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# Extent of power of Parliament to amend our Constitution

The amendment procedure adopted by the founders of our Constitution has been enshrined in Article 368 of the Constitution. The power to amend the Constitution has been bestowed on our Legislature – Central and State. Most of the provisions of our Constitution can be amended by 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 and is assented to by the President, the Constitution shall stand amended in accordance with the terms of the Bill. The assent of the President is a mere formality because he cannot withhold his assent. However, amendment of some provisions of the Constitution, in addition to the special majority as described above, requires ratification by the Legislature of not less than one-half of the States. These provisions include amendment to Article 54, 55, 73, 162, 241, 279-A, Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, any of the lists in the Seventh Schedule or representation of the States in Parliament or Article 368.

The amendment procedure adopted by the founders of our Constitution has often been criticized as being too cumbersome. However, in comparison to most of the world Constitutions the amendment procedure enshrined in our Constitution is simple and practical. Except for a few provisions, as have been enumerated in the preceding paragraph, the remaining provisions can be amended by the Parliament by simple majority. The amendment provisions contained in the Constitutions of other countries, for example, America, Australia and Ireland are much more complicated and an amendment by their Parliament requires ratification by a referendum of the people.

However, to prevent the Parliament from seeking to carry amendments to the Constitution to facilitate the passing of their own agenda which they have failed to get through Parliament by reason of some article of the Constitution which has acted as an obstacle in their way certain safeguards have been enacted in the Constitution. The first and foremost safeguard is Clause 2 of Article 13 of the Constitution, which invalidates any law which takes away or abridges the Fundamental rights contained in Part III of the Constitution. The Supreme Court was called upon to decide the extent of the power of Parliament to amend the Constitution, as early as 1951 in the case of Shankari Prasad

versus Union of India, AIR 1951 SC 458. In this case the validity of the 1st Amendment, especially the inclusion of Article 31-A and 31-B, was challenged in a petition under Article 32. It was alleged inter-alia, that as Article 13 (2) prohibited making of laws abridging fundamental rights, it prohibited such abridgement even by an amendment because an amendment was also a law. Rejecting the argument, the court held that the power to amend the Constitution, including the fundamental rights, was contained in Article 368 and that the word 'law' in Article 13 (2) did not include an amendment of the Constitution which was made in exercise of constituent and not legislative power. Later several other amendments were made to Part III of the Constitution. The 17th Amendment which added several legislations to the Ninth Schedule making them immune from attack on the ground of violation of fundamental rights was challenged in Sajjan Singh Versus State of Rajasthan, AIR 1965 SC 845. Though three of the five judges in this case fully approved the view taken in Shankari Prasad's case, two of them in separate but concurring opinions doubted whether the Parliament could amend the part containing fundamental rights. In Golak Nath versus State of Punjab, AIR 1967 SC 1643, the Supreme Court was once again petitioned to decide the extent of powers of amendment. In this case the inclusion of the Punjab Security of Land Tenures Act, 1953 in the Ninth Schedule was challenged on the ground that the 17th Amendment by which it was so included as well as the 1st and 4th Amendments abridged the fundamental rights. The case was heard by an 11 Judge Bench of the Supreme Court, which by a majority of 6:5 held that the fundamental rights were outside the amendatory process, if the amendment took away or abridged any of the fundamental rights, and that the Shankari Prasad and Sajjan Singh cases conceded the power of amendment over Part III on an erroneous view of Article 13 (2) and 368 and to that extent they were not good laws. The judgment was, however, given prospective effect and therefore, it did not invalidate any of the amendments disputed in the case. However, five of the eleven judges gave dissenting judgment and controverted the majority judgment. In sum, the Golak Nath case decided that the Constitution did not provide for a specific power to take away or abridge the fundamental rights enshrined in Part III of the Constitution, even by an amendment under Article 368 and suggested that a Constituent Assembly could be summoned for this purpose by Parliament in exercise of its residuary power contained in Entry 97 of List I of the Seventh Schedule read with Article 248. This decision led to the passing of Constitution (24th Amendment) Act, 1971 which made significant changes to Article 368 and 13 of the Constitution. Firstly, it sought to nullify the effect of Golak Nath by adding clause (4) to Article 13 which provides that nothing in Article 13 shall apply to an amendment of the Constitution made under Article

368. In other words, the term 'law' as contained in Article 13 will not extend to an amendment made under Article 368. This position was reaffirmed by adding Clause (3) to Article 368, which provides that nothing in Article 13 shall apply to an amendment made under Article 368. Secondly, this amendment made a change in the marginal note to Article 368 by substituting "Power of Parliament to amend the Constitution and procedure therefor" for "Procedure for amendment of the Constitution". This was done because Subba Rao CJ in Golak Nath's case was of the view that Article 368 provided only for the procedure for amendment of the Constitution and the power to amend the Constitution is to be found elsewhere. In order to clear any doubts, the opening paragraph of Article 368, now numbered as Clause (1) further provides that Parliament may in the exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution, including the fundamental rights. This amendment, therefore, recognizes the distinction between an ordinary law and a constitutional amendment, a position not acceptable to the majority in Golak Nath. Besides, any doubt about the meaning of the word "amend" is removed by providing "amend by way of addition, variation or repeal". Thirdly, in the next paragraph, now numbered as Clause (2), this amendment substituted the words "it shall be presented to the President who shall give his assent and thereupon" for "it shall be presented to the President for his assent and upon such assent being given to the Bill". This change takes away any discretion, if any, with the President in giving his assent to the Bill proposing amendment to any provision of the Constitution, and makes the position of the President in the matter of giving assent to Bills under Article 368 somewhat different from that in case of ordinary bills. Subsequently, 25th, 26th, and 29th Amendments to the Constitution were made abridging or taking away the fundamental rights in some respects.

The validity of the above amendments was challenged in Kesavananda Bharti Versus State of Kerala, AIR 1973 SC 1461, wherein a writ petition was filed initially to challenge the validity of the Kerala Land Reforms Act, 1969. But as the Act was amended in 1971 during the pendency of the petition and was placed in the Ninth Schedule by the 29th Amendment, the petitioner was permitted to challenge the validity of the 24th, 25th and 29th Amendments to the Constitution also. The petition was heard by a 13-Judge Bench of the Supreme Court. It was urged by the petitioner that if the power of amendment is to be construed as empowering the Parliament to exercise the full constituent power of the people and authorizing it to destroy or abrogate the essential features, basic elements and fundamental provisions of the Constitution, such a construction must be held unconstitutional. All the judges were of the view that the 24th Amendment is valid, and that

by virtue of Article 368, as amended by the 24th Amendment, Parliament has power to amend any or all the provisions of the Constitution including those relating to the fundamental rights. A majority of the judges (9 out of 13 judges) overruled the judgment in Golak Nath's case and held that though the Parliament had plenary power under Article 368 to amend any part of the Constitution including fundamental rights but could not alter the basic structure or framework of the Constitution. C.J. Sikri explained the concept of basic structure by way of giving illustrations, such as, 1) supremacy of the Constitution, 2) republican and democratic form of government, 3) secular character of the Constitution, 4) separation of powers between the legislature, the executive and the judiciary, and 5) federal character of the Constitution. This structure, as pointed out by him, is built on the basic foundation, i.e. the dignity and freedom of the individual and this cannot by any form be amendment or be destroyed. J. Shelat and J. Grover illustrated the basic elements of the constitutional structure by adding to those already enumerated by C.J. Sikri 1) the mandate to built a welfare state contained in Part IV of the Constitution, 2) the unity and integrity of the nation. In the same vein, J. Hegde and J. Mukherjea illustrated the basic elements or fundamental features of the Constitution such as: 1) sovereignty of India, 2) the democratic character of our polity, 3) the unity of the country, 4) the essential features of the individual freedoms secured to the citizens, and 5) the mandate to build a welfare state and egalitarian society. J. Jaganmohan Reddy found elements of the basic structure of the Constitution as indicated in its Preamble and translated in its various provisions. In his view, for example, a sovereign democratic republic, parliamentary democracy and the three organs of the State certainly constitute the basic structure, and at any rate without fundamental principles in Part III and directive principles in Part IV the Constitution will not be the Constitution. Subsequently, in a number of judicial pronouncements the Supreme Court has declared various other provisions of the Constitution as forming part of basic structure of the Constitution. In Indira Gandhi versus Raj Narain, AIR 1975 SC 2299, the election of Mrs. Indira Gandhi was invalidated by the Allahabad High Court on the ground of corrupt practices. The Parliament enacted the 39th Amendment to overcome the effect of High Court judgment by withdrawing the jurisdiction of all courts over the election disputes involving the Prime Minister. Relying on the *ration decidendi* in the case of Keshavananda Bharti, the Supreme Court held that the exclusion of judicial review in election disputes damaged the basic structure of the Constitution and thus, the amendment was unconstitutional. The scope and extent of the application of the doctrine of basic structure again came up for examination in Minerva Mills Ltd. versus Union of India, AIR 1980 SC 1789. In this case the petitioner

challenged the validity of Section 4 and 55 of the 42nd Amendment. These sections amended respectively Article 31-C and 368. In Article 31-C laws implementing any directive principle were exempted from challenge on the ground of violation of Article 14, 19 and 31 and in Article 368 clauses (4) and (5) validated all invalidated and existing amendments and removed all limitations on future amendments. The Court invalidated the amendment by applying the basic structure doctrine and held that since the Constitution had conferred a limited amending power on Parliament, Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. In S. R. Bommai versus Union of India, AIR 1994 SC 1918 secularism has been recognised as one of the basic features of the Constitution. Again in L. Chandra Kumar versus Union of India, AIR 1997 SC 1125, the Supreme Court held that to the extent Articles 323-A and 323-B excluded the jurisdiction of the Supreme Court under Article 32 and the High Courts under Article 226, they were unconstitutional. The court emphasised the judicial review was a basic feature of the Constitution which could not be diluted by transferring judicial power to the administrative tribunals and excluding the review of their determinations under Article 32 or 226. With these pronouncements, the existence of the doctrine of basic structure in our constitutional law is no more a matter of dispute. The only dispute remains about its contents. Some of the contents seem to have settled, while others are in the process of settling down and still some others will settle in course of time.

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