

SUPREME
COURT
CASES

1974
VOL. I

CC

D935.1
I391*1974'1

THE SUPREME COURT CASES

84
P 901

1974

Volume 1

Mode of Citation

(1974) 1 SCC

华东政法大学图书馆



04012370



EASTERN BOOK COMPANY

Law Publishers and Booksellers

34, LALBAGH, LUCKNOW—226 001

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Printed by P. L. Malik at Law Times Press, 56/C, Singar Nagar, Lucknow—226 005
and Published by him from 34, Lalbagh Lucknow—226 001

The New Year

We are glad to greet our subscribers with a bigger and clearer type for headnotes and judgments. With this we fulfill the long standing desire of esteemed subscribers especially the senior lawyers and Judges.

The reporting of cases in 1973 has been with promptness and completeness, maximum number of cases, reportable and non-reportable, having been reported. The sensational Fundamental Rights case was also reported very promptly. A new feature was the summary of arguments of the leading Counsels in the Fundamental Rights case. We are hopeful that in future also this could be made possible for the major decisions at least.

Distinguished jurists and writers have contributed to the journal section of Supreme Court Cases. On the Fundamental Rights case the comments of Messrs. N. A. Palkhivala, K. Subba Rao and N. S. Bindra have been published. The other case-comments and articles have been widely welcomed and the coming year will see more of them.

We are grateful to our subscribers for their continued support and patronage and with that assurance we hope to bring the best in the reporting of Supreme Court Cases.

—Editors

Kesavananda Bharati v. The State of Kerala Who Wins ?

by

PROF. P. K. TRIPATHI*

I

The object of this paper is to consider certain aspects of the judgment delivered by the Supreme Court in the case of *Kesavananda Bharati v. The State of Kerala*¹, hereinafter referred to as the present case. It was heard by a Bench consisting of thirteen Judges, presumably with a view to wielding more authority than that of the Bench of eleven Judges which heard the *Golak Nath case*². The hearing lasted for sixty-eight days³. The subject matter of the controversy was the scope of the power of amendment of the Constitution under Article 368. Undoubtedly, therefore, the outcome of the case has tremendous significance for the working of the Constitution.

The last case before this when the Supreme Court considered the scope of the power of amendment under Article 368 was *I. C. Golak Nath v. State of Punjab*⁴, decided in 1967. The Court then had held, by a majority of six against five, that Parliament under that Article could not abridge or take away any Fundamental Right just as it could not do so by ordinary legislation. The main arguments pressed by the petitioners in the present case were different from those relied upon by the majority opinions in *Golak Nath's case*. Yet, the petitioners also relied on *Golak Nath* and, a definite and total rejection of the majority view in *Golak Nath* has been one of the important outcomes of the present case. A brief mention may, therefore, be made of this aspect of the present case so that the deck may be cleared for taking up the arguments which were more heavily pressed by the petitioners and which, ultimately, found favour with some of the learned Judges.

By the time the present case came to be heard and decided, academic research had completely undermined the foundations of the arguments supporting the majority opinions in *Golak Nath*. Mr. Seervai drew pointed attention to Article 305 of the draft Constitution to establish that possible exceptions

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1. (1973) 4 SCC 225 : AIR 1973 SC 1461.

2. (1967) 2 SCR 762 : AIR 1967 SC 1643 : (1967) 2 SCJ 486.

3. The hearing commenced on 31st October, 1972 ; oral hearing closed on 23rd March, 1973 ; written arguments were submitted upto 27th March, 1973. Petitioners' arguments lasted 31 days and their reply lasted 2½ days ; Respondents' arguments lasted 33½ days and reply lasted 1 day.

4. See n. 2, supra.

to the amending power were sought to be incorporated expressly in the Constitution in the Part devoted exclusively to amendment⁵. This destroyed the credibility of the argument that an exception in favour of Fundamental Rights was intended by the framers of the Constitution and was left to be read by implication in Article 368. Again, Dr. Gajendragadkar pointed out in his *Tagore Law Lectures*, in 1972, that a Constituent Assembly, to be summoned, as suggested by Subba Rao, C. J., in exercise of the legislative power under item 97 of the Union List, will not be bound by the procedure under Article 368.⁶ This showed that the reasoning of Subba Rao, C.J., would, in the ultimate analysis, lead to the absurd consequence of rendering Article 368 otiose.

The main prop of the two majority opinions in *Golak Nath*, however, was the argument that there was no distinction between ordinary law and the Constitution and that, therefore, the injunction in Article 13(2) against any 'law' abridging or taking away a fundamental right also extended to a Constitutional amendment under Article 368. The distinction between Constitution and ordinary law had always been sensed and recognised; but the challenge now posed was to articulate this distinction with precision and in juristic terms. Relying upon the works of the positivist jurists Austin, Kelsen and Salmond, the present writer attempted to meet this challenge, in the *Telang Memorial Lectures* delivered at the University of Bombay in February 1971, by the thesis that the distinction between law and Constitution lay in the criterion of validity; i.e., whereas an ordinary law depended on a higher law for establishing its own validity, a provision of the Constitution did not so depend on another law and, instead, generated its own validity⁷. Nine out of the ten Judges who expressly overruled *Golak Nath* in the present case, adopted this thesis in one form or another, and expressed the distinction between ordinary law and Constitution in terms of the criterion of validity⁸. Of these, Ray, J., as he then was, and

5. H. M. Seervai : Constitutional Law of India, Ch. XXX (1967), p. 1095.

6. Dr. P. B. Gajendragadkar : The Indian Parliament and the Fundamental Rights, *Tagore Law Lectures*, Eastern Law House, 1972, at p. 175.

7. P. K. Tripathi : Some Insights into Fundamental Rights, University of Bombay, (1972), Ch. I, *Golak Nath* : A Critique, p. 17.

8. (1973) 4 SCC 225 : AIR 1973 SC 1461. See, Hegde and Mukherjea, JJ., at p. 471, para 626 (AIR para 642) (they reject the claim that certain laws were "constitutional laws", and give it as their reason that "For their validity they had to depend on Art. 372" : earlier, at p. 469, para 622 (AIR para 638), they characterise the Constitution as "not only a law but the paramount law of the country") ; Khanna, J., p. 744, para 1370 (AIR para 1381), (He regards the Constitution to be "the fundamental and basic law" which "provides the authority under which ordinary law is made") ; Ray, J., at pp. 518-19, paras 772 to 774 (AIR paras 787 to 789) ; Palekar, J., at p. 692, para 1266 (AIR para 1276) ; Mathew, J., at pp. 833-34, paras 1572, 1575 to 1577 (AIR paras 1586, 1589 to 1591) ; Dwivedi, J., at p. 933, para 1900 (AIR para 1913) ; Chandrachud, J., at p. 984, paras 2068, 2071 and 2073 (AIR paras 2081, 2084 and 2086) ; and Beg, J., at p. 915, para 1843 (AIR para 1857), and p. 913, para 1837 (AIR para 1851), where he adopts the reasoning of Ray, Palekar, Mathew and Dwivedi, JJ.

Mathew, J., with due respect, gave very thorough and lucid exposition to the thesis⁹; indeed, they seem to make it the corner-stone of their opinions.

Perhaps, it is necessary to state that the principle explaining the distinction between law and Constitution on the basis of the criterion of validity is not to be confused with the doctrine of ultra vires. That doctrine does not explain why a Constitutional provision should not be declared invalid, nor does it explain how a Constitutional provision differs qualitatively from any other legal provision. It can offer no explanation why, as we shall point out later, there can be no analogy between sub-section (4) of Section 29 of the Ceylonese Constitution and Article 368 of our Constitution, and why, unlike Ceylon, there can be no *pro tanto* repeal under our Constitution. The doctrine of ultra vires won't be able also to meet satisfactorily, for instance, the argument advanced by Mr. Palkhivala that there were several "constitutional laws" valid and in force at the commencement of the Constitution of India, and, that Clause (1) of Article 13 referred, *inter alia*, to them; and, consequently, the inhibition in Clause (2) of Article 13 should extend also to constitutional law made through amendments under Article 368. The doctrine of ultra vires was certainly known when *Golak Nath* was decided, and was not found capable of furnishing an adequate answer to the arguments of the petitioners accepted by the majority opinions in that case. In his opinion, in the present case, Chandrachud, J., has observed :

"The fundamental distinction between constitutional law and ordinary law lies in the criterion of validity. In the case of constitutional law, its validity is inherent whereas in the case of an ordinary law its validity has to be decided on the touchstone of the Constitution. With great respect, the majority view in the *Golak Nath* case (supra) did not on the construction of Article 13(2), accord due importance to this essential distinction between legislative power and the constituent power."¹⁰

With due respect, the learned Judge has stated the distinction accurately, but his criticism of the majority view in *Golak Nath* fails to take note of the fact that the benefit of subsequent researches available when the present case came up in 1973 was not available to the learned Judges who decided *Golak Nath* in 1967. The exposition of the qualitative distinction based upon the criterion of validity on which the learned Judge has relied was the product of later research. The proof of this, if proof be needed, is to be found in the total absence of any mention or hint about the "criterion of validity" in the majority as well as the minority opinions in *Golak Nath*. The latter at least could be expected to have grabbed at this criterion if the same had been presented to the Court during argument or were otherwise available in contemporary literature in readily assimilable form. It is highly probable, indeed, that the outcome of

9. *Ibid.*

10. *Supra*, n. 1, at p. 984, para 2068 (AIR para 2081).

the *Golak Nath* case would have been different if this articulation of the distinction between Constitution and ordinary law could have then been presented to the Court. In any event, the impact on *Golak Nath* of the criticism and research during the intervening period was so decisive that nine of the eleven opinions written in the present case expressly overruled it¹¹; and even the remaining two opinions written by Sikri, C.J., and Shelat, J., both of whom were parties to that view in *Golak Nath*, did not make any attempt to defend it. Both these learned Judges skirted the issue on the alibi that it was not necessary to attend to it.¹² Realistically speaking, they too must be understood to have tacitly overruled *Golak Nath* by holding, as they did, that Fundamental Rights can be abridged—though not abrogated—by an amendment under Article 368 of the Constitution.¹³

The petitioners must have had some premonition of this fate of the majority view in *Golak Nath*. Therefore, as already stated, they put their main emphasis on the alternative submission that the word “amend” or “amendment” in Article 368 must be narrowly construed so that the Article may not comprehend the power to abrogate, emasculate or destroy the “essential elements” or “basic features” of the Constitution. The Fundamental Rights, they said, illustrated, but did not exhaust, such elements or features. The Court’s response to this submission may be briefly summed up as follows :

Six Judges, namely, Sikri, C.J., and Shelat, Grover, Hegde, Reddy and Mukherjea, JJ., (hereafter referred to as the six Judges led by the Chief Justice) fully accepted this submission of the petitioners, and held that the Fundamental Rights, being part of the essential elements or basic features of the Constitution could not be abrogated or emasculated by the exercise of the power of amendment under Article 368. They conceded, however, that reasonable abridgment of the rights¹⁴, as distinct from their abrogation or emasculation will be permissible under that Article. Six other Judges, namely, Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ., held that there were no limitations or restrictions of a substantive

11. Those written by Hegde and Mukherjea, Ray, Reddy, Palekar, Khanna, Mathew, Beg, Dwivedi and Chandrachud, JJ.

12. Sikri, C.J., did not discuss or defend the majority view in *Golak Nath* because, “the same result follows in this case even if it be assumed in favour of the respondents that the amendment of the Constitution is not law within Art. 13(2) of the Constitution”. (1973) 4 SCC 225, 312, para 38 (AIR para 43). For the same reason, Shelat and Grover, JJ., observe : “The decision in *Golak Nath* has become academic”. *Id.*, at p. 406, para 479 (AIR para 496).

13. See. H. M. Seervai : *The Fundamental Rights Case : At the Cross Roads*, (1973) Bombay Law Reporter, Vol. LXXV, Journal, 49, at pp. 49, para 6, who takes the same view ; we respectfully agree

14. This formulation, highly suggestive of a parity between judicial review of the amending power and that of ordinary legislative power under Article 19, is used by Sikri, C.J., who observes : “Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest.” Supra, n. 1, at p. 365, para 287 (AIR para 297).

nature on the exercise of the power of amendment under Article 368. Three of them, namely, Ray, Beg and Dwivedi, JJ., conceded the possibility of one limitation, however, namely, that the entire Constitution cannot be repealed at one stroke leaving behind a Constitutional void¹⁵. Palekar, J., dismissed the argument based on the possibility of such total repeal as "quibbling"¹⁶; Mathew, J., regarded the power of such repeal "beyond doubt"¹⁷; and Chandrachud, J., avoided the mention of total repeal and said that the word 'amendment' in Article 368 "connotes a power of the widest amplitude"¹⁸. Khanna, J., wrote an opinion the tenor of whose reasoning ran counter to that of the opinions of the six Judges led by the Chief Justice, and also rejected the doctrine that certain 'essential elements' or 'basic features' of the Constitution could not be abrogated by amendment. He specifically held that the right to property could be so abrogated¹⁹, and expressly stated that Fundamental Rights are not entitled to be treated differently from the other provisions of the Constitution.²⁰ However, he also held that what he called the "basic structure or framework of the Constitution" could not be abrogated by the exercise of the power of amendment under the Constitution.²¹

II

The six Judges led by the Chief Justice have relied upon a variety of arguments in support of the restricted construction they put on the power of amendment. Three of these arguments may be considered separately for the reason that in the present writer's submission, they have not received adequate attention either in the opinions of the other six Judges or in that of Khanna, J., whose reasoning is quite close to theirs.

The first of these arguments leans on the absence of certain Articles of the Constitution from the proviso in Article 368. It is said that certain important provisions like those relating to the election of the Vice-President, or State Judiciary, or the office of the Governor, or the Council of Ministers, are vital to the working of the Constitution and, in many cases, even to the federal aspects of the Constitution; their omission from the proviso could only mean that they were intended to be placed beyond the power of amendment, because, it ought to be regarded unthinkable that they should be liable to amendment without any reference to the wishes of the states. The argument is sharpened by reference to the omission of Articles 52 and 53 from the proviso while Articles 54 and 55 find a place therein. Is it rational that while the consent of the States is obligatory for amending the procedure for the election of the

15. *Ibid.*, Ray, J., at p. 557, para 917 (AIR para 932); Beg, J., at p. 913, para 1835 (AIR para 1849); Dwivedi, J., at p. 928, para 1885, (AIR para 1898).

16. *Ibid.*, at p. 680, para 1239 (AIR para 1249).

17. *Ibid.*, at p. 832, para 1567 (AIR para 1581).

18. *Ibid.*, at p. 981, para 2059 (AIR para 2071).

19. *Ibid.*, at p. 794, para 1483 (AIR para 1496); also at p. 824 (AIR para 1904), Conclusion (viii).

20. *Ibid.*, at p. 770, para 1435 (AIR para 1446).

21. *Ibid.*, at p. 824 (AIR para 1903), Conclusion (vii).

President of India, no such consent should be required if the very office of the President were to be abolished, it is asked. This argument seems to have nettled the respondents as is evident from the fact that the learned Solicitor-General of India went to the extent of suggesting that Articles 52 and 53 may be read by implication in the proviso to Article 368.²² That concession certainly could not have weakened the petitioners' argument that the implication, once conceded, should more rationally take the two Articles altogether outside the scope of Article 368.

The opinions of the other six Judges just make no attempt to meet this contention, and, most of them actually avoid even posing it in its fullness even to be summarily disposed of. The same is true of the opinion of Khanna, J., also. He, like some of the other six Judges, mentions, generally, that the provisions contained in the proviso "relate to the federal principle or the relations of the States with the Union", and cites K. C. Wheare in support of the propriety of the selection²³. But, obviously, as pointed out by the opinions of the six Judges led by the Chief Justice, all matters relating to the relations between the Union and the States have not been included in the proviso. Important matters affecting Centre-State relations like, for instance, Part XII of the Constitution, relating to Financial and Property relations, not to speak of the State-Judiciary, the Governor and the Council of Ministers and others, have been left out to be amended by Parliament without the consent of the States. What was, then, the basis of the selection ?

It seems that in the Constituent Assembly there was a strong feeling among some members that the Constitution should, in its entirety, be left open to amendment by an ordinary majority in Parliament, and that there should be no provisions with respect to which consent of the States should be required. Rejecting this view and explaining that only such matters as "refer not merely to the Centre but to the relations between the Centre and the Provinces", have been placed in the proviso, Dr. Ambedkar further explained that even of these matters "we have selected very few".²⁴ He then went on to comment on the desirability of each of the matters selected for the proviso, one by one. He did not, however, explain the scheme or the basis on which these "very few" matters were selected from among those which concerned "the relations between the Centre and the Provinces". Is it possible to discern any scheme from the selection itself ?

It is submitted that the selection of matters included in the proviso to Article 368 has not been haphazard but based on a simple and well-knit scheme.

22. Reference to this concession is made, for instance, by Shelat and Grover, JJ. *ibid*, at p. 414, para 497 (AIR para 514).

23. *Ibid*, at pp. 775-76, para 1443 (AIR para 1454).

24. C. A. D., Vol. IX, 17 September, 1949, at p. 1661.

In the main, barely the legislative and executive powers and the franchise granted by the Constitution to the States as such, have been selected for entrenchment. Ancillary to this, the machinery that can affect and alter these powers and franchise have also been entrenched, because without that the mere entrenchment of the powers and franchise themselves will not ensure their security. Nothing else, whether or not pertaining to the mutual relationship between the Union and the States has been entrenched. Thus, Chapter I of Part XI included in Clause (b), and the whole of Clause (c) pertain to actual grant of legislative power under the Constitution. Articles 73 and 162, included in Clause (a) deal with actual grant of executive power. Articles 54 and 55 included in Clause (a) deal with the franchise enjoyed by the States in the election of the President ; and Clause (c) deals again with the franchise enjoyed by the States as such in the composition of Parliament. The remaining provisions entrench just those institutions which may alter the powers and franchise of the States. Thus, Clause (a) entrenches Article 368 itself, because, by the use of that Article, the powers and franchise of the States may be altered. Also, the Union Judiciary and the High Courts have the power to interpret and thereby affect the scope of the Constitutional provisions concerning the power and franchise of States and that is why, in view of this power of judicial legislation, the provisions relating to the Supreme Court and the High Courts have been entrenched. The provisions relating to the lower judiciary have not been entrenched not because they are less important or basic, but because, under the scheme of the Constitution, the Courts below the High Court have no jurisdiction to interpret the Constitution.

It will follow from the above analysis that there is nothing illogical about the inclusion in the proviso of Articles 54 and 55 which deal with the election of the President although, at the same time, Articles 52 and 53 relating to the President's office itself have not been included. Articles 54 and 55 recognise the States' franchise in the Presidential election and are for that reason included. Articles 52 and 53 deal with a more basic or fundamental issue, namely, the office of the President ; but they have not been entrenched because they do not deal with the franchise, nor with the legislative or executive power of the State vis-a-vis the Centre. Just as provisions relating to territory, citizenship, fundamental rights, directive principles, elections, Parliament, Governors, emergency and so forth are all basic and yet left to be amended by Parliament without the consent of the States, so also, and for precisely the same reason, are Articles 52 and 53 left unentrenched.

Reference may next be made to the argument based on the use of the expression "amend" or "amendment" in Articles 4 and 169, and in Clause 7 of Schedule V and Clause 21 of Schedule VI. Mr. Seervai had pointed out, during argument, that the very fact that Clause 7 of Schedule V and Clause 21 of Schedule VI, each in its sub-clause (2) provides that any amendment "by

way of addition, variation or repeal" carried out under the respective preceding sub-clause shall not be deemed to be an amendment of the Constitution under Article 368, shows that amendment "by way of addition, variation or repeal" would be within the comprehension of Article 368. This, it is submitted, was a clinching argument and has been adopted by Ray, Khanna, Mathew, Dwivedi, and Chandrachud, JJ.²⁵ Palekar and Beg, JJ., made no reference at all to the petitioners' argument based on Articles 4 and 169, and the two Schedules.

None of the other six Judges nor Khanna, J., however, discussed an important aspect of the argument, namely, that while the Constitution uses the unexpanded expression "amendment" in Articles 4 and 169, it uses the expanded expression amplified by the words "by way of addition, variation or repeal" in the two Schedules, indicating thereby that the framers used the unexpanded and the expanded expressions discriminately, and, that the unexpanded expression always indicated a narrower scope. The sequitur of this argument, obviously, was that the unexpanded expression used in Article 368 carried behind it the intention to delimit.

It is submitted that the framers of the Constitution were conscious that only the Constituent Assembly or the authority under Article 368 possessed unlimited powers of amendment over the Constitution. They apprehended, therefore, that any power to amend the Constitution otherwise than under Article 368, when conferred on lesser authorities was bound to be regarded by the Courts with extreme thrift and jealousy. Unless, therefore, Clauses 7 and 21 of Schedules V and VI, respectively, took the aid of the expanding words "by way of addition, variation or repeal" it was likely that doubts will be entertained about the validity of the changes made from time to time by ordinary Parliamentary legislation. That will also explain why the amendment of Section 291 of the Government of India Act, 1935, employed the same expanded expression to describe the power conferred upon the Governor-General to introduce changes in the Government of India Act, 1935, which was the Act in the nature of the Constitution of this country before the 26th of January, 1950. Unless so expanded, the power of the Governor-General to amend the Government of India Act, 1935, was likely to be treated by the Courts restrictively and cautiously, and not with the same amplitude as the power of the British Parliament, or, of the Constituent Assembly, or, of the duly constituted amending authority under Article 368. The reason why the expanded words are not used in Articles 4 and 169 is also obvious. The scope of the amendment permitted under each of these Articles is limited by the context itself. All that is authorised

25. *Supra*, n. 1 : See Ray, J., at pp. 537-38, para 842 (AIR para 858) : Khanna, J., at pp. 772-73, para 1439 (AIR para 1450) ; Mathew, J., at p. 831, para 1565 (AIR para 1579) ; Dwivedi, J., at p. 932, para 1893 (AIR para 1906) ; and Chandrachud, J., at p. 979, para 2051 (AIR para 2063).

is consequential amendment to be made in the First and Fourth Schedules in the case of the former and in certain articles like Article 168 in the case of the latter. There could have been no such apprehension of an unduly narrow construction being put by the Courts on the power of incidental amendment in the case of Articles 4 and 169 as in the case of Schedules V and VI. It need hardly be said that the considerations for giving a narrow construction which would possibly be countenanced by the Courts when the power was to be exercised by the Parliament acting in its legislative capacity or by the Governor General under Section 291 of the Government of India Act could not conceivably arise when the proper and sovereign amending authority was to exercise the amending power in its normal course. Hence no need for the use of the expanding words in Article 368.

III

Lastly, we might refer to the petitioners' argument based on the Privy Council judgment in *Ranasinghe's case*.²⁶ Petitioners contended that the provisions of Section 29 of the Order in Council incorporating the Constitution of Ceylon were precisely similar to the provisions of the Constitution of India. They pointed out that in *Ranasinghe's case*, the Privy Council speaking through Lord Pearce, had observed, albeit obiter, that the provisions of sub-section (2) of Section 29, which corresponded to our fundamental rights, were not alterable by amendment even if the procedure laid down in sub-section (4) of Section 29, which corresponded to our Article 368, were followed. The correspondence and equivalence between sub-section (2) of Section 29 and Part III of our Constitution, and between sub-section (4) of Section 29 and our Article 368 was conceded by the respondents. Indeed, in his academic writings also, Mr. Seervai has all along insisted that this correspondence and comparison between the respective provisions of the two Constitutions is correct and valid.²⁷ Rearmed by this assurance, the other six Judges, and Khanna, J., concede that the provisions in the two Constitutions are similar. But they do not concede that the Privy Council has, in fact, observed in *Ranasinghe's case* that the provisions of sub-section (2) of Section 29 cannot be amended through the procedure prescribed in sub-section (4) of the Section. With due respect, this position is untenable in the face of the express words of Lord Pearce quoted by Sikri, C.J., and other Judges where his Lordship (Lord Pearce), after stating his reasons, categorically observes that the provisions of sub-section (2) "are, therefore, unalterable under the Constitution".²⁸

Apart from the observations of Lord Pearce, the position that the rights secured in sub-section (2) cannot be amended by the procedure laid down in

26. *The Bribery Commissioners v. Ranasinghe*, 1965 AC 172.

27. See, for instance, H. M. Seervai : *The Position of the Judiciary under the Constitution of India*, Sir Chimanlal Setalvad Lectures, University of Bombay, 1970.

28. *Supra*, n. 26, at pp. 193-94.

sub-section (4) of Section 29 seems to be regarded as well-established in Ceylon. The submissions of Mr. Lawson, Q.C., counsel for appellants in *Ranasinghe's case*, who contended for the validity of the impugned legislation despite non-compliance with the procedure in Clause (4), and was naturally anxious to secure the widest possible amplitude of power for the Ceylonese Parliament, clearly bear out this assumption. This extract taken from his submissions as summarised in the Law Reports is only typical :

"The limitation on the sovereign legislative competence is Section 29(2)—apart from that there are no supreme law clauses in Ceylon Constitution."²⁹

Or, to take another example :

"There is no body of persons and no persons outside Parliament who can control the exercise of the legislative power, subject only to Section 29(2) and (3)..... It is an uncontrolled Constitution subject only to Section 29(2)."³⁰

Other passages can be cited, but need not burden this paper.

It need not follow, however, that the fundamental rights, or any other provisions of our Constitution are "unalterable under the Constitution". Because, it is submitted, the concession that there is a correspondence between the two Constitutions is itself erroneous. The fundamental difference is that while the power under Article 368 is the non-legislative and purely constituent power, that under sub-section (4) of the Ceylonese Section 29 is a legislative power. The sharp qualitative distinction that the Constitution of India makes between the legislative power in Article 246, or, generally, in Chapter I of Part XI of the Constitution and the constitutive power in Article 368, or Part XX of the Constitution is not to be found in the Ceylonese Section 29. The power of amendment exercised by adopting the procedure laid down in sub-section (4) of Section 29 is none other than the power which has been conferred under sub-section (1) of Section 29 ; it is not a new and different power. This is apparent from the opening words of sub-section (4) : "In the exercise of its power under this section, Parliament may amend or repeal.....". Ceylonese lawyers and the Privy Council have always regarded the power to amend as a part of the general power "to make laws for the peace, order and good government of the Island" granted by sub-section (1) of Section 29 ; and sub-section (4) is regarded by them merely as laying down a condition which must be satisfied when that power is exercised for a particular purpose, namely, that of amending the Constitution. This is borne out, for example, in the following passage from the Judgment of the Privy Council in *Mohammed S. Kariapper v. S. S. Wije Sinha*³¹:

29. *Ibid.*, at p. 179.

30. *Ibid.*, at p. 179.

31. 1968 AC 717, at pp. 742-43.

"Section 29(1) confers full legislative power upon Parliament subject only 'to the provisions of this order', i.e., the Constitution. Sub-section (4) indicates that *the power conferred by sub-section (1) extends to amending or repealing 'any of the provisions of this order'*. The exercise of the power is, however, restricted by the proviso." (Emphasis supplied).

It is because the power to amend is not a separate species originating from a separate source, but is a part and segment of the general legislative power granted in sub-section (1) that sub-section (2) of Section 29 is considered un-amendable. Sub-section (2) begins with the words "No such law shall" and then lays down the four prohibitions under Clauses (a) to (d) concerning the free exercise of religion and the equal rights of the religious minorities. It is submitted, therefore, that the construction envisaged in the dicta of the Privy Council in *Ranasinghe's case* are neither fanciful nor born of insufficient deliberation. They represent the recognised law in Ceylon. It is true that sub-section (4) of Section 29 itself can be amended or even deleted. But such an amendment will also be carried out only by virtue of the legislative grant in sub-section (1) of Section 29, and will, therefore, be unable to get round the prohibition in sub-section (2).

Subba Rao, C.J., was impressed by the dicta in *Ranasinghe's case* and he relied upon them in his leading majority opinion in *Golak Nath*. His insurmountable difficulty was that under our Constitution the power to amend was not part of the legislative power but was a separate, distinct and overriding constituent power granted not only in a separate article but in a separate part of the Constitution. All these important differences which stymied his conclusions the learned Judge chose simply to ignore. He was constrained to take the stand that the power of amendment under our Constitution is derived from item 97 of the legislative list. That position found no support in any other opinion even in *Golak Nath's case*, and has been rejected or abandoned by every opinion in the present case. Its spectre, therefore, need no longer haunt constitutional deliberations in this country. It is good to appreciate and remember, however, that the underlying frailty of Chief Justice Subba Rao's reasoning was that he envisioned a complete correspondence and similarity between the provisions of Section 29 of the Ceylonese Constitution and the provisions of Parts XI, III and XX of our Constitution. That no such correspondence or similarity exists will be a fitting epitaph on the grave of the *Golak Nath case*.

Before leaving *Ranasinghe's case* it may be noted that the Constitution of Ceylon incorporated in the Order in Council of 1946, rests on the British colonial-cum-dominion pattern. One corollary of that pattern is that the provisions or guarantees in sub-section (2) of Section 29, though not amendable by the Ceylonese Parliament, are subject to the amending power of an Order in Council and, ultimately, of the British Parliament which is the real sovereign under that

pattern. It is true that the British Parliament will, under political arrangements with the Ceylonese, make only such amendments as the Ceylonese desire. But that should not obscure the legal position. Another corollary of the British colonial pattern is that, under the doctrine of *Queen v. Burah*, the Legislature, especially in a non-federal colony, is treated as a replica of the British Parliament subject only to the express restrictions, if any, incorporated in the instrument of grant or in any imperial statute applicable to the colony. The real question raised and tested in *Ranasinghe's case* was whether the limitation that a colonial legislature was bound by the restrictions expressly laid down in the instrument of grant was the product of general jurisprudence or of the Colonial Laws Validity Act, 1865, which expressly incorporated it. The interesting feature was that the Ceylon Independence Act of 1947, specifically said that the Colonial Laws Validity Act, 1865, no longer applied to the Parliament of Ceylon. Counsel for appellant, therefore, argued that the Ceylonese Parliament had consequently become as unfettered in its legislative authority as the British Parliament itself; and, just as the British Parliament was not bound to follow any manner and form prescribed by an Act of a predecessor Parliament and could just ignore such Act and proceed to legislate as if no such fetter existed, so could the Ceylonese Parliament. In other words, just as an Act of the British Parliament inconsistent with and in disregard of the requirements of manner and form imposed by an earlier Act of the same Parliament would constitute a *pro tanto* amendment of the earlier Act, so, it was contended, an Act passed by the Ceylonese Parliament in disregard of the condition laid down in sub-section (4) of Section 29 of the Ceylon Constitution should constitute a *pro tanto* amendment of Section 29(4) itself, and should be constitutionally valid. If, indeed, the Ceylonese Parliament were to be treated as a truly sovereign Parliament like the British Parliament, there was no reason why the argument should not have prevailed. But, the Ceylonese Parliament was not treated as a sovereign Parliament in that sense, and, as in the case of the New South Wales Assembly, in *New South Wales v. Trethowan*,³² the Ceylonese Parliament was held constitutionally bound to respect the manner and form prescribed by an existing valid law, namely, Section 29(4). The significance of *Ranasinghe's case* is that it advances the Trethowan doctrine a step further. The limitation on a non-sovereign colonial legislature under the British Commonwealth, which was held in *Trethowan's case* to bind such legislature because of the express provision to that effect in the Colonial Laws Validity Act, 1865, was extended in *Ranasinghe's case* even to a legislature to which the Colonial Laws Validity Act, 1865, did not apply.

It may also be noted, that the power of the Ceylonese Parliament to make *pro tanto* amendments of the Constitution by following the procedure laid down

32. *Attorney-General of New South Wales v. Trethowan*, 1932 AC 526.

in Section 29(4)—subject to the unamendability of sub-section (2)—was not at all questioned in *Ranasinghe*. Later, that power was expressly upheld in *Wije Sinha's case*.³³ To the extent that the Parliament of Ceylon can make *pro tanto* amendments of the Constitution by a two-thirds majority under sub-section (4) of Section 29, the Constitution of Ceylon is like the British rather than like the Indian Constitution. In India, the question of a *pro tanto* amendment just does not arise. An amendment, in India, must formally express itself to be so and must follow the procedure of Article 368. The distinction between a rigid or controlled construction and a flexible or uncontrolled construction is customarily stated to be based on whether there is or there is not a difference in the procedure for ordinary legislation, and legislation amending the Constitution. According to this test, of course, the Ceylonese Constitution will be regarded rigid or controlled because of the special procedure in sub-section (4) of Section 29. But should any and every difference in the two procedures justify calling the Constitution rigid? Suppose the same majority is required for ordinary legislation as well as for legislation amending the Constitution, but the assent of the Governor-General or the President is not required in the latter, thereby rendering constitutional amendment actually easier; will it be appropriate to term the Constitution rigid? Or suppose, the only difference is that in the case of the amendment the Bill introducing the amendment must be presented only with the permission of the President, will that really make the Constitution rigid? Perhaps, a more realistic test will be that a Constitution under which a *pro tanto* amendment can be made—even by a special majority as in Ceylon—should be regarded and termed flexible, and, a Constitution whereunder a *pro tanto* amendment is not permissible should be regarded rigid. Under this test not only a Constitution like that of the Colony of Queensland involved in *McCawley's case*³⁴ but also the Ceylonese Constitution will be regarded flexible like the British Constitution—except that sub-section (2) of Section 29 will remain unamendable by the Ceylonese Parliament. Such a description will be closer to the reality of the Constitution of Ceylon under which there is no distinction between the legislative and constituent powers and the latter is only a part of the former.

One final point, already implicit in the above discussion, may be expressly stated. Since the power of amendment in Ceylon is lodged in sub-section (1) of Section 29 of the Constitution, and is legislative in character, with due respect, it is not accurate to describe the limitations imposed on it by sub-sections (2) and (3) of the same section as implied limitations. They are express limitations on the legislative power.

33. *Supra*, n. 31.

34. 1920 AC 691 : AIR 1920 PC 91.