

Amendment of the constitution part XX, [Article368]

- Article 368 describes the **procedure and power of Parliament** to amend the constitution
- **Procedure of amendment:** The bill to amend the constitution can be introduced before **any house of the Parliament**. When this bill is passed by majority of total number of members of each house [that is more than 50%] and at least two third majority of the members present and voting, then the bill is presented before the Presidents who will be bound to give his/ her assent for the same[24th CAA]. After the approval of president on the bill, the constitution will be amended
- **Types for the amendment**
 1. **Amendment by simple majority-** article 4, 162 and 239-A list in this category. The simple majority of parliament is sufficient for amendment in these provisions. **These articles are excluded from purview of Article 368**
 - ✓ 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:
 - ✓ Admission or establishment of new states.
 - ✓ Formation of new states and alteration of areas, boundaries or names of existing states.
 - ✓ Abolition or creation of legislative councils in states.
 - ✓ Second Schedule- emoluments,
 - ✓ Allowances, privileges and so on of the president, the governors, the Speakers, judges, etc.
 - ✓ Quorum in Parliament.
 - ✓ Salaries and allowances of the members of Parliament.
 - ✓ Rules of procedure in Parliament.
 - ✓ Privileges of the Parliament, its members and its committees.

- ✓ Use of the English language in Parliament.
- ✓ Number of puisne judges in the Supreme Court.
- ✓ Conferment of more jurisdictions on the Supreme Court.
- ✓ Citizenship-acquisition and termination.
- ✓ Elections to Parliament and state legislatures.
- ✓ Delimitation of constituencies.
- ✓ Union territories
- ✓ Fifth Schedule-administration of scheduled areas and scheduled tribes.
- ✓ Sixth Schedule-administration of tribal areas.

2. Amendment by special majority

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 percent) 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 the fact whether there are vacancies or absentees.

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 the 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 include

- (i) Fundamental Rights;
- (ii) Directive Principles of State Policy; and
- (iii) All other provisions which are not covered by the first and third categories.

3. **Special majority and ratification by States-** which are basis a **federal structure** are included in this category. These are vital matters states have important powers and any unilateral amendment May adversely affect the interest of States. For incorporating amendments in these provisions, special majority of each house of parliament as well as ratification by not less than **1/2 States is required.**

- Following provisions require such ratification
 1. Election of president[article 54, 55]
 2. Extent of executive powers of union and state[article 73, 162, 241, 279 A]
 3. Articles dealing with union and state judiciary[article 124- 147, 214- 231, 241]
 4. Distribution of legislative powers between union and state[article 245- 255]
 5. Goods and service tax council[article 279 a][instead by 101 amendment act 2016]
 6. Representation of states in parliament[Schedule IV]
 7. Any of the list of seventh schedule; or
 8. Article 368 itself

- 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 (Lok Sabha & Rajya Sabha) 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.

5. 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.
6. 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.
7. 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.
8. 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
9. 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.

Can fundamental rights be amended?

- Yes fundamental rights can be amended by parliament in exercise of powers conferred under Article 368 subject to basic structure of the constitution.
- In **Sankari Prasad vs. Union of India 1951** the Supreme Court held that power to amend the constitution including the fundamental rights is contained in Article 368 and the word law in article 13[2] includes only an ordinary law made in exercise of legislative power and does not include the constitutional amendment which is made in exercise of power. The Constitutional Amendment will be valid even if it abridges or takes away any fundamental rights.
- Subsequently in **Sajjan Singh vs. State of Rajasthan 1965** Supreme Court approved the majority judgment in Sankari Prasad case and held that amendment of the Constitution means amendment of all parts of the constitution
- In **Golaknath vs. State of Punjab** Supreme Court prospectively overruled its earlier *Sankari Prasad case* and *Sajjan Singh case*. The court held that Parliament had no power from the date of decision, to amend part 3 of the Constitution so as to take away or abridge fundamental rights.

- The court observed that the amendment is 'law' within the meaning of article 13[2] and therefore if it violates any of the fundamental rights it may be declared void. The word law under article 13[2] includes the statutory as well as constitutional law. The court further held that Article 368 only deals with procedure to amend the constitution and the power to amend the Constitution is derived from article 245
- **24th Constitutional Amendment Act 1971:** to overcome the difficulties resulting from *Golaknath's* decision Parliament passed 24th Constitutional Amendment Act 1971
- It added clause 4 to article 13 which provided that nothing in this article shall apply to any amendment of this constitution made under Article 368
- It amended Article 368 of the constitution and provided that Parliament May in exercise of its constituent power may amend, vary or repeal any part of the constitution. **It also made mandatory for the President to give his assent to the Constitutional Amendment Bill.**
- **24th Constitutional Amendment** not only restored the amending power of the Parliament but also extended its scope
- The validity of 24th Constitutional Amendment was challenged in the case of **Kesavananda Bharati vs State of Kerala 1973** the supreme court in this case overruled *Golaknath case*. The court upheld validity of 24th Constitutional Amendment and observed that Article 368 contains the power and procedure to amend the constitution even prior to 24th amendment
- The court however said that Article 368 does not empower the Parliament to amend the constitution so as to damage or destroy the basic structure of the constitution
- **42nd Constitutional Amendment Act 1976:** to nullify the effect of *KeshavNandan Bharti case* **clause 4 and 5** were inserted to Article 368 by 42nd Constitutional Amendment Act 1976
- [clause 4] provided that amendment of the Constitution will not be called in question in any Court and [clause 5] provided that there shall be no limitations on constituent power of Parliament to amend any part of the constitution.

- In **Minerva Mills vs. Union of India 1980** the Supreme Court struck down clause 4 and 5 of the Article 368 of the on the ground that it destroys basic structure of the Constitution as is **limited amending powers** is itself a part basic structure of the constitution.
- The Supreme Court in **IR Coelho versus state of Tamil Nadu 2007** held that any law laid under the **ninth schedule of the Constitution** after **April 24th 1974** would be open to challenge in court of law on the ground that it destroys the basic structure of the constitution.