CHAPTER VIII

TENDENCIES AND PROSPECTS OF AMENDING PROCESS IN INDIAN CONSTITUTION

The Constitution of India is remarkable for many outstanding features which will distinguish it from other constitution even though it has been prepared after ransacking all the known constitutions of the world and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed:

"One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world. More than hundred years have rolled when first written constitution was drafted. It has been followed by many other countries reducing their constitution to writing .... given these facts, all constitution in their main provisions must look similar. The only new things if there be any, in a constitution framed so late in the day are the variations: made to remove the faults and accommodate it to the need of the country" 1

Though, our constitution may be said to be a 'borrowed constitution', the credit of its frame lies in gathering the best features of each of the existing constitution and in modifying them with a view to

avoiding the faults that have been disclosed in their working and to adopting them to the existing conditions and need to this country. So D.D. Basu rightly said: "If it is a 'Patchwork', it is a beautiful patchwork."²

The principle of accommodation is said to be Indian Original contribution to Constitution making. The credit of its framers lies in gathering the best features of each of the existing constitutions and in modifying them in such a fashion that no body can identify them. So Austin expressed his view about the Indian Constitution in the following way:

"..... It is the ability to reconcile, to harmonize and to work without changing their content, apparently incompatible concepts, at least concepts that appear conflicting to the non-Indian and especially to European or American observer. Indian's constitutional structure is a good example of the principle of accommodation on matters of substance. Federal and unitary systems of government are apparently in compatible. A constitution an American or an English constitution, an American or an English constitutional lawyer would say, must one: or the other, yet Indian constitution is either depending on the circumstances.... The Assembly successfully played the alchemist, turning foreign metals into Indian coin."³


The framers of Indian constitution have borrowed much from the various sources but they have not blindly followed any one system. They have endeavoured to evolve a system suited to the genins of the Indian people.

**MID-WAY AMENDING PROCESS:**

Tendency of our constitution is a crious amalgam of British and American system. It makes a particular balance between the British Parliamentary system and the American Presidential system; between the British Parliamentary supremacy, between the British unitary system of government and the American Federalism. It also strikes a balance between the British 'Flexibility and American Rigidity in terms of its amendability'.

Amending, Process of Indian Constitution is neither too flexible nor too rigid. It is a sort of compromise worked out between two divergent views prevalent amongst the members of the constituent Assembly, one emphasizing the adoption of the U.S.A. federal pattern with a certain amount of rigidity and another laying stress on a simple majority of parliament.4

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Framers of the constitution avoided two extremes of excessive rigidity and excessive flexibility. They had not lost sight the need of adoptability of the constitution meant to serve a vast heterogeneous and complex society. As the same time they were conscious of the sanctity that a constitution should have a endure as a basic law not easily alterable at the whims of transient political majority in parliament. A mid-way amending process was devised so as not to impede progress and at the same time to protect the constitution from uncalled for hasty encroachments.

To maintain the above tendency framers of our constitution adopted the single amending process U.K. with the rigid amending process of U.S.A. They also mitigated the rigidity of U.S.A. amending process to avoid the method of convention, decreasing the percentage of majority in case of state consent associated to states in a few important matters.

Similarly they did not follow the rigidity of Switzerland and Australia and avoided the provision of Referendum. They also avoided the double absolute majority of Australian constitution and initiating provision of Switzerland.
To avoiding the too much rigidity of U.S.A., Australia and Switzerland, Framers of our constitution drafted the Article 368. So Article 368 becomes more easy in comparison of those federal constitutions. Under Article 368 it is only the amendment of a few of the provisions of the constitution that requires ratification of the State legislatures and even then ratification of only half of the states, while the American constitution requires ratification of three-fourth of the state and Australia requires absolute majority of the states and Switzerland require majority of the states. The rest of the constitution may be amended by a majority of not less than two-thirds of the members of each House present and voting which again must be a majority of the total membership of the house.

With the Article 368 in our constitution, simple amending procedure of amendment of British constitution is also adopted. Under the simple amending process parliament can amends certain provisions of the constitution without following the special procedure of Article 368. In these provisions, it is provided that there is no

necessity to adopt the permission of Article 368. The result is that such provisions can be altered by the Union Parliament in the ordinary simple process of legislation without giving the name of constitutional amendment. So Paras Diwan on this point rightly comments:

"There is a temptation to call former (Article 368) alone as 'Amendment of the Constitution' and to deny this description to the letter (By simple process), but, it is submitted since in both cases the constitution stands amended, both are constitutional amendments." 6

The same view is expressed by the D.D. Basu:

"Alterations of certain provisions of the constitution are not to be deemed to be amendment of the constitution..., even though the result of such alteration is also considered as an amendment of the constitution." 7

Though it may not be called alteration but effect and result of the both the process are same, in both the cases constitution stands amended, then why it should not be called amendment of the constitution? If result is constitutional amendment then there is no doubt to call it constitutional amendment.

The Indian amending process has certain distinctive features compared with the corresponding provisions in other federal constitution. It may be submitted in following way:

1) It has more than one amending process and unique combination of British flexibility and American rigidity.

2) Unlike U.S.A. constitution no separate body for amending the constitution has been provided in the Indian constitution, instead, the constituent power is vested in Parliament.

3) Unlike Switzerland, legislatures are not empowered to initiate any proposal for amendment in the constitution.

4) Unlike Australia and Switzerland, Nigeria 1719. There is no provision for referendum in the Indian Constitution.

5) The requirement regarding ratification by state legislatures is more liberal than the corresponding provisions in the U.S.A., Australia, Switzerland and Canada Act, 1982.

6) The requirement regarding assent of Executive Head is more liberal and formal than the corresponding provisions of Australia, West Germany and to U.S.S.R.
7. Likewise U.S.A., Indian Constitution does not prescribe a time limit within which state legislatures should ratify or reject an amendment bill. When time is fixed in constitution of Switzerland, Australia and Canada Act, 1982.

8. Unlike West Germany and U.S.A., there is no entrenched or reserved provision in the Indian Constitution. all provisions of the constitution including those relating to Fundamental rights are amendable. Though through the judicial permanent restriction has been imposed on Article 368 by the Doctrine of 'Basic Structure'.

Thus, Indian constitution is a unique combination of British flexibility and American rigidity. Therefore K.C. Wheare said - "This variety in the amending process in wise but is rarely found."8

Prof. Harichand also called the Indian Amending Process as an unique process of Amendment and observed:

8. Wheare, K.C. : Modern Constitution (1966), P.143
"Indian constitution framers have made an important contribution to the theory and the practice of constitutional law.... And variety of modes of changing the constitution imparts to 'flexibility' despite the appearance of 'Regidity' even if large on the text of Article 368". 9

In support of the above contention it would be pertinent to quote the Sukhcharan K. Bhatia 10:

"A perusal of Article 368 seems to show that the Framers of the Constitution avoided two extremes of excessive rigidity and excessive flexibility. They had not last sight of need of adaptability of the constitution meant to serve a vast heterogeneous and complex society. At the same time they were conscious of the sanctity that a constitution should have to endure as a basic law not easily alterable at the whims of transient political majorities in Parliament. A mid-way amending process was devised so as not to impede progress and at the same time to protect the constitution from uncalled for hasty encroachments" 10

**TENDENCY OF AMENDING PROCESS WITH REFERENCE TO STATES:**

It is a general tendency of Federal constitution that its units have equal and Sovereign status in

themselfe and they also participate in the federal government. Federation is a result of agreement between union and state Governments. For protection of agreement between union and units the process of amending the constitution should be rigid and should require consent of all the federating units.

Hence, participation of Union and the States together is insisted upon for amendment in most of the Federal constitution. Therefore C.F. Strong observed:

"The method is peculiar to federation. There is no federation of course, whose constitution does not require, in some form or other, the agreement of either a majority or all of the federating units. The voting on the proposed measure may be either popular or by the legislatures of the State Concerned. In Switzerland and Australia the referendum is use in the United States some States use the referendum, other leave it to the legislature, detailed directions in this matter being omitted from the federal constitution".11

In the same way K.C. Wheare also stressed on the necessity of participation of Federating Units:

"It is essential in a federal Government that if there be a power of amending the constitution, the power, so far at least as concerns those provisions of the constitution which regulate the status and powers of the general and regional governments should not be confined exclusively either to the general government or to regional government." 12

The Indian Union resembles Canadian Federation, rather than the American or the Australian modes, in that there were no pre-existing states with constitutions of their own to govern such independent sovereign states prior to their union in a federal structure. In India, it was the Government of India act 1935, which initially infused federal elements into a unitary constitution comprising the provinces in order to include the Indian states into it and this plan was adopted by the constituent Assembly. The Indian states having merged with the Indian union, after the independence. It was a federal union constituted by a constitutional document rather than a result of compact or agreement between independent states.

The American Federation has been described as indestructible union composed of Indestructible State. It is not possible for the National Government to redrew the

map of the United State by forming new States or by altering the boundaries of the State as they exercised at the time of the compact without the consent of legislatures of the states concerned. 13

The same principle is adopted in the Australian constitution with the further safeguard superadded that a popular referendum is required in the affected state to alter its boundaries. 14

In the same strength constitution of Switzerland15, Malaysia 196316, Nigeria 197917 and Canada Act 198218 provide that no alteration of boundaries and representation may take place without the consent of the federating units.

But under our constitution, it is possible for the Union Parliament to reorganise the state or to alter

13. See Article IV S.3(1) Constitution of U.S.A.
14. See Section 99,123-124, Constitution of Australia
15. See Article 121,122 & 123, Constitution of Switzerland.
16. See Article 159(2) Constitution of Malaysia.
17. See Section 9 and 8 of Nigeria 1979.
their foundaries or to eliminate a state altogether by a simple majority in the ordinary process of legislation. The constitution does not require that the consent of the legislature of the State in Necessary for enabling Parliament to make such laws only the President has to ascertain the view of the legislature of the state or states concerned before recommending a Bill for this purpose to Parliament, and if any state legislature does not express its view within the period fixed by the President, the bill may be introduced in Parliament even without obtaining the view of the state.¹⁹

Supreme Court of India, in W.B. Vs. Union of State²⁰ observed:

"Parliament is therefore.... in vested with authority to alter the boundaries of any State and to diminish its area so as even to destroy the boundaries of a state with all its power and authority."

The comparative case with which such reorganization is possible is demonstrated by the fact that within three years of the commencement of the constitution, a new state named Andhra was formed by sub-dividing the state of Madras. The process of reorganisation is even continuing as will be evident from

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¹⁹. See Article 2,3 and 4 Sch. I and Sch. IV. Constitution of India.
the formulation of Madhya Pradesh, Himachal Pradesh, Manipur, Meghalaya, Nagaland, Tripura, Haryana and Karnataka etc.

The position again differs in relation to initiating the amending bill India from the constitution of U.S.A. and Switzerland. In the Constitution of U.S.A. and Switzerland the State legislatures can initiate any proposal for amendment of the constitution. But in our constitution the state legislature can not initiate any bill for amendment of the constitution. The only mode of initiating a proposal for amendment is to introduce a bill in either house of Union Parliament and State has no such power.

In the matter of ratification, it is only the amendment of few of the provisions given in Article 368(2) of the Constitution that requires ratification by the state legislature and even then ratification by only one half of them would suffice, while the American constitution requires ratification by three-fourth of the state then constitution of Australia and Switzerland require absolute majority of States.
Thus, it may be seen that amending process of Indian constitution in relation to participation of state is not satisfactory. Consent of States is generally avoided in most of the subject matters. Where the consent of state is required it is very unsatisfactory. It may be suggested that for maintaining the federal structure and imposing check upon the frequent change in the constitution, consent of State legislatures should be necessary for each and every provision of the constitution.

TENDENCY OF AMENDING PROCESS WITH REFERENCE TO PEOPLE:

Under Article 368 of Indian Constitution, people are not associated with the amending process at all. This factor is decisive in determining the ambit of the amending power. In contrast, to Federal Constitutions like Australia, Switzerland and Nigeria 1979, amendment of the constitution cannot take place without the consent of the people determined by a referendum or by the summoning a convention or otherwise.

In view of the frequent amendment, after the 42nd amendment onwards a persistent demand has been made for referendum therefore a bill, to this affect, was introduced in the Parliament in 1976 it was passed by
Few members among the constitution framers gave considerable thought to the introduction of the referendum for amendment of the constitution but majority opposed it on the ground of vast population, literacy of people, huge expenditure, wastage of time, money and power.23

Therefore Justice Khanna observed:

"The argument that provision should be made for referendum is equally facile. Our constitution makers rejected the method of referendum. In a country where there are religious and linguistic minorities, it was not considered a proper method of deciding vital issues. The leaders of the minority communities entertained apprehension regarding his method. it is obvious that when passing are roused the opinion of the minority in a popular referendum is found to get submerged and lose effectiveness... It therefore, can not be said that the method of referendum provides a more effective check on the power of amendment compared to the method of bringing it about by prescribed majority in each house of the parliament." 24

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the Lok Sabha but it was unfortunately defeated in Rajya Sabha. 21

In the criticism of the referendum, it is said that the introduction of referendum would diminish the importance of parliament and the sense of responsibility of the members, elected by the people.

But in response to above criticism it is better to quote eminent Swiss writer F. Bon Jour:

"For from diminishing the importance of parliamentary labours referendum obliges members to prepare laws and decrease with the greatest possible care and by imposing upon them the duty of justifying their work to the people, it helps to make them public men in widest sense of the them. It adds to rather than detracts from the importance of their function." 22

On the basis of above statement it may be said that it is wrong to think that referendum would diminish the importance of parliament. It helps, adds and maintain the dignity of Parliament, if its step is right and in the favour of the society and for the development of the country.

TENDENCY OF AMENDING PROCESS AND EXECUTIVE HEAD:

In the constitution of U.S.A. Executive Head 'President' is not associated in the amending process. But in the Indian constitution Executive head 'President' is associated in the amending process.

Under Article 368(2) when an amending bill is passed in each House by a majority of total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting "It shall be presented to the President who shall give his assent to the bill and their upon the constitution shall stand amended in accordance with terms of the bill".

In the original constitution under Article 368(2) it is provided -

"It shall be presented to the president for his assent and upon such assent being given to the bill".25

Under this original position of Article 368 (2) president had power to give assent on the amending bill but he was not bound to give assent on the bill, he could refuse to give assent on the bill.

25. See Article 368(2) before the 1971.
Justice Wanchoo in his majority opinion in Golak Nath Case held:

"We read Article 368, we can not hold that President is found to assent and can not with hold his assent which bill for amendment of constitution is presented to him" 26

Thus, it may be seen that in original constitutional provision President had voice in concern to amending Bill. He could express his opinion on the bill. He had choice to either accept the bill or reject it.

Position of President, in relation to amendment totally changed after the 24th Amendment Act 1971, in which words "Who shall give his assent to the Bill" are inserted in the place of words "upon such assent being given to the bill".

After the 24th Amendment Assent of President is only obligator and becomes only formality rather than power in reality. So Justice Khanna expressed his view. 27

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"24th amendment has been made so as to make it obligatory for president to give his assent to amend Bill after it has been passed in accordance with the Article".

Similarly Justice Mathew Observed:

"After 24th Amendment .... It is declaratory in character except as regard the compulsory nature of the assent of the President to a bill for amendment." 28

Thus, in result, position of President is the same in both the constitution U.S.A. and India, both have no hold upon the amending bill, though both differ in the context, U.S.A., has no provision for the assent of President whereas, India has a provision for assent of President, but it is only formality.

TENDENCY OF AMENDING PROCESS WITH REFERENCE TO PARLIAMENT:

Subject to special procedure laid down in Article 368, our constitution vests constituent power upon ordinary legislature of union, that is called Parliament and there is no separate constituent amending body as it exists in the constitution of U.S.A. under the constitution of U.S.A., constituent

body is created with the association of Union and State legislatures which is known as convention.

In Indian constitution Parliament is only competent body to amend the constitution excepting to the certain matters given in Article 368(2) Parliament has exclusive power to amend the constitution. State legislatures have their voice only in few matters which are given in article 368 (2). Excepting of these state has no voice in amending process. Similarly people are also avoided from the amending process by rejecting to provision of referendum, which is prevail in amending process of Switzerland and Australia.

Thus, the Sovereignty of Parliament in relation to amending process, has been established, by the Framer of our constitution, by exclusion of state legislature in relation to initiate the proposal of amendment, giving limited power of ratification to state legislatures and totally excluding the people from the amending process.

In relation to subject matter, Indian Parliament is Sovereign Body. It can amend each and every provision of the constitution because under the plain wording of Article 368, there is no express limitation upon the amending power of Parliament and there is no entrached provisions in Indian
constitution. It is another thing, that through judicial pronouncements power of Parliament is curtailed or limited.

Our constitution is of a hybrid pattern. It is partly controlled like U.S.A. and partly uncontrolled like U.K. It is a balance between British flexible and American rigidity in terms of its amendability. It is uncontrolled with respect to those provisions of the constitution which may be amended by an ordinary law through the legislative procedure it is controlled with respect to the remaining provisions which may be amended only by following the procedure prescribed in article 368, when any part of the constitution is amended by following the simple procedure, the amendment is the result of the exercise of the legislature power. When it is amended through the procedure prescribed by Article 368, the amendment is the result of the exercise to the constituent power. But in effect and result both are same and that is called a constitutional amendment, so D.O. Basu rightly observed:

"Alteration of certain provisions of the constitution are not to be deemed to amendment of the constitution..... even though the result
of such alteration is also considered as an amendment of the constitution.²⁹

The same view is expressed by Paras Diwan:

"There is temptation to call former alone as, amendment of the Constitution and to deny this description to letter, but it is submitted since in both cases the constitution stand amended, both are constitutional amendment."³⁰

Thus, lack of express limitation upon the power of Parliament and execution of State legislatures and people, Parliament become omnipotent (Important) in the field of amending process. Except Article 368 it has no limitation so it becomes an absolute amending body.

Fusion of legislative and Executive power occurring in Cabinet system under the Parliamentary from the Government Parliament becomes more powerful and leads to danger of absolutism.

Party system in democratic form government also rules the hopes of people. Parliament works for its party's sake and does not care about the will of the general people and misrepresent their needs. Thus,

³⁰ Paras Diwan : An ending power constitutional amendments (1990) P.117
constitution becomes a constitution of a party and every party which into power changes the constitution according to its party politics rather than for the Nation.

In the light of above factors, Parliament becomes more omnipotent amending body with reference to other Federal constitutions. It can amend each and every provision of the constitution and there is no express limitation other than following the procedure of Article 368. Through judicial pronouncement extra legal check of basic structure was imposed upon amending process, yet in legal term Parliament can amend each and provision of the constitution even preamble of the constitution and there is no express limitation upon the amending power of Parliament.

**TENDENCY OF AMENDING PROCESS AND JUDICIARY:**

Judiciary has a very vital role in interpreting, protecting, supplying, adding and giving a real shape to constitution. It fills the gaps, supper defect and moulds to constitution according to demand of present society. U.S.A. and Australia are the best example of it.
Constitution of Australia gives a general outline of Government and it was drafted many years ago in a different age. Therefore, the High court of Australia, especially fills in details for the day to day running of the country and it adopts the constitution to the present day. Engineers case 31, Malbourne case 32 and Bank Nationalization case 33 are the best example of it.

Similarly, in the constitution of U.S.A. Doctrine of Judicial Review 34, Doctrine of impunity of instrumentalities 35, Doctrine of Eminent domain and police power 36 due process of law 37, are entirely the result of Judicial procurement though there is no express wording on the point in the constitution in clear term.

Judicial Review is an informal process of amendment. Judiciary through its interpretation gives new shape to constitutional provision and thus it amends

31. See Amalgamated Society of Engineers Vs. Adelaide steam ship Co.Ltd.(1920) 28 C.L.R.129
34. Malbury Vs. Madison (1803) U.S. 137.
37. Chicago B.Q. Railroad Co.Vs. chicango (1897) U.S. 246
the constitution in informal way. No doubt amendment of the constitution is carried into effect by the compliance of the formalities of constitutional amendment. But it is also depend upon the attitude of Judiciary.

Soon after the commencement of Indian Constitution, two provisions, one implementation of socio-economic progress under the head of Directive principles of state policy and second safeguarding the Fundamental Rights, come into conflict. Neither part III of the constitution nor Article 368 provides specifically whether the rights under in part III are amendable or not? in absence of any specific provision on this point, the answer to the question whether the fundamental rights are amendable by parliament, depends on the construction and interpretation of the judicial review. This leads to some controversy between the legislature and judiciary involving questions of relative supremacy of their organs.

The very first two years of the working of the constitution followed by First amendment supreme Court of India in Shankar Prasad case\(^3\) conceded unlimited

\(^3\) Shankari Prasad Vs. Union of India AIR (1951) SC 458.
amending power to the parliament and court adopted the liberal attitude toward the Article 13(2) and Article 368.

Again, Supreme Court in Sajjan Singh case \(^{39}\) by majority of three to two clearly upheld the verdict of Supreme Court given in Shankari Prasad \(^{38}\) and held that apart from the unambiguous language of Article 368, on principles also it appears unreasonable to suggest that constitution makers wanted to provide that guaranteed Fundamental Rights should be touched by way of amendment.

But, opinion of Hidayatullah and Mudholkar JJ created some doubt about the amending power of Parliament in relation to fundamental rights, Justice Hidayatullah expressed his doubt in the following term

"The constitution gives so many assurances in Part-III that could be difficult to think that they were play things of a special majority, to hold this would mean prima-facie that the most solemn part of our constitution stand on the same footing as any other provision and even less firm ground than one on which arrides mentioned in the proviso stand" \(^{40}\)

\(^{39}\) Sajjan Singh Vs. State of Rajasthan AIR (1965) SC 845

\(^{40}\) Ibid Justice Hidayatullah Para 862.
Similarly, Justice Mudholkar doubted:

"....... Above all, if formulated a solemn and dignified preamble which appears to be an epitome of the basic feature of the constitution, can it not be said that these are indicia of the intention of constituent Assembly to give a premancy to basic features of the constitution." 41

The attitude, about the fundamental rights, of Justice Hidayatullah in Sajjan Singh case 39 becomes the majority opinion of Golak Nath case 42. In majority opinion of Golak Nath case six to five held that Fundamental Rights could not be abridged or taken away by Parliament. They took the view that an act amending the constitution in accordance with article 368 was still 'law' within the meaning of article 13(2), so that the constitution amendment Act would be void if it sought to take away or modify any of the fundamental rights guaranteed by Part-III of the constitution.

The Judges in Golak Nath, intentionally or unintentionally wrongly construed the provision of Article 13(2) 368 and located the Amending power of

41. Ibid Justice Mudholkar Para 864.
Parliament in Articles 245, 246, and 248 read with Sch. 7 list item 97 and not in Article 368.

Thus judiciary gave a wrong twist to Article 368 in reference Article 13(2). therefore H.M. seervai rightly called it : "Productive of great public mischief". 43

Similarly, D.D. Basu observed :

"...... Part III of the constitution would be unamendable though it was not expressly excluded from the pur-view of Article 368" 44

The similar approach was adopted in other property rights cases 45 to overcome there cases and for removing the hinderence parliament enacted 24, 25, 26 and 29th amendments.

The constitutionality of all these constitutional amendment Act were challenged in Kesavanda Bharti case 46. The majority of Supreme Court in Kesavananda Bharti case over ruled the Golak Nath

and held that Parliament has power to amend each and every provision of the constitution; even the Fundamental Rights or Article 368 itself, but parliament cannot alter or destroy the 'Basic structure' of the Constitution.

In Kesavananda Bharti case Judiciary accepted that parliament has power to amend each and every provisions of constitution from Preamble to schedules, but it imposes one restriction upon amending power of Parliament that is, parliament cannot alter or destroy the 'Basic structure of the constitution'.

Seeds of Basic structure theory may be seen in the doubt of Justice Mudholkar in Sajjan Singh case seeds which were sown in Sajjan Singh took the real shape of doctrine in the majority opinion of Kesavananda Bharti case. Judiciary reached on this conclusion not through the express wording of Article 368 but on the theory of implied limitation. It gave too much important to wording of preamble, history of drafting the constitution and sovereignty of the people and reached on the conclusion that Parliament could not change the basic structure of the constitution.

47. Majority opinion formed by C.J. Sikri, Shelat, Grover, Hegde, Mukherjee, Reddy and Khanna, JJ.
Chief Justice Sikri in his conclusion observed:

"The learned attorney-General said that every provision of the constitution is essential otherwise it could not have been put in the constitution. This is true. But this does not place every provision of the constitution in the same position of the constitution in the same position. The true position is that every provision of the constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist to the following features:

(1) Supremacy of the constitution.
(2) Republican and Democratic forms of Government.
(3) Secular character of the constitution.
(4) Separation of power between the legislature to executive and the Judiciary.
(5) Federal character of the constitution."

Similarly Shelat, Grover, Hegde, Mukherjee and Jagmohan Reddy gave the list of basic structure but they were not final and Justice Hegde and Mukher clearly said:

"On the careful consideration of various aspects of the case, we are convinced that parliament has no power to abrogate or emasculate the basic elements or fundamental features of the constitution such .... These limitations are only illustrative and not exhaustive." 49

With reference to the scope of the amending power Chief Justice Sikri said:

"In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression 'Amendment of the constitution' has consequently a limited meaning in our constitution" 50

Justice Khanna, concurred with the majority decision but delivered a separate Judgement. He joined with the majority opinion on the point that basic structure can not be abridge or taken away but he did not accept the implied limitation over the Article 368 as did other six judges of in their majority Judgment. He reached the same conclusion though the interpretation of word 'amendment', but not the theory of implied limitation. Thus he followed the theory of express limitation but he reached on the conclusion of majority judgment.

49. Ibid, Para 682
50. Ibid, Para 294
Justice Khanna did not believe on the implied limitation and he said -

"I have not been able to discern in the language of the article or other relevant article any implied limitation on the power to amendment contained in the said article (368)" 51

With regard to the scope of the amending power Khanna J. Said:

"The word 'Amendment' postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subject to alterations, as a result of the amendment, the old constitution can not be destroyed and done away with it is retained though in the amended form.... The words' amendment of the constitution' with all their wide sweep and amplitude can not have the effect of destroying or abropating the basic structure or frame work of the constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship of hereditary monarchy nor would it be permissible abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only can not likewise be done away with. Provision regarding the amendment of the constitution does not furnish a pretence for a subverting the structure of the constitution nor

51. Ibid, para 1456
can Article 368 be so construed as to embody the dealt with of the constitution or provide sanction for what may perhaps be called its lawful harakiri. such subversion or destruction can not be described to be amendment of the constitution as contemplated by Article 368" 52

Thus, separate judgment of Justice Khanna made majority opinion of Kesavananda Bharti case 46 with the C.J. Sikri, Shelat, Grover, Hegde, Mukherjee and Reddy, when he accepted the doctrine of basic structure under Article 368, though he did not accepted the implied theory of above judges.

On the other side Palekar, Mathew, Beg, Dwivedi and Chandrachud JJ, in their minority opinion they held:

"There is no limitation under Article 368 express or implied on the amending power of parliament." 53

Justice in his minority opinion clearly said:

"The power to amend is wide and unlimited. The power to amend means the power to add, alter, or repeated any provision of the constitution. There can be or is no distinction between essential and unessential features of the constitution to raise any impediment to amendment of alleged essential feature..." 54

52. Ibid, Para 1437
53. Ibid, Head Note, P. 1462
54. Ibid, Justice Ray Para 1078
Thus, it may be seen that Kesavanand Bharti decision though a historical judgment was decided by a very thine majority seven to six, a separate judgment of Mr. Justice Khanna playing a decisive role in it.

Therefore the tendency of judiciary in Kesavananda Bharti case is that 'you have power but can not use it' Supreme Court accepted the amending power of Parliament under Article 368 but denied to use it in relation to basic structure of the constitution.

D.D. Basu criticised the basic structure theory as follow:

".... It (Kesavananda Bharti case) introduced a Noval and amorphous sphere of entrenchment by judicial interpretation, by inventing the doctrine of basic features of the constitution as constituting implied limitation upon the amending power conferred by Article 368 which did not expressly entrench any part of the constitution" 55

H.M. Seervai also reached on the same conclusion as:

"A careful reading of six majority judgment, does not give a clear and precise idea as to what exactly and definitely constitute the basic features which are not mentioned anywhere in the constitution" \(^{56}\)

In the same strength, P.K. Tripathi in his Article observed.\(^{57}\)

"Basic structure theory is very vague and uncertain, they are illustrative and not exhaustive...."

Dr. Harichand also did not appreciate basic structure theory and said:

"It is unrealistic to think that certain Valves which we believe it would be looked at in the same manner as we do by the generation to come.... to declare oneself to be solomons for all the ages to come... and therefore the valve interpretation of basic structure theory should be rejected...."\(^{58}\)

When the doctrine of Basic structure has been criticised from all sides, even though trend of Judiciary is not changed, it has been affirmed by Supreme Court in Smt. Indra Nehru Gandhi \(^{59}\), Minerya Mills\(^{60}\) and Waman Rao case.\(^{61}\)

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60. Minerya Mills Vs Union of India AIR 1980 SC 1789
Thus, tendency of the Judiciary does not appear to be satisfactory. When in Golak Nath case Supreme Court through his interpretation of Article 13(2) in reference to 368 restrictions imposed upon the amending power of Parliament then in Kesavananda Bharti case in the name of implied theory doctrine of basic structure is invented to put a check upon the amending power of the parliament.

Therefore, basic structure theory established the Supremacy of Judges over the Parliament and restored the final wording over the amendment. In every dispute where question will arise that is it basic structure or not? Then it is judiciary which shall have final wording over the matter that Parliament has power to amend on such subject or not?

Therefore S.K. Bhatia rightly comments:

"Basic structure doctrine is basically mischievous. It makes that permissive what is otherwise not; it permits the judicial review of constitutional amendment not merely on permissible procedural count but on substantive count on account of value system, not of the 'we the people' reflected through their duly elected representative but that of individual judges. The tragedy is that with the blind adoption of doctrine of State decision this doctrine has led our judges to contrive the judgment instead of construing the constitution".

PROSPECTS OF AMENDING PROCESS:

Since 1950, there have been more than 67 Amendments till October 5, 1990 in Indian constitution, this creates doubt about the correctness of amending process in contrast to the American amending process where only 26 amendments have taken place during the two hundred years. A National debate is now going on in the country from different quarters on the frequency, quality and character of the recent amendments of the constitution. A lot of criticism is advanced about the Indian Constitution having being amended constitution 67 times within the brief span of four decades. Well, it should be said at the outset that the number of times that a constitution needs the amended can not be co-related with the time factor, nor is it proper to judge constitutional amendments merely by number. When a constitution amendment requires to effected, the occasion is dependent on variety of causes and once the cause appears patent the amendment becomes invitable and as such it should effected at the earliest opportunity. An amendment to the constitution can not be anticipated in advance as it depends on the interprative need for it and that imperative need may arise any movement. As such amendments to various
provisions of the constitution can not be phased to any set time schedule. The occasion for amendments or the cause might come in quick successions or it might not for a long time. The Swiss constitution for example was amended only 11 times during the first 28 years but during the next 78 years it was amended as many as 98 times. 63 Similarly Indian constitution was amended only 23 times during the 20 years but during the next 20 years it was amended as many as 44 times till October 5, 1990 times.

The normal experience has been that in the initial period of the working of the constitution, since the various provisions contained in the constitutional document come in for being tried out, the frequency of amendments is greater. But once it is established that and large, the various provisions of the constitution have facilitated the realisation of the objectives for which those provisions have been made, constitution amendments become less frequent. In the U.S.A. for instance, the first 10 amendments were initiated and adopted at once time but later on constitutional amendments became less frequent. 64


64. Ibid. P. 238
However, the frequency of constitutional Amendments depends on the Nature of the constitution. Indian Constitution is a largest single constitutional document for the federal as well as for components of a federal scheme of the Governments. So the tendency for constitutional amendment increases not only because of enlargement of the scope of the constitutional document but for the purposes of the facilitating harmonious relationship between the union and state Government.

Again, the frequency of constitutional amendments depends on the attitude of the people not upon the flexibility or Rigidity of the amending process. Switzerland and Australian Constitution are the best examples of it, both have rigid amending process in them but number of amendments vary in both countries. What is the reason behind it? It is only attitude of the people which increases and decreases the number of amendments. 65

Another question that arises in the context of constitutional amendment in Indian is whether the amendments were drastic and fundamentally altered the

basic structure and scheme of the constitution or were merely clarification and consequential meant for upholding that scheme and for facilitating the due discharge of the constitutional obligations and directives. The amendments carried out till date established beyond doubt that the objectives have been for the preservation and perpetuation of the scheme of the constitution and for facilitating the realisation of the goals and aspirations of the people of India as provided for in part IV of the constitutional document. Amendments in most cases were necessitated consequent on judicial interpretation of the phrasingology of the constitution not being in consequence with the spirit of the constitution, while quite a few amendments were made to comply with the interpretation given by the Judiciary.

Frequent amendment of the constitution have been created dispute about the sovereignty of the Parliament in the field of amendment. It is said now a days amendments have become a play things of majority of Parliament. It is only the result of will of the majority party and not a will of majority of the people. It is wrong to think that parliament have
become more powerful and misusing its amending powers. The People of India are to exercise their sovereignty through a Parliament, which is only a body of People's representatives. Parliament is merely the mouth piece of the sovereign people and not the sovereign itself. It holds force from the people and its existence depends on the will of the people than how it may say that parliament misusing its amending powers without the consent or assurance of the people.

Thus, it may be submitted that prospect of mixed nature amending process of our constitution is working more satisfactory rather than those constitutions which are purely flexible or purely rigid.

It may be stated that every power may be misused therefore it does not mean that there should be no power. Mischief of Parliament can be removed by the awareness of the people and there is no necessity of Judicial control over the Parliament in form of doctrine of Basic structure.