

COMPARATIVE ANALYSIS OF AMENDMENT PROCEDURE OF CONSTITUTION OF INDIA AND USA

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ABSTRACT

A constitution is the main document of any country. It is the constitution that acts as the working document of the country. The amendment of this document from time to time as per the requirements is one of the most important procedures. India and the USA both have written constitutions and the amendment procedure of the constitution is written in both these constitutions. The amendment procedure of the constitution varies from country to country. This paper talks about the amendment procedure of the Indian Constitution and American Constitution. The paper also compares the procedure of amendment of the Indian Constitution and the Constitution of the USA. The state legislatures play a role in both these amendment procedures. The constitution cannot be amended as per the will of the legislatures. There must be certain limits for amending the constitutions of the country. This paper talks about the limitations which are imposed on the procedure while amending the constitution in both India as well as in the USA. The constitution is the charter of the country and should not be unnecessarily amended with a bad intention. The amendment should be made only for the benefit of the public and should not override the basic character of any country.

INTRODUCTION

India and the USA are the two major democracies in the world. Both the nations were the previous states of The British Empire. The Constitution is the contract that administers the nation. English impact can be seen intensely in the constitution of both of these nations. The American Constitution came into power in 1789 while the Indian constitution in 1950. "Constitution may not describe the full reality of the political system, but when carefully read they are windows into underlying reality".ⁱ The Constitution of a nation, similar to some other down business instrument must change. As per Wheare, "The constitution, when they are shaped and embraced, will in general mirror the prevailing convictions and interests, which are normal for the general public at that time". Wheare likewise referenced that "a constitution is, in reality, the resultant of a parallelogram of powers political, financial, and social which works at the hour of its appropriation".ⁱⁱ Every country has its procedure to amend its constitution but the Constitution of the country can be changed by two processes mainly;

i) Informal Amendment or de facto.

ii) Formal Amendment or de jure.

A formal Amendment is a type of amendment where the process of amendment is mentioned in the constitution itself. The constitution can be amended by the people themselves or can be done through representatives elected by the people. Informal Amendment is an amendment process that is not specifically mentioned in Constitution. This informal Process contains many sub-processes which are (i) judicial review of the constitution (ii) complete change of the constitution.

AMENDMENT PROCEDURE OF CONSTITUTION OF THE UNITED STATES OF AMERICA

American Constitution came into power in 1789. It is one of the oldest constitutions of any country. The constitution of the country should be revised occasionally as per the changing scenario of the country and the world. It is believed that the constitution of the United States is

the most challenging constitution to amend. Due to this difficulty in amendment the Supreme Court of the United States has made more amendments and additions in the constitution than by all other means.ⁱⁱⁱ There have been twenty-seven amendments in the constitution of the United States but it is only amended eighteen times.^{iv}

Formal Method

Some executive acts agreements and treaties have an amending effect on the constitution. No arrangement of the constitution is a dead letter; thus, if an arrangement of the constitution is neither cancelled nor implemented for quite a while, it turns out to be dead de facto however not in a legal sense. The process of amendment is mentioned in every constitution. According to the Article V of the United States Constitution;

“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 before 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.”^v

The process of amendment is mentioned in the Article V of the constitution which states that the amendment may be presented by

- i) Majority of two-thirds of both the Houses of Congress.
- ii) Calling a convention by legislatures of two-thirds states.

As of now, no convention has been called to propose the amendment, all the amendments are proposed by both the houses of Congress. The proposed amendment must be ratified by the (i) legislature of three-fourth of the states OR (ii) calling a convention by three-fourth of the states.

After the amendment is ratified then it immediately becomes the part of the Constitution as no assent of the President of The United States.

To be inserted in the constitutional law, those procedural hurdles must be apparent from the specific amendment proposal referred to in Article V. The continuity and clarity in Article V allow one to understand that the Constitution is officially amended: when two-thirds and three-quarters of the legislature join together to approve and ratify the amendment resolution, the proposal becomes binding on all purposes and intentions as part of this Constitution.

Informal Method

Formal changes in the constitution in the US are not the sole method of achieving established changes. Constitutional changes, for instance by perusing the legislature, executive, or judicial frameworks, can likewise happen in an informal way. The judiciary, by court decisions, has made the most changes. In any case, the courts are by all account not the only ones who can utilize the informal established alteration measure.

While formal alterations have prompted a move in the 'word' of the U.S. Constitution, informal changes have prompted an adjustment in the importance of the 'word' of the content of the U.S. Constitution, depending on legal understandings or the act of working certain groups of state power.

- **Role of Judiciary**

The 'popular' case of *Marbury vs Madison*^{vi} was the first case that talked about the position of the Supreme Court in relation to the Constitution of the USA has been decided by Supreme Court Justice John Marshall. Justice Marshall States: “It is clear that the jurisdiction and duty of the judicial department is to say what the law is ... a law which is in contradiction to the constitution is invalid and that the courts, like other departments, are bound by this instrument”

AMENDMENT PROCEDURE OF CONSTITUTION OF INDIA

Indian constitution was formed on 26th November 1949 and came into effect on 26th January 1950. Indian Constitution is the longest constitution of a sovereign country. It is the lengthiest handwritten constitution in the world. Many articles of the Indian constitution are borrowed from various countries. The amendment procedure of the constitution of India is somewhat inspired by the Constitution of South Africa. There have been many amendments in the constitution from time to time. The Indian Constitution has been amended One Hundred and Four times. Excluding the amendment of certain provisions and articles, the method and the process of amendment of the constitution is similar to that of passing a new law/statute. The proposed amendment can be introduced in any house of the Parliament. After the completion of readings in one house, it is then sent to the other house and the same procedure is followed by the later house. If there is a disagreement between the two houses during the passing of the ordinary legislation a joint sitting can be called by the President of India but this is not the case with amendment bills. If there is a disagreement between the houses regarding the amendment bill then as per the constitution in such case no joint sitting can be called by the President and the bill is considered not passed.^{vii}

The amendment bill must be proposed in any house of the Parliament and must be passed by both the houses of the Parliament by a majority of Two-Thirds members of the house present and voting. After passed by both houses the assent of the President is required for the implementation of the amendment. This is the procedure when ordinary amendments have to pass but “there are some amendments which can only be amended by an extraordinary procedure which requires the ratification 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.”^{viii} Ratification by state legislatures is one of the main procedures when it comes to certain kinds of federal amendments. The constitution can be amended by three methods which are 1) simple majority 2) special majority 3) special majority with ratification by states.

The process of amendment of the Indian constitution is mentioned in Article 368 of the constitution. It is read as follows;

“An amendment of this Constitution may/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 not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bills”

If the legislatures decide to amend certain articles such as “ (a) article 54 article 55 article 75 article 162 or article 241, 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.”

COMPARATIVE ANALYSIS OF USA AND INDIA

The features of the amendment to the Constitution of the United States are certain facets of substantive constitutionalism. According to the applicable amendment, these elements are part of the US amendment process, in compliance with the structure used in the amendment. One or more features of constitutionalism will easily be found, even during the era of modifications to the US Constitution by formal or informal amendments. The democratic existence of this constitution and the changes made possible during the time of the constitutional amendment are closely linked to another feature of the constitutional amendment. Reforms that promote large interests should facilitate the introduction of the process to reform the democratic constitution without undermining its practical value as a permanent routine for the protection of majority interests and the preservation of minorities. To promote the rights of the majority on the one hand and protect minorities on the other, it takes a sort of flexibility. In fact, with the informal amendment of the US Constitution, this allowance for some sort of flexibility was made possible.^{ix}

In India basically there is only one procedure to amend the constitution which is a formal method provided under Art 368 of the Indian Constitution. The fundamental rights granted by the Constitution have been abridged by most constitutional amendments in India. The Supreme Court held before 1967 that Parliament had the authority to amend each and every provision of the Constitution, but overturned the previous opinion in the case of I.C. Golaknath^x and ruled that Parliament could not make amendments to constitutional rights based on Article 13(2) of the Constitution. Article 13(2) strictly prohibits making, to the extent that it infringes, any invalid amendments and any statute that infringes or infringes any of the rights referred to in Part III, natural rights and any rule that infringes or infringes any of the rights referred to in Part III.

Between the amendment procedures of these two countries, the Indian constitution is more flexible for amendment as compared to the US constitution. The US constitution is more rigid and difficult to amend. This can be seen by the number of amendments each country has made in its constitution. The Indian constitution which came into force in 1950 has seen one hundred four amendments as compared to the US constitution incorporated in 1789 were amended only twenty-seven times.

LIMITATION OF AMENDMENT PROCESS

After considering the locus of the power of amendment, the limitations on that power, if any, need to be examined. There may be two kinds of restrictions, either express or implied. It is important to research them when they exist in the constitutions of other countries to achieve a better understanding of express limitations. Such a review will expose their relevance and effectiveness, as well as the complicated and intractable issues they give rise to in the development of civil law.

It is sometimes imperative for constitutionalists to place such limits on the right to amend them and, thus, to specifically set them down in the constitution. The drafters of the Constitution of the United States specified in Art V that the first and fourth clauses of the ninth provision of the first Article shall not be changed by any amendment made prior to 1808 and that no State

should be stripped of its full suffrage in the Senate without its permission. The former prohibitions are now irrelevant, but there is still a ban on the indefinite prohibition of any provision by which a state is stripped of full suffrage in the Senate without its approval. It is pointless to add that this limit is not absolute. If any State had ratified any provision eliminating representation in the Senate, it would be entirely legitimate and the only condition for the approval of the State is met in this manner. Alternatively, by an amendment ratified by both Nations, this provision itself may be repealed. This provision then turned out, in reality, to be "a restriction on the method rather than the scope of amendment"^{xi}

In 1973, in Kesavananda Bharathi's case, the Supreme Court passed a landmark judgment that Parliament could not alter the basic structure of the Constitution that saved the political framework in the Indian Parliament, to energize advancements in different zones that control the major rights that were fomented by writs in the Supreme Court. During the crisis time, in any case, the Parliament altered by accepting an uncontrolled position that it could make any constitutional amendment, which was stayed by the Supreme Court in the Minerva Mills case in 1980, in light of the choice in the Kesavananda Bharathi case.^{xii}

CONCLUSION

As the current economic and political conditions suggest that a lot of changes are in store for countries in the future, it does not take an astrologer to predict that it would be appropriate to amend the Constitution over and over again. While the Constitution should order reverence and regard from all, if and when the country wants to amend it, it should be amended. The Constitution, after all, is not a cord to bind the entire country down; it is a tie to hold the whole nation united as it marches quickly on the road to material development, academic advancement, and spiritual uplift. To worship the Constitution as an altar is to render it worthless for centuries to come. It is necessary to change the Constitution to keep it intact, but at the same time, it can be changed only when it is necessary in the interests of the entire world and should be occasionally amended as far as possible. In other words, it should not be an amendment simply for an amendment. Not only should a legitimate amendment be needed, but

it should also be hammered out after a fair deal of consideration, and its implications on other aspects of the Constitution, in particular, should be carefully researched.

ENDNOTES

References

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^v Article V of The Constitution of United States.

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