



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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“AMENDING PROCESS AND ITS IMPLICATIONS ON UNION STATE RELATIONS”

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Abstract:

Law and society both govern and are regulated by one another. If there are changes in society, the law will alter as well. It is not possible for the laws to remain static. With the changing condition of society, it is necessary to update its rules and laws on a regular basis. Article 368 of the Indian Constitution specifies the method for amendment of the Constitution. Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in this article. A bill for constitutional amendment may be introduced in either house of Parliament. If a bill is passed by not less than 2/3rd members present and voting, it shall be presented to the President for his assent. The President shall give his assent to the bill and thereupon, the Constitution shall stand amended in accordance with the terms of the bill. What are the implications of an amending process on Union-State relations. If such amendment seeks to make any change in some specific article, provision or schedule; then amendment shall be ratified by the legislatures of not less than one half of the states by resolution to that effect passed by legislatures before the bill is presented to the President for his assent. Where the legal requirements for constitutional change are deemed to present too high a bar, it may sometimes be possible to achieve change through an amending process that retains legal continuity. The aim is to study the amending process of the Constitution and the objective is to find its implications on Union-State relations.

Key Words - Amendment, Constitution, Legislature, Parliament, State, Union etc.

INTRODUCTION:

Amending the Constitution of India is the process of making changes to the nation's fundamental law or supreme law. The procedure of amendment in the constitution is laid down in Part XX (Article 368) of the Constitution of India. This procedure ensures the sanctity of the Constitution of India and keeps a check on arbitrary power of the Parliament of India. The process of

amendment under Section 368 - a constitutional amendment bill that may be introduced in Parliament must be passed by each house with most of the total membership in the house and by a minimum of two-thirds of the members present and voting.

The constitution originally listed 395 articles, twenty-two sections, and eight editions, but has now been changed to 465 articles. There are twenty-five parts and twelve schedules in total. The Legislature took almost three years to draft a constitution, two years, eleven months, and eight days. It was written in two languages: Hindi and English, and it was handwritten. According to B. R. Ambedkar, the Constitution of India was drafted after a thorough review of all known international constitutions. Many parts of India, as a means of amendment, have been adopted in South Africa, and the fundamental rights, representations, and written constitution are derived from the United States. There are two types of constitutions: solid and flexible. The best example of a strong constitution is the United States Constitution, which is why amendments are so difficult. That is why changing the US constitution is so difficult. The Constitution of India is a mixture of strong and flexible principles.¹ The constitution is a set of rules and regulations that establish the mechanisms of the provincial government and define and determine the relationship between the executive, legislative, and judiciary, as well as the central, district, and local government. The Constitution is the source, the legal source from which all other laws should come, concisely and concisely. The written Constitution of the United States of America was the first known example of a written Constitution, which established a unique pattern and was unanimously adopted as a remarkable text for its shortness, restraint, and simplicity. Many other constitutions have adopted many of its features, but not its brevity. One such text is the Constitution of India. India's constitution, the longest in the world, is believed to represent the political, economic, and social views and aspirations of the Indian majority at the time of writing (1947-1949). This is true of all constitutions to some degree.

HISTORICAL BACKGROUND:

The Constitution is a living document rather than a dry one. A document with a unique legal status. The constitution being a living organ, its ongoing interpretation is permissible. It is the supreme law of the land, the supreme law of the land, and the supreme law that must be obeyed. The supremacy of the constitution is essential to bring social changes in the national policy

¹ Nora Headling, Fundamentals of Constitution available at <https://constitutionnet.org/sites/default/files/2016-10/The%20Fundamentals%20of%20a%20Constitution.pdf> last seen 28/4/2023

evolved with the passage of time. The country's constitution represents the goals and aspirations of citizens. The United States of America has become the first country in the world to write its constitution. When it came to the drafting of the Indian Constitution, it was M Roy Roy who proposed the establishment of a forum to draft this document. According to him, the draft would achieve three objectives, including removal of the political parties as intermediaries, articulating a constitutional vision, and transferring the powers from the British to India². The INC then formally submitted the request to the British government. In what has been known as the 'August offering,' the British government approved the proposal in 1940. Sir Stafford Cripps developed the Cripps Mission Plan to establish the Constituent Assembly but was rejected by the Islamic State, which called for a separate Constituent Assembly. to write the Constitution of Pakistan. The Muslim League eventually approved the revised plan of Lord Pethick Lawrence, known as the Cabinet Objectives Plan, and the Legislature was established under this plan in 1946. And the Indian Constituent Assembly made all its decisions in the union. Because he was an old member, Drs. Sachidanand Sinha was elected interim President at the first meeting of the Council. Many committees were also formed, such as the Design Committee, the Executive Committee, the Advisory Committee, and the State Committee. Its Building Committee took 141 days to finalize the draft Constitution. After 11 sessions, the draft was completed, and the Constitution was adopted on November 26, 1949.

WHAT IS AN AMENDMENT:

- An amendment is a change or addition to the terms of a contract or document.
- An amendment is often an addition or correction that leaves the original document substantially intact.
- Other times an amendment can strike the original text entirely and substitute it with new language.

In the case of ordinary persons, an amendment involves altering, modifying, or deleting a text or provision. A formal or formal declaration of changes in legal rules is known as a legislative amendment. There are various provisions in our first constitution, such as the right to education, freedom of the press, bookings, provisions relating to panchayats, municipalities, GST, and

² Constitution of Free India: A draft available at [https://www.constitutionofindia.net/historical-constitutions/constitution-of-free-india_a_draft_m_n_roy_1944_1st%20January%201944](https://www.constitutionofindia.net/historical-constitutions/constitution-of-free-india-a-draft-m-n-roy-1944-1st%20January%201944)

soon. The purpose of this amendment concept is to change things for the better. It may take the form of adding, subtracting or amending any part of the law for the benefit or welfare of the community of its social structure. If it is better to renew the law than to write a new one, an amendment is often used and only the legislature has the power to make changes.

PROCEDURE OF AMENDMENT: NATURE AND SCOPE

Constitutional changes are brought about by two processes:

1. **De-jure or formal modification** – this is made through an amending process provided in the constitution itself.
2. **De facto or informal modification** - it can be made through judicial interpretation for amendment.³

Such changes can be affected by: -

- a) the Court's interpretation
- b) legislation- by filling gaps or supplementing the Constitution
- c) changes in conventions and constitutional usages

Flexible and Rigid Constitutions - The amendment procedures can be classified into two heads as rigid and flexible.

1. **Rigid procedures** mean it is difficult to amend the constitution like that of the U.S., Australia, Canada, and Switzerland and
2. **Flexible procedure** means in which procedure to amend is easy and can be done even by bypassing normal legislation like that of the United Kingdom.

Even though this approach is defined as strong under the Indian constitution, it has shown flexibility in operation.⁴

Article 368 of the Constitution of India provides for the right to amend. The process to be followed in India is simple and consistent, and there are differences in procedure when it comes to the state of the Union government. In any House, an amendment bill may be introduced. In

³ Massey, I. P. "THE PROCESS OF AMENDMENT AND THE CONSTITUTION A STUDY IN COMPARATIVES." Journal of the Indian Law Institute, vol. 14, no. 3, Indian Law Institute, 1972, pp. 407–19, <http://www.jstor.org/stable/43950146>.

⁴ <https://ijlra.com/wp-content/uploads/2022/03/AMENDMENT-OF-THE-CONSTITUTION-IN-INDIA-AND-US-A-COMPARATIVE-STUDY.pdf>

India, all constitutional amendments require a Special Majority, which means that they must be approved by both houses with more than half the total number of members present and voting.⁵

PROCESS OF AMENDMENT IN CONSTITUTION OF INDIA

The Provisions related to amendment in the constitution are as follows: -

1. Many of the articles that can be amended by Parliament, in general, are article 4, Article 189, and article 243 which are not subject to the procedure set out in Article 368 of the constitution.
2. Articles of the constitution that can be amended by special majority such as Fundamental Rights.
3. Articles which required in addition to the special majority mentioned above, ratification by not less than ½ of the state legislatures, are as follows –
 - i. Election of the president (Art. 54 and 55)
 - ii. Extent of the executive powers of the Union and the states (Art. 73 and 162)
 - iii. Articles dealing with the judiciary in union and high courts in the state (Art. 214-231, Art.133-147)
 - iv. Legislative relation between power and state (Art. 245 –255)
 - v. Representation of state in parliament (IV schedule)
 - vi. Article 368 itself.

The process of amendment under Section 368 - a constitutional amendment bill that may be introduced in Parliament must be passed by each house with most of the total membership in the house and by a minimum of two-thirds of the members present and voting. Once a bill has been passed by both houses it is presented to the president for approval, who will provide access to the bill and the constitution will be amended.

DOCTRINE OF BASIC STRUCTURE OF THE CONSTITUTION

The process of amendment under Section 368 - a constitutional amendment bill that may be introduced in Parliament must be passed by each house with most of the total membership in

⁵ Shukla, V.N., Constitution of India, Eastern Book Company, Lucknow.

the house and by a minimum of two-thirds of the members present and voting. Once a bill has been passed by both houses it is presented to the president for approval, who will provide access to the bill and the constitution will be amended. The certain examples of basic structure as given in the case of *Keshavananda Bharati*⁶ and some that have evolved with time are:

1. The Rule of Law
2. The Principle of Equality
3. The doctrine of separation of powers
4. The supremacy of the Constitution
5. Federalism
6. Secularism
7. The sovereign democratic-republican nature of polity
8. Parliamentary system of Government
9. Free and fair elections
10. Independence of judiciary (Independent Judicial System)
11. Powers of the Supreme Court under Arts. 32, 136, 141 and 142
12. Fundamental Rights in certain cases
13. Limited power of Parliament to amend the Constitution
14. Power of Judicial Review
15. Republican and democratic form of Government

The features listed above are not exhaustive. The court will decide whether the feature is important or not from time to time as the need arises. Art. 368 of the Constitution of India empowers parliament to amend the Constitution. To understand the basic doctrine of architecture, one must first understand Section 133, which is regarded as the custodian of fundamental rights. Article 13 adds teeth to basic rights, which would be like a toothless leopard if they did not. This principle limits the legislative power of the legislature conferred on Article 368 of the constitution. In addition, Article 13 has a future effect. Article 13 also established the doctrine of judicial review and was held in the case of *Minerva Mills v. Union of India*⁷ that the review of justice is part of the framework of the Constitution.

⁶ (1973) 4 SCC 225; AIR 1973 SC 1461

⁷ AIR 1980 SC 1789

ANALYSIS OF CASES

1. Shankari Prasad V. Union of India 1951⁸

The First Amendment Act of the Constitution was challenged in this case. It was about the completion of the Zamindari program. This action was opposed because it violated the property right. It was elevated from having a basic right to a constitutional right⁶ over time. Articles 31A and 31B have been added because of this article. This problem first arose in this case, where it was determined that the word “law” in Article 13 refers to principles enshrined in the common law. It does not include constitutional revisions made under the special procedure of Article 368. As a result, by amending the constitution, parliament may deprive them of fundamental rights.

2. Sajjan Singh V. State of Rajasthan 1965⁹

The 17th CAA, which introduced the ninth edition, was challenged in this case. Anything included in Schedule 9 will not be excluded from legal review. The Supreme Court ruled in favor of Shankari Prasad in a 3: 2 majority, ruling that parliament has the power to change fundamental rights. According to J. Gajendragadkar, constitutions do not have a clear clause stating that parliament cannot change fundamental rights. However, this decision did not satisfy J. Hidayatullah and J. Mudholkar.

3. Golak Nath V. State of Punjab, 1967¹⁰

The Supreme Court overturned its previous rulings, concluding that fundamental rights are sacred and given a “superior and immutable” status, and that parliament has no authority to amend Part III of the constitution to remove or restrict basic rights. In Article 13, the word ‘law’ includes the word ‘amendment’. If the authors of the Constitution had intended to exclude amendments to Article 13, they would have made that clear. In addition, Section 13 (3) is written in extremely broad terms. It is contained in Article 13 if there is no alternative to change, then a constitutional amendment will not infringe on basic human rights. It is used to have a future effect.

⁸ 1951 SCR 89; AIR 1951 SC 458

⁹ 1965 AIR 845, 1965 SCR (1) 933

¹⁰ 1967 AIR 1643; 1967 SCR (2) 762

4. 24th Amendment Act, 1971

Responding to a Supreme Court decision in the Golak Nath case, Parliament passed the 24th amendment, overturning the decision. The amendment adds Article (4) of Section 13 to make it clear that the word “law” in Article 13 does not include constitutional amendments, and Article (3) of Section 368 clearly states that parliament may change any part of the constitution, including Fundamental Rights.

5. Keshavanand Bharati V. State of Kerala, 1973¹¹

In this case, the constitutional validity of the 24th Amendment was challenged. The Supreme Court overruled its judgment in the Golak Nath Case, and it upheld the validity of the 24th Amendment and stated that the parliament is empowered to abridge or take away any of the fundamental rights. At the same time, the Supreme Court fulfilled its role as the guardian of fundamental rights of citizens and it formulated the classical ‘Doctrine of Basic Structure’ of the Constitution. According to it, the parliament can amend fundamental rights, but it cannot touch those fundamental rights which form a part of the ‘basic structure’ of the constitution. Basic structure denotes the basic pillars upon which the Constitution stands. This concept was picked up from the Wilmer Constitution (Germany) to guarantee basic rights to all citizens and to prevent its encroachment by the state. In conclusion, we can say that the net result of Keshavanand Bharati’s judgment was that it over-ruled the Golaknath Case and it upheld Shankari Prasad subject to the doctrine of basic structure.

The theory of the basic structure of the Constitution was reaffirmed and applied by the Supreme Court in Smt. Indira Nehru Gandhi vs. Raj Narain case¹¹ and certain amendments to the Constitution were held void.

The effect of the various decisions of the Supreme Court may be thus summarized:

- Parliament has limited powers to amend the constitution.
- Parliament cannot damage or destroy the basic features of the Constitution.
- The Procedure prescribed for the amendment is mandatory. Noncompliance with it will

¹¹ (1973) 4 SCC 225; AIR 1973 SC 1461

result in the invalidity of the amendment.

- Clauses (4) and (5) inserted in Art. 368 by the 42nd Amendment Act is invalid because they take away the right of judicial review.
- Parliament cannot increase its amending power by amending Art.368.

29th Constitutional Amendment

The Kerala Land Reforms Act, 1963 (Act 1 of 1964) and other such land reform Acts were added to the Ninth Schedule.

The court upheld the 24th Amendment and stated that the 2nd part of the 25th Amendment was ultra vires.

The court in this judgment answers an extremely important question that was left unanswered in *Golak Nath v. State of Punjab* i.e. the extent of Parliament to amend. The court observed that such a power should be a balance between the Parliaments' duty to follow the constitution and its duty to perform socio-economic duties.

To answer this question, they established the Doctrine of Basic Structure. While they admitted that the Parliaments' power to amend the constitution was unrestricted with regards to the portion of the constitution they wished to amend, there were certain contours of the constitution that should be left untouched. *Hedge.J* and *Mukherjee.J* in their opinions stated that the Indian constitution was more of a social document based on social philosophy than a political document. Just like every philosophy, the constitution contains certain basic features that should not be touched. The majority bench left it up to the courts to decide what the basic features of the constitution were because, in their opinion, they were not exhaustive.

The major findings of the court are as follows:

There is a difference between an amendment and ordinary laws.

Overruled *Golak Nath v. State of Punjab* by stating the power of Parliament to Amend is not unfettered. It can't violate the Basic Structure of the Constitution.

They established the extent of amendment under Article 368 and stated that it was restrictive and

they could not make fundamental changes.

It stated that parliament can amend any provision in the constitution, including fundamental rights. But this was again subject to the fact that they could not alter the basic structure.

The court mentioned a few basic structures which they could locate such as “Free and Fair Elections” and the “Federal Structure of the Nations”. They also stated that the list was not exhaustive and it was up to the courts to decide whether it was a basic structure or not.

The court upheld the 24th Amendment and struck down the second part of the 25th Amendment. However, the 25th Amendment was to be subjected to two conditions-

- The word ‘amount’ does not only relate to compensation and it should be related to the market value of the property at that time.
- The part which barred judicial review was struck down as ‘no law can prevent scrutiny by the courts’.

Conclusion:

The constitution of India is one of the most fascinating documents on this planet. No other country has a constitution as comprehensive as ours and is the largest constitution in the world. But despite being so comprehensive, the reason why this document is so interesting is due to the fact that it is extremely flexible. The fathers of our constitution made it so, they wished that the constitution would not only aid the country to grow but it would also grow alongside it. Thus, the government can amend the constitution depending on various issues brought up. These powers are given by Article 368.