



MAJORITY AND AMENDMENT OF THE CONSTITUTION

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Abstract

Majority play a significant role in democratic form of government, while forming the government, amendment of the Provisions of the Constitution.

The constitution is a living document. Its Provisions, have to be construed having regard to the March of time and the development of Law. The time is not static, it goes on changing with it, the life of a nation also changes. The social, economic and political conditions of the People go on changing. Law particularly the constitutional law of the country¹, must also change in order to adapt it to the changing needs; the changing philosophy; the changing life, of the people. It, therefore, requires some mechanism for the law to secure the contemporary needs of the people such a Mechanism is known as the amendment of the law, the amendment of the constitution of the country.

The provisions relating to amendment of the constitution are contained in Part XX, article 368 of the constitution after the decisions in the Keshvananda Bharti Case², and Indira Gandhi Case³, there was no doubt at all that the amendmentary power of parliament was limited and it was not competent to parliament to alter the basic structure of the constitution⁴.

Keywords: Significant, document, construed, development. Static, contemporary, Mechanism, Competent structure.

Introduction

Dr. Ambedkar, Chairman of the drafting committee, observed about the Indian constitution, "one can safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible federation⁵.

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Power to amend the Constitution

Article 368 as originally stood was titled as to "Procedures for amendment of the Constitution". It conferred power on the Union Parliament to amend the Constitution. The Constitutional (24th Amendment) Act, 1971 substituted the original Article 368 in the following respects :-

- a) the title is replaced by new title "Power to amend the constitution and procedure therefore".
- b) The new Clause (1) conferred on Parliament "the constituent power to amend the Constitution by way of addition, variance or any provision of the Constitution".
- c) The new Clause (2) makes it obligatory for the President to give his assent to a Bill for amendment, presented to him, after being passed by both Houses of Parliament.

The Constitution (42nd amendment) Act 1976 further amended Article 368 to the effect declaring "*the Constituent Power of Parliament a unlimited and absolute*" and excluding inference by the court in the exercise of the power, on any ground.

Procedure for amendment of the constitution

Broadly speaking there are two modes of amending the constitution

- A. The informal method and
- B. The formal method.

Types of Majorities as per the Indian Constitution

There is not explicit classification majority in Indian Constitution. But are careful reading of different articles in Indian Constitution would provide an idea about four types of majorities. They are Absolute Majority, Effective Majority, Simple Majority and Special Majority. For ease of understanding we have again classified Special Majority



Absolute Majority

It refers to a majority of more than 50% of the **total membership of the house**. For example, as the total membership of Lok Sabha is 545, an absolute majority in Lok Sabha means 50% of 545 plus 1 i.e. 273.

Cases, where the absolute majority is used : In normal business of the Parliament or State Legislature absolute majority, is not generally used. But this majority it is used during the general election, for the formation of Government at Center and States.

Effective Majority

Effective Majority of the house means more than 50% of the **effective strength of the house**. This implies that out of the total strength, we deduct the vacant seats. When Indian Constitution mentions "all the then members", that refers to the effective majority.

For example in Rajya Sabha, out of the total strength of 245 members if there are 45 vacancies, then the effective strength of the house is 200. Then the effective majority is 50% of 200 plus 1 i.e. 101.

Cases where the effective majority is used:

1. Removal of vice president in RS - Article 67(b)
2. Removal of Speaker and Deputy Speaker of Lok Sabha and State Legislative Assembly.

Simple Majority

This refers to the majority of more than 50% of the members **present and voting**. This is also known as functional majority or working majority. The simple majority is most frequently used form of majority in Parliamentary business. When the constitution or the laws do not specify the type of majority needed, the simple majority is considered for voting.

To understand simple majority, let us consider a situation in Lok Sabha. On a particular day, out of the total strength of 545, 45 were absent and 100 abstained from voting on an issue. So only 400 members present and voting. Then the Ordinary bill need to be passed with the simple majority in both Houses of the Parliament before it is sent to Indian President for his assent.



Cases where the simple majority is used:

1. To pass Ordinary/ money / financial bills.
2. To pass Non-Confidence Motion/ Adjournment Motion / Censure Motion / Confidence Motion.
3. For the removal of Vice President majority required in Lok Sabha is simple majority A67(b).
4. To declare financial emergency.
5. To declare state emergency (-President's rule).
6. Election of Speaker/Deputy Speaker of Lok Sabha and State Legislatures.
7. Constitution Amendment Bill under Article 368 which needs to be ratified by states, require only simple majority at State Legislatures.

Special Majority

All types of majority other than the absolute, effective or simple majority is known as special majority. A special majority are of 4 types, with different clauses.

- Type 1- special majority of our article 249
- Type 2- Special Majority as per Article 368
- Type 3 -Special Majority as per Article 368 + 50 percent state ratification by simple majority
- Type 4- Special Majority as per A61.

Special Majority as per Article 249

special Majority as per article 249 required for majority of **2/3rd member present and voting**. For example, if out of the 245 members in Rajya Sabha if only 150 are present and voting, then the special majority required as per article 249 would be 101.

Cases where Special majority as per article 249 is used: To pass the Rajya Sabha resolution to empower the Parliament to make laws in the state list. (valid upto 1 year, but can be extended any number of times).



Special Majority as per Article 368 requires a majority of **2/3rd members present and voting supported by more than 50% of the total strength of the house**. This type of majority is used for most of the Constitutional amendment bills. To pass a Constitution Amendment Bill in Rajya Sabha, in addition to getting the support of 123 members, the bill should be favoured by more than 2/3rd of the members present and voting.

Cases where special majority as per Article 368 is used:

1. To Pass a Constitutional Amendment Bill which does not affect federalism.
2. Removal of judges of SC/HC
3. Removal of CEC/CAG
4. Approval of National emergency requires special majority as per Article 368 in both houses.
5. Resolution by the state legislature for the creation/abolition of the Legislative Council (Article 169).

Special Majority as per Article 368 plus State ratification

This type of special majority is required when a Constitutional Amendment Bill try to change the federal structure. Special majority as per article 368 plus state rectification requires majority of **2/3rd members present and voting supported by more than 50% of the state legislatures by a simple majority**. A good example would be the bill which introduced the National Judicial Appointments Commission (NJAC). It required the support of at least 15 state legislatures out of the 29 states.

Cases where Special majority as per Article 368 plus state ratification is used: To pass a Constitutional Amendment Bill which effects federalism like the position of High Court judges.

Special majority as per Article 61

Special majority as per article 61 requires a majority of **2/3rd members of the total strength of the house**. In Lok Sabha, the special majority as per article 61 is 364 while in Rajya Sabha, the special majority as per article 61 is 164.

Cases where special article 61 is used: For the impeachment of the Indian President.



Position of Fundamental Rights

- I. *Shankari Prasad vs Union of India* (AIR 1951 SC 455), the Supreme Court held that the power to amend the Constitution including the fundamental rights is contained in the Art. 368, and the word 'Law' in Art. 13 includes only and ordinary law and does not include constitutional amendment which is made in exercise of constituent power. The Court thus distinguish between the ordinary legislative power and constituent power. In *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845), it held that the words 'amendment of Constitution' means amendment of all the provision of Constitution.
- II. *Golak Nath v. State of Punjab* (AIR 1971 SC 1643) - In this case the Supreme Court by a majority of 6 to 5 overruled its earlier decision in *Shankari Prasad* and *Sajjan Singh* cases and held that Parliament cannot amend the Fundamental Rights. The Court rejected the argument that power to amend the constitution was a sovereign power and observed that amendment is a legislative process and Art. 368 lays down merely the proceedings for amendment of Constitution. An amendment is a 'law' within the meaning of Art. 13(2) and therefore, if it violates any of the fundamental rights it may be declared void.
- III. 24th Amendment 1971 - in order to remove the difficulty created by the decision in *Golak Nath's* case, Parliament enacted this Act. It not only restored the amending power of Parliament but also extended its scope by adding the words in Art 368, "to amend by way of the addition or variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article." A new clause added to Art. 13 which provides that "nothing in this Article shall apply to any amendment of this Constitution made under Article 368".

Thus, the validity of a Constitution Amendment Act shall not be open to question on the ground that it takes away or affects a fundamental right. The 24th Amendment has been held to be valid in *Keshavanand's* case (through subject to some qualifications).



- IV. Keshavanand Bharati vs State of Kerala (AIR 1973 SC 1461): Theory of Basic Structures - In this case, also known as 'Fundamental Rights case', a special Bench of 13 judges was constituted to hear the case (the case was heard for 5 months and gave the longest judgement running into 595 pages). The views of 7 judges -Sikri C.J., Shelat, Hegde, Grover, Jagmohan Reddy, Mukherjee, J J; Khanna J. took a middle path and titled the balance in forming the majority) could be summarised as follows:
- (i). In Golak Nath's case was overruled and majority held that a Art. 368 ever before 24th Amendment contained the power as well as *procedure* of amendment. Hence, limitations upon the amending power must be formed from Art. 368 itself.
 - (ii). The Parliament has wide powers of amending the Constitution and it extends to all the Articles, but amending power is not unlimited and does not include the power to destroy or abrogate the 'basic feature' or 'framework' of Constitution. There are implied or inherent limitations on the power of amendment under Art. 368.
 - (iii). Sikri C.J. said that the word 'amendment' must derive its colour from Art. 368 and rest of constitutional provisions. The expression "amendment of Constitution" in Art. 368 means any change in any of the provisions of Constitution within the broad contours of Preamble and the Constitution to carry out the objectives in Preamble and Directive Principles. Thus, it would mean that while fundamental rights cannot be abrogated, reasonable abridgement of fundamental rights can be affected in the public interest.
 - (iv). Basic Structure - According to Sikri C.J, the 'basic structure' was built on the basic fundamental i.e. the freedom and dignity of the individual; the basic structure of the Constitution consists of following features - (a) Supremacy of Constitution (b) Republican and Democratic form of Government and sovereignty of country (c) Secular and federal character of Constitution, and (d) Separation of powers between Legislature, Executive and Judiciary, (Shelat and Grover, J.J. also included the 'fundamental rights' and 'Directive Principles' in the basic structure)



Basic Structure of the Constitution

According to judges in Kesavananda Bharati case the enumerations made regarding the basic structure of the Constitution were merely illustrative and not exhaustive; the basic structure of the Constitution, inter alia, comprises of the following:

1. Supremacy of the constitution
2. Republican and democratic forms of government.
3. Secular character of the constitution
4. Separation of powers between the legislature, executive and judiciary.
5. Federal character of the constitution.
6. Unity and integrity of the nation.
7. Sovereignty of India.
8. Democratic character of our polity.
9. Essential features of individual freedoms secured to the citizens.

Conclusion

An exception is a embodiment of perfection of Law, whereas process of amendment enlivener, vigorousness is rejuvenating the law, and make fit to cater the problem of society and nation.

References:

1. I.R. Coelho v. State of Tamil Nadu AIR 2007 SC 861
2. Keshvanand Bharti V. State of Kerla (1973) SCC 235
3. Indira Nehru Gandhi V. Raj Narain 1975 Supp SCC 1
4. Minerua Mills Ltd. V. UnioOn of India (1980) & SCC 625
5. Constituent Assembly Debate, Vol IX 1569