CHAPTER - I

INTRODUCTION

In the ancient period, there was no existence of word 'Constitution'. Crown was the sole source of all authority and he personally exercised the Supreme Executive, Legislative and Judicial powers. The origin of institution of Representative Legislature put the foundation of 'Constitutional Monarchy'. Crown's arbitrary powers had been taken away and the 'Limited-Government' was established.

According to Charles Howard McIiwain:

"Constitutional Government is a Limited Government. Constitution is a legal limitation on Government; it is a antithesis of an arbitrary rule; it is a Government of Law-instead of will."¹

The era in which the first American Constitutions were framed is called 'Constitutional period of modern world.'² The American example was speedily followed by France and then many of German States adopted written

Constitution. European States likewise adopted written constitution before the middle of the 19th century.

The word 'Constitution' is used in Great Britain in the wider sense. It is used to describe the whole system of government of a country, the collection of rules which establish and regulate the government. But in almost all the other countries, the word 'Constitution' is used in a narrow sense. It is used to describe not the whole collection of the rules, legal and extra-legal but rather selection of legal rules only, which is usually embodied in one document.

C.F. Strong defined a constitution as:

"A constitution may be said to be a collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted. The constitution may be a deliberate creation on paper, it may be found in one document which itself is altered or amended as time and growth demand or it may be a bundle of separate laws given special authority as the laws of the constitution." 3

Lord Bryce observed:

"A frame of political society, organised though and by law, that is to say, one in which law has established permanent institutions with recognised functions and definite rights."4

The constitution of country is not only a legal document but also a social, political and national character reflecting the hopes and aspirations of the people. It is a flexible instrument for carrying out social-economic changes and to bring about the cherished values of the people. As an effective investment of the socio-economic engineering it may assume prime importance particularly in the underdeveloped nations where the everchanging and everwidening numerous hopes and aspirations of the teeming millions are to be converted into realities. Through the constitution the living image of the Nation and people's breathe, encompassing all that is needed to make the society organic and vitally responsive to the needs of the people.

NECESSITY OF AMENDING PROCESS IN THE CONSTITUTION:

There is nothing permanent on the earth and so is the case with the constitution as well. Constitution is a

living organ and it has to keep pace with the changing needs of the society. Constitutions are not ends in themselves but are only the means or the mechanism for the attainment of the necessary and described ends. Change is the one eternal law of life and it allows no exception in the case of constitutions.

According to James Wilford Garner:

"Human societies grow and develop with the lapse of time, and unless provision is made for such constitutional readjustment as their internal development requires, they must stagnate or retrogress."

Quick and Garren, compared to the constitution as a living organism in the following way:

"...A constitution may be compared to a living organism. It is not in the nature of living organism to remain monotonously the same from year to year and from age to age. As with individual units, so with Nation, change is one of the laws of life. The constitution of a Nation is the outward and visible manifestation of its National life to the pulsations of which it necessarily responds. The energy within any healthy organic structure must find vent in change. Change assumes various external forms. The power in a progressive community is never quiescent or stationary."

W. Brooke Graves also observed:

"... Government is a changing, growing, developing, dynamic institution, in need of continuous adoption to changed social and economic conditions." 7

In the same spirit President Woodrow Wilson also compared the constitution with the living organism in the following way:

"Constitution is a ........ a vehicle of life ....... and such it, it must grow and develop as a life of the Nation. ....Its atmosphere is opinion, the air from which it takes its breath and vigour. The underlying understandings a constitutional system are modified from age to age by change of life and circumstances and corresponding alterations of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the Nation's need and purposes." 8

Thus constitution is a living organ of the society and represents the will of the people. It is an instrument for carrying out socio-economic change and bring about the cherished values of the people. Through the constitution numerous hopes and aspiration of the

people are to be converted into realities. Therefore, an adequate provision for amendment is necessary for every constitution.

Constitution is a guide line for the governance of the country. It consists of those rules or laws which determines the form of its government and the respective rights and duties of it, towards its citizens and of the citizens towards the government. The constitution thus sets out the frame work and functions of the government of a state and declares the principles governing the operation of those organs and the relation between them and the citizen of the state. Concept of rights and duties may be varied according to need of the society. Similarly concept about organism of government may be changed according to necessity of the society. So there must be a provision of amendment in the constitution.

The life of a Nation is dynamic and with it political, social and economic conditions change almost continuously. Consequently, either new problems are created or the complexion of the old ones are altered. It is, therefore, quite often that a constitution drafted in one era and in a particular context is found inadequate in another era and context. The basic ideas upon which a
constitutions is based in one generation may be found outworn in the next. It thus becomes necessary to have some machinery, some process, by which the constitution may be adopted from time to time in accordance with national needs.

There are two processes by which a constitution adopts itself to the new circumstances. Informal process and Formal Process. In Informal Process the constitution text remains the same, merely its interpretation undergoes a change. Informal Process is the process of Indicial interpretation, conventions and constitutional usages. These methods of Informal Process are not a ultimate solution to the problems, but it a temporary relief toward the problem.

So far the permanent solution, there is necessity of Formal Process of amendment. This process of Formal amendment in the most important and effective way of adopting constitution to the changing circumstance in the society.

If no provision were made for the amendment of the constitution, the people would have been with no remedy of means for adopting it to changing need of times
and would perforce have recurred to extra-constitutional methods of changing the constitution, only by means of a revolution. On this point Prof. H.E. Willes wrote:

"If no provision for amendment were provided there would be a constant danger of revolution." 9

No law, whether it may be constitutional law or ordinary law, can live in society without the will of the people because force is always on the side of governed, the governor's have nothing to support them but opinion of the people. So A.V. Dicey rightly observed:

"The existence and alteration of the human institution must always and everywhere depend upon the beliefs or feelings or in other words, upon the opinion of the society in which such institution flourish." 10

The Political Sovereign is echo of the political philosophy of Rousseau that sovereignty always resides in the people and that it can at any moment recall the grants it has made, that the people are to exercise their

will through periodical assemblies, it is not enough for the assembled people to have once fixed the constitution of the state is complete. The object of opinion of these assemblies is the maintenance of the social treaty. Rousseau said:

"There is in the state no fundamental law that can not revoked, not excluding the social concept itself, for it all the citizens assembled of one accord to break the concept, it is impossible to doubt that it would be very legitimately broke." 11

In reality a constitution can retain its force only so long as the people care for it. The existence of every government or institution is the consent of those who have power to change it and in a purely democratic nation the force of government defend upon majority. If the constitution create a frustration in the mind of the people then it can not take its place in the society.

Aristotale, a great political scientist of his time as observed:

"Constitution is cycle of change ...... and Frustration is the root cause of all such changes in the functioning of a government. For instance, from monarchy, we have preferred democracy and if Democratic process failed to satisfy the aspiration of the people, we should be rather compelled to adopt another form of government whether it may be totalitarian or constitutional dictatorship." 12

So far avoiding the revolution and making constitution according to the will of governed people there must be a provision of amendment in the constitution itself. If no provision were made for the amendment of the constitution, there would be no legal way of meeting the changed need of the times and the constitution would have to forcibly subverted. On this point A.V. Dicey gave illustration in the following way:

"..... Twelve unchangeable constitution of France have each lasted on an average for less than ten years and have frequently perished by violence. Louis Phillippe's Monarchy was destroyed within seven years of the time when Tocqueville pointed out that no power existed legally capable of altering the articles of the character. On one Notorious instance at least and other examples of the same phenomenon might be produced from the annals of

revolutionary France - the immutability of the constitution was the ground or excuse for its violent suberson. If the inflexibility of France constitution has provoked revolution, the flexibility of English constitution has once at least saved them from violent overthrow. 13

Sir Ivor Jennings also criticized the inflexibility of the constitution in the following way:

"The real difficulty is that problems of life and society are infinitely variable. A draftsman thinks of problems that he can foresee, but he sees through a glass darkly. He cannot know what problem will arise in ten, twenty, fifty or hundred years. Any restrictions on legislative power may do harm because the effect of that restriction in new conditions can be foreseen." 14

Sometimes inbuild mechanism of a written constitution fails to meet the need of unforeseen and unforeseeable events. In such situation, amendment of constitution not merely become invitable but also desirable. Thus a constitution has to ensure stability and at the same time sufficient flexibility so that it is

able to meet the challenge of change. The constitution-makers have to avoid the mistake of over-emphasising the flexibility of stability. In the words of Dickinson:

"The largest numbers of the controversies and causes of dissatisfaction that arise under a written constitution are connected with the question of progress ... The function of a written constitution is to provide such a principle and frame work of order within which change can proceed without endangering stability. It is the function of a constitution to provide resistance to change merely as such. If that were not so, a constitution would be an incitement to revolution rather than a means of avoiding them. On the other hand, a constitution which left the door open to any and every kind of change could not perform its function, since the function of a constitution is to ensure a stable progress and certain types of change are incompatible with stability."

It may be stated that amending provision in the constitution is also necessary for removing the doubt or purifying the mistakes or giving the correct meaning of word in the context of present society. On this point John W. Burgess said:

"A constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state truthfully organised in the constitution but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of a state."\textsuperscript{16}

A Federal Constitution is in the Nature of an agreement between the parties to the federation, giving rise to a new state, namely the federation. If this arrangement is to continue, the process of changing the constitution should be rigid. A rigid constitution does not involve unamendability but has some what difficult special process of amendment. It proceeds on the principle that the process of amendment should be such as to guarantee against hast and ill-considered changes brought under the day to day political pressure, so that the basic norms of the constitution are not changed in a hurry. Thus a written Federal Constitution portulates what the Americans call 'Limited Government' as distinguished from the English System of Parliamentary Sovereignty.

Supporting to above contention A.V. Dicey observed:

"A Federal state is a political contrivance intended to reconcile national unity and power with the maintenance of state rights ..... If this arrangement is to continue, the process of changing the constitution should be rigid and should require consent of all the Federating Parties."17

Speaking of provision regarding amendment of a constitution and at the same time sounding a note of caution against a too easy method of amendment, Prof. H.E. Willis wrote:

"If no provision for amendment were provided there would be constant danger of revolution. If the method of amendment were made too easy, there would be the danger of too hasty action all of the time. If either case there would be a danger of overthrow of our political institution. Hence the purpose of providing for amendment of the constitution is to make it possible gradually to change the constitution in a ordinary fashion as the change in social conditions make it necessary to change the fundamental law to correspond with such social change."18

Thomas M. Cooley also did not support too much rigidity in constitution and pleaded avoidance of rash and hasty legislation. He observed:

"A change in Government is according to the order of nature, a good constitution should provide for safe growth and expansion. Here again, it may be easily concluded the unwritten has advantages. What growth can be better, it may be asked, than that which is going on from day to day, imperceptibly and is finally officially and formally recognised when it is complete? But on the other hand, this method of change accompanied by dangers that may threaten the very existence of government .... The written constitution thus prepares the way for growth and expansion be steps which give security against public disorder and violence, its provisions may be moulded to new thoughts, new aspirations and new needs, as peaceful as the simplest law on the statute book may be modified, perhaps with us little discussion."

The provision of amendment must be in the constitution though it may be easy or difficult, ordinary or special, without it we cannot think about the existence of the constitution and it will be tyranny of time as stated by Mulford:

"An unamendable constitution is the worst tyranny of time or rather the very tranny of time. It makes an earthy providence of a convention which has adjourned without day. It placed the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stone their sepulchres." 20

W. Brooke Graves, also draws attention to the great importance that is to be attached to a suitable amending provision in written constitution. He observed:

"A constitution whose amending protections make it impossible to make necessary modifications in governmental institutions comes to be a sort of constitutional strait-jaket. We cannot prevent Government changes by failing to make adequate constitutional provision for them. The alternative method is likely to be a revolutionary upheaval caused by the accumulation of grievances and social and economic maladministration." 21

As to how important an amending provision is a constitutional document is and what would be the consequence in the absence of such a provision, is aptly stated by J.W. Garner:


"No written constitution is complete without (amending provision) such a provision ...... In some respects the amending provision is the most important of the constitution, because as it has been said, upon the correspondence of the written constitution with real and natural conditions of the state depends the question whether it shall develop with peaceable continuity or shall suffer alternations of stagnation, retrogression and revolution."22

Commenting about the amending process Pandit Jawaharlal Nehru expressed a view:

".....We want this constitution (Indian Constitution) to be solid and as permanent as structure as we can make it, nevertheless there is no permanency in constitution, there should be a certain flexibility. If you make anything rigid and permanent, you stop a Nation's growth, the growth of living vital organic people. Therefore it has to be flexible."23

In view of the opinions expressed above see that for the living and progressive constitution, there must be provision of amendment under the constitution. If any institution or constitution wants its existence in the society it must run with the will of the people, demand of the people and accept the progressive approach of life and society.

So Justice Cushing correctly said:

"If the constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment." 24

Conviced of the possibility of amending process Herman Finer could not resist the temptation of expressing himself in the following words:

"The amending clause is so fundamental to a constitution that it may be called the constitution itself." 25

THE WORD 'AMENDMENT', CONSTITUTION - AMENDMENT AND ITS SCOPE:

In Shorter Oxford English Dictionary it is said that word 'Amendment' is derived from the Latin word 'Emendare', which mean 'removal of faults or error, reformation or the alteration of Bill before Parliament, a proposal, alteration which it adopted may even defeat the measure.' 26


On the other side, in Century Dictionary it is said that the word 'Amendment' is derived from the French word 'Amender' which means to make better, by way of alteration, correction or addition.\textsuperscript{27}

According to Webster's Third New International Dictionary, it means - 'Act of amending for the better, correction of fault or faults, the process of amending as a motion, bill, act of constitution that will provide for its own amendment, an alteration proposed or effected by such process.'\textsuperscript{28}

As per Random House Dictionary of the English language, 'Amendment' means - 'to alter, modify, rephrase or add to, subtract from (a motion, bill, constitution etc.) by formal procedure, to change for the better, improve, to remove or correct faults.'\textsuperscript{29}

In Standard Dictionary of Funk and Wagnalls, 'Amendment' is defined as an act of changing a fundamental law as of a political constitution or any

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} See Century Dictionary.
\item \textsuperscript{28} See Websters Third New International Dictionary.
\item \textsuperscript{29} See Random House Dictionary of the English language (unabridged Ed.)
\end{itemize}
\end{footnotesize}
change made in it according to a prescribed mode of procedure as to alter the law lay amendment, an amendment of the constitution. 30

According to 'Words and Phrases' Permanent Edition, word 'Amendment' involves an alteration or change, as by addition, taking away or modification. 31

In the Dictionary of Social Sciences the word 'Amendment' has been explained in the following way:

"The term 'Amendment' whenever used, has the core denotation of alteration or change. Historically the change or alteration denoted was for the sake of correction or improvement. In the realities and controversies of political, however, the nature of correction or improvement becomes uncertain, so that alteration or change remains the only indisputable meaning as the term is applied." 32

As to be interpretation of the word 'Amendment' authorities have expressed divergent views. According to Crawford:

32. See Dictionary of Social Sciences.
"There are many different definitions of the term amendment, as it applies to legislation. Generally, it may be defined as an alteration or change of some thing, proposed in a bill or established as law. We are not, however, here concerned with the amendment of the proposed bills, but with the amendment of existing laws. Thus limited, a definition as suitable or any, defines an amendment as a change in some of the existing provisions of statute or stated in more detail, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or it is in some way changed or altered in order to make it more complete or perfect or effective."33

Sutherland in his 'statutory construction' observed:

"Any change of the scope or effect of an existing statute whether by addition, omission or substitution of provisions which does not wholly terminate its existence whether by an act purporting to amend, repeal, revise or supplement or by an act in dependent original in form, is treated as amendatory."34

From the above, it can be seen that word 'Amendment' includes in itself three sense, First: Addition, Second: Variation, Third: Removal. Every 'Amendment' can only take place in above three sense.

33. Crawford:Statutory construction (1940 Ed.) P.-170
34. Sutherland : Statutory construction (1943 Ed.) P.-348.
The word 'Amendment' includes in itself word 'change', 'alter' and 'repeal' though these three words have their own separate meaning in themselves.

The word 'Alter' in itself has a sense of addition, without removing any thing. The word 'Alteration' means variation or mutuation of thing.

On the other hand, word 'Change' means substitution or succession of one thing, in place of another, substitution of other condition or variety. Under word 'change' one thing is taken away and other is substituted on place of it.

On the another side word 'Repeal' has a sense of removal and destruction, because word 'Repeal' means to take away a thing from the document and it is not necessary to place another thing on that place.

The word 'Change', 'Alter' and 'Repeal' have a different meaning in themselves, although they are part of the word 'Amendment'. The combination of these three words in a single word 'Amendment' enlarges, increases and expands the meaning of word 'Amendment' in a different way.
The word 'Change' and 'Alter' connate a sense of variation, substitution and reformation. They have a sense of improvement and enlargement. On the other hand word 'Repeal' has a sense of total removal, abridgement and distruction.

In the above two different sense word 'Amendment' covers a very vast field in it under it one can adopt a constructive approach as well as distructive approach. It has progressive aspect as well as it has anti-progressive aspect.

The word 'Amendment' has no fix and precise meaning. It is a colourless word. It takes colour from the context in which it is used. It can not be interpreted in vacuum. Lord Greene observed:

In construing words in section of an act of Parliament is not take these words in Vacuo, so to speak and attribute to them what is sometimes called their natural or ordinary meaning.  

Holmes J. observed:

"A word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." 36

Lord Wright observed:

"The Question, then, is one of construction and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The constitution has been described as the federal compact and the construction must hold a balance between all its parts." 37

From the above, it can be submitted that the word 'Amendment' has a fix and precise meaning. It takes colour from the context in which it is used. The dictionary meaning of word 'Amendment' is inappropriate in constitutional context. Sikri C.J. expressed his view on this point in the following way:


"In the constitution the word 'Amendment' or 'amend' has been used in various places to mean different things. In some Articles, (of Indian constitution) the word 'Amendment' in the context has a wide meaning and in another context it has a narrow meaning." 38

The word 'Amendment' is different from the word 'Constitutional-Amendment'. The word 'Amendment' is not applicable to constitutional law in a manner as it is applied in the ordinary law, because there is difference between constitutional law and ordinary law.

If the word 'Amendment' is added with the word 'Constitution' then it becomes a 'Constitutional-Amendment' and at that time it takes a different shape from the ordinary meaning of the word 'Amendment'. The word 'Constitutional-Amendment' connotes a definite and formal process of constitutional change with the ordinary meaning of the word 'Amendment'. In this sense procedural limitation has been imposed with the ordinary meaning of the word 'Amendment'.

On this point Crowford in his book 'Statutory Construction' observed:

"If a statute enumerates the things upon which it is to operate, everything else must necessarily and by implication be excluded from its operation and effect. So if the statute directs certain acts to be done in a specified manner by certain persons, their performance in any other manner than that specified or by any other person than is there named is impliedly prohibited." 39

In the historic Ceylon case of the Bribery Commissioner Vs. Ranasingh, the Judicial Committee of the Privy Council held:

"The Bribery Amendment Act 1948 was passed without the special majority referred to in the proviso to section 29(4) even though it amount to an amendment of Section 55 of the constitution order as to a appointment of Judicial officers .... The Bribery Amendment Act was invalid for non-compliance with the procedure laid down in the proviso to section 29(4) and that the minority are entitled under the constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority." 40

40. Bribery Commissionery Vs. Ranasingh (1964) 2 All ER 785, 792 PC.
The substance of the above decision is that though the Ceylon Parliament had plenary power for ordinary legislation, in the exercise of its constituent power it was subject to the special procedure laid down in the proviso to section 29(4). While a bare majority would suffice for making an ordinary law in exercise of the power conferred by sub-section (1) a special majority was required for passing a law for making a constitutional amendment.

Similarly, in the American decisions procedural limitations are strictly followed in matter of constitutional amendment. In Hawke Vs. Smith\(^{41}\) case the validity of 18th amendment was challenged. When the 18th Amendment of the Federal constitution, passed by the congress, was sent to the State for ratification, the legislature of the State of Ohio ratified it in accordance with Article V of the Federal Constitution, but in addition, sought to submit it to the referendum of the people of the State. on the ground that the constitution of state of Ohio provides for a referendum in the case of amendment of the constitution, even of the U.S.A. Supreme Court clearly held:

\(^{41}\) Hawke Vs. Smith (1919), 253 US. 221.
"The V Article is a grant of authority ..... to congress. The determination of the method of ratification is the exercise of a national power specifically granted by the constitution that power ..... is limited to two methods .... the framers of the constitution might have adopted a different method. Ratification might have been left to vote of the people or to some authority of Government other than that selected. The language of the article is plain and admits of no doubt in its interpretation. It is not the function of the courts or legislative bodies, National or State, to alter the method which the constitution has fixed."42

The aforesaid observation of the American Supreme Court is thus a direct authority for a proposition that when a written constitution provides a procedure for amendment of the constitution in clear terms under Article V at that time to resort to some other method, as referendum which is not given by Article V, although it may be good and beneficial, would be unconstitutional.

The similar approach was adopted in Australian Constitution. Attorney General of New South Wales Vs. Trethowan case.43 Section 7A of the New South Wales Constitution Act 1902 was challenged. Section 7(A) of the

42. Ibid at pp.-228-29.
43. Attorney General of New South Wales Vs. Trethowan 1932, AC. 526.
New South Wales Constitution Act 1902, provided that no Bill abolishing the legislative council or repealing section 7A should be presented for the Royal assent until it had been approved by a majority of electors voting on a submission to them to be made accordance with the section. A Bill was passed by the legislature 1930, abolishing the legislative council and repealing section 7A without a referendum as required by section 7A. Privy Council held that the Bill would not be a valid Act even if it received the Governor's assent, because the legislature had no power to make such a law except in conformity with section 7A of the Constitution Act.

Again in the constitution of Canada this approach was adopted. The procedure as well as wording of the Act must be followed otherwise such amendment would be considered as a invalid law. In Re the Initiative and Referendum Act 1919, British North American Act 1867 section 92 head I was challenged. Section 92 head I empowered to Provincial Legislature to amend the Constitution of Province 'Excepting as regards the office of the Lieutenant-Governor, who directly represented the crown. The Legislative Assembly of Manitoba passed the initiative and Referendum Act. It compelled the

44. Re The Initiative & Referendum Act 1919, AC. 935.
Lieutenant-Governor to submit a proposed law to a body of votes totally distinct from legislative of which he was the constitution head. Lordship of Judicial committee of Privy council held:

"... The language of the Act could not be construed otherwise than as intended, seriously affecting the position of the Lieutenant-Governor as an integral part of the legislature and to detract from the right which were important in the legal theory of that position. Section 92 of the Act of 1867 entrusted the legislative power in a Province to its legislature and that legislature only .... but it does not follow that it can create and endow with its own capacity a new legislative power created by the Act to which it owes its own existence." 45

In the above case it was held that legislature had no power to create new legislative body which was not given in the Act.

Aforesaid cases are the best examples of the strict and narrow interpretation of the word 'Constitutional Amendment'. In all cases plain and direct meaning of the words have been taken in considering the matter in reference to given text and in the given prescribed procedure.

45. Ibid at P.-945.
On the other hand, the formal method consists in changing the language of the constitutional provisions so as to adopt them to the changed context of the Federal Feature with the context of personal liberties or with the context of the social, economic and political needs. In such interpretation implied meaning of the word, object of the provision and whole context of the text is observed by the court. The theory of inherent and implied limitation on the amending power is based on the assumption.

About the implied limitation over the 'Constitutional-Amendment' under the Article V of American Constitution, Justice Holmes observed in Comper Vs. United States.46

"...The provisions of the constitution are not mathematical formulas having their essence in their form, they are organic living institutions transplanted from English soil. Their significance is vital not formal, it is to be gathered not simply by taking the words and dictionary, but by considering their origin and the live of their growth."

Justice Harrison also expressed the same view in the Livermore Vs. Wait 47:

"The word 'Amendment' in the State Constitution implied such an addition or change within the lives of the original instrument as will effect an improvement or better carrying out of the purpose for which it was framed."

In Australia, similar opinion was expressed by Lord Wright in James Vs. Commonwealth of Australia. 48:

"A constitution must not be construed in any narrow or pedantic sense."

Justice Higgins, in Attorney-General of New South Wales Vs. Brewery Employees Union observed. 49

"Although we are to interpret words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting to remember that it is a constitution a mechanism under which laws are to be made and not a mere Act which declares what the law is to be."

47. Justice Harrison, Livermore Vs. Wait (1894) 102 Cal.118.


In the Indian context Golak Nath case\textsuperscript{50} and Kasavanand Bharati case\textsuperscript{51} are the best examples of implied limitation upon Article 368. But on the other side, in Shankari Prasad\textsuperscript{52} and Sajjan Singh cases\textsuperscript{53} theory of implied limitation has been rejected by the Supreme Court.

The word 'Amendment' was explained by the Supreme Court in Shankari Prasad case\textsuperscript{52} in its plain meaning and rejected the theory of implied limitation and held that the power to amend the constitution including the Fundamental Rights under the wording of Article 368. The word 'law' in Article 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional Amendment which is made in exercise of constituent power. Therefore a Constitutional Amendment will be valid even if it abridges and takes away of the Fundamental Rights.

The same view was expressed by the Supreme Court in Sajjan Singh case\textsuperscript{53} and affirmed the opinion of Shankari Prasad case\textsuperscript{52}. Supreme Court in its majority opinion held that the word 'Amendment' of the constitution

\textsuperscript{50}Golak Nath Vs. State of Punjab AIR 1967 SC 1643.
\textsuperscript{51}Kesavanand Bharati Vs. State of Kerala AIR 1973 SC 1461.
\textsuperscript{52}Shankari Prasad Vs. Union of India AIR 1951 SC 458.
\textsuperscript{53}Sajjan Singh Vs. State of Rajasthan AIR 1965 SC 845.
means Amendment of all the provisions of the constitution because there is no express limitation under the wording of Article 368. Gajendragadkar C.J. said:

"If the constitution-makers took the precaution of making this specific provisions to exclude the applicability of Article 368 to certain Amendments, it would be reasonable to assume that they would have made a specific provision if they had intended that the Fundamental Rights guaranteed by Part III should be completely outside the scope of Article 368.

Apart from the fact that the words used in Article 368 are clear and unambiguous in support of the view that we are taking, on principle also it appears unreasonable to suggest that the constitution-makers wanted to provide that Fundamental Rights guaranteed by the constitution should never be touched by way of amendment."54

Thus it can be seen in Shankari Prasad case52 and Sajjan Singh case53 theory of implied limitation was not accepted. But in Sajjan Singh case53. Mudholkar J. did foresee the importance of this implied limitation theory. He observed in the course of his judgement in the following way:

54. Ibid Gajendragadkar CJ at P.-858.
We may also have to bear in mind the fact that ours was a written constitution. The constituent Assembly which was the repository of sovereignty could have created a sovereign Parliament on the British Model. But instead it enacted a written constitution, created three organs of State, made the union executive responsible to Parliament and the state executive to the State Legislatures, created a Federal structure and distributed legislative power between Parliament and the state legislature, recognised certain rights as fundamental and provided for their enforcement, prescribed forms of oath or affirmations which require those who subscribe to them to owe true allegiance to the constitution and further require the members of the union judiciary and of the higher judiciary in the States, to uphold the constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the constitution. Can it not be said that these are indicia of the intention of the constituent Assembly to give a permanency to the basic features of the constitution? It is also a matter for consideration whether making a change in a basic feature of the constitution can be regarded merely as an amendment or it would be in effect, rewriting a part of the constitution, or if it would be within the purview of Article 368?

This above doubt of Mudholkar J. in Sajjan Singh's case 53 created a new path for the majority opinion of Golak Nath case 50 and Kesavanand Bharati 55. Ibid. Mudholkar J. at P-864.
case. In Golak Nath case the theory of implied limitation was followed in a garb, but ultimately theory of implied limitation was expressly followed in Kesavanand Bharati case.

It may be noted that in Golak Nath case theory of implied limitation in reference to Article 368, did not accept directly as did in Kesavanand Bharati case, but in garb of interpreting the word 'law' under Article 13(2) and Article 368, Supreme Court imposed restriction over the Parliament, though there was no express wording about limitation and held:

"We, therefore, hold that there is nothing in the nature of the amending power which enables the Parliament to override all the express or implied limitations imposed on the power. As we have pointed out earlier, our constitution adopted a novel method in the sense that Parliament makes the amendment by legislative process subject to certain restrictions and that the amendment so made being 'law' is subject to Article 13(2)."

Kesavanand Bharati case adopted the approach of Golak Nath case, but reached into opposite direction.

---

On the question as to whether there are implied limitations on the power to amend the constitution. The six senior Judges Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Jagannathan Reddy held that Parliament has power to amend any provision of the constitution, but it can not damage or destroy the essential Basic Structure or Frame work of the constitution. In Kesavanand Bharati C.J. Sikri said:

"... The word 'Amendment' must derive its colour from Article 368 and the rest of the provisions of the constitution. There is no doubt that it is not intended that the whole constitution could be repealed. Therefore, in order to appreciate the real content of the expression 'Amendment of the Constitution' in Article 368 I must look at the whole structure of the constitution." 58

After seeing the whole scheme of constitutional provisions Sikri C.J. questioned to himself:

"What is the necessary implication from all the provisions of the constitution?" 59

Then Sikri C.J. answered to this question in the following way:

58. Ibid. Sikri C.J. at P.-1500 Para 88-89.
"It seems to me that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability and the importance of the economic, social and political justice mentioned in the preamble, the importance of Directive Principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made an irresistible conclusion emerges that it was not 'Amendment' in the widest sense.

It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the constitution, namely, Secularism, Democracy and the Freedom of the individual would always subsist in the welfare state.

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 and not the meaning suggested by the respondents."60

Hegde and Mukherjee J.J. expressed the opinion about the word 'Amendment' in the following way:

"The word 'Amendment' without more is a colourless word. It has no precise meaning. It takes colour from the context in which it is used. It cannot be interpreted in vacuo .... We must read word 'Amendment' in Article 368

60.  Sikri, C.J. at P.-1534 Para 292, 293 and 294.
not in isolation but as occurring in a single complex instrument. Article 368 is a part of the constitution. The constitution confers various powers on legislatures as well as other authorities. It also imposed duties on those authorities. The power conferred under Article 368 is only such power. Unless it is plain form the constitutional scheme that the power conferred under Article 368 is a super power and is capable of destroyed all other powers, as contended on behalf of union and states, the various parts of the constitution must be construed harmoniously for ascertaining the true purpose of Article 368."

Similar, opinion was expressed by Justice Shelat, Grover and Jaganmohan Reddy, in the majority opinion of Kesavanand Bharati case.

Thus majority opinion of the Kesavanand Bharati case took the restricted meaning of word 'Amendment' and held that word 'Amendment' does not mean to take away or abridge the Basic Structure or Essential Feature of the Constitution.

It is significant to note here that six other Judges Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud

held that 'the power to amend the constitution is unlimited; each and every provision of the constitution can be amended by the Parliament though they are Fundamental, Basic, Essential or Not'.

Justice Ray observed:

"The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal 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 amend of alleged essential feature. Parliament in exercise of constituent power can amend any provision of the constitution. Under Article 368 the power to amend can also be increased. Amendment does not mean mere abrogation or wholesale repeal of the constitution. An amendment would leave an organic mechanism providing the constitution, organisation and system for the state. Ordinarily and peaceful changes in a constitutional manner would absorb all amendments to all provisions of the constitution which in the end would be 'an amendment of the constitution.'"63

Justice Palekar:

"If the doctrine of unamendability of the core of essential features is accepted it will mean that we add some proviso below article 368:

63. Ibid - Ray J. at P.-1718 Para 1078.
'Nothing in the above Amendment will be deemed to have authorized an Amendment of the constitution which has the effect of damaging or destroying the core of the essential feature, basic principles and fundamental elements of the constitution as may be determined by the courts.' This is quite impermissible."64

Similarly, Justice Mathew, Beg, Dwivedi and Chandrachud held that the power to amend the constitution is unlimited.

The scale of the judgment on this question has been turned by the Judgment of Mr. Justice Khanna who has not agreed with any of the twelve Judges. According to him the power of amendment is limited; it does not enable the Parliament to alter the basic structure or framework of the constitution, but he had that Fundamental Right to Property does not constitute basic structure or framework of the constitution. The result of the majority judgement is that Parliament under its power of amending the constitution can amend any of the Fundamental Rights contained in Part III of the constitution, but cannot destroy the Basic Structure or Framework of the constitution.

64. Ibid - Palekar J. at P.-1822 Para 1326.
In Smt. Indira Gandhi Vs. Raj Narain\textsuperscript{65}, Kesavanand Bharati's Basic structure doctrine is followed and Supreme Court held that the principle of free and fair elections, being an essential postulate of democracy is part of the basic structure of the constitution.

Similarly in Minerva Mills Ltd. Vs. Union of India\textsuperscript{66}, it has been firmly established that judicial review is essential feature of the constitution and can not be amended out of the constitution.

The view of Justice Khanna is Kesavanand Bharati case\textsuperscript{57} was affirmed by Justice Beg in the Karanataka case\textsuperscript{67} with reasons and Justice Chandrachud again affirmed in Waman's case\textsuperscript{68}. In this case\textsuperscript{68} the doctrine of basic features is taken as well-settled. It must be acknowledged that the doctrine has come to stay until and unless it is reversed by another Bench which is larger than that in Kesavanand Bharati.\textsuperscript{57}

From all these pronouncement of the Supreme Court of India, it may be submitted that the word 'Amend' did

\begin{itemize}
\item \textsuperscript{65} Smt.Indira Gandhi Vs. Raj Narain AIR 1975 SC 2299
\item \textsuperscript{66} Minerva Mills Ltd. Vs. Union of India AIR 1980 SC 1789.
\item \textsuperscript{67} State of Karanataka Vs. Union of India AIR 1978 SC 68, Para 92-93.
\item \textsuperscript{68} Waman Rao Vs. Union of India AIR 1981 SC 271, Para 18.
\end{itemize}
not confer the power of 'total-repeal' or 'revision of the constitution', upon the constituent body set-up by Article 368. 'Amendment' further meant that notwithstanding the change made, the identity of the original constitution remained in fact, so that the 'Basic Structure' or 'Framework' or 'Basic' or 'Essential Features' of the original constitution could not be changed by any exercise of the power to 'amend' as conferred by Article 368.

**MODES OF AMENDING PROCESS AND CONSTITUTION:**

The amendable constitution is now an accepted norm. Only debate that still survives in around the notion as to how easy or how difficult this amending provision should be.

Lord Bryce 69 classified constitutions as 'Flexible' and 'Rigid', depending on whether they can or can not be changed by the same process by which ordinary laws are made.

What is it, that makes a constitution flexible or rigid? Answer of this question has been given by C.F. Strong in the following way:

---

"The whole ground of difference here is whether the process of constitutional law-making is or is not identical with the process of ordinary law-making. The constitution which can be altered or amended without any special machinery is a flexible constitution. The constitution which requires special performance for its alteration or amendment is a rigid constitution."70

Thus, on the basis of amending process constitutions are classified by the experts in two categories: Flexible constitution and rigid constitution. Flexible constitution is one under which every law of every description can be legally changed with the same ease and in the same manner one and the same body as the ordinary law. In case of Rigid constitution, constitution means a particular enactment belonging to the articles of the constitution which cannot be legally changed with the same ease and in the same manner by one and the same body as the ordinary law is passed.

At present, in our contemporary society it is accepted that every constitution should have an inbuilt mechanism for its amendment, though it may be flexible or rigid. The working of some of the federal constitutions, such as U.S.A., Australia, Switzerland, Canada and India have shown that rigidity is a matter of letter of the

constitution. The device of the rigid constitution is adopted to prevent the bute majorities to stream-roll minorities, but in reality whenever the overwhelming majority of people have desired a constitutional amendment, the rigidity of the constitution has not stood in the way.

At last, in the words of J.W. Garner, it may be submitted:

"The provision for amendment should be neither so rigid as to make needed changes practically impossible nor to flexible as to encourage frequent and unnecessary change and thereby lower the authority of the constitution." 71

It would not be out of place to quote the observation of Mr. Justice Ray in this context, the Historic Fundamental Right's case 72, interalia observed:

"Except for special methods of amendment in a rigid or controlled constitution although the method may vary in different constitutions and except for express limitations if any, in rigid or controlled constitutions, the meaning and scope of the amending power is the same in both the flexible and rigid forms." 72

In sum it may be reiterated that constitution may be controlled or uncontrolled, but it must fulfil the will and necessity of the people and society. Controlled constitution at present has become a fashion of the civilized society. But it must now become too much rigid, complicated, sophisticated, heavy and technical. If it is so, it can not move freely with the society and can not fulfil the demand of the society. On the other hand it should not be too flexible or lucid. It should adopt a middle course to so as to obviate the evil of two extremes.