

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

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ISSN

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

AUTHORED BY – ANMOL TANWAR

## **Introduction**

A constitution is termed as the fundamental law of any country. Since it is a fundamental law the procedure to amend the same has to be different from the ordinary law. A constitution has a very special legal status as it sets out the basic framework and determines the essential purposes of different organs of any government. In India and USA, both the countries having a federal constitution, the constitution is supreme and it has been given a special status. Countries like Britain, where the parliament is the supreme, can amend the constitution by ordinary law making process, so it can be said that in terms of the amendment procedure the constitutional law stands on an equal footing with other laws in Britain.

Countries having a written and rigid constitution place the constitutional law on a different footing as compared to other ordinary laws. In these countries constitution is supreme in the sense that in terms of status it is placed on highest pedestal and all laws in force in the country get their validity and sanction from the constitution. As the life of a nation changes with political, social and economic changes taking place the constitution should also be changed to meet the needs of the society.<sup>1</sup> Recently, the Indian legislature realised the need for reservation on economic basis so it had to come up with special provisions for economically weaker sections of the country. The GST law was also introduced to meet the needs of changing time.

### **1.1.Nature of the ‘amending process’**

In a layman’s understanding a constitutional amendment can be said to be an improvement, a revision or a correction to the original text. Amendment is to ‘amend’ or to ‘change’ the constitutional provision(s) usually by a special procedure enshrined in the constitution itself. The amending power under the constitution, also considered as the *constituent power*, can only be

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<sup>1</sup> Gregory A. Caldeira, *Constitutional Change in America: Dynamics of Ratification under Article V*, 15 PUBLIUS 29 (1985).

exercised by that body and in that method which is enshrined in the Constitution. This proposition finds support in Article V of the American Constitution and in Article 368 of our constitution.

### **1.2. Significance of the constitutional amendments**

A constitution which was drafted in one era may become inadequate in another era. So there arises a need for some kind of mechanism which can adopt the constitution according to the changing needs of the time. It has been largely accepted that a constitution which does not provide means for change is left without any means of survival. The ideals and beliefs of the country also undergo changes with time so there is a need for inclusion of these ideals and beliefs in the constitution. One example is, India added 'socialist and secular' words in the preamble in 1976 by way of amending process. More than hundred constitutional amendments by Indian parliament show the need of provisions related to the amendment procedure in India. In United States the American Constitution has also undergone 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 task of finding out the gaps in the constitution is left to the legislature. The author is of the view that no one generation has a monopoly over wisdom. Humans are fallible but they do learn from the experiences and must be empowered to change the constitution as per the exigencies of the time.

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

India and United States both have a federal constitution. The American amendment procedure is more in consonance with the federal principles as it provides to the states special methods for initiation of constitutional amendments. At the very outset it can be said that both the constitutions reveal that union parliament is not the only body which has the power to amend each and every provision of the constitution without the involvement of the states. Both the constitutions provide for multiple stages of approving any constitutional amendment which works as an inherent mechanism to ensure checks and balances against the hasty constitutional amendments.

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

In both the constitutions some of the constitutional provisions are subject to rigorous methods of amendment involving state consent. There are also some limitations provided in terms of amending key provisions of the constitution (In India, it can be understood by the 'basic structure doctrine'). The role of states in the amending process can be said to be a safeguard for the federal constitutions. States ensures that this power is not exercised in an arbitrary manner by the central legislature. Although both the amendment processes are not identical but they have some fundamental similarities in terms of providing ample protection when it comes to states' rights.

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

In India some scholars argue that there is only one mode of amendment and that is provided under Article 368. Whereas some argue that there can be two modes of amendment which are there. First is the formal method and second is the informal method of constitutional amendment. Formal method is the one which is provided in the Constitution under Article 368 whereas informal method can be said mean judicial interpretations. These scholars argue that, in such cases, although the constitutional text is not subject to any change but the meaning and the context undergoes a drastic change. Article 21 of the Constitution of India, by means of series of the Apex Court decisions, has been given a wide meaning by the Indian Supreme Court.

The American Constitution deals with constitutional amendments under Article V of the constitution. United States of America also has two methods of constitutional amendment like India. As far as the informal method is concerned, the United States uses 'judicial creativity' instead of the phrase 'judicial interpretation' as a means of amendment. The American Constitution as we know is skeletal and not a detailed one. Being a brief constitution it gives a lot of scope for judicial creativity. The American Apex Court endeavours to adopt the constitution according to the varying time by providing the right interpretation of the constitutional provision. The Apex Court of United States while dealing with first constitutional amendment,<sup>3</sup> related to freedom of speech, held that there can be no right without limitation. Therefore, the American Supreme Court had taken the task to elucidate the limitations on the exercise of freedom of speech. The first ten constitutional amendments or the American Bill of Rights have also been given correct interpretation by the Supreme Court.

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<sup>3</sup> Brandenburg v. Ohio, 395 U.S. 444 (1969).

## 2.2. The Amending Procedure

Article 368 of the Indian Constitution gives amending power to the parliament and it also provides for the procedure of a constitutional amendment. Article 368 provides that a constitutional amendment can only be introduced by way of a Bill in either house of the Indian Parliament. It basically means that the rules which govern the initiation, consideration and passing of other Bills are also relevant when it comes to amending Bills. This Bill is required to be approved by each House - either by simple or by special majority.

Simple majority here means that the Bill is mandatory to be approved by majority votes of the members who are present and voting in each house of the parliament. Special majority here means that the Bill is required to be passed in both the houses of parliament by a majority of total membership and by a majority of not less than  $2/3^{\text{rd}}$  of the members who are present and voting. Once the Bill is passed by each house of the parliament it has to be necessarily presented to the president for his assent.

In America the amendment procedure initiates with the 'proposal of constitutional amendment' introduced in either House of Congress. The proposal has to be assented either by a vote of two-third of each House of Congress or by a constitutional convention called by the Congress. The constitutional convention can only be called by the Congress upon an application of  $2/3^{\text{rd}}$  of the state legislatures.

It is pertinent to note that all the constitutional amendments in the United States have been initiated by the proposal approved by a vote of two-third of each house of the Congress. The second method, which is by calling the constitutional convention, was rarely used in actual practice. Although such a provision in the hands of the state legislatures ensures checks and balances and is in line with the principle of federalism.<sup>4</sup>

## 2.3. Ratification by the States

Article 368 of the constitution also grants a special status to some of the constitutional provisions. By special status we mean that these constitution provisions can only be amended after getting state ratification. This provision was added with a view to keep the separate existence of the states in federal structure. Clause 2 of Article 368 says that if the amending Bill tries to make any change

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<sup>4</sup> Hugh Evander, *The Doctrine of Amendability of the United States Constitution*, 7 INDIANA L. REV. 457 (1932),

in the Articles 54, 55, 73, 124 - 147, 162, 214 - 231, 245 – 255, Fourth Schedule, Seventh Schedule and Article 368 itself then that Bill cannot be presented to the President until the Bill is ratified by one-half of the states. The ratification is done by passing a resolution to that effect by the state legislatures.

In American constitution ratification by the states is essential after the initiation of proposal. The ratification of a constitutional amendment can be done by two methods provided under Article V of the American constitution. These methods are: (i) ratification by 3/4<sup>th</sup> of the state legislature; or (ii) constitutional convention of 3/4<sup>th</sup> of the states. It is the discretion of the Congress to determine the method of ratification. Once the ratification takes place the proposed amendment to the constitution becomes effective.<sup>5</sup>

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

In India the assent of the constitutional head, which is the president, has to be taken before the Bill gets converted into a constitutional amendment. The words used in Article 368 are 'shall be presented' undoubtedly means that the assent is mandatory and not only directory. It is also important to note that the Bill having been passed in accordance with Article 368 leaves no discretion to the President to reject the Bill. In light of the above statement it could be inferred that assent of the constitution head is a mere formality.

In United States as far as the assent of the constitutional head is concerned, there is no formal requirement as such. This is a unique feature of the American constitution. In light of the same the initiation and the ratification of the Bill are the only essential constitutional requirements for any constitutional amendment to be valid. Once the amendment Bill gets the ratification of the states the Bill gets a life.

#### **2.5. Final Adoption**

In India after satisfying all the essentials of Article 368 which are: (a) initiation of Bill in either House; (b) passing the Bill by simple majority, special majority or special majority plus ratification by the half of the states (which depends on the nature of the amendment sought to be made); and (c) after getting the assent of the president, the Bill deemed to be finally adopted. The constitution of India, accordingly, stands amended.

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<sup>5</sup> William Marbury, *The Limitations upon the Amending Power*, 33 HARVARD L. REV. 225 (1919).

On the other hand the United States constitution stands finally adopted on the date ratification of the states is given. Ratification is given by way of vote of three-fourth of the states or by the constitutional convention of the states. This indicates that the procedure adopted by India is lengthier as compared to the American procedure. Also, the American procedure seeks to limit the procedure to two important steps and gives due recognition and participation to the constituent units.

## Limitations on the Amending Power

Under the Indian Constitution certain limitations are imposed on the amending power of the parliament to amend the Constitution. There are certain provisions of the constitution which are protected under different doctrines of law. These doctrines provide valid reasons for restricting the amending power of the Parliament or Congress. These doctrines are based on the preposition that the Parliament (Congress) and the Constituent Assembly cannot be placed at equal footing and be given same *constituent power*. Like Indian constitution the American constitution also has some inherent restrictions when it comes to the Amending power. One such limitation can be seen in the provisions related to the 'right of the states to equal suffrage in the Senate'.

### 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>6</sup> the court while dealing with the constitutional legitimacy of 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*,<sup>7</sup> 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>9</sup> stands overruled after *Kesavananda Bharti*. It was also reaffirmed in the case of *Indira*

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<sup>6</sup> *Shankari Prasad v. Union of India*, AIR 1951 SC 458.

<sup>7</sup> *Golak Nath v. State of Punjab*, (1967) SCR 762.

<sup>8</sup> *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

<sup>9</sup> *Supra* note 7.

*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>11</sup> Implied limitations are provided by the Supreme Court in its judicial decisions. In National Prohibition case,<sup>12</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>13</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

In this comparative study we have gone through two amendment procedures provided in the respective Country’s constitution. We got to know that even though USA and India are democratic countries but their way of functioning, making laws and amending power are different as compared to each other. The Constitution of India has borrowed some features from other countries after testing their suitability to our country. It can be said that there are so many differences between the amending procedures among the compared countries that the similarities are less than the fingers. Almost every country’s Constitution provides provisions for the constitutional amendments. These provisions become a need in light of the changes that occur in a dynamic society. Flexibility is, therefore, considered a good feature in any constitution. A

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<sup>10</sup> Indira Gandhi v. Raj Narain, AIR 1975 SCC 2299.

<sup>11</sup> George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICHIGAN L. REV. 213 (1920).

<sup>12</sup> *National Prohibition Cases*, (1920) 253 US 350.

<sup>13</sup> *Laser v. Garnett*, (1922) 258 US 130.

constitutional amendment is also considered as the means of achieving social as well as political change.

In Constitutional Amendments the role of a state is very restricted in India but in America, the constituent units (states) have been given a key role. States in United States are given the power to even initiate any “proposal for amendment of the Constitution”. But Indian states are not given this power in terms of initiation of proposal for amendment. Under the Indian Constitution an amendment which passes the test of Article 368 becomes a part of the Constitution only if the assent of the Constitutional Head is obtained. But in the United States of America, the Constitutional Head is not given this status and therefore provisions prescribing the assent of the President do not find any place in the American Constitution.

If we compare the two Constitutions, we will find that it is very difficult to amend the United States Constitution as compared to the Indian Constitution. The rigidity of the United States Constitution is evident from the fact that since 1789 around thousands of amendments were introduced in the United States Congress but only 33 could be adopted and sent to the states for getting ratification. Ultimately, only 27 amendments could pass.<sup>14</sup> Article 368 gives Indian Parliament supremacy in some matters to amend the constitution but then in some matters it necessitate approval by not less than one-half of the states. The notable point is that both in Indian Constitution and the United States Constitution no time limit has been provided for ratification. Lastly, I would like to conclude that the Indian Constitution is more flexible than rigid. This statement finds support in the fact that only a few of the Constitutional amendments require approval from the state legislatures and even then ratification by one-half of the states would suffice. The remaining provisions of the Indian Constitution can be modified by a special majority of the Indian Parliament. Whereas, the United States has a rigid constitution and it can only be modified by the United States Congress by way of an extraordinary procedure enshrined in the United States Constitution for that purpose.

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<sup>14</sup> Erwin Chemerinsky, *Amending the Constitution*, 96 MICHIGAN L. REV. 1564 (1998).