The Ache of Amendment: Lesson from the Story of Indian Federalism

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ABSTRACT

India with its Independence inherited a horrifying legacy of partition[1] *and the tiring quest of congressmen to unite and stitch the divided picture of British India*[2]. *It was pertinent to recognize that to attain such "social unity"*[3] *the future belonged not to imperialism but to federalism.*[4] *Federalism is one such charted terrains of Indian Constitutional law, the nature of which is still debated among scholars.*[5] *It lacks a definitive meaning, however, it broadly means a distribution of power between the Centre and the State. Even the Supreme Court of India was tied in knots to demystify the nature of Indian Federalism.*[6] *Features of constitution plays crucial role in determining the nature of federalism.*[7] *Constitutional Amendments adds and subtracts to our understanding of such features of the Constitution.*[8] *Constitutional Amendments in the Indian context broadly means an amendment to the Constitution under article 368 of the Indian Constitution. But the dynamics of amendments are not governed by the simple rule of first past the post.*[9] *Besides codified requirements, the amendment culture of a country plays a crucial role in understanding the undercurrents of constitutional amendments.*[10] *This paper will analyze the impact of constitutional amendment(s) on the federal structure of India by looking at the amendment culture of the country. It would address the necessity of constitutional amendments in general and will attempt to show how constitutional amendments have time and again operated the risk to the Indian federalism and saved its life. It would look at various types of formal and informal amendments which changed our understanding of the Indian Federalism. Finally, it would look at how the amendments to the federal nature of India, in turn effected the amendment culture of the country and answer as to why is there a necessity for constitutional amendments when there is a question of federalism.*

[1] The partition of British India into three sovereign countries namely India, East Pakistan and West Pakistan as per the Mountbatten Plan spearheaded by Sir Radcliffe. **See** Ian Talbot & Gurharpal Singh, *The Partition of India* (Cambridge University Press 2009).
[2] V.P. Menon, *The Story of the Integration of India* (Orient Black Swan 1985, Originally Published 1956).
[3] Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) p. 83.
[4] Ibid p. 87. **See also** Radhakamal Mukerjee, *Democracies of the East*, p. 352.
[5] Ibid p. 24.
[6] HM Seervai, *Constitutional Law of India*, vols. 1-3 (4th edn, Universal Book Traders 1991–96).
[7] Ibid. Discussing the tests of federalism by Prof. Wheare and Prof. Sawyer discussed later in the paper.
[8] Richhard Albert, *Constitutional* Amendments (OUP 2019) p. 83.
[9] The import of the statement being that amendments donot result merely on the raise of hands by the authorities, rather there are other factors at play which affects the amendments to the Constitution.
[10] Albert (n 8) p. 110.

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I. THE STORY OF CONSTITUTIONAL AMENDMENT IN INDIA

Constitution is the embodiment of the paramount norms[11] and the promise to abide such norms. These norms and their meaning keep changing in a constitutional democracy.[12] A democratic constitution has to be responsive to such transformations in the society. The process of amendment provides such an opportunity for Constitution to evolve and transform. It is what preserves the relation between democracy and constitutionalism.[13] In this part, the paper will look at the significance of constitutional amendment in a rigid constitution such as that of India.

a. Introduction to Constitutional Amendments & Amendment Culture

India has a multi-layer approach towards constitutional amendments. There are three categories of amendments under the Indian Constitution. First are those which require a simple majority[14]; Second are those which require a special majority[15] and; Third which require in addition to special majority, ratification by one-half of state legislatures[16]. The rules governing the latter two are covered by Article 368. A bill for amendment can be introduced in either house of Parliament. It can also be introduced as a Private Member Bill. To agree conclusively on the true nature and definition of 'constitutional amendment', it took more than two decades and nineteen wisemen of the Sup. Ct. to decide the scope and ambit of solely Article 368 of the Indian Constitution that deals with the power and process of amendment in the Indian Constitution.[17] It was in the case of *Kesavananda Bharati v. State of Kerala*[18] that the Sup. Ct. agreed to some definitive meaning of the word 'amendment' and scope of Article 368. It was held that "*the word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations*."[19] But the currents of 39th Amendment shook these definitions of the wisemen when constitutional

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[11] *H.H. Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225, para 1957.
[12] RC Bhardwaj, *Constitution Amendment in India* (Northern Book Center for Lok Sabha Secretariat 1995).
[13] Khosla (n 3) p. 156.
[14] Articles 4, 169; Para 7(2) of Schedule V and Para 21(2) of Schedule VI, Constitution of India, 1949.
[15] Article 368, Constitution of India, 1949. "*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 and by a majority of not less than two thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended*"
[16] Article 368, Constitution of India, 1949. "*...Provided that if such amendment seeks to make any change in: (a) article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the lists in the Seventh Schedule, or (d) The representation of States in Parliament, or (e) the provisions of this article,*"
[17] The debate of whether amendment means law, which started from *Shankari Prasad Singh Deo v Union of* India AIR 1951 SC 458 and was settled in *Kesavananda Bharati* (n 11).
[18] *Kesavananda Bharati* (n 11).
[19] **See** Khanna J in *Kesavananda Bharati* (n 11) para 1437.

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amendments took form of legislative judgements like the Acts of Attainder[20] or *Princely Firman's*[21] which Mathew J. described as a "*string of isolated dooms*"[22]. Article 368 which provides rules for amendment, was itself amended to include the word 'constituent power' which signifies the superpower of legislative, executive and judiciary combined in the hands of Parliament to amend the Constitution.[23] This mischief was dealt with in the case of *Indira Gandhi v. Raj Narain*[24](*Election Case*) where the amended Article 368 which used the word 'constituent power' was for the first time scrutinized by the Sup. Ct. of India. In the *Election case*, Ray CJ. held that judicial power is conferred solely in the courts and is not meant to be shared with the executive.[25] Article 141 of the Indian Constitution makes a judgement of Sup.Ct. binding upon all the courts, and thus judicial powers cannot be vested to the parliament. This view was therefore held to be extreme, and the only possible recourse before the Sup.Ct. to reject the defense of 'constituent power' without overruling the decision of *Kesavananda Bharti* is by looking at the objectives of the 24th amendment which added the word 'constituent power' under Article 368. The amendment was meant to carry out the objectives of Preamble and implement directive principles. By conferring the absolute power of all the three branches to the Parliament, it goes against the objective of the amendment itself. If the amendability becomes unlimited, the Parliament under the garb of 'constituent power' might remove Article 368 and making it entirely unamendable. Therefore, the *Election Case* held such an interpretation of 'constituent power' extreme, untenable and one that would defeat the very purpose of framing the constitution.[26]

The discussion till now, however, was only with regards to the power of formal amendment which is codified under article 368 of the Indian Constitution. Whereas, a constitution can be amended even by informal means.[27] This paper will look into some of the informal means of amendment with respect to the federal nature of India. These informal amendments are not "extralegal" rather are a direct result of the amendment culture prevalent in a polity. Factors such as the composition of society, language, size of the country and the nature of polity, to

[20] Seervai (n 6) p. 3118. **See also** de Smith, *Constitutional and Administrative Law* (2nd ed., 1973) p. 308.
[21] Ibid. **See also** *Indira Nehru Gandhi v. Raj* Narain, (1976) 2 SCR 347, p. 2444-5.
[22] Seervai (n 6) p. 3109.
[23] 24th Amendment to the Indian Constitution, 1971.
[24] *Indira Nehru Gandhi v. Raj* Narain, (1976) 2 SCR 347.
[25] ibid. p. 2320. **See also** Seervai (n 6) p. 3143.
[26] ibid.
[27] Albert (n 8) p. 2.

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name a few, affect the amendment culture in a country.[28] Richard Albert in his seminal work on 'Constitutional Amendments' identify three forms which Amendment Cultures might take, namely (a) Acceleration – Where countries frequently amend their constitution formally, (b) Redirection – Where they take informal means in absence of flexible formal rules; and (c) Incapacitation – Where despite flexible rules of formal amendment, the conservative approach of the people shuns them from amending the constitution or they cannot come to a common ground.. A narrow definition of Amendment Culture can be related to Prof. Ackerman's concept of 'constitutional moment'[29] when constitutional meanings are changed without altering the text of the constitution due to the influence of these factors. The study of Indian Basic Structure Doctrine is also another example of an informal amendment which had a huge impact on the amendment culture of the country.[30] Be as it may, "*a Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied "here and there", they will respect it all the more and they will not fight against, when we want to change it.*"[31] This import of Pt. Jawaharlal Nehru's Speech in support of the first amendment to the Indian Constitution lays before us in plain sight that an amendment cannot alter the basic structure of the constitution nor can it replace the existing constitution with a new one altogether.

b. The Significance of Constitutional Amendments

After a brief discussion about the politics of constitutional amendment the paper will further delve in to answer how constitutional amendments impact the politics of a country. The nature of a constitution whether rigid or flexible is determined by how amenable it is to an amendment. Constitutions sometimes are resistant towards an amendment. There are various factors which makes a constitution unamendable. Richard Albert observes three types of un-amendability in Constitutions. First being "Codified Un-amendability" where the text of the constitution itself provides that values or parts of the constitution cannot be amended.[32] The second is "Interpretive Un-amendability" like the theory of Indian Basic Structure. Third is the "Constructive Un-amendability" where the constitution provides for amendment, but the rules

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[28] Tom Ginsburg & James Melton, "Does the Constitutional Amendment Rule Matter at All?" (2015) 13 International Journal of Constitutional Law. "*amendment culture means the set of shared attitudes about the desirability of amendment*".
[29] Albert (n 8) p. 21.
[30] The basic structure theory did not altered the text of the constitution, but by changing the way of interpretation of constitution and meaning of words, its affect has been that of a formal amendment.
[31] Khanna J. in *Kesavananda Bharati* (n 11).
[32] Albert (n 8) p. 140;

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of amendment are so stringent that it is virtually impossible to amend. The Constitution of Taiwan, Richard Albert observes, to be entirely a case of constructive un-amendability.[33] It is clear that why un-amendability in a constitution is desired, as best explained by Hidayatullah J. in *Sajjan Singh* that "*fundamental rights cannot be a play-thing in the hands of the parliament*". The fear that the legislature might usurp the power to satisfy their political fiends is what haunts from making the constitution entirely amendable.[34] While the concern is right at its point, but the amendments are a double-edged sword and it is here submitted, what ails if the constitution becomes un-amendable.

As per eminent jurist H.M. Seervai "*an un-amendable constitution by not providing for orderly change invites a subversion of constitution by revolutionary or extra-constitutional means*".[35] To substantiate this claim, A.V. Dicey's observation on the French Constitutional history is pertinent. Dicey observes that "*a total of twelve un-amendable Constitutions of France has each lasted for less than ten years on an average and has frequently been perished by violence*".[36] This shows us the sinister picture of un-amendability of the constitutions. Therefore, one has to travel with caution when crossing the terrains of constitutional amendment(s). Where one side is the fear of majoritarian partisanship trying to subvert the constitutional values if the entire constitution is easily amendable, the other side is a violent outbreak of social revolution from the masses if the constitution is a rigid one and is unamendable. Therefore, it can be said conclusively that amendments add life to the constitution. By tackling the problem of obsolescence of the words and their meaning and harmonizing them with current values and meanings, amendments operate on the risk to the life of the Constitution and the Country.

[33] Donald S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) p. 117. "The Japanese constitution is one of the most rigid constitutions which has not been amended even once since its promulgation in 1946 due to the three-step rigid process."; **See** Albert (n 8) pp. 158, 115. "If Lutz do a re-assessment the Japanese Constitution will be the most rigid even replacing the USA".

[34] 39th Amendment to the Indian Constitution, 1975.

[35] Seervai (n 6) p. 3132.

[36] A.V. Dicey, *Law of the Constitution* (10th edn) p. 129.

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II. FEDERAL NATURE OF INDIA

Federalism is one such distinguishing feature which solidifies the majority opinion of *Kesavananda Bharati* that the power to amend doesnot mean the power to abrogate the fundamental rights or other freedoms in the Constitution.[37] Federalism generally put is a distribution of powers between Centre and State. Articles 245, 246 read with Schedule 7 of the Indian Constitution, provides extent of legislative power and the distribution of functions between State and the Center under the three lists namely Union, State and Concurrent lists. It is submitted that Parliament can make changes in these lists by addition, variation, repeal of an entry or transposing an entry from one list to the other.[38] The entire list itself cannot be repealed or abrogated.[39] Therefore, it logically follows that *federalism* is outside the scope of amending power to be abrogated. It therefore makes an interesting study as to how amendments and federalism interact with each other in the Indian Constitutional paradigm. This part will look into the nature of Indian Federalism to provide a ground for its assessment in light of the constitutional amendments.

a. Features of Federalism

Federalism entails the basic idea of power sharing between the political institutions. In India there are primarily two tiers of government, Central and State. A third tier, *Panchayati Raj* (local governance) was later introduced in the Constitution,[40] but is not considered for the purposes of the present analysis. Both these tiers share their functions but govern in their autonomous spheres.[41] The Indian model of Federalism in the Constitution is highly influenced by the result of partition in the wake of the Indian Independence. With an ache for a strong centre to redirect the policy goals towards development, the power sharing was departed from what existed prior to Independence, where Centre dealt with few issues of national importance and the provinces enjoyed much of the power. There was re-distribution of power in the Indian Constitutional foundation, however, much of the power was aggrandized with the centre. Therefore, Indian Constitution has been alleged by many to not be "perfectly federal". Some say it is a case of Quasi Federal, some say it is Quasi Con-federal and other say it is just Asymmetrical.[42] While this predicament can be settled from the words of Dr. Ambedkar in the

[37] Sikri CJ in *Kesavananda Bharati* (n 11).
[38] Seervai (n 6) p. 3156.
[39] ibid.
[40] 73rd and 74th Amendment to the Indian Constitution, 1992.
[41] Louise Tillin, *Indian Federalism* (OUP 2019).
[42] ibid; **See also** M.P. Singh, *Indian Politics* (PHILearning 2011).

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Constituent Assembly, that "*Indian federation is a flexible federation*".[43] So indeed, there are unitary features in the constitution that gives power to the Centre over and above the Provinces (States), but a jurisprudential account will help us observe that the Indian Union is a case of federalism.

Professor K.C. Wheare, a leading theorist of 'federalism' in his classic work puts forth the test of a federal country to be that "*whether or not in a government there is a division of power between general and regional authorities where each in its own sphere is co-ordinate and independent of the other*".[44] This test can be clearly applied to the case of Indian Constitution by looking at Articles 245, 246 read with Schedule 7 where powers are divided between the Centre and State in such manner. However, eminent jurist H.M. Seervai submits that the above test can only be accepted if put in light of Prof. Sawyer's argument that for a country to be federal, it must be seen that whether a federal situation existed in the country before it adopted a federal constitution or not? Though the discussion of the historical account of India's federalism before independence is not warranted by this paper, but if one analyze, the Government of India Act of 1935 did provide with federal solutions by distributing power between centre and provinces.[45] Therefore, taking both these tests into account, it can be unequivocally said that Indian Constitution is a case of federalism. However, this cannot be so simply put in the case of Indian Constitutional Law or the practise of Indian Constitution. There are a lot of curves and turfs which has led to conflicting interpretations of the federal nature of India. The Supreme Court in *State of West Bengal v. Union of India*[46] held that the Parliament can even take the entire area of a state, to form a new state and that there is no constitutional guarantee of continuing existence of a state. Since then the Sup. Ct. has been of the view that even though the Indian Constitution is claimed to be a federal one, but "unitary" features are so many, that federal ones almost disappear. The clear purport of this decision comes out in the case of *State of Rajasthan v. Union of India*[47], where it was held that although the Indian Union is federal, but its extent is largely watered down due to the developmental needs of the country which has to be nationally oriented.[48] But this assessment is highly unsatisfactory in light of Prof. Wheare's argument that to find whether a constitution is federal or not, it must

[43] Granville Austin, *The Indian Constitution* (OUP 2018) p. 317.
[44] K.C. Wheare, *Federal Government*, 4th Edition (1963). As per Prof. Wheare, the US federal principle which establishes a dual form of government [federal and state], neither of which is sub-ordinate to each other, rather co-ordinate and are independent, is the gist of federalism.
[45] Seervai (n 6) p. 285.
[46] *State of West Bengal v Union of India*, AIR 1963 SC 1241.
[47] *State of Rajasthan v Union of India*, (1977) 3 SCC 592.
[48] ibid.

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be inquired, whether it works as federal or not. Mere presence of "unitary" features that may render a Constitution as 'quasi-federal' doesnot prevent it to be dominantly federal in practise. Because the law of Constitution is one thing, whereas its practise which is the constitutional law, is totally different. Therefore, a re-assessment of federal and unitary features of the Constitution is necessary to determine whether the federal features are dominant or not and whether the law of Constitution is federal in practise or not?

b. The State and The Union in India

The very first basic requirement for a definition of federal government to be real, observes Prof. Wheare, is that it must contain the words "*United States*"[49] Article 1 of the Indian Constitution passes this test as it lays that India is Union of States. Therefore, based upon all the above arguments of Prof. Wheare, Prof. Sawyer and H.M. Seervai, Indian Constitution surely has a federal 'form'. Though there are unitary features, but the presence of unitary features does not *ipso facto* renders a Constitution to be not federal. Practise of Constitution or the Constitutional law is another beast altogether. Therefore, an analysis of federal and unitary features under the Indian Constitution is hereby necessary. There are various relations between the Union and the State envisaged under the Constitution like the legislative, administrative, financial et al. An examination of three prominent features of Indian Federalism would help us to determine whether the federal principles in the Indian Constitution are dominant or not.

i. State Boundaries

The Constitution under article 3 provides the Union with the power to alter State boundaries. It may increase or decrease the area of state, divide it or amalgamate it. The power of re-organization is thus granted to the Union. The article prescribes the bill to be presented before the State assembly, but the Supt. Ct. has held it clearly that it is just an act of formality and the Union has no obligation to wait for the concurrence of the States.[50] It was further held that ascertaining the views of the State was mandatory under article 3 but the Parliament is in no way bound by those views.[51] It was also held that a law made under article 3 is paramount and cannot be fettered by Article 246 read with List II & III of the Indian Constitution.[52] However, a recent decision clearly mentions that while making a law, Parliament cannot fetter the

[49] Wheare (n 43) p. 1.
[50] *Babulal Parate v. State of Bombay*, AIR 1960 SC 51.
[51] *Pradeep Chaudhary v. Union of India*, (2009) 12 SCC 248.
[52] *Mullaperiyar Environmental Protection Forum v Union of India*, (2006) 3 SCC 643.

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legislative competence of the States under article 246 read with List II & III of the Indian Constitution.[53] This *prima facie* looks as a very unitary feature when the existence of the State is regulated by the Union. However, Seervai in his celebrated book observes that never has this power been abused by the Union. The Union has re-organized boundaries only when the state employs "extra-constitutional" agitation, the Parliament is forced to alter the boundaries of the state.[54] Therefore, in practise, the federal principle is thus not violated.

ii. Distribution of Power (Legislative Competence)

As already discussed, the three lists in the seventh schedule are the powerhouse of Union and State legislatures. Their powers are distributed in three distinct chambers, however the residuary power[55] and the benefit of repugnancy[56] is conferred with the parliament. This draws out the unitary feature of Indian Federalism. But it is hereby submitted that this arrangement has been taken completely from the Government of India Act, 1935 where the Muslim provinces did not want the Central Government to hold the residuary power to legislate on matters not enumerated under the two lists. So, the concurrent list was introduced by the British Parliament to remedy the problem and every possible aspect of law-making was thought and put into it. However, to account for human fallibility, the residuary power was vested with the Governor General of India the use of which would only be warranted in a rare and unstipulated circumstance. The present residuary power with the Parliament has the same import and therefore the practise of Indian Constitution does not violated federalism.[57]

With regards to the precedence of Federal law over State legislation, federal constitutions like Canada observes that if Federal and State laws cannot be reconciled then federal law will take precedence.[58] Even in the USA, a defiance of Federal law by the State(s) has been put down by the use of Armed Forces and of U.S. and this has been held to be not inconsistent with the Federal principles of the US Constitution. In light of the accounts of federal constitutions around the world, it will not be erroneous to observe that the case of India is no different and therefore the power of Union to give directions to the State and the precedence of Federal law over the State legislation is not in defiance with the federal principles.

[53] *State of Himachal Pradesh v. Union of India*, (2011) 13 SCC 344.
[54] Seervai (n 6) p. 301.
[55] As per Article 248 of the Indian Constitution the residuary power to legislate upon matters not enumerated in the schedule 7 lists lies with the Parliament.
[56] As per Article 254 of the Indian Constitution, if there is a repugnancy between a Central and a State legislation, the State legislation to the extent repugnant with the Central legislation will be void.
[57] Wheare (n 43) p. 27. "...apart from List II & III what is left outside the exclusive authority of States in India is of subordinate concern".
[58] *Attorney General for Ontario v. Attorney General for the Dominion*, (1986) A.C. 348.

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iii. Emergency & President's Rule

The most haunted feature of the Indian Constitution which attacks the federal principle in the gravest form is the power to impose Emergency and Presidential Rule under articles 352 and 356 respectively. Article 352 allows the President to proclaim an emergency when 'satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion'. This earlier provided 'internal disturbance' instead of armed rebellion. Using which the infamous Emergency of 1975 was imposed by Indira Gandhi. This was a biggest blow to the Indian Federalism However, the 44th Amendment did remedy it by using the word 'armed rebellion' instead of internal disturbance. Also articles 20 & 21 were declared to be absolute and outside the ambit of the President to suspend it. The story with the President's Rule is also the same. Under Article 356, in the event that a state government is unable to function according to constitutional provisions, the central government can take direct control of the state machinery. It was assumed to be a dead letter by the constituent assembly and only inserted to tackle what Karl Loewenstein has termed 'militant democracy', which is extremist political situations from being formed in the States, observes Gopal Subramanium.[59] But the consistent abuse of Article 356 which was not envisaged by the Constituent Assembly is what strikes at the heart of Indian Federalism. This question came up for consideration in *S.R. Bommai v. Union of India*[60] where it was held by the Sup. Ct. that "*The proclamation under Article 356(1) is not immune from judicial review. The Supreme court or the High court can strike down the proclamation if it is found to be malafides or based on wholly irrelevant or extraneous grounds*" The court also observed that "*Federalism which is a basic feature of Indian Constitution, has a goal in India, to place the nation as a whole under the control of a centre, while the states are not the agents, and get to exercise sovereign powers in their own legislative capacity. Qua the Union, State is Quasi-Federal*." Seervai submits that Article 352 in light of the 44th amendment makes *de jure* what happens *de facto* in federal countries like USA, Canada, Australia. In times of war or threat of war, they act as they were "unitary" and not federal.[61] He also observes that imposing martial law by President Kennedy in Mississippi where racial segregation is schools disregarded the order of the federal court. Armed forces were deployed to tackle the problem

[59] Gopal Subramanium, *Supreme but not Infallible* (OUP).
[60] *SR Bommai v Union of India*, (1994) 3 SCC 1.
[61] Seervai (n 6) p. 301.

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of "internal disturbance" and this was all done under federal provisions.[62] Therefore, the power to impose emergency or president's rule doesnot clearly violates the principle of federalism even in its original form and more so after the 44th Amendment and the decision of *S.R. Bommai*.[63]

Therefore, it is very clear from the above analysis, that the dual polity under the Indian Constitution can take both Unitary and Federal form as it requires.[64] However from practise it is observed that the federal principles takes precedence over the unitary ones in general and only in unique situations it is otherwise. There is no qualms that the Union enjoys a greater power, but in no way it hampers the autonomy of the States and as Dr. Rajendra Prasad observes that "call it whatever unitary or federal, but this serves our purpose"[65] and as a matter of fact it is submitted that it does serve our purpose. The analysis below will accentuate how over the course of period, the amendments to the Indian Constitution be it formal or informal, have added to our meaning of federalism and kept it a workable feature in the Indian Constitution.

III. Impact of Constitutional Amendments on Indian Federalism

Theorists of federalism all around the world have tried to shed light on the true nature of Indian Federalism. Everyone comes up with a new and different conclusion in light of new developments. In this part, moving ahead from defining the nature of Indian Federalism, the paper will look at how constitutional amendments have over the period affected the federal structure of India. These amendments are not *strictu sensu* changes in the text of the constitution, but also changes in the way they are perceived by the people by judicial decisions, government orders, ordinances to name a few. A relative account of both formal and informal changes to the federal nature of the Constitution and the Country would be of pertinent value to understand the two decisive features of the constitution which not only forms the part of the basic structure doctrine but sheds it legitimacy also.[66]

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[62] Seervai (n 6) p. 292.
[63] *SR Bommai v Union of India*, (1994) 3 SCC 1.
[64] CAD VII, 1, 33-34.
[65] Austin (n 42) p. 231.
[66] Seervai (n 6).

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a. Formal Amendments and its Changes

For the purposes of the present analysis, Table 1 (below) provides a list of twenty-two formal amendments to the Indian Constitution which has affected the federal structure of India.[67] On a quick look of Table 1 it lays before us in plain sight that most of the formal amendments to the Indian Constitution were enacted to incorporate new states within the territory of India or for making special laws for some states. The 5th Amendment of 1955 came out as the first amendment directly impacting the federal principles when Article 3 was amended to apply time limit on the State legislatures to express their views.[68] Although the views of the State legislature were not binding but applying time-limit made its opinion inconsequential in the eyes of the Union. After that from 1956-1975 for almost two decades all the amendments affecting India's federal structure were passed to incorporate either new States, make special laws for them[69] or forming legislative assemblies for them. Many States, due to ethnic unrest or fear of cultural misappropriation, were given special status and special provisions were slotted under Article 371(A-I) for them. These 'special provisions' brought front the asymmetrical elements of India Federalism.

In 1976 during the National Emergency, the 42nd Amendment was passed by the Indian Parliament. Apart from mischievously adding the words 'socialist' & 'secular' to the Preamble of Indian Constitution, the impugned amendment gave the biggest blow to the Indian Constitution. The ruins made by the amendment with respect to judicial independence and the power of the courts has been discussed in great length by legal scholars.[70] What is curious over here is to discuss its impact on the federal structure of the Country. By amending articles 353 and 358, moving beyond the Swaran Singh Committee Report, the amendment enabled the Parliament to make laws for the State under Emergency and a proviso was added to article 359 which permitted Parliament to make similar laws and enable Executive action contravening fundamental rights.[71] The present amendment gave unitary powers to the office of the President of India to disqualify members of the State Legislature. And the Office of the President was made to be acting in accordance with the Council of Ministers. In effect the Central Executive

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[67] The list of twenty-two formal amendments have been selected keeping mind its relevance from the perspective of the current paper. There are many other formal amendments to the Indian Constitution which has affected its federal structure but discussing all of them are beyond the scope of the paper. Therefore, for the present analysis the paper will be focused to the list of twenty-two amendments in Table 1.

[68] See table 1.

[69] Ibid.

[70] Granville Austin, *Working A Democratic Constitution* (OUP, 1999) New Delhi pp. 353, 371, 372, 374, 382.

[71] Ibid. p. 373.

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had the absolute power to dissolve any functioning legislation. With the opposition under arrest and the judiciary almost crippled, the amendment was nothing short of the poison injected to the body of an ailing Constitution.

After the 42nd amendment, it can be visibly seen that the Constitution was not so quickly amended. During the Khalistan Crisis in Punjab[72] where groups resorting to extra-constitutional means were terrorizing the land of Punjab, a series of Amendments were introduced to extend the President's Rule in Punjab. Similarly, the constitution was amended to make special laws for the Bodoland Territory of Assam where people resorted to extra-constitutional means and breaking the machinery in the State. This was done to give rights to the indigenous people of the State. Apart from this, the constitution was scarcely amended to affect the federal nature of the country post the 42nd amendment. Only special recognitions to States[73] and altering of territories with neighboring countries[74] saw significant amendment to the Indian Constitution for a period of almost four decades. In the year 2017, there was a substantial change in the fiscal federalism of India when the Parliament by the 101st Amendment Act introduced the Goods and Service Tax which changed the practise of revenue distribution between the Union and States.

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[72] Sisson, M, 'Sikh terrorism', in Martin, G (ed.), *The sage Encyclopedia of Terrorism* (SAGE Publication 2011).
[73] See table 1. 53rd, 56th, 69th, 90th Constitutional Amendment.
[74] Ibid. 100th Constitutional Amendment.

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Formal Amendment		
Year	Number	Purpose
1955	5th	Article 3 amended to require Presidential assent & time limit for the state legislature to express their views before presenting a bill dealing with state boundary/re-organization in either house of the Parliament.
1956	7th	States Re-organization Act to alter state boundaries on linguistic lines and introduction of Union Territories.
1961	10th	Incorporation of Dadra and Nagar Haveli.
1961	12th	Incorporation of Goa, Daman & Diu.
1963	13th	Formation of State of Nagaland under Article 371A
1962	14th	Incorporation of Pondicherry; Legislative Assemblies were formed for HP, Tripura, Manipur, Goa.
1966	18th	Introduction of UT's in Article 3 to enable its re-organization.
1969	22nd	Provision to form autonomous state within Assam.
1971	27th	Reorganization of Mizoram into UT with a legislature and Council of Ministers.
1973	31st	Increased seats in Parliament for North-Eastern states.
1974	32nd	Regional Rights of Telangana and Andhra regions of Andhra Pradesh by inserting Article 371D.
1974	36th	Formation of Sikkim as a State under 4th Schedule.
1975	37th	Formation of Arunachal Pradesh Legislative Assembly.
1975	38th	Enhanced power of President and Governor to Pass Ordinance as conclusive which cannot be challenged.
1976	42nd	Use of Central Armed Forces in States; President under Article 74 would be acting in accordance with the Council of Ministers; President empowered to disqualify members of State Legislature; curtailing Fundamental Rights etc.
1985,1990, 1990,1990	48th,64th, 67th, 68th	President's rule in Punjab in wake of the Khalistan Crisis.
1986	53rd	Article 371G introduced to elevate Mizoram as a State.
1987	56th	Article 371I introduced to incorporate Goa as a State.
1991	69th	Legislature and Council of Ministers formed for Delhi by inserting Articles 239AA & 239AB.
1992	73rd & 74th	Panchayati Raj and third tier administration for villages (Part IX, IX-A)
2003	90th	Reservation in Assam relating to Bodoland Territory by amending Article 332.
2003	91st	Restrict the size of council of ministers to 15% of legislative members
2015	100th	Exchange of enclaves with Bangladesh.
2017	101st	Introduction of GST

Table 1 – List of Formal Amendments in the Indian Constitution (for the needs of the paper)

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b. Informal Amendments and its Changes

Apart from the significant formal amendments discussed above, there are few informal amendments to the Indian Constitution which had its impact on the federal structure of the Country. The judicial opinions have been at the helm of informal amendments when it comes to provisions relating to fundamental rights and directive principles. But the same cannot be said for federal provisions of the Constitution. For the purposes of the paper, the study will be limited to reflect upon the few ways in which the informal amendment works. The first informal change brought to the Indian Constitution which impacted federalism in India are the decision of the Sup. Ct. in the cases of *State of West Bengal v. Union of India*[75] and *State of Rajasthan v. Union of India*[76]. The Supreme Court made it clear that the Constitution is although federal in its form but has a lot of unitary features which makes the federalism in India watered down. This came as a major break in the prevalent ways of understanding Indian Constitution which was otherwise held to be completely federal. However, it was yet again another judicial opinion in *S.R. Bommai v. Union of India*[77] which held that the federalism in India is not watered down.

Another example is the National Emergency declared in 1975 under article 352 of the Indian Constitution by the President's assent. It changed the way the Constitution was looked at by great lengths. The country began to be governed with an almost unitary rule. The States autonomy within their own spheres were weakened. During the 21month Emergency, 14 times President's Rule was imposed in various States.[78] It was the emergency which gave the Union the power to enact an amendment like the 42nd amendment which formally amended the Indian Constitution to deprive it of its federal features. The Emergency of 1975 altered the understanding of the Nation regarding the use and abuse of such Emergency Powers which was otherwise considered by the Constituent Assembly as a "dead letter".[79]. A domino effect took place with the Jay Prakash Narayan Movement, the Jana Sangh (right-wing political arm of Rashtriya Swayamsevak Sangh) which merged with other parties opposed to the autocratic rule of Indira Gandhi to form the Janta Party which came to power in the 1977 elections by removing Indira Gandhi and her Party. The 44th amendment brought by the Janta Party aimed to rid the Indian Constitution with the vices of the 42nd Amendment. In the following decades

[75] *State of West Bengal v Union of India*, AIR 1963 SC 1241.
[76] *State of Rajasthan v Union of India*, (1977) 3 SCC 592.
[77] *SR Bommai v Union of India*, (1994) 3 SCC 1.
[78] K. Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance*. (Kanishka Publishers: New Delhi, 2001) pp. 91-97.
[79] *Constituent Assembly Debates*, vol 9 (Lok Sabha Secretariat 1986) 177, 4 August 1949.

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of the Emergency, due to the demand of regionalization, the States have been empowered with economic and political de-centralization.[80] Therefore, the promulgation of emergency can be said to be the most serious and happening informal amendment which greatly shaped the amendment culture in the country.

With the Janta Party in the Centre, the value of federalism was for the first time realized by the Congress Ministers in the State parties. Although the Congress returned to the Centre in the 1980 election, but by 1989 the Congress dominance came to an end with greater demands of multi-party and coalition governments.[81] The demand of regionalization since then started to grow, and gave way for true federal power sharing between smaller State parties and national parties. With this growth in regionalization, India saw a shift from its usual method of State creation which was based on liguistic lines. The states of Jharkhand, Chhattisgarh and Uttarakhand, were the first States to be created on non-linguist lines due to the demands of regional parties.[82] The social movement of regional parties and history of the sufferings of the *adivasi's* resulted in formation of the States of Jharkhand and Chhattisgarh. This allowed regional groups to bargain political autonomy in form of statehood and interact with the Centre in the federal power-sharing. The entire discussion of the struggle and social movement in all these States is beyond the scope of this paper, but what is crucial here is to note that with formation of these states, it changed the way Indian federalism was conceived. It added a space of interaction for un-institutionalized subaltern politics in the otherwise institutionalized federal system of the Country.

The Sup. Ct's. decision in the case of *M.C. Mehta v. Union of India*[83] *sub-silentio* made a drastic shift in the structure of Indian Federalism. The Court directed the government to set up a board at the 'Central' level to deal with indiscriminate extraction of groundwater. It did not go into the question whether groundwater is under List I of the Seventh Schedule or residuary power so as to empower Centre to regulate its use. The court overlooked that under List II Entry 17 water is a State subject and groundwater clearly falls under it.[84] The Sup. Ct. changed the understanding of India Federalism by blurring the lines of legislative competence in the Indian Constitution. In another case, the Punjab Re-organization Act, 1966 which created the

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[80] Louise Tillin, 'Federalism and Democracy in Today's India', *Economic & Political Weekly* (2018) Vol LIII No 33 p. 49.

[81] Mahendra Prasad Singh, "Federalism, Nationalism and Multicultural Secularism in India" *Indian Journal of Federal Studies* (2012) 13 (1) p. 22.

[82] Louise Tillin, 'Questioning Borders: Social Movements, Political Parties and the Creation of New States in India', *Pacific Affairs* (2011) Vol 84 No 1 p. 67.

[83] (1997) 11 SCC 312.

[84] Kamala Sankaran 'Water in India: Constitutional Perspectives' in Ramaswamy Iyer (ed), *Water and the Laws in India* (Sage Publications 2009) p. 20.

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State of Haryana, was challenged before the Supreme Court.[85] As per Sec. 78 of the Punjab Re-organization Act, 1966 the waters of the Ravi-Beas system was allotted to Haryana by obligating Punjab under the act itself, to build a Sutlej-Yamuna Link (SYL) canal. The contention of the State of Haryana was that, Punjab was undergoing its obligation in a tardy manner and Haryana being rendered a non-riparian State which before the re-organisation was a riparian State, lost its right to raise an inter-State water dispute under the Inter-State Water Disputes Act, 1956 over the manner in which Punjab was undergoing its obligation to Haryana.[86] The court left the decision open with a question "how far is it valid for a State to question the vires of the Act under which it was created in the first place". This possibility of a riparian state to be made non-riparian by exercise of power under Articles 3&4 of the Indian Constitution highlights the anti-federal elements of the Indian Constitution which are brought by the Judicial Decisions and Legislative Acts.

All these events and instances brought significant change in the understanding of the federal principles of the Constitution. It therefore marks for an informal amendment of the Indian Constitution. It was evident how judicial decisions, presidential orders and legislative acts gave surprising results which went a long way in shaping the current federal polity of the Country. However, the story of informal amendment can never be complete without discussing the de-operationalizing of the most controversial article of the Indian Constitution being Article 370 which gave special status to the State of Jammu & Kashmir without even formally amending the Constitution. The succeeding section will briefly discuss the implications of the decommissioning of Article 370 and what are the federal hurdles if the traditional formal way was taken.

[85] *State of Haryana v. State of Punjab*, (2004) 12 SCC 673.
[86] Kamala Sankaran (n 84) p. 28.

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Informal Changes to the Indian Constitution	
YEAR	CHANGE
1963, 1967	The decision of *State of West Bengal v Union of India*, AIR 1963 SC 1241, *State of Rajasthan v Union of India*, (1977) 3 SCC 592, holding that Indian Federalism is watered down.
1975	Promulgation of Emergency u/a 352.
1997	The decision of *M.C. Mehta v. Union of India* (1997) 11 SCC 312 giving Right of Water to Union.
1994	The decision of *S.R. Bommai v. Union of India.*
2000	Formation of Jharkhand, Chhattisgarh and Uttarakhand on non-linguistic lines.
2004	The case of *State of Haryana v. State of Punjab* on riparian right of Haryana.
2019	Presidential Order de-commissioning the operation of Article 370

Table 2 – List of Informal Amendments in the Indian Constitution (for the needs of the paper)

c. Abrogation of Article 370

Article 370 has been the most debated and controversial article for the *demos* of India. It gave special powers and status to the State of Jammu & Kashmir as per the terms of Maharaja Hari Singh's Instrument of Accession. Article 370 reflected the same promise of the Indian sub-continent to the valley of Jammu & Kashmir. Within four months of coming to power again with even strong majority, the Narendra Modi government in August 2019 brought about a tectonic shift in the status of Jammu & Kashmir. The President of India de-commissioned the operation of Article 370 thereby stripping off the special privileges enjoyed by the State. Secondly, the Parliament of India simultaneously passed an Act bifurcating the State into two Union Territories of Ladakh and Jammu & Kashmir. Article 370 was not directly amended by an Amendment Act, rather Presidential Order changed the meaning of the word 'Constituent Assembly of Jammu and Kashmir' to Legislative Assembly of Jammu & Kashmir by amending the interpretation clause under Article 367.[87]

[87] The Constitution (Application To Jammu And Kashmir) Order, 2019, C.O. 272. "*To article 367, there shall be added the following clause, namely:—(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir - (b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir; (c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers;*

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The intriguing fact of this event is that though Article 370 has been decommissioned, it still remains in the Constitution, but its effect has been thoroughly negated. It can be operationalized with any successive Presidential Order regarding the same. So, it is pertinent to ask, what threatened the super-majority party (BJP) in the Parliament to bring a formal amendment act and remove Article 370 totally which has been in the BJP's manifesto almost since the Party's inception. Article 370 is the hallmark of the federal feature during the moment of constitutional foundation which respected the Accession of Princely States into the Union of India as Sovereigns. The powers under Article 3 of the Constitution could be seen to be used by the Parliament not to merely alter State boundaries but extinguish a State altogether. It made explicit what was implicitly commented by the Sup. Ct. that Parliament has the power to extinguish a state[88] and that India is an indestructible Union made up of destructible units[89]. The opinion of the *demos* in the State although no binding was not even sought by the Parliament in this case. This made the State's opinion totally otiose. These changes brought dangerous precedents in the constitutional history of the Country. Parliament dodged the whole federalism debate by firing shots from the President's shoulder. Article 370 was a part of Indian Federalism as it laid power sharing terms between a Centre and a State. A formal amendment would drive a knife right at the heart of the federal principle of the Constitution and carried the chance to be invalidated by the Supreme Court of India. Be as it may, but the whole step was applauded by a majority of the people in the Country. May be over the time, Article 370 lost its purpose and became a spooking needle for other states due to the asymmetry in power sharing it introduced.

Based on the above account it may not be erroneous to hold that maybe India is progressing towards an accelerated amendment culture with the only difference being that the amendments are informal ones rather than being formal.

and (d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State"."

[88] *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1, p. 71.

[89] *Raja Ram Pal v. Hon'ble Speaker (Lok Sabha)*, (2007) 3 SCC 184, p. 27.

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IV. THE NECESSITY OF CONSTITUTIONAL AMENDMENTS

Federalism in India is a complex web of Formal Constitutional Amendments, Acts of Parliament, Informal Changes by Ordinances, Government Orders, Presidential Orders, Judicial Opinions and at times by the voices of We the People of the Society. Federalism of India is therefore always in a flux. A study of the few informal amendments has shown how judicial opinions and Presidential Orders have changed the fate and understanding of federalism in the country. India has dominant federal principles, but the asymmetries invite unitary measures at regular intervals of time. These formal and informal amendments either adds or subtracts to our understanding of federalism. From the analysis of Table 1 we saw that formal amendments in initial decades of the coming into existence of the Constitution, helped mainly to resolve the issues regarding boundary and representation of various States. Informal Changes on the other hand helped to clarify on the width, scope and use of powers by the Federal and State legislatures. The study showed us that most changes for incorporation of new states or making special provisions for states, required formal amendments. Most of these amendments were a result to satisfy extraconstitutional demands of the people in the state. States like Andhra Pradesh secured special rights for the Telangana area under Article 371D due to unrest and agitation in parts of the State territory. This new article also went on to become the ground or bifurcation of Andhra Pradesh into Telangana and Andhra Pradesh. Also, the Presidents Rule in Punjab required an amendment to the constitution four times while none other State ever required a formal amendment to the constitution for imposing President's rule. This was done in response to the Khalistan movement and extra constitutional ways to subvert or subdue the regime. In the first fifty years of the coming into existence of the Constitution, we can see that the Parliament was not hesitant to amend the constitution when the matter was that of state boundaries. However later it is found that the judicial opinions took precedence to explain the scope and with of Parliamentary and State powers regarding Federalism in the Constitution. The states of Jharkhand, Chhattisgarh and Uttarakhand were created as new states on non-linguistic and regional grounds. However, no formal amendment was introduced to secure marginalized community in these states unlike the case of other states under Article 371. This shows, that earlier in India there was an 'Accelerated' amendment culture. However, the study of constitutional amendments helped us understand that the accelerated amendment culture in the country metamorphosed into a 'Redirection Culture' where informal changes took precedence in absence of flexible rules of amendment. The acceleration if at all present is towards informal amendments only. Also, the constitution in the country is gaining high reverence between representative leaders and masses, and we are thus moving towards an

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amendment culture as 'Incapacitation' where despite flexible rules of amendment, there is an ache to amend the constitution.

The purpose of this article was to show how amendments, and more particularly, the informal amendments play an important role in shaping our understanding of the constitutional idea of federalism. It also attempted to show how constitutional ideas like that of federalism affects the amendment culture of the country. By studying the evolution of Federalism in different power chambers of the Democracy, it was evident how institutionally complex is the idea of Federalism. As it was seen, many formal amendments regarding state boundaries were preceded by some agitation or unrest by the people in the State. There are larger and smaller interest groups who together aim to have a share in the power sharing federal polity, and therefore clear 'rules' are desired. For that formal amendments can never be ignored. Whether it is with regards to international borders[90] or overhauling changes in tax regime[91], for evolution of new 'rules', formal amendments are always the way ahead for the certainty it brings in the legal system. Whereas, informal amendments help us build 'principles' in furtherance of the rules so evolved. They go a long way in understanding the implications of those rules and applying those rules to the day to day governance. However, from the study it is clear that these informal amendments often bring 'tectonic shifts' from the usual understanding of federalism. It is clear from the study that constitutional amendments play a dynamic role in shaping the constitutional ideals and more particularly federalism which supports the India Democracy.[92] Federalism in India therefore forms the defining moment of Indian Constitutional history. And regular amendments whether by formal or informal means play a crucial in operating to the life of federalism in India vis-à-vis the Indian Constitution by adapting it with changing times, political climate, civil unrest and social demands through various power nodes of the democracy.

[90] See table 1. 100th Constitutional Amendment.
[91] See table 1. 101st Constitutional Amendment.
[92] Louise Tillin, 'Federalism and Democracy in Today's India', *Economic & Political Weekly* (2018) Vol LIII No 33 p. 49.

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