

CHAPTER - I

I N T R O D U C T I O N

Section - A.

Constitutional Amendments and the Indian Political System --- the theoretical framework.

I

The Constitution of a country not only specifies the institutional form but also reflects the ideals and aspirations of the nation concerned. More precisely, constitutions are regarded as a vehicle for social advancement. Nature and purpose of a Constitution. But it is a truism that no written constitution of the world can be regarded as infallible and immutable, although it is regarded as a fundamental law of the land.

Since a Constitution is not a mere metaphysical abstraction, it must assume the task of regulating power - relations or the relationship of the individual with the political system in a changing socio-economic environment. This element of dynamism in human society calls for a responsible and responsive Constitution. The fundamental rules in a Constitution serve, in the first place, as the fountain-head of authority for the exercise of state-power. Secondly, they provide the state with an institutional framework, a 'container' within which the dynamic process of government and politics can operate. (1) Thus, the political process of a country must adjust itself with the norms of the Constitution to produce optimum results.

II

It is interesting to note that inspite of recurring 'conflicts' during the past two decades, the basic framework of the Indian political system has shown a surprising degree of adaptability

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to the changing circumstances. The Indian political system was confronted with, to borrow Easton's observation, the dual tasks of system maintenance

and system persistence. The Indian political system directed its actions towards exploring change as well as stability, and the system has been constantly engaged in a conversion process, producing outputs (decisions and policies) and altering the environment. Though persistence as well as goal-attainment is claimed to be the primary objective of the Indian political system, its survival and the preservation of essential variables within their critical range still continue to be its primary goals.

Here comes the question of incorporating some built-in mechanism, usually in the shape of formal amendment procedure, for adapting the Constitution to the socio-political environment. Where this mechanism is absent, 'informal amendments through judicial interpretation, legislative enactments and customary developments are resorted to, as in the U.S.A. Proper emphasis should be placed on the elements of ease and frequency of 'actual' change instead of the procedure of change as may be prescribed in the Constitution. A balance should be maintained in order to 'ensure the stability of the fundamental constitutional norms whilst

avoiding the rigidity that would make evolution, adaptation to changing circumstances, and the growth of consensual opinion for peaceful change difficult to achieve. (5)

The question of capabilities - extractive, regulative, distributive and symbolic -- imparts a significant key to the understanding of the systems theory, especially in its formulation by David Easton, in as much as it brings to the fore the vital matters like survival, stability and maintenance of the political system. It enhances the conceptual richness of the political system by going substantially beyond the somewhat static analysis of stability and equilibrium and focussing on concepts such as disturbances, stress, regulation and purposive redirection, all of which lend a significant dynamism to the analysis of the system-maintenance. (6) David Easton has very correctly pointed out that the idea of system-persistence extends far beyond that of system-maintenance. It is oriented towards exploring change as well as stability which are alternative avenues for coping with the challenges to the system. (7) The stability

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of a political system may, therefore, for all practical purposes, depend on its capability to recognize and accept the need for change by suitable alterations, adaptations and

adjustments in the basic framework of the system. It may be pre-condition for, and a precursor to political development, that is, the ability to fulfil demands through existing institutions or their modification or through the creation of new institutions. But political stability cannot be taken for granted, and every political

system has to, and does pass through periodic crises and conflicts and recurrent conditions of instability caused by the dysfunctional operation of unauthorised political structures or the anomic activities of groups and organizations. Such conflicts may be either systemic conflict, involving the basic nature and survival of the

Systemic or Issue
Conflict.

political system, or non-systemic, issue-
conflicts involving specific issues and problems

not centering round the basic institution. Failure to deal effectively with systemic conflict brings disaster and disintegration to the political system, especially if the political institutions have not been deep-rooted in the political culture and tradition of the nation. In political systems, however, which are less exposed to violence as a means of resolving systemic conflict, as in India, constitutional amendments, or major constitutional revisions, might go a long way in removing such challenges to stability and other systemic goals. (8) Since most of the political conflicts are non-systemic, constitutional amendments become all the more effective in removing the recurrent stresses. By providing for the safety valve within the political system (as Justice A. N. Ray had so appropriately observed in his minority judgement in the Keshavananda Bharati case of 1973) and acting as a counter-dote to revolution (so forcefully brought out by Justice Wanchoo in his minority judgement in the 'Golaknath' case of 1957), constitutional amendments prevent such challenges to systemic survival, stability and persistence, and in a positive sense, contribute to an increased and more effective regulative and distributive capability of the political system.

III

There is another important area where constitutional dynamics gains its significance. It is unversally admitted that the social context and political culture of a country are very important in shaping a constitution and determining its course of action. It is the prevailing consensus of attitudes and beliefs which sustain a constitutional framework,

Constitutional Dynamism and the Question of Legitimacy -- Incipient Legitimacy and Legitimacy-gap.

provide the necessary support and give a sense of legitimate authority. A truly 'living' constitution must grow from legitimizing processes at hand and from an existing consensus that embodies some substantive and most procedural concerns of government. (9) The legitimacy, acceptability and normative quality of the constitution will depend largely on specific techniques or methods of constitution-making which is a resultant of the configuration of socio-political forces at that time.

Constitutions may come into being through evolution, through the deliberations of an assembly or by fiat. (10) Of all these three methods, the second one, i.e. constitutions by assembly, has got two distinct advantages over others : The written constitution, on the onehand, 'imparts certainty and clarity' (11) while, on the other hand, 'the participation of many social groups in its making promises protection for the interests and objectives of the ordinary citizen.' (12) But one should not ignore the limitations of such system. It may so happen that the participation of various groups with conflicting interests 'may force on the assembly dysfunctional compromises in a vague, contradictory, or even unworkable constitution.' (13)

It is, however, quite possible that a constitution may

acquire legitimacy at inception, but may not be actually lived up to, thus creating a hiatus between the norms and the existential reality. Such cases of incipient legitimacy or legitimacy-gap, after a period of time, may be conveniently corrected by a scheme of constitutional amendments.

Here, while dealing with the question of legitimacy of a constitution, drafted by a Constituent Assembly, the Indian experience may be recalled. The Constituent Assembly which was primarily responsible for drafting the Indian Constitution, had been suffering from certain inherent limitations right from the beginning. The criticism that was advanced by many against the Constituent Assembly of India mainly centred round two issues:

- (a) Was it a representative body? and
- (b) Was it imposed upon the Indian people?

In other words, these two questions are directly related with the problem of legitimacy of the constitution which is the end-product of the deliberations in the Constituent Assembly.

At the very outset, it must be conceded that in the Constituent Assembly all the political parties were not represented. The Socialists and the Communists were not represented, ⁽¹⁴⁾ which prevented the Assembly from acquiring a truly representative character. It is equally important to note that in the absentee list were persons like Sapru and Jayakar who took very active part in the Round Table Conference. While the former fell ill at that time, the latter had ⁽¹⁵⁾ some doubt about 'the legality of the Objectives Resolution'. Persons like Radhabinode Pal, P.R.Das, Sir, M. Ismail and Sir Sultan Ahmed were also absent. So, from a strictly ^{formal} ~~legal~~ point of view, the Consti-

tuent Assembly could not be said to have a genuinely representative character.

From this issue follows the next one, i.e. to what extent, the Constitution was an imposed one. Since all the parties were not duly represented in the Constituent Assembly, it was definitely imposed upon those parties which were unwilling to take part in the deliberations of the Constituent Assembly. It has been rightly observed that it would have been better "to associate all other parties willing to live together under one constitution, give them equal status and importance and arrive at a Constitution based on the greatest amount of agreement among them." (16) The overwhelming majority of the Congress Party in the Constituent Assembly and its monolithic nature has led Granville Austin to remark that 'the Assembly was the Congress and the Congress was India.' (17)

Regarding the nature of the Constituent Assembly, Dr. Rajendra Prasad, who was elected its Chairman, observed:

"This Constituent Assembly has come into being with a number of limitations many of which we will have to bear in mind as we proceed I also believe that it is competent to break limitations attached to it at its birth." (18)

Nehru also spoke in the same vein when he was led to remark:

"You know that the Constituent Assembly is not what many of us wished to be. It has come into being under particular conditions and the British Government has a hand in its birth. They have attached to it certain conditionswe shall endeavour to work within its limits." (19)

It may be recalled here that on August 20, 1947, Mahavir Tyagi, K. Santhanam and other members raised the question of the status of the Assembly. (20) Doubts were also expressed by Ivor Jennings regarding the legal status of the Constituent Assembly. (21) Again, debates in the Constituent Assembly conclusively prove that in the tussle between the pro-Gandhian and pro-Western believers, the latter prevailed and the Constitution that finally emerged was almost modelled on the Western constitutional pattern. Of course, that does not confirm that Gandhian ideals have altogether been rejected. Gandhian principles have found their echo in the Chapters on Fundamental Rights and the Directive Principles of State Policy of the Constitution. In a word, the Constitution has really been, what Austin has called, an example of 'consensus and accommodation.' (22) In the course of the working of the Constitution, it has been observed that the heavy reliance on Anglo-American constitutional norms has been accepted by the people of the country. Its true reflection can be found in the statement of Panikkar that the Indian Constitution and its principles are to be understood and interpreted in terms of the unwritten conventions of the British Constitution. (23) But it is clear that the framers in the Assembly were primarily guided by the desire to bring about integration of the different elements of the society and thereby initiate the process of political development.

It is an admitted fact that the stability of a political system depends, to a large extent, upon the capacity to change itself suitably with the changing socio-economic pattern within which it is to operate. An analysis of the working of the Indian

political system will prove that although the Constitution was set in operation in 1950 with the nation's goals and desires specifically mentioned therein, it failed to live upto these declared aspirations of the nation. This was evident during the very first year of the working of the Constitution and to the great surprise of many, the Constitution (First Amendment) Act was passed in 1951 to remove certain built-in contradictions that were standing in the way of its successful functioning.

The reasons for these changes can be easily obtained from the fact that the Constitution, right from its inception, became 'over-programmatic'. It was also discovered that these changes were necessitated because of the very nature of the Constitution itself. It became clear that the Constitution was essentially a 'derivative' and 'adventitious' one, with no direct touch with Indian political culture.

A brief reference to the circumstances under which the present Constitution was drafted may be made at this point to clarify the position. The Constituent Assembly which was solely responsible for drafting the Constitution was essentially composed of persons who did not represent the people of India on a large scale. The task of decision-making rested mainly on ~~the part of~~ the political elite who took part in the deliberations of the Constituent Assembly. Moreover, the social structure within which the framers were assembled, did not prove to be conducive to such functions. The economy was essentially dilapidated and shattered. The administrative structure was about to collapse. The society was inegalitarian in nature and consequently fragmented in all senses - economic or

otherwise. The sense of national unity that was brought about immediately after Independence was definitely not a positive one. Naturally, the social integration that was achieved during the days of the Constitution-making was a forced one. The close contact with the Western liberal ideas and Western parliamentary system generated some kind of liberal thinking in India which served as a driving force for a new movement for national freedom. ⁽²⁴⁾ But this national movement failed to produce the desired result because of the roles of communalism and separatism which were standing in the way of national and political development. ⁽²⁵⁾ Although the Constitution-making body tried their best, in a half-hearted way, to accommodate the principle of federalism within the Indian constitutional framework, its actual realization suffered a serious setback because of the very nature of the Indian society which was based on certain inherent diversities. ⁽²⁶⁾ Indeed, India was a veritable laboratory of diversity; linguistic, religious, and caste cleavage have all played a crucial role in defining areas of conflict. ⁽²⁷⁾ In the context of the process of political development in India, Myron Weiner's description of two political cultures - ~~the~~ "elite" and "mass" and Morris - Jones' reference to "languages", "idioms", "manners", "styles" and "fashions" of politics in India, as falling into three categories of 'modern', 'traditional' and 'saintly', in spite of its apparent crudity, "perhaps accurately reflect the state of politics serving as the backdrop for the process of political development." ⁽²⁸⁾

In such a political atmosphere, the Constitution was

framed as a symbol of national aspiration, and 'a modernizing instrument' ⁽²⁹⁾ whose primary function was intended to be one of bringing about 'a dynamic and purposive future'. ⁽³⁰⁾ But it is interesting to note that although the political system envisaged by the Constitution was more evolutionary than revolutionary, ⁽³¹⁾ the framers tried to incorporate elements of dynamism in it by setting their goals in clear terms in the forms of the Preamble and the Directive Principles of State Policy. The goals and aspirations contained in the Preamble, the Part III and Part IV of the Constitution, not only embody 'the gains of the social revolution of the past century' and the ideas of freedom which modern India cherishes, ⁽³²⁾ but make the Constitution, in Austin's famous observation, a 'vehicle for social revolution'. ⁽³³⁾

IV

Constitutional dynamism, then, is a 'specific response to wider changes in social life'. ⁽³⁴⁾ A Constitution should

Constitutional dynamics as balancing between stability and change.

⁽³⁵⁾ have a dynamic of its own and 'comparative studies of change need always to reflect the impact of government upon society. If the success of a political system depends on a satisfactory balancing between stability and change, this can be best promoted by a viable system of constitutional dynamics.

It is by applying this yardstick that the achievement or otherwise of the Constitutional practice of a country is to be judged. There may be complete harmony between constitutional principles and the goals to be achieved in a particular political

process. Again, there are examples where the accomplishment lags far behind the ambition. Moreover, there may be cases where there is no scope at all for constitutional adjustment with the real political process thereby causing a virtual constitutional deadlock. Judging from this perspective, Loewenstein's ontological

Loewenstein's ontological classification

(36) classification of constitutions as 'normative' 'nominal' and 'semantic' seems to be appropriate and realistic. While making this classification, he correctly emphasizes the operational aspect of a political process. In his opinion, while making an 'ontological evaluation' of Constitutions, 'it is essential to recognize that the reality of a specific functional arrangement of power depends to a large measure on the socio-political environment to which the pattern is applied.' (37)

Amending procedure in a Constitution requires to be skilfully drafted because in the absence of such a mechanism, a Constitution may be converted into a 'frozen one'. (38) But it is to be noted with deep concern that the process of amendment of the Constitution has always received inadequate attention of the political scientists. Most of the writers try to explain in details the various organs of government, their relationship with other organs, fundamental rights and the like, but hardly pay due attention to this most important aspect of the Constitution. Most of them ignore the fact that the power of amendment is 'a power of higher grade and of more political importance than any other power provided for the Constitution.' (39)

According to Loewenstein, 'normative' Constitutions

prevail in the West 'where it serves as the procedural frame for the compromise of the power-contest'. (40) He includes the Constitutions of France, Germany, Italy, Israel and Ceylon in this category. (41)

It is curious to note that Loewenstein brings these Constitutions in this category because these were either 'manipulated by an intellectually Westernized people' or framed by the political elite who received education 'in contacts with the British'. (42) He, however, does not include the Burmese Constitution of 1947 in this category because 'her experience with self-government' is 'scanty'. (43)

A 'nominal' Constitution simply embodies 'a declaration of constitutional intent, a blue-print expected to become a reality in future'. (44) This type of Constitutions can be seen 'where Western Constitutionalism is implanted into a colonial and/or agrarian-feudal social structure'. (45) In this category, Loewenstein includes the Constitution of those states which are 'accustomed to authoritarianism'. (46)

Finally, there are Constitutions which are 'used for legalizing, stabilizing and perpetuating and existing configuration of power'. (47) These Constitutions fail to 'serve as the procedural frame for the competitive power elements'. (48) These Constitutions may be written in nature but these are merely face-saving gestures demanded by the present time universal belief in democratic legitimacy. (49) However, while admitting that 'in underdeveloped countries, the distinction between the semantic and the nominal Constitution cannot always be applied with satisfactory precision', (50) Loewenstein brings the Constitutions of Egypt, Iran and Iraq under this category. (51)

Keeping this theoretical background in mind, the need for inclusion of an amending clause in constitution can well be appreciated. A constitution which does not contain any provision for its amendment with the development, growth and expansion of the community is the most inadequate and imperfect 'deed of partnership.' (52) It would be doomed to collapse ignominiously, and without hope of reconstruction. (53) It has been observed that such a constitution is bound 'to break beneath the pressure of national forces' (54) which it cannot control or resist. The constitution of a nation must be responsive to the outward changes in the nation's life since 'change is the laws of life.' (55)

Thus, a constitution, to be responsive to the outward changes, must have the essence of workableness to be achieved through the mechanism of an amending clause. Any stagnation, resulting from the absence of this essence of workableness, is 'sure to cause steadily deepening discontent and to invite recourse to extra-constitutional or semi-constitutional devices which border revolution.' (56)

In order to forestall revolutionary upheavals, every constitution based on wisdom and supreme prudence, must establish a procedure according to which it can be revised or modified. The importance of this historical fact attracted Garner's attention, when, writing in connection with some of the American State Constitutions (eight of them belonged to the 18th century), he observed:

"Whether this omission was due to oversight or failure to appreciate the obvious advantages of expressly pointing out in the constitution itself the mode of procedure to be observed in altering its provisions; or whether it was due to the prevailing opinions

repeatedly asserted in the bills of rights, that the people have an inalienable right at all times to amend their Constitutions and hence a belief that no necessity existed for limiting their right by self imposed restrictions - there is a difference of opinion. (57)

Whatever reasons may be found behind this omission, it is held that an unamendable constitution is the worst tyranny of all times. W.W. Willoughby's observations in this connection are worth-mentioning:

"The fundamental error of all those who have sought to place inherent limitation upon the amending power as provided for in the Federal Constitution is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the states or that it implies an understanding between them and the National Government that the allocation of powers as provided for in the original instrument shall not be changed in any or its more important or essential features." (58)

The United States of America claims the reputation of being the pioneer in the field of providing an amending clause in the

The U. S. experience. body of the constitutional document. It has been rightly observed that the American Constitution 'has turned out to be perhaps the most successful example in history of a legal instrument that has served both as a safeguard of individual freedom and as a ligament of national unity. (59) The Frame of Government of Pennsylvania of 1862, granted by William Penn was the first charter to have a provision for alteration. It made a provision that no act, law or ordinance which would alter or change the charter in any part should thereafter be enacted without the consent of the Governor and six parts of seven of the said freemen in provincial

council and General Assembly. Similar provisions found place in the Frame of Government of 1863 and of 1696 and in the Charter of Delaware, 1701. Of all the thirteen State Constitutions, only six contained provision for their future revision, namely Delaware (1776), Pennsylvania (1776), Maryland (1776), Georgia (1777), Vermont (1777) and Massachusetts (1780). By 1787, during the Federal Constitution's meeting, the revised Constitutions of South Carolina and New Hampshire were included, thus raising the number to eight. The reasons behind the failure on the part of other State Constitutions of Connecticut, New Jersey, New York, North Carolina, Virginia and initially of New Hampshire and South Carolina to include amending clauses was explained by Jameson in his leading book -- "A Treatise on Constitutional Conventions".⁽⁶⁰⁾ This omission occurred because 'many of them were framed in extreme haste, for temporary purposes, when little was thought or known of the best modes of constructing or amending such instruments.'⁽⁶¹⁾

V

Having established the necessity of incorporating an amending clause within the constitutional frame, the question arises as to what should be the desired type of amending process for a Constitution. The answer seems to be a difficult one, since constitutional practices vary greatly in different countries. At this point, it is necessary to look into the primary forces which are responsible for bringing about constitutional changes in a country. In the first place, these forces may help in creating new circumstances --- circumstances which again go to shape the

Primary forces behind constitutional dynamics.

responsible for bringing about constitutional changes in a country. In the first place, these forces may help in creating

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constitutional structure. Secondly, these forces may completely change the nature, content and influence of circumstances, prevalent at the time of framing a Constitution. This second category is of greater importance and it can be seen that in most of the cases of constitution-making, these forces played dominant role. Following K.C. Wheare, these forces may be categorised as follows: (62)

Some of these forces which influence the constitution-making are visible and tangible, such as political party, the electoral system and the like. (63) But there is a second category of forces which is no less important than the first group and which take a major share in shaping the Constitution. These are public opinion (organized or unorganized), the attitude of the framers of the Constitution, the economic crisis etc. Though these are ~~invisible~~ invisible forces, they operate vigorously during the period of constitution-making of every country. (64)

In the opinion of Wheare, (65) the amending procedure in most modern constitutions aims at safeguarding one or more of

Wheare's four-fold criteria. four objectives. In the first place, the constitution should be changed only after a good deal of 'deliberation' for the proposed change or changes. Secondly, provision should be made so that people can express their views before a change is made. (66) Thirdly, in a federation, 'the powers of the units and the Central Government should not be alterable by either party acting alone. (67) Fourthly, 'individual or community rights, for example, of minorities in language or religion or culture, should be safeguarded.' (68) (69)

In order to safeguard these basic objectives, four

principal methods of amendments are generally provided in the constitutions of different countries. Amendments may be brought about by ---

- (a) The ordinary legislature, but under certain restrictions;
- (b) the people through referendum;
- (c) a majority of all the units of a federal state; and (70)
- (d) a special Convention.

The Constitution of Rumania (which is now defunct) provided the first method of amending the Constitution that is, amendment by ordinary legislative process. (71) Of course, one simple restriction was there. It provided that a quorum was necessary to bring about an amendment. Moreover, the Constitutions of Belgium, Norway and Sweden provide a peculiar system. In order to bring about a particular constitutional amendment relating to a particular national issue, the Assembly is first dissolved and a fresh election is held. The new Assembly with a fresh mandate from the people at large, assumes the role of a Constituent Assembly. This Assembly is constitutionally empowered to amend the particular provision of the Constitution. (72) The main feature noticeable in this system is that the amending procedure, although made much easier, has been subjected to this limitation. The Constitution of South Africa has gone a step further in providing that a constitutional change requires the support of the majority of the members of the two Houses in a joint session of the legislature. (73)

Secondly, the device of popular vote or referendum was introduced in the Constitution of France during the days of the Revolution. (74) The system prevails in some form or other in the

Constitutions of Switzerland, Australia and Eire. It has been observed that in Switzerland 'where amendment of the Constitution requires' always the consent of the majority of electors voting a referendum, and of a majority of the electors voting in a majority of the cantons;

The Swiss system.

and on some occasions, the consent of the general legislature also, the process has been used frequently and successfully. (75) In order to deal affectively with the emerging national problems on socio-economic fronts, the powers of the Central Government have been increased from time to time to a great extent. Since Switzerland does not face the barrier of the power of judicial review, she has been able to confer greater power on the general government, however, drastic and detrimental it might appear from a strict federal principle. In 1874, when the Constitution of 1848 was submitted to a general revision, there occurred upto 1952, ninety-nine plebiscites in Switzerland upon constitutional questions. Of these forty-seven were referenda upon constitutional amendments, (76) submitted to the people by the general legislature. Thirty-seven of these proposals were accepted. (77) Of the remaining plebiscites, forty-two were proposals for amendment of the Constitution presented on the initiative of fifty-thousand voters. (78) Seven only of these were accepted by the people. There were ten cases where the general legislature offered proposals as substitutes for those offered on the initiative of fifty-thousand voters, and in the eight out of these ten cases, the proposals were accepted. (79)

The people of Switzerland, however, have a

significant role in bringing about a constitutional amendment. A study of the amending provision will reveal that there are two types of amendments in Switzerland, viz., total and partial revisions of the Constitution. The initiative for amendment of the Constitution rests both with the Federal Assembly and the people. It may be pointed out in this connection that, in case of a conflict of opinion between the two Houses of the Federal Assembly about the necessity of an amendment, the proposal is referred to the people and if accepted, the Assembly is dissolved and a new election is held. The newly constituted Assembly then deals with the proposed amendment.

But the people of Australia, by a sharp contrast, refused on most occasions to alter their Constitution through the amending process which is substantially the same as that of

The system in Australia. } Switzerland. In practice, it was borrowed from (80)
Switzerland. Since 1900, proposed constitutional amendments were submitted to the people by referendum on twenty-four occasions (81) of which the following years are worth-mentioning - 1906, 1910, 1911, 1913, 1919, 1926, 1928, 1937, 1944, 1946, 1948 and 1951. Only four of (82) these amendments obtained the requisite majority of all the electors voting and a majority of the electors in a majority of states. The first amendment in 1906 was made with a view to altering the date of the Senate and was accepted by majorities in all the States. The second amendment of 1910 enabled the Commonwealth to take over state-debts irrespective of the date at which they were contracted, in place of the provision that the Commonwealth might take over State-debts in existence at the time of the formation of federation. This amendment was approved in all the

States except New South Wales. The third amendment relating to the Financial Agreement of 1927 is deemed to be one of the most important amendments so far done. The fourth amendment which was brought about in 1946 empowered the Commonwealth to legislate upon certain social services. This amendment was subsequently approved by majorities in all the States. (83)

But it is to be noted that the successive proposals made since 1911 to increase the powers of the Commonwealth had been rejected. In 1911, the proposals relating to empowering the Commonwealth to deal with trade and commerce without restrictions, was rejected by a majority of all the electors voting and by a majority of the electors voting in all the States except Western Australia. In 1913, another set of similar proposals met the same fate. Again in 1926, all attempts to increase the powers of the Commonwealth with regard to the settlement of industrial disputes were rejected by the majorities of all the electors. In 1937, proposals to increase the powers of the Commonwealth with regard to marketing and aviation experienced the same fate. (84) Again in 1944, all proposals aimed at giving the overwhelming power to the Commonwealth in all important economic and social affairs, failed to obtain the support of all the voters and therefore were rejected. (85) In 1944, proposals for social services were accepted partially. In 1951, another proposal which was made to empower the Commonwealth to deal with Communism was rejected by a majority of all the electors and by majorities in each of the three States. (86) It has been observed that the people of Australian Commonwealth are reluctant to approve any amendment which is not at the same time stated in specific terms and supported

(87)
by the main political parties. It may be noted here that a joint Committee of the Senate and the House of Representatives was ~~again~~ (88) appointed to rationalize the Federal State relations. In spite of the fact that the Committee submitted two reports, one in 1958 and (89) another in 1959, but by 1965 no action had been taken on them.

From the foregoing discussion, it appears that, with the exception of the proposals of 1910, 1928 and 1946, each of the proposals has been rejected. Of course, the Commonwealth has gained tremendous powers in other fields of administration, not by amendments, but by constitutional practice. The majority of the Australian electorate ~~has~~ ^{was} opposed to the encroachment of the Commonwealth upon the sphere originally reserved by the Constitution to the States. In this respect, while the Swiss electorate has been liberal in its use of a rigid amending process the Australian electorate has been conservative.

The third method of amending a Constitution, that is, by the approval of a majority of all the units, is a characteristic feature of the amending procedure in a federation. The federal Constitution which is an indissoluble compact between the federation and the component units, is regarded as the fundamental law of the land and hence it can not be altered by ordinary legislation and can be altered only by the mode prescribed in the Constitution itself. Naturally, the amending procedure in a federal Constitution must be sufficiently rigid so as to protect the rights of the federating units. But at the same time, the procedure should be flexible to some extent so as to enable the Constitution to respond to the changing needs of the society. In most of the federations, the amending process provides the system of ratification by the

legislature of the component units. A detailed study of the amending provision that has been prescribed by the Constitution of the United States of America clearly reveals that the process laid down therein, not only provides for the system of ratification by the States but also of a convention to be convened for the purpose. So it may be concluded that the U.S. Constitution provides an amending procedure which is a combination of the third and fourth methods mentioned earlier.

The American system.

The Constitution drawn up in 1787 was the work of an able group of men, conscious on the one hand of the inadequacies of the authority that the Central Government already possessed for the work it had to do and aware on the other hand, that 'the sentiment was too strong for a consolidated government to be within the bounds of possibility. (90) It is definitely a credit 'to the wisdom of the convention that the document has been formally amended only twenty-five times in 183 years', and 'ten of these amendments came within two years after the Constitution was ratified. (91) Although the process of formally amending the Constitution appears to be difficult, 'the Supreme Court has been willing to permit the political branches of the government considerable latitude in their interpretation and implementation of the fundamental law (92) thus enabling the Constitution to adopt 'those political changes that society has recognized as generally desirable. (93)

Thus, considering this necessity, the framers 'devised a difficult but not prohibitive procedure' (94) for amending the Constitution.

The amending clause prescribes two possible processes of proposal and two of ratification of amendments:

- 1) Two-thirds of both Houses of the Congress shall propose amendments;
- 2) the legislatures of two-thirds of several states shall apply to the Congress to call a convention for proposing amendments, and ratification shall take place by--
- 3) three-fourths of the legislatures of the several states;
or
- 4) by conventions of three-fourths of the several States.

Although two methods of initiating amendment and two methods of ratifying them are provided, all, thus far adopted, have been proposed in the same way by joint resolution of the two branches of Congress. Of course, this does not mean that there have been no attempts to bring amendment proposals by the alternative method of national convention. Under the leadership of the Council of State Governments, an attempt was made in December, 1962 'to get the States to memorialize Congress to call a Convention for consideration of three amendments aimed at reducing the power of the Supreme Court and strengthening the power of the States. (95) One such attempt was related to the amending article itself, (96) and it was moved with a view to authorizing two-thirds of the State Legislatures to initiate amendments without the approval of the Congress. (97)

Two vital problems are generally associated with the amending process of the U.S. Constitution. One is concerned with the question of time-limit for ratification and the other is concerned with the power of a State to reject and then approve of a proposed amendment. (98) Regarding the first one, the Congress felt the necessity of fixing a period for ratification and consequently

a seven year time-limit was provided in the Constitution by the 18th, 20th and the 21st Amendment Bills relating to prohibition, election and assumption of office (the Lame-duck Amendment) and repeal of prohibition respectively. It is worthwhile to mention here that the U.S. Supreme Court held that the right of stipulating a time-limit falls within the pervue of Congressional powers. (99) It is curious to note that 'no decision on the matter has ever been made. Congress has gone to the extent of declaring that a State 'once having ratified, cannot reverse its action'. (100) This question arose in connection with Kanas Legislature's rejection of the Child Labour Amendment in 1925 and approval of the same in 1937. Finally, judicial interpretation clearly shows that ratification must be done by the State Legislatures or conventions. as Congress may decide, and not by the people acting directly. In 1918 Ohio amended her State Constitution for inclusion of the principle of popular participation in ratifying an amendment bill; but the U.S. Supreme Court held this procedure invalid. (102)

The amending procedure as has been provided in the U.S. Constitution, has been subjected to criticism because of its extreme rigidity. The critics point to the fact that because of this element of rigidity, no amendments were made to the Constitution during the periods 1804-65 and again 1870-1913. But during a period of two decades stretching from 1913-1933, prolific constitution activities were visible and six amendments were added, apart from those first ten amendments which, constitute the Bill of Rights. Thus, while commenting on the amending procedure, R. E. Cushman has observed: "The question of how difficult or easy to of

amendment a Constitution should be, is not a simple one. The answer to it should depend upon what the Constitution contains. If its provisions are all of fundamental import, then a method of amendment or revision is desirable which is sufficiently deliberate and restrictive to assure the most careful and mature consideration. Constitutions, containing clauses of trivial import, should be easier to amend. (103)

Section B: Overview of Existing Literature.

The foregoing analysis establishes the fact beyond doubt that amending procedure occupies the most significant place in the total scheme of a Constitution. But in spite of its importance, very few scholars in India have paid due attention to this aspect. It is interesting to note that the issue of drafting the amending mechanism also failed to draw adequate attention of the Framers of the Constitution who, in the Constituent Assembly, took up the issue for deliberation at the fag end of the session. Naturally, it was beset by certain inherent but avoidable anomalies and loopholes at its birth.

So far, only a few works have been accomplished on the amending process under the Constitution of India, but nothing has been done to find out the impact of the amendments on the Indian political process as such in the macro-level perspective of the goals and achievements of the Indian political system. The present study seeks to strike a new path since it ventures to throw light on this unexplored but most valuable aspect of the working of the Indian political system that is currently confronted with recurring challenges to its stability.

On amending procedure, mention must be made of K.C. Markandan's valuable work 'Amendments and the Amending Procedure in the Constitution of India' and Hari Chand's book "Amending Procedure Under the Constitution of India (A Ph.D. thesis of the University of London). But these two works are mainly concerned with the procedural aspect of the amending mechanism. In Markandan's book, an attempt has been made to compare the amending procedure as obtained in the Constitution of India with those of other Constitutions, while in Hari Chand's work, the historical aspect of the evolution of the amending procedure has been analysed with some detail.

Apart from these two prominent works, reference should be made to three other works namely 'Critical Study of the Constitutional Amendment in India (Saugar University Ph.D. thesis, 1965) by Shyam Bihari Srivastava; 'Amending Process and the Amendments in the India Constitution (Punjab University Ph.D. thesis, 1971) by Subhashini and 'Comparative Study of the Amending Process under the Constitutions of the U.S., India, Canada and Australia (Delhi University Dissertation, LL.M., 1966) by Bhagwan Prasad Verma. But nowhere in these studies, attempts have been made to show their impacts on the Indian political process and the methodology adopted in these works are mainly historical-analytical in nature.

Granville Austin's celebrated work 'The Indian Constitution - Cornerstone of a Nation', although 'a political history of the framing of the Constitution', ⁽¹⁰⁴⁾ has been very useful in preparing this study. The book has been of immense help because it has dealt with the socio-political issues adequately 'with insight into political bases and motivations of Indian life', ⁽¹⁰⁵⁾ which has gone

a long way in providing many an untold and hitherto unpublished materials, dealing with the nature of political culture as was obtained during the formative period of Constitution-making. Side by side with Austin's book, K.V. Rao's Parliamentary Democracy of India (A critical commentary) has provided many key elements to the understanding of the nature of the Constituent Assembly and has helped in resolving the problem of legitimacy of the Indian Constitution.

Apart from these, mention must be made of two valuable publications by I.C.P.S., namely, 'Parliament and Constitutional Amendment' and 'Fundamental Rights and Constitutional Amendment'. These two books contain a number of scholarly expositions of this aspect by leading authorities of the subject. But in these books, no systematic study has been made to find out the nature and impact of constitutional amendments on the Indian political system.

P.B.Gajendragadkar's 'The Indian Parliament and Fundamental Rights' and S. N. Ray's 'Judicial Review and Fundamental Rights' have been useful in analysing the nature and extent of Fundamental Rights in the light of the recent constitutional amendments. The second one, i.e. 'Judicial Review and Fundamental Rights' has been of immense value in this study since the findings in this work have a tremendous bearing on the constitutional working and the governmental process in India. Late Professor D. N. Banerjee's celebrated work 'Our Fundamental Rights --- their Nature and Extent' though somewhat dated, served as a foundation in analysing judicial decisions which are directly related to constitutional amendments in India.

Of all the primary source-materials, special mention must be made of the nine volumes on Constituent Assembly Debates. Extensive as well as intensive study of the Debates has been made to find out the ^{opinions} attitudes of the Framers of the Constitution ^{about} the provision relating to constitutional amendment. Extensive comparison has been made with the nature, scope, purpose and operation of provisions for constitutional amendments obtained in different leading constitutions of the world. In this sphere, use of the comparative method has been adequately resorted to in order to find out the efficacy of the provision for constitutional amendments in India.

A number of leading Indian and foreign journals have been consulted for the preparation of the study. Only a few of them may be mentioned here for lack of space. Of these, special mention must be made of The Indian Journal of Political Science, The Journal of Constitutional and Parliamentary Studies, The Indian Journal of Politics, Political Science Review, Asian Recorder, Keesing's Contemporary Archives and the like.

Some recent publications on constitutional amendments deserve mention, namely, Paras Diwan's 'Abrogation of 42nd Amendment - Does Our Constitution need a Second Look?', Sundar Raman's 'Fundamental Rights and the 42nd Constitutional Amendment', P.B. Mukherjee's 'The Indian Constitution - Change and Challenge' and S. Biswas' (ed) - Constitutional Amendments -- A Study'. In all these publications, the focus of discussion has been unidirectional -- an analysis of the nature and impact of the Constitution (42nd

Amendment) Act. The authors ⁱⁿ all these works have tried to point out the dysfunctional and sinister impact of this amendment Act on the Indian democratic political process. The scope and coverage of ^{the study} study are, therefore, pinned down to a specific period and specific enactment.

Three other works, though not directly related to the present study, deserve mention. These are: Rajeev Dhavan's 'The Supreme Court and the Parliamentary Sovereignty', Bakhshish Singh's 'The Supreme Court of India as an Instrument of Social Justice' and Ram Gopal's 'Undemocratic Elements in the Indian Constitution'. The first two books have been very helpful in analysing the attitude of the Judiciary vis-a-vis the Parliament to the question of interpreting the amending provisions of the Indian Constitution. Once again, they cover only one aspect of the question of Constitutional amendment.

Section C : Plan and Method of Study.

Chapter I of the present study deals with the theoretical framework of the study and the theoretical foundations of constitutional amendments. Amendments work as a machinery for constitutional growth, a safety valve for the political system, a corrective of the legitimacy gap and a positive contributor to systemic persistence and development.

Chapter II deals with amending procedures in the leading constitutions of the world. This discussion has been kept strictly within limits. In the debates of the Constituent Assembly, members referred only to the amending procedures obtaining in the

U.S.A., Canada, Switzerland and Australia. In this Chapter, a few other examples have also been brought in with a view to making the discussion as comprehensive as possible by offering a wider perspective for comparison.

In Chapter III, an analysis of the history of the amending procedure in India has been made. An attempt has been made to show how, in the Constituent Assembly, members tried to reconcile various opposing viewpoints. From the speeches and remarks of the members of the Constituent Assembly, the intentions of the framers have been analysed in an objective manner. These come as valuable yardsticks by which to assess the actual operation of the amendment provision and to highlight the gap, if any, between intentions and the existential reality.

Chapter IV ^{makes} ~~deals with~~ a detailed analysis of the amending procedures as obtained in the Indian Constitution at its inception and as modified in later years. The analysis in this Chapter is mainly based on constitutional law.

In Chapter V, a penetrating study has been made to find out the constitutional relations between Fundamental Rights and the amending procedure as laid down in Art. 368. For the purpose of clarification, references have been made to leading cases relating to Fundamental Rights.

Chapter VI embodies the specific constitutional amendments and their broad classificatory pattern. Amendments have been grouped in three broad categories namely, (a) amendments relating to the federal structure of the country; (b) amendments relating to Fundamental Rights guaranteed in Part III of the Constitution; and (c) amendments concerning community interest and social

advancement. The first category vitally concerns the emerging governmental structure, especially in the light of the crucial question of Union-State relations that has been engaging our attention for the last one decade or more - and that has a great bearing on the stability of the political system. The second involves the perennial issue of freedom and authority in a changing world and the actual character of the political system emerging out of their interaction. The third offers valuable insight into the objectives and purposes of the Indian political system, especially, the broad goals of modernization and development, and their actual realization. The typology offered here is not final or comprehensive but offers a convenient starting point for systematic analysis.

A detailed discussion regarding the genesis, content, character and assessment ^{of the Constitution (Forty Second Amendment) Act} has been done in Chapters VII & VIII.

General issues and problems of constitutional amendments in India have been studied in Chapter IX. These problems have been discussed in the context of (a) the nature of the Indian Constitution and Government; (b) Changing political landscape and party position and (c) Legislative - Judicial interaction. The method adopted is more behavioural than institutional, and the interaction between structures and functions has been adequately investigated. To make the discussion all-comprehensive, references have been made to recent constitutional amendments. Special emphasis has been given on the Constitution (Forty Second Amendment) Act, 1976. This Amendment Act definitely upset the power balance in the governmental system. It triggered off controversy unprecedented in the annals of the Indian political system. It may not be an exaggeration to say that the Sixth General Election of March 1977 was fought on this issue.

The concluding observations regarding the impact of constitutional amendments have been made in the last Chapter, that is, in Chapter X.

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