

Amendment of the Constitution

3. The bill must be special

Evolution of the Indian Constitution: Constitutional Amendments

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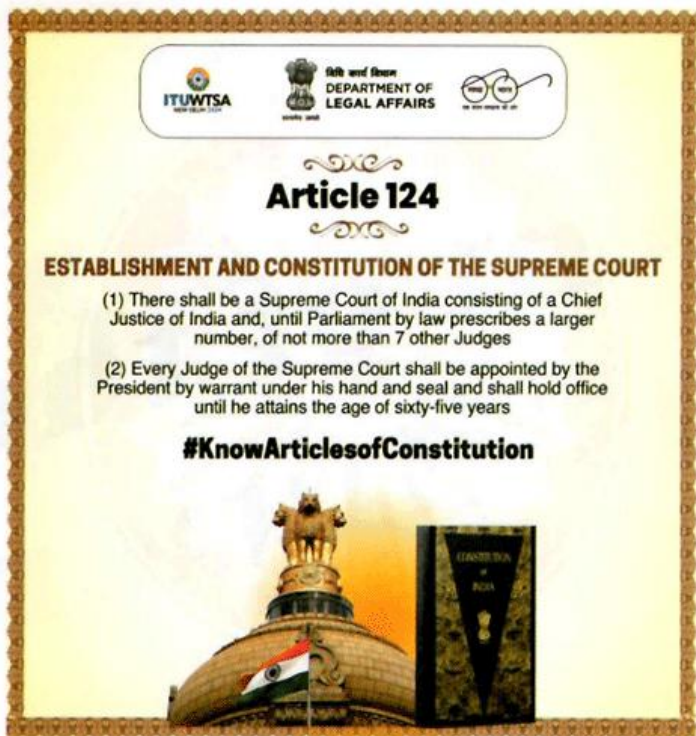
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The present Constitution has evolved from a century-long British Rule during which the British Parliament enacted a number of acts that provided a framework of government and administration to India. Compared to unitary constitutions, federal constitutions are more difficult to amend. In the case of India, also a federal constitution, the process of constitutional amendment is less rigid. So far, as many as 106 amendments have been carried out in our Constitution.

Our Constitution, drafted by a galaxy of legal experts and seasoned statesmen, has been the backbone of Indian democracy, guaranteeing not only an elaborate administrative machinery of governance but also a charter of a socio-economic revolution. It is not merely a legal document setting out the fundamental laws for governance of India, but also a living and dynamic document. This document was

designed to address the diverse aspirations of the Indian people.

Evolution of our Constitution during British Rule: The present Constitution has evolved from a century-long British Rule during which the British Parliament enacted a number of acts that provided a framework of government and administration to India. Our present Constitution has evolved from these acts. Of these acts, the Councils Act of 1909, the



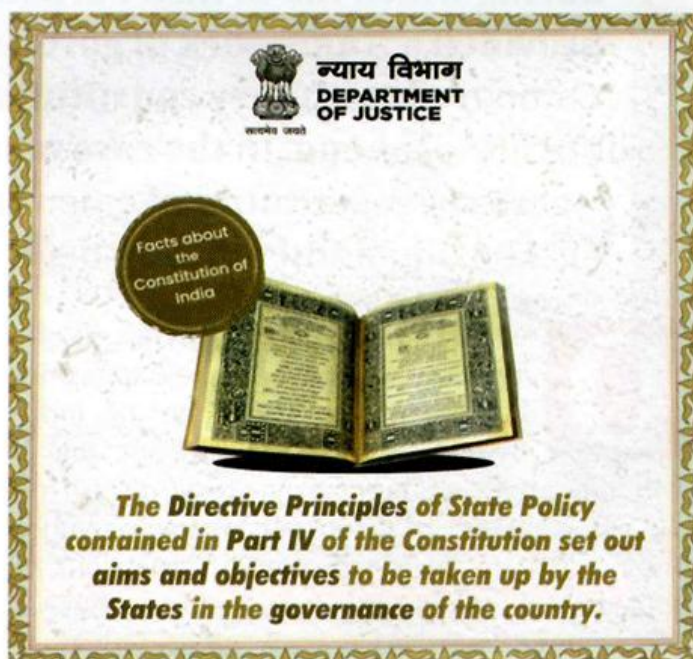
Government of India Act of 1919, and the Government of India Act of 1935 are three major milestones in India's constitutional development during the British rule. These acts provided a parliamentary form of government in British India. Rule of law, federalism, and a strong central government were the other salient features of these acts. In fact, the Government of India Act, 1935, served as the constitution of British India till our present constitution was adopted. Sixty-five per cent of our constitution has been taken from this act alone. The British imprint on our Constitution is, thus, too prominent.

Constitutional amendment of a federal constitution: Compared to unitary constitutions, federal constitutions are more difficult to amend. They are to be amended by a rigid procedure requiring a special majority in the federal parliament, and sometimes its ratification by the states is also required. For example, the US constitution is very rigid, and amending it requires not only a two-thirds majority of the US Congress, but also ratification by three-fourths of its 50 states. In the case of India, also a federal Constitution, the process of constitutional amendment is less rigid. So far, as many as 106 amendments have been carried out in our Constitution. After so many amendments, the Indian Constitution stands significantly altered from its original form. Acharya Kripalani had commented that after the 42nd Amendment, 1976, he could see only amendments and no original constitution!

Need for Constitutional Amendments: A Constitution is a living document that must reflect the changing socio-economic aspirations of the people whom it is meant to serve. With changing times and circumstances, the aspirations of the people also change, and these changes must be reflected in the constitution by amending it, or else it will cease to be a relevant document and become outdated. Though the framers of our Constitution succeeded in writing a comprehensive document, they were aware of the need to change its provisions in the future and therefore provided for an amendment procedure (Art. 368) in the constitution itself. Amendment means changing one or more parts of the Constitution, and it can be done by adding a new provision, deleting an existing provision, or revising or modifying a provision.

Procedure for amending the Constitution: There are three ways in which our Constitution can be amended:

- (1) By an ordinary law passed by Parliament by a simple majority. For example, admission of new states (Art. 2), creation of new states or altering their areas, boundaries or names (Art. 3), or changes made in the citizenship provisions (Art. 11).
- (2) By following a special procedure given in Art. 368 which requires an amendment bill to be passed by a two-thirds majority in both Houses of Parliament. Most of the amendments are carried out following this procedure.

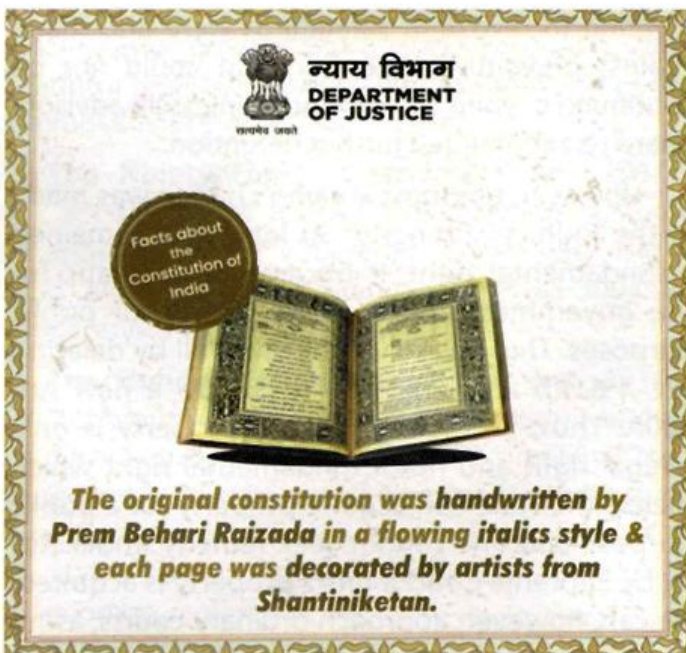


(3) By passing an Amendment Bill by Parliament by a two-thirds majority as well as its ratification by at least half of the states if the bill seeks to make changes in provisions that affect the federal provisions. For example, GST had to be ratified by half of the states also.

Does Parliament have unbridled powers to amend any part of the Constitution?

The notion of parliamentary sovereignty suggests that Parliament, in exercise of its constituent powers, has unlimited powers to amend any part of the constitution. In fact, this was the stand taken by the Supreme Court in two cases: the Shankari Prasad case, 1951, and the Sajjan Singh case, 1964, acknowledging Parliament’s unfettered powers to amend any part of the Constitution that included even fundamental rights. However, in the Golaknath case, 1967, the court ruled that Parliament has no constituent powers to amend fundamental rights because they occupy a sacrosanct position under the constitution. In response, Parliament passed the 24th Amendment Act in 1971 that overcame the Golaknath ruling. By adding new clauses to Art. 13 and Art. 368, it was clarified that Parliament can amend even fundamental rights.

Kesavananda Bharati case, 1973, and the doctrine of basic structure: Though the term ‘basic structure’ does not find any mention in our Constitution, it was invented by the Supreme Court in the famous *Kesavananda Bharati* case, 1973. It means the core features of the constitution as pointed out by the court. These core features, or basic features, as

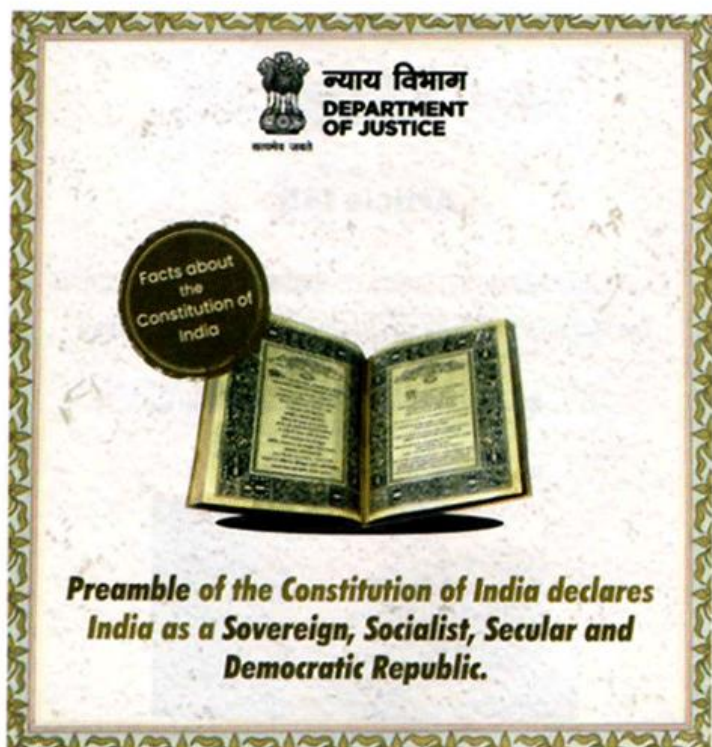


pointed out by the Court, are:

- Supremacy of the Constitution
- Republican and democratic form of government
- Secularism
- Separation of powers
- Rule of law
- Independence of the judiciary
- Federal character of the polity

When the 24th Amendment was challenged before the court, it came out with the basic feature doctrine under which there are certain features of the Constitution that provide it a unique identity, and therefore, they cannot be destroyed by an amendment. Although the Parliament has the authority to amend any part of the Constitution, it cannot make changes that compromise the Constitution’s fundamental framework or essential features.

This hurdle was sought to be overcome by the 42nd Amendment, 1976, which allowed Parliament to amend any part of the Constitution and protected it from being challenged in any court on any ground. Then came the *Minerva Mills* Judgement, 1980 in which the Supreme Court nullified this, holding that it destroys the basic feature of the Constitution. This was the first application of the basic feature doctrine, which was later also applied in the *IR Coelho* case, 2007 in which Supreme Court held that a law



placed in the Ninth Schedule of the Constitution is not immune from judicial review and is subject to scrutiny under the 'basic feature' doctrine. More recently, this doctrine was applied to the 99th Amendment Act, 2014 which created a National Judicial Appointment Commission (NJAC) for appointing judges of higher courts. Later, the NJAC was declared null and void and the collegium system of appointment was restored in its place.

Landmark Constitutional Amendments since 1950: Though as many as 106 amendments have been made to the Constitution so far, the following are considered major amendments that introduced significant changes in the Constitution.

The First Amendment Act, 1951: The main objects of this amendment were to place 'reasonable restrictions' on laws made on various grounds given in Art. 19 (security of the state, public order, morality, decency, etc.). It also abolished the *zamindari* system and inserted the 9th schedule to the Constitution which provides immunity from judicial review of certain laws, mostly dealing with land reforms.

The Seventh Amendment Act, 1956: Its main object was to implement the reorganisation of states on a linguistic basis, as recommended by the *Afzal Ali* Committee.

The Forty Second Amendment Act, 1976: This is also known as the *mini Constitution of India*, as it carried out wide ranging and drastic changes

in the Constitution during the emergency. It amended the Preamble and Directive Principles by adding Arts. 39A (free legal aid), 43A (participation of workers in management of industries), 48A (protection of environment and the wildlife), and insertion of Part IV A to the Constitution providing for fundamental duties. Art. 74 was amended to make the President 'bound by the advice of the council of ministers'. It also provided for tribunals by inserting Art. 323A and 323B in a new Part XIV A. Most importantly, it added clauses (4) and (5) to Art. 368 which gave unfettered powers to Parliament to amend any provision of the Constitution. Passed during emergency, this amendment curtailed civil freedoms, powers of the judiciary, and diluted the fundamental rights.

The Forty Fourth Amendment Act, 1978: This amendment was enacted by the *Janata Party* government in the background of the 42nd Amendment and the experience of emergency. First, it made changes in Art. 352 relating to proclamation of emergency. The word 'internal disturbance', which was a vague expression and was open to misuse, was replaced by 'armed rebellion'. Further, the written advice of the Cabinet to the President to proclaim an emergency was made mandatory. Also, it needed to be passed by a two-thirds majority of both houses of parliament within a month. For its further continuance, it required renewal by Parliament every six months by a two-thirds majority only. Also, Lok Sabha was empowered to revoke it by a simple resolution if ten per cent of its members requested a special meeting to revoke it. Safeguards were also made against preventive detention that could not be continued beyond three months unless an advisory board recommended further detention.

However, the most striking change was made in the Right to Property. So long as it remained a fundamental right, it became problematic for the government to acquire property for public purposes. This was solved once for all by deleting Art. 19(1)(f) and shifting Art. 300 to a new Art. 300A. Thus, today, the right to property is only a legal right and not a fundamental right which means the state can acquire property for a public purpose and one cannot seek remedy under Art. 32 by Supreme Court if one's property is acquired. He can, however, approach ordinary courts, as no

one can be deprived of his property except by authority of law.

The Fifty Second Amendment Act, 1985:

The objects and reasons of this amendment were given in the act in these words: "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy." By this amendment, the Tenth Schedule was added to the constitution, which provides the grounds on which a member of a legislature shall be disqualified for an act of defection. This act has been further strengthened by the 91st Amendment, which has added more teeth to the 1985 anti-defection law.

The Sixty First Amendment Act, 1988:

The purpose of this amendment was to lower the voting age from 21 years to 18 years to include India's youth in the electoral exercise. The object of this act stated: "The lowering of the voting age would provide to the unrepresented youth of the country an opportunity to give vent to their feelings and help them become a part of the political process."

The Seventy Third and Seventy Fourth Amendment Acts, 1992:

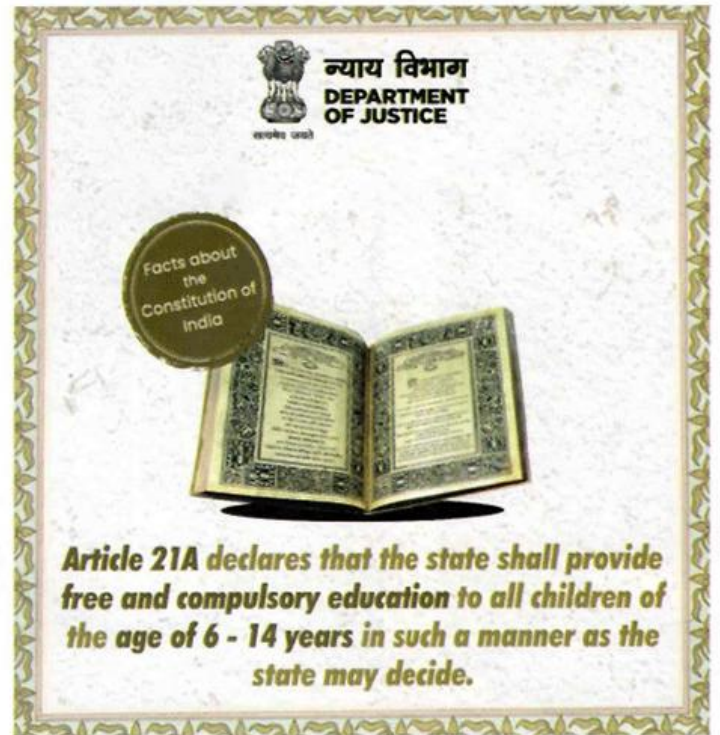
These two amendments have constitutionalised the *Panchayati Raj* Institutions (PRIs) at both village and urban levels by adding Part IX (the *Panchayats*) and Part IXA (the Municipalities). Two new Schedules have been added, viz; the 11th and 12th Schedules, detailing the areas of work to be taken up by these local bodies. This has revolutionised the concept of decentralised democracy by ensuring timely elections, representation of women and SC/STs, devolution of powers and financial resources, and creating a separate election commission and finance commission for every state.

The Ninety Ninth Amendment Act, 2014:

This act sought to replace the collegium system of appointment of Supreme Court and High Court judges by establishing a National Judicial Appointment Commission (NJAC).

The Hundred First Amendment Act, 2016:

This act brought the GST regime in existence under the 'One Nation One Tax' slogan. It simplified the tax regime in one stroke and is hailed as a great step towards cooperative federalism. Both the union and the states pooled their sovereignty to agree to a common tax regime, i.e., GST.



The Hundred Sixth Amendment Act, 2023:

This has finally paved the way for 33 per cent reservation for women in both Lok Sabha and state assemblies. This became possible after many hurdles faced in passing the bill for nearly two decades. This act, in a single stroke, has empowered Indian women and made our legislatures more representative in gender terms. However, it will come into force only after the next delimitation exercise so that the delimitation commission can decide which seats shall be reserved for women.

Concluding observations:

Constitutional amendments have changed our economic, social and political landscapes and expanded the reach of the constitutional arm for people's welfare. As regards the nature of these amendments, the following must be noted:

- a. Many amendments have been only procedural in nature, and they have only elaborated on the existing provisions.
- b. Some amendments were regressive and politically motivated and gave rise to authoritarianism. The most striking example is the 42nd Amendment. Also, the 52nd Amendment, dealing with defections, has largely failed in its objectives.
- c. Most of the amendments have been forward looking and have served their objectives reasonably well. □

(Views are personal)