

## **Adaptability, Change and Amendability in Indian Constitution**

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### **Abstract**

The constitutional system of any country is the mirror of that society in which it is designed to operate. The policy and institution underlying the constitution reflect the level of civilization and political culture of society. The working of the institutions projects the character of a mass society. The constitution as such is designed to be dynamic; it is democratic, not committed. It is dynamic in the sense that it has the potency to change political institution, if necessary without any formal change. It provides for contradictory institutions, such as the President and a Prime Minister with a council of ministers to aid and advice, a federal polity without saying so with several unitary features. It is democratic because it allows every shade of government for functions. The directive principles enumerated the areas of positive functions without the labels capitalist, socialist or Marxist. Negative functions of the State are defined as the fundamental rights. The dynamism of the constitution depends on the scope of conventions to develop such as relating to the President, the Prime Ministers, and Governors, federalism, parliament and its privileges. These conventions are yet to grow firmly and their absence causes difficulties and problems.

**Keywords:** Constitutional system, Federalism, Parliament, Governors, Adaptability.

### **Introduction**

The reality lies with the fact that no constitution can stand the test of time unless it guarantees progress as well as order. As is the experience of the written constitution, no amount of drafting acumen can eliminate the necessity of occasional adjustments. Sometimes in built mechanism of a written constitution fails to meet out the need of unforeseen and unforeseeable events. In such situations amendment of the constitution not merely becomes inevitable but also desirable. Thus a constitution has to ensure stability and at the same time, sufficient flexibility so that it is able to meet the challenge of the time. The constitution makers have to avoid the mistake of over emphasizing the flexibility or suitability. This is why Dickenson says "The largest number of controversies and causes of dissatisfaction that arise under a written constitution are connected with the question of progress. The function of a written constitution is to provide such a principle and frame work of order within which change can proceed merely as such. If that were not so a constitution would be an incitement to revolutions rather than a means of avoiding them. On the other hand, a constitution which left the door open to any and every kind of change is to ensure a stable progress and certain types of changes are incompatible with stability. Again, writes, Lord Brougham that" Constitutions must grow, if they are of any value they have the roots, they ripen they endure, Those that are fashioned to resemble painted sticks, planted in the ground as I have seen in other countries what are called the trees of liberty. They strike no root, bear no fruit, swiftly decay and are long perish.

In the word of J.W. Garner, atypical written constitution contains three sets of provisions; first a series of prescriptions setting forth the fundamental civil and political rights of the citizens and imposing certain limitations on the power of the Government as a means of securing the enjoyment of these rights, second, a series of provisions outlining the organisation, of the government, enumerating its powers, laying down certain rules relating to its administration and defining the electorate and thirdly, a provision or provisions pointing out the mode of procedure in accordance with which formal changes in the constitution may be brought about. He again reiterates that no written constitution is complete without such a provision. In some respects the amending provision is the most important part of the constitution because as it has been said, upon the correspondence of the written constitution with real and actual conditions of the state depends the question whether it shall develop with peaceable continuity or shall suffer alterations or stagnation, retrogression and revolution.

As a matter of fact, in a written constitution, the provision relating to its adaptability of the social changes is the real test of its viability. A constitution which does not contain an amending provision to enable it to be brought in consonance with development, growth and expansion of the people whom it seeks to govern will be a most inadequate and imperfect document. It is doomed to fail and decay. The smooth amending provision in a constitution enables a country to develop and effect change peacefully, alternative to which is stagnation or revolution. A good constitution lays down a smooth procedure of its amendment in such a manner as to forestall any revolutionary upheavals. It has been said by the eminent constitutional jurists, experts and political scientist that unless it is “profoundly illogical and supremely imprudent”, every written constitution must provide a procedure by which a constitution is updated and made responsive to the changing needs of society.

On the other hand some constitution makers have thought that they were capable of making a constitution which will be infallible and would continuously serve the coming, generation. It would not need any amendment. But this is fallacious argument. It is argued that un-amendable constitutions rest on the assumption that their authors are infallible and they have a right to bind future generations to accept final what they have decreed.

Thomas Jefferson one of the Founding Fathers of the United States’ constitution once said that, “I am certainly not an advocate of frequent and untried changes in the laws and constitutions. But I know also that laws and institutions must go hand in hand with the progress of the human mind. When tested with the passage of time, the un-amendable constitution stands impracticable and imperfect. Mulford again says that “to make amendment difficult or well high impossible and then to assume that it shall be exclusively and exhaustively definite of the action of the people in all events involve the denial of the organic and moral being of the people. It is directly improper since in its necessary inference of the people on the longer exists as a power in the moral order which is the life of history. The notion of infallibility of the constitution is fallacious and misconceived. The fundamental error on the part of those who seek to place absolute limitation on the amending power is that they start on the assumption that institution is in the nature of a compact between states of that there is an understanding among them and the federal government that the allocation of powers as laid down in the constitutional document shall not be changed in any manner. Originally, this was the dominant thought among the protagonists of the federal constitution, since all early federations came into existence as a result of agreement among the independent states. At that time, it was considered that a constitution was an end in itself. It was undermined rather it was not in their contemplation that it was no more than a means to an end, a document adopted for the specific purpose of regulating the public affairs and preserving the individual rights of the nation. It was also not in their comprehension then that it was impossible to expect one generation to plan a government that would endure throughout all succeeding generations. This thought is obviously fallacious as each question has a right to determine the law under which it lives since the earth belongs to the living whose dead have neither powers nor rights over it. This may be concluded with the assertion that in our submission the amendable constitution is now an accepted norm. As a matter of fact, only debate that still survives is around the notion as to how easy or how difficult this amending provision should be confirmed.

**Amendability of The Constitution** In our contemporary society it is all-accepted phenomenon that every constitution should have an inbuilt mechanism for its amendment, though a distinction between flexible and rigid constitution is still made. A rigid constitution is that which is amended by a special majority of legislature beyond than they which is required ordinary legislation. The United States constitution is the best example of this type but in the flexible constitution the changes occur in the same device as the ordinary laws are passed. The device of the rigid constitution was adopted to present the brute majorities to stream roll minorities, but is reality wherever the overwhelming majorities of the people have desired a constitutional amendment, the rigidity of the constitution has not stood in the way. It is now settled notion that besides formal amendments the constitutions are changed with other methods particularly by the process of judicial review as it happened in the United States during the period prior the New Deal. The U.S.

Supreme Court has observed that the Commerce clause is as wide as the need of the nation. The letter of the constitution stipulated a strong centre but the judicial interpretation leaned heavily in favor of the provinces on the other hand, the letter of Australian constitution leaned heavily in favor of the states, but the judicial interpretation gave more powers to the common-wealth. There are some other modes by which in its actual working a constitution may stand amended. According to K.C. Wheare, these factors “operate not upon the strict law of the constitution but upon its practice, factors which accept the existing division of the legal powers but operate upon the governments which exercise the power so divided. These factors are conveniently grouped under the heading of usage, custom or convention. By this process of change though the letter of the constitution does not change but in actual practice its meaning and import change. The federation works more as a cooperative enterprise of the general and regional governments than as a two layer coordinate, independent governments, working in their own spheres. These constitutional agencies may be added to this which has come into existence for the coordination and cooperation of the two layers of governments.

**Formal Amendment:-** Now we are venturing to analyze the nature and modes of the formal amendment. There are two divergent views regarding the amendment of the constitution.<sup>13</sup> According to one view the term amendment has a very restricted meaning, an amendment must relate to something in the original constitutional document and that should not be destructive of the very character of the original document. This is what the majority called the Basic case. Again in 1894 case in *Lincoln vs. Waite* a State court observed that the term amendment means such an addition or change within the lines of the original instrument as would affect an improvement or better carry out the purpose for which it was framed. On the other hand, in some cases the U.S. Courts have given others meanings to the term amendment. In *FiegenSPAN versus Bodin*.<sup>15</sup> The court declared that the definition of the term amendment includes addition to as well as correction of matters already treated and there is nothing in the immediate context which suggests that it was used in the restricted sense.

Now it has become an accepted principle that the amendment of the constitution has a wider meaning than amendment of pleadings. The amendment of the constitution signifies a constitutional change effected by a formal procedure laid down in the constitution. Really speaking, the amending procedure in any constitution should be neither so rigid as to make the needed changes almost impossible nor so flexible as to encourage frequent and unnecessary change. It will be not appropriate to give the views of the founding Fathers of the Constitution regarding the amending procedure as discussed and debated in the constituent Assembly. The Chairman of the Drafting Committee, Dr. Ambedkar observed ‘the provisions relating to amendment of the constitution have come in for virulent attack at the hands of the critics of the Draft Constitution, It is said that the provision contained in the Draft make amendments difficult. It is proposed that the constitution should be amendable by a simple majority at least for some years. The argument is suitable and ingenious. It is said that this constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the constitution by simple majority while the later has been denied the same right. It is as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the constitution one has only to study the provisions for amendment contained in the American and Australian constitution. Compared to them those contained in the Draft constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum. The powers of amendment are left with the Legislature Central and Provincial. It is only for amendments of specific matters and they are only few that the ratification of the state Legislatures is required. All other Articles of the constitution are left to be amended by parliament. The only limitation is that it shall be done by a majority of not less than two thirds of the Members of each House present and voting and a majority of the total Membership of each House. It is difficult to conceive a simple method of amending the constitution.

What is said to be the absurdity of the amending provision is founded upon a misconception of the position of the constituent Assembly and of the future Parliament elected under the constitution. The constituent Assembly in making a constitution has no partisan motive beyond securing a good and workable constitution; it has no axe to grind. In considering the articles of the constitution it has no eye on getting through a particular measure. The future parliament if it met as a constituent Assembly, its members will be acting as partisans seeking to carry amendments to the constitution to facilitate the passing of party measures which they have failed to get through parliament by reason of some Article of the constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the constituent Assembly has none. That is the difference between the constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the constitution by simple majority and the parliament though elected on adult suffrage cannot be trusted with the same power to amend it. Dr. V.N. Shukla may be quoted at this juncture when he says, In U.S.A. amendment of the constitution may be proposed only by Congress with the approval of two thirds majority of both Houses and a convention summoned on an application from the two thirds of the members of both Houses. The proposed amendments must subsequently be ratified by at least three fourths of the total number of state legislature or by a convention in three fourths of the total number of the states. In Switzerland and, no alternation of the constitution can be effected without resorting to a referendum. In Australia the constitution can be altered only by an Act passed by an absolute majority in both Houses or in case one House refers to pass it by an Act passed by an absolute majority in either House for the second time after an interval of three months. But in either case, the Act must be subjected to a referendum in each state. If the majority of states, a majority of the voters approve it shall be presented to the Governor General for the Royal Assent.

Now we may conclude our argument keeping in view the above discussion regarding the flexibility and inflexibility of the constitution. In regard with our constitution the observations of Dr. B.R. Ambedkar may again be quoted, I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and war time. Indeed, if I may say so, if things go wrong under the new constitution the reason will not be that we had a bad constitution. What we will have to say is that man was vile. Sir, I move. And lastly we may remark in general that the machinery of amendment should be like a safety valve so devised as neither to operate the machine with too great facilities nor to require, in order setting in motion an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand, to those of conservatism. The latter of the constitution never neither be idolized as a sacred instrument with what mistaken conservatism, which clings to its own wrong out garments until the body is ready to perish from old nor yet ought it to be made a play thing of politicians to be tampered with a degraded to the level of an ordinary statute. Amendability of Constitution, Particularly in India Our constitution provides for three classes of amendments of its provisions. One constitutional provisions of comparatively less significance can be amended by the simple legislative process as is adopted in passing ordinary legislation in parliament two, those provisions which are material and vital are made relatively stable as these can be amended only by following the rule of special majority as laid down in the Article 368. Three, there are certain constitutional provisions relating to the federal character, which may be characterized as the entrenched provisions which need for their amendment in addition to the passage of the amending Bill by special majority in the two Houses of parliament ratification by half of the State Legislatures. This procedure is also laid down in Article 368. M.P. Jain says that the more elaborate procedure of referendum or constitutional convention has been avoided in India. The constitution Makers, thus sought to find out a via-media between the two extremes of flexibility and rigidity so that the constitution may keep full harmony with social dynamism.

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5. Jefferson, thomas, Quoted in Paras Diwan Opcit.-P.13.
6. Ibid-P. .
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8. This was evident from the decision in Russel & Queen (1882) 7 A.C. 829.
9. This began with A.G. of Ontario Vs. A.G. of Canada (1896) A.C. 348.
10. For instance see Amalgamated Society of Engineers versus Adelaid's Steamship Com. 28 CCR 192.
11. Wheare K.C. Federal Government P. 238.
12. For instance, Article 263 of the Indian Constitution visualizes for inter-state councils. Article 262 for adjudication of disputes, relating to water of inter-state, rivers and Article 307 visualizes creation of any authority to resolve problems of interstate trade and commerce.
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