

## Chapter - 10

### AMENDMENT OF THE CONSTITUTION

Like any other written Constitution, the Constitution of India also provides for its amendment in order to adjust itself to the changing conditions and needs. However, the procedure laid down for its amendment is neither as easy as in Britain nor as difficult as in USA.

Article 368 in Part XX of the Constitution deals with the powers of Parliament to amend the Constitution and its procedure.

#### PROCEDURE FOR AMENDMENT

The procedure for the amendment of the Constitution as laid down in Article 368 is as follows :

1. An amendment of the Constitution can be initiated only by the introduction of a bill for the purpose in either House of Parliament and not in the state legislatures.
2. The bill can be introduced either by a minister or by a private member and does not require prior permission of the president.
3. The bill must be passed in each House by a special majority, that is, a majority (that is, more than 50 per cent) of the total membership of the House and a majority of two-thirds of the members of the House present and voting.
4. Each House must pass the bill separately. In case of a disagreement between the two Houses, there is no provision for holding a joint sitting of the two Houses for the purpose of deliberation and passage of the bill.
5. If the bill seeks to amend the federal provisions of the Constitution, it must also be ratified by the legislatures of half of the states by a simple majority, that is, a majority of the members of the House present and voting.
6. After duly passed by both the Houses of Parliament and ratified by the state legislatures, where necessary, the bill is presented to the president for assent.
7. The president must give his assent to the bill. He can neither withhold his assent to the bill nor return the bill for reconsideration of the Parliament.
8. After the president's assent, the bill becomes an Act (i.e., a constitutional amendment act) and the Constitution stands amended in accordance with the terms of the Act.

#### TYPES OF AMENDMENTS

Article 368 provides for two types of amendments, that is, by a special majority of Parliament and also through the ratification of half of the states by a simple majority. But, some other articles provide for the amendment of certain provisions of the Constitution by a simple majority of Parliament, that is, a majority of the members of each House present and voting (similar to the ordinary legislative process). Notably, these amendments are not deemed to be amendments of the Constitution for the purposes of Article 368.

Therefore, the Constitution can be amended in three ways:

- (a) Amendment by simple majority of the Parliament,
- (b) Amendment by special majority of the Parliament, and
- (c) Amendment by special majority of the Parliament and the ratification of half of the state legislatures.

#### **By Simple Majority of Parliament**

A number of provisions in the Constitution can be amended by a simple majority of the two Houses of Parliament outside the scope of Article 368. These provisions include:

1. Admission or establishment of new states.
2. Formation of new states and alteration of areas, boundaries or names of existing states.
3. Abolition or creation of legislative councils in states.
4. Second Schedule—emoluments, allowances, privileges and so on of the president, the governors, the Speakers, judges, etc.
5. Quorum in Parliament.
6. Salaries and allowances of the members of Parliament.
7. Rules of procedure in Parliament.
8. Privileges of the Parliament, its members and its committees.
9. Use of English language in Parliament.
10. Number of puisne judges in the Supreme Court.
11. Conferment of more jurisdiction on the Supreme Court.
12. Use of official language.
13. Citizenship—acquisition and termination.
14. Elections to Parliament and state legislatures.
15. Delimitation of constituencies.
16. Union territories.
17. Fifth Schedule—administration of scheduled areas and scheduled tribes.
18. Sixth Schedule—administration of tribal areas.

#### **By Special Majority of Parliament**

The majority of the provisions in the Constitution need to be amended by a special majority of the Parliament, that is, a majority (that is, more than 50 per cent) of the total membership of each House and a majority of two-thirds of the members of each House present and voting. The expression 'total membership' means the total number of members comprising the House irrespective of fact whether there are vacancies or absentees.

'Strictly speaking, the special majority is required only for voting at the third reading stage of the bill but by way of abundant caution the requirement for special majority has been provided for in the rules of the Houses in respect of all the effective stages of the bill'.

The provisions which can be amended by this way includes: (i) Fundamental Rights; (ii) Directive Principles of State Policy; and (iii) All other provisions which are not covered by the first and third categories.

#### **By Special Majority of Parliament and Consent of States**

Those provisions of the Constitution which are related to the federal structure of the polity can be amended by a special majority of the Parliament and also with the consent of half of the state legislatures by a simple majority. If one or some or all the remaining states take no action on the bill, it does not matter; the moment half of the states give their consent, the formality is completed. There is no time limit within which the states should give their consent to the bill.

The following provisions can be amended in this way:

1. Election of the President and its manner.
2. Extent of the executive power of the Union and the states.
3. Supreme Court and high courts.
4. Distribution of legislative powers between the Union and the states.
5. Any of the lists in the Seventh Schedule.

6. Representation of states in Parliament.
7. Power of Parliament to amend the Constitution and its procedure (Article 368 itself).

### **AMENDABILITY OF FUNDAMENTAL RIGHTS**

The question whether Fundamental Rights can be amended by the Parliament under Article 368 came for consideration of the Supreme Court within a year of Constitution coming into force. In the *Shankari Prasad* case (1951), the constitutional validity of the First Amendment Act (1951), which curtailed the right to property, was challenged. The Supreme Court ruled that the power of the Parliament to amend the Constitution under Article 368 also includes the power to amend Fundamental Rights. The word 'law' in Article 13 includes only ordinary laws and not the constitutional amendment acts (constituent laws). Therefore, the Parliament can abridge or take away any of the Fundamental Rights by enacting a constitutional amendment act and such a law will not be void under Article 13.

But in the *Golak Nath* case (1967), the Supreme Court reversed its earlier stand. In that case, the constitutional validity of the Seventh Amendment Act, which inserted certain state acts in the Ninth Schedule, was challenged. The Supreme Court ruled that the Fundamental Rights are given a 'transcendental and immutable' position and hence, the Parliament cannot abridge or take away any of the Fundamental Rights. A constitutional amendment act is also a law within the meaning of Article 13 and hence, would be void for violating any of the Fundamental Rights.

The Parliament reacted to the Supreme Court's judgement in the *Golak Nath* case (1967) by enacting the 24th Amendment Act (1971). This Act amended Articles 13 and 368. It declared that the Parliament has the power to abridge or take away any of the Fundamental Rights under Article 368 and such an act will not be a law under the meaning of Article 13.

However, in the *Kesavananda Bharati* case (1973), the Supreme Court overruled its judgement in the *Golak Nath* case (1967). It upheld the validity of the 24th Amendment Act (1971) and stated that Parliament is empowered to abridge or take away any of the Fundamental Rights. At the same time, it laid down a new doctrine of the 'basic structure' (or 'basic features') of the Constitution. It ruled that the constituent power of Parliament under Article 368 does not enable it to alter the 'basic structure' of the Constitution. This means that the Parliament cannot abridge or take away a Fundamental Right that forms a part of the 'basic structure' of the Constitution.

Again, the Parliament reacted to this judicially innovated doctrine of 'basic structure' by enacting the 42nd Amendment Act (1976). This Act amended Article 368 and declared that there is no limitation on the constituent power of Parliament and no amendment can be questioned in any court on any ground including the contravention of any of the fundamental rights.

However, the Supreme Court in the *Minerva Mills* case (1980) invalidated this provision as it excludes judicial review which is a 'basic feature' of the Constitution. Again in the *Waman Rao* case (1981), the Supreme Court adhered to the doctrine of the 'basic structure' and further clarified that it would apply to constitutional amendments enacted after April 24, 1973 (i.e., the date of the judgement in the *Kesavananda Bharati* case).

### **INGREDIENTS OF THE 'BASIC STRUCTURE'**

The present position is that the Parliament under Article 368 can amend any part of the Constitution including the Fundamental Rights but without affecting the 'basic structure' of the Constitution. However, the Supreme Court is yet to define or clarify as to what constitutes the 'basic structure' of the Constitution. From the various judgements, the following have emerged as 'basic features' of the Constitution:

1. Supremacy of the Constitution.
2. Sovereign, democratic and republican nature of the Indian polity.
3. Secular character of the Constitution.

4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.
6. Unity and integrity of the nation.
7. Welfare state (socio-economic justice).
8. Judicial review.
9. Freedom and dignity of the individual.
10. Parliamentary system.
11. Rule of law.
12. Harmony and balance between Fundamental Rights and Directive Principles.
13. Principle of equality.
14. Free and fair elections.
15. Independence of Judiciary.
16. Limited power of Parliament to amend the Constitution.
17. Effective access to justice.
18. Reasonableness.

