



# REVISITING THE PROCEDURE OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE ANALYSIS OF INDIA AND USA

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*Abstract : The fundamental law of any country is its constitution. Since it is a fundamental law, the procedure for amending it must be different from that of ordinary law. A constitution has a very special legal status because it lays out the basic framework and specifies the main objectives of each government's various branches. In both India and the United States, which have federal constitutions, the constitution is supreme and has been given special status. Because countries like Britain, where the parliament is supreme, have the ability to amend their constitutions through regular legislative processes, it can be argued that British constitutional law is on an equal footing with other laws in terms of the amendment procedure. In this Paper the author has drawn a critical comparison between the amendment procedure of India and USA*

**Key words** Constitution, Comparative analysis, USA and Indian Constitution.

## I. INTRODUCTION

Any nation's constitution is referred to as its fundamental law. The process for amending it must differ from that of ordinary law because it is a fundamental law. Because it lays out the fundamental framework and establishes the primary goals of each government's various branches, a constitution has a very special legal status. The constitution is supreme and has been granted special status in both the United States and India, both of which have federal constitutions. It can be argued that the constitutional law of Britain is on an equal footing with other laws in terms of the amendment procedure because nations like Britain, where the parliament is supreme, have the ability to amend their constitutions through regular legislative processes.

II. Constitutional law is treated differently than other laws in nations with written and inflexible constitutions. The constitution is supreme in these countries because it is regarded as the highest authority and provides legitimacy and approval for all laws that are currently in effect. The constitution ought to be modified to accommodate societal demands as a country's political, social, and economic landscape evolves. The Indian legislature had to create special provisions for the nation's economically disadvantaged regions after realizing the necessity of economic reservation.

III.

### 1.1.Nature of the 'amending process'

IV. A constitutional amendment can be understood by the general public as an enhancement, revision, or correction to the original text. Amendment is the process of "amending" or "changing" a constitutional provision or provisions, usually through a unique process that is outlined in the constitution itself. The constitutional amending power, also known as the constituent power, can only be used by the body and in the manner specified by the Constitution. Article 368 of our constitution and Article V of the American Constitution both support this idea.

### 1.2.Significance of the constitutional amendments

A constitution that was written in one era might not be suitable in another. Therefore, a mechanism that can adapt the constitution to the evolving needs of the times is required. The idea that a constitution that does not allow for change is doomed to exist has been widely acknowledged. Incorporating the nation's evolving ideals and beliefs into the constitution is necessary because they also change over time. For instance, India amended the preamble in 1976 to include the words "socialist and secular." The need for

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provisions pertaining to India's amendment process is demonstrated by the more than 100 constitutional amendments made by the Indian parliament. The American Constitution has also gone through various significant changes from its very inception.

D.D. Basu speaks about the need of 'amending process' and goes on to say that the provisions related to the constitutional amendment is provided to secure orderly change in the constitution. These amendments seeks to provide remedy for the defects that are disclosed in the working of the constitution or defects that occur due to the unforeseen circumstances which could not be guarded against at the time of the enactment.<sup>2</sup> Therefore, the legislature is tasked with identifying the constitutional gaps. According to the author, wisdom is not monopolized by any one generation. Although humans are fallible, they do learn from their mistakes and should have the authority to amend the constitution to suit the needs of the moment.

### **Constitutional Amendments in India and USA**

Both the US and India have federal constitutions. Because it gives states unique ways to start constitutional amendments, the American amendment process is more in line with federal principles. One could argue that both constitutions make clear that the union parliament is not the only entity with the authority to change any part of the document without the states' consent. As a built-in safeguard against hurried constitutional amendments, both constitutions allow for several stages of approval for any proposed amendment.

Certain constitutional provisions in both constitutions are subject to stringent amendment procedures requiring state approval. Additionally, there are restrictions on changing important parts of the constitution (in India, this is known as the "basic structure doctrine"). One could argue that the states' involvement in the amendment process serves as a safeguard for the federal constitutions. States make sure that the central legislature doesn't use this authority arbitrarily. Despite their differences, the two amendment procedures share some essential characteristics in terms of offering sufficient protection for states' rights.

#### **2.1. Modes of Constitutional Amendment**

Some academics in India contend that Article 368 offers the only way to amend the constitution. On the other hand, some contend that there are two possible ways to amend. There are two methods for amending a constitution: the formal method and the informal method. While the informal method can be defined as judicial interpretations, the formal method is the one stipulated in Article 368 of the Constitution. These academics contend that in these situations, the meaning and context of the constitution drastically alter even though the text itself remains unchanged. The Indian Supreme Court has given Article 21 of the Constitution of India a broad interpretation through a number of Apex Court rulings.

Under Article V of the Constitution, the United States Constitution addresses constitutional amendments. Like India, the United States of America has two constitutional amendment procedures. Regarding the informal method, the term "judicial interpretation" is not used in the United States; rather, "judicial creativity" is used. The current version of the American Constitution is vague and unspecific. Due to its brevity, the constitution allows for a great deal of judicial creativity. By correctly interpreting constitutional provisions, the American Apex Court works to adopt the constitution in accordance with changing times.

When discussing the first constitutional amendment pertaining to freedom of speech, the US Supreme Court ruled that no right can exist without restrictions. As a result, the American Supreme Court took on the challenge of clarifying the restrictions placed on the use of free speech. The Supreme Court has also correctly interpreted the American Bill of Rights, which consists of the first ten constitutional amendments.

#### **2.2. The Amending Procedure**

The Indian Constitution's Article 368 grants the parliament the authority to amend the document and outlines the steps involved in doing so. According to Article 368, a constitutional amendment can only be proposed in either house of the Indian Parliament as a bill. In essence, it means that the same rules that apply to the introduction, deliberation, and passage of other bills also apply to the amendment of existing ones. Each House must approve this bill, either by a simple majority or by a special majority. Here, "simple majority" refers to the requirement that the bill be approved by a majority of the members present and voting in each house of parliament.

In this case, a special majority means that the bill must be approved by a majority of the entire membership and by at least two-thirds of the members who are present and voting in both houses of parliament. The president must be asked to sign the bill after it has been approved by both houses of parliament.

V. The "proposal of constitutional amendment" that is introduced in either House of Congress starts the amendment process in the United States. Either a constitutional convention called by the Congress or a vote of two-thirds of each House of Congress must approve the proposal. Only when two-thirds of the state legislatures apply can the Congress call a constitutional convention. It is important to remember that every proposal for a constitutional amendment in the US has been approved by a two-thirds majority in each house of Congress. In reality, the second approach—calling a constitutional convention—was hardly ever employed. In the hands of state legislatures, however, such a clause guarantees checks and balances and is consistent with the federalist principle.

#### **2.3. Assent of the Constitution Head**

VI. In India, a bill cannot become a constitutional amendment until the president, who is the head of the constitution, gives his or her assent. The phrase "shall be presented" in Article 368 clearly indicates that assent is required and not merely optional. It's also crucial to remember that since the bill was approved in line with Article 368, the president has no choice but to accept it. The aforementioned statement suggests that the constitution head's assent is merely a formality. There is no official requirement in the United States regarding the constitutional head's assent.

Accordingly, the only necessary constitutional conditions for any constitutional amendment to be enforceable are the Bill's introduction and ratification. After the states ratify the amendment bill, it becomes operative.

#### **Limitations on the Amending Power**

The Indian Constitution places restrictions on the parliament's ability to make amendments to the document. The constitution contains provisions that are protected by various legal doctrines. These theories offer good justifications for limiting the Parliament's or Congress's ability to amend laws. These theories are founded on the idea that the Constituent Assembly and the Parliament (Congress) cannot be granted the same constituent authority or be treated on an equal basis. Similar to the Indian constitution, the

<sup>2</sup> D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (2012).

American constitution has some built-in limitations on its ability to amend. The clauses pertaining to the "right of the states to equal suffrage in the Senate" are one example of this restriction.

### 3.1. Doctrine of Basic Structure:

A limitation on Amending Power It all started with the issue that whether fundamental rights under Part III can be modified using Article 368 of the Constitution. This question came up for first time in the landmark case of *Shankari Prasad v. Union of India*,<sup>3</sup> the court while dealing with the constitutional legitimacy of the first constitutional amendment held that even part III can be modified by the procedure provided under Article 368. However, the Supreme Court overruled this decision in *Golak Nath v. State of Punjab*, and laid down that the parliament has no power to modify part III of the Constitution.

The principle of Basic structure thus developed in the historic *Kesavananda Bharti* case<sup>8</sup> wherein the Apex Court held that Article 368 do not grant power to the Parliament to alter the basic framework (structure) of the Constitution. Article 368 cannot be used to 'damage', 'destroy', 'abrogate' or 'alter' the basic structure or framework of the Constitution. Hence, the *Golak Nath* case<sup>4</sup> stands overruled after *Kesavananda Bharti*<sup>5</sup>. It was also reaffirmed in the case of *Indira Gandhi v. Raj Narain*<sup>10</sup> and other later cases. The Supreme Court has time and again used this doctrine to save certain basic provisions of the Constitution. This has ensured that the power granted to the Parliament under Article 368 is not used in a way to abuse such power.

### 3.2. Express and Implied Limitations in America

As discussed earlier, the American Constitution also has some inherent limitations on the amending power. As far as the express limitations are concerned, the only limitation which the American Constitution provides is that "no state will be deprived of its equal suffrage in the Senate without its consent."<sup>6</sup> Implied limitations are provided by the Supreme Court in its judicial decisions. In *National Prohibition case*,<sup>7</sup> it was held by the Court that there are certain basic or vital provisions in the American Constitution which cannot, in any case, be modified by the procedure enshrined in Article V of the American Constitution. It was argued that, Article V is merely a safeguard for correcting minor flaws which were left unnoticed. If ample power is given by way of this provision it would result in a 'constitutional revolution'. On the contrary, if we go through the decisions in *National Prohibition case* and *Laser v. Garnett*,<sup>8</sup> it can be safely concluded that the implied limitations as discussed earlier seems hypothetical. In light of the same the only limitation on the amending power under American Constitution is the express limitation provided under Article V of the Constitution.

### Conclusion

We have examined the two amendment processes outlined in each nation's constitution in this comparative analysis. We discovered that, despite being democratic nations, the United States and India operate differently in terms of how laws are made and how power is amended. Several elements from other nations have been incorporated into the Indian Constitution after their appropriateness for our nation has been evaluated. One could argue that there are so many differences between the countries under comparison in terms of amending procedures that there are hardly any similarities.

The constitutions of practically all nations contain clauses allowing for constitutional amendments. As a dynamic society undergoes changes, these provisions become necessary. Therefore, flexibility is regarded as a positive attribute in any constitution. Comparing the two constitutions reveals that, in contrast to the Indian Constitution, the United States Constitution is extremely difficult to amend. Since 1789, thousands of amendments have been proposed in the US Congress, but only 33 of them have been approved and sent to the states for ratification, demonstrating the US Constitution's rigidity.

Only 27 amendments were ultimately able to pass. Article 368 grants the Indian Parliament the authority to amend the constitution in certain situations, but in other cases, at least half of the states must agree. The important thing to note is that there is no ratification deadline in either the US Constitution or the Indian Constitution. Finally, I want to say that the Indian Constitution is more adaptable than strict. This assertion is supported by the fact that only a small number of constitutional amendments need state legislature approval, and even then, ratification by half of the states is sufficient.

A special majority of the Indian Parliament has the authority to amend the remaining clauses of the Indian Constitution. In contrast, the United States has a strict constitution that can only be changed by the US Congress through an extraordinary process that is specified in the US Constitution.

<sup>3</sup> *Shankari Prasad v. Union of India*, AIR 1951 SC 458.

<sup>4</sup> *Golak Nath v. State of Punjab*, (1967) SCR 762.

<sup>5</sup> *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461

<sup>6</sup> *George D. Skinner*, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICHIGAN L. REV. 213 (1920).

<sup>7</sup> *National Prohibition Cases*, (1920) 253 US 350.

<sup>8</sup> *Laser v. Garnett*, (1922) 258 US 130.