was thought to have answered Coelho's puzzle. The issue before the three-judge bench, as referred to by the nine-judge bench in *Coelho*, was the constitutionality of the Constitution (Thirty-fourth Amendment) Act, 1974, which put the Janmam Act in the Ninth Schedule under Article 31B of the Constitution. The Court ruled that the Tamil Nadu Legislature had the authority to pass the Janmam Act, and used the Impact Test to reduce the question in this case to:

Whether the State's acquisition of the forest property in the Janmam estate infringed on any rights under Part III of the Constitution.

Whether the Constitution's identity, i.e. its Basic Structure, was altered as a result of the breach.

The petitioner claimed that Articles 14, 19, and 300A of the Constitution had been violated in the first test. While the grounds for attack under Article 19 are unclear, and Article 300A merely establishes a constitutional right to property, whose deprivation can be justified by authority of law, the petitioners attempted an article 14 violation based on the non-application of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, because the forest lands were cleared before the ceiling could be determined and compensation paid under the said statute.

The Court distinguished between the Ceiling Act and the Janmam Act, stating that the latter was enacted to acquire janmis' rights in Janmam estates and to introduce ryotwari settlement,

²² *Supra* Note 5.

whereas the former was enacted to set a ceiling on agricultural land holdings and to distribute excess lands to the landless and agricultural population. As a result, the similarly situated test will not apply in this case; as a result, Article 14 will not be infringed in any way. Because the initial test was negative, the subject of testing the amendment on the touchstone of the basic structure is no longer relevant.²³

Conclusion

The main purpose of Article 31B was to defend land reform laws. What's more remarkable is that, despite the Constitution's simple Article 31A, the framers felt the need to include Article 31 B to preserve land reform legislation. For instance, the Janmam Act could have been covered under Article 31A(1)(a) providing for "*the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights*".²⁴ Although Article 31B gives greater protection against Part III than Article 31A, which only protects against Articles 14 and 19, the paper contends that land reform legislation itself cannot conceivably be judged on the basis of any other Part III provision than Articles 14 and 19. Furthermore, with the right to property no longer being a Fundamental Right, land reform laws do not require Article 19 protection, save and except for a far-fetched Article 19(1)(g) challenge to practice any profession, or to carry on any occupation, trade, or business.

However, the founders of the Constitution thought it necessary to create another clause to expressly cushion agrarian measures, in which case the Ninth Schedule now needs to be cleaned up by removing such laws that do not specifically deal with land reforms. An alternate idea would be to change Article 31B by adding precise indicators on the types of land reform legislation that would be eligible for the Ninth Schedule's already restricted protection. A more straightforward option would be to delete Article 31B, save land reform laws under Article 31A, and create a separate schedule in the Constitution to designate which laws are protected by Article 31A. Despite its flaws and shortcomings, Coelho has changed the way people think about judicial review and underlined the necessity of the Basic Structure

WORDS SPEAK

²³ *Supra* Note 5.

²⁴ *Supra* Note 5.