CHAPTER 1

1. INTRODUCTION: THE CONSTITUTION AND THE AMENDMENT PROCESS

1.1. The Dynamics of a Living Constitution

The Constitutional evolutionary tree illustrates that there has been a constant row between stability (status quo) and change. Globally all the Constitutions are understood to grow and evolve over time as the conditions, needs, and values of our society changes. The *locus classicus* of the metaphor of the living Constitution appears in Missouri v. Holland, 252 U.S. 416, 433 (1920), in which Justice Holmes compared the Constitution to an “organism” and argued that the words of the text “have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.” In Edwards v. Canada (Attorney General) [1930] A.C. 124, holding that women were eligible to serve in the Canadian Senate, the Canadian Supreme Court self-consciously adopted an organic metaphor to explain its version of living constitutionalism, which has come to be known as the “living tree” doctrine. Proponents of this view assert that such evolution is inherent to the Constitutional design because the Framers intended to document a different approach that would respect the endurance of a written Constitution and would also suggest that how its text and principles retain their authority and legitimacy over decades and centuries.

In 1977 a leading proponent of complexity theory named Ilya Prigogine a chemist, won a Nobel Prize for his work on dissipative systems in thermodynamics. What makes Prigogine’s discoveries in thermodynamics pertinent to the social sciences is that Prigogine argues that the chaotic creativity found in thermodynamic systems is augmented in the human experience. His book *The End of Certainty*\(^1\) defies the well-established view that natural phenomena operate mechanistically and in a predetermined fashion. As Prigogine puts it, “We see that human creativity and innovation can be understood as the amplification of laws of nature already present in physics or chemistry.”\(^2\) If one were to keenly observe, one can easily associate this with the tenets enshrined in Marx’s Dialectical Materialism. Joseph

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\(^2\) Ibid 71
Stalin, in his book Philosophy of Marxism has mentioned that “Contrary to metaphysics, dialectics does not regard nature as an accidental agglomeration of things, of phenomena unconnected with, isolated from and independent of each other but as a connected whole in which things, phenomenon are organically connected with, dependent on and determined on and determined by each other”. Further Engels in the aforesaid work reaffirms in the same vein that “All nature from the smallest thing to the biggest, from a grain of sand and sun, from Protista to man, is in a state of coming into being and going out of being, in a constant flux, in a ceaseless state of movement and change.  

Hence, by correlating the principles of thermodynamics with the doctrines of social sciences one can realize that as opposed to the Newtonian archetype where isolated and closed systems might operate like machines devoid of reflexes, Prigogine maintains that systems in the real world do not follow any presets. Rather they operate dynamically because they are not isolated but are in fact open. Further he also clarifies that the two subsets of the open system (a) the near equilibrium open system and the (b) far-from-equilibrium system exhibit different behaviours. Whereas near-equilibrium open systems do not evolve internally, far-from-equilibrium systems on the other hand do evolve internally. Prigogine calls this far-from-equilibrium open system a "dissipative system", because such a system arises from a dissipative process – i.e., a process by which energy is exchanged (where energy is either gained or lost) between the system and its surrounding environment. These dissipative systems evolve internally through several steps. When a system can no longer absorb energy and reaches a point of saturation, fluctuations are bound to occur, causing the highly-tensed and turgid system to rupture. The system must then choose between the two antagonistic directions, what Prigogine calls the “pitchfork bifurcation.” This presents an ex-ante unpredictable decision of which pitchfork path the system will take. Once the system “chooses” a path, further bifurcation or divergence follows, again placing the system under duress to re-organize and streamline itself. Significantly, this erratic process can lead to chaos or order, regression or evolution. However Prigogine sees this process as an act of creativity.

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3 Engels quoted by J. Stalin in “Philosophy of Marxism”, PPH, Bombay, 1945, p.4.
1.2. Factors that affect Constitutional Mortality

While talking about constitutional survival, it is essential that we give due prominence to those factors that lend endurance and the requisite pliability to the Constitution. In order to offset the impending shocks, we can enumerate some structural factors that crucially affect the political order and undoubtedly have some effect on the lifespan of Constitutions. It is a matter of great concern that we position them in such a way that not only are they adjudged by the role they play but also what makes them so critical when understood in the context of constitutional mortality. The specificity of the document, the inclusiveness of the constitution’s origins, and the constitution’s ability to adapt to changing conditions are the significant predictors of prolonged existence of a constitution. We also expect that a set of structural conditions associated with the state render the constitutional system more or less stable.

1. **Explicit.** One decisive yet functional approach that can help constitutions survive is to identify the relevant loci of stresses and deal with them when the constitution is in the pre-promulgatory phase. By constructively affecting (modifying) the constitutional text and rendering the advantages of constitutional bargain that it can bring forth in the longer run, it can be nifty in solving problems of hidden information among the bargainers. By considering the various possible future shocks and scenarios, the drafters can also diminish the problems of strategic behaviour and draft those features that can act as buffers when the Constitution becomes operative. So one can deduce that the unambiguous nature of the text can help rescue the Constitution from going into a denial mode and this in turn will lead to constitutional survival. The term specificity encompasses not only a clarity of particular terms in a general manner but also in the sort of the types of events the constitution covers.

2. **Inclusive.** This is an era of Democratic inclusiveness and cohesiveness and Constitutions throughout the world are driven by this very spirit. Not only are they conferred with respect but also they are duly recognized as charters of social inclusion (mostly they also have a Bill of rights appended to them) by citizens and elites alike. With the changing democratic climate, the Constitutions too have been abreast with the times and concurrently assumed new connotations for each country. For some countries (e.g., the United States), the document is emblematic of sovereignty and statehood; for others (e.g., many Latin American constitutions of the 1800s) and many
Third world countries, the constitution symbolises the spirit of emancipation from the regressive and obdurate stances of the shifting political majorities. To be more precise, Constitutions that earn legitimacy and the support from the people at large have an edge over those that do not attain favourable sanctions of the *vox populi*. Being in a symbiotic relationship of mutual existence, the bond between legitimacy and survival is reciprocal. This very fact is validated when both the framers and citizens show more attachment to a legitimate document, and in due course of time these documents are embedded so strongly in the mind-sets that they assume a survival instinct that will in turn engender norms of attachment. Further Constitutions whose provisions are acknowledged and well-received are registered as self-enforcing and command merit. This suggests that by capitalising on the social capital, both at the drafting and approval stage can help fabricate a Constitution that will help ensure its enforcement by the public or other relevant actors. This is another important factor that leads to Constitutional durability-cum-malleability that augments the Constitutional expanse by increasing community participation.

3. **Adaptability.** As described above, in order to maintain system homeostasis and to neutralise the exogenous pressures, it becomes all the more important that the constitutional system develops the mechanisms to adapt to changes in its environment. There are two key mechanisms by which constitutional metamorphosis can take place (a) through formal amendments to the text and (b) through informal amendment that results from interpretive changes. Using the metaphor of visible Cambian rings (the annual growth rings appearing in the great redwoods along the northern California coast that record a tree’s growth), W. Van Alstyne in Clashing Visions of a “Living” Constitution, CATO Supreme Court Review 2011 says amendments to the US Constitution register changes in society. A healthy society should display these changes in formal amendments, not through sleight-of-hand and scarcely visible reinterpretations by unelected judges (whether or not their appointing presidents are re-elected). Is our society healthy? Not by this measure, for an absence of Cambian rings signals petrification.

To a certain extent, these mechanisms can also undergo further modifications. As an auxiliary to the former mode of amendment, judicial interpretation can become helpful and as regards the latter there may be less need for judicial interpretational intervention. Thus the difference can be attributed to the degrees of rigidity that are imposed on the Constitution.
For instance, if the formal amendments are sought through a difficult procedure (as in the United States, which lays down the requirements of ratification by three-quarters of state legislatures) the most rational way to adapt the constitution would be through judicial interpretation. However, on the other hand, if the formal amendment is much less cumbersome and less taxing in terms of its ratification, it might not need judicial reinterpretation of the Constitution.

In order to prevent the Constitutions from committing hara-kiri, constitutions should resort to temperate adaptation where both rigidity and flexibility are in sync and in a state of equilibrium. A rigid constitution may be apposite for a society at the outset where there may be least amount of endogenous and exogenous demands on the Constitution, but the same Constitution may perform poorly if the permeability levels are sabotaged when the pressures become demanding and rapid. We predict that such Constitutions will force actors to take extra-constitutional action to secure changes and will thus die young.

1.3. What Can Best Challenge Constitutional Inertia?

For years, a dividing line was drawn between Conservatives who favoured looking to the Framers’ original intent when interpreting the Constitution and Liberals who instead favoured the idea of a ‘living Constitution’. Conformists like Robert Bork championed the idea of Constitutional fidelity and viewed the Constitution as having a fixed and fairly precise meaning, which in conservative hands usually coincided with the preferences of contemporary conservatives. An unwavering and undiluted faith in the document’s meaning coupled with democratic legitimacy requires us to interpret it in light of the conditions and challenges faced by succeeding generations. This is better known as Constitutional Fidelity in Constitutional parlance. By being faithful to the Constitution in the matters of the interpretation of its words and applicability of its principles, it can very well help sustain its vitality over time and serve as a general charter for a growing nation and a changing world. They argue that the text of the Constitution should be construed according to its original understanding—that is, the way the text was understood by the people who drafted, proposed, and ratified it. On this view, modern constitutional controversies should be resolved on the basis of what the framing generation understood the text to mean in application because that understanding is what the people acting in their sovereign capacity, endorsed as the supreme

law of the land. For instance when judges in United States of America interpret a constitutional provision, the argument goes--- they are bound by this original understanding which can only be changed through the formal process of constitutional amendment under Article V.

Nevertheless the creed of Liberals deems it to be necessary that constitutional interpretation must be informed by contemporary norms and circumstances, not simply by its original meaning. Liberals now better known as Progressives, by contrast, advocate that the Constitution must evolve to meet changing circumstances. They have rather conceptualized the Constitution as “living law,” as a “living charter,” “capable of growth.” The expression “living” Constitution compares the Constitution to a living organism growing and changing in response to its environment. This metaphor takes as fact a process of change that involves larger social, political, and economic forces in which the Constitution-in-practice is situated. Judges cannot be at the hub of this account because they do not control these forces and they could not successfully control them even if they tried. Moreover, the process of change must involve all of the various actors in the Constitutional system and their responses to (and advocacy of) social, political, and economic change. In the apt words of Lord Brougham:

“Constitutions must grow, if they are of any value; they have 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.”

The word Constitution is used in two senses. Firstly, it is used to describe the whole system of government of a country, the collection of rules which establish and regulate the Government. Great Britain provides an example whose Constitution is used in a wider sense as opposed to other nations where the word Constitution is used myopically. In these Constitutions there is a selective assortment of rules (legal and extra-legal) which are thoroughly compared and sifted and then embodied in one document or in few documents. The selection is mostly a selection of legal rules only. The Constitution then, for most countries in the world, is a selection of the legal rules which govern the government of that country and which have been embodied in a document.

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7 Louis D. Brandeis, The Living Law, 10 Ill. L. Rev. 461 (1916).  
9 Brandeis Papers (Harvard University) (draft of Brandeis’s dissent in United States v. Moreland, 258 U.S. 433 (1922))  
The contemporary use of the term Constitution was established when it was applied to the new instruments of government adopted by the American colonies after their separation from Great Britain in the later part of the 18th century. The era of (1776-1789) in which the American Constitutions came into being has been called by Seeley, a period which is “pre-eminently the Constitutional period of the Modern period.” Written Constitutions since then have been the general rule in almost whole of the Constitutional world. The First precedent of North America was naturalised in France and then pollinated to most of the countries in Europe–Spain in 1812, Norway in 1814, Denmark and Netherlands in 1815, Portugal in 1822, Belgium in 1831, Sweden in 1866, Italy and Switzerland in 1848. By the end of the century, every European state except Britain, Hungary and Württemberg each had a written Constitution of some sort. Paradoxically the insurgent American Colonies of Great Britain too followed the same line of Constitutional development.

In the words of J.W. Garner, a typical written constitution contains three sets of provisions: first a series of prescription 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 those rights; second a series of provisions outlining the organisation of the Government, enumerating the powers, laying down certain rules relating to administration and defining the electorate; and third a provision or provisions pointing out the mode of procedure in accordance with which formal changes in the Constitution may be brought about.12

In a written Constitution the provision relating to its adaptability to the social changes is the real test of its viability. A Constitution that is devoid of an amending provision will be the most inadequate and imperfect document and hence doomed to fail. Lester Orfield confirms this by holding that the Civil War may have been prevented if the federal constitution had been easier to amend.13 On the other plane of the argument, a Constitution with foresight will lay down a smooth and feasible procedure of its amendment in such a manner so as to forestall any revolutionary cataclysms. Besides this there have been times that the Constitution makers have thought of enacting a Constitution that was incorrigible and immutable. It would not need any amendment but the fallaciousness of this stance has been well brought by Jefferson in the following words:

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“Some men look at Constitutions with sanctimonious reverence and deem them like the Ark of the Covenant, too sacred to be touched. They ascribe to the men of the preceding age wisdom more than human and suppose what they did to be beyond amendment.”

Since a Constitution is “the resultant of a parallelogram of forces, political, economic, and social which operate at the time of its adoption” it is also true that these forces are not static. They vary with the times and necessities of the masses which ultimately bring discord between the Constitution and the society for whose benefit the Constitution is framed. In particular, Constitutional provisions designed to secure the liberty and other rights of the individual, should be construed liberally in favour of the citizen.

Cardozo has remarked that the provisions of the Constitution have a content and a significance which vary from age to age, and it is the task of the method of free decision to arrive at a solution which is permanent, for the Constitution does not lay down rules of conduct for a brief period only but for an ‘expanding future’. The Constitution of nation is the express manifestation of the life of the people and it must respond to the deep pulsation for change. Second, even if the alternative is not revolution or other forms of unconstitutional change, there will still be a number of situations where formal constitutional amendment is highly desirable. Main reasons include:

1. Democracy in the traditional sense (majority rule)
2. Improvement of decision-making procedures
3. Adjustment to transformations in society (political, economic, cultural)
4. Adjustment to international cooperation
5. Flexibility and efficiency in decision-making
6. Ensuring, adjusting or reconfirming fundamental rights

Describing the Indian Constitution as a “living” document unduly minimizes the fixed and enduring character of its text and principles. The Indian Constitution is treated quite differently. In our view, interpretations, applications, and understandings of the Constitution's text and principles may change, but the Constitution itself does not change unless properly amended. This approach explains the dynamic character of constitutional law. The Constitution of a State, as an assembly of fundamental juridical norms and principles must periodically be adjusted to the challenges of the contemporary political society, for its

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14 K.C. Wheare, the Modern Constitutions, London, Oxford University Press, 1952, p. 98
15 Black Court Law, pp77-78.
modern existence and functioning as no Constitution can be perpetual. The Constitutions are fundamental legislative works, on which may depend upon the evolution of a state, its stability and wellbeing. The drafting acumen of the framers is reflected in Article 368 which calibrates the level of amendment in such a way that gives ample room to both rigidity and flexibility. Hence, India's constitution has a varied level of amendment thresholds depending on the issue. The optimal threshold for amendment balances the need for change in response to exogenous developments, and the interest in preventing the government from entrenching its power.\textsuperscript{17} A high threshold for amendment helps ensure that changes to the fundamental structures are accomplished only with the approval of the principal, or a large component thereof. At the same time, there are also arguments against strict constitutional confinement. First, it is a historical and empirical observation that constitutional binding is sometimes simply not possible. Secondly, the first generation cannot act proxy for all the subsequent generations. Forces calling for political reform are strong enough, and then changes will be made, regardless of the formal constitutional rules. In such cases, it will normally be highly preferable for the changes to be done through formal constitutional amendment rather than by revolution and upheaval, breaking the too-strict formal constitutional chains at huge cost to society.

Speaking in the same vein about the Indian Constitution which is the repository of living constitutionalism, Jawaharlal Nehru opined:

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“….in any event we should not make a Constitution such as some other great countries have, which are so rigid that they do not and cannot be adapted to changing conditions. Today especially when the world is in turmoil and we are passing through a very swift period of transition what we may do today may not be wholly applicable tomorrow. Therefore, while we make a Constitution which is sound and as basic as we can, it should also be flexible.”\textsuperscript{18}
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Constitutions are always an expression of their time and require periodic adjustments. The term constitutional engineering implies that “sophisticated craftsmanship” is being applied. Incorporating the key problems impeding the creation of societal order into constitutions and establishing fundamental rules for their regulation (whereas the fine adjustments are determined by laws and regulatory statutes) seems the obvious thing to do

\textsuperscript{17} For a recent discussion, see Rosalind Dixon & Richard Holden, Amending the Constitution via Article V and the Effect of Voting Rule Inflation (Jan. 28, 2009) (unpublished manuscript)
\textsuperscript{18} CAD, Vol.VII at 323.
and this is attained by incorporating the Amending clause, the moment a Constitution is reduced to writing.

Huddleston of Alabama has aptly stated:

“The clause which lies nearest to its heart is the clause which permits a change in the Constitutions. It is more vital and more fundamental than any other provision of the Constitution. For by dealing with that clause, we may fix it so that the Constitution is absolutely rigid and may never be amended, or we may fix it so that it may be amended lightly and without sufficient thought. In other words, through that clause we reach toward every other clause in the whole Constitution, and that cannot be said about any other clause of the Constitution.”

After judging the viability of a Constitution on the basis of Constitutional Persistence, Constitutional Flux is another emerging criterion that has drawn attention from different quarters. In other words, it lays the determinative foundation of rigidity and flexibility. When the concept of a Constitution is inseparably connected with the idea of persistence, Constitutions are regarded as a solid framework for political action. While (the perception of) factual phenomena and accordingly their normative appreciation are constantly changing, constitutions are deemed to serve as foundation for the manner (as well as the extent to which) these phenomena are addressed. Thus, Constitutions depend on inherent stability; an exclusively ‘Heraclitian’ conception of dynamic constitutions in constant normative flux would not meet these requirements: ‘A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion’. Still the framework’s design has to ensure a sufficient capacity to respond to social reality. As much as constitutions serve as normative foundations of political systems elevated from normal politics, they cannot evade completely from being responsive to a changing political environment. Otherwise their requirements would turn out to become a normative corset too tight to regulate political practice reasonably any longer. Moreover, a ‘Platonic’ vision of a static constitution trying to establish normative truth will not prove to be sufficiently workable.” A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation and it will either degenerate into an anarchy, or by the pressure of its inequalities bring on a revolution.”

19 67 Cong.REC.(1926) 7203, quoted by Orfield, supra note 6 at 206.
20 Joseph Story, Commentaries on the Constitution of the United States III (1833) Ch XLI § 1821.
Thus a balance has to be struck between dynamic elements providing for the system’s flexibility and static elements providing for the system’s persistence in order to safeguard its functionality. ‘That useful alterations will be suggested by experience, [can] not but be foreseen’.\(^{21}\) A ‘healing principle’ is to be introduced \(^ {22}\) as ‘[it is wise […] in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy.’

To Thomas Paine “The written American Constitutions are to liberty what, what a grammar is to language.” He adds further that “A Constitution is not of the Government but of the people constituting it: a Government without a constitution is a power without a right; a Constitution is a thing precedent to the Government; and the Government is only a creature of the Constitution”.\(^ {23}\) It was due to his untiring efforts in the field of Constitutionalism that the modern conception of the Constitution came into vogue as a sacrosanct “fundamental law of the land which was basic and unalterable by ordinary legal process.

Desirous of stability, most human societies, at a stage of Constitutional progression have opted for written constitutions so that their political, social and economic institutions acquire a degree of stability. But written constitutions can sustain only if they have a mechanism for ushering change. The truth is that no Constitution can bear the brunt of time unless it pledges progress as well as order. As is the experience of the written Constitutions, no amount of drafting acumen can eliminate the necessity of occasional amendments. Sometimes the intrinsic mechanism of a written Constitution fails to meet the need of unanticipated events.

In fact the biggest downside of an unamendable Constitution has been highlighted by Mulford in a very crisp manner. According to him, “An unamendable Constitution is the worst tyranny of time or rather the very tyranny of time. It makes an early providence of a convention which has adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres.”\(^ {24}\)


In such events, amendments not only become essential but also *de rigueur*. In this manner, the function of a constitution is to provide such a paradigm of order within which change is not incompatible with stability but allows optimism. It is reverberated over and again that no written constitution is complete without the amendment provision which is the only criteria that is determinative of whether there shall be peaceable continuity or shall suffer alterations of stagnation and retrogression. Even though Gladstone remarked that “The American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man”\(^{25}\) yet one cannot be oblivious to the truth that howsoever good a Constitution may be but it is beyond the wisdom of one generation that framed it. The real difficulty is that the life and society are infinitely variable. This spells the necessity of incorporating a provision, called and Amending Clause, in every constitution to meet the exigencies of time.

To bring out this truth one can very well refer to Peter Suber’s work on *The Paradox of Amendment*\(^{26}\) where he has provided a reasoned analysis of how law and Constitutions copes with the changes and maintains continuity of law. Further by identifying the two ubiquitous paradoxes that are the Paradox of Amendment and The Paradox of Omnipotence (according to which the first generation of sovereign people can bind its successors) which is prevalent in every Constitution, he has been instrumental in challenging the popular belief of immutability and irrevocability associated with every Constitution.

The reasonableness of this idea is suggested in the following way, ‘If the first generation (G1) needed 70% approval to adopt the constitution, and the second generation (G2) needed 75% to amend, then failure by G2 to amend would not show sufficient consent to the constitution to establish the legitimacy of the constitution for G2. Failure of G2 to amend may conceal a 74% consensus for radical change, in which case G2 dissents from the constitution more widely than G1 consented to it, and yet is supposed to be bound. This is not self-evident injustice, but the unjust element of it cannot be blinked away. With 74% consensus for radical change G2 could ignore the constitution and their ancestors had in adopting the old one and make another one — could revolt — with more legitimacy than G1 had in making the prior constitution. On the other hand, if G2 amends at 75%, then it may have been delayed longer than is just, which is roughly as long as it had 70% approval, or as long as it had the breadth and depth of support needed to revolt and make its own constitution

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with the same degree of legitimacy as its predecessor. This is especially true when, not G2, but G10 or G20 finally amends when G2-G19 each mustered at least 70% consensus for change.\textsuperscript{27}

His stance is further buttressed by the fact when he draws on the Consent theory expounded by John Locke, where sufficient amount of emphasis is placed on continuing consent of the governed, not just the consent of the founding generation. The most visible impact is manifested in the form of legitimacy. Justifying the need and inevitability of an amendment clause, he lays down the foundation of a pragmatic and sustainable Constitution. Factors that lead to Constitutional inertia and stagnation are also removed once the Constitution becomes revocable and permits piecemeal change or wholesale replacement. So long as the establishment of the constitution is revocable by later generations, and the method of amendment is fair, then the first generation is not tyrannically binding its successors. But if the method of amendment is not fair, or it’s too rigid then the Constitution inherited by future generations is garnered illegitimately then founding a document for eternity is not only unreasonable but a tantalizing proposition. Echoing the ill effects further, he mentions that the authority of a Constitution over generations of citizens who did not ratify it would diminish roughly to the extent that the difficulty they face in amendment exceeds the difficulty of the original ratification. For such citizens, legitimate amendment would be more difficult than a revolution or discontinuity that would establish a New Constitution with equal or greater legitimacy. With decreasing validity the consent theory would drop to about zero plus any surcharge (Surcharge is the residual obligation or feeling of obligation to obey the law which remains after a particular legal duty has been neutralized by a conflicting moral duty, by the obsolescence of the rationale for the legal rule, or by a conflict between the legal rule and its rationale — in short, when the normal reasons for obeying the law are inapplicable. It is roughly the sense of obligation to obey the law simply because it is the law, as opposed to the obligation to obey the law because it is good, wise, rational, or beneficial to do so)\textsuperscript{28}

This reflects the broad understanding that it is simply not possible for the makers of a constitution to create a text which is eternal, and which can serve society through processes of development and transformation.

\textsuperscript{27} Ibid.,
\textsuperscript{28} The concept of surcharge is borrowed from Mortimer and Sanford Kadish, Discretion to Disobey: a Study of lawful Departures from Legal Rules, Stanford University Press, 1973, pp. 27-28. Their source for the concept was W.D. Ross, The Right and the Good, Oxford University Press, 1930.
While there is broad consensus that constitutions neither can nor should be entirely unchangeable, there is wide room for discussion as to how flexible they should be. This is closely linked to the question of what a constitution is and should be, as pointed out by Holmes and Sunstein, in their distinction between positive and negative constitutionalism:

“A constitution is not simply a device for preventing, tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensibly, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the stupidity of politicians. Constitutions are multifunctional. […] Theorists should therefore place greater emphasis than they have hitherto done on positive constitutionalism. The task is to create limited government that is nevertheless fully capable of governing.” 29

While a negative vision of constitutionalism will normally imply reluctance to constitutional change, a more positive perspective will recognise that amendments may often be necessary or desirable in order to promote effective democratic governance and ensure legitimacy. It can furthermore be argued that although the Ulysses metaphor captures an important element of constitutionalism, it is not wholly accurate, in the sense that constitutional binding is seldom an act of “self-binding”. Rather, it is often the binding of others. Sometimes constitutions are imposed by political regimes on the way out, in order to protect their interests against the democratic will of their successors. And even if this is not so, then all constitutions of a certain maturity reflect not the pre-commitment of the present generation, but rather that of earlier generations. Critics have pointed out that too much resistance to amendment and reform implies a democratically questionable principle of allowing society to be “ruled from the grave” – by letting the (sometimes mythologized) will of the “founding fathers”, as interpreted by judges and academics, determine the political problems and challenges of today.

Thus, the domain of amendment clause is of vital importance to each and every Constitution that has been framed so far. By expanding the canvas of constitutional interpretation, it emerges not as an exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental. It is particularly important that

constitutional provisions are not construed statically, but interpreted to embrace scenarios not
contemplated by their creators.

This value was well expressed by John W. Burgess in 1891

“[The amendment clause] is the most important part of a constitution. Upon its
existence and truthfulness, i.e., its correspondence with real and natural conditions
depends the question whether the state shall suffer the alternations of stagnation,
retrogression and revolution. A constitution, which may be imperfect and erroneous in
its other parts, can be easily supplemented and corrected [through an amendment
clause; otherwise] error will accumulate until nothing short of revolution can save the
life of the state.”\(^{31}\)

1.4. Causal Designs of Amending Power

Etymologically, the word Constitution has its origin in the Latin noun *constitutio*,
which means settlement with reason. In the Roman law system, the Constitution meant the
edict signed by the Emperor, whose legal force was superior to that of the other legal
documents adopted by the Empire’s public authorities.\(^{32}\) Constitutions, as systems of
government, come in a whole range of shapes and sizes. If we look only at the form they are
cast in, we find that some countries have for the most part written constitutions (United
States, the Netherlands, South Africa) whereas other countries have partly unwritten
constitutions (United Kingdom). It is often suggested informally that the United Kingdom
does not have a written constitution. This is not strictly true. Instead it is an organic system
with an indeterminate content consisting of legal and non-legal rules, case law and customs,
conventions and standing orders all governing government.\(^{33}\) Many countries with a written
constitution have enshrined it in a single, separate document (concentrated written
constitution), whereas other countries, such as Sweden, have a number of different
constitutional documents (dispersed written constitution).\(^{34}\)

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1891, 1:137.

\(^{32}\) Tudor Draganu, Drept constitutional (Constitutional Law), Didactica si Pedagogica Publishing House,
Bucharest, 1972, p. 45

pp. 40-41.

\(^{34}\) J.M. de Mein, The Kingdom of Sweden, in Prakke, L., C A.J.M. Kortmann and J. C. E. Brandhof (eds.),
Constitutional Law of 15 EU Member States, Deventer, Kluwer, 2004
In the process of establishing the modern states, the idea that constitutional dispositions regulate, first of all, political relations became increasingly visible. Thus, the relations regarding the organizing and exercising of power within a state have a preponderantly political character, by means of the constitutions gaining also a normative, judicial character.

A written Constitution is considered to be a distillation of the ideals of a nation and deserves due attention. Thus, the document of Constitution provides only a manifest cover to the real thing, community’s ideal or the world-view (Weltan Schauung), as does rind to the kernel. If the rind (shell) is manipulated without hurting the kernel it is all fine and permissible. Indeed often desirable unavoidable to access the kernel. On the other hand, if by tampering, ‘kernel’ itself is damaged or comes under threat such exercise will be beyond a parliament’s routine license to amend. As with most organisms, a Constitution cannot be presumed to visualize its own extinction.

A logical deduction of the natural law foundation of a written constitution would be that it is an established fabric that should not be altered except when some pressing evolutionary process demands. Corwin voiced the Higher Law belief etched in every written document as: the legality of the Constitution, its supremacy and its claim to be worshipped, alike find common ground on the belief in a law superior to the will of human governors.\(^35\) A similar approach can be adopted towards the Indian Constitution i.e. from one vantage point the Constitution enunciates a list of social ideals and a desired social order-------in other words when viewed in its entirety it appears as nothing but a colossal footnote appended to the Preamble; and from another perspective it appears as a catalogue of powers, procedures and restraints on the aforementioned powers. In this sense, it is a framework for Government, and the very idea of framework carries with it the idea restraint.\(^36\) Such Constitutions measure high on the stability/endurance scale which should not be tampered with easily. The sole reason for this is that it personifies the Higher Law which is the quintessence of every written Constitution.

However, a written instrument of governance also enjoins the idea of social compact which was asserted in the early American constitution and this concept that people in every generation have a right to modify, revise and reform the compact also gained currency. As the ideals, aspirations and mores of a nation continue to change in the historical evolutionary,


\(^{36}\) Upendra Baxi, Some Reflections on The Nature of Constituent Power in Rajeev Dhavan and Alice Jacob (Eds.), Indian constitution : Trends and Issues, 122 (1978), p. 137
so it becomes essential that people of one generation should not shackle their descendants to the framework of their own conception. The purpose of a constitution, in the opinion of Romanian sociologist Dimitrie Gusti, is to formulate politically and legally, in a solemn manner, social psychology, the economic state, the desiderates of social justice and the ethnic aspirations of the nation.”37 It is here that the blinkered mindsets should be discarded in favour of a larger vision. This thought was expressed by Thomas Paine:

“There can never be a Parliament or any description of men or any generation of men, in any country, possessed of the right or the power of binding or controlling posterity………..It is the living, and not the dead that are to be accommodated.”38

Constitutional design experts or’ consociationalists’, assert that Constitutions that have been recently engineered give us a two pronged insight. While one holds that living political Constitutions must be Darwinian in structure and practice another stream of thought engages us to have faith in Lamarckism.39 Lamarckism may be a more powerful idea than Darwinism40. Unlike nature, where Darwinism seems to reign, Lamarckism often makes for better urban design. Whereas Darwin’s theory of evolution emphasizes the value of random mutations in overcoming exogenous shocks (with species that lack these beneficial features becoming extinct), Lamarck’s theory of “inheritance of acquired characters” suggests that learned experience may be incorporated and transformed into organic features. Constitutional Design scientists recommend that Reflexive designs with effective, built-in self-adjustment and auto learning mechanisms work better than rigid designs without such adaptation mechanisms. Science itself, arguably the ultimate modernist domain, is a dynamic enterprise with a built-in commitment to self-correction and constant development; at times this development is linear, and at times it takes quantum leaps. By contrast, fixation and rigidity—institutional or ideological—lead to amnesia, backwardness, and ultimately an inability to predict problems or respond effectively. Military history of the twentieth century, from Pearl Harbour to the Yom Kippur War, is filled with examples of such fiascos. So,

37 Dimitrie Gusti, Constitutia din 1923 în dezbatera contemporanilor (The Constitution of 1923 in the Contemporaries’ Debate), Humanitas Publishing House, Bucharest, 1990, p. 21
38 Thomas Paine, Rights of Man (1792) in Howard Fast (ed.), The Selected Works of Tom Paine at 99
39 The term “Lamarckism” comes from the name of eighteenth-century French biologist Jean- Baptiste Lamarck, who is known for the evolutionary theory that acquired characters are inheritable, or that “modifications resulting from an organism’s development of particular habits may be passed on to that organism’s offspring under the appropriate conditions.
40 Charles Darwin, The Origin Of Species 93–94 (Collector’s Library 2004) (1859) (introducing the concept of natural selection, in which small hereditary variations in individuals contribute to their survival or destruction).
rigidity and inability to change are often bad things. Why, therefore, should they be considered good things when it comes to constitutionalism?\textsuperscript{41}

This “aspiration to advance”, evolve and establish an egalitarian notion of social justice to all is a mega exercise undertaken by all the “Contemporary Constitutions” and it would not be a hyperbole to say that the Indian Constitution qualifies as the most ambitious constitutional venture ever embarked upon in recent history. Macro planning as visible in Indian Constitution follows a top-down approach which has been made possible by a judicious use of well-timed self-addressing mechanisms called Amending formulae. Every change in a nation’s written constitution heralded by an amending formula explicitly creates a new combination of procedures and constraints for the development and enforcement of law, and every newly written constitution legally supersedes both the written and unwritten parts of the previous constitution. Changes in the formal documents that affect fundamental procedures and constraints also tend to induce changes in the unwritten practices, especially in areas directly affected by the constitutional reform. In this sense, major constitutional reforms can be thought of as revolutionary (discrete), rather than evolutionary (continuous) in nature.

As is well known the amending procedures of some written constitutions, particularly American constitution is rigid and cumbersome giving very little scope for self-revision. On the other hand, the Constitution of Germany lends itself mild flexibility while retaining the fundamental rules of the political game. Article 15 of the Swedish constitution requires amendments to be approved by two successive parliaments separated by an election; ordinary laws require approval by only a single parliament. Instances of federations can also be cited here where due importance has been given to the national and sub national amendment procedures.

The extent to which National Constitutions control or simply recognise sub-national Constitutions varies considerably. Some federations, such as Belgium, Brazil, Canada, India, Malaysia, Mexico, Nigeria and South Africa, set out the primary constitutional requirements for their sub-national units in the federal Constitution. Thus, in some cases, any changes to the national constitution must be ratified by popular majorities in at least a majority of constituent units. In some other countries, changes to the National Constitution that have a particular effect on sub national units must be ratified by the affected units. To understand this phenomenon, a new taxonomical classification is generated called Parallelism and Non-

\textsuperscript{41} Ran Hirschl, The “Design Sciences” and Constitutional “Success”, 87 Texas L. Rev. 1347, (2009)
Parallelism. Federations like Brazil, Malaysia and Switzerland which contain similar amendment procedures at both the national and sub national level reflect Parallelism.

In Malaysia, the national constitution can be amended upon a 2/3 majority of the national legislature, and the same type of legislative extraordinary majority requirement is in place in most state constitutions. Meanwhile, in Brazil, amendments can be proposed in several ways, but they must be approved by a 3/5 vote of both houses of the national legislature, on two separate readings. The Brazilian state constitutions have the same general requirement for approving amendments. Finally, in Switzerland, both the national and cantonal constitutions are amended rather easily and through diverse mechanisms. At the federal level, constitutional changes can be proposed either by the legislature or by initiative petition, and they must be ratified by a majority of the people and by voters in a majority of cantons. Cantonal constitutions vary in their specific amendment procedures; but they all resemble the federal constitution in permitting amendments to be proposed by initiative petition and also in requiring ratification by popular referendum.

While assessing federations on the basis of Non-Parallelism, we find that either the sub national constitutions possess a flexible amendment procedure or they are endowed with an alternative mechanism indiscernible at the National tier. A number of Russian sub national units also provide for amendment mechanisms not found at the national level. There are three amendment procedures at the national level, but the main procedure requires the federal legislature to propose a change (by a 3/5 vote of the two houses), at which time a constitutional assembly is held, and the work of the assembly can be approved by 2/3 of the members of the assembly or by a majority of the people. In Germany, the Landes constitutions provide for an alternative mechanism not found at the federal level. The amendment procedure at the federal level requires amendments to be approved by a 2/3 vote of both houses of the federal legislature. The Landes constitutions are also amended by a 2/3 vote of Land legislatures. But in some instances, Landes constitutions also permit the people to initiate amendments, although these must still be approved by the legislature.

42 Constitution of Malaysia, Art. 159.
43 Constitution of Brazil, Art. 60
45 Constitution of Switzerland, Art. 120, 121
The Constitution of United States, as the first modern federal Constitution, has been a significant influence on other federations. Article V of the United States Constitution gives a role to the National Congress at the initiation stage and a role to the States at the ratification stage. At the national level in America, amendments are proposed either by a 2/3 vote of both houses of Congress or by a convention called upon the petition of 2/3 of the state legislatures to Congress. State Conventions have only been used once for this purpose. Amendments are then ratified by ¾ of the states, either by their legislatures or in ratifying conventions. Amendments to state constitutions can be achieved in a number of ways. One-third of the states provide for the constitutional initiative, whereby the people can not only propose amendments by initiative petition but then approve them in a popular referendum, without any participation of the state legislature. In nearly a third of the states, a referendum must be held periodically on whether to call a constitutional revision convention. In one state, amendments can be submitted to a popular referendum by a constitutional revision commission. Many states permit legislatures to submit amendments to the people upon a mere majority vote, albeit sometimes in consecutive legislative sessions.

The United States system has influenced those in Mexico and Nigeria as well. In Mexico, constitutional amendments require the approval of a special majority of two-thirds of those present and voting in each chamber of the National Congress and approval by more than half the State legislatures. In Nigeria, constitutional amendments also require the approval of two-thirds majorities in each House of the National Assembly, but must reach the higher standard of approval of two-thirds of the State Houses of Assembly.

However, in many European nations the differences between the rules on amendment are to a large extent as old as the written constitutional systems of Europe, which usually date back to the late 18th or early 19th century. Early constitutionalist theory did not agree on one single preferred amendment formula – and each nation designed their own, sometimes inspired by each other, but always influenced by the domestic political context and compromises. These amendment formulas are often older than the age of the present constitutions, as many of them were followed and kept on when during the 20th century new constitutions were introduced to replace the earlier ones. To the extent that it is possible to

48 See the ratification of the 21st amendment to the United States Constitution
50 Constitution of Mexico, art 135
51 Constitution of Nigeria, s 9(2).
identify a common Continental (West European) tradition for constitutional amendment, then this is a balanced approach, which is by comparison more flexible than for example the rather strict amendment rules in article V of the US Constitution. The oldest constitution still in force in Europe is the Norwegian one, which was adopted in May 1814. (It is the second oldest in the world, following the 1787 constitution of the USA). Over the centuries it has however been amended more than two hundred times, and only approximately 1/3 of the 112 articles remain completely in their original form. Elements and remains of earlier constitutional rules can be found in many present constitutions, such as the reference in the preamble of the French constitution of 1958 to the Declaration of 1789. The most recent new constitution in Europe is that of Montenegro of 2007.

In France there are two alternative procedures – either by simple majority decision in each chamber followed by a popular referendum (simple majority), or upon proposal by the president with a 3/5-majority requirement in parliament, but no referendum. The republican form of government cannot be changed, but this is not subject to judicial review. As already observed by Tocqueville:

“It have long thought that, instead of trying to make our forms of government eternal, we should pay attention to making methodical change an easy matter. All things considered, I find that less dangerous than the I thought one should treat the French people like those lunatics whom one is careful not to bind lest they become infuriated by the constraint.”

During the processes of constitution writing in Central and Eastern Europe in the 1990 the dominant view was that the new democracies should adopt rigid constitutions, with strict rules on amendment, in order to protect the new democratic order and constrain executive power. Others, however, argued strongly that the particular aspects of this major transition to democracy required a more flexible form of constitutionalism, with relatively easy access to amendment, in order to adjust to the fundamental changes taking place. There are however countries in which the process of amendment is more difficult than average (including Bulgaria, Romania and Russia) and countries where it is relatively easier (including the Czech Republic, Estonia and Slovenia).

In a few countries, however, a special body has to be elected or convened in order to pass constitutional amendments. The Bulgarian constitution requires elections for a special body, the Grand National Assembly, for adopting a new constitution or for amending specific

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provisions. Establishing this special body leads to the dissolution of Parliament. Once the Grand National Assembly has carried out its mandate, namely adopting the constitutional amendments, new parliamentary elections take place.

1.5. **Meaning Of “Amendment” Under the Indian Constitution**

Constitution in a limited sense is not adventitious, it gradually grows out of a particular social milieu as from a chrysalis containing a value system and entrenched social mores of a community who decide to live on a defined territory in pursuit of happiness, to lay low their fears and fulfil their aspirations. Once this is living arrangement evolved and agreed upon among the stakeholders is formalized into a Constitution, its progenitor, the dominant value system, out of which it came out, just the same from that moment walks in lockstep with it so to speak as its ‘double’, an alter ego. It remains amorphic and invisible yet no less real keeping constant watch against any attempt at its defilement. No express constitutional provision, undoubtedly, delineates the above indicated parameters but this is a necessarily implied circumscription inbuilt in the very purpose for which constitution come into existence: to facilitate a people to live their dreams to graduate to realizing their cherished world-view. This kind of ‘consubstantiality’ existing between a Constitution and the antecedent fluid mass of values which had crystallized into the former in the first place remains one constant to ensure that the spirit of the Constitution is not violated by the periodic chops and changes in the body of the constitution made necessary to keep pace with moving times.

The expression “amendment of this Constitution “is the heart of Article 368. It is the yardstick by which the magnitude of amending power can be gauged. The extent of its scope can be judged from the fact that it treats the entire ensemble of the written text called the Indian Constitution and subjects each and every article of the sanctimonious document to amendment. In other words, no portion of the Constitution can be impervious to the all-pervading impact of the amending power, neither the invulnerable Part III that deals with the Fundamental Rights nor the indestructible Preamble.

Ironically the expression as such has not been expanded in any manner, although it is strewn here and there on the Constitutional canvas as “Amend” or “Amendment. Article 367(1) applies the General clauses Act to the interpretation the Constitution to amplify its meaning but that too is of no avail. Nonetheless Section 6-A of the act provides that
‘amendment’ includes addition, substitution and omission. In the Constitution the word “amendment” has been used either in the mainstream with a wide meaning or in the periphery with a limited context.

Articles like 107 which deals with legislative procedure, Clause (2) provides that “subject to the provisions of articles 108 and 109, a bill shall not be deemed to have been passed by the House of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agrees to by both houses” have apportioned a narrow meaning. Similarly in article 192(2), 197(2) and 200 the meaning is curtailed. Its occurrence in Article 169(2) which lays down that any” law referred to in clause (1) shall contain such provisions for the amendment of the Constitution as may be necessary to give effect to the Provisions of the law and may also contain such supplemental, incidental and consequential provisions as Parliament may deem necessary” reiterates the same. Quite the opposite, there are articles like Articles 372, 252, 254 and 320(5) that utilise the triad of meanings which can be altered or repealed or amended for amendment.

When positioned under the judicial lens, the import of the word “amendment” was for the first time magnified in Sajjan Singh case. In this case, majority judges held that it was true that the dictionary meaning of the word “amend” was to correct and rectify but in the milieu of a Constitution this meaning was extraneous and superfluous. They also alleged that that the amendment of a Constitution may include the deletion of any or more of the provisions of the old constitution and substitute in their place new provisions. Thus the power to amend in the context is a very wide power and it cannot be controlled by the literal dictionary meaning of a word “amend.”

However the meaning is arrested and stunted in case of Golaknath by the majority judges (except Hidayatullah) who held that amendment employs only minor variations or improvement to the Constitutional provisions and did not include total repeal of the provisions already existing in the Constitution. Amending a Constitution thus is essentially a corrective surgery with obvious limited scope; not a surrogacy to bring forth a new foetus. Therefore the power to amend cannot be deemed as unlimited but only to the extent it promotes its health and makes it more efficient to survive longer to better serve changing societal needs, just as in submitting to a surgeon’s knife for an invasive procedure a patient cannot be presumed to have given him the license to kill but only a consent to unavoidable hazards of the procedure. As words cannot be construed in a void and in order to augment

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53 (1965) I SCR at 946-47.
their stance on the narrow interpretation of the word “amendment “they relied on the Livermore v. E.G. Waite case\textsuperscript{54}, where the Court widely held:

The significance of the term “amendment“ implies such as addition or change within the lines of original instrument as will effect an improvement or better carry out the purpose for which it was framed. On the other hand, there was consensus amongst judges like Wanchhoo, Bachawat and Ramaswamy JJ. and Hidayatullah J. who upheld the wide connotations of the term ‘Amendment’ which encapsulated not only addition, variation within the general framework but repeal or revocation of the entire Constitution. A similar analogy is obtainable in the National Prohibition Case\textsuperscript{55} where the U.S. Supreme Court defied the attack on the eighteenth Amendment of the U.S. Constitution by upturning the line of argument that held that amendment must be confined in its scope to an alteration of that which existed in the Constitution without encroaching on the basic structure.

In the pursuit of interpreting this term, another landmark effort was made in the Kesavanand Bharti case (1973) where the majority judges again attributed a constricted meaning to the term while the same was contradicted by Khanna J. who cited the British Coal Corporation vs. The King\textsuperscript{56} that the power to amend has “wide amplitude” and can substitute the old provisions with the new provisions of different nature. Minority judges also concurred and said that article 368 has substantive meaning as it resides in a written Constitution therefore any part of the Constitution could be amended by all plausible modes of change be it “variation, addition or repeal.” While elucidating this view Chandrachud J. said that the legal meaning of amendment should not be proscribed by a meaning which can be read as a sombre “Improvement.” Instead the frontiers of the term are so extensive and the power contained in the article was indeed so wide that it expressly conferred a power by clause (e) of the proviso to amend the amending clause itself.\textsuperscript{57} In the words of Beg J.: The Constitution can be eroded “Completely step by step so as to replace it by another.”\textsuperscript{58}

In India, the different amendment procedures for different types of amendments become increasingly more complicated. Also a harmony is struck between the national and

\textsuperscript{54} ILR (1804)102 Cal.113 at 119  
\textsuperscript{55} (1919) 253 US 350  
\textsuperscript{56} 1935 AC 500.  
\textsuperscript{57} Id. At 980-81.  
\textsuperscript{58} AIR 1973 SC at 1975
sub national units which are forced to work in tandem because of its quasi-federal nature.  

An amendment to the Indian Constitution is understood to be an extremely difficult affair although during the period of its existence it is one of the most frequently amended constitutions in the world. The first amendment came only a year after its adoption and instituted numerous minor changes. Depending on the gravity of the article and outcome of the change, our Constitution provides for three methods of amendments. The first is by a simple majority in both houses of Parliament, the second is by a special majority in Parliament along with ratification by at least half of the State legislatures and third by a special majority in the Parliament.

1.6. Amendments by a Simple Majority

There are a large number of provisions in the Constitution which can be amended by a simple majority in both Houses of Parliament and without the approval of the states. Thus, changes to some constitutional provisions are deemed not to amount to constitutional amendments, and may therefore be implemented by ordinary legislation. The matters which can be amended by such a procedure are:

1. Creation of new States or reconstitution of existing states.
2. Creation or abolition of Upper Chambers in States.
4. Laws creating local legislatures or Council of Ministers or both for certain Union Territories.
5. Administration of Scheduled Areas and Scheduled Tribes.

It follows that the special procedure for amendment of the Constitution contained in Article 368 does not apply to such laws which can therefore be enacted by a simple majority needed for making ordinary laws.

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59 This influence is strengthened because political parties tend to be locally or State based, and coalitions of parties are often required to form governments: George Matthew, ‘India’, in A L Griffiths (Ed.) Handbook of Federal Countries, McGill-Queen’s University Press, Montreal, 2005, pp. 166 - 174

60 Contrast with the South African Constitution, which is also considerably difficult to change. Section 74(2) states that Bills amending the Constitution require a two-thirds majority in the National Assembly and a supporting vote of six of the nine provinces represented in the National Council of Provinces. Some parts are even more firmly entrenched, e.g. a Bill amending Section 1, which sets out the founding values, requires a 75 percent majority
The most striking example of provisions alterable by a simple majority vote in Parliament and assented to by the President are Articles 1, 2, and 3. Article 1 lays down that India shall be a Union of States and these States are named in the First and Fourth Schedule of the Constitution. Article 2 and 3 empower the Parliament to form new states and to alter the areas, boundaries or names of the existing states or to cause a state to disappear entirely by merging it with another State or States. A bill affecting such changes may be introduced in either House of Parliament on the recommendation of the President. The President is required to refer such a bill to the Legislature of the State or States so affected for expressing their opinion within a stipulated period of time. After the expiry of the said period, the bill is introduced in the Parliament. Article 4(2) expressly states that such a law shall not be deemed as an amendment of the Constitution for the purposes of Article 368 but the fundamental importance of these articles can in no way be discounted. They can change the political map of India yet they are not governed by the provisions of Article 368.

Before advancing further and speculating over the other methods of advancement we need to understand what ‘special majority’ stands for. The remaining two mechanisms of amendment rest on special majority and this very provision is responsible for the formal changes in the Constitution.

1.7. Defining Special Majority

In most cases a motion, resolution or a bill requires support of a simple majority of members who are present and participating in voting. However for some other articles the amendment has to be done by a special majority as mentioned in Article 368.

Article 368 states that a Bill has to be passed in both the Houses by a majority of the total membership of each house, and by a majority of not less than two-thirds of the members present and voting. In such cases a Constitution Amendment bill has to have a minimum support of at least 273 MPs in the Lok Sabha, irrespective of the number of MPs present at the time of voting, apart from at least two-thirds of those present and voting. If the entire Lok Sabha was voting in such a case the bill would need the support of a minimum 364 MPs. The bill must also be passed by both houses in the same form because any amendment to the bill itself also requires a special majority. There is no provision for a joint session in these cases and hence a party with a majority only in Lok Sabha cannot get the bill passed on its own.
Like other bills, such a bill is then sent for the President’s assent but unlike other bills, the President has no power to send it back for reconsideration.

Rules 155 to 158 of Lok Sabha makes it clear that the special majority is required at every stage of the passing of a Constitution Amendment Bill.

### 1.8. Amendments by a Special Majority and State Ratification

All matters which relate to the federal setup of the Constitution require to be made most rigid. To change them, the Bill must be passed by not only a majority of total membership in each house and majority of not less than two-thirds of the members present and voting in each house but also needs to be ratified by at least one-half of the State Legislatures. Provisions of the Indian Constitution, that, require additional State approval mainly concern federal matters, being: (a) the election of the President (arts 54-5); (b) the extent of the executive power of the Union (art 73); (c) the extent of the executive power of the States (art 162); (d) the Union judiciary (Ch IV of Part V); (e) high courts in the States (Ch V of Part VI); (f) the distribution of legislative power (Ch I of Part XI) and the lists in the 7th Schedule setting out those powers; (g) the representation of the States in Parliament; and (h) provisions dealing with amendment of the Constitution. Amendments to these provisions must be passed by a two-thirds majority each House of the Indian Parliament and must then be ratified by the legislatures of not less than half the States before being presented to the President for assent. The provision so entrenched are in a nutshell are:

1. Manner of election of the President.
2. Executive power of the Union and its States.
3. The Supreme Court and the High Courts
4. Distribution of Legislative powers between the Union and the States.
5. Representation of States in Parliament.
6. Art. 368- The amending power and process.

The reasons for entrenching these articles were given by Ambedkar in the Constituent Assembly in the following way, “If Members of the House who are interested in this are to examine the articles that have been put under the proviso, they will find that they refer not merely to the Centre but to the relations between the Centre and the Provisions (States). We cannot forget the fact that we have in a large number of cases invaded provincial autonomy.”
To amend the provisions laying down the distribution of powers and of revenue without permitting the provinces or the States “have any voice is in my judgement altogether nullifying the fundamentals of the Constitution.”

1.9. Amendments by Special Majority

Besides these two methods, the remaining provisions of the Constitution can be amended by a majority of the total membership in each House and a majority of not less than two-thirds of the members present and voting in each House of Parliament. No ratification by the state legislatures is required for these amendments.

Thus, the three mechanisms of the amending process were thus a compromise worked out by the Drafting Committee and were designed to achieve a flexible Constitution. The compromise was worked out between a small group of Assembly members who recommended the adoption of an amending process like that of the amending process like that of the United States and a somewhat larger group that advocated amendment of all the clauses of the Constitution at least during the initial period by a simple majority of each house of a Parliament. Such a categorization of amendments is not visible anywhere in any other written Constitution.

Many more amendments followed, at a rate of almost two amendments per year since 1950. Many matters that would be dealt with by ordinary statutes in most democracies must be dealt with by constitutional amendment in India due to the document's extraordinary detail. Most of the Constitution can be amended after a quorum of more than half of the members of each house in Parliament passes an amendment with a two-thirds majority vote. Articles pertaining to the distribution of legislative authority between Union and State governments must also be approved by 50 percent of State legislatures. Most constitutional amendments, however, require approval by a two-thirds majority of each House of the Indian Parliament. The Council of the States (upper House) primarily comprises representatives of the States who are elected by the Legislative Assembly of each State. Hence, the States retain an influence upon constitutional amendment through their representation in the upper House. One’s constitutional understanding also conveys that it is because of these various modes of amendments the Constitutions are rendered democratically responsive to the changing social needs. While there is broad consensus that constitutions neither can nor should be entirely

61 CAD, VOL.IX, pp.1661-63.
unchangeable, there is wide room for discussion as to how flexible they should be. This is closely linked to the question of what a constitution is and should be, as pointed out by Holmes and Sunstein, in their distinction between positive and negative constitutionalism:

“A constitution is not simply a device for preventing, tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensibly, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the stupidity of politicians. Constitutions are multifunctional. […] Theorists should therefore place greater emphasis than they have hitherto done on positive constitutionalism. The task is to create limited government that is nevertheless fully capable of governing.”

While a negative vision of constitutionalism will normally imply reluctance to constitutional change, a more positive perspective will recognise that amendments may often be necessary or desirable in order to promote effective democratic governance and ensure legitimacy.

On a deeper level, it can also be held that the very legitimacy of a given constitutional system rests on the premise that the present day electorate can amend and change it. This has been emphasized by Holmes and Sunstein, who argue that “political legitimacy in liberal systems ultimately depends upon the option to bring about change, used or held in reserve. The legitimacy of a liberal constitution has a similar foundation, paradoxically, in its liability to revision. It is accepted, or deserves to be accepted, partly because it can be changed”.

1.10. Genesis of Article 368 under The Indian Constitution

The framers of the Indian Constitution were aware of the difficult and rigid procedure of amending the American Constitution. With this goal in mind on 17 March, 1947 a questionnaire was advanced by the Constitutional advisor Mr. B.N. Rau among the members of the Constituent assembly. While submitting the draft proposal he drew attention not only

63 Ibid, p. 279, and also at p. 301 on How democratic legitimacy rests “on the foreseeable opportunity to “throw the rascals out”.

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towards the provision of the American Constitution but also of other Constitutions like that of Australia, Canada, Ireland, Union of South Africa, U.S.A and Switzerland.\textsuperscript{64}

Divergent suggestions were advanced by the members suggesting special procedures for constitutional amendments. Dr. S.P. Mookherjee came forward with a proposition that amendments can be initiated by \(\frac{1}{4}\) of the members of either house of the Union legislature and should be enacted by \(\frac{2}{3}\) majority in each of the two houses of the Union Legislature and also by \(\frac{2}{3}\) majority of the Constitutional convention (composed of members elected either directly or by the Lower House of the Units).\textsuperscript{65} Sardar K.M.Pannikar suggested that amendment to the Constitution be first initiated in either House of the Union Legislature and then enacted by \(\frac{2}{3}\) majority in both the Houses of the Union Legislature and then ratified by the Legislature of each unit.\textsuperscript{66} Or ratified by \(\frac{2}{3}\) of the legislatures of the Units (Lower House). Opposing the above schema, in a joint memorandum N. Gopalaswami Ayyangar and Alladi Krishnaswamy Ayyar, held that “amendments of the Constitution will be made by the Union Legislature but no amendment will be deemed to have been approved by the Union Legislature unless it has secure the support in each of the two chambers of a majority of not less than \(\frac{2}{3}\) of its sanctioned strength. Further such amendment will have no effect unless it is also approved by the legislatures of not less than \(\frac{2}{3}\) of the Units.\textsuperscript{67} This proposal was akin to the provision enshrined in the American Constitution with slight deviation. While the American constitution provided for ratification by \(\frac{3}{4}\) of the states, the Indian proposal recommended the prerequisite of ratification by \(\frac{2}{3}\) of the states.

Rau’s Draft in his memorandum also made a similar provision that an amendment of the Constitution could be initiated in either house of Parliament. After the proposed amendment was passed in each House by a majority of not less than two-thirds of the total membership of that house and ratified by the legislatures of not less than two thirds of the units it would be presented to the President for his assent and on such assent being given the amendment would come into operation.\textsuperscript{68}

However, in his draft not all amendments were to undergo this elaborate and rigid process. There were several provisions for amendments which were to be realized by the conventional legislative process and an easy method of amendment in the initial stages of the constitution. For instance, (1) all supplementary legislation regarding citizenship could be

\begin{itemize}
  \item \textsuperscript{64} B. Shiva Rao, The Framing of India’s constitution, Select Documents, Vol.11, pp. 448-51
  \item \textsuperscript{65} Ibid.
  \item \textsuperscript{66} Papers in the President’s Secretariat: statement showing the replies of Sardar K.M. Pannikar and Dr. S.P. Mookherjee to the Questionnaire issued to them
  \item \textsuperscript{67} Vide papers in the President’s Secretariat.
  \item \textsuperscript{68} B. Shiva Raoop.cit., at 550.
\end{itemize}
made by ordinary union Law; (2) union law could include new territories within the Union as well make readjustments of territory as between the Provinces.\(^{69}\) The memorandum also contained a transitional provision that until the expiration of three years from the commencement of the Constitution, The Federal Parliament may, notwithstanding anything in Part XIII; by Act amend this Constitution whether by way of variation, addition or repeal.\(^{70}\) The three year period had been borrowed from Article 51 of the Constitution of Ireland when Shri Rau had an opportunity to discuss this provision with jurists and statesman during his visit to USA Canada, Ireland and UK in October 1947. But Mr. De Valera, the Irish Premier advised Mr. Rau that the period of three years provided for the amendment of the Constitution by a simple Act of parliament was far too less. He thus recommended a threshold period of not less than five years.\(^{71}\) K.M.Munshi also shared and justified the same as Mr. Rau, that in framing a Constitution …… it was not necessary to have a very elaborate and rigid scheme of amending its provisions in the first three years.\(^{72}\)

In order to expedite the entire process, a joint meeting of the Union Constitution Committee and the Union Powers committee was convened on 30 June 1947 which modified and reconsidered the recommendations advanced by Mr, Rau. These modified proposals were included in the report of the Union constitution Committee presented to the Constituent Assembly on 4 July 1947. Finally the Union Constitution Committee assembled again on 12 July 1947 where it enhanced Mr. Rau’s draft report by introducing two significant changes. It was suggested that for the purpose of amendment, the provisions of the Constitution should be categorized into two:

(a) where an amendment proposed a change in the Federal Legislative List, or in the representation of unit in the Parliament, or in the powers of the Supreme Court, it would require, a majority in each house and two-thirds of the members present and voting and second, ratification by the legislatures of the units representing a majority of the population of all the units.

(b) In regard to other amendments, the requirement of ratification by the units would not be necessary.

All these submission were then clubbed in a supplementary report of the Committee and presented to the Constituent assembly on 13 July, 1947; and a slightly modified version

\(^{69}\) B. Shiva Rao, op.cit., at 492.

\(^{70}\) Vide Papers in the President’s Secretariat.

\(^{71}\) Draft Constitution of India dated 22\(^{nd}\) September,1947, article 238.

\(^{72}\) Constituent Assembly Debates (hereinafter cited as CAD), Vols. I-IV at 546.
was incorporated in the Draft constitution prepared by Rau in October 1947. From these considerations one may conclude, that stringency of amending process was entirely ruled out in the preliminary stages. At the same time too flexible process was also not acceptable except for a limited period.

1.11. Proposals Espoused by the Drafting Committee

The Drafting committee considered the above provisions in February 1948. Initially the provision forwarded by Shri Rau which conferred an unrestrained and exclusive power on the Parliament to amend the Constitution for a period of three years was not accepted wholly. Later, it was accepted in principle and an amendment to this effect was moved to enable the Parliament to amend any of the articles of the Constitution for a period of five years.\textsuperscript{73}

Shedding light on this amendment, Shri Rao observed:

“The process of amending the Constitution during the first few years should be made unchallenging than is provided for in this article. In the first place, to mention only one example, the pattern of the Indian states is undergoing rapid change and one cannot say with confidence that the Constitution will not have to be continually altered at least during the initial years, to fit the constantly changing pattern. Other problems may too emerge requiring frequent amendment of the Constitution. The Constitution should not, therefore, be too rigid during the first few years.”\textsuperscript{74}

Scrutinised with utmost prudence by the Drafting Committee on 10 February, Rau’s article was incorporated in its Draft Constitution and then subsequently submitted to the Constituent assembly. The two articles that dealt with this amendment are as follows:

“304(1), An amendment of the Constitution may be initiated 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 –third of the members of that house present and voting, it shall be presented to the Parliament 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.”

\textsuperscript{73} B. Shiva Rao, op.cit., p. 369
\textsuperscript{74} Ibid, pp. 374-75
The proviso was added to it which declared that if such amendment sought to make any change in (a) any of the lists in the Seventh Schedule (b) the representation of the States in the Parliament (c) the powers of the Supreme Court, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States for the time being specified in Part I of the first schedule and the Legislatures of not less than one-third of the States for the time being specified in Part III of that Schedule.

According to clause(2), “Notwithstanding anything contained in the last preceding clause, an amendment of the Constitution seeking to make any change in the provisions of this Constitution relating to the method of choosing a governor or the number of House of the Legislature in any state for the time being specified in Part I of the First Schedule may be initiated by the introduction of a bill for the purpose in The Legislative Assembly of ten state, or where the state has a Legislative Council, in either house of the Legislature of the state and when the bill is passed by the Legislative assembly, or where the State has a legislative council, by both Houses of legislature of the state, by a majority of the total membership of the assembly or each house, as the case may be, it shall be submitted to the President for assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the bill.

Under article 305, notwithstanding anything contained in article 304, the provisions of the Constitution relating to the reservation of seats for the Muslims, Scheduled Castes and Scheduled tribes or Indian Christians either in Parliament or in the Legislature of the state would not be amended during the period of ten years from the commencement of the Constitution and would cease to have effect on the expiration of that period unless continued in operation by an amendment of the Constitution.

This led to a wide array of suggestions which hailed from different spectrums and strata’s of the law society. The Editor of the Indian Law Review and some members of the Calcutta bar, expressed that a written constitution should be rigid enough to be able to sustain itself and also that a single procedure should be earmarked for the amendment of the Constitution. They thus wanted to rephrase the Article 304 in the following manner:

“an amendment to the Constitution may be initiated by the introduction of a bill of the purpose in either House of Parliament and when the Bill is passed in each house by majority of total membership of that House and by a majority of not less than two-third of total membership of both Houses and ratified by ten legislatures of the majority of the total number of states, it should 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.”

But the Constitutional advisor opined that if this amendment was implemented, in this rigid guise it might prove to be a boon in case of some significant provisions. Concurrently, it would be impossible to apply the same rigorous and tortuous method to the amendment of each and every provision of the Constitution. Hence the redraft was not recognized.

The Special Committee\(^7^6\) recommended a more rational and flexible process of amending the Constitution as opposed to what was laid down in the Draft constitution. Firstly the Constituent assembly was not based on adult suffrage, the members having being elected on a very restricted franchise. Further the Indian states were in a state of turbulence and strife and keeping this in mind one could not prefigure whether the Constitution should be amended frequently or not to fit the constantly changing pattern. The Parliament of the new Union of India, on the other hand, would be based on adult franchise. If a Constituent Assembly based on a restricted franchise could by a simple majority frame the Original Constitution, it was specious to lay down that the Parliament based on adult franchise except by a specially difficult process involving special majorities and in some cases special ratifications.

Therefore, the Drafting Committee inserted a new clause after clause (2) of Article 304 so as to shore up the article under deliberation which can be read as follows:

“(3), notwithstanding anything contained in clauses (1) and (2) of this article any of the provisions of this constitution except the provisions of this article and of article 305 may be amended by Parliament by law, whether by way of variation, addition or repeal within a period of five years after the commencement of this Constitution.”

### 1.12. Constituent Assembly Skims through the Submissions

Detailed deliberations and debates commenced on draft Article 304 on September 17,1949. Numerous amendments to this article were submitted, the prime move being tabled by Dr. Ambedkar. Through this motion he tried to enlarge the list of Constitutional provisions in the proviso. This list now included (a) draft articles 43, 44, 60, 142 and 213A(b) Chapter IV of Part V, Chapter VII of part VI and chapter I of Part IX(c)any of the lists in the Seventh

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75 Papers in the President’s secretariat: suggestions from non-members for amendments to the Draft Constitution of India.
Schedule (d) the representation of States in Parliament and (e) the provisions of draft article 304.  

P.S. Deshmukh observed that the Constitution should be amended by a bare majority. He wanted to avoid two-thirds majority as well as the counter check technique. He apprehended that if there was a proposal to effect some consequential changes, very strenuous efforts would have to be made for bringing out that change. Thus he preferred an easy procedure of amendment.

Regarding the second motion that he moved, Deshmukh advocated that at least for a period of three years it should be possible for parliament not only to pass amendments by a majority of the houses but also that whenever the President certified that a certain amendment was not one of substance and that it was not going to vitiate or abrogate the principles of the constitution, but being one of the form, obstructed the working and the proper administration of governance of India, it should be possible to pass that amendment with a simple majority of the Houses. This should also be applied to amendments suggested by the judges of the Supreme Court because on their wisdom would depend much of the fate of the Constitution.  

Sri H.V. Kamath pointed out that the future Parliament should be empowered to amend the Constitution easily as it would be superior to its parent body i.e. is the Constituent Assembly which was elected indirectly by a limited franchise. Out of the five amendments moved by him, two of them found their way in article 368 through the Twenty-fourth amendment, 1971 which runs as follows:

1. “Notwithstanding anything in this connection, Parliament may in exercise of its constituent powers 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 purposes 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, 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.”

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77 CAD, Vol.IX at 1643.
78 Ibid.
79 Ibid. pp. 1649-52.
Defending his amendment Dr. B.R. Ambedkar, spoke on the various alternatives suggested by the members that the constitution is a dynamic document that should be made receptive to amendments by future Parliaments either by a simple majority or by a by method which was more facile than the one embodied in article 304. For convenience he peruses the amending provisions of the Constitutions of Canada, Ireland Switzerland, Australia and d America.

Reflecting on the amendment provisions embedded in the Irish Constitution, one finds there is a provision that both houses by a simple majority might alter or repeal any part of the Constitution provided that the provision of the Houses to amend, repeal or alter was submitted to the people in a referendum and approved by the people by a majority.\(^{80}\)

Further under the Australian constitution, the amendment should be passed by a majority of the Parliament followed by its submission to the electors who were entitled to elect representatives to its Lower House. This was to be ensued by a referendum of the people or the electors. A further rider was that it must be accepted by a majority of the States and by a majority of the electors.\(^{81}\)

In the Constitution of United States, the attribute of the amendment clause stipulated the necessity of a majority of two-thirds of both the Houses subject to the fact that the amendment must be ratified by the decision of a majority of two-thirds of the States. The reason for citing these as examples was that in no country it was provided that a Constitution should be amended by a simple majority.\(^{82}\)

He justified the rationale behind compartmentalising various articles of the Constitution into three categories that why one required simple majority and others a mechanism that was more intricate. The articles that were open to the Parliament by a simple majority were unfortunately overlooked in the draft article as it was under consideration but in other articles. He then referred to article 2 and article 3 which dealt with the creation of new states and reconstitution of existing states which entailed a simple majority for its amendment.

He went on further to explicate that why some articles were entrenched and only by way of a two third majority accompanied by ratification by the states can they be amended. These articles referred not merely to the Centre but to the relations between the Centre and States. He said that although the framers had in many made inroads in the State autonomy,

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\(^{80}\) Ibid., p 1659.

\(^{81}\) Ibid, p. 1600.

\(^{82}\) Ibid., p.1661.
yet they made sure that the federal set up of the Constitution was unaffected and unscathed by the vagaries of the erratic majorities. To say that that even those articles of the Constitution which pertained to the administrative, legislative and financial powers should be made liable to modification by the Parliament by a two–third majority, without seeking the consent of the State legislatures was an outright assault on the spirit of Federalism enshrined in the Indian Constitution. Hence, a tripartite arrangement of amendments is provided where through harmonious construction between rigidity and flexibility the fundamentality of the document was perpetuated

1.13. Crystallization of Draft Article 304 into Article 368

Thus the article proposed by Dr. B.R. Ambedkar was adopted and reinforced as Article 368 in supersession of all other amendments. It was eventually adopted in 1950 with certain distinctive features when compared with similar provisions in other Constitutions. They are (a) Unlike other Constitution no separate body for amending the constitution has been mentioned in the Indian Constitution instead the constituent power was vested in the Parliament; (b) It is the parliament and not the State legislature that can initiate the proposal for amendment in the Constitution. (c) There is no provision for referendum which in a way saves the amendment process from a circuitous passage, (d) further the requirement regarding the state ratification is more temperate than the ones found in another Constitutions and (e) and finally all the provisions of the Constitution are prone to amendment inclusive of fundamental rights. Thus the article can be read as follows:

368.\(^{83}\) [Power of Parliament to amend the Constitution and procedure therefore].\(^{84}\]

[(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 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 membership of that house present and voting, \(^{85}\)[it

\(^{83}\) Subs. By the Constitution (Twenty-fourth amendment) Act, 1971, S.3, for “Procedure for amendment of the Constitution”.

\(^{84}\) Ins. by ibid.

\(^{85}\) Art. 368 renumbered as cl.(2) by the Constitution (Twenty–fourth Amendment) Act, 1971, S.3.
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 74, 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 legislature 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 powers of Parliament to amend by way of addition, variation or repeal the provisions of this a constitution under this article.]

A perusal of Article 368 seems to show that the framers of the Constitution avoided the two extremes of excessive rigidity and a surfeit of flexibility. They had not lost sight of the necessity of adaptability of the Constitution serving a vast and heterogeneous society. At the same time they were conscious of the gravity of the fact that a sustainable Constitution should have to endure as a basic law not easily amenable at the caprice of the political majorities in Parliament. The Constitutional enthusiast Dr. B.R. Ambedkar made a thorough observation on November 25, 1949:

“Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed some very weighty views which makes the Constitution, can never afford to ignore. In one place, he has said:

86 Subs. by ibid. for “it shall be presented to the President for his assent and upon such assent being given to the Bill”
87 The words and letters “specified in parts A and B of the first schedule “omitted by the Constitution (I seventh Amendment)” act, 1956, S. 29 and Sch.
We may consider each generation as a distinct nation, with a right, by the will of the majority to bind themselves, but none to bind the succeeding generations……. The assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada, or by making the amendment of the Constitution subject to its fulfilment of extraordinary terms and Conditions as in America or Australia, but has provided a most facile procedure for amending the Constitution.” 89

Thus, a midway was devised as they were conscious of the desirability of reconciling urges for change with the need of continuity. Change without continuity is a retrograde step which was dropped by the Constituent Assembly and also by the future Parliaments. In the next chapter, we shall carry out a macroscopic study of significant amendments since the inception of the Constitution that have revolutionized the Indian polity.

89 CAD Vol.XI, pp. 975-76
1.14. Research Design: Methodology and Survey of Literature

The present segment sheds light on the research methodology and the techniques employed by the researcher to conduct this research. It provides an elaboration of the methods, procedures, review of literature, hypothesis used and sources of data which were adopted in the course of the study. This chapter essentially provides the research framework and design in detail because only when we understand the literal meanings, approaches and semantics behind the Constitutional architecture can we advance ahead.

1.14.1. The Research Problem

Constitutions occasionally need to be amended. As political practices change over time, adjustments to the constitutional text keep it aligned with current practices and help ensure its continued relevance. Constitutional change also gives the current citizenry an opportunity to have a say in the way they are governed. This serves as a mechanism for each generation of citizens to consent to their constitution’s edicts, which generate greater attachment to the text, a critical requirement for the constitution to limit government effectively.90 Hence a constitution that provides an effective procedure for amending lasts longer and plays a more important role in governance that one that does not.

Given the theoretical importance of Constitutional amendments, it is surprising that not many literary works in the realm of Indian Constitution have given due attention to the repercussions that amendments have on the Indian polity. The scenario of literature on amendments is also very bleak when it comes to explaining their impact. Moreover amendments to the Indian Constitution have been given a trivial treatment in the scholarly literature as not many works have undertaken them as their theme. It is in this background that the present research is conducted which aims to plug this gap and resorts to analyse the validity and relevance of amendments with their aftereffects.

1.14.2. Conceptual Analysis of the Word Amendment

The Blackwell Dictionary of Western Philosophy\(^91\) defines conceptual analysis as the basis for propositional analysis. Only when we understand the meaning of a word can we employ it in formulating precise questions and thus provide correct solutions. For analytical philosophy, this activity of reaching the understanding of a given concept is vital." Sander and Pinhey hold that concepts are the basis of building a theory.\(^92\) Concepts are very important in the theoretical framework that sets a context for the research, as determining the data that will be collected and how they will be collected and categorized and as being essential in describing the findings. They are essential in ordering the vast diversity of empirical phenomenon. Taking cue from this train of thought, we have tried to explain through definitions the meaning of Amendment which is the basic premise on which this work is based upon.

To begin with, we find that amendment is the most popular and most widely used word in the amending clauses of the Constitutions across the world to denote the process of change. Several other words and expressions are also used for this purpose like revision, change, alteration, modification, reform, review. But of all of them amendment is the most ubiquitously used.

According to the Oxford English Dictionary an ‘Amendment’ denotes the idea of ‘correction /repair or improvement. For some others constitutional amendment rules are designed to serve exactly these purposes that is to allow for the correction of or improvement upon prior constitutional design choices in the light of new information, evolving experiences or political understandings.\(^93\)

The Bouvier's Law Dictionary 1856 Edition\(^94\) describes amendment as “An alteration or change of something proposed in a bill.”

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\(^91\)Nicholas Bunnin and Jiyuan Yu (Ed.), The Blackwell Dictionary of Western Philosophy, 2004 available at http://www.blackwellreference.com/public/tocnode?id=g9781405106795_chunk_g97814051067954_ss1-143


Another view holds that constitutional amendments denote those forms of constitutional change that originate via certain exceptional or higher forms of lawmaking rather than from the ordinary forms of legislative, judicial and executive action. On this view amendments may or may not be reflected in formal changes to the text of the Constitution and also be enacted outside, as well as within, formally predefined channels for constitutional amendment.  

The Shorter Oxford English Dictionary defines the amending of amend as:

“to free from faults ,correct , convert ;to rectify ;esp. to emendate . To reform oneself. To make alterations (in a bill before the parliament) To repair, to restore.”

According to Standard Dictionary , Funk and Wagnalls (1894) 96, the word amendment is described as “The act of changing a fundamental law, as of a political Constitution ,or any change made in it according to a prescribed mode of procedure; as to alter the law by amendment; an amendment to the Constitution.”

According to Black Law’s Law Dictionary, Sixth edition 97, the word amend means, “To improve. To change for the better by removing defects or faults. To change, correct, revise.”

Likewise the Random House Dictionary of the English Language(Unabridged ed.) 98 too offers a definition of the word amendment in the following manner:

“to alter ,modify, rephrase or add to ,subtract from (a motion, bill, Constitution etc,) by formal procedure , to change for the better ,improve , to remove or correct faults.”

According to the Webster’s Revised Unabridged Dictionary of 1913, the word amend, means:

“To change or modify in any way for the better ;(a) by simply removing what is erroneous, corrupt, superfluous, faulty and the like;(b) by supplying deficiencies ;(c)by substituting something else in the place of what is removed ;to rectify.”

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The IDEA Glossary for Constitution terms defines Amendment as “change or addition to a document or legal provisions.”

The online edition of Merriam Webster dictionary defines amendment as the “act or process of changing the words or meaning of a law or document: the act or process of amending something. It is considered as a formal or official change made to a law, contract, constitution or other legal document.

1.15. Review of Literature

During the course of my study I came across many books which dealt with the Indian Constitution and its myriad aspects. In Jankowicz’s words, “Knowledge doesn’t exist in a vacuum, and your work only has value in relation to other people. Your work and your findings will be significant only to the extent that they’re the same as, or different from, other people’s work and findings.” In keeping with this tradition, various authors both Indian and foreign, who have contributed to the vast literature on the subjects of Constitution, Constitutional development, Amending process and Amendment provisions have been surveyed to get a better insight into the changing dynamics of the Indian polity. Fink defines literature review as being ‘a systematic, explicit and reproducible method for identifying, evaluating and synthesizing the existing body of completed and recorded work produced by researchers, scholars and practitioners.’ Keeping this in mind some relatable books have been reviewed which are as follows:

*Sanford Levinson’s (ed.), Responding to Imperfection, The Theory and Practice of Constitutional Amendment* is an anthology of essays which deal with the constitutional tradition of amendments which is followed by various countries. It has been discussed in the book that the relative ease or difficulty of amendment has significant implications for the ways that governments respond to problems. *Political Mobilisation and Democracy in India: States of Emergency*, written by *Vernon Hewitt* is another thought provoking work that addresses the paradox of political mobilization and the failings of governance in India, with

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100 http://www.merriam-webster.com/dictionary/amendment
reference to the conflict between secularism and Hindu nationalism, authoritarianism and democracy.

Further another work titled *Constitutional Origins, Structure, and Change in Federal Countries* by Kincaid and Tarr, analyses government in Australia, Belgium, Brazil, Canada, Germany, India, Mexico, Nigeria, Russia, South Africa, Switzerland, and the United States. Each chapter provides an updated description and analysis of the constitutional origins, how it has changed and the structure and development within a particular federal democracy.

Another exclusive work in this domain is a highly unconventional read by Mark Tushnet called *Why the Constitution Matters*, Universal Law Publishing Co., New Delhi, 2011. In his avant-garde exposition he has argued that the Constitution matters not because it structures our government but because it structures our politics. It is a bold attempt where he maintains that politicians and political parties and not Supreme Court decisions are the true engines of constitutional change in the constitutionally orthodox system of the United States.

In his succinctly crafted chapters which fall under the following headings, ‘How the Constitution Matters,’ ‘How the Supreme Court Matters’ and ‘How to Make the Constitution Matter More-or Differently’, he tries to reconstruct our constitutional understanding. Thus a new slant is given to Constitutional reading which helps us to contrast it with Indian constitutional system.

*Comparing Constitutions* written by S.E. Finer, , Vernon Bogdanor and Bernard Rudden , *Oxford Clarendon Press*, 1995 chalks out the texts of four important constitutions, the American, German, French, and Russian. It adds the basic political structure of the European Union, and provides a full account of the British constitution in the terms revealed by examination of the other texts.

*India Since Independence* by Bipan Chandra, Aditya Mukherjee, and Mridula Mukherjee offers a thorough and incisive introduction to contemporary India. It is the story of the forging of India and how its constitution was framed. A sequel to the best-seller, India’s struggle for independence, this book analyses the challenges India has faced and the successes it has achieved, in the light of its colonial legacy and century-long struggle for freedom. Another commendable work which deserves much attention is *The Indian Constitution --Cornerstone of a nation* by Granville Austin which analyses how past and present, aims and events, ideals and personalities influenced the framing of the Constitution.
The book goes on to discuss how the founders laid the cornerstone for a new India and provides an interesting background to the controversial issues surrounding the development of constitutional democracy in the country.

The *Framing of the India’s Constitution* edited by B. Shiva Rao is a compendious collection of five volumes, constitutes material of a basic structure in the area of Constituent Assembly’s role in framing India’s Constitution. These volumes contain authentic texts, substantial summaries, accounts of earlier attempts at constitution making by Indian Nationalists, reports of advisory bodies of the Constituent Assembly, views of learned societies, eminent individuals and others. Altogether this has been the most arrant work so far in the realm of constitutional literature in India.

*Constitution Amendment in India* by R. C. Bhardwaj is another well-documented study on the nature, scope and operation of amending process of the Constitution of India. It contains a brief legislative history and a synopsis of each of the Constitution Amendment Act enacted till August 1994. *Indian Government and Politics* by Peu Ghosh comprehensively outlines the evolution of the Indian Politics, discussing all the constraints, challenges and shortcomings faced by Indian Polity till date. The book shows how State-Society interface, with special emphasis on civil society activities, can play an integral role in shaping the political fate of the country.

Another relevant book utilized for the study is *India's Living Constitution: Ideas, Practices, Controversies* written by Zoya Hasan, Eswaran Sridharan and R. Sudarshan which discusses the various constitutional-political ideas in the text of the Indian Constitution or implicit within it, as well as in actual political practice in the country over the past half-century.

*Constitutional Reforms --- Problems, Prospects and Perspectives* by Subhash C.Kashyap, Radha Publications, New Delhi, 2004 is yet another authoritative study that adds to the tally of constitutional works. The three broad themes dealt with in this work are i) The Constitution, its working and Need for Reforms, ii) Constitution at Work and iii) Need and Mechanism for Change. The work documents issues like Reconstitution of Indian polity, Constitutional Reforms, Constitutional aspirations and directions, Legitimacy of Amendments, Inadequacies of the present Constitution and many other constitutionally imperative themes.
In this list of studies one can add two more authentic works that is K. Subba Rao’s work, *Conflicts in Indian Polity*, Lajpat Rai Memorial Lectures, S. Chand and Co., Delhi, 1969 and *Social Justice and Law*, Shyama Prasad Mukherjee Memorial Lectures, S. Chand and Co., Delhi, 1974 by the same author.

By way of *Conflicts in Indian Polity*, he reflects upon the debates between Constitution in Theory and Constitution in Practice; democracy and totalitarianism; capitalism and socialism; Fundamental Rights and Directive Principles of State Policy; Hindi/English and regional languages; Legislature and Judiciary and so on. In his work he has examined rationally that there is no row between the Legislature and Judiciary as both discharge different but complementary functions.

In the second series of lectures, the learned judge has argued that the main responsibility for promoting social justice lies with the Parliament and State Legislatures which should make the laws and the executive of the day which should enforce them effectively. According to him, the judiciary has not failed the country despite its limited role.

Another memorial lecture that warrants attention here is Justice Mukherjee’s *Bhulabhai Desai Memorial Lectures on the Elemental Problems of the Indian Constitution*, Institute of Constitutional and Parliamentary Studies, Delhi, 1972. The themes of his three lectures are i) Justice: Social, Economic and Political; ii) Fundamental Rights and Constitutional Amendments and iii) Emergent Patterns of Center-State Relations. In this eloquent study he has raised many important issues such as whether one should talk of ‘class’ justice or ‘classless justice’ or whether rule of law is compatible with a planned economy. By way of conclusions, he observes that humanity is after all the business of law and social institutions are what they do and not what they say they do.

One more path-breaking work that offers an inimitable perspective on the development of Indian polity is Rajni Kothari’s work *Politics in India*. The book deftly treats the subjects of institutional strategy, party system and coalition making, framework of “center and periphery”, social infrastructure, political socialization, political institutionalization and national integration. Divided into eleven well-researched themes, he has identified the integrative, adaptive and transformative capabilities of the Indian political system very niftily.
The renowned author Rajeev Bhargava (ed.), Politics and Ethics of the Indian Constitution, Oxford University Press, New Delhi, 2008, provides discussions on equality, the idea of citizenship and property, notion of minority rights, conception of democracy and welfare found in the Constitution. The aim of the volume, thus, is to arbitrate between contesting interpretations of the many core values of our polity.

Antinomies of Society: Essays on Ideologies and Institutions by Andre Beteille- one of the pre-eminent sociologists of India, is a timely collection of essays which examines the tensions and contradictions in society as manifested through different social and political institutions, and ideologies like Marxism, secularism and nationalism.

Comparative Constitutional Law by M.P. Singh written in honour of an eminent constitutionalist of India, Professor P.K. Tripathi, consists of learned essays from renowned constitutionalists and jurists from all over the world. Together the essays constitute an ideal work on comparative constitutional law. Not only do they deal with more than thirty important constitutional issues in at least ten different countries, they also cover as many as six different systems of law, namely, civil law, common law, Islamic law, law of the Far East, Scandinavian law and socialist law.

As the four amendments viz., Forty –second and Forty Fourth, Seventy-Third and Eighty- Sixth Amendment form the pivot on which my thesis is based, it becomes essential that we also focus on the works that treat these amendments as their exclusive theme.

To begin with, works of significance that have been put under the scanner are the writings of Palkhivala’s Constitution and the Common Man, Bombay 1971 and Our Constitution Defaced and Defiled, 1974. The two works clearly reveal the position that the Judiciary ought to be given a role higher than the Parliament.

N.A. Palkhivala’s book Our Constitution Defaced and Defiled deals with the wider question of amending power under Article 368 and the enactment of Article 31C in the form of amendment of the Constitution which he considers as a fatal blow to not only to fundamental rights but to the very intentions of the framers. He has argued in this work that the insertion of Article 31C, “seeks to subvert seven essential features of the Constitution “.(p.53). It gives a blank charter to Legislatures to ignore the human rights, subordinates rights to social policy, alters the basic scheme of Article 368, takes away Article 31 dealing with right to property and Article 19(1)(f) having the right to acquire, hold or dispose of
property, destroys article 32 which gives right for constitutional remedies, allows states assemblies to repeal fundamental rights and liquidates democracy in favour of totalitarian rule by cessation of the rule of law.

A. Lakshminath traces the concept and legitimacy of Basic Structure in his monumental work *Basic Structure and Constitutional Amendments—Limitations and Justiciability*. It postulates the dynamics of judicial process, questions the Constitution’s amending power through the Basic Structure Doctrine and scrutinizes the limitations and justiciability of the doctrine.

Another pioneering work under review is *The Courts and the Constitution: Summits and Shallows* by Justice O. Chinnappa Reddy, a former judge of the Supreme Court of India. The thirty chapters of this work examines the Court essentially in areas relating to public law and the Constitution. The author has as a social auditor, prepared a ‘balance sheet’ of the working of the court and has found that “The Supreme Court of India has done very well indeed. There have been sloughs of despondency but the pilgrim has progressed.” (p.314) All the chapters takes us to a scholarly journey starting with the cultural, historical and political state of the Indian nation.

*Before Memory Fades* by Fali S. Nariman is a revelatory, comprehensive and perceptive autobiography. This book deals with a wide variety of important subjects, such as, the sanctity of the Indian Constitution and attempts to tamper with it, crucial cases that have made a decisive impact on the nation, especially on the interpretation of the law, the relationship between the political class and the judiciary and the cancer of corruption and how to combat this menace.

*The Emergency: A Personal History* by Coomi Kapoor is a powerful, and at times moving documentation of the personal hardship, inconvenience and agony that the Emergency regime inflicted on her and brush with authoritarianism. Coomi Kapoor dedicates the book to her detained husband, Virendra Kapoor. The book also attempts to refute the narrative that Indira Gandhi had no choice but to introduce the Emergency because of the disorder and anarchy sought to be unleashed by the JP-led opposition. Another book of relevance is *Emergency Retold* by Kuldip Nayar 'Emergency Retold' by the distinguished journalist and human rights activist, Kuldip Nayar. In the book, Nayar recounts how the Emergency came about and freely takes names in his characteristic, courageous, signature
style. This book, of four chapters, documents the manner in which that coup was organised, nurtured and finally ended.

_The Dramatic Decade: The Indira Gandhi Years by Pranab Mukherjee_, Aleph, adds to the anthologies on Emergency. It is an eye opening account of the Emergency. As an inside story it also reveals in its crisp style the real authors of Emergency which later became a prelude to the 42nd amendment act.

_10 Judgements That Changed India, by Zia Mody_, is a collection of ten critical judgements passed by the Supreme Court, which transformed democracy and redefined daily life for all Indians. The ten essays in 10 Judgements That Changed India, explores several themes such as environmental jurisprudence, reservations, and custodial deaths, within the Indian legal system. This book explains key legal concepts, provides a review of the judgements, and maps the impact of those judgements.

_S. Malik, (Ed.) Fundamental Rights Case: The Critics Speak, 79, 1975_ throws light on the fundamental rights that are in reality, now available to the Indian citizens after the decision of the Supreme Court in Kesavanand Bharati case. The book contains full text on judgments of the Supreme Court in Kesavanand Bharati case, popularly known as the 'Fundamental Rights' case and the cases of Golak Nath, Sajjan Singh and Sankari Prasad, which were referred to in the judgment and the arguments of counsel.

_Panchayati Raj: A study of Rural Local Government in India by Henry Maddick_ provides in carefully organized manner detailed information about India’s rural local government system called Panchayati Raj. On the same theme _Panchayati Raj, Participation and Decentralization by Ramesh K. Arora and Meenakshi Hooja (Eds.)_ is a welcome anthology in the field of decentralisation studies which discusses some of the most significant and critical issues pertaining to the impact of Panchayati Raj Institutions, the framework of participatory democracy and the design of decentralized governance in India. Throughout the volume, the emphasis is on highlighting some of the more prominent features of India’s participatory democracy and on a few noticeable lacunae that need to be overcome through institutional devices.

_Status of Panchayati Raj in the States and Union Territories of India edited by George Mathew_, Concept Publishing Company for Institute of Social Sciences, 2000 is a comprehensive publication which assesses the experience of the functioning of the
panchayats during the last five years. Besides a chapter each on states and UTs. It contains three special articles 1. Panchayati Raj in India—An Overview 2. Panchayats in Schedule areas and 3. Panchayats and women.

In the book *Masks of Conquest: Literary Study and British Rule in India*, by Gauri Viswanathan (1989), provides a fascinating account of the ideological motivations behind the introduction of English literary education in British India. She studies the shifts in the curriculum and relates such developments to debates over the objectives of English education both among the British administrators, as well as between missionaries and colonial officials.

*History of Education in India* by R.N. Sharma and R.K. Sharma takes an in-depth look into the history of education in our country and contains an analysis of it. It traces education in India since the Ancient Vedic, Post Vedic and Buddhist period. Further it provides detailed description of India’s education during the following time periods: 1835-1853, 1854-1882, 1882-1900, 1900-1920, 1921-1937, 1939-1953 and in the present times. There are suggestions and remedies given for improvement and progress in education, and a discussion on the problems of primary and basic education. *School, Society, Nation: Popular Essays in Education* by Rajni Kumar, Anil Sethi and Shalini Sikka (Eds.) is an anthology that deals with the problems and challenges of contemporary Indian education. This volume has 20 essays by eminent persons that discuss child-oriented ideas regarding curricula, books and the learning processes. This book does not aim to merely report current educational research and pertinently, seeks to promote debate on difficult issues confronting us in education.

*Education in the Emerging India*, Atlantic Publishers and Distributors, New Delhi, 2007 by R.P. Pathak also makes an in depth study of emerging issues unravelling relationships between education and development in Indian society. Briefly outlining the concept and nature of education, it presents in detail its approaches and dimensions, history and development. It analytically studies the trends, processes, ideals and philosophy of education against the backdrop of Indian society. *Education and the Disprivileged: Nineteenth and Twentieth Century India* by Sabyasachi Bhattacharaya addresses the familiar issue of unequal access to education in a new perspective. In this regard, whether one looks at gender or caste or ‘tribes’ or class differences, the gap between the privileged and the disprivileged is a matter of everyday experience. *Modern Indian Education: Policies, Progress and Problems* by C.P.S. Chauhan, is a well-documented record of the historical
development of Indian education after independence covering all its aspects. It is a unique addition to the existing literature on the subject.

The preceding paragraphs present us with an overview that strengthens our foundational knowledge about the Constitution and its three resilient pillars but to my knowledge no work has so far investigated the impact of amendments on the Indian polity. Therefore in the present study titled “Impact of Major Constitutional Amendments on the Indian Polity”, an effort has been made to study the amendments with their impacts and how far they have been successful in achieving the goals for which they were wrought. It is further hoped that this humble contribution shall be a meaningful addition in the realm of constitutional studies.

1.16. Objectives of the Study

In order to make the present work significant and meaningful, explicit objectives have been chalked out to render necessary direction to the study undertaken which are as follows:

1. To amplify the study of Part XX /Article 368 which has so far been relegated to the background?

2. To highlight the indispensability of the Amendment provision in the Indian Constitution

3. To survey and critically analyze the major amendments inked and implemented

4. Finally to assess and adjudge the political and social reverberations that transpired from these amendments.

1.17. Hypothesis to be tested

To provide sufficient direction to research, the statement of a research problem should always suggest observations that offer some solution to the problem. These tentative answers to research problems are called Hypothesis. Lundberg aptly remarks, “The only difference between gathering data without a hypothesis and gathering them with one is that in the latter case we deliberately recognize the limitations of our senses and attempt to reduce their fallibility by limiting our field of investigation so as to prevent greater concentration of particular aspects which past experience leads us believe are insignificant for our
He further said, “In its most elementary stages, the hypothesis may be any hunch, guess imaginative idea, or intuition whatsoever becomes the basis for action or investigation.”

According to Black and Champion, hypothesis is a “tentative statement about something, the validity of which is usually unknown.” Maurice Artheus suggests, “it demands (hypothesis) searching, delving, trying, failing and trying again and coming to a conclusion.” Simply stated it is basically a tentative or conjectural statement asserting a relationship between certain facts which helps us to see and appreciate (1) the kind of data that must be collected in order to answer the research question and (2) the way in which data should be organized most efficiently.

It can be seen that formulation of a hypothesis gives definite point to the inquiry, aids in establishing direction in which to proceed and helps to delimit the field of enquiry by singling out the pertinent facts on which to concentrate and by determining which facts should be set aside for the time being. Because it is a sharp instrument which cuts out extraneous or useless explanations, it can also be likened to ‘Occam’s Razor’.

The hypothesis which has been undertaken for the study was derived by analyzing the past researches on the theme, by deducing observations from the primary and secondary data sources and through critical literature review in the concerned field. A careful analysis of the amendments from these sources reveal that each and every amendment has been a value laden intervention and there were definite ‘objects and reasons’ for their enactment. P. Sood in his study ‘Politics of Socio-Economic Change in India’(New Delhi ,1979), asserts that apart from redefining with crystal clarity the basic thought and character of Indian polity it (42nd Amendment ) attempted to make the Constitution more in tune with the changing circumstances.

Thus the two hypotheses on which my work revolves are (a) amendments do have a progressive and constructive impact on the Indian polity and (b) the higher the number of amendments, the greater will be the dynamism of the Constitution. Though the numbers of

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103 G.A. Lundberg, Social Research: A Study in Methods of Gathering Data, Longmans, Green and Company, 1942
amendments have escalated in a short span of time yet they have successfully answered all the changes and have played a significant role in removing the roadblocks in the countries.

1.18. Research Methodology

Before embarking on an academic journey of thesis writing, a robust research methodology is not only essential but also a must. It is held that the research methodology constitutes “the techniques, the research community and the methodological rules—-together constitute a methodological domain through which all research must pass in order for it to achieve certain standards if integrity and validity. It acts as a mediator between the researcher’s subjective beliefs and opinions and the data and evidence that he or she produces through research. If this domain is functioning properly, it acts as something like a filter which prevents bad research from passing through “106.

Methodology implies more than simply the methods you intend to use to collect data. It is often necessary to include a consideration of the concepts and theories which underlie the methods.107 Methodology means description, explanation and justification of methods and not the method themselves. The methodology is the general research strategy that outlines the way in which research is to be undertaken and, among other things, identifies the methods to be used in it. These methods, described in the methodology, define the means or modes of data collection or, sometimes, how a specific result is to be calculated.108 It is a plan and procedure for carrying out the research, an approach to understanding phenomenon and above all a procedure of empirical investigation. Precisely it can also be said that methodology refers to philosophy on which research is based. This philosophy includes assumptions and values that serve as basis for research and are used for data analysis and reaching conclusions.

With the above description of methodology, we can now take up the methods of research. Broadly speaking there are various methods for conducting research. The most popular methods are:

1. Field Study Method
2. Experimental Method

106 Quoted in Wing Hong Chui, Research Methods for Law, Edinburgh University Press, 2007,p.22
107 See www.humanities.manchester.ac.uk/studyskills/assessment_evaluation/dissertations/methodology
3. Survey Method  
4. Case study method  
5. Statistical Method  
6. Historical Method  
7. and Evolutionary Method  

The present work undertaken by the author is an example of pure theoretical research and to achieve its objective more than one strategy has been put to use. First a triad of historical, descriptive and analytical methods has been employed. The first two methods are used for getting an understanding of the historical backdrop, for unfolding the semantics and for textual clarifications. Historical method or historiography, "attempts to systematically recapture the complex nuances, the people, meanings, events, and even ideas of the past that have influenced and shaped the present".¹⁰⁹ This method has been used to get an understanding of the historical backdrop of amendments which chiefly involves the immediate circumstantial causes and the debates in the Parliament. The object of descriptive method is ‘to portray an accurate profile of persons ,events or situations’¹¹⁰ so that we can get new insights into the phenomenon under investigation.  

Historiography involves far more than the mere retelling of facts from the past. It is more than linking together tired old pieces of information found in diaries, letters, or other documents, important as such an activity might be. Historical research is at once descriptive, factual and fluid.¹¹¹ Notter points out that historical research extend beyond a mere collection of incidents, facts, dates or figures. It is the study of the relationships among issues that have influenced the past , continue to influence the present , and will certainly affect the future.¹¹²  

As one cannot fully evaluate or appreciate advances in knowledge, policy, science or technology without some understanding of the circumstances within which these developments occurred.¹¹³ Historical research becomes supportive here as it involves a process that examines events or combination of events in order to uncover accounts of what  

¹¹² L. Notter, The case of historical research in nursing, Nursing Research 21 ,1977, p.483  
happened in the past. It allows the contemporary researcher to “slip the bonds of their own time”\textsuperscript{114} and descend into the past.

Historical research became valuable for me in the course of the research as it has greatly helped in uncovering the literal and latent meaning of documents and other historical sources within their historical time frames. Likewise Descriptive approach also proved beneficial in pursuing this work.

As it is an Impact assessment study an analytical slant becomes the most appropriate means in this context. Since this work documents the “Impact of amendments”, this research is both explanatory and evaluatory in nature. Documentary research according to V. Jupp and C. Norris follows three paradigms viz; Content analysis, Interpretive, and Discourse Analysis.\textsuperscript{115} These three techniques (Content analysis, Interpretive, and Discourse Analysis) are combined with critical analysis which ‘involves an examination of the assumptions that underpin any account (say in a document) and a consideration of what other possible aspects are concealed or ruled out. It can also involve moving beyond the document themselves to encompass a critical analysis of the institutional and social structure within which such documents are produced.’\textsuperscript{116} In other words Critical analysis assisted in scrutinizing the reasons why the following amendments were necessary but also their impact.

In order to understand the approaches adopted in pursuance of the theme, a cursory look at the concepts shall be helpful. The goal of Pure or theoretical research is the quest for knowledge and knowing more about the phenomenon. It involves the development and testing of hypothesis and theories and is designed to add to our knowledge of the social world.\textsuperscript{117} It is basically a non-empirical approach to research, which usually involves perusal of mostly published works like researching through archives of public libraries, court rooms and published academic journals. For instance the present study justifies the hypothesis that amendments are a significant aspect of the Constitution and do have a progressive and constructive impact on the Indian polity. No matter to what extent they have increased in number in the Indian Constitution but every new amendment reinvents the Constitution with the changing needs of the people and exigencies of times.

\textsuperscript{115} Jupp and C. Norris, Traditions in Documentary Analysis , London,1993
\textsuperscript{116} Ibid.,
\textsuperscript{117} Leonard Cargan, Doing Social Research , Rawat Publications, New Delhi ,2008,p.6
This work can also be accredited as both explanatory and evaluative in nature. The purpose of explanatory research is to find out why an association or relationship exists and why a specific event occurs by identifying causes and effects of social phenomenon. While evaluative research is one step beyond explanatory research as it is concerned with measuring the effectiveness of an action programme. The combination of these two inquiries is thus utilized in the sixth chapter of the thesis where the four major amendments have been studied in the backdrop of the causes and effects that led to their implementation and their operationalisation. They are also adjudged on the basis to which extent they have been successful in accomplishing the objective for which they were produced.

At the same time this work can also be called as doctrinal legal research which is not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is in fact a process of selecting and weighing materials taking into account hierarchy as well as understanding social context and interpretation. This kind of inquiry can be found in Chapters three, four and five which showcase a large number of relevant legal cases to support each amendment.

1.19. Sources of Data

Being a desk study it involves the summary, collation and/or synthesis of existing research to assess the depth more than the breadth of the subject rather than primary research, where data is collected from, for example, research subjects or experiments. As far as the sources of data are concerned, the research work heavily draws from an amalgamation of Primary, Secondary and Tertiary sources Finnegan provides a useful definition of the distinction between primary and secondary sources in the following words:

“Primary sources …form the basic and original material for providing the researcher’s raw evidence, Secondary sources, by contrast, are those that discuss the period studied but are brought into being at some time after it, or otherwise somewhat removed from the actual events. Secondary sources copy, interpret or judge material to be found in primary sources.”

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118 Ibid., p.6
119 Sunny Crouch and Matthew Housden, Marketing Research for managers; The Marketing Series; Chartered Institute of Marketing, Butterworth-Heinemann, 2003, p. 22.
The Primary sources involve the oral or written testimony of eyewitnesses. They are original artifacts, documents and items related to the direct outcomes of an event or an experience.\textsuperscript{121} Also known as grey literature they are the first occurrences of a piece of work. They include published sources such as reports and some central and local government publications such as White papers and planning documents. They also include unpublished manuscript sources such as letters, memos and committee minutes that may be analyzed as data in their own right. For the present study primary sources comprise of an intensive study of the Archival resources, Draft Constitution, the Existing constitution, Private papers of the members of the Constituent assembly, Constitutional Assembly Debates, Report releases of the various committees of the constituent assembly, Reports of the various Parliamentary committees and life histories.

The secondary sources in contrast, involve the oral or written testimony of people not immediately present at the time of a given event. They are documents written or objects created by others that relate to a specific research question or research area. They may include textbooks, encyclopedias, oral histories of individuals or a group, journal articles, newspaper stories and even obituary notices.\textsuperscript{122} On this basis secondary data can be broadly divided into two types:

a. Documentary secondary data which include written documents such as notices, correspondence, minutes of meetings, reports, diaries, transcripts of speeches and public and administrative records. It can also appear as books, journals, articles, newspapers and magazines. Lastly it can also include non-written documents such as tape and video recordings, pictures, drawings, films and television programmes\textsuperscript{123}, digital versatile disks and CD–ROMS.

b. Survey based secondary data which usually refers to data collected by questionnaires that have already been analyzed for their original purpose. Such data can refer to organisations, people or households.\textsuperscript{124} They are made available as compiled data tables or as a computer readable matrix of raw data. Thus Survey based secondary data is collected

\textsuperscript{121} Salkind, op.cit., 1996
\textsuperscript{122} P.D. Leedy, Practical Research: Planning and Design, 6\textsuperscript{th} Edn., Prentice Hall, Englewood Cliffs, New Jersey, 1999
\textsuperscript{123} C. Robson, Real World Research, 2\textsuperscript{nd} Edn. Blackwell, Oxford, 2002
\textsuperscript{124} C. Hakim, Secondary Analysis in Social Research, Allen & Unwin, London, 1982
through one of the three distinct types of survey: Censuses, continuous /regular surveys or
adhoc surveys.

As far as this work is concerned various books, journals, weeklies, magazines law
quarterlies, reviews, reports published and unpublished thesis, newspapers, critical studies ,
reference works, biographies and Rajya Sabha and Lok Sabha Publications , Census and
regular / continuous surveys both by government and non-government agencies have been
diagnosed. Research Methodology would be incomplete if leading Textbooks were not
consulted. While not authoritative, they may be persuasive.125

The importance of newspapers as a secondary source of data has been highlighted by
Mannheim and Rich who share the view that ‘Newspapers are an excellent source of current
and historical information including the texts of important speeches, commentaries on
political issues, and results of public opinion polls.’126

In this work both law journals and law reviews are also consulted .It is important to
distinguish between law journals and law reviews here. Law journals tend to be published by
professional organisations such as law societies or bar associations and comprise short article
focusing on the practical application of current law. Law reviews on the other hand are
usually published by universities and contain in-depth articles emphasizing a theoretical
rather than practical approach.

As far as biographies are concerned they have always been an important aspect of
social science research. This is because biographies draw people and groups out of obscurity;
they repair historical records and they give powerless people a voice. As suggested by
Griffith’s , first person accounts such as oral histories and biographies are necessary if a
researcher is to understand the subjectivity of a social group127 that has been “muted , excised
from history[and ] invisible in the official records of their culture.”128

Tertiary literature sources also called search tools, are designed either to help to locate
primary and secondary literature or to introduce a topic. They therefore include indexes and

125 Wing Hing Chui , Research Methods for Law , Edinburgh University Press, 2007, p.28
Longman , New York, p.53
127 E. Griffith , In her own Right : The Life if Elizabeth Cady Stanton , Oxford University Press, New York ,
1984
128 J. Long, Telling Women’s Lives : The new sociobiography, Paper presented at the annual meeting of the
American Sociological Association,Chicago,1987,p.5
abstracts as well as encyclopedias and bibliographies. For our study encyclopedias, bibliographies, abstracts and Internet was used as source of tertiary source of information.

1.20. Interpretation of Data

In this work hermeneutical analysis has been followed to interpret data which looks beyond the objective meaning of the text and tries to analyze the latent themes and meanings in the established text. Just as the meaning of Scripture could not properly be grasped and transmitted except in the mode of practical exegesis, so too, a legal text or statute is not merely there "to be historically known or understood but to be concretized through interpretation in its current validity." 129 This approach was arrived at after analyzing the primary and secondary sources of data. Hermeneutical mediation has helped to advance the study in a larger perspective by linking past and present understandings and has unified the objective with the subjective. Employing this technique, the four amendments have been explored in their immediate context and have been critiqued with their impacts systematically and analytically.

In conclusion we can say that research is a strategic art that needs an explicit research design. It is the sine qua non for any social science inquiry or investigation. For our study we have structured our research design and research methodology accordingly in keeping with the demands of our study and have adhered to it consistently all through. This segment on research design will hopefully be a practical prolegomena to the chapters that would follow thus giving us a better grasp and insight into the subject under study.

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