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ABOUT US

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“PROVISIONS REGARDING CONSTITUTIONAL AMENDMENT IN INDIA, USA AND SOUTH AFRICA- A COMPARATIVE ANALYSIS”

AUTHORED BY - SAGAR PURUSHOTTAM BAGDE

ABSTRACT

Time is not static; it continues to change. It also changes the lives of a country. The social, economic and political conditions of the People are constantly changing. Law, especially the Constitutional Law of the Country, must also be changed to meet changing needs, changing philosophy and changing life of the people. Consequently, legislation requires some mechanisms to meet the needs of the people at present. Such a mechanism is known as the ‘Amendment of the Law’ or the ‘Amendment of the Constitution of the Country’. Broadly Speaking about the Amendment Procedures, there are generally two methods of Constitution Amendment given namely as – Informal (De facto) Method & Formal (De jure) Method. Under the Informal Method, the letter of the law does not change, it remains unchanged but its meaning and importance changes. This method includes Amendments by changing the Provisions of the Constitution with the Interpretation. Conversely, Under the Formal Method, the provisions of the law are amended by, modification, addition or abolition, which is the written text of the Constitution. In this Research Paper, I attempted to conduct a Research which is Comparative in nature of Amendments Procedure of the Constitutions of India, the Constitution of the United States of America and the Constitution of the Republic of South Africa, 1996 for the purpose to understand the difference between their different Governance Systems. The Research also explored the various limitations of the other country’s

Amendment Process specifically, the Constitution of the United States of America and the Constitution of the Republic of South Africa, 1996.

Keywords: *Amendment, Law, the Constitutions of India, the Constitution of the United States of America and the Constitution of the Republic of South Africa, 1996.*

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CHAPTER-I

INTRODUCTION

“What makes the Indian Constitution so rigid is that, in addition to a somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem of constitutional validity must often rise”.

- Sir, Ivor Jennings¹

The term ‘*amendment*’ is deduced from the Latin term ‘*amendere*’ that means ‘*to change*’ or ‘*to correct any fallacy*’. As per an Oxford Dictionary, an ‘*Amendment*’ indicates the idea of ‘*Correction or Repair or Improvement*’.

Garner’s Black Law Dictionary defines “*amendment as a formal revision or addition proposed or made to a statute, construction, pleading, order or other instrument, a change made by addition, deletion or correction specially an alteration of wording*”.²

¹Ivor Jennings: “Some Characteristics of the Indian Constitution: 1953, Oxford University Press”.

²Garner, “Black Law Dictionary”, 8th ed., p.89.

The Constitution Framers includes the provisions of the amendments to address possible difficulties in the future. Like time, the law doesn't stagnate, it continues to appear. The political, social and economic conditions of the people are continuously changing, so the Constitution of the Country can be helpful to the adaptation of those who are changing and switching their lives as a respective of Development of the Nation. If no Constitutional provisions were to be amended, people would need to use anti-constitutional strategies.

For ordinary persons, an amendment includes the modification, alteration or deletion of a provision or text. Formal declarations of changes to legal regulations are called as '*Legislative Amendments*'. The objectives of this amendment is now to improve things. It can take the forms of adding or amending or removing any part of the law for the interest or well-being of the community in its social structure. If it is better to revive the law than to create a new one, amendments are frequently used.

1.1. Statement of Problem

This Research Paper talks about the Statement of the Problem which is related to the Absolute Powers of Parliaments and their Limitations which are imposed on the Procedures while Amending the Constitution of India, the USA and South Africa respectively and relatively.

1.2. Research Objectives

The various Objectives of this Research Paper are given as follows:

- i) To study the Concept of Amendment Procedure in the Constitution of India in accordance with its Requirements;
- ii) To examine the Absolute Powers of Parliament in relation to the Constitutional Amendments and their Limitations;
- iii) To analyze this Comparative Study of Indian Constitution with the Constitutional Amendment Procedures of American and South African Constitution;

1.3. Research Hypothesis/ Question

In order to attained the above-mentioned objectives, the following Research Hypotheses and Research Questions has been formulated-

1.3.1. Research Hypotheses

- a) Each Country follows different Amendment Procedures with the Limitations.
- b) Amendment provides the Basic Structure of the Government, but does not address all

possible questions or problems between the different organs of the Government.

- c) The Amending Procedure is comparatively difficult & rigid in the USA than the other two countries.

1.3.2. Research Question

As we all know that the Constituent Assembly took 2 years, 11 months and 18 days to prepare the Constitution of India. Now, if we think about it, the question may arise that if we make such a great effort, this means almost 3 years to build our Indian Constitution then –

- 1) What are the reasons, why we need to add Constitutional Amendment provisions to our Constitution?
- 2) Whether the power granted to the Parliament to amend the Constitution is absolute or not? If yes, what are these limitations.
- 3) Are there similar problems in other countries such as the American and South African Constitution?

1.4. Review of Literature

Several Authors/Researchers have done research in the field of Constitutional Law. As a result, many literatures in this field can be found in Books, Journals, Articles, Dissertations and Reports.

Adem Kassie Abebe, the Author in the Article, *“The Substantive Validity of Constitutional Amendments in South Africa”*³, points out that the Constitution does not recognized substantive limitations on the Power of Amendments of the Constitution.

Prithivi Raj and Murtaza S. Noorani in their Article, *“Constitutional Amendment: A Critical Analysis”*⁴, critically analyze the “Basic Structure Doctrine”, as well as other safeguards in various countries, to protect the essential parts of the Constitution. The authors of this paper clearly realized the problems from different viewpoint, taking into account the diversity of the stakeholders affected by the amendment. The author also proposes and proceeds to a convincing solution to the problems associated with amendment and its long-term process.

³Adem Kassie Abebe, “The Substantive Validity of Constitutional Amendments in South Africa”, pp.656-694.

⁴Prithivi Raj and Murtaza S. Noorani, “Constitutional Amendment: A Critical Analysis”, INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION, Vol.2, Issue 3, 2020, pp. 83-115.

Eesha Sharma and Asmit Chitransh in their Article, *“Amending Constitution Comparative Study of India, United Kingdom and the United States of America”*⁵, tries to compare various methods of amendment procedure to understand current situations of its requirement and critically analyses the three countries' amendment procedures and provides the best amendment procedures in each country.

Shubhangi Baranwal in her Article, *“Amendment of the Constitution- A Comparative Study between South Africa, UK, India & USA”*⁶, address the concept of amendment with its significance and need in the Constitution. The author of this paper also talks about Comparison Studies of various forms of government in the United States, South Africa and India and their amendment procedures.

Chirag Patel RS in his Article, *“Amendment of The Constitution in India and US: A Comparative Study”*⁷, analyze the comparisons between the Constitution of India and the United States with its advantages and disadvantages that add to the points of constitutional amendment.

Dr. Santosh Kumar in his Article, *“Comparative Analysis of Constitutional Amendment Processes: A Worldwide Investigation”*⁸, provides a comparative analysis of the constitutional amendment processes in the UK, the USA, China, France, South Africa, Russia, Canada, Australia and India. It explores the main features and procedures of the amendment process in each country and highlights similarities and differences. This article examines the role of parliament, the special requirements of the majority, the popular referendum and the ratification of the State in the amendment process.

Rajas Jani, the Author in the Article, *“Comparative Analysis of Amendment Procedure of Constitution of India and USA”*⁹, discuss the amendment procedures of the Indian and

⁵Eesha Sharma and Asmit Chitransh, “Amending Constitution Comparative Study of India, United Kingdom and the United States of America”, INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION, Vol.3, Issue 4, 2021, pp.745-760.

⁶Shubhangi Baranwal, “Amendment of the Constitution- A Comparative Study between South Africa, UK, India & USA”, LEGAL DESIRE INTERNATIONAL JOURNAL ON LAW, 25th ed., Vol. 8.

⁷Chirag Patel RS, “Amendment of The Constitution in India and Us: A Comparative Study”, INDIAN JOURNAL OF INTEGRATED RESEARCH IN LAW, Vol.II, Issue II.

⁸Dr. Santosh Kumar, “Comparative Analysis of Constitutional Amendment Processes: A Worldwide Investigation”, INTERNATIONAL JOURNAL OF RESEARCH PUBLICATION AND REVIEWS, Vol.5, Issue 5, May-2024, pp.5180-5184.

⁹Rajas Jani, “Comparative Analysis of Amendment Procedure of Constitution of India and USA”, JOURNAL OF LEGAL STUDIES AND RESEARCH, Vol.7, Issue 1, January-2021, pp.271-279.

American Constitutions. The document also compares the amendment process to the Indian Constitution and the United States Constitution specifically focuses on the limits imposed on the procedure during the constitutional amendment in India and the USA.

1.5. Rationale of the Research

The reason behind doing a comparative study is to understand the discrepancies between different governance systems. Furthermore, it helps to understand the advantages and disadvantages of adding amendments to various laws and acts. Amendments have been made to protect the constitution in the times of disputes over its validity.

Most important reason for this study of Constitutional amendment is to adapt to the changes in times and needs of society. When we look back on history, it is easy to interpret that the old constitution cannot be used in today's society. Therefore, changes or amendments are an important part of its governance.

1.6. Research Methodology

The methodology I use in this Project is the "*Doctrinal Research Method*", where I had referred to the Primary Sources of Information as statutory legal materials like Bare Acts, Subordinate Legal Materials, Case Laws etc. and the Secondary Sources of Information as Textbooks, Legal Articles, Parliamentary Debates, Journals etc. to analyze the review of the Judicial viewpoint to the comparative study of amendment procedures in various countries such as the USA and South Africa.

1.7. Nature of Research

As, it is a type of Interpretative Research (that is "*Doctrinal Research*"), which provide a detailed and complete description of the constitutional amendment procedure of the above-mentioned countries and then critically analyze them to understand which systems are best suited for today's needs of society.

1.8. Scope and Limitations of the Research

The concept behind the difficult amendment procedures was to avoid Political Conflicts and introduce a Stable Government. Another reason for the need to amend the Constitution is that provisions on constitutional amendments are made by constitutional framers in order to overcome future difficulties.

Since the beginning of the Constitution, constitutional battles has been held in this respect of both in the Courts and the Parliament. Parliament appears to have asserted its supremacy, as the British Parliament had, but the Supreme Court interpreted Parliament as a constitutional creature, exercising powers within the framework of the Constitution and not outside it.

Although the Constitution explicitly grants power of amendment to the Parliament, the Hon'ble Supreme Court ultimately has to interpret the scope of this power and impose, if applicable, limits on that power of amendment.

CHAPTER-II

MEANING OF AMENDMENT AS PER THE PROVISIONS OF THE CONSTITUTION OF INDIA

2.1. Introduction

One of the most interesting and remarkable features of Article 368 is that Fundamental Rights are not included in the provisions of this article. In our Constitution, the term '*amendment*' or '*amend*' is used in both the broad and narrow senses, as follows: The opening words of Art. 4 (1) read as:

“Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to provisions of the law.”¹⁰

In this case, the term “*amendment*” is narrowly defined and the terms “*law*” in Art.3 and Art.4 must comply with the democratic model established in the Constitution and the powers of Parliament shall not exceed the Constitution. Accordingly, without the effective legislative, executive and judicial bodies provided for in Art.4, the legislature cannot create, grant or establish a State by law under Art. 4.

Art.169 (2) of the Constitution of India provides as:

“Any law referred to in clause (1) shall contain such provisions for the amendment of this Constitution as may be necessary to give effect to the provisions of the law and may

¹⁰D.D. Basu, “Commentary on the Constitution of India”, 14-Lexis Nexis, Haryana, 4th ed. 2013.

¹¹*Supra note 1.*

¹²*Supra note 2.*

also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary.”¹¹

The word “*amendment*” used in this article clearly conveys a more limited meaning, but “para 7 of Part D of Fifth Schedule” which contains the word “*amend*”, is also of a broader meaning. It provides:

“Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such schedule as so amended.”¹²

2.2. Concluding Remark

From this discussion it seems that the word “*amendment*” is used in different senses in different parts of the Constitution. But there is a clear point that the makers of the Constitution of India do not want the whole Constitution to be abolished.

CHAPTER-III

AMENDMENT PROCEDURE UNDER THE CONSTITUTION OF INDIA

3.1. “Art. 368. Power of Parliament to amend the Constitution and procedure therefor-

(1) Notwithstanding anything in this Constitution, Parliament may in 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.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162, article 241 or article 279A; or*
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI; or*
- (c) any of the Lists in the Seventh Schedule; or*

(d) the representation of States in Parliament; or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is 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.”¹³

3.2. Procedure of Amendment in the Constitution of India

The Constitution of India provides three ways of amending its provisions namely given as follows:

3.2.1. Amendment by Simple Majority

3.2.1. (i) Amendment by the Parliament-

Some provisions of the Constitution can be amended by a Simple Majority of the present members of Parliament and by means of votes in both houses.

It is the procedure adopted for making ordinary act. A Bill for this reason may be initiated in any of the Houses of the Parliament, at the request of the Central Government or at the request of the States. Amendments to these provisions are expressly excluded from Article 368 (Refer Art.2 to Art. 4).

3.2.1. (ii) Amendments at the States Instances -

Some provisions of the Constitution of India can be amended by the Parliament by enacting laws, at the instance or names of the States (Refer Art.169) and some other provisions can also be amended by or after a discussion with the States (Refer Art.3).

3.2.1. (iii) Amendments by State Legislatures-

Some provisions of the Constitution of India can be amended by legislation passed by the State Legislature by Simple Majority. A law enacted by the State Legislature for the purposes of

¹³Article 368 of the Constitution of India.

Art.164 (5), Art. 186 & Art.195 also affects the corresponding amendments in Schedule II.

3.2.2. Amendments by Special Majority (Art.368)

The provisions of the Constitution may be amended in addition to the above-mentioned provisions by means of the procedure laid down in Art.368 as follows:

- a) Amendments of the Constitution of India can only be initiated by Introducing Bills in any one of the two houses of the Parliament of the Union.
- b) After the Bill is passed in each House of the Parliament by a majority of all members of the House, i.e.by a majority of not less than two thirds of the Members of the House present and voting, it shall be presented to the President's assent.
- c) After receiving the assent of the President, The Constitution stands amended in accordance with the terms of the Bill.

3.2.3. Amendment by Special Majority Plus Ratification by States

This category includes provisions specifically mentioned in Cl.2 of Article 368, if the Amendment Bill mentioned above, seeks to make any change in the provisions under items (a) to (e), then such a Bill having been passed by Special Majority in each House of the Parliament, shall not be presented to the President for his assent to it, until the Bill has been ratified by the Legislatures of not less than one-half of the States, by passing resolutions to that effect.

The reasons for the constitution of these articles were presented by Dr. Babasaheb Ambedkar to the Constituent Assembly.

He explained,

“If members of the House who are interested in this are to examine the Articles that have been put under the proviso, they find that they refer not merely to the Centre but to the relations between the Centre and the Provinces (States). We cannot forget the fact that we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that the federal structure of the Constitution remains fundamentally unaltered.”¹⁴

¹⁴Constituent Assembly Debates (CADs), Vol.III, 4323.

3.3. Limitation on Amending Power under the Constitution of India

Under the Doctrine of the “*Basic Structure*”, the Constituent Assembly, which represents the sovereignty of the people, provides for the amendment of the Constitution in Art.368 & the mechanisms that can exercise this power.

Of Course, in the *Kesavananda Case*¹⁵, none of the Advocates of the Doctrine of the “*Basic Features*” appears to have suggested the process by which such “*Basic Features*” can be amended, if they cannot be amended according to Art.368.

However, the alternative of a Constituent Assembly would arise if we assumed that such features are not amendable under Art.368 and that the country would not welcome a revolution to make changes to such “*Basic Features*”, as pointed out by Hidayatullah J. in his separate opinion in *Golak Nath Case*¹⁶.

“This question involves two facets:

- 1) *Is there any part of the Constitution which is excluded from the amending provision in Art.368?*
- 2) *If so, how can it be amended, can it be done through the people themselves at a Referendum or through another Constituent Assembly?”*

3.4. Concluding Remark

No amendment to the Constitution of India can be made by any authority other than what is prescribed in Art. 368 or otherwise than in the manner prescribed therein.

It is Patentable that Art.368 does not excluded or contain any part of the Constitution outside the scope of Article 368 explicitly.

I regret being constrained to point out that no part of such amending power is vested, either directly or indirectly in the Judiciary.

¹⁵*Kesavananda v. State of Kerala* (1973).

¹⁶*Golak Nath v. State of Punjab* (1967).

CHAPTER-IV

AMENDMENT PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA

4.1. Article V

“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 Senate.”¹⁷

4.2. Procedure of Amendment in the Constitution of the United States of America

Article V of the Constitution of the United States of America provides the formal amendment procedure into two parts, namely –

4.2.1. Proposal for an Amendment

Amendments can be proposed in two ways as:

- 1) by two-third (2/3rd) of the votes in both the Houses of Congress;
- *This is the only method used to propose amendments so far.*
- 2) by a National Constitutional Conventions called by Congress on the request of two-third (2/3rd) of the State Legislatures;
- *This method of proposing amendments, which Scholars have discussed for a long time, has never been used.*

¹⁷Article V of the Constitution of the United States of America.

It should be noted that when applying the Convention, Congress is obliged to call the Convention by calling for the second alternative. It cannot refuse to do so.

4.2.2. Ratification for an Amendment

Amendments can be ratified by two methods as:

- 1) by the Legislatures of three-fourth (3/4th) of the States;
- 2) by the Special Conventions in three-fourth (3/4th) of the States;

Whatever Method of Amendments Proposed, Congress specifies which of the two Ratification procedures should be followed.

4.3. Limitation on Amending Power under the Constitution of the United States of America

Article V of the Constitution of the USA itself provides for the following two express limitations on amending powers of the Congress. The last two sentences of Article V make certain subjects unamendable-

- 1) The first, prohibit amendments before 1808 that would affect the limitations of the Constitution on the Power of Congress to -
 - a) restrict the slave trade; or b) levy certain taxes on land or slaves.
- 2) The second, prohibits amendments that would deprive States from exercising equal suffrage in the Senate without their consent.

*Bryce*¹⁸ and *Willoughby*¹⁹ have argued that the U.S. legal sovereignty resides in the amending body set up by Art.V, because it has “*the legal power to determine its own competence as well as that of others*”.

Therefore, there is, no limitation upon the amending power conferred by Art.V of the Constitution of the USA other than those expressly provided in the text of Art.V itself as explained in *National Prohibition Cases*²⁰. It is only public opinion acting upon these agencies which places any check upon the amending power.

4.4. Concluding Remark

Accordingly, constitutional amendments must be made strictly in accordance with the methods provided for in the Constitution are not tolerated if they are not amended even in order to

¹⁸ Bryce, American Commonwealth, Vol.I, p.366.

¹⁹ Willoughby, Public Law; Government of Modern States; Nature of the States, p.244.

²⁰*National Prohibition Cases* (1920).

determine the true wishes of the people on the matter and anything that may consider individuals or bodies to be better done by representatives of the Constituent Assembly, a Convention or other bodies is not of any really important significance.

CHAPTER-V

AMENDMENT PROCEDURE UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

5.1. "S.74. Bills amending the Constitution

1. *Section 1 and this subsection may be amended by a Bill passed by-*
 - a. *the National Assembly, with a supporting vote of at least 75 per cent of its members; and*
 - b. *the National Council of Provinces, with a supporting vote of at least six provinces.*
2. *Chapter 2 may be amended by a Bill passed by-*
 - a. *the National Assembly, with a supporting vote of at least two thirds of its members; and*
 - b. *the National Council of Provinces, with a supporting vote of at least six provinces.*
3. *Any other provision of the Constitution may be amended by a Bill passed-*
 - a. *by the National Assembly, with a supporting vote of at least two thirds of its members; and*
 - b. *also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment-*
 - i. *relates to a matter that affects the Council;*
 - ii. *alters provincial boundaries, powers, functions or institutions; or*
 - iii. *amends a provision that deals specifically with a provincial matter.*
4. *A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.*
5. *At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must-*
 - a. *publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;*
 - b. *submit, in accordance with the rules and orders of the Assembly, those*

- particulars to the provincial legislatures for their views; and*
- c. submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.*
6. *When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures-*
- a. to the Speaker for tabling in the National Assembly; and*
- b. in respect of amendments referred to in subsection (1), (2) or (3) (b), to the Chairperson of the National Council of Provinces for tabling in the Council.*
7. *A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of-*
- a. its introduction, if the Assembly is sitting when the Bill is introduced; or*
- b. its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.*
8. *If a Bill referred to in subsection (3) (b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.*
9. *A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.*²¹

5.2. Procedure of Amendment in the Constitution of the Republic of South Africa

- 1) The provisions of S.1 of the Constitution can only be amended if at least six of the nine provinces are supported by the National Assembly and the proposal is approved by 75% of the National Assembly.
- 2) Provisions of Chapter 2 of the Constitution which includes the Bill of Rights, also require relatively strict amendment rules.
- 3) The provisions on human rights can only be amended with the consent of at least 2/3rd of members of the National Assembly & at least six of the nine provinces of the National Council of Provinces.

²¹S.74 of the Constitution of the Republic of South Africa.

- 4) All other provisions of the Constitution can be amended by a 2/3rd majority in the National Assembly.
- 5) However, if an amendment concerns a problem affecting the National Council of Provinces or if it affects the Boundaries, Powers, Functions or Institutions or if it changes a provision specifically dealing with a provincial matter, approval must also be obtained by at least six provinces in the National Council of Provinces.
- 6) In addition, if a proposed amendment affects only a particular provinces, the Legislative Council of the affected provinces must approve the proposed amendment.

5.3. Limitation on Amending Power under the Constitution of the Republic of South Africa

In the *Case of Collins v. Minister of the Interior Case (1957) (Coloured Vote Case)*, On 9 November the Appellate Division handed down a decision and ruled that Parliament had the power to alter the composition of the Senate, a power explicitly granted by the South Africa Act. However, the Constitution does impose time limits on the submission of amendment proposals (a kind of 'cooling-off' period). Persons or committees wishing to introduce a constitutional amendment bill should publish the proposed amendment in the Govt. Gazette for public comment at least 30 days before it is presented to Parliament.

5.4. Concluding Remark

The South African Constitution does not explicitly prohibit any amendments to its provisions. In fact, the powers of the Constitutional Court themselves are not exempt from constitutional amendments.

CHAPTER-VI

COMPARATIVE PERSPECTIVES OF CONSTITUTIONAL AMENDMENT

6.1. Comparative Study of the Constitutional Amendment Procedure

In order to compare the process of amendments of India, the USA and South Africa, we will discuss it separately in the following manner.

6.1.1. In the Context of Amendment Proposal

In the United States of America, the States plays a key role and can propose constitutional amendments. On the other hand, the states of India and South Africa cannot propose constitutional amendments means they are unable to propose constitutional amendment.

6.1.2. In the Context of the President Assent

It is interesting to note that the President in the case of the Constitution of the United States of America does not play any role in the amendment process. It follows that, even if the Constitution grants amendment powers to the Legislature, its exercise is not identified with the legislative function.

In this case, the Supreme Court undoubtedly observed: *“The negative of the President (i.e. the veto power) applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution”*.

Amendments, which are not legislative acts, *“are not officially submitted to him at all”*. Also, it does not require the Governors of the State to sign the ratification instruments which an integral part of the other two countries Amendment Procedure.

On the contrary, the President’s approval was already provided in the original text of Art.368 of the Constitution of India, which stipulates that a bill amending the Constitution, when required by Parliament and ratified by the State, where required, *“shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended”*²².

But the Constitution (24th Amendment Act, 1971) drastically altered this stance by adding a new express word to Article 368 (2) despite the need to file a Bill to amend the Constitution. – *“who shall give his assent to the Bill”*²³.

Therefore, the President of India cannot reject to give his assent to a Bill to amend the Constitution that has been presented to him.

6.1.3. In the Context of Cooling-off Period

The Constitution of the Republic of the South Africa provides a Cooling-off Period of at least 30 days as a time limit for submitting amendment proposals. Such a types of time period limits were not imposed by the Constitutions of the India and the Constitution of the United States of America on amendment proposals.

²²Article 368 of the Constitution of India.

²³Article 368 of the Constitution of India.

6.1.4. In the Context of Rigidity/Flexibility

In comparison to constitutional amendment procedures in India, the USA and South Africa, the main difference is the degree of flexibility. The Constitution of the United States of America was regarded as being quite inflexible, requiring Approval of the Congress and State Ratification, but the Constitution of India is thought to be more flexible and occasionally permits the amendments by a simple majority in the Parliament. Also, The Constitution of the Republic of the South Africa was relatively easier to amend than the Constitution of the United States of America.

6.1.5. In the Context of Role of Supreme Court

The result is that the American Supreme Court has no power of Judicial Review to veto an amendment of the Constitution of the United States of America, on the ground of any substantive limitation, because it would enable the Supreme Court *“to veto the will of the people expressed in a constitutional amendment without any possibility of the reversal of the court’s action except through revolution”*.²⁴

Although, the three countries have a Judicial Review System but the area to which the Supreme Court can intervene in the process of amendment varies.

6.2. Significance of the Research

The Study and Comparisons of the constitutional amendment procedures in different countries can help us to understand the different roles played by the States and Parliaments in this process of constitutional amendment.

6.3. Concluding Remark

In a Comparison, the amendment procedure of the Constitution of India is thought to be more flexible than those in the Constitution of the United States of America, whereas the amendment procedure of the Constitution of the Republic of South Africa is comparable to those of India but is less flexible overall due to its greater complexity and involvement of provinces.

The key difference is that the Constitution of the United States of America is significantly more rigid, requiring state approval in most cases and that it is difficult to amend.

²⁴Burdick, Law of the American Constitution, p.48.

CHAPTER-VII

CONCLUSIONS AND SUGGESTION

To conclude this, in my point of view that, despite being Democratic Nations, the USA and India have quite distinct legislative frameworks, legal systems and amendment processes. Unlike the USA, India does not have a specific body for amending its constitution. Only the Indian Parliament has the authority to modify the Country's Constitution. In certain situations, the Indian Parliament may alter the constitution with the consent of at least half of the States, according to Article 368.

It is important to remember that neither the Constitution of the United States of America nor the Constitution of the India stipulate a period of time for verification; in contrast, the Constitution of the Republic of South Africa provides a 30-days "*cooling-off period*" for the proposal of constitutional amendments.

In the present context it would suffice to summarize the lessons I have learnt from this Comparative Study, in the preceding pages:

1. Once it is established that the makers of the Constitution have made an express provision for amendment of the Constitution, any limitations upon that power must be found from the text of the Constitution itself.
2. Once it is held that the Constitution has provided for its own amendment without any restriction, the only seriousness or gravity of the subject of amendment can-not give rise to any "*implied limitation*".

From the above study, I personally suggest that, we may also adopt the mechanisms of the State Proposal for Constitutional Amendment as provided in the Constitution of the United States of America to established more friendly relations between the Central Government and the State Government.

BIBLIOGRAPHY

Books:

- 1) D D Basu, COMMENTARY ON THE CONSTITUTION OF INDIA, 4th ed., 2013.
- 2) Dr. Bhardwaj, R.C., CONSTITUTION AMENDMENT IN INDIA, Lok Sabha Secretariat, New Delhi, 1995.

- 3) Dr. Pandey, J.N., CONSTITUTIONAL LAW OF INDIA, Central Law Agency, Allahabad, 2004.
- 4) Jain, M.P., INDIAN CONSTITUTIONAL LAW, Lexis Nexis Butterworths Wadhwa, Nagpur, 2012.
- 5) Shukla, V.N., CONSTITUTION OF INDIA, Eastern Book Company, Lucknow, 2008.
- 6) Seervai, Preface to Vol.II of the 2nd ed. of Constitutional Law of India.
- 7) Burdick, LAW OF THE AMERICAN CONSTITUTION, p.48.
- 8) Ivor Jennings: SOME CHARACTERISTICS OF THE INDIAN CONSTITUTION: 1953, Oxford University Press.
- 9) Garner, 'BLACK LAW DICTIONARY', 8th ed., p.89.
- 10) Constituent Assembly Debates (CAD), Vol.III, 4323.

Articles:

- 1) Prithivi Raj and Murtaza S. Noorani, "Constitutional Amendment: A Critical Analysis", INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION, Vol.2, Issue 3,2020, pp. 83-115.
- 2) Eesha Sharma and Asmit Chitransh, "Amending Constitution Comparative Study of India, United Kingdom and the United States of America", INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION, Vol.3, Issue 4, 2021, pp.745-760.
- 3) Shubhangi Baranwal, "Amendment of the Constitution- A Comparative Study between South Africa, UK, India & USA", LEGAL DESIRE INTERNATIONAL JOURNAL ON LAW, 25th ed., Vol. 8.
- 4) Chirag Patel RS, "Amendment of The Constitution in India and Us: A Comparative Study", INDIAN JOURNAL OF INTEGRATED RESEARCH IN LAW, Vol.II, Issue II.
- 5) Dr. Santosh Kumar, "Comparative Analysis of Constitutional Amendment Processes: A Worldwide Investigation", INTERNATIONAL JOURNAL OF RESEARCH PUBLICATION AND REVIEWS, Vol.5, Issue 5, May-2024, pp.5180-5184.
- 6) Rajas Jani, "Comparative Analysis of Amendment Procedure of Constitution of India and USA", JOURNAL OF LEGAL STUDIES AND RESEARCH, Vol.7 Issue 1, January-2021, pp.271-279.
- 7) Adem Kassie Abebe, "The Substantive Validity of Constitutional Amendments in South Africa", pp.656-694.