

# Amending the Constitution: USA & India

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## Abstract

A Constitution is regarded as the document which governs the present and future of a nation. And while doing so, it shapes the nation as per the will of the people who provide sovereignty to the nation. But as the needs and circumstances of every human being changes with time, the same is in the case of a nation. And with the changing atmosphere the constitution needs to adapt itself, in order to remain relevant. And in order to do so, the constitution amendments are done by the legislatures. In the present paper, the author attempts to present the system that exists in the USA, the oldest democracy, and India, the biggest democracy in the world. The author attempts to compare them on the basis of their procedure and how the countries' popular will has impacted the amendments done to their respective constitution so far.

**Keywords:** Amendment, Popular-Will, Need, Interest, Power.

## Introduction

The thought of drafting an indigenous constitution for the Indians by Indians itself is an inspiration from that of the U.S. For Nehru and Gandhi, the example of the U.S. drafting its own constitutional rights after its independence was very strong. Soon after the declaration of Poorna Swaraj in 1930, which can be considered as an equivalent to Declaration of Independence 1776 of the U.S., every Indian decided not to compromise in attaining a complete independence and the great minds of India believed indigenous constitution is the first right step towards it. Thus, the question of whether or not studying U.S constitution history and practice is useful in understanding contemporary constitutional developments in India absolutely gets a positive answer—Yes!

Since the drafting of the Constitution, the constitutional history of the U.S. has made a significant impact on the Indian constitution. India had adopted the fundamental rights from the Bill of Rights of the U.S.<sup>1</sup> However, the UDHR also has its own impact on India's fundamental rights. The concept of Judicial review was adopted by the Judiciary of India and this doctrine was first given in the case of *Marbury v. Madison*<sup>2</sup> and thereby it had opened a Pandora box in the legal system of India. The *Kesavananda Bharti case*<sup>3</sup> purported doctrine of basic structure for the very first time, and fundamental right is a part of basic structure. In the case, *Indira Gandhi v. Raj Narain*,<sup>4</sup> The Supreme Court of India upheld that judicial review is a part of this doctrine. In *Brij Bhushan v. State of Delhi*,<sup>5</sup> the Court opined that Fundamental Right, the "freedom of speech and expression" has been taken from the 1st Amendment Act of the U.S.

<sup>1</sup> Bill of Rights of U.S., 1791.

<sup>2</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>3</sup> *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (1973) 4 SCC 225.

<sup>4</sup> *Indira Gandhi v. Raj Narain*, 1975 SCC (2) 1590.

<sup>5</sup> *Brij Bhushan v. State of Delhi*, 1950 AIR 129.

Impeachment of President<sup>6</sup> and removal of judges from Supreme Court and High Court<sup>7</sup> is a reflection from the Legal framework of the U.S.

While we compare the legal systems of these nations we get to know about certain striking features, the U.S follows a Presidential form and the position and powers of the President there is powerful and wide. Whereas, in India the President only acts as a Head of Executive and is obligated to go by the words of the Council of ministers. The federal structure in the U.S. has allowed real autonomy and supremacy to the states, but in India since it is a cooperative federalism the residuary and ultimate power reside in the hands of the centre, however the states have been with limited powers which would be enough to govern their regional needs. We could also find similar doctrines such as the separation of power and the principle of checks and balances in these legal systems. Both, Dr. B.R. Ambedkar and James Madison have advocated these doctrines to ensure there is no overreach of power by any organ of government.

In regard with the affirmative action, though India validates the use of reservations, a parallel can be drawn with the *Bakke case*<sup>8</sup> and the *Champakam Dorairajan case*.<sup>9</sup> Recently, the Supreme Court of India in the case, *Patan Jamal Vali v. State of Andhra Pradesh*<sup>10</sup> had acknowledged and tried to incorporate the principle of intersectional discrimination. This principle had already got significant traction in the U.S.

Hence, it is very much on the fact that studying U.S. constitutional Law history and practice is useful in understanding the contemporary constitutional developments in India because the legal system of India itself has significant inspiration from that of what it is in the U.S. Thus, in order to understand the text of the constitution, to analyse the evolution of the legal system in India or to even know about the trajectory of the legal fraternity in India one must have a basic understanding of the constitutional history of the U.S.

### **Classification of Constitutions based on Amendment Procedure**

This classification of constitutions in two types, namely rigid and flexible, is given by Professor Dicey. According to him, a flexible constitution is one in which every law of every description can be legally changed with the same ease and in the same manner by one and the same body whereas rigid constitution is one in which certain laws, known as fundamental or constitutional laws, cannot be changed in the same manner as common laws.<sup>11</sup> The UK has the most flexible constitution because there is no distinction between legislative power and constituent power. Unlike the UK, the USA, which has a written constitution, has a special place for constitutional amendment. In fact, in most of the written constitutions, the power to amend the constitution is vested mostly in a body other than legislature or in legislature but with special procedure prescribed for the same.

What kind of constitution would India need was greatly debated by the founding forefathers of our Constitution. Pandit Jawaharlal Nehru, speaking on the need to have a flexible constitution for India said that it is vital for India's economic growth as well as all round growth of people. He specifically observed that given the turmoil the world is in and given how fast things are changing in this period of transition, things that we can do today may not be applicable in toto tomorrow.<sup>12</sup> If no constitutional amendment

<sup>6</sup> Article 61 of the Indian Constitution, 1950.

<sup>7</sup> Article 124(4) of Indian Constitution, 1950 and Judges Inquiry Act of 1968.

<sup>8</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>9</sup> *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226.

<sup>10</sup> *Patan Jamal Vali v. The State of Andhra Pradesh* on 27 April, 2021.

<sup>11</sup> A.V. Dicey: *Introduction to the Study of the Law of the Constitution*, London, 1952, p. 127.

<sup>12</sup> Constituent Assembly Debate., Vol. VII, 8 November 1948, pp. 322-323.

provisions were made, people would have to use an unconstitutional strategy, such as reform, to change the constitution.

Pandit Nehru in the Constituent Assembly said that,<sup>13</sup>

*“While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in the Constitution. There should be flexibility. If you make anything rigid and permanent you stop the nation’s growth.”*

Keeping this in mind, the makers of our Constitution were not in favour to entrust constitutional amendments to a separate body nor were they in favour to have an arrangement like that of the British where Parliament is supreme in every sense. Thus, combining the theory of fundamental law as that of the USA and the theory of Parliamentary sovereignty as that of the UK, makers of our constitution gave powers to amend the constitution to the legislature subject to special procedure laid down.

### **Amendment Procedure in India: Evolution & Existing**

Development of amending procedure of Indian constitution was an interesting journey. Some of the members of constituent assembly were in favour of adopting a simple method of amendment for initial few years so as to save administrative sufferings of the newly formed nation while others like Shri H V Kamath were in favour of providing procedural safeguards to avoid hasty amendments.<sup>14</sup> Commenting on the debate of having a simple method of amendment for the first few years, Dr Babasaheb Ambedkar observed that compared to constitutional amendment procedures of the USA and Australia, the draft amendment procedure is the simplest. It eliminates difficult and elaborate procedures such as decisions by convention and referendum. Only a few specific matters are to be ratified by the State Legislature. Only limitation in it is that it needs to be done by a majority of not less than 2/3<sup>rd</sup> of the members of each house present and voting and a majority of total membership of each house.

Therefore, the Constitution of India provides for a partly flexible and partly rigid method of amendment. It provides for three categories of amendments<sup>15</sup> – One which can be done by simple majority, secondly one which can be affected by a ‘special majority’ and thirdly which requires in addition to ‘special majority’ ratification by one half of the state legislatures. The last two categories come under purview of Article 368 of the Indian Constitution. The founders of the Indian constitution thus demanded a text that could be developed with a growing nation and adapt to changing conditions of the increasing population. From time to time, the Constitution should thus be revised. No one can say it is the end of the floor. An unchanging constitution is the one that becomes the biggest obstacle to the nation's progress. Dr Ambedkar said in the Constituent Assembly on November 4, 1948 that,

*“The Constitution is not something which you are going to do from day to day. It must deal with the fundamental aspects... and not with the details which are matters of legislation. If you do that you bring the basic things to the level of the secondary things too. You lose them in a Forest of Detail.”*

Article 368 has been amended by 24th Amendment act, 1971<sup>16</sup> and 42nd Amendment Act, 1976 and reads as it stands today as –

<sup>13</sup> Constituent Assembly of India Debates (Proceedings) – Vol. VII, 8 November 1948.

<sup>14</sup> *Ibid.*, Vol. IX, 17 September 1949, pp. 1644-1667

<sup>15</sup> *Shankari Prasad vs. Union of India*, A.I.R. 1951 S.C. 455.

<sup>16</sup> Before its amendment by the 24th Amendment Act and 42nd Amendment Act, article 368 stood as follows: Art 368, Procedure for amendment of the Constitution: An amendment of the 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

*“Article 368.*

*(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,<sup>17</sup> [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 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.*

*(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.”*

From article 368 of the Indian constitution, we can thus observe that the only way to amend the Indian constitution is by introduction of a bill in either house of Parliament. Such a bill is to be passed by special majority as mentioned in Article 368 and there is no provision of joint session in case of disagreement as in case of passage of ordinary laws. Bill so passed is then presented to the President for his assent. When

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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 for his assent and upon such assent being given to the Bill, 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, or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of the 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

<sup>17</sup>Total membership in this context has been defined to mean the total number of members comprising the House irrespective of any vacancies or absentees on any account vide Explanation to Rule 159 of the Rules of Procedure and Conduct of Business in Lok Sabha.

amendment seeks to amend any of the provisions mentioned in proviso<sup>18</sup> to Article 368, it must be ratified by Legislature of not less than half of the states. Such ratification by States is via resolution passed by same and there is no time limit to pass the said resolution.<sup>19</sup> Any attempt to amend the Constitution by a Legislature other than Parliament and in a manner different from that provided for will be void and inoperative.<sup>20</sup>

Various case laws have analysed the process of amendment as mentioned in Article 368 and laid down various principles in respective judgements. Whether entire Constitution is void for want of ratification or amended provision required to be ratified under proviso to 368(2) was a significant point of law that came before the Hon'ble court in *Anti Defection*<sup>21</sup> case wherein validity of 10th Schedule of Constitution inserted by 52nd amendment act 1985 was challenged. The Constitution bench in its majority judgement upheld the validity of 10th Schedule but declared Para 7 of the Schedule to be invalid as it was not ratified by a required number of state legislatures. The minority judges in this case treated the whole constitutional amendment act as invalid.

Further it has been observed in *Shankari Prasad case*<sup>22</sup> by Patanjali Shashtri J that Article 368 is not a complete code in respect of legislative procedure to be followed at various stages. This matter came up before the Hon'ble court in *Shankari Prasad case* wherein Patanjali Shashtri J observed, Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of article 368, when they entrusted to it power of amending the Constitution. Thus, in Lok Sabha, Rules for procedure and conduct of business make certain specific provisions with regard to bills for amendment of constitution such as voting procedures at various stages of the bill and procedures in case of private members intending to introduce constitutional amendment bills. Although Special majority as envisaged in the act is applicable only to voting at the final stage, Lok Sabha rules prescribe that such adherence is to be required at all effective stages of the bill. This provision not only ensures strict adherence to article 368 of Indian constitution but also validity of the procedure adopted. It guards against the possibility of violation of the spirit and scheme of that article.<sup>23</sup> The Short Title, Enacting Formula and the Long Title may be adopted by a simple majority. In case of private bills, like any other ordinary bill, the period of one month notice applies to such bills too.

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<sup>18</sup> These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., (a) the election of the President (articles 54 and 55); (b) extent of the executive power of the Union and the States (articles 73 and 162); (c) High Courts for Union territories (article 241); (d) The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); (e) distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); (f) representation of States in Parliament; and (g) the provision for amendment of the Constitution laid down in article 368.

<sup>19</sup> With regard to the corresponding provision in the U.S. Constitution viz. Article V which also does not prescribe any time limit for ratification, the U.S. Supreme Court has held that the ratification must be within a reasonable time after the proposal (*Dillon vs. Gloss* 65, Law Ed. 9945) but that the Court has no power to determine what is a reasonable time (*Coleman vs. Miller*, 83, Law Ed. 1385). It has further held that the question of efficacy of ratifications by State Legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of amendment (*Coleman vs. Miller*, 83, Law Ed.1385)

<sup>20</sup> *Abdul Rahiman Jamaluddin vs. Vithal Arjun*, A.I.R. 1958 Bombay, 94.

<sup>21</sup> *Kihota Hollohon vs. Zachilhu and others*, (1992) 1 S.C.C. 309.

<sup>22</sup> *Supra note* 15.

<sup>23</sup> Second Report of the Rules Committee, April 1956, Lok Sabha Secretariat, New Delhi



Scope of Parliament to amend the constitution has been subjected to constant scrutiny by the court in various landmark judgements. Until Golaknath case,<sup>24</sup> it was held that there is no part of the constitution which can't be amended including the Fundamental rights and Article 368 itself.<sup>25</sup> It held that amendment of the Constitution is a legislative process and it is a law under Article 13.<sup>26</sup> Therefore, if Constitutional amendment abridges or takes away fundamental rights, it is void. There was a presupposition that Fundamental Rights are beyond the reach of Parliament and the same arises from the scheme of constitution and nature of freedoms. This decision resulted in Parliament passing 24<sup>th</sup> Amendment Act 1971 wherein Article 13 and Article 368 were amended to the language that bar in article 13 against abridging or taking away Fundamental rights doesn't apply to constitutional amendment made under article 368.

Later on, Supreme Court reviewed Golaknath case in Kesavananda Bharti case<sup>27</sup> and went into validity of 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup> and 29<sup>th</sup> Constitutional Amendment Acts. 9 out of 13 judges forming the majority held that Golaknath case is overruled and Article 368 doesn't enable parliament to alter the basic structure of the constitution of India. The Supreme Court held that Parliament has power to amend even the Fundamental Rights but that should be done within broad contours of Preamble and Constitution to carry out objectives in the preamble and directive principles. To summarise, it means that every provision of the constitution can be amended without altering the basic structure of the constitution. This theory of basic structure was reaffirmed in the case of Indira Gandhi v Raj Narain.<sup>28</sup> In view of Kesavananda Bharti case, Supreme Court held 52<sup>nd</sup> Constitutional Amendment Act to be unconstitutional and void citing that Parliament has only limited amending powers and that forms basic features of the constitution which cannot be destroyed to usurp absolute amending power. The concept of basic structure has since then been developed in the catena of cases like Waman Rao case,<sup>29</sup> Bhim Singhji case<sup>30</sup> and so on and so forth. What is included in basic structure is not finite and various judgements have so far held that there are certain things which are essential.<sup>31</sup>

<sup>24</sup> *IC Golaknath vs. State of Punjab*, A.I.R. 1967 S.C. 1643.

<sup>25</sup> In *Shankari Prasad Singh Deo vs. The Union of India* (A.I.R. 1951 S.C. 458), the Supreme Court unanimously held: The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatsoever. In the context of article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13 (2) does not affect amendments made under article 368. In *Sajjan Singh vs. The State of Rajasthan* (A.I.R. 1965 S.C. 845), the Supreme Court (by a majority of 3:2) held: When article 368 confers on Parliament the right to amend the Constitution, the power in question can be exercised over all the provisions of the Constitution. It would be unreasonable to hold that the word "Law" in article 13 (2) takes in Constitution Amendment Acts passed under article 368.

<sup>26</sup> Constitution of India, art. 13(2): "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void."

<sup>27</sup> *Supra* note 3.

<sup>28</sup> *Indira Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299.

<sup>29</sup> *Waman Rao vs. Union of India*, A.I.R. 1981 S.C. 271.

<sup>30</sup> *Bhim Singhji vs. Union of India*, A.I.R. 1981 S.C. 234.

<sup>31</sup> The basic features of the Constitution have not been explicitly defined by the Judiciary. However, Supremacy of the Constitution; Rule of law; The principle of Separation of Powers; The objectives specified in the Preamble to the Constitution; Judicial Review; Articles 32 and 226; Federalism; Secularism; The Sovereign, Democratic, Republican structure; Freedom and dignity of the individual; Unity and integrity of the Nation; The principle of equality, not every feature of equality, but the quintessence of equal justice; The 'essence' of other Fundamental Rights in Part III; The concept of social and economic justice—to build a Welfare State: Part IV in toto; The balance between Fundamental Rights and Directive Principles; The Parliamentary system of government; The principle of free and fair elections; Limitations upon the amending power conferred by Article 368; Independence of the Judiciary; Effective access to justice; Powers of the Supreme Court under Articles 32, 136,

Thus, we can observe that in India, there is no separate body for the purpose of amendment of the constitution and power is vested in the legislature. There is no provision which cannot be amended but within the basic framework of the constitution. Role of states in amendment procedure is very much limited only to amendments under a few articles. Parliament has the exclusive right to change the constitution but it cannot be said that the Parliament is independent. The procedure itself restricts use of power to amend the constitution in parliament. Indian constitution is a dynamic document catering to changing needs and statuses of Indian society and doctrine of basic structure as propounded by Hon'ble court acts like a guiding principle to safeguard the values and essence of Indian constitution. Less amount of complexity and bureaucratic effort in changing the constitution yet preserving the basic structure over years makes it a unique constitution with unique amending procedure.

### **The Amendment Procedure of the US Constitution**

The Article V of the US Constitution provides for the provision for amendment procedure. The process itself presents a unique challenge for state legislatures as institutions, as well as for individual members of a state legislative body. It is because of the fact that there have been really rare implementations and also because there have been very rare cases in the court(s) regarding The Constitution is the fundamental law of the land, it is regarded as the primary document of any nation. Over the period of time, the problems including social, economic and political conditions of any country take various forms and dimensions. The conditions of any country go through various changes over time. Therefore, it becomes a necessity to revisit the constitution so as to make it updated with the time and so that it remains a dynamic document which can cater with the changing needs of the society. This procedure is referred to as the Amendment procedure of the constitution. The constitution amendments ensure that the provisions and interpretation of the constitution remain relevant in the changing time as well. Therefore, no matter how strong the constitution is, there is no eternity to it in its raw form. The states which are founded on popular sovereignty, like India and USA, must make possible fresh assertions of popular will, as that will keep on changing as per the requirements of the people.

In the present paper, the author will be comparing the amendment procedure in India and the USA. In order to do that, it is very important to look at the history of amendment procedure in India as the Constitution of India is heavily impacted by the Constitution of the USA.

The drafting of a written constitution was itself an inspiration for the Indians from the history of the USA. The popular leaders like Nehru and Mahatma Gandhi were heavily influenced by the inclusion of certain rights in the Constitution itself. After the Declaration of Poorna Swaraj in 1930, it was declared by the leaders that India will get complete independence from any rule and in order to make it happen they were of the opinion that a constitution drafted by the people of India would be necessary. The declaration of Poorna Swaraj of 1930 can be said to be as important as the declaration of independence of 1776 in the USA. So, it can be said that in order to understand the Indian Constitution it is necessary to know the US connection.

From the making of Indian Constitution to present days, the constitutional history of the USA significantly impacted the Indian Constitution. The Fundamental Rights in India are comparable and impacted from the Bill of Rights of the USA. Although, the Universal Declaration on Human Rights, 1948 impacted the

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141, 142; Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act, etc., are termed as some of the basic features of the Constitution.

making of FUndamental Rights of India in the same because of which there are many unanswered questions regarding the procedure. The present law is based on the cases that have happened over a long period of time regarding particular issues, in particular circumstances, in particular times and in particular states, across history. Although the Federal Subordinate Courts do not carry the same value of their decisions as that of the Federal Supreme Court, they help a legal researcher to know the full picture of the principles that have evolved over the time which helps to analyse the constitutional process as it exists in the USA.

#### **Article V of the US Constitution states that:**

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.

In the case of *Ullman v. United States*, the US Supreme Court declared that the only method for amendment of the US Constitution for adding or removing language in the document is to be done as per the procedure provided under the Article V.

The text of the Article V provides for two methods for proposing an amendment,

1. Congress may propose an amendment to the states, upon a two-thirds vote of both the houses; or
2. A convention may propose an amendment to the states. A convention is called by Congress, on application of two-thirds of the states.

Once the amendment is proposed the next step includes the ratification. The ratification may occur through two processes, as determined by the Congress:

1. Ratification by three-fourths of the state legislatures; or
2. Ratification by three-fourths of states, acting by state convention.

Although there is no limitation on the substance that can be amended, but as the US Constitution provides for Federalism itself, even an amendment cannot modify the balance of power among states in the Senate, without the consent of each affected state.<sup>32</sup>

The amendments to the Constitution proposed till now have all been through the congressional method and none of them have been through conventional method.<sup>33</sup>

#### **Congressional Method,**

Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that

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<sup>32</sup> In 1922 in the case of *Leser v. Garnett*, 258 US 130 (1922), the US Supreme Court heard a challenge to the Amendment 19th (Women's right to vote), based on a claim that it impermissibly violated a state's autonomy as a political body if the state failed to ratify the amendment (the petitioners were from Maryland, which had not ratified the amendment). The Court rejected the claim.

<sup>33</sup> R. Bernstein, *Amending America*, 1993.



they should be incorporated in the text of the original instrument.<sup>34</sup> Instead, the House decided to propose them as supplementary articles, a method followed since.<sup>35</sup> It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.<sup>36</sup> In the *National Prohibition Cases*,<sup>37</sup> The Court ruled that in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.<sup>38</sup> The approval of the President is not necessary for a proposed amendment.<sup>39</sup>

### Conventional Method,

Because it has never successfully been invoked, the convention method of amendment is surrounded by a lengthy list of questions.<sup>40</sup> When and how is a convention to be convened? Must the applications of the requisite number of States be identical or ask for substantially the same amendment or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions and others lurk to be revealed on deeper consideration.<sup>41</sup> This method has been close to utilisation several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators.<sup>42</sup> Two States were lacking in a petition drive for a constitutional limitation on income tax rates.<sup>43</sup> The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one State of the required number, and a proposal for a balanced budget amendment has been but two States short of the requisite number for some time.<sup>44</sup> Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

Although Members of Congress have introduced more than 11,000 proposed amendments to the Constitution since the Founding,<sup>45</sup> Congress has approved only thirty-three proposed amendments by the requisite two-thirds vote. Congress has historically proposed constitutional amendments by enacting a

<sup>34</sup> 1 Annals of Congress, 433-436 (1789).

<sup>35</sup> *Id.* at 717.

<sup>36</sup> *Id.* at 430.

<sup>37</sup> *National Prohibition Cases*, 253 US 350 (1920).

<sup>38</sup> *Id.*

<sup>39</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

<sup>40</sup> The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP—AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* (1988).

<sup>41</sup> *Id.* See also *Federal Constitutional Convention: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 90th Congress, 1st Sess. (1967).

<sup>42</sup> C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee), Volume 7, page 89, 1957.

<sup>43</sup> *Id.* at 8-9, 89.

<sup>44</sup> R. Caplain, *Constitutional Brinkmanship- Amending the Constitution by National Convention*, Page np. 73-89, 1988.

<sup>45</sup> U.S. Senate: Measures Proposed to Amend the Constitution, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>.

joint resolution.<sup>46</sup> Following historical practice involving proposing amendments, which included the Bill of Rights, Members of Congress have proposed amendments as codicils (i.e., supplementary articles), rather than line-by-line revisions to the Constitution's text.<sup>47</sup> After congressional approval, proposed amendments are sent to the states for potential ratification.

### **Ratification**

When a state has ratified an amendment, it must submit a set of paperwork back to the National Archives and Records Administration. The Office of the Federal Register verifies that the documents appear to be in proper order and acknowledges receipt. The National Archives and Records Administration also receives records of other legislative actions—such as rejection of an amendment or rescission of a ratification—but it does not make any substantive determination about the validity of these actions. When it appears that a sufficient number of states have ratified a proposed amendment, the Archivist of the United States issues a proclamation certifying that the amendment has been ratified. The certification is published and serves as an official notice of ratification. A ratified amendment is effective as of the day a sufficient number of state ratifications are completed, not on the day the certification is proclaimed.

Apart from the requirements of Article V, there are no provisions of federal law, or established customs and practices that direct a specific procedure related to convening or administering a convention. A federal convention has not occurred since the original convention was convened to draft the constitution in 1787. The experiences of individual states in amending their state constitutions by convention, which has occurred with some regularity over time, may be helpful in considering the issues that might arise in a federal convention, and in considering how those issues might be resolved. Over time, state legislatures have developed customs and practices for submitting applications for a convention to Congress. Congress has never taken action in response to these applications, or in response to the customs and practices used to submit them.

### **Comparative Analysis**

Based on the above discussion it can be said that the Indian Constitution is partly rigid and partly flexible. Whereas based on the fact that till date there has only been 27 amendments in the US Constitution, it is the most rigid constitution in the world. But the option of proposing amendment has given more prominence to states as they are also allowed to propose the same, whereas in India only either of the houses of the parliament can propose the amendment. Though both the countries have formal procedures mentioned under their respective constitution, In India Article 368 and in USA Article V, the informal procedure varies as the informal amendment is done by the Judiciary in case of India but in USA it is done by the States itself. In India, the ratification by states is only needed in the case of such an amendment which is changing the federal structure and in that too only more than half of the states need to verify, which makes it very narrow. While in the USA, constitutional amendment becomes valid only after being ratified by 3/4th of the states acting by the state conventions or by 3/4th majority of the state legislatures. In India, once the amendment is passed by both the houses of the Parliament, the bill is sent to the President for his assent, while in the USA there is no need to place a constitution amendment before the president for approval or veto. The amendment comes into force in India only after it has been duly published in the

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<sup>46</sup> 1 Annals of Cong. 735 (1789).

<sup>47</sup> *Id.* at 733-744.

Official Gazette of India. Whereas in the US the amendment comes into force from the date when the requisite 3/4th number of states has ratified it. But after that the NARA certifies the amendment and gives a certificate that the amendment is valid.

One of the glaring differences between both the Constitutions is that, in India the text of the Constitution is amended itself so as to make the amendment part of the constitution, but in the USA the original text of the constitution is not touched rather an amendment is added just like an annexure. This could be because of the reason that the US prefers to safeguard the sanctity of the original text of the Constitution, whereas India prefers to have such a system where the amendments are placed at a pedestal on par with the original wordings of the Constitution.

Both in the US and India, the amendments to the Constitution are subject to Judicial review. And in both the countries the legislature has *“no right to rewrite the whole of the constitution.”*

### **Conclusion**

Analysing the information collected, it can be seen that amendment is the most important pillar of a democracy. It not only helps a nation to keep up with the evolving world but also helps to maintain a just and equal environment for everyone. Constitution is known to be of 2 types i.e. Rigid and Flexible. While the US constitution can be considered as a rigid one, the UK is completely opposite to it. The power to amend any provision in the US is equally divided. The houses as well as the states have an equal responsibility to accept the proposition to ultimately turn it into a bill; whereas, the whole power in India lies between the houses. If one house does not accept the bill, it cannot be passed since there is no provision for conducting a joint meeting to settle disputes. After analysing both the procedures, it is safe to say that India lies between the two, making it comparatively easier to amend the constitution by providing powers with limits. The researcher has also gone through the various modification procedures given in each country's constitution in this comparative review. Even though the United States and India are democratic nations, their ways of working, creating rules, and amending authority are all distinct. India's constitution came much later than the US. India has also borrowed several elements of other countries' constitutions after determining their suitability for our republic. However, there are so many variations in the amending procedures among the compared countries that there are less parallels than there are fingers. In India, there is no independent constituent body for the intent of amending the constitution, like there is in the United States. The Parliament in India has the power to change the Constitution. In India, the state's position in constitutional amendment is small, but in the United States, states have a larger role to play, and states may also propose constitutional amendments. States, on the other hand, are unable to propose constitutional amendments in India. In India, an amendment enacted by Parliament in accordance with Article 368 will only become part of the Constitution after the President's assent. However, in the United States, the President would not have any authority, and the US Constitution makes no allowance for the President's assent. Article 368 grants the Indian Parliament the power to change the constitution in certain cases, however in certain cases, approval by at least half of the states is needed. The important thing to note is that neither the Indian nor the US constitutions provide a time period for ratification. Finally, it can be claimed that the Indian Constitution is more fluid than rigid. Just a few constitutional changes need passage by state governments, and even then, bills by one-half of the states will suffice. The Indian Parliament may change the remainder of the Constitution with a special majority vote. The United States, on the other hand, has a strict constitution that can only be revised by the US Congress by a special

mechanism established by the US Constitution for that reason. Both the democratic Constitutions have the ability to survive and contain the capacity to respond to socio-political and economic change.

One of the major points that can be taken after studying this paper is that both the countries completely ignore the opinions of citizens before making an amendment. It is suggested that the states should always be given an opportunity to express their views before an amendment is proposed in the country. Thus, although both the amending procedures are not identical, they have certain basic elements in common like giving adequate protection against changes in the important rights of the states, judicial review and also making the state involvement in amending procedure a common feature.