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Concept - Provision related to Emergency  
under Constitution of India

# AMENDMENT U/ Article 368

**INTRODUCTION-** The Constitution Of India declares India into a 'Sovereign, Socialist, Secular, Democratic, Republic' country. The Constitution of India was passed by the constituent assembly on 26 November 1949. The Constitution of India is considered as the longest written Constitution has 395 Articles and 12 Schedules. A Constitution should be dynamic in nature and should be able to adapt itself to the changing needs of society. As due to the sudden change in the society, the Constitution and the pattern of government will require a major change. Article 368 of the Indian Constitution provides the procedure of Amendment. Indian Constitution is neither rigid nor flexible because, under Article 368, the Constitution can be amended by a simple majority or by the special majority and by the majority of not less than 2/3 members of each house.

There are two types of Amendment procedures

- **Rigid** - Under this procedure, it is difficult to amend the Constitution. This procedure is used by the U.S., Australia, Canada, and Switzerland.
- **Flexible** - Under this procedure, it is easy to amend the Constitution. The Amendment can be done by passing normal legislation.

Indian Constitution is both rigid as well as flexible i.e. it is difficult to amend but practically flexible. As per Article 368 of the Indian Constitution, an Amendment can be introduced in either of the houses, later it can be passed by a special majority or by a simple majority. Later if the bill is passed by the majority it will be sent to the president for his assent.

## **Necessity of Amendment-**

The time is not static, it goes on changing. It is necessary to make changes in the Constitution. The social, economic, political condition of the people goes on changing. If the changes were not done in the Constitution we would be unable to encounter the future difficulties and it will become a hurdle in the path of development.

## **CATEGORIES OF AMENDMENT-**

**1. Amendment by Simple Majority-** Certain Articles of the Constitution can be amended by simple majority. Article 368 does not deal with this category of amendment. The following provisions require amendment by simple majority:

- Citizenship
- Abolition or creation of Legislative Councils in States
- Creation of Local Legislatures or Council of Ministers or both for certain Union Territories
- Admission or establishment of new states
- Use of English language in the Parliament
- Quorum of the Parliament
- Rules of procedure in the Parliament
- Delimitation of Constituencies
- Fifth schedule
- Sixth schedule, etc.

## **2. Amendment by Special Majority-**

Articles which require amendment by special majority come under the ambit of Article 368. The Articles which require amendment by special majority shall be brought into effect by a majority of the total members of each House of the Parliament and by majority of not less than  $\frac{2}{3}$  of the members of that House who are present and voting.

The impeachment of the President under Article 61

Approval of national emergency, etc. comes under this category.

The Provisions which cannot be amended by Simple Majority and which do not require Ratification by States are amended by Special Majority.

## **3. Amendment by Special Majority and Ratification by States**

Some Articles require Amendment by Special Majority as well as ratification by not less than  $\frac{1}{2}$  of the State Legislatures. The States have an important role in the amendments of these matters. The following provisions require ratification by the States:

- Election of President – Articles 54, Article 55
- Extent of Executive powers of the Union and States – Article 73, Article 162
- Articles dealing with Judiciary, Supreme Court, High Court in the States and Union Territories – Articles 124 to 147, Article 214 to 231, Article 241
- Distribution of Legislative powers between the Centre and the State – Article 245 to Article 255
- Any of the Lists of Seventh Schedule
- Representation of States in Parliament Forth Schedule
- Article 368 (Amendment)

## Procedure for Amendment

A Bill in order to amend the Constitution may be introduced by any House of the Parliament and must be passed by each House by a majority of the total membership of that House and by a majority of not less than 2/3 of the members of that House who are present and are voting. After being passed by both the Houses, it shall be presented to the President and he shall give his assent to the Bill. In this process the Constitution is amended.

## Amendment of Fundamental Rights

□ In [Shankari Prasad v. Union of India](#)

In this case, for the very first time question was raised on the Amendment of fundamental rights i.e. whether the FR can be amended under Article 368 or not. In this case the validity of the First Amendment through which Article 31A and 31B were added in the Constitution. The five judges bench stated that Article 368 provides general and strict power to the parliament to amend the Constitution by following proper procedure.

□ In [Sajjan Singh v. the State of Rajasthan](#)

In this case, the validity of the Seventeenth Amendment was challenged. The question raised was that the seventeenth Amendment puts a limit on the jurisdiction of the High Court and therefore rectified. However, the court disposed of the contention. But choose to deal with the 2nd contention i.e. the reconsideration of Shankari Prasad case, the court stated that, even if the Article 368 does not expressly declares the power of parliament regarding Amendment of FR, the parliament could by a suitable Amendment assume those powers.

□ In [Golaknath v. the State of Punjab](#)

In this case, the validity of first, Seventeenth, and fourth Amendment were challenged. This time from the eleven judges bench, the majority of six judges decided that the parliament has no power to amend part 3 of the Constitution. On the other hand, the court considered that the parliament has a duty to correct the errors in the law, therefore adopted the doctrine of prospective overruling through which the 3 Amendments discussed were continued to be valid but in future, the parliament has no power to amend the part III of the Constitution.

□ After the judgment of Supreme Court in Golaknath case the 24th Amendment was passed in 1971, and made a change in Article 13 and 368:

A new clause added in Article 13 which says; nothing in this Article apply to Amendment in the Constitution under Article 368.

□ **New clauses were added in Article 368:**

A new heading was introduced as; **Parliament's power to amend the Constitution.**

Parliament may change, add, repeal any provision of this Constitution in accordance with the procedure provided.

□ In [Kesavananda Bharati v. State of Kerala](#)

This case was considered as the historical landmark case, where for the first-time Supreme Court recognized the basic structure concept. In this case, the validity of the 25th Amendment was challenged with the 24th and 29th Amendment was also questioned. The court by majority overruled the judgment of Golaknath case. It was held that even before the 24th Amendment the parliament has the limited power to amend the Constitution by following the proper procedure. The Supreme Court also declared that Article 368 of the Constitution does not allow the parliament to change, damage the basic structure of the Constitution. This landmark judgment changes the history of the Constitution.

□ In [Indira Nehru Gandhi v. Raj Narayan](#)

Under this case, once again the basic structure concept was reaffirmed. The Supreme Court applied the same theory and struck down the 4th clause of Article 329 A on the ground that the Amendment is beyond the power of the parliament and it destroyed the basic structure of the Constitution. The Amendment was made regarding the jurisdiction of all courts including the Supreme Court, regarding the dispute of an election of the Prime Minister of India.

□ 42nd Amendment

Immediately after the decision of the Supreme court in Kesavanada Bharti and Indira Gandhi case, the parliament introduced the 42nd Amendment and added the word secular and socialist in the preamble and add clause 4 and 5 to the Article 368 of the Constitution. It indirectly declares that there is no limitation on the power of the parliament regarding the Amendment.

Even after the judgment of the supreme court, the parliament has the unrestricted power to change or repeal any part of the Constitution. Thus this Amendment creates a question regarding the supremacy i.e. who is supreme Parliament or Supreme Court? Through this Amendment, the parliament declared the concept of basic structure invented by the supreme court is vague and unlawful.

□ In [Minerva Mills v. Union of India](#)

In this case, the validity of the 42nd Amendment was challenged, as it destroyed the basic structure of the Constitution and regarding clause 4 and 5 of Article 368. The Supreme Court by majority struck down the Clauses added by the 42nd Amendment and stated that the limited power of the parliament is in the basic structure itself.

□ In [L. Chandra Kumar v. Union of India](#)

Under this case, the validity of the Article 323A and 323B was challenged, both deals with the exclusion of the High Court under Article 226 and 227 and the Supreme Court under Article 32 was inserted by the 42nd Amendment. The SC, in this case, declared both the provisions unconstitutional and held that the power of judicial review under Article 226, 227, and 32 were given by the basic structure and the parliament has no power to amend that.

## Evaluation of the various Judgments of Supreme Court

The Supreme Court through Golaknath, Kesavanada Bharti, Indira Gandhi and various other cases tried to put an implied limitation on the amending powers of the parliament, if we summarize the judgments of all the cases discussed in this Article, the court always tries to pressurize on few things that are:

- Parliament has limited power to amend the Constitution.
- The parliament cannot damage the basic structure of the Constitution
- Article 368 does not provide the power to the parliament regarding the Amendment in Part III of the Constitution.
- The Parliament by amending Article 368 cannot increase its Amendment powers.

## Conclusion

Article 368 of the Indian Constitution provides the procedure of Amendment. Indian Constitution is neither rigid nor flexible because under Article 368 the Constitution can be amended by a simple majority or by the special majority and by the majority of not less than 2/3 members of each house. Indian Constitution is both rigid as well as flexible i.e. it is difficult to amend but practically flexible. As per Article 368 of Indian Constitution, an Amendment can be introduced in either of the houses, later it can be passed by a special majority or by a simple majority. Later if the bill is passed by the majority it will be sent to the President for his assent. In 69 years of the Constitution, 103 Amendments are already done.

The 42nd Amendment is considered as the mini-Constitution, the terms socialist, secular, integrity was inserted through it. The First Amendment was done in the year 1950, itself.

**However**, in my views, the court by giving the judgments tries to increase their powers and put express limitations on the parliament. The Article 368 is silent on the matter whether the parliament has the power to amend the basic structure or not, but that also does not mean that the Article 368 put the limitation regarding the Amendment of basic structure as well as Part III of the Constitution.

Immediately after the decision of the Supreme court in Kesavanada Bharti and Indira Gandhi case, the parliament introduced the 42nd Amendment and added the word secular and socialist in the preamble and added clause 4 and 5 to the Article 368 of the Constitution. It indirectly declares that there is no limitation in the power of the parliament regarding the Amendment. Even after the judgment of the Supreme Court, the parliament has the unrestricted power to change or repeal any part of the Constitution. Thus this Amendment creates a question regarding the supremacy i.e. who is supreme Parliament or Supreme Court? Through this Amendment, the parliament declared the concept of basic structure invented by the Supreme Court is vague and unlawful.

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