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This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

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CONTENTS

- I. Introduction
 - II. Pros and Cons of Living Constitution Vis-à-Vis Dead Constitution
 - III. So which type of Constitution do we have: Alive or Dead?
 - IV. Indian Constitution vis-à-vis American Constitution
 - V. The basic structure doctrine adds rigidity or flexibility to the Constitution?
 - VI. Judicial Review and Judicial Activism
 - VII. Conclusion
-

I. INTRODUCTION

Bhim Rao Ambedkar in his constituent assembly said “However good a constitution may be, it is sure to turn out to be bad because those who are called to work it happen to be a bad lot. However bad a constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot.”¹ A Living constitution is the one which evolves, changes over time, and adapts to new circumstances without losing its original intent. A living constitution is flexible; the amendment making in this type of constitution is easy compared to the dead constitution. So, the question arises that which type of constitution our nation has, in my opinion; Indian constitution is both adaptable and unbending in nature. Our Constitution producers circumspectly picked this approach for the accompanying reasons. It is adaptable so that the constitution can react to the progressions of the general public and consolidate new enactment's every now and then easily. It is inflexible so that the constitution is not changed by few greedy groups of politicians for their political gains. On the Other hand, the dead constitution as quoted by Justice Antonin Scalia the only good Constitution is a dead Constitution. The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights are—you know—come forth. And that’s an enormous responsibility in a democracy to place upon nine lawyers or even 30 lawyers. “Dead Constitution is a document made to preserve the basic principles of the constitution and to uphold its essence. It cannot be interpreted according to the wish of judges, lawmakers, and bureaucrats it means, its meaning is fixed. The dead constitution cannot be amended except by the difficult process of constitutional amendment. The constitution of America is considered as the Dead constitution which has seen 33 amendments in last 230 years.

So which type of constitution is best suited for our country, India has changed from the time constitution was made in incalculable ways. The nation has grown; its population has multiplied several times over. The technology has changed, the international conditions have changed, the economy has changed, and the social mores has changed in a way no constitution maker could have possibly imagined or foreseen. Furthermore, it is just not realistic to expect the lumbering

¹ Ronojoy Sen| TNN | Jan 23, 2010

revision procedure to stay aware of these progressions. The architect of the Constitution, B R Ambedkar, noted in his concluding speech that he had little doubt that it would be amended with time so the framers inserted Article 368² in the constitution which explains the procedure for amendment.

II. PROS AND CONS OF LIVING CONSTITUTION VIS-À-VIS DEAD CONSTITUTION

- I. By Living Constitution means the constitution that was written as a dynamic document, so it can change with the time. Our Society is a living organism which is changing rapidly over the time so, the rules and regulation that are governing the society must be modified in accordance with it and living constitution accepts the necessity of modifications according to changing needs of the society, on the other hand, the dead constitution is rigid in nature, so the modification is very tuff.
- II. Secondly, in the actual working of the living Constitution, there is enough flexibility of interpretations of rules and laws laid down by constitution as our constitution does not only deal with substantive law but also with procedural law but the dead constitution follows the rule of strict construction.³
- III. On the other hand, the Constitution is supposed to be rock solid foundation of a nation, the epitome of our most major rule that is the entire thought of having a constitution.
- IV. The living constitution is most probably manipulable constitution, if the constitution is dynamic means it's changing and question arises that the persons who are changing it might do so according to on his or her ideas.

III. SO WHICH TYPE OF CONSTITUTION DO WE HAVE: ALIVE OR DEAD?

This has been a topic of debate since the commencement of the constitution that whether it is flexible or rigid in nature but things can't be always black and white they are sometimes gray. In the case of Indian constitution existence of gray should be accepted.

The creators of the constitution were shrewd individuals who fused the best of each constitution and brought forth managing the book of the largest democracy. The producers were aware of the fact that excessively rigid constitution won't withstand the weight of progress and in the meantime, excessively flexible constitution won't have the capacity to give security, predictability, and Identity to its people. Hence we have Article 368⁴ of the constitution which provides amendment process. The elasticity and stiffness can be decided by looking at kinds of amendment permitted under the constitution. There are three ways for amending the constitution

1. Similar to ordinary law: simple majority in Parliament: amendments such as those relating to the establishment of states or use of official language which only require a simple majority of

² The Constitution of India, 1950

³ Theory given by Thomas Jefferson

⁴ Parliament may in the exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

Parliament as mentioned article 2 and 3 of the constitution. This amendment process shows the flexibility of constitution.

2. The special majority in Parliament in both Houses separately in matters relating to fundamental rights and directive principle of state policy: as per article 368, this process can be said as a mixture of both flexibility and rigidity.

3. Special majority of Parliament and ratification of one-half of states in matters such as election of the President or the Supreme Court this Indicates more rigidity then flexibility: article 368

Thus, both rigidity and flexibility are characteristics of the Indian Constitution:

Basic structure doctrine propounded in *Keshvanand Bharati vs. the State of Kerala*⁵ have certainly propounded more rigidity in the constitution. Indian constitution can be said as more flexible and less rigid constitution thus it can be said as the alive constitution.

IV. INDIAN CONSTITUTION VIS-À-VIS AMERICAN CONSTITUTION

The constitutions of India and America are often compared because of their different natures. Indian constitution is longest written constitution whereas the American constitution is the shortest written constitution. The Indian constitution is considered as living, breathing document because almost like a living being document keeps on responding to the situations, on the other hand, the constitution of America is considered as a dead document because of the inflexible nature. Till date, the constitution of America is amended 27 times in which first ten amendments was a bill of rights made in year 1791 and other 17 was for Individual civil rights protection, in 228 years the American constitution is only amended 27 times whereas Indian constitution in 67 years has been amended 101 times. Thus American constitution is an example of rigidity which does not accept changes easily. B.R Ambedkar in his concluding speech pointed out that comparing to the British and American constitution the amending process is far much simpler.

The process of amending the American constitution is far much difficult then Indian constitution. The authority of amending the constitution of United States is derived from article V of the constitution. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate⁶. Whereas the amendment Process of Indian constitution is mentioned in article 368. (123)

⁵ (1973) 4 SCC 225

⁶ Article V (amendment process) Signed in convention September 17, 1787. Ratified June 21, 1788

V. THE BASIC STRUCTURE DOCTRINE ADDS RIGIDITY OR FLEXIBILITY TO THE CONSTITUTION?

The Introduction of the unamendable way of certain fundamental elements of the Constitution, propounded in the *Keshavananda Bharati* case has unquestionably presented greater inflexibility. In this landmark case, the judiciary set certain limits to the parliament's power to amend the constitution. No amendment can violate the basic structure of the constitution. From this case, it was decided that parliament can amend any and all part of the constitution but within its limitations and the judiciary is the final authority for deciding that whether the amendment is violating the basic structure or not and what will be the basic structure. The doctrine thus forms the basis of a restricted power of the Supreme Court to reconsider and strike down constitutional amendments enacted by the Parliament which is in a quarrel with or seek out to alter this "basic structure" of the Constitution. The basic structure doctrine is only applicable to the constitutional amendments although the basic structure is not clearly described anywhere and it is purely discretion of court deciding what basic structure is and what is not. In *Shankari Prasad Singh Deo v. UOI*⁷, the Supreme Court collectively held, "The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatsoever. The basic structure principle was first propounded in 1964 by Justice J.R. Mudholkar in his dissent in the case of *Sajjan Singh vs. State of Rajasthan*⁸ "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 Article 368?"⁹ Followed in the case of *Golak Nath vs. State of Punjab*¹⁰ in which Supreme Court reversed its earlier decision Part III of the constitution which includes Fundamental Rights was given transcendental position and beyond the reach of parliament and it was decided that any amendment which takes away or abridges with fundamental rights is unconstitutional. Then in the year of 1973, the landmark decision delivered by 13 judges' constitutional bench in the case of *Keshvanand Bharati v. the State of Kerala* decided that parliament has wide powers except the power to destroy or emasculate the basic elements or fundamental features of the constitution. In writing justice Sarv Mittra Sikri indicated that basic structure consists of the following of the constitution.

- The federal Character of the constitution.
- Maintenance of the separation of powers.
- The secular character of the constitution.
- The republican and democratic form of government.
- The supremacy of the constitution.¹¹

In *Indira Nehru Gandhi v. Raj Narayan*¹², the supreme court applied the theory of basic structure and struck down Clause(4) of article 329-A which was inserted by constitution(39th

⁷ (AIR. 1951 SC 458)

⁸ 1965 AIR 845, 1965 SCR (1) 933

⁹ Soul of The Nation - Constitution of India By P. R. Gupta

¹⁰ (1967 AIR 1643, 1967 SCR (2) 762)

¹¹ Soul of The Nation - Constitution of India By P. R. Gupta

amendment) Act, 1975 on the ground that it was beyond the amending power of parliament as it destroyed the 'basic feature' of the constitution. Chandrachud, J., struck down Cls. (4) and (5) as unconstitutional on the ground that they were an outright negation of the right to equality conferred by article 14, a right which is a basic postulate of our constitution. The Supreme Court thus added the following features as basic features of the constitution to the list of basic features laid down in the Keshvanand Bharati case:

1. Rule of law
2. Judicial review
3. Democracy, which implies free and fair election

It has been held that the jurisdiction of the supreme court under Art. 32, is the basic feature of the constitution

In *Minerva Mills Ltd. V. Union of India*¹³ the Supreme Court has held that the following are the basic features of the constitution:

1. Limited power of parliament to amend the constitution
2. Harmony and balance between fundamental rights and directive principles.
3. Fundamental rights in certain cases;
4. Power of judicial review in certain cases

Independence of the judiciary is part of the basic structure¹⁴

42nd Amendment and Article 368 - After the decision of the supreme court in Keshavananda Bharati and Indira Nehru Gandhi cases the constitution (42nd amendment) act 1976, was passed which added to new clauses, namely, clauses(4) and (5) to article 368 of the constitution. Clause (4) provided that "no constitution amendment (including the provision of part III) or purporting to have been made under article 368 whether before or after the commencement of the constitution (42nd amendment) Act, 1976 shall be called in any court on any ground. Clause (5) removed any doubts about the scope of amending power. It declared that there shall be no limitation whatever on the constituent power of parliament to amend the provisions of the constitution under this article. Thus insertion of clause (5) made it clear that even the basic feature of the constitution could be amended. This amendment removed the limitation of amending the constitution imposed by the ruling of Keshavananda Bharati's case.

Then in *Minerva Mills v. Union of India*¹⁵ the supreme court struck down Clauses (4) and (5) of Article 368 inserted by the 42nd amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution . Limited amending power is the basic structure of the constitution. Since these clauses removed all limitations on the amending power

¹² AIR 1975 SC 2299

¹³ AIR 1980 SC 1789

¹⁴ Shri Kumar Padma Prasad v. The Union of India (1992) 2 SCC 428

¹⁵ AIR 1980 SC 1789

and thereby conferred an unlimited amending power, it was destructive of the basic feature of the constitution.

In the year of 1987, the case of *S.P. Sampat Kumar v. Union of India*¹⁶ challenged the constitutional validity of Art. 323-A and the provisions of Administrative Tribunals Act, 1985 was challenged on the ground that the act by excluding the jurisdiction of the high court under Arts. 226 and 227 in service matters had destroyed the power of judicial review which was the basic feature of Indian constitution. It was held that though the act has excluded the judicial review of the high court in the service matters under Art. 226 and 227, yet it has not excluded judicial review of Art. 32 and 136 the act is valid.

Again in case of *I.R Coelho v. State of Tamil Nadu*¹⁷ the supreme court held that any law placed in the 9th schedule after April 24, 1974, when Keshavananda Bharati's judgment was delivered would be open to challenge. Even though an act is put in the 9th schedule by a constitutional amendment, its provisions would be open to challenge on the ground that they destroy or damage the basic feature, if the fundamental rights are taken away or abrogated pertaining to the basic feature of the constitution.

VI. JUDICIAL REVIEW AND JUDICIAL ACTIVISM

Though there is nothing written in Indian constitution about basic structure but court gave its major judgments based on it this is done in exercise of the power of judicial review given by Article 13, of constitution of India¹⁸ which is originated from the *Marbury V. Madison*¹⁹ case in the USA. It is a process by which court has the power to review to the constitutionality of any statute or application of statute. Judicial review can be defined as a doctrine under which legislative and executive actions are subject to review by the judiciary. People often get confused between the term judicial review and judicial activism. In India Judicial activism was made possible with PIL (Public Interest Litigation) Judicial activism can be said as a loophole to an alive constitution, judicial activism is an ideology where judges give judgments on their political or personal agenda rather than on law through precedents in case laws. It gives the power to the interpreters of the constitution to re-interpret the laws and make laws as per requirement of present scenario. The role of judiciary in judicial activism becomes pertinent as they would use existing personal views in delivering a judgement. This is double-edged sword right side of

¹⁶ AIR 1987 SC 386

¹⁷ AIR 2007 SC 8617

¹⁸ Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

¹⁹ 5 U.S. 137 (1803)

which is definitely sharper than the wrong side and this has been proved in many cases such as *Aruna Ramchandra Shanbaug vs Union of India & Ors.*²⁰ in its landmark judgment, passive euthanasia was allowed in India only if the person is mind-dead and cannot breathe without support machine and those in a Persistent Vegetative State (PVS) for whom the feed can be decreased out and pain managing palliatives are included, as indicated by setting down international specifications.

In the case of *Vishakha and others v State of Rajasthan*²¹ where Vishakha and another group of women filed a PIL against the state of Rajasthan and Union of India to enforce fundamental rights of working women under Art.14,19 and 21 of Constitution of India. The Supreme court laid down some guidelines to lessen the problem of sexual harassment in 1997 which became the sexual harassment of women at the workplace (prevention, prohibition, and Redressal), Act 2013. It laid down the requirements for employers dealing with complaints of sexual assault and predetermined the formation of a committee to dispose of complaints from victims of harassments.

In short, judicial activism means that instead of judicial restraint, the Supreme Court and other lower courts become activists and compel the authority to act and sometimes also direct the govt. regarding policies and also matters of administration.²²

This is clear from above statements that judicial review takes place after the rule or law has been passed or implemented but the judicial activism can take place anytime when the fundamental right of a person is violated.

VII. CONCLUSION

Law can change the society and society can change the law. For this statement number of amendments is there in the statute. Like the 86th amendment in art. 43 to the const. which says The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. This also inserted 21 An of the constitution which is - The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

By the 42nd amendment, four new directive principles were added

- I. To secure open doors for solid advancement of youngsters (Article 39)
- II. To elevate square with equity and to give free lawful guide to poor people (Article 39 A)
- III. To find a way to secure the investment of specialists in the administration of industries (Article 43 A)
- IV. To ensure and enhance the environment and to protect forests and wildlife (Article 48A)

²⁰ (2011) 4 SCC 454

²¹ JT 1997(7)SC 384

²² Short Essay on Judicial Activism in India by DNYANESH KUMAR accessed on 20 April 2017

Hence it can be said that alive constitution is more effective. The nation can grow with the alive constitution.

From the above study, it can be said that the Indian constitution is a mixture of both rigidity and flexibility, it is not that rigid that it cannot be amended and not that flexible that the spirit of the constitution is lost by amendment. It is clear that Indian constitution is more flexible than rigid. We have amended our constitution 101 times if it was rigid would it have been possible. The Constitutional Amendment Acts like the First, Fourth, Twenty-Fourth, Twenty-Fifth, Thirty-Ninth, Forty-second, Forty-fourth, Seventy-third, Seventy-fourth, and Ninety-seventh are crucial changes so far included in the original Constitution.²³ Even after so many amendments in sixty-seven years of working on our constitution, it still continues to function as the framework within which our country operates. In some matters, it is more rigid than flexible such as amendments relating to federal character although more flexible in other.

The constitution of India has proved to be a document above all the bodies (Executive, Legislative, and Judiciary). In short, it can be concluded that our constitution consists of both living and dead parts.

²³ Indian constitution flexible or rigid or a mixture of both on Gk today.in accessed on 20 April 2017