KESAVANANDA BHARTI CASE– BESTOWING DEMOCRACY TO THE PEOPLE OF INDIA

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This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B. (Hons.)

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CERTIFICATE

This is to certify that the research work entitled "KESAVANANDA BHARTI CASE– BESTOWING DEMOCRACY TO THE PEOPLE OF INDIA"is the work done byUdit Raj Sharma under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons.) degree at the College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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Date – 7th April, 2015

DECLARATION

I declare that the dissertation entitled "KESAVANANDA BHARTI CASE– BESTOWING DEMOCRACY TO THE PEOPLE OF INDIA" is the outcome of my own work conducted under the supervision of Asst. Prof. Raj Kumar, at the College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

(Signature)

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LIST OF ABBREVIATIONS-

AIR-	ALL INDIA REPORTER
SCC-	SUPREME COURT CASES
Vol.-	VOLUME
Iss.-	ISSUE
SCR-	SUPREME COURT REPORTS
Art. –	ARTICLE
FR's –	FUNDAMENTAL RIGHTS
DPSP-	DIRECTIVE PRINCIPLES OF STATE POLICY
USA-	UNITED STATES OF AMERICA
CJI-	CHIEF JUSTICE OF INDIA
J.-	JUSTICE
Cl. –	Clause
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1. INTRODUCTION

Each member of legal fraternity who has ever learnt law in India is expected to know the most celebrated case of India, which is sometimes titled as "verdict which saved democracy in India". April 24, 1973 is a date unforgettable in the legal, constitutional and political history of India when this 700-odd paged judgment, delivered by a 13-Judge Constitutional Bench with the majority of 7:6 when the Apex Court had 15 judges in toto, involving some of the finest and brilliant advocates of the country, not only upheld the supremacy of the constitution but also paved way for an ideal democracy in India for times to come and therefore acquired a hallowed place in our constitutional history where very few will doubt marking it as "the most important case in the history of India". The Kesavananda Bharati case was the culmination of a serious conflict between the judiciary and the government, revolving around finding an answer to one question that was the power of Parliament to amend the Constitution unlimited? In other words, could Parliament alter, amend, abrogate any part of the Constitution even to the extent of taking away all fundamental rights?

This case is much celebrated and has been researched and talked about number of times by different scholars of law; this research once again tries to reopen the Pandora box by analyzing the judgment, the legal position prior to it, its impact on Indian polity, the evident tussle between the judiciary and government, the political environment shaped under the aegis of Mrs. Indira Gandhi, the constitutional amendments that nullified the GolakNath, Bank Nationalisation and Privy Purses judgments, the pursuit and discovery of the soul of constitution i.e. the basic structure, the difference in opinions of those learned judges, the attempt to reconsider this case in times of emergency and the question of utmost importance- what was offered by the 13-bench judgment to the masters of all times "the people of India". Undoubtedly, this judgment bequeathed

democracy to the people of India by framing a perennial rule setting constitutional fences on the powers of the parliament.

The Research analyses the conditions when this landmark judgment was delivered by the Apex Court of India, the interpretations of constitutional principles put forth by the both parties employing legal giants as advocates, the basic structure doctrine and its dimensions, the impact of the judgment on the legal and political scenario of India, the limits to the powers of the parliament and how has this judgment bestowed democracy and fundamental freedom in spirit to the people of India. The research tries to analyze a very basic question involved and that is "had this judgment not been passed or had the decision of the Court in this case been otherwise, what would have been the fate of Indian democracy today?"

The research, though does not follows a specific pattern but reflects a somewhat chronological analysis of the constitutional development involving the Pre-Kesavananda Era, the Kesavananda verdict and the post-Kesavananda position involving later developments on the basis of Kesavananda verdict.The Pre-Kesavananda Bharti Position section highlights the legal and constitutional position in India prior to the passing of the aforesaid judgment and further highlights the GolakNath Judgment and the interpretation provided by the judiciary in that case which shaped the legal position of parliament's power to amend the constitution**.** The Kesavananda Bharti Judgmentsection extensively discusses about the whole case involving the facts in the matter, the constitutional question to be determined by the Court, the arguments put forth by both parties i.e. the petitioner and the state, the majority and the minority opinion of the Court, the diversity in the opinion of the Judges and the ratio of the case overruling the previously set precedents on the question of parliament's power of amending the constitution. Further, the research discusses about the soul of the Kesavananda verdict i.e.The Basic Structure Doctrine and under this section it analyses the basic structure doctrine, its emergence, its meaning, its dimensions and how the court reached to base its rationale on this doctrine, how the traces of this doctrine were drawn from the different jurisdictions, on what grounds is this doctrine attracted criticism from some jurists an members of academia. The further section details the Post- Kesavananda Bharti Periodwhereit discusses how the

Kesavananda Bharti verdict has pioneered in facilitating the interpretation in the name of basic structure doctrine and how implied limitations on the amending powers have been imposed by judicial creativity to prevent the abrogation of the essential features of the Constitution. This section also details about various cases such as Raj Narain, Minerwa Mills in which the basic structure doctrine was upheld and constitutional fences were placed on the amending powers of the parliament. The next section analyses the impact of the Kesavananda verdict and highlights that how this judgment has impacted the Indian democracy and why this judgment hold the honour of being titled as the most important judgment in the constitutional history of India. This section further introspects on the question that "had this judgment been otherwise than what it was, what would have been the fate of Indian democracy today?"

The Kesavananda Bharti Case arose out of the Writ Petition No. 135 of 1970 filed under Article 32 of the Constitution of India for the enforcement of the fundamental rights guaranteed under Articles 25, 14, 19(1)(f) and 31 of the Constitution and challenge was made to the provisions of the Kerela Land Reforms Act, 1963 as amended by the Amendment Act of 1969 to seek declaration that it is unconstitutional, ultra vires and void and during the pendency of the petition, the Kerela Land Reforms (Amendment) Act, 1971 was passed. Through the 29th Amendment Act to the Constitution, the two aforesaid Acts were inserted to the Ninth Schedule to the Constitution and the most significant constitutional questions to be decided before the larger bench of the Constitution were – (a) Whether 'I.C. Golaknath V. State of Punjab (1967)' was rightly decided or not? (b) What is the extent of the amending powers conferred by Article 368 of the Constitution, apart from Article 13(2), on parliament?

2. THE PRE-KESAVANDA BHARTI ERA-

The questions on the constitutional validity of the constitutional amendments have been raised since 1951 and the basic question involved has been whether the Fundamental rights of the citizens could be amended so as to take away any fundamental right through a constitutional amendment? And the first affected fundamental right in the initial years of independence has been the 'right to property' contained in Article 31 which has been amended several times.

2.1 **Shankari Prasad v. Union of India**[1] was the first case when amending powers of the Parliament were brought into question since the validity of the Constitution (First Amendment) Act, 1951[2], was challenged which curtailed the right to property guaranteed by Art. 31. A direct conflict between Article 13 and 368 arose before the Court and the Court upheld the validity of the First Amendment by stating the following reasons-

"*We are of the opinion that in the context of Article 13, law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of the constituent power with the result that Art. 13(2) does not affect the amendments made under Art. 368*."

The Court emphasized that there exists a clear demarcation between the ordinary law, which is made in exercise of legislative power, and the constitutional law, which is made in exercise of the Constituent powers. The Court thus, held that the Parliament could by following the procedure laid down in Art. 368 amend any fundamental right.

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[1] AIR 1951 SC 458

[2] The First Amendment created Article 31 A and B. Article 31A stated that any acquisition of property by the state through law could not be called into question under the rights to property, equality, freedom of speech, or freedom to practice one's profession. Article 31B created the Ninth Schedule, a list of laws inserted in the back of the Constitution. Laws that were placed into this schedule through Constitutional amendment could not be found invalid by the judiciary on the basis of any of the fundamental rights. In the First Amendment, thirteen land reform laws were placed into this protected schedule.

2.2 Sajjan Singh V. State of Rajasthan –

After a span of almost 13 years, the same question again knocked the doors of the Apex Court when in the matter of ***Sajjan Singh V. State of Rajasthan***[3], the validity of the Constitution (Seventeenth Amendment) Act 1964 was challenged since it adversely affected the right to property. Through this amendment, a number of statutes which affected the property rights were placed in the Ninth schedule to immunize them from the judicial review. The ratio of Shankari Prasad was affirmed and it was held that that the words "amendment of the Constitution" means amendment of all the provision of the Constitution i.e. Article 368 extends to all the parts of the constitution and the argument of the petitioners claiming violation of fundamental right and therefore invalidity of the amendment under Article 13 was negated again as in Shankari Prasad

2.3 Further in ***Golaknath V. State of Punjab***[4], the constitutional validity of the Constitution (Seventeenth Amendment) Act which inserted certain state acts in Ninth Schedule again was challenged. The majority in 6:5 ratio, prospectively overruling the earlier judgments of Shankari Prasad and Sajjansingh's case, held that the Parliament had no power from the date of this decision to amend Part III of the Constitution so as to take away or abridge the fundamental rights.. The apex court held that the amending power and legislative powers of Parliament were essentially the same and therefore, any amendment of the Constitution must be deemed to be a 'law' as understood in Article 13 (2). CJI SubbaRao presented a different interpretation of Article 368 by holding that the Power of Amendment is not derived from Art. 368 but from the Articles 245, 246 & 248 and it is only the procedure which is prescribed by Art. 368. The Apex Court further observed that-"It has necessarily pointed out to the parliament that constitution is not any party's manifesto which can be changed at their own will but is a national heritage which can be amended only when a national consensus demands for it."

[3] AIR 1965 SC 845
[4] (1967) 2 S.C.R. 762

From the judgment of Golaknath started the hunt and pursuit of power by the Parliament and the Government began lawmaking to entrust full control in their own hands.

2.4 The Post-Golaknath and Pre-Kesavananda Era-

The Golaknath verdict certainly worried the government and the government made efforts to nullify the effect of the verdict and escape abiding by the reasoning laid down even though the verdict limits the amending powers of the government only to an extent of not abridging the fundamental rights of the citizens. The government did not sit back with the limits set by the verdict. This period cannot be analyzed in purely legal sense as it is not possible to rule out the political aspects which determined the actions of the government and the legislature.

The government meanwhile brought the policy Nationalization of private banksand In R C Cooper V. Union of India[5], the nationalization of the private banks by the government was brought under challenge before the Apex Court and the impugned legislation was held unconstitutional and struck down as being violative of Article 14, Article 19(1)(f) and Article 31 of the Constitution. With regard to the compensation sought to be offered under the impugned legislation, it was held that the compensation to be provided for the takeover of the banks was 'illusory'. Without much delay, the other action of the government of withdrawing the recognition of the privy purses granted to the rulers of the erstwhile princely states was challenged before the Apex Court in the matter of MadhavjiRaoScindia V. Union of India[6] (Privy Purses Case) and the Court struck down that government order where grants were held to be property further holding that "the executive cannot act against a statute or exceed its statutory powers."

These verdicts were also adverse to the Indira Government and after gaining absolute majority in the 1971 elections, came back more forcefully with the proposal of constitutional amendments[7] to nullify the effect of all adverse verdicts and also to grant almost absolute powers to the Parliament. This time evidenced that both Parliament and judiciary were at loggerheads. The parliament sought to accumulate the lost control with

[5] (1970) 3 SCR 530
[6] (1971) 3 SCC 9
[7] https://klbhatia.wordpress.com/ , last accessed on April 6, 2015

the help of amendments between 1971 and 1972. The parliament sought to amend any part of the Constitution including even Part III[8] which deals with fundamental rights and even made it obligatory on the President to give assent to any amendment bill. The right to property was greatly diluted and attempts were made to bring right of equality under Article 14[9] and fundamental freedoms under Article 19 subservient to DPSP's under Article 39 (b) & (c)[10]. Privy Purses were abolished and many laws of land reforms were inserted in the Ninth Schedule to immune them from judicial review[11].

[8] The Constitution (Twenty-fourth amendment) Act 1971
[9] The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
[10] The Constitution (Twenty-fifth amendment) Act 1971
[11]The Constitution (Twenty-sixth amendment) Act 1971 & The Constitution (Twenty-ninth amendment) Act 1972.

3. THE KESAVANANDA VERDICT-

The Kesavananda Bharti Judgment, passed by the Special bench of 13 Judges on 24th April 1973, with the majority of 7:6, finally held that Article 368 of the Constitution "does not enable the Parliament to alter the basic structure or framework of the Constitution" and this judgment overruled the decision of the 11-Judge Special Bench, passed by the majority of 6:5 that "Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights"[12]. The Kesavananda Bharti Case[13] arose out of the Writ Petition No. 135 of 1970 filed under Article 32 of the Constitution of India for the enforcement of the fundamental rights guaranteed under Articles 25, 14, 19(1)(f) and 31 of the Constitution and challenge was made to the provisions of the Kerela Land Reforms Act, 1963 as amended by the Amendment Act of 1969 to seek declaration that it is unconstitutional, ultra vires and void and during the pendency of the petition, the Kerela Land Reforms (Amendment) Act, 1971 was passed. Through the 29th Amendment Act to the Constitution, the two aforesaid Acts were inserted to the Ninth Schedule to the Constitution and the most significant constitutional questions to be decided before the larger bench of the Constitution were – (a) Whether 'I.C. Golaknath V. State of Punjab (1967)' was rightly decided or not? (b) What is the extent of the amending powers conferred by Article 368 of the Constitution, apart from Article 13(2), on parliament?

Since the petitions involved complex questions of constitutional importance and also a review of 11-Judges Bench Judgment was involved, the CJI Sikri divided his judgment into eight parts; the first dealing with Introduction involving brief facts, the second involving the interpretation of the Golaknath Case, the third dealing with the interpretation of the Article 368 of the Constitution, the fourth dealing with the validity of the 24th Amendment Act to the Constitution, the fifth dealing with the validity of the section 2 of the 25th Amendment Act to the Constitution, the sixth dealing with the

[12]I.C. GolakNath&Ors. vs. The State of Punjab &Ors.: AIR 1967 S.C. 1643, (1967) 2 SCJ 486
[13]His Holiness Kesavananda BharatiSripadagalavaru v. State of Kerala & another, (1973) 4 S.C.C. 225, A.I.R. 1973 S.C. 1461.

validity of section 3 of the 25th Amendment Act to the Constitution, the seventh dealing with the validity of the 29th Amendment Act to the Constitution and the last part dealing with the conclusions.

The most important thing to be determined by the Court was the extent of the amending powers of the Parliament. In the very introductory part of the judgment, it was mentioned that the interpretation herein are done keeping in mind the background, the history of India and the hopes and aspirations of the people of India and other relevant circumstances.

The Court while interpreting the provisions of the Constitution took recourse to the Preamble considering it a part of the Constitution since not only the constitution was framed in the light of the preamble, the preamble was finally settled in the light of the Constitution.

The word 'Amendment' as used in Article 368 of the Constitution was a matter of interpretation since whether the scope of amending powers of the Parliament were unlimited had to be analyzed. The Court, in order to understand the horizons of Article 368 of the Constitution of India, had to know the meaning and implication of the word 'Amendment' used in Article 368. The petitioners in the matter placed reliance on the contrast between the use of the word 'amendment' in Article 4 and 169 and paras 7 and 21 of the 5th and 6th Schedule respectively which use the composite expression 'amend by way of addition, variation or repeal'.

The petitioners contended that the use of the word amendment at different places with different phraseology clearly signifies that the legislature intended to give different scope & implication to it at different places. The narrow and broad implications are given at different places and under Article 368 narrow scope is intended by the Constitution because if a wide scope was intended by the parliament then use of the words 'alter, amend or repeal' could have been done by the drafters of the Constitution. The respondents argued that the amending power of the Parliament under Art 368 had no limitations and it cannot be limited by some vague doctrine of repugnancy to natural and inalienable rights and the Preamble.

The Court while dealing with implied limitations observed that it is a matter of common understanding that the fundamental features namely secularism, democracy and freedom of individual would always subsist in the welfare state. CJI Sikri, while concluding on this question that whether there are any implied limitations on the powers of the parliament held that –

"*The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-Constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility. I am driven to the conclusion that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that, while fundamental rights cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest*"[14].

The Court further observes that the touchstone for interpreting the Constitution will be the intention of the Constitution makers, which can be discerned from the Constitution and the circumstances in which it was drafted and enacted.

[14] Ibid at ¶ 309-311

3.1 The Golaknath and the Kesavananda Bharti-

The Golaknath's judgment overruled the two preceding judgments, Shankari Prasad and Sajjan Singh, by the majority of 6:5. The case took a pro-rights approach and gave such status to the fundamental rights which was received never before and it was held that the fundamental rights occupy a 'transcendental' position in the Constitution and therefore no authority under the Constitution, even the parliament exercising the amending power under Art. 368 of the Constitution would amend the fundamental rights. The Court in this case observed that –

"*an amendment of the Constitution is a law within the inclusive definition of the law under Article 13(2) of the Constitution and, as the entire scheme of the constitution postulates the inviolability of Part III thereof, Article 368 shall not be so construed as to destroy the structure of our Constitution*"[15]

Not only did the Court emphasized on the importance of the fundamental rights but also brought into practice a new example of judicial creativity by the 'doctrine of prospective overruling' and the court expressed two broad reasons for application of the said doctrine which were –

- In the preceding two decisions of the Apex Court (Shankari Prasad and Sajjan Singh), the power of the parliament to amend the fundamental rights had been upheld.
- During the period between 1950 and 1967, many legislations were enacted in order to bring agrarian reforms in India and this legislation was also made on the premise that the Parliament could amend the fundamental right and had retrospective affect been given to the view of the Court in Golaknath, it would have led to a situation of chaos and uncertainty in the country.

Further, the court in the case held that Article 368 as such did not confer the amending power but it merely lays down the procedure for amendment. Apart from these observations, a very different setup was also suggested by the Court to amend the

[15] M P Jain; Indian Constitutional Law (Sixth Edition) Page 1766

Constitution even in the matters of rights by setting up of the constituent assembly to make the new constitution or radically change the existing one. There is a clear reasoning why such pro-right approach was taken by the judiciary in the Golaknath case as it becomes evident that the majority was afraid of the possible erosion of the basic and fundamental rights if such process of amending the Constitution continues unabated.

In essence, the Golaknath judgment sowed the seeds of limiting the amending power of the Parliament although only to an extent of abridging the fundamental rights. The judgment became controversial for several reasons; where on one hand it was appreciated for promoting the protection of the undeniable human rights finding place in the Constitution; on the other hand it was criticized for acting as hurdle in the way of enacting socio-economic legislations to meet the needs of developing society.[16]

There is a great relationship between both the judgments as Kesavananda Bharti can be termed as an improvement over the Golaknath where it not only answered few of the important questions left unanswered by the previous judgment and filled the vacuum left by the previous judgment but also made clear the position of law by express recognition of the doctrine limiting the amending powers of the Parliament. Both the judgments are ideal examples of judicial creativity where the Kesavananda judgment overpowers the later judgment by laying down the constitutional principles in a more certain and systematic manner with some classical purposive interpretation. The Kesavananda judgment has made certain appreciable improvements over the Golaknath Judgment which are depicted as follows-

- In order to impose limitations on the amending powers of the Parliament, the Golaknath judgment confines only to fundamental rights negates the other important parts of the constitution which are equally significant as that of the fundamental rights but this gap was filled by the Kesavananda judgment by holding that not only the core elements of fundamental rights but all other 'basic features' of the Constitution are unamendable which involve democratic and federal structure etc.

[16]UpenBaxi; The Little Done, the Vast Undone, 9 JILI 323 (1967)

- The Golaknath judgment brought rigidity to the approach by holding that all fundamental rights are unamendable but kesavananda judgment offers flexibility in this respect. Had this flexibility not been provided, the balance between the development of the fundamental rights and Directive Principles of State Policy could not have been maintained. A fair balance is now provided by the 1973 judgment leaving scope both for the legislature and the judiciary for playing their role in the constitutional philosophy. Especially the two phrases 'basic features' and 'abrogation' are quite vague and therefore provide a fair deal of scope of interpretation for the Courts.

An unqualified amending power could mean that a political party with a two-third majority in the Parliament, for a few years, could make any changes in the Constitution, even to the extent of establishing a totalitarian state[17], to suit its own political exigencies.

[17]Palkhivala , Our Constitution defaced and defiled, 147; Mr. Palkhivala characterizes Kesavananda as 'one of the milestones in the history of jurisprudence'

3.2WHAT CONSTITUTES 'BASIC STRUCTURE'-

Although the majority of the judges held in the favour of basic structure doctrine, there was no unanimity among the judges about what constitutes the basic structure of the Constitution and therefore the various opinions expressed by the different judges are produced to facilitate the comprehensive understanding of the basic structure doctrine as emerged from the kesavananda verdict.

As per Chief Justice Sikri[18], "*the basic structure may be said to consist of the following features namely (1) Supremacy of the Constitution, (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the legislature, the executive and the judiciary; and (5) Federal character of the Constitution; and such structure is built on the basic foundation i.e. dignity and the freedoms of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed*."

As per Justices Shelat and Grover[19] "*The basic structure of the Constitution is not a vague concept and the following can be regarded as the basic elements of the Constitutional structure. (1) The Supremacy of the Constitution; (2) The Republican and Democratic form of Government and Sovereignty of the country; (3) Secular and federal character of the Constitution; (4) Demarcation of power between the legislature, the Executive and the Judiciary; (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV and (6) The unity and the integrity of the nation*."[20]

As per the Justices Hegde and Mukherjee[21], it is expressed about the basic features of the Constitution that "*On a careful consideration of the 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 as sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual*

[18]Ibid(¶ 292 and 293)
[19]Ibid (¶ 582)
[20] The learned Judges treat the fundamental rights and the DPSP as the basic features of the Constitution.
[21]Ibid (¶666)

freedoms secured to the citizens. Nor has the Parliament power to revoke the mandate to build a Welfare State and egalitarian Society. These limitations are only illustrative and not exhaustive."

Jaganmohan Reddy[22] observed that "*The elements and the basic structure are indicated in the preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice — social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and opportunity. Each one of these is important and collectively they ensure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements, the structure will not survive and it will not be the same Constitution, or this Constitution, nor can it maintain its identity if something quite different is substituted in its place, which the sovereign will of the people alone can do. . . . What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as that will fall for consideration in any concrete case, where they are said to have been abrogated and made non-existent. The fact that a complete list of these essential elements constituting the basic structure are not enumerated is no ground for denying that these exists . . . . A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view, constitute the basic structure. But do the fundamental rights in Part III and the directive principles in Part IV constitute essential elements of our basic structure of Constitution in that the Constitution will be a Constitution without them? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot; without either fundamental rights or directive principles, what can such a Government be if it does not enforce political, economic or social justice*?"

[22]Ibid (¶ 1159)

Justice Khanna held[23] "*In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues or survives.*"

Justice Mathew holds that[24] "*I think these are rights which inher in human beings, because they are human beings — whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality, that the people gave unto themselves the Constitution and these basic rights are essential features of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore, the moral rights embodied in Part IV of the Constitution are equally essential features of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a court of law in case the State fails to implement the duty. But they are fundamental to the governance of the country, and all organs of the State including the judiciary are bound to enforce those directives.*"

Justice Beg, about the status of fundamental rights in the Indian Constitution holds using following words[25] "*The voice of the people speaking through the Constituent Assembly constituted a new 'Republic' which was both 'Sovereign and Democratic'. It no doubt sought to secure the noble objectives laid down in the preamble primarily through both fundamental rights found in Part III and the Directive Principles of the State Policy found in Part IV of the Constitution — If any distinction between Fundamental Rights and Directive Principles on the basis of the difference between ends or means were really to be attempted, it would be more proper, in my opinion, to view fundamental rights as the ends of the endeavours of the Indian people for which Directive Principles provided*

[23]Ibid (para 1430)
[24]Ibid (para 1714)
[25]Ibid (paras 1800 and 1801)

the guidelines. It would be still better to view both Fundamental rights and the 'fundamental' Directive Principles as guidelines."

Justice Dwivedi[26] holds that "*Every provision of the Constitution which may be amended only by the procedure prescribed in Article 368 is an essential feature of the Constitution, for it is more set than legislative laws . . . . Thus the provisions specified in the proviso to Article 368 are more essential than the rights in Part III. It has already been shown earlier that the fundamental rights, even though an essential feature of the Constitution, are within the sway of the amending power in Article 368*"

Justice Chandrachud holds[27] that "*Fundamental rights undoubtedly occupy a unique place in the civilized societies whether you call them 'transcendental', 'inalienable', 'inviolable' or as Lieber called 'primordial'. There is no magic in these words for the strength and importance of these rights is implicit in their very description of them as 'fundamental'.*

[26]Ibid ¶ 1930-31
[27]Ibid ¶ 2076

3.3The other questions before the Court were testing of the constitutional validity of the constitutional amendments. **Testing validity of the 24th Amendment[28] Act to the Constitution and Twenty-Fifth Amendment-**

Section 2 and 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971 were called into question and the Court had to test the validity and constitutionality of these provisions. Section 2[29] and Section 3[30] of the Constitution (Twenty-fifth Amendment)

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[28] Constitution (Twenty-Fourth Amendment) Act, 1971 reads-

(2) In Article 13 of the Constitution, after Clause (3), the following clause shall be inserted, namely:

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

(3) Article 368 of the Constitution shall be re-numbered as Clause (2) thereof, and

(a) for the marginal heading to that article, the following marginal heading shall be substituted, namely:

Power of Parliament to amend the Constitution and procedure therefor.;

(b) before Clause (2) as so re-numbered, the following clause shall be inserted, namely:

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article;

(c) in Clause (2) as so re-numbered, for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill", the words "it shall be presented to the President who shall give his attest to the Bill and thereupon" shall be substituted;

(d) after Clause (2) as so re-numbered, the following shall be inserted, namely:

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(a) [29] for Clause (2), the following clause shall be substituted, namely: (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

(b) Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(c) after Clause (2A), the following clause shall be inserted, namely: (2B) Nothing in Sub-clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2).

[30] 3. After Article 31B of the Constitution, the following article shall be inserted, namely:

Act, 1971 broadly seek to bring change in the law of property by proposing amendments in the right to property and law of acquisition of property by the State.

The petitioners with regard to the validity of Article 31 C submitted that the provisions has features of totalitarianism and therefore illegal and void. Mr. Palkhivala, representing the petitioners contended that Article 31C has four features of totalitarianism: the first being that there is no equality and the ruling party could favour its own party members, the second being that there need not be any freedom of speech, the third being there need be no personal liberty which is covered by Article 19(1)(b), and the fourth that the property will be at the mercy of the State. In other words, confiscation of property of an individual would be permissible.

3.4 Controlled and Uncontrolled Constitution-

While dealing with scope of powers conferred on the amending body under Article 368, the Court in Kesavananda also commented on the categories of the constitution in the sense that whether a constitution is controlled or uncontrolled constitution. The Court looked into the question to determine to what extent the amending body can alter the Constitution in different categories of Constitutions and ultimately to draw the conclusion for Article 368 and the scope of amending powers. The Respondents were of the view that the difference between them lies only in the procedure provided for amendment which according to the court was an over-simplification and the Court held that the true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. It is

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31. C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

beyond doubt that the Constitution of India is a controlled Constitution. The purposive interpretation done in the Kesavananda Bharti judgment regarding the interpretation of Article 368 was with an intent to make the constitution 'controlled' which had due to political vagaries, became almost 'uncontrolled' since most of the constitutional amendments were not of any broad consensus on a national basis but of the wishes of the majority party.

Where there is a written Constitution which provides the sovereignty in the people (as in India) there is firstly no question of the law-making body (as Parliament) being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, the amending body cannot be equated with the people.

3.5 The Kesavananda Verdict-

The final verdict after much of the deliberations and arguments which came on 24th April 1973 in which nine judges signed a statement for summary of the judgment was as follows-

1. Golaknath's Case is overruled.
2. Article 368 of the Constitution does not enable the Parliament to alter the basic structure or framework of the Constitution.
3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid.
4. Sections 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.
5. The first part of the section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part namely "and no law containing a declaration that is for giving effect to such policy shall be called in question in any court on any ground that it does not give effect to such policy" is invalid.
6. The Constitution (Twenty-Ninth Amendment) Act, 1971is valid.

3.6 The 'Unique-ness' of the Kesavananda Judgment-

Apart from laying the principle for constitutional interpretation and prescribing implied limitations on the amending powers of the parliament, the kesavananda verdict was unique was unique in lot many other aspects and still remains to be so. The few interesting things about this verdict which make it a 'unique' judgment are mentioned in the following parts.

The Attorney General while arguing this matter referred to 71 Constitutions of different countries to argue on the amending powers of the parliament. This aspect also makes the case an 'unconventional one' where legal giants from both sides put their best of wit to convince the Apex Court on significant issues of constitutional interpretations where the Court is reported to have admired the research in the case. Justice Sikri declares –"The learned Attorney-General brought to our notice extracts from 71 Constitutions. I admire the research undertaken but I find it of no use to me in interpreting Article 368."[31] The other interesting thing about the judgment is that it was heard by the largest bench constituting 13 judges which never happened before in the Apex Court and the case was heard for longest period of time i.e. 68 days.

The other interesting thing is that though the most important contribution was the basic structure doctrine; there was no unanimity between the judges of what constitutes the basic structure. One of the advocates on behalf of the respondents and a believer of unlimited amending power of the Parliament later conceded that had this doctrine not been laid down by the Court, there could have been a possibility of the state being turned into a 'police state' as the experience of the emergency showed. In a book[32] shocking facts were revealed that few of the draft judgments were already in the possession of the government even before being delivered on 24th April, 1973.

[31] ¶ 373 of the Kesavananda Judgment
[32] T. R. Andhyarujina, "The Kesavananda Bharti Case- the untold story of struggle for Supremacy between Supreme Court and the Parliament.

4. THE BASIC STRUCTURE DOCTRINE – EMERGENCE, GROWTH AND RECOGNITION IN CONSITUTIONAL PHILOSOPHY

4.1 DOCTRINE OF IMPLIED LIMITATION-

The doctrine of implied limitations has been recognized in India and has spread in the judicial minds all across the nation. However, the fact that has not gained much light and which had not gained acknowledgment is that the argument regarding the doctrine of implied limitations was first advanced at Bar by one of India's leading constitutional advocates, M.K. Nambyar. However, the true credit for bringing this doctrine to light goes to a German Jurist and scholar Professor Dietrich Conrad[33] who on a visit to India in 1965 delivered a lecture on "Implied limitations of the Amending Powers" to the law faculty of the BHU[34]. A paper was then prepared on the subject and sent to a professor in Madras for his comments and this was when this paper got the attention of Mr. Nambyar. In his lecture professor Conrad made deep observations, the instances of which are produced below-

"*Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorisation by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a moghul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period - discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner*."

As the hungry discovers the means of food, the thirsty discovers the source of water, the nude discovers means of covering the body, there is a probable reason of this doctrine being expounded in Germany and it is not just a coincidence that such a doctrine of

[33] Formerly Head of the Law Department, South Asia Institute of the University of Heidelberg, Germany
[34] Banaras Hindu University

implied limitations got its birth in the mind of a German scholar. The Germans did learn from the bitter experiences of the Nazi era. The German law[35] explicitly bars the amendments to provisions concerning the federal structure and to the basic principles laid down in Article 1 to 20 dealing with human rights and democratic and social setup of the nation.

The doctrine of implied limitations was not accepted in the GolakNath's case even though the majority felt that 'there is a considerable force in the argument' it did not comment on the doctrine as such. While passing the judgment in Kesavananda Bharti Case, there was a situation when 12 judges of 13-Judge bench split evenly as six Justices[36] were of the view that Article 368 does not enable the Parliament to abrogate or take away fundamental rights since there are 'inherent or implied limitations' which prevent parliament from destroying the 'basic structure' of the Constitution and the other six Justices[37]did not recognize any limitations on the amending powers of the Parliament beyond those which are contained in Article 368 and the amending body is empowered to alter any provision of the Constitution. It was Justice Khanna who arrived as a game changer and on whose judgment the balance tilted in the favour of majority. He however not supported the theory of implied limitation but instead held that the word 'amendment' itself suggested of the limitations. He further held that

"*the power of amendment under Article 368 does not include the power to abrogate the constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to the fundamental rights as well as those which may be said to relate to essential features.*"[38]

The Kesavananda case also touches upon the concept of 'Doctrine of implied limitations' as the petitioners claimed that the doctrine is applicable since it limits the power of the

[35] Article 79(3) of the Basic Law of Federal Republic of Germany, adopted on 8th May, 1949
[36]CJI S.M. Sikri and Justices J.M. Shelat, A.N. Grover, K.S. Hegde, S. Mukherjee and P. Jagan Mohan Reddy
[37]Y.V. Chandrachud, Ray, M.H. Beg, D.G. Palekar, S.N. Dwivedi and K.K. Mathew
[38]¶ 1434 of the Judgment

legislature in legislating when the essential features of the Constitution are abrogated. The Court looked in a number of instances where the implied limitation has been put by the judiciary on the legislating powers. It has been since the constitution of the Supreme Court of India post-independence.

4.2 Role of Preamble in interpreting the Constitution-

While dealing with the significant questions of constitutional importance, the Apex Court had to look into the importance of Preamble of the Constitution and whether it can be a guiding light in construing the provisions of the Constitution.

The respondents were of the view that by virtue of the amending powers the Parliament can even amend, repeal or vary the Preamble while the petitioners were of the view that all the elements of the constitutional structure are found in the Preamble and those essential features cannot be repealed or abrogated by the amending body because the 'whole edifice as it stands must fall' if those are taken away.

The respondents further commented on the vagueness of the Preamble and contended that the terms used in the Preamble (human dignity, economic and social justice) are vague and different schools of thoughts carry different perception for those terms.

The Court however did not refute the contention that the terms used in the Preamble are understood by different schools of thought in different manner but also analyzed that when these words were inserted in the Preamble of the Constitution, the drafters were aware that in what sense they are using such words in the Constitution and to realize the ideals envisaged under the Preamble, Part III and IV have been added to the Constitution to lay guiding principles for the future governments in helping them fulfilling the ideals envisaged and realize them to the maximum. The Court also stated that this Court has a number of times looked into the preamble of the Constitution for guidance in interpreting it and also given Preamble a 'transcendental position' while interpreting the constitution or the other laws. The Court also made mention of the number of precedents, namely, *BehramKhurshidPesikaka*[39], *BasheshwarNath V. Commissioner of Income-Tax*[40] where Preamble was referred to interpret the Constitution. The Court further relied on *Re Kerela Education Bill 1957*[41] where this Court referred to the Preamble extensively and observed

[39] (1955) 1 SCR 613 @ 653
[40] (1959) Supp. 1 SCR 528
[41] (1959) SCR 995

that the fundamental rights were provided for “to implement and fortify the supreme purpose set out in the Preamble”. It was also observed that not only by our courts but also in other nations of the world the Preamble of the Constitution has been referred to interpret the constitution and lay down the constitutional principles.

Sir AlladiKrishnaswami, an eminent lawyer is reported to have said, "so far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has' to be attached to the Preamble in a Constitutional statute". Our Preamble outlines the objectives of the whole Constitution. It expresses "what we had thought or dreamt for so long.”[42]

The role of the preamble was also laid down in an American Case, *Hunter v. Martin*[43], the Supreme Court of USA said "the Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the "United States;" and language still more expressive will be found used on other solemn occasions.”

[42] Constituent Assembly Debates Vol. 10, p. 417
[43] 1 Wheat. R. 305, 324

4.3 The Analysis of Amendment and Amending Powers-

Time and tide wait for none is a fairly celebrated thought among the masses which is an undeniable truth since times do not remain static and this is the onus on the human race to change with the changing patterns of the time. Social mores and ideals keep changing and creating new problems and altering the complexion of the old ones. It is but common to understand that the Constitution drafted to meet the needs of an era may be found inadequate in another era and another context. There can be various modes by which the Constitution can be made to adapt to the needs of the next generation. It is practically very difficult rather impossible to give birth to a new constitution to meet the needs of the new generations and to adapt with the changing times. This is why the mechanism of Amendment to the Constitution time to time in accordance with the national demands is prevalent. Power to amend the constitution is in itself a basic structure of the constitution.[44] The mode of adapting the constitution timely to new circumstances may either be formal or informal. Informal methods are judicial interpretations and conventions; the formal method is the constituent process.

In the case of judicial interpretations, the constitution per se doesn't change but the interpretation of it undergoes a change which either narrows down its scope or broadens it. "while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."[45] In a recent decision given by the Apex Court of India, the Court observed that-

"*The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing.*

[44]MahavirTyagi during debates on draft constitution held that a constitution which was unalterable was practically a violence committed on the future generation.

[45] Justices BLACK and FRANKFURTER, Conflict in the Court, 57.

Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in the social reality. Indeed when social reality changes the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be aid that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law."[46]

The Constitutions leave a wider scope for the judiciary to interpret and provide workable meaning to the provisions of the Constitution. The best example can be of the First Amendment to the U S Constitution[47] which guarantees the freedom of speech in a broad sense. The provision as such lays down no limits or restrictions on the right to freedom of speech; the US Supreme Court has the onus to spell out restrictions on this right since no right can be unlimited in practice. In India also, judicial interpretation is also a regular, significant and indispensable affair. The best example could be the interpretation of Article 21 of the Constitution of India which guarantees the 'right to life and personal liberty' whose scope has been greatly broadened by the Apex Court by reading into various other such as the right to privacy, the right to environment, right to livelihood and various other rights within the ambit of the aforesaid Article. Practically, such judicial interpretations are most used in the case of the fundamental rights.

The formal method of constitutional amendment is generally prescribed in the Constitution itself. It changes the language of the constitutional provision so as to adapt it in accordance with the changing social needs. There exists a difference between the legislative process and the constituent process; the former denotes making of an ordinary law and the latter denotes an amendment to the Constitution. A formal amending process is no less important as the process of constitution-making and so it may rightly be characterized as the 'constituent' process. The example of the formal amending provision

[46]Badsha versus UrmilaBadshahGodse and Anr (2014) 1 SCC 188

[47] The Amendment provides "Congress shall make no law…abridging the freedom of speech or of the press."

can be referred from the US Constitution where the constitutional amendment process involves 'initiation and ratification' as the two separate stages.[48]

In India, the formal constitutional amendment has different classes depending on the their importance and significance and prescribes three classes of amendments in which the provisions of the comparatively less significance can be amended by a simple legislative process as is adopted in passing the ordinary legislation in the Parliament; the material and vital provisions can be amended only by following the rule for special majority as laid down in Art. 368 and the third class involves amendment of 'entrenched provisions' which are provisions relating to federal character, which, for their amendment, need in addition to the passage of the amending bill by the special majority in the two houses of Parliament, ratification by half of the state legislatures for which the procedure is laid under Art. 368.

[48] Art. V of the US Constitution reads as follows: "The Congress whenever two-thirds of both houses shall deem it necessary, shall propose Amendments to this Constitutions, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution. When ratified by the Legislatures of three fourth of the several states, or by convention in three fourths of several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress…"

4.4 The Judicial approach towards the Amendment to Fundamental Rights-

The judicial approach towards the amendment of fundamental rights has been changing and has evolved in the real sense since at the times of Shankari Prasad and Sajjan Singh judgments the judiciary did not interfere with the constitutional amendments even though they were found to be inconsistent with the fundamental rights of the citizens.

A shift in approach was witnessed from the Golaknath judgment when the Court showed far greater awareness for the protection of fundamental rights of the citizens even though it did not recognize the implied limitations on the amending powers of the parliament. The majority was fearful of the fact that if such an unlimited and uncontrolled exercise of the amending powers continue, there will be a day when the amending body would not hesitate to take away or abridge the fundamental rights of the people and the people of the country would be left remediless as the parliament would be control their rights and their piece of undeniable rights and freedoms will become a plaything in the hands of the majority in the amending body. The pro-right approach was quite evident from the findings of the Golaknath Case where the judiciary imposed a complete ban on the amending powers of the parliament under Article 368 to interfere with the fundamental rights of the people however the legislature was held free to add to the list of fundamental rights of the people. The approach preferred by the 11 judge bench in this case was too rigid since it hardly leaves any scope for the legislature to make legislation even touching making minor curtailment or alteration to the fundamental rights of the people and would create impediment in enforcing the directives under Part IV of the Constitution.

The final change in approach was brought by the 13 judge bench in the Kesavananda verdict where the too rigid approach of ‘non-compromise with the fundamental rights’ was also negated by the Apex Court and a balanced approach was put forth by the Court in which the fundamental rights were held to be important and undeniable but the amending body was having the autonomy to amend the fundamental rights of the people to an extent that the basic feature or fundamental features of the Constitution is not abrogated. The primary change which was brought by this judgment was that it struck a balance between the protection of the fundamental rights and the amendment powers of the parliament. It affirmed the inherent or implied limitations on the power of the

parliament under Article 368 of the Constitution. In the cases following the Kesavananda judgment, the basic structure doctrine has been affirmed and the findings there are carried forward. However, it is undisputed that the fundamental rights have a unique and indispensable status to the constitution and the judiciary has always been proactive in the protection of fundamental rights of the citizens.

With regard to the importance of fundamental rights, the question which needs to be answered is that whether these basic rights of the people could become a plaything in the hands of majority party in the Parliament? Part III of the Constitution is of unique importance since it reflects the traits of the country idealized by the constitution makers. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judiciary has conferred the '*sacrosanct and transcendental'* status to the fundamental rights and that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament.

4.5 Basic Structure Doctrine-

It is clear beyond doubt that constitution of India is a supreme document and every authority or body which functions in the country is under authority from this supreme document. However, the distinct role of judiciary as 'interpreter of the constitution' is of great importance since no other organ of the government i.e. executive or the parliament is authorized to do so except the judiciary of the country. Each action by the executive and the parliament must be within the fathoms of the constitutional authority granted to them but the judiciary can interpret the constitution and therefore confine and broaden the dimension of provisions of the Constitution. As a guardian of the fundamental rights and custodian of the Constitution, the Apex Court has the onus to ensure that the legislature, in the pretext of amending the constitution, does not alter the ideals of the constitution makers which form the basic features of the Constitution.

In Kesavananda Bharti case, the Preamble was held to be a part of the Constitution and though not a source of powers it was considered to be a source of limitations to be imposed on the powers of the Constitutional authorities. In the opinion of the Court, unless there are restrictions on the power of amendment the danger is that the Indian Constitution may also meet the same fate as did the Weimar Republic at the hands of Hitler and democracy might suffer. The need for Basic Structure doctrine was best explained by Justice Hegde and Mukharjee in the Kesavananda Bharti Case as- "*Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed*."

The Supreme Court, although, invited a lot of criticism for the interpretation of law done by it in Golaknath and Kesavananda verdict for several reasons but the purposive interpretation done by the Court is commendable since it has saved the dignity of the sovereign i.e. 'the people of India' and also the dignity of the sacred document called the Constitution which embodies the ideals, dreams and aspirations of the freedom lovers and

prevented this document from becoming the manifesto of a political party. It must be remembered that the constitution makers attempted to make a 'controlled constitution' and the Apex Court through its verdicts has affirmed this status. It is evident beyond doubt that the government had made all attempts to convert our constitutional democracy into a parliamentary democracy and a lot depended on the verdict of the 13 Judge bench and the people of the country owe gratitude to the majority for saving the democracy rather the constitutional democracy in such circumstances and for times to come. The description of the circumstances prevailing is given by Justice Hedge in following words-

"*Because of Congress's unbroken dominance at the Centre and in almost all the State Governments, India is for practical purposes a one-party state. Within the Congress party, democracy is at the premium and power is unduly concentrated. The standard of political morality is low. The press is free only to praise….the radio is controlled by the government. The vast majority of the people are apathetic and badly informed; the constitution is certainly too abstract to be on their cognitive maps. In these circumstances, it is up to the Supreme Court to defend it. The Supreme Court is the last bulwark of democracy*."[49]

The truth remains that given the development of law in the contemporary context, it can be inferred that the basic feature theory has stood the test of time, since its inception forty two years ago.

[49] M.P. Jain ; Indian Constitutional Law (Sixth Edn.) p- 1178-79

4.6THE BASIC STRUCTURE DOCTRINE- A VIEW AT APPRECIATIONS AND CRITICISMS-

The basic structure doctrine has been amply discussed in the research and now what remain to be looked into are the reviews about the doctrine from both sides of the coin, its appreciations and the rebukes on its genesis. It must be understood that why would the Apex Court give such a purposive interpretation as in Kesavananda and why would it advocate for the applicability f this doctrine. The possible reasons for advocating the doctrine could be as follows-

- The doctrine was necessary to prevent the entrenchment of the basic and fundamental rights against the constitutional amendments which have been evident from the history[50] and to check that the Parliament's powers of amending do not become unlimited & unfettered.
- The doctrine helped overcome the exclusions of the express limitations on the mending powers under the Constitution. The implied limits were read into the Constitution to ensure that the Parliament does not abrogate the basic structure of the Constitution.[51]
- The doctrine made possible the harmonious existence of the Article 368 of the Constitution with the other provisions and especially the Preamble[52] which enshrined the various ideals and cornerstones of our constitution. Now, if parliament could change the form of government from democracy to some other form and this is validated by the Constitution, the Preamble would not be able to co-exist with these amendments.

The criticisms of the doctrine can be broadly summarized as follows-

[50]Sudarshan R., Stateness in the Indian Constitution. The doctrine of basic structure had been invoked under the Weimar (German) Constitution. The German Constitution, 1949 sets out that certain portions of law are immune from amendment in order to overcome the defects of the Weimar Constitution exploited during the Hitler years. The Constitution of 1949 describes itself as the 'Basic Law' only to be a Constitution adopted by a free decision of the German people (Article 146 of the West German Constitution, 1949).

[51]Krishnaswamy, S.: Democracy and Constitutionalism in India---A Study of the Basic Structure Doctrine, (New Delhi, Oxford University Press, 2009) at 39

[52] Ibid at 28

- It is held as inherently undemocratic since the unelected members (the judiciary) seeks to block the mandate of the elected candidates (the parliamentarians).
- It weakens the stature of the Parliament and therefore is itself against Constitution.
- Durga Das Basu, the constitutional jurist, criticizes the doctrine by questioning whether there is any juristic foundation for the assumption that some parts of the Constitution or its core or its framework is excluded from the amending powers of the Parliament through an inherent limitation.[53]

Analysis of the criticisms presents that the doctrine is mainly criticized on the hypothesis that it is the parliamentary democracy or the parliamentary sovereignty which is not supported by the doctrine but this form of democracy is neither envisaged by the constitution makers nor supported by the Constitution and it is the constitutional democracy which is envisaged by the Constitution. Further, the Parliament being a creature of the Constitution cannot destroy the fundamental principles enshrined under it and cannot claim supremacy over the Constitution itself.[54] Mr. Soli J Sorabjee observes that "*in the Indian Constitution there are tangible and substantial gains resulting from the doctrine and stands as a bulwark against the further erosion of the basic fundamental rights*."[55] The doctrine has stood the test of time and one of the staunch believers of the parliament's unlimited powers of amendment and the advocate who also appeared for the Respondents in the Kesavananda verdict, after witnessing the state of the nation in emergency, admits that if the doctrine had not been laid, India state could have been converted into a Police state.[56] This fact itself shows the significance of the doctrine in India.

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[53]Basu, Durga D.: Comparative Constitutional Law, (2nd ed. (revised), (Nagpur, Wadhwa and Company, 2008), at 108.

[54] See RajuRamachandran: The Supreme Court and the Basic Structure Doctrine, in Supreme But Not Infallible: Essays in the Honour of the Supreme Court of India, (B.N. Kirpal et al. eds., 2000); SubhashKashyap: The 'Doctrine' Versus the Sovereignty of the People, in The Supreme Court Versus the Constitution, (Pran Chopra ed., 2006), at 99

[55]Sorbjee, Soli J.: Evolution of the Basic Structure Doctrine: Its Implications and Impact on Constitutional Amendments, excerpt from lecture delivered at Oslo University, Norway on 6th October, 2008, at 6, available at: http://docsgoogle.com/Doc?ibid=dct39c8c101f38gp3cf

[56] http://ibnlive.in.com/news/41-years-of-kesavananda-bharati-the-day-the-sc-saved-the-constitution/467305-3.html, (24th April 2014)

4.7 Jurisprudence of 'Limiting the Amending powers' in other Jurisdictions-

Due to unfortunate events of two World Wars and the flagrant violation of human rights witnessed by the world in those wars, the countries of the world were cautious of safeguarding the basic human rights and fundamental freedoms of their subject and simultaneously were cautious of not granting absolute powers in the hands of the amending body to the Constitution. Many Constitutions of the world created post- World War II had certain unamendable provisions in them.

For example, the Constitution of Portugal and the Constitution of Greece have a list of provisions which are unamendable[57]. The Constitution of Germany places limits on amending the Constitution by listing the unamendable provisions[58]. Where these constitutions provide a list of mendable provisions there are few which prescribe only one or two essential features as unamendable.[59]

The Constitution of Thailand 2007 also has these features since it prohibits the constitutional amendments which "change the democratic regime of the government with King as the head of the State or change the form of the state". [60]Not only this, but the Constitution confers wide powers on the Judiciary as well by granting control over various representative bodies as well as by control in appointments to Senate.

The Constitution of Iran makes both the Islamic and democratic character as well as certain objectives of the state as unamendable[61] as well as grants powers to the Guardian Council to approve all laws passed by the Parliament and veto them if found inconsistent with the Islamic Law or the Constitution of Iran[62].

[57] Constitution of Portugal at Article 288 and 1975 Syntagma Constitution at Articles 110, 2, 4–5, 13, 26 (Greece)
[58] The German Constitution bars the amendments to Article 1 (human dignity) and its democratic and federal form of government.
[59] The Constitutions of Italy and France, for example, simply safeguard their republican form of government against amendment under Articles 89 and 139 respectively of their respective Constitutions.
[60]SomdetPhraParamintharamahaBhumibolAdulyadej [Interim Constitution of Thailand], 2006, B.E. at Ch. 15
[61]QanuniAssassiJumhuri'iIsla'mai Iran [The Constitution of the Islamic Republic of Iran], 1980, at 177(5).
[62] ibid at Article 94

Bangladesh also has an interesting case where the Constitution directs the retired Chief Justice or other retired member of higher judiciary to head a caretaker government during election when the two political parties are viciously distrustful of each other.[63]

In India, leaving apart few subjects exempted under Art 368 only, the jurisprudence of limiting the Constitution amending powers of the government has largely been developed by the judiciary on the ground of the 'basic structure doctrine' through the Kesavananda verdict and now the other nations of the world are also following the trend where the judiciary by interpreting the constitution has imposed limitations on the powers of the legislature to amend the essential features of the Constitution so as to cost the Constitutional identity in lieu of the amending powers. It has been previously discussed in the research that how this doctrine has been adopted by judiciaries of other nations and in cases such as Pakistan, where expressly they are not accepted but in spirit application is evident.

On interesting case is that of the Supreme Court of Belize where it struck down the Constitutional amendments in Belize on the ground that the legislations violated the basic structure of the Belize Constitution. In the matter of Bowen v. Attorney General[64], the constitutional validity of the Sixth Amendment Bill 2008 was challenged by a group of landowners since the amendment sought to waive protection offered by Section 17(1) of the Constitution. According to the Chief Justice, the law-making powers of the Belizean Parliament are not unlimited and it cannot make a law abridging the 'basic structure' of the Constitution ad that the basic structure not only includes the rights guaranteed by Chapter II but also the principles, ideas, beliefs and desires enshrined in the Preamble of

[63] Constitution of Bangladesh , Article 58 B–C - If no retired member of the higher judiciary is available or willing, an impartial citizen is appointed. In 2006, the primary opposition party in Bangladesh protested that the former Chief Justice who was to oversee the caretaker government was not impartial. After the Chief Justice refused to take on the position, the Presibident was eventually sworn in to head the caretaker government. Amibid violent protests in 2007, the Presibident declared a state of emergency, which led to the military backing of a caretaker government. This may signal an end to the retired judiciary's role in caretaker governments in the future. See Bangladesh Presibident to Lead Caretaker Government, PEOPLE'S DAILY ONLINE, Oct. 30, 2006, available at: http://english.people.com.cn/200610/30/eng20061030_316328html ;

[64] BZ 2009 SC 2

the Constitution and which included, inter alia, the right of the individual to the ownership of private property.[65]

In this manner, the ambit of basic structure doctrine was further progressively increased and that too in a different jurisdiction placing reliance on the Kesavananda verdict.

[65] http://ukconstitutionallaw.org/2013/05/28/derek-obrien-the-basic-structure-doctrine-and-the-courts-of-the-commonwealth-caribbean/ , last accesed- 7th April, 2015.

5. **THE POST KESAVANANDA BHARTI SCENARIO-**

The Basic structure doctrine as recognized by the Kesavananda Bharti case to put limitations on the amending powers of the parliament became the recognized principle of constitutional jurisprudence and there are number of instances in the manner of precedents when the aforesaid doctrine has been reaffirmed by the Apex Court of India and the whole Chapter dedicated to the post-kesavavnandaBharti scenario details about the reaffirmation of the 'basic structure' doctrine and how this doctrine has acquired a significant position in the constitutional philosophy of the country.

5.1 After Kesavananda Bharti, the first case demanding a new dimension of the basic structure doctrine was the famous Election Case (Indira Nehru Gandhi V. Raj Narain[66]). In this case the constitutional validity of the Cl. 4 of the Constitution (Thirty-ninth Amendment) Act, 1975[67] was put to question. Clause 4 of the aforesaid amendment

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[66] AIR 1975 SC 2299: 1975 Supp SCC 1

[67] In part XV of the Constitution, after Article 329, the following Article shall be inserted, namely-

"329A. (1) Subject to the provisions of Chapter II of Part V, no election-

(a) To either house of the Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election;

shall be called in question, except before such authority (not being any such authority as is referred to in clause (b) of article 329) or body and in such manner as may be provided for by or under any aw made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such elections may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any Court.

(3) where any person is appointed as the Prime Minister or, as the case may be, chosen to the office of the speaker of the House of the People, while an election petition referred to in clause (b) of Article 329 in respect of his election to either House of the Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister, or as the case may be, being chosen to the office of the speaker of the House of the people, but such election may be called in question under any such law as is referred to in clause (1).

inserted Article 329A to the Constitution and the amendment had three affects- first, to withdraw the election of Prime Minister and few other Union officials from the ambit of ordinary judicial proceedings; second, to declare void the Allahabad High Court decision which declared Indira Gandhi's election to LokSabha as void; and third, to exclude the Apex Court's jurisdiction to hear appeal.

The aforesaid clause was challenged relying on the Kesavananda Ruling as it grossly interferes with the judicial process and thereby destroys the basic feature of the Constitution. It was contended that the impugned clause not only annuls the High Court Judgment but also affects the election law.

The Apex Court upheld the contention and declared the clause 4 unconstitutional as it destroys the basic features of the Constitution and is against 'rule of law'. It was held that it destroyed the democratic feature of the Constitution. Justice Khanna holds that –

"*To put a stamp of validity on the election of a candidate by saying that the challenge to such an election would not be governed by an election law and that the said election in any case would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries.*"

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(4) No law made by Parliament before the commencement of the Constitution (Thirty-Ninth Amendment) Act, 1975, in so far as it relates to the election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied of any such person as is referred to in clause (1) to either House of the parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-Ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this Article shall have effect notwithstanding anything contained in the Constitution.

This case evidences the reaffirmation of the Kesavananda verdict and the reliance on the basic structure doctrine as the democratic structure of the constitution is one of its essential and basic features and 'free and fair elections' are the soul of any democracy and therefore the clause was scrapped off a unconstitutional. Further, the clause also tried to disturb the balance of separation of power by ousting the judicial task from judiciary and granting its function to legislature which is again destruction of a basic pillar of the Constitution. This is how the kesavananda verdict made way for future judgments relying on basic structure theory.

The government was unable to digest the ruling of the Apex Court in the Election Case and was reluctant to accept the interpretation done therein. The government desired to totally retrain the judiciary from intervening in any effort of the legislature and wanted to put complete ban on the judicial review of constitutional amendments and for these purposes Art 368[68] was again amended in the 42nd Amendment to the Constitution enacted in 1976.

5.2 The rationale of the Kesavananda Bharti was further carried forward in the Minerva Mills case (**Minerva Mills Ltd. V. Union of India**[69]), where the scope and extent of the basic structure doctrine was reconsidered and the court again reiterated the doctrine. In the matter, a petition challenged the constitutional validity of clauses (4) and (5) of the Art 368, introduced by section 55 of the 42nd Amendment. It was clearly evident that the true intent behind these clauses was to undo the basic structure doctrine by legislative action and do away with the limitations imposed by the Kesavananda Bharti judgment on the Parliament's power of amending.

The clauses were held unconstitutional as abrogative of the basic features of the Constitution i.e. 'judicial review' and the Court expressed that the Constitution envisages balance between the three wings of the state and it is the function of judges to pronounce on the validity of laws. The Court observed that if the courts are deprived of the power of judicial review, fundamental rights will become rights without remedies and

[68] This Amendment introduced two sub clauses to the Art 368. As per clause (4), no constitutional amendment can be challenged in Courts and clause (5) clarified that no limitation can be imposed on the constituent power of the legislature.
[69] AIR 1980 SC 1789: (1980) 3 SCC 625

"*a controlled constitution will become uncontrolled*"[70].

This case further broadened the scope of the 'basic structure' where judicial review was specifically recounted as the essential feature of our Constitution.

5.3 Later in the matter of **WamanRao v. Union of India**[71], the Supreme Court considered the validity of the Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 but the Act was placed in IXth Schedule to the Constitution, Article 31A, 31B and 31C (as existed before 42nd Amendment) was also brought under question for testing the constitutional validity and challenged for damaging the 'basic structure' of the Constitution. The Court gave widest application of the basic structure doctrine by nullifying the effect of IXth Schedule altogether. The Court held that all Acts and regulations included in the Ninth schedule uptil the landmark Kesavananda judgment i.e. April 24th 1973 will receive full protection of Art 31B but the Acts and regulations included in the Ninth schedule after Kesavananda (on or after April 24th 1973) will not receive the protection of Art 31 B for the plain reason that even in kesavananda judgment , there is no justification for conferring a blanket protection to the laws just by making additions to such schedule. It was held that

"the various constitutional amendments, by which additions were made to the Ninth schedule on or after April 24, 1973 will be held valid only if they do not damage or destroy the basic structure of the Constitution."[72]

In the various following verdicts of the Supreme Court of India, it has analyzed different elements as the basic structure of the Constitution and in this manner the doctrine has grown stronger and wider from case to case basis and day by day. Some of the verdicts strengthening the doctrine are mentioned.

5.4 In S. P. Sampath Kumar v. Union of India[73] and in P. Sambamurthy v. State of A.P.[74], the rule of law and judicial review were held to be the integral part of the Constitution

[70] AIR 1980 SC 1789 @ 1799
[71] AIR 1981 SC 271
[72] M P Jain; Indian Constitutional Law, page- 1783
[73] AIR 1987 SC 368.
[74] AIR 1987 SC 663

and therefore within the ambit of the 'basic structure'. In Central Coal Fields Ltd. V. Jaiswal Coal Co[75], effective justice was held to be a part of 'basic structure' of the constitution. In the matter of Delhi Judicial Service Assn. V. State of Gujarat[76], the Articles 32, 136, 141 and 142 of the Constitution providing for the power of the Apex Court were held to be part of the 'basic structure' of the Constitution.

The ambit of basic structure and its dimension kept evolving with the cases and a catena of judgments made a large ambit of the Constitution unamendable being covered within the basic structure of the Constitution. The concepts such as 'independence of judiciary[77], secularism[78], judicial review under Article 32, 226 & 227 of the Constitution[79], federalism[80], separation of powers[81], free, fair and periodical elections[82]. In L. Chandrakumar v. Union of India[83], the superintendence power of High Courts over the decisions of all other courts within their jurisdiction was held to be a part of the Basic structure. The Apex Court, in the matter of M Nagraj V. Union of India[84], held that the amendment must not destroy constitutional identity and the theory of basic structure judges the constitutional amendment.

In the matter of IR Cohelo V. State of Tamil Nadu[85], the Court through a unanimous decision held that many of the current fundamental rights are part of the basic structure of the Constitution and that the laws in the Ninth Schedule would have to be tested on these principles.

The aforementioned decisions of the Apex Court have made the basic structure doctrine an indispensable chapter in the constitutional jurisprudence and constitutional history of

[75] 1980 Supp. SCC 471
[76](1991) 4 SCC 406 @ 452
[77] Kumar Padma Prasad v. Union of India, AIR 1992 SC 1213; State of Bihar v. BalMukundSah, AIR 2000 SC 1296.
[78]Valsamma Paul v. Cochin University, AIR 1996 SC 1011; Aruna Roy v. Union of India, AIR 2002 SC 3176
[79] L. Chandrakumar v. Union of India, AIR 1997 SC 1125
[80] S.R Bommai v. Union of India, AIR 1994 SC 1918
[81] State of Bihar v. BalMukundSah, AIR 2000 SC 1296.
[82]Special Ref. No. 1 of 2002 (Gujarat Assembly Election Matter), AIR 2003 SC 87; KihotoHollohan v. Zachilhu, AIR 1993 SC 412.
[83] AIR 1997 SC 1125
[84]AIR 2007 SC 71.
[85] (2007) 1 S.C.R. 706

India and granted a sacred status to the fundamental rights and basic freedoms of the individual enshrined in the Constitution of India. The basic structure doctrine by these rulingshas been conferred omnipresence applicability in the whole constitutional philosophy of India and even Ninth schedule now could not protect a law if it abrogates the basic features of the Constitution.

6. THE IMPACT OF THE KESAVANANDA BHARTI VERDICT

The Case is recognized as the basic structure case of India and the impact which this case has been able to create both nationally and internationally; and both in legal and political landscapes is by virtue of the basic structure theory which it propounds and which sets the constitutional fences on the amending powers of the legislature and offers solution to the ongoing tussle between the Parliament and the Judiciary.

The doctrine of basic structure has no less contributed in the development of the Indian democracy and the judges in exercising the powers of the judicial review have acted no less than the freedom fighters who fought for independence of the nation against the British Rule. The Kesavananda Bharti Judgment has not only changed the social, political and constitutional landscape within the country for the days to come but also impacted the constitutional landscape in other countries of the world where the Kesavananda Bharti Judgment being the guiding precedent for the Apex Court of the other countries. There are no ordinary comments which are attracted on the achievements of the Apex Court by upholding the constitutional democracy and it has been remarked that "*in the free trade of constitutional ideas the Indian Supreme Court has come to play the role of an exporter. This holds true with respect to at least two major innovations introduced by the Court; namely, public interest litigation and 'basic structure doctrine'*."[86] By expressly relying on the reasoning in the Kesavananda Bharti Case, the Supreme Court of Bangladesh adopted the 'basic structure doctrine' in the matter of *Anwar HossainChowdhary V. Bangladesh*[87].

Considering the case with Pakistan, it cannot be negated that the doctrine has shown some influence in the constitutional landscape of Pakistan. In a case in 1963, even prior to the Kesavananda Bharti Case, the Supreme Court of Pakistan, in the matter of *FazlulQuaderChowdry V. Mohd. Abdul Haque*[88], in order to describe the inherent limitations on the powers of the President to remove difficulty in bringing the Constitution into operation used the expressions such as 'fundamentals of the

[86]Prof. Conrad; Noorani A.G., "Behind the basic structure doctrine" Frontline Vol 18, Iss. 09; Available at-http://www.frontline.in/static/html/fl1809/18090950.htm
[87] 41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1
[88] PLD 1963 SC 486

Constitution', 'basic structure of the Constitution' and 'essential features of the Constitution' however the Court did not recognize the doctrine as such.[89] In a recent case on judicial appointments, *Al-Jehad Trust V. Federation of Pakistan*[90] the Apex Court of Pakistan came close to recognizing 'a basic structure' limitation on the powers of the Government however the express recognition of the doctrine is still evaded by the Court. Therefore, it can be safely concluded that where Indian and Bangladeshi judiciary have made express recognition of the doctrine, the Pakistan judiciary has made implied strides towards the application of this doctrine for protecting the basic and core structure of the Constitution. The development of this doctrine in itself evidences of how the academia and the juristic opinions can help in shaping the jurisprudence of a nation and especially when it is with regard to the constitutional jurisprudence which impacts the whole law of the land.

6.1 **"Had this judgment been otherwise than what it was, what would have been the fate of Indian democracy today?"**

Laws are meant to regulate the human conduct in the society and it is a mechanism developed by society to regulate various affairs undertaken in it. It must be remembered that law is a creation of human existence and not vice versa and therefore laws cannot overshadow human spirit and existence; and laws have to be in consonance with the core human values. If this is not done explicitly then these core human values have to be implied and read into as a part of the law and as a broader philosophy behind every lawmaking.

The Constitution as a charter of the state details about the organs of the government and the same is done by the Constitution of India by constituting the Legislature, the Executive and the Judiciary of the country and defining their powers and functions. The legislature and executive derive their authority from the constitution and have to strictly function within the limits prescribed by the Constitution and the Judiciary has been given the task of 'a watchdog' to check the actions of other two organs of the government and ensure the constitutionality of their actions. The judiciary has been conferred with both

[89] Supra at 20
[90] PLD 1996 SC 367

the power and function of 'interpreting the Constitution' which no other organ of the government has been entrusted with and therefore the protection and enforcement of the Constitution and the spirit of the Constitution lies at the hands of Judiciary.

The judgment by affirming the various constitutional principles limiting the power of the Government has upheld the supremacy of the Constitution and made the position clear by declaring that the constitution is not a 'plaything at the whims of the majority' and the fundamental, basic and undeniable freedoms of the citizens cannot be put at stake by the majority party by virtue of being the majority in the Parliament. Had this verdict being otherwise, the whole position would have been upside down and the whole spirit of democracy would have been dead. The freedoms and rights of the citizens could have been at the mercy of the majority in the Parliament and the whole concept of 'supremacy of the Constitution' could have been abrogated by the Government itself by making pro-government amendments to the Constitution and taking away the power of judicial review from the judiciary and transformed the role of judiciary from the 'protectors of the Constitution' to the 'mute spectators' of the ripping apart the constitutional principles and philosophies.

Justice Sikri in the Kesavananda Bharti Case holds that

"The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-Constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the

very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility."[91]

The abovementioned observations of the Judge clearly reflect the state of affairs which might arise if the Constitution is left at the sweet wish of the government and this possibly answers the question '*Had this judgment been otherwise than what it was, what would have been the fate of Indian democracy today'.* It is even doubtful whether democracy in the real spirit could have been alive or not. Even Part III and IV of the Constitution detailing about the fundamental rights and the Directive Principles of State Policy which are described to be the conscience of the Constitution[92] could be abrogated.

[91] Para 309 of the Judgment
[92] The Indian Constitution by Granville Austin, p.50

7. **CONCLUSION**-

The nation for a long time witnessed a tussle between two wing of the state, Parliament and Judiciary however after the 'right to property' was dropped from the list of fundamental rights, much of the tussle was over. But the few questions still remain that 'was there in reality any tussle for power between them' and if there was, who of the two won the tussle'. It is clear beyond doubt that the government wanted to extract and exercise maximum power and to do that it had to twist and turn the provisions of the Constitution which it did not hesitate to do and made all attempts to establish a 'parliamentary democracy' but the only thing which came in the way to pursue such aims was the judiciary of the country. It is not that the legislature was not aware of the power of judiciary, the constitutional amendments present a clear picture that maximum effort was made to oust the jurisdiction of the Courts. The creation of the Ninth schedule to the Constitution was itself a biggest example to this fact and this was reflected in other amendments to the Constitution. The fact is that although it seems that there was a tussle between judiciary and the Parliament, it was a tussle between the Constitution and the amending body; it was a tussle between the ideals of the constitution makers and the ideals of the amending body and it would not be an overstatement to declare that the constitution makers were aware of such circumstances and that is why they entrusted the task of 'custodian of the fundamental rights' and 'interpreter of the Constitution on the judiciary. The answer to the second question that 'who wins the tussle' is of immense importance for each and every individual of the country. In this tussle between legislature and judiciary, it is the 'Constitution' which has won and through the constitution, it is the people of India which have won. The Kesavananda verdict which put the limitations on the amending powers of the Parliament by affirming the Basic structure doctrine, shows that the Supreme Court of India has fulfilled its sacred duty of being the 'protector of the Constitution' and by saving the essential features of the Constitution from being amended, it has protected the 'ideals of the constitution makers' enshrined in the Preamble and further upheld the faith of the sovereign i.e. 'the people of India' on the

judiciary as the protector of their rights. It was never a fight of the judiciary, the judiciary always fought on behalf of the Constitution and therefore it was never the situation that the judiciary wanted to bring 'judicial dominance' in place of 'parliamentary democracy' but it was the 'constitutional democracy' which the judiciary wanted to uphold and did upheld through the Kesavananda verdict in 1973. So, the question that which of the wings of the state; the legislature, the executive or the judiciary is the sovereign, is answered by itself since it is none of the wings which is the sovereign, it is the constitution and the people of India who are the sovereign. By the Kesavananda verdict it must not be analyzed that the judiciary has acquired dominance over the other wings of the state but what must be analyzed is that the judiciary has performed the duty entrusted to it by the Constitution and reaffirmed the sovereignty of the people of India. The Court in Kesavananda verdict one observed that it is difficult to understand that how the power of judicial review would make the judiciary supreme in any sense rather it is of paramount importance in a federal constitution.[93]

[93]In Bidi Supply Co. v. The Union of India [1956], it was said that the heart and soul of the democracy lies in the judicial process.

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