Constitutional Amendment: Process and its Abuse

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INTRODUCTION:

The Constitution of a country is the fundamental law of the land. The basis on which all other laws are made and enforced. It has been described as a "superior or supreme law" with "perhaps greater efficiency and authority", and "higher sanctity" and more permanence than ordinary legislation. Nevertheless, an adequate provision of its amendment is considered implicit in the very nature of a constitution. A democratic Constitution has to be particularly responsive to changing conditions. Since a government founded on the principle of popular sovereignty, "must make possible the new assertion of the popular will as the will change.

Our Constitution is an evolving text. There is no longevity, even though this Constitution is as solid and long-lasting as we would like it to be. It's possible that what we can do today won't be relevant tomorrow. The constitution must adjust as well as the way that government operates.

To the country's social and economic development. The proposed constitution did away with difficult and involved procedures like conventions and referendums. The federal and provincial legislatures retain the authority to amend laws. Modifications to specific subjects require the state legislatures' permission, and there are relatively few. The Parliament is given the authority to change the Constitution's other provisions. The primary limitation is that it must be approved by a vote of both houses. By a vote of the entire membership of each house and not less than two-thirds of the members present and voting in each House.

Amendment to the Constitution

The world is dynamic and always evolving. People's social, economic, and political situations are constantly changing. Thus the nation's constitutional law must change to meet these shifting demands and impact how people live their lives. The populace would resort to extra-constitutional mechanisms, such as revolt, to change the constitution if no plans were made for its modification. The authors of the Indian constitution were anxious to produce a document that could change. Along with a growing populace and accommodate a growing populace's changing circumstances. Every four years, the Constitution needs to be amended.

Rigid or Flexible Constitution

Depending on how easily they can be changed, constitutions are typically categorised as "flexible" or "rigid." According to Prof. A.V. Dicey, there are two different types of constitutions: flexible and rigid. A flexible constitution is one "under which every law of every description can legally be changed with the same ease and in the same manner by the same body." A rigid constitution, on the other hand, prohibits changes to certain laws. Commonly known as constitutional or fundamental laws, in the same way as changes to other laws.

Comparison between the USA and the UK constitution

The United Kingdom has an unwritten Constitution is the best example of an extremely flexible Constitution. As there is no distinction between the legislative authority and the constituent power. The British Parliament has the authority to amend the Constitution through the regular legislative procedure. Contrary to the British system, a written constitution like the one in USA gives the constitutional amendment a significant role. In places where the system is federal, its significance grows. The authority to alter the Constitution is either granted to a body other than the regular Legislature in most written constitutions or it is granted to the regular Legislature subject to a unique procedure. Additional safeguards in a federal system, like the participation of state legislatures at the state level, are also provided for to ensure that the Federal setup does not get altered merely at the desire of the Federal Legislature.

Need for Flexibility in the Constitution

Pandit Jawaharlal Nehru stated at the Constituent Assembly: "While we want this Constitution to be as solid and as lasting a framework as we can make, it is vital to introduce an element of flexibility."

Constitutions lack permanence despite this, though. There ought to be some latitude. You can't grow a nation or live, breathing, organic people if you make something hard and fixed. It must therefore be adaptable. …

In any case, we shouldn't create a constitution that is so inflexible that it cannot or does not simply adjust to changing circumstances, like some other great countries' constitutions. Particularly now, when the globe is in upheaval and we are seeing a very rapid era of change transition; hence, what we accomplish now could not be entirely appropriate tomorrow. As a result, in creating a constitution, it should be adaptable and as sound and fundamental as possible.

Procedure to amend the constitution

In contrast to the most prominent Constitutions in the world, the Indian Constitution offers a unique amendment mechanism. It can be characterized as being partially flexible and rigid. Because uniformity in the amending process imposes "very unnecessary limits" on the change of parts of a Constitution, Prof. K.C. Wheare has praised the fact that the Indian Constitution allows for variability in the amending process.

Types of Amendments in India

The Indian Constitution allows for three types of amendments.

First, those that can be passed by Parliament with a simple majority, like the one needed to approve any ordinary law; these include the revisions envisioned in Articles 4, 169, paragraph 7(2) of Schedule V, and paragraph 21(2) of Schedule VI fall within this category and are specifically excluded from the scope of Article 368, the precise Constitutional provision that deals with the authority and process for amending the Constitution.

Second, those amendments can be enacted by Parliament with a specified "special majority".

And third, those that fall under Article 369 of the Constitution. Require approval from at least half of the State Legislatures in addition to such a "special majority." Article 368 is the governing document for the latter two categories.

In this regard, it should be noted that there are, as Dr. Ambedkar noted, "innumerable Articles in the Constitution" that submit the matter to legislation passed by Parliament. According to Article 11, for instance, Parliament may enact any provision relating to Regardless of everything in Articles 5 to 10, citizenship. Thus, without technically changing the Constitution in the sense of Article 368, Parliament may, in effect, provide for, modify, or repeal the application of some of its provisions by passing ordinary laws. Such measures cannot be viewed as or categorised as constitutional amendments because they make no changes at all to the Constitution's text.

Regarding the constitutional authority to formally amend the Constitution, Article 368 of the Indian Constitution grants Parliament the authority to do so by adding to, changing, or repealing any provision by the procedure outlined therein, which is distinct from the procedure for ordinary legislation. Article 368 of the Constitution, as amended by the Constitution (24th Amendment), Act of 1971

Legislative Procedure and Constitution Amendment

Regarding the many stages of the legislative process, Article 368 is not a "full code." The process for how a Bill is to be introduced, how each House is to pass it, and how the President's

assent is to be obtained is not quite clear. The Supreme Court decided on this issue in the Shankari Prasad case.

In delivering the Court's ruling, Patanjali Sastri J. made the following observation:

"Given that the Constitution provides for the establishment of a Parliament and stipulates a specific procedure. For the conduct of its ordinary legislative business to be supplemented by rules made by each House (Article 118), it must be taken that the framers of the Constitution intended Parliament to follow that procedure."

Therefore, a Bill for amending the Constitution is dealt with by the Parliament using the same legislative procedure. Which applies to an ordinary piece of legislation, except the requirements of a special majority, ratification by the State Legislatures in some cases, and mandatory assent by the President.

Rules to Constitutional Amendment Bills

The Rules of Procedure and Conduct of Business in the Lok Sabha have particular provisions in relation to Constitutional Amendment Bills.

They relate to

(a) the voting procedure in the House at various stages of such Bills, in the light of the requirements of Article 368; and

(b) the procedure before introduction in the case of such Bills, if sponsored by Private Members.

Although the 'special majority', insisted upon the Article 368 is prima facie applicable only to the voting at the final stage, the Lok Sabha Rules prescribed adherence to this constitutional requirement at all the effective stages of the Bill, i.e., for adoption of the motion that the Bill be taken into consideration; that the Bill as reported by the Select/Joint Committee be taken.

What after that?

If a Bill has been referred to a Committee; for adoption of each clause or schedule of a Bill; for adoption of each clause or schedule of a Bill as modified; or that the Bill or the Bill as amended, as applicable, be passed. It is clear that this clause, which expresses the Rules Committee's position after extensive deliberation and consultation with the Attorney-General, is ex-abundanti cautela. The consideration of a Bill seeking to amend the Constitution, including its consideration clause by clause being concluded in the House with only one clause remaining, guards against the possibility of violating the spirit and scheme of that Article and not only ensures the validity of the procedure adopted by strictly adhering to Article 368.

The Speaker may, however, with the concurrence of the House, put any group of clauses or schedules together to the vote of the House, provided that if any member requests that any of the clauses or schedules be put separately, the Speaker shall comply to do so. The Short Title, Enacting Formula, and Long Title may be adopted by a simple majority. For the adoption of amendments to clauses or schedules of the Bill, a majority of members present and voting in the same manner as in the case of any other Bill, will suffice.

Scope of Parliament's Power to Amend the Constitution

Up until the case of L.C. Golak Nath v. State of Punjab, the Supreme Court had maintained that no part of the Constitution was impermeable. Also the Parliament could amend any provision of the Constitution, including the Fundamental Rights and Article 368. By passing a Constitution Amendment Act in accordance with the requirements of that Article. However, in the instance of Golak Nath, the Supreme Court (by a margin of 6:5) reserved its own prior rulings.

The court ruled in Golak Nath's case that a constitutional amendment constitutes a legislative process. If a constitutional amendment "takes away or abridges" a Fundamental Right granted by Part III. It is void under Article 368 because it is "law" as defined by Article 13 of the Constitution.

The Court further held that the Fundamental Rights protected by Part III of the Constitution are granted a transcendental status by the Constitution and are kept outside the purview of Parliament. The structure of the Constitution and the nature of the freedoms prevent Parliament from altering, limiting, or impairing Fundamental Freedoms under Part III.

The Constitution (Twenty-fourth Amendment) Act, of 1971 was enacted by Parliament as a result of the Supreme Court's ruling in the Golak Nath case. As a result of this Act, the Constitution now expressly states that any Article of the Constitution. Including those about fundamental rights, may be modified by Parliament. Articles 13 and 368 have been changed to make it clear that changes to the Constitution made through Article 368 are not subject to the prohibition as per Article 13 on abridging or removing any of the Fundamental Rights.

Kesavananda Bharati Sripadagalvaru vs. State of Kerala

In Kesavananda Bharati Sripadagalvaru vs. State of Kerala, the Supreme Court reviewed the decision in Golak Nath's case and went into the validity of the 24th, 25th, 26th, and 29th Constitution Amendments. The case was heard by the largest-ever Constitution Bench of 13

Judges. The Bench gave eleven judgments, which agreed on some points and differed on others. Nine Judges summed up the 'Majority View' of the Court thus:

1. Golak Nath's case is over-ruled.

2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.

4. Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.

5. The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part namely "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid.

6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The majority of the Full Bench upheld the validity of the Constitution (Twenty-fourth Amendment) Act and overruled the decision of Golak Nath's case holding that a Constitution Amendment Act is not "law" within the meaning of Article 13. Upholding the validity of clause (4) of Article 13 and a corresponding provision in Article 368(3), inserted by the Twenty-fourth Amendment Act. The Court settled in favor of the view that Parliament has the power to amend the Fundamental Rights also. However, the Court affirmed another proposition also asserted in Golak Nath's case.

Amendments to the Constitution

The Court held that the expression 'amendment' of this Constitution in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to Fundamental Rights, it would be that while Fundamental Rights cannot be abrogated. A reasonable abridgment of Fundamental Rights could be effected in the public interest. The true position is that every provision of the Constitution can be amended provided the foundation and structure of the Constitution remain the same.

ABUSE OF CONSTITUTIONAL AMENDMENTS

is Similar to how a coin has two sides, heads, and tails. Similar constitutional amendments affect the government's organs in both positive and negative ways. Article 124 and other portions,

Article 356 were some of the Articles that came under fire. Although it was ultimately overturned, it still raises serious concerns about the judiciary's independence.

ARTICLE 356

Article 356 has been utilized or exploited more than 125 times, despite B.R. Ambedkar's assurances that it would remain a dead letter. It was nearly always employed for political purposes rather than a real breakdown of the American constitutional system.

Former Prime Minister Indira Gandhi invoked Article 356 up to 27 times, typically to overthrow majority governments due to political instability, a lack of a clear mandate, or the withdrawal of support, among other reasons.

When the Janata administration was first established in 1977, nine state Congress governments were overthrown as a reprisal. When she retook office in 1980, Indira Gandhi swiftly overthrew nine administrations with a majority of the opposition. Later governments also behaved similarly.

The State of Rajasthan v. Union of India case, a seminal judgment from 1977. Stated the theory that the employment of Article 356 was not truly open to judicial review. This position was effectively rejected by the 1994 Supreme Court (S.R. Bommai case) majority decision. The Bommai case ruling established the parameters and procedures for the dismissal of State administrations.

A nine-member Supreme Court panel interpreted the parameters of Article 356, which also permits the installation of President's Rule in the States but under strict restrictions, in the S.R. Bommai case. Determining whether there are objective circumstances that make it impossible to carry out governance in the State where the proclamation has been made and the process must be followed was one of them.

SUGGESTION

Judiciary Controlling Itself: The judiciary needs to understand that, while it may occasionally be beneficial, an activist judiciary is neither beneficial to the nation nor to the judiciary itself.

Fine-tuning Governor's role: The governor must exercise his discretion and personal judgment in a wise, impartial, and effective manner. To ensure that democratic administration runs smoothly and that the spirit of federalism is strengthened.

The recommendations of the Sarkaria Commission and Punchhi Commission should be implemented in their entirety in this situation.

For instance, “the mechanism for appointment of governors should be clearly written out”; “a fixed tenure for the governor must be assured,” and “the conditions of appointment must also be laid down.”

COLLEGIUM CONTREVERSY

1958 LAW COMMISSION REPORT

The collegium controversy began in the late 19th century with a 1958 law commission study that discussed the selection of judges to the Supreme Court. It stated that the appointment should not always be made based on seniority. But might sometimes be done based on technicalities. If someone is more qualified than a person older than them, they shouldn’t be denied the opportunity merely because of their age.

1973 CONTROVERSY

The debate centered on whether or not the constitution’s fundamental framework could be changed. In the case of Keshwanand Bharti v. UOI, where the government lost with a 7:6 ruling. They expressed their at the ruling by elevating J. AN RAY to the position of CJI, surpassing the other four senior-most judges on the SC.

COOLING DOWN THE CONTROVERSY

By appointing V.Y. CHADRACHUR as the new CJI, they sought to quell the issue surrounding the selection of Justice AN RAY. He was chosen by a majority vote.

FOUR JUDGES TRANSFER CASE

SP GUPTA V UOI

FACTS

Numerous writ petitions were submitted to various High Courts in 1981 by different attorneys and practitioners. Every petition had the same problem. All of the petitions contested a government decree regarding the transfer and non-appointment of two judges. The Central Government’s order was challenged in the first case, which was filed in the Bombay High Court. And in the second petition, which was filed in the Delhi High Court, which also questioned the constitutionality of the process used to choose judges in higher courts. Several inquiries were made over the Supreme Court’s temporary appointment of three additional justices, which did not comply with Article 224 of the Constitution.

ISSUES:

- INDEPENDENCE OF THE JUDICIARY

- MEANING OF THE TERM CONSULTATION
- DISCLOSURE OF CORRESPONDENCE

HELD:

- GOVT IS BOUND TO DISCLOSE
- CONSULTATION MEANS FULL AND EFFECTIVE CONSULTATION
- NON- APPOINTMENT JUSTIFIED
- PRIMACY TO EXECUTIVE

SUPREME COURT ADVOCATES ON RECORD ASSOCIATION V UOI

FACTS:

The nine-Judge Bench not only overruled S.P. Gupta's case but also devised a specific procedure for appointment of Judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence of the judiciary." For the same reason, the primacy of the Chief Justice of India was held to be essential.

The bench held that the recommendation on that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive.

Thus, in 1993, the Chief Justice of India got primacy in appointing judges, and till this time, it was the government's job to fill vacancies in HCs and the SC.

The matters relating to the appointment of the judiciary have plagued and perplexed the judicial mind ever since the inception of the constitution. This matter has to be resolved by the interpretation of the constitutional provisions relating to the appointment of the judiciary. The omnipresent bogey haunting every pronouncement is the independence of the judiciary. A delicate balance had to be struck between democratic control of an essentially undemocratic institution and impartial arbitration.

Sankal Chand vs. Union of India

The matter came up for adjudication in Sankal Chand vs. Union of India, where the court upheld the transfer of the Chief Justice of Himachal Pradesh. However, by 1982, the debate had reached epic proportions. These matters took solid form in a batch of writ petitions questioning the move to transfer the judges challenging the affected transfer of some judges and demanding the justifiability of judge strength.

The Supreme Court, while disposing of the matter, vested the ultimate control with the Central Government. At this juncture, a bill was introduced in the parliament seeking to amend the Constitution (67th Amendment) Bill, 1990 seeking to amend Articles 124(2), 217(1), 222(1), and 231(2)(a). This bill was brought to empower the president to set up a judicial commission known as National Judicial Commission. The avowed objective was to implement the 121st Law Commission Report. This report recommended that a judicial commission is set up to oversee the appointment of the judiciary. However, nothing came of this as the bill lapsed with the dissolution of the 9th Lok Sabha. The writ petitions seeking a review of SP Gupta's case were heard by a three-judge bench, namely Chief Justice Ranganath Mishra and Justices MN Venkatachaliah and MM Punchhi, which recommended reconsideration.

HELD:

Thus on the question of primacy the court concludes that the role of the Chief Justice of India in the matter of appointment of the Judges of the Supreme Court is unique, singular, and primal. But participatory vis-a-vis the executive on a level of togetherness and mutuality. And neither he nor the executive can push through an appointment in derogation of the wishes of the other.

In this judgment, the majority consisting of Justices JS Verma, Yogeshwar Dayal, GN Ray, Dr. AS Anand, and SP Bharucha with concurring separate judgments delivered by S. Pandian and Kuldip Singh, JJ, held that view in SP Gupta's case insofar as the issue of "primacy" is concerned is overruled.

The minority consisting of Ahmadi and Punchhi, held that the executive had primacy over the opinion of the Chief Justice of India while on the matter of the fixation of judge strength, Punchhi did not express a view, Ahmadi, J concurred with Venkataramaiah, J in SP Gupta's case allowing a limited mandamus to the issue.

In re Special Reference, 1 of 1998

FACTS

Another well-known case that affected the appointment of judges was this one. The main question to be resolved was whether the phrase "consultation with the Chief Justice of India," as used in Articles 217(1) and 222(1). It refers to consultation with a number of judges when the Chief Justice of India forms an opinion. Or whether the Chief Justice of India's single individual opinion constitutes a valid consultation that falls under the definition of the term "consultation," as used in the aforementioned Articles. The case also addressed a number of other issues, such as

whether the Chief Justice of India's recommendations are binding on the Indian government even if they are issued in violation of the law and the consultation process.

According to the ruling in the case, the phrases "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Indian Constitution call for the Chief Justice of India to form his or her opinion after consulting with a majority of judges. The Chief Justice of India's personal and subjective viewpoint does not qualify as a legitimate "consultation" as used in the aforementioned Articles.

Supreme Court Advocates-on-record Association & Anr. vs. Union of India

FACTS

Through this collection of petitions, the NJAC Act and the 99th Amendment Act's constitutionality were contested before a five-judge Constitution Bench. The NJAC was set up for the selection, appointment, and transfer of judges to the higher courts to replace the prevailing collegium system under Articles 124(2) and 217(1) of the Constitution. Along with the Chief Justice of India and the next two most senior Supreme Court justices. The NJAC also included the Union Minister for Law and Justice and two other distinguished individuals. The CJI and group of the SC's 4 most senior judges were part of the collegium that NJAC wanted to replace.

ISSUES

The constitutionality of the NJAC Act and the 99th Amendment Act was questioned.

JUDGMENT

The NJAC suggested giving the executive more power to appoint judges. This was purportedly done to increase accountability and transparency in the selection process. The 99th Amendment and the NJAC Act were both declared illegal. The same was declared by a majority of 4:1 of the five-judge Constitution Bench who ruled that the NJAC were in violation of:

Principles of the separation of powers and the independence of the judiciary that was fundamental to the Constitution.

Justice Lokur said that the 99th Amendment and the NJAC Act left unresolved questions regarding the privacy of the candidates. For judicial appointments while expressing concerns about transparency and accountability in the NJAC. He came to the conclusion that the NJAC Act and the 99th Amendment, did not aim to strike a compromise between the candidates' right to privacy and the public's right to know. But were intended to bring transparency to the hitherto

opaque collegium system. He accepted an implicit fundamental right to privacy by doing so, one that would be subject to checks and balances.

SUGGESTIONS:

Everyone evolves over time. The same is true of our constitution. I believe that the changes that are destroying your country's reputation ought to be made more quickly.

Like – RAPE ISSUES, SEDITION, RESERVATION, AND COLLEGIUM SYSTEMS, etc.'

In the case of the collegium system, I believe it needs to be revamped as soon as possible. I believe the law commission's 1958 report's recommendation was correct and should have been done a long time ago. But now is the right time because the issue is receiving so much attention that should be done only now.

BIBLOGRAPHY:

https://www.ijlmh.com/wp-content/uploads/Amending-Powers-of-Constitution-and-its-Limitations.pdf

https://eprints.soas.ac.uk/33587/1/11010348.pdf

https://privacylibrary.ccgnlud.org/case/supreme-court-advocates-on-record-assn-vs-union-of-india#:~:text=This%20landmark%20judgment%20has%20come,%2C%202014%20(NJAC%20Act).