BLOGS

Notes on Article 368 of the Indian Constitution

Indrasish Majumder · 03 Jul 2023

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Introduction

Part XX provides for amendments to the Constitution. **Article 368** provides for the power of the Parliament to amend the Constitution. The amending power of Parliament is not unlimited. It is subject to certain limitations imposed by the Constitution itself. The Parliament cannot amend the Constitution in a way that alters the basic structure or fundamental principles of the Constitution.

Amendments under the Indian Constitution

Amendments can be made by Parliament following specific procedures. There are two types of amendments: those requiring a **simple majority** and those requiring a **special majority**.

Simple majority amendments require more than 50% of the members present and voting in both Houses of Parliament. Special majority amendments need a majority of the total membership of each House of Parliament and a two-thirds majority of the members present and voting.

Some amendments also require the ratification of at least half of the state legislatures. Amendments can be introduced as ordinary bills or special majority bills depending on the type of majority required. Ordinary bills can be passed by a simple majority and can be introduced in either House of Parliament. Special majority bills require a two-thirds majority in each House and need to be passed separately by both Houses of Parliament.

After passing Parliament, the amendment bill is sent to the President for assent. The President must give assent to the amendment bill and cannot withhold it. The power of judicial review

allows the Supreme Court to examine the validity of constitutional amendments. The Supreme Court can declare an amendment invalid if it violates the basic structure of the Constitution.

Article 368 of the Indian Constitution

The article lays down the authority of Parliament to modify the constitution and the corresponding process. The inclusion of a provision for amending the Constitution was intended to address potential challenges that may arise in the future with respect to the functioning of the Constitution as per the needs of society. The process of amendment is characterized by a moderate level of complexity. The amendment of the constitution can be carried out through three distinct procedures.

Amendment by Simple Majority (more than 50%)

The proposed manner of amendment suggests that articles of the Constitution can be modified by Parliament through a simple majority vote, equivalent to the passing of an ordinary law.

The aforementioned articles comprise:

- Article 5, which pertains to citizenship,
- Admission for establishment of new states, formation of news states, alteration of boundaries, names of existing states.
- The abolition of the creation of Legislative councils in a state is stipulated in Article 69,
- The creation of local legislatures for the Council of Ministers or both for union territory is provided for in Article 239A.

Amendment by Special Majority

All constitutional amendments, excluding those mentioned previously, fall under this classification and require approval from a majority of the entire membership of each parliamentary house, as well as a majority of no less than two-thirds of the members present and voting in that house. DPSP (Part IV) and Fundamental Rights (Part III) are two important provisions that can be changed by way of special majority.

Amendment by Special Majority and Ratification by States

Certain amendments to the Constitution require a special majority, which means they need to be passed by both Houses of Parliament with a majority of the total membership and a two-thirds majority of the members present and voting.

Some articles that require a special majority to be amended are:

- The process of electing the president as outlined in Articles 54 and 55.
- The scope of executive authority vested in the Union and state governments as delineated in Articles 73 and 162 of the Indian Constitution
- Articles pertaining to the Judiciary, specifically the Supreme Court (124–147), the High Court in the states (214–231), and the union territories (241)
- The allocation of legislative powers between the central government and state governments Specifically, in Articles 245 through 255
- Any item listed in the Seventh Schedule of the Constitution
- The representation of states in the Parliament as stipulated in Article IV
- Article 368

Amendment of a Fundamental Right

- The issue of whether it is possible to amend fundamental rights under Article 368 was brought before the Supreme Court in 1951 in the case of Shankari Prasad v. Union of India. The present case pertains to the challenge against the legitimacy of the initial (first) Constitutional Amendment Act that introduced Articles 31A and 31B. The basis of the challenge is that the aforementioned amendment abrogates the rights granted under Part III of the Constitution. As per the ruling of the Supreme Court, the authority to modify the constitution under Article 368 encompasses a fundamental right. Additionally, the term “law” mentioned in Article 13, clause 2, pertains solely to an ordinary law and not a constitutional amendment.
- The case of Sajjan Singh versus the State of Rajasthan in 1965 involved a challenge to the constitutional validity of the 17th Amendment Act of 1964. The Supreme Court upheld the decision rendered in the Shankari Prasad case.
- The case of Golaknath versus State of Punjab in 1971 once again involved a challenge to the constitutionality of the 17th Amendment Act, which had introduced specific state acts into the ninth schedule. The Supreme Court, in a reversal of its previous rulings in the Shankari Prasad

and Sajjan Singh cases, determined that the Parliament lacks the authority to curtail or revoke the fundamental rights of citizens. The application of the doctrine of prospective overruling by the Supreme Court resulted in a ruling that restricted the decision's effect to future cases only. The court asserted that Article 13, clause 2's definition of a law applies to constitutional amendments. In the event that an amendment contravenes any of the fundamental rights, the court is empowered to nullify said amendment.

The 24th Amendment Act of 1971

Parliament introduced the 24th Amendment Act to address the challenges arising from the Supreme Court's ruling in the Golaknath case. This amendment included the addition of clause 4 to Article 13, which stipulates that an amendment does not constitute a law.

- The constitutional validity of the 24th Amendment Act was contested in the landmark 1973 case of Kesavananda Bharati v. State of Kerala, which is commonly referred to as the Fundamental Rights case.
- The Supreme Court has ruled that Parliament possesses complete authority to modify any provision of the Constitution, including Part III. However, it lacks the authority to alter the fundamental features or structure of the Constitution.

The judges in this case identified certain basic characteristics integral to the constitution, namely:

- The principle of constitutional supremacy is of paramount importance in ensuring the rule of law and upholding the fundamental values enshrined in a nation's constitution.
- A republican, democratic, and secular form of government is essential for promoting the principles of equality, liberty, and justice for all citizens.
- The concept of separation of power is a fundamental principle in governance that seeks to distribute the functions of government among distinct branches, namely the executive, legislative, and judicial arms, to prevent the concentration of power in any one branch.
- The federal character of the constitution refers to the structural arrangement of a political system that recognises the existence of multiple levels of government, with each level possessing a degree of autonomy and authority over its respective jurisdiction.
- The rule of law

- The process of judicial review
- Democracy is characterised by the conduct of elections that are both free and fair.
- The jurisdiction of the Supreme Court as stipulated in Article 32 is a topic of interest.

The 42nd Amendment Act of 1976

In response to the constraints placed by the judiciary on the amending authority of the Parliament in the Keshav Nand Bharti case, the Parliament introduced the 42nd Amendment Act, which incorporated clauses 4 and 5 into Article 368. These provisions effectively eliminated all restrictions previously imposed on Parliament by the Supreme Court.

In the case of Minerva Mills v. Union of India, 1980, the Supreme Court invalidated clauses 4 and 5 of Article 368 on the grounds that they undermined a fundamental aspect of the constitution.

In this instance, the Supreme Court ruled that the following elements are also considered to be part of the fundamental framework of the Constitution:

- The Parliament’s ability to modify the constitution is restricted.
- The achievement of harmony and balance between fundamental rights and the Directive Principles of State Policy (DPSP) is a crucial aspect of constitutional governance.
- Only in specific circumstances can fundamental rights be considered to be part of the basic structure.

Conclusively, it is important to note that the judiciary has an indispensable stake in having a say regarding an amendment to the constitution.