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Editorial

The basic and most important unit of the society has been the family from the beginning. For the empowerment and development of the country, first of all it is necessary to pay attention to the moral, social, economic and cultural dimensions of basic institutions like family. Balanced development of the family is very important for the development of the society. Therefore, if we want to have a complete and balanced development of the country, then we need to lay maximum emphasis on the basic institution called family. It is necessary that we should not make any discrimination between son and daughter in the family and we must explain this to our sons and get them involved in their activities. Even today, those who belong to the old belief believe that a woman cannot get any freedom, she cannot go anywhere alone, she cannot roam anywhere alone, but today's youth refuse to accept these values.

Some people also say that the importance of the walls in the house, the same importance is given to the education of the boys in the society. But how is a house made? Who are in the base of the house? The base of the house is our daughters, our girls, that means they are related to the roots. If our root becomes weak in the society, then our house or house cannot be strong at all. There is a need to understand this social context in reality.

The extent of favoritism is reached when we see discrimination in small tasks. Some people think that a girl is someone else's wealth, what job she should do. That's why some parents discriminate between boys and girls and this discrimination is visible somewhere in our behavior, in feeding and dressing. This is sheer injustice. God has given the same brain to boys and girls and today girls are proving it by bringing better results.

Girls stay at their parents' house for only a few days, so it is our duty to pay deep attention to their education, upbringing, only then we can fulfill the concept of a strong society. God has made us the trustee of our children so it is our duty to treat all members equally with full justice because both boys and girls have same power, same soul. So we should give them equal opportunities for development.

The basic objective of women empowerment is the development of women and communication of self-confidence in them. Women empowerment is important for the overall development of the society. Empowerment of women is the most important social phenomenon because they are the creators. If you empower them, make them strong, encourage them, it is better for the society. Women and men are the basis of creation and human society. Both complement each other. These are the wheels of the chariot of life by which the journey of life runs

smoothly. The role of both has been equally important for stability in family and society. The basis of change and development in a society depends on the mutual interaction of men and women, walking step by step and equal mobility of both. A chaotic situation is created in social life when any one side lags behind. The history of mankind is witness to this that where women have been neglected, the development of the society has been stunted. The role of women in creation of creation, education of children, upbringing of family is much more important than that of men, thus her position becomes central in the society. Therefore, without the progress of women, there can be no upliftment of mankind and society. As far as India is concerned "Yatra Naryastu Pujayante Ramante Tatra Devta" means where women are worshipped. The deities reside there. With this ideal any Indian woman can feel pride in comparison to the western woman. The ideal of learning in Saraswati, the ideal of wealth in Lakshmi, the ideal of valor in Durga, the ideal of purity in Ganga, even the ideal of creation in the form of Jagad Janani we find only in India.



Professor Akhilesh Shukla
Chief Editor

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Theory of basic structure in reference to the amendment of the Indian constitution (An observation)

• Om Dutt

Abstract- *Provision for amendment of the constitution is made with view to overcome the difficulties which may encounter in future in the working of the constitution. No generation has monopoly of wisdom nor has it a right to place fetters on future generation to mould the machinery of government according to their requirements. If no provisions were made for the amendment of the constitution the people would have recourse to extra constitutional method like revolution to change the constitution. It has been the nature of the amending process itself in federation which has led political scientist to classify federal constitution as rigid. A federal constitution is generally rigid in character as the procedure of the amendment is unduly complicated. But, the framers of Indian constitution were also aware of the fact that if the constitution was so flexible it would be a playing of the whims and caprices of the ruling party. The amendment of the constitution necessarily contemplates that the constitution has not to be abrogated. The word amendment postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subject to alteration. As a result of the amendment the old constitution cannot be destroyed and done away with, it is retained though in the amended form. The words amendment of the constitution with all their wide sweep and amplitude cannot have the effect of destroying and abrogating the basic structure or framework of the constitution.*

Keywords- *Basic structure and amendment of the constitution of India*

Introduction- The idea upon which a constitution is based in one generation may be spurned as old fashioned in the next generation. It thus becomes necessary to have some machinery, some process, by which the constitution may be adopted from time to time in accordance with contemporary national needs. Indian constitution upholds certain principles which are the governing rules for the parliament, any amendment cannot change these principles and this is what the doctrine of basic structure upholds. The principles as we have today been not present always but over the years it has been propounded and upheld by the judicial officers of the country. In this article, we would dwell in detail on the evolution of the doctrine of basic structure and also the procedure of the amendment of the Indian constitution. With this we would also discuss that which features of the Indian constitution those have been regarded as part of basic structure by the honorable courts.

Provisions for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. No generation has monopoly of wisdom nor has it a right to place fitters on future generations to mold the machinery of government according to their requirements. If no provisions were made for the amendment of the constitution, the people would have recourse to extra constitutional method like revolution to change constitution.¹

“It has been the nature of the amending process itself in federation which has led political scientist to classify federal constitution as rigid. A federal constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American constitution is very difficult. So is the case with Australia, Canada and Switzerland. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that is consequently behind the time.”²

Meaning of basic structure- About the essentials of the basic structure of the constitution yet the judges enumerated certain essentials of the basic structure of the constitution, but they also made it clear that they were only illustrative and not exhaustive. They will be decided on the basis of the fact in each case. In *M. Nagraj V. Union of India*.³ 5 judge's bench of Supreme Court has explained the theory of basic feature of this theory again in detail as follows. Basic structures are systematic principles underlying and connecting provisions of the constitution. They give coherence and durability to constitution. These principles are part of constitutional law even if not expressly stated. This principle has essentially developed from the German constitution. It is not based on literal words. Theory of basic structure is based on the concept of constitution identity. The main object behind the theory is continuity and within that continuity of identity. In the seminal *KeshvanandaBharti's case*.⁴ SIKRI C.J. mention the following as the “basic foundation and structure of the constitution.

1. Supremacy of the constitution.
2. Separation of power among the legislature, the executive and the judiciary.
3. Republican and democratic form of government.
4. Secular character of the constitution.
5. Federal character of the constitution. SIKRI C.J. maintained that the above features are easily discernible not only from the preamble but the whole scheme of the constitution.
6. The dignity of the individual secured by the various fundamental rights and the mandate to build a welfare state contained in the directive principles.
7. The unity and integrity of the nation.⁵
8. Parliamentary system.

The above features have been mentioned as only illustrative and the list is not by any means exhausted. Whether a feature of the constitution is 'basic' or not is to be determined from time to time by court when the

question arises. Since *Keshvananda*, the matter has been considered by the Supreme Court in several cases and the court has had occasion to declare several features of the constitution as fundamental features or basic structure of the constitution.

So it is generally agreed that all fundamental right do not constitute basic structure. For example in *KeshvanandaBharti* itself it has been held that the right to property does not pertain to the basic structure of the constitution. Now that article 31 has been replaced, and article 300A included in the constitution, right to property has erased to be a fundamental right, as well as basic feature of the constitution. Now it is nearly as a constitutional right.⁶

In a case of *KihotoHollohon*⁷, The Supreme Court has declared: “democracy is a basic feature of the constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes.

Sawant and Kuldeep Singh JJ. Has observed in the case of *SR Bommai*⁸ that democracy and federalism are essential features of our constitution and are part of it basic structure “this view is supported by Ramaswami J. who has observed that federalism envisaged in the constitution of India is a basic feature.”⁹

In the same case the Supreme Court has ruled that secularism is the basic feature of the constitution. The concept of secularism is embedded in the constitution. The concept means that the state is to accord equal treatment to all religions and religious sects and denominations.¹⁰

“Secularism” is also regarded as a fact of equality. How can the concept of equality are promoted if the state prefers and promotes one particular religion, race or caste which necessarily means being less favorable to other religious groups, sects or casts.

In *Indira Gandhi V. Rajnarain*¹¹ the Supreme Court has unequivocally ruled that the preamble to the Indian constitution guarantees equality of status and of opportunity and that the rule of law is the basic structure of the constitution. The concept of equality which is the basic rule of law and that which is regarded as the most fundamental postulate of republicanism are both embedded in Article 14 of the constitution. The doctrine of equality enshrined in article 14 of the constitution, which is the basic rule of law, is the basic feature of the constitution.¹²

In a plethora of cases such as *Bhagwati J. in union of India V. Sankal Chand HimmatlalSeth* AIR 1977 Sc. 2328 (1977)4 SCC 193 and the *Gupta* cases AIR 1982 Sc. 149, *Kumar Padma Prasad V. union of India* AIR 1992 Sc. 1213: (2000)4 SCC 640 and *state of Bihar V. BalMukund Shah*, AIR 2000 Sc. 1296 etc. the Supreme Court has asserted that independence of judiciary is a basic feature of the constitution as it is the *sine qua non* of democracy. It is the most essential characteristic of a free society. This means that the judiciary ought to be kept free from the influence of political considerations and therefore, several articles in the constitution, such as

article 32, 136, 226, 227 guarantee judicial reviews of legislation and administrative actions.

It is for the judiciary to uphold the constitutional values to enforce the constitutional limitations. That is the essence of rule of law which *enter alia* requires that the exercises of powers by the government whether it be the legislative or the executive or any other authority, be conditioned the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind part of the basic structure of the constitution.

Procedure of amendment of the constitution- The idea upon which a constitution is based in one generation may be spurned as old fashioned in the next generation. It thus becomes necessary to have some machinery, some process by which the constitution may adopted from time to time in accordance with contemporary national needs. The framers of the Indian constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adopt itself to the changing need and circumstances of a growing people. The nature of the amending process envisaged by the framers of our constitution can best be understood by referring the following observation of the late prime minister Pt. Nehru 66 while we want this constitution be as solid and permanent as we can make it, there is no permanence in the constitution there should be certain flexibility. If you make anything rigid and permanent you stop the growth of nation, of a living, vital, organic people. In any event we could not make this constitution so rigid that it cannot be adopted to changing condition when the world is in a period of transition what we may do today may not be wholly applicable tomorrow.

But the framers of Indian constitution were also aware of the fact that if the constitution was so flexible it would be a playing of the whims and caprices of the ruling party. They were, therefore, anxious to avoid flexibility of the extreme type. Therefore they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes.

The modes of adopting the constitution from time to time to new circumstances may either be informal or formal. Informal methods are judicial interpretation and conventions the formal method is the constituent process. In judicial interpretation the constitutional text does not change, but its interpretation undergoes a change. The words in the constitution having one in one context may be given somewhat different meaning in another context. While the language of the constitution not change the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.¹³ except this the operation constitutional provisions may be modified by the growth of conventions, practices and observations. Both of these processes are of slow and gradual metamorphosis of constitutional principles and are somewhat invisible.

Now we talk about the formal method of constitutional amendment. This consists of changing the language of a constitutional provision so as to adopt it to the changed context of social needs. One can therefore safely say that the Indian federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation.¹⁴ for the people of amendment the various articles of the constitution are divided into three categories.

1. Articles that can be amended by parliament by simple majority as that required for passing of any ordinary law. Such as articles 5, 169 and 239-A these articles are specially excluded from the preview of the procedure prescribed in article 368.
2. Articles of the constitution which can be amended by special majority as lay down in article 368. Most of the constitutional amendments other than those referred to above, come in this category.
3. Under this category those articles come which require, in addition to the special majority mentioned above, ratification by not less than $\frac{1}{2}$ of the state legislature. The states are given an important voice in the amendment of these matters. These are fundamental matters where states have important power under constitution and may unilateral amendment by parliament may vitally affect the fundamental basis of the system built up by the constitution. This class of articles consists of amendments which seek to make any change in the provision mentioned in article 368. The following provisions require such ratification by the states such as :-
 1. Election of the president article 54 and 55.
 2. Extent of the executive powers of the union and states article 73 & 162.
 3. Articles dealing with judiciary, Supreme Court, High Court in the states and union territories article 124 to 147 and 214 to 231 & 241.
 4. Distribution of legislative powers between the central and the state article 245 to 255.
 5. Any of the lists of the 7th schedule.
 6. Representation of states in parliament 4th schedule.
 7. Article 368 itself.

Procedure for amendment- A bill to amend the constitution may be introduced in either house of parliament. It must be passed by each house by a majority of the total membership to that house and by a majority of not less than $\frac{2}{3}$ of the members of that house present and voting. When a bill is passed by both houses it shall be presented to the president for his assent who shall give his assent to bill and there upon the constitution shall stand amended¹⁵ therefore it is clear that most of the provisions of constitution can be amended by an ordinary legislative process. Only a few provisions which deal with the federal principle require a special majority in addition to the

ratification by the states. The procedure to amend these provisions is in conformity with the federal principle. The procedure to amend the constitution is however, not as difficult as in America or Australia. The difficult procedure of referendum followed in Australia and Switzerland or constitutional conventions followed in America have not been adopted in the constitution of India.

Amendment of Fundamental Rights- The question whether fundamental rights can be amended under article 368 firstly came for consideration of the Supreme Court in *Shankari Prasad V. Union of India*¹⁶ in this case the Supreme Court held that the power to amend the constitution including the fundamental rights is contained in article 368, and that the word “Law” in article 13 includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which made in exercise of the constitutional power. So a constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

In *Sajjan Singh V. state of Rajasthan*¹⁷ the validity of the 17th amendment act 1964 of the constitution was challenged. The Supreme Court approved the majority judgment given in *Shankari Prasad's* case and held that the word “amendment of the constitution” means amendment of all the provisions of the constitution.

In *Golak Nath V. state of Punjab*¹⁸ the validity of the constitution (17th amendment) act 1964. Which inserted certain states acts in ninth schedule was again challenged. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decision in *Shankari Prasad's* and *Sajjan Singh* cases and held that parliament had no power from the date of this decision to amend part-3 of the constitution so as to take away or abridge the fundamental rights. The chief justice said that the fundamental rights are assigned transcendental place under our constitution and therefore they are kept beyond the reach of parliament. The chief justice applied the doctrine of prospective overruling and held that this decision will have only prospective operation and, therefore the 1st, 4th and 17th amendment will continue to be valid. It means that all cases decided before the *Golak Nath's* case shall remain valid.

The minority however held that the word 'law' in article 13(2) referred to only ordinary law and not a constitutional amendment and hence *Shankari Prasad's* and *Sajjan Singh* cases were rightly decided. According to them, article 368 deals with not only the procedure of amending the constitution but also contains the power to amend the constitution.

In order to remove the problems created by the decision of Supreme Court in *Golak Nath's* case parliament enacted the (24th amendment) act. This amendment has made several amendments. This amendment not only restored the amending power of the parliament but also extended its scope by adding the words “to amend by way of the addition or variation or repeal” any provisions of this constitution in accordance with the procedure laid down in this article.

Test Of Basic Structure- With these pronouncements the existence of the doctrine of basic structure in our constitutional law is no more a matter of

dispute. The only dispute remains about its contents. Some of the contents seem to have settled, while others are in the process of settling down and still some others will settle in course of time. From KeshvanandBharti to Samabamurthy¹⁹ judicial review clearly emerged as one of the aspect of the basic structure principle. But in KihotoHollohon V. Zakillhu the Court left this issue open. Finally in L. Chandra Kumar²⁰ has settled that judicial review is part of the basic structure of the constitution.

After having enumerated several basic features of the constitution in different cases in M. Nagraj V. union of India²¹ the Court has tried to formulate a general test to decide if an amendment is against the basic structure of the constitution. In the matter of application of the principle of basic structure, the Court held that “twin tests have to be satisfied namely the 'width test' and the test of identity.” Upholding the validity of three amendments in article 16 inserting clause (4-A) and (4-B) and making an amendment in the former as well as in article 335, a five judges bench of the Supreme Court unanimously held that applying the “width test” we do not find obliteration of any of the constitutional limitations. Applying the test of 'identity' we do not find any alteration in the existing structure of the equality code. Relying upon the earlier cases specially KeshvanandBharti it clarified that not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the constitution such as democracy, secularism equality or the one that changes the identity of the constitution is impermissible:²² to destroy its identity is to abrogate the basic structure of the constitution concluded the Court. A little later in I.R. Coelho V. State Of T.N.²³ a nine judges bench unanimously reemphasizing the identity test varied it in respect of the fundamental rights. While according to I.R. Coelho and Nagraj held that in respect of the amendments of the fundamental rights, not the change in a particular article but the change in the essence of the rights must be test for the change in identity. In I.R. Coelho the Court held that if the “triangle of article 21 read with article 14 and article 19 is sought to be eliminated not only the essence of right test but also the right test has to apply.²⁴ pointing out the difference between the rights test and essence of right test the Court observed that both form part of application of the doctrine of basic structure but when in a controlled constitution conferring limited power of amendment an entire chapter is made inapplicable the essence of right test as applied in M. Nagaraja case will have no applicability. In such a situation to judge the validity of law it is the rights test which is more appropriate.

Conclusion- So on the basis of the above observation and in light of the Supreme Court's finding of different cases one of the main architects of basic structure doctrine had said that as the amending power is intended to be very wide only clearest cases of transgression would justify judicial intervention as a remedy of last resort. Regularly such cases will be discernible by an element of abuse of power of some collateral purpose appearing behind the purported scope of the amendment of the constitution. In the absence of such elements a general presumption of constitutionality must operate even more than in the case of ordinary legislation. By its very nature basic structure will

remain vague to be worked out in each and every case. It consists of some sorts of external values located in the constitution. The presumption is that except in extra-ordinary situations as existed during 1975-77 emergencies when it may be influenced by the exigencies of the situation the amending body knows and respects these values. The eternal values are not static with the growth of constitution associated with the growth of society they will also grow and vary. With the maturity of our democracy they will be crystallized and will be discernible more easily. These values cannot be anti-democratic by their very nature; they must sustain and nourish democracy.

So the basic structure of fine balance between flexibility and rigidity given to the constitution by its makers has been well preserved by the doctrine of basic structure as is evident from the number of amendments since Keshvanand Bharti case.

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