Kesavananda Bharati v. The State of Kerala Who Wins?

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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. State of Kerala1, 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 case2 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 Punjab4, 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 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 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 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 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 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 abridgedâ€"though not abrogatedâ€"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 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 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 together 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. 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 an 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 discriminatingly, 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 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 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 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 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 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 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)â€”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 Sinha31 :

"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 unamendable. 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 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 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 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 Part 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 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 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 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 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 case to bind such legislature because of the express provision to that effect in the Colonial Laws Validity Act, 1865, was extended in Ranasinghe case even to a legislature to which the Colonial Laws Validity Act, 1865, did not apply.

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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 in Section 29(4)â€”subject to the unamendability of sub-section (2)â€”was not at all questioned in Ranasinghe. Later, that power was expressly upheld in Wije Sinha 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 madeâ€”even by a special majority as in Ceylonâ€”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 case34 but also the Ceylonese Constitution will be regarded flexible like the British Constitutionâ€”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.

IV

With due respect, the opinions of the six Judges led by the Chief Justice also have their common blind spots. Three of these seem to call for special attention.

Firstly, all these learned Judges deny the relevance of the United States precedents. Article V of the United States Constitution, which lays down the power and procedure for the amendment of the Constitution, uses the simple word "amendment" without any amplifying words like repeal, addition, alteration and so forth. The framers of our Constitution had constantly kept the United States model before themselves and were bound to have felt assured by the history of the judicial interpretation of Article V. As pointed out elaborately in the opinions of the other six Judges, the United States Supreme Court has consistently rejected all arguments for a narrow construction of that Article. We need not repeat those arguments. We may just draw attention to two matters only. One of them is that in the cases relating to the eighteenth amendment, the Supreme Court rejected the argument that where the liberty of the individual is involved, the power of amendment can validly be exercised only through conventions and not through legislatures of the States ; and it cannot be denied that the eighteenth amendment, which imposed prohibition in the United States, did infringe a very intimate zone of liberty of the individual. The other matter worth drawing attention to is that except in the case of the twenty-first amendment, all other amendments to the United States Constitution have been passed by the Congress and ratified by the legislatures of States, and not by conventions called for that purpose.

In view of these facts, it is submitted, with due respect, that the arguments advanced by the six Judges led by the Chief Justice for rejecting the United States precedents do not sound very convincing. Sikri, C.J., rejects the applicability of these precedents, for instance, on the ground that the Supreme Court of the United States "has hitherto not been confronted with the question posed before us : Can Parliament in exercise of its powers under Article 368 abrogate essential basic features and one fundamental right after another including freedom of speech, freedom of religion, freedom of life?" Rhetoric apart, it is not correct to say that Constitutional amendments in the United States have not touched on fundamental matters or personal freedom. The thirteenth amendment abolishing slavery, the fourteenth prohibiting States from discriminating, the fifteenth securing the right of the coloured men to vote, and the eighteenth enforcing prohibition, belie this reading of United States history.35 He has also argued that "if the power to amend the Federal Constitution had been with two-third majority of the Congress", then only the "American decisions would have been of assistance". With due respect, how much majority should be required and on what matters the States should have a say are questions of detail on which the framers of a twentieth century Constitution for India may properly differ from the eighteenth century framers of the United States Constitution without being guilty of departing from the basic pattern and concept of the amending power. If at all, the framers of the Indian Constitution who liberalised the conditions of amendment should be understood to have been desirous of rendering amendments easier, rather than more difficult, or altogether impossible.

The learned Chief Justice, like Hegde and Mukherjea, JJ.,36 has pointed out several other differences between the two Constitutions to justify the rejection of the United States precedents, namely, different aspirations of the two peoples during their struggles for freedom, differences of religion, language and economic developments in the two countries, the fact that the States have separate and different Constitutions in the United States, and so forth.37 If such differences should justify the rejection of foreign experience, no foreign precedents can ever be relevant. Like the differences in the areas of the two countries, or of the races inhabiting each, or the oceans that surround them or the Presidential and

Cabinet forms of governments which distinguish them, differences mentioned by the learned Chief Justice are, it is submitted, irrelevant to the subject-matter under discussion. Because, the point simply was that the word "amendment", simpliciter, was used in the United States Constitution, and attempts at obtaining a narrower judicial construction for the scope of the power of amendment had been consistently rejected by the Supreme Court of that country. The framers of our Constitution constantly had the United States model before their eyes ; and they particularly borrowed the doctrine of judicial review from that model. They had good reason, therefore, to feel assured that no limitations specifically rejected by the Supreme Court of the United States will be read in the power couched in similar language in our Constitution.

All the six Judges led by the Chief Justice found it appropriate to base the differentiation on the ground of peoples' participation which, they say, characterises amendments in the United States and is carefully avoided in India. Hegde, J., goes to the extent of making the desperate observation that in the United States :

"The Constitution makers must have proceeded on the basis that the Congress is likely to require the amendment of basic elements or fundamental features of the Constitution to be ratified by State Conventions."38

This observation is based on a conjecture not supported by authority or evidence. It is directly negatived by the view taken by the Supreme Court of the United States in U.S. v. Sprague39 which was cited to the Court and which has been relied upon by the other six Judges.

Shelat and Grover, JJ., observed that in the United States :

"The whole basis of decisions . . . is that it is the people who amend the Constitution and it is within their power to make the federal power or unmake it . . . . Out of the alternative methods provided for amendment, there is only one in which the people cannot get directly associated . . . ."40

They cite no cases to support their views as to the "whole basis of decisions" in the United States. And, they ignore the reality that the "only one method in which the people cannot get directly associated" is almost the only method by which amendments have been carried out in the United Statesâ€”the only exception being the twenty-first amendment.

The real major premise of the six Judges led by the Chief Justice seems to be their belief that Parliament, even when acting on the basis of a two-third majority, does not represent the people and cannot speak for the people. They have given frank expression to this premise. Thus, Sikri, C.J., has observed :

"Proposal by Congress and ratification by three-fourth legislatures of the States can, in this context, be equated with action of the people. But what is important to bear in mind is that the Congress, a federal legislature, does not itself amend the Constitution.

In India, the position is different. It is Parliament, a federal legislature, which is given the power to amend the Constitution except in matters which are mentioned in the proviso. I may repeat that many important provisions including fundamental rights are not mentioned in the proviso. Can we say that an amendment made by Parliament is an amendment made by the people? This is one of the matters that has to be borne in mind while considering the proper meaning to be given to the expression 'amendment of this Constitution' in Article 368 as it stood before its amendment by the 24th Amendment."41

Similar views have been expressed by Reddy, J., when he observes that ratification by the legislatures has been treated by the judiciary in the United States as ratification by the people.42 And Hegde and Mukherjea, JJ., go further to analyse the electoral process in India to conclude that "The assertion that either the majority of Members of Parliament or even two-third members of Parliament speak on behalf of the nation has no basis in fact".43

This stand taken by the learned Judges raises many important questions. There are certain provisions of the Constitutionâ€”those mentioned in the proviso to Article 368â€”which require assent of half the States for their amendment. Does such consent, coupled with a two-third majority in Parliament, represent the people? If so, does the expression "amend" or "amendment" in Article 368 have one import, a wide one, for the proviso and another, a narrower one, for the rest of the Constitution? If, on the other hand, even half the States added to the two-third majority of Parliament fail to make the grade, will two-third the number of States be enough? Or, is it that nothing less than or different from precisely the proportion prescribed by the United States Constitution will be required? And, if so, for what reasons? Written Constitutions aspire to keep these debates away from the court house by exhausting them on the floors of the Constituent Assemblies which are supposed to be more appropriate forums for them.

According to the theory of representation enunciated by the six Judges led by the Chief Justice, most of the governments we have had at the Centre and often in many of the States never represented the people, and, probably, had no justification to rule ; or, in any case, in these situations we had no representative governments. This theory has never been subscribed to either by the Courts or by parliamentarians, in Britain or in the United States. The framers of the Constitution appear never to have realised the dilemma that if they attempted to make amendments easier by relaxing the conditions for amending, they will lend justification to a narrower construction for the text they employ so that,

ultimately, amendment of the Constitution remains as difficult, if not more. That sounds as if something like Boyle's law which applies to gases at constant temperature applies also to constitutional amendments, so that if you increase the value of one factor the value of the other factor automatically diminishes, with the result that the product of the two always remains constant.

The framers of the Constitution also did not seem to realise that if they proclaimed India to be a sovereign State in the Preamble the Parliament of the nation will cease to have even such powers as a colonial legislature will have. And yet that has been the result. Because, on account of the Colonial Laws Validity Act, 1865, only such limitations of manner and form as are imposed by the instrument of grant or, by an applicable imperial statute, are binding upon a colonial legislature, and none others ; particularly none to be implied by the Courts. Obviously, the only applicable imperial statute for India would have been the Indian Independence Act of 1947, which puts no limitations.

Does the Preamble to the Constitution contain anything to suggest that the people of this "democratic" Republic will not be represented by their Parliament even when the same will act with a two-third majority? The Preamble does say, indeed, that the Constitution is adopted, enacted and given by the people. It says so precisely to prevent anyone from raising any doubts about the right and authority of the Constituent Assembly to speak on behalf of the people on the pretext that it was not duly elected by adult franchise for the specific purpose of Constitution making. But it does not say that all the adults in India, not to speak of all the people of all ages in this country, collected somewhere in the Parliament House and prepared the Constitution! It does not contain any negation of the fact that the people were present, as people can be present on such occasions and for such purposes, through their representatives or their leaders. If people means not their representatives but each and every adult in the country, then, except, perhaps, for tiny City States, no country can ever democratically make a Constitution for itself, because, every adult just cannot possibly be present, much less every personâ€”should adults be also regarded unfit to represent children and infants. And even if all are present there always will remain the theoretical difficulty about the right of the majority which approves a particular provision to represent the minority which is opposed to it.

The reference to the "people" as the makers of the Constitution, it is submitted does not deny the principle of representation in Constitution making ; on the contrary, it asserts just that by precluding any one from questioning that position, and particularly, from questioning the right of the Constituent Assembly to speak in the name of the people. A careful look at the text of the Preamble will at once reveal that this is not left to be implied, but is expressly stated therein. Says the Preamble : "We the people of India, having resolved . . . IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day . . . GIVE TO OURSELVES THIS CONSTITUTION." Sure, the words "in our Constituent Assembly" do not refer to any building or place, and speak for themselves. The emphasis, be it noted, is in the original text, and not supplied.

It is submitted that the argument that Parliament does not represent the people is a dangerous argument, because it questions a fundamental assumption not only of our Constitution but of the democratic or representative form of government. Suffice it to say that once fundamentals can be questioned no organ of the State can remain secure in the enjoyment of its power and jurisdiction. Parliament may not emerge to be the only vulnerable organ of State in such free-style debating.

There is a basic jurisprudential difficulty about the contention that a two-third majority of Parliament does not represent the people. Judicial opinion, unlike legislative opinion expressed in the form of a vote in the House, is based on judicial reasoning and seeks to convince the legal profession, if not also the knowledgeable public. Had it not been so, there would have been no need for writing judicial opinions, and, probably, there would have been no doctrine of precedents. Now, it is the essence of legal reasoning that it proceeds from certain assumptions or premises and from these, by the application of logic and reason, conclusions are sought to be drawn and justified. In this process, the reasoning commences from the non-controversial which is assumed or made the premise, and proceeds to establish what had hitherto been controversial. Judicial reasoning does not start with assumptions and premises which are themselves as controversial as the conclusions to be established ; because, if that were to be done, the entire reasoning will become not only unconvincing but an exercise in futility. The assumption that a two-third majority of Parliament does not represent the people of the country is, to say the least, a controversial assumption. With due respect, therefore, no argument about the import of the word "amend" and the scope of the power of amendment in Article 368 can be cogently built on this assumption.

Before leaving this topic of the applicability of the United States precedents, the views of Khanna, J., may be briefly noticed. The learned Judge does not subscribe to the theory that Parliament in India does not represent the people and has no power, therefore, to amend to the same extent as the Congress and the States under Article V of the United States Constitution. His view, on the contrary, seems to be that even in the United States the "basic structure" of the Constitution cannot be amended. The learned Judge states that no change of basic structure has been brought about by amendment in the U.S.A. "No doubt", he concedes, the United States Constitution has "changed a good deal", but that was by "growth of customs and institutions which have modified the working" of that Constitution without any formal amendments.44 With due respect, this position is open to a two-fold criticism. In the first place, the Supreme Court of the United States has recognised no such limitation on the amending power in favour of "basic structure" provisions. And, secondly, there is obvious infirmity in the position that whereas the duly authorised amending mechanism should be denied the power to touch certain provisions of the Constitution the same may be suffered to be amended by

unauthorised agencies on the sly. To say the least, what can be changed by the latter must be liable to be changed by the former also. As already stated, it is also difficult to believe that no basic structure changes have been introduced in the United States Constitution by the thirteenth, fourteenth, fifteenth and nineteenth amendments, to speak only of some. A major part of federal judicial review of State legislation in the United States has been authorised by the fourteenth amendment only.

V

Another blind spot in the argument of such of the six Judges led by the Chief Justice relates to the appreciation of Ryan case from Ireland.45 In that case, the Supreme Court of Ireland, confirming the unanimous decision of the High Court, upheld, by a majority of two to one, the sixteenth amendment to the Constitution of that country. This amendment affected Article 50 of the Constitution, which itself provided for amendment of the Constitution. Article 50 provided that the Constitution could be amended by Parliament like any ordinary piece of legislation, but it also said that after an initial period of eight years constitutional amendments were to require approval by referendum. Article 50 did not expressly state that the Article itself could be amended. The sixteenth amendment increased the initial period of eight years to sixteen, and also dropped a reference to Article 47 which exposed amendments within the period of eight years to the possibility of repeal by referendum. In other words, the sixteenth amendment enlarged the amending power of Parliament under Article 50 ; and, the challenge was that Parliament could not do this because "referendum" was a fundamental feature which could not be abrogated by the Parliament, especially, as there was no express grant of power in Article 50 for amending that Article itself. The significance of this case to the interpretation of Article 368 in India is that this challenge was turned down unanimously by the High Court, and by a majority of two against one by the Supreme Court of Ireland, the sequitur being that in India, where there never was any provision for referendum, and where Article 368 expressly mentions the power to amend that Article itself, a challenge based on the ground of "fundamental features" will, "a fortiori", have no scope or relevance.

Sikri, C.J., whose suggestion from the Bench appears to have initially drawn the attention of the Bar to this case, held it to be distinguishable on such grounds as, for instance, that in India the people have not at all been associated with the process of amendment, or, that there are no Fundamental Rights guaranteed in the Irish Constitution, or that, unlike our Constitution, the Irish Constitution regards the authority for Constitution-making as derived from God.46 The device of distinguishing is an old weapon in the judicial arsenal ; and its exercise is certainly not forbidden. It is well-known, however, that its use is often made is hardship cases, generally as a fig leaf to conceal value judgments. With due respect, it is difficult to see the relevance of these differentiating features to the amending process. The fact that in India the people have been given no participation in the amending process will, if at all, only indicate that greater faith was reposed in the Parliament in this country than in Irelandâ€”and the necessity for the sixteenth amendment in Ireland demonstrated which course was wiser. So, also, the fact that the power of Constitution-making is not derived from God in India should make for greater freedom of amendment for human agencies.

Before leaving Ryan case, it may be noticed that in the judgment of Reddy, J., it is stated that the learned Advocate-General of Maharashtra had submitted that clause (e) in the proviso to Article 368 was introduced to meet the reasoning of Kennedy, C.J., in Ryan, that if the amending provision were itself made expressly amendable, no more scope would have been left for reading implied limitations.47 With due respect, it is difficult to ignore that in the absence of the provision in clause (e) Article 368 would have been amendable without the consent of the States, and that would have left the States insecure in the matter of their own legislative and executive powers and franchise which other clauses in the proviso protect.48 It is true, in any case, that the presence of the express provision in clause (e) also serves the purpose of meeting the Irish Chief Justice's point.

VI

The last blind spot to be mentioned is the logical fallacy involved in taking, on the one hand, the position that the power under Article 368 is not as comprehensive as it would have been if amplifying words like "repeal" had been added, and, also holding, at the same time, that the addition by the twenty-fourth amendment of those very amplifying words, including "repeal", has not enlarged the power of amendment. Chief Justice Sikri made reference to the amendment of Section 291 of the Government of India Act, by the Constituent Assembly, authorising the Governor-General "to amend by way of addition, modification or repeal",49 and, he also referred to the amendment suggested by Mr Kamath, and rejected by the Constituent Assembly, to the word "amend" in Article 368 to cover addition, modification and repeal.50 The opinion of Shelat and Grover, JJ., refers to these two events as having a bearing on the scope of the power under Article 36851 and, at one stage, reasons that "there can be no comparison between the scope of the Ceylon Parliament's amending power and that of the amending body under Article 368" because Section 29(4) of the Ceylonese Constitution empowers the Parliament of that country to "amend or repeal".52 And, the opinion of Hegde and Mukherjea, JJ., likewise refers to the amendment of Section 291 of the Government of India Act, 1935, and to the amplified versions of amending power used in the Fifth and the Sixth Schedules and concludes that there is a prima facie reason to believe that our Constitution makes a distinction between a mere power to amend and a power to amend by way of "addition, modification or repeal".53 Reddy, J., also emphasises the distinction between the use of the mere word "amend" and the words "amend or repeal", in support of according narrower scope to the power under Article 368.54

It would have been logical if these learned Judges had, in view of the significance they attached to the amplifying words, declared the twenty-fourth amendment unconstitutional insofar as it expands the power of amendment by the amplifying words "by way of addition, variation or repeal". But they have upheld the amendment. A future Bench of the Supreme Court, persuaded, on the one hand, by their reasoning as to the distinction between the bare expression "amend" and the enlarged expression "amend by way of addition, variation or repeal", and faced, on the other hand, by the text of the validly amended Article 368 may not find a narrower construction on the amended Article 368 any longer possible.

Khanna, J., it must be noticed, avoids this inconsistency. Citing the authority of British Coal Corporation v. King55 and strengthening it with a quotation from Orfield, the learned Judge holds that the power to amend or change "has a wide amplitude" and "would necessarily cover cases of repeal and replacement of earlier provisions by new provisions of different nature".56 He also held that "the argument that Parliament cannot by amendment enlarge its own powers is untenable".57

How does Khanna, J., then come to hold that the "basic structure or framework" of the Constitution cannot be abrogated or changed? He bases the decision to limit the amending power, as do the six Judges led by the Chief Justice, on an a priori assumption, namely, that there must be some limits on the amending power. Khanna, J., does not regard the word "amend" incapable of subsuming repeal as he has frankly stated. The six Judges led by the Chief Justice also do no regard the import of that word to be any different from the import of the expanded expression "amend by way of addition, variation or repeal", as is evident from the construction they put on the amended Article. But all the seven of them believe that there must be some limitations on the power under Article 368 to amend the Constitution. The real anxiety of Khanna, J., was that if not struck down, the second part of Article 31-C will "provide the cover for making laws with a regional or local bias", and will thereby "imperil the oneness of the nation", and sow the "dangerous seeds of national disintegration".58 These apprehensions, with due respect, were not unjustified, and were shared by the Law Commission of India in their suo motu report to the Government when the Twenty-fifth Amendment Bill was pending before Parliament.59 Khanna, J., observed :

"In deciding the question relating to the validity of this part of Article 31-C, we should not, in my opinion, take too legalistic a view. A legalistic judgment would indeed be a poor consolation if it affects the unity of the country.60"

Although the learned Judge later says that "the evil consequences which would flow" if Article 31-C were upheld should not be "determinative of the matter",61 the fact remains that the apprehension of those consequences was an important articulated major premise of his opinion. And, once a factor finds its way into the balance, it is not possible to assess or control the weight it is going to exert because the human mind is not conditioned the way a chemical balance is.

What the apprehension of national disintegration was to Khanna, J., the apprehension of damage to a range of principles and valuesâ€”described by them as basic features or essential elementsâ€”was to the six Judges led by the Chief Justice. Thus, Chief Justice Sikri feared that if no restrictions were implied on the amending power "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".62 Shelat and Grover, JJ., thought that the provisions of Parts III and IV of the Constitution and those relating to the rights and safeguards of minorities and the federal principles must, in their essence, be taken outside the scope of the amending power if they were to be preserved.63 Hegde and Mukherjea, JJ., were anxious not to concede the power to "destroy the sovereignty of this country", to "substitute the democratic form of government by monarchical or authoritarian form of government", to "break up the unity of this country", to "destroy the secular character" of our State and so forth.64 And, Reddy, J., feared that Parliament might "effect a metamorphosis of power of making itself the supreme sovereign".65

Surely, if the amending power is given its unrestricted scope, it will be "possible" for a two-third majority of Parliament legitimately to bring about such consequences ; that cannot and need not be denied. The real problem of construction, therefore, is whether this mere possibility, apart from any question of likelihood, of undesirable but legitimate use of the power of amendment, justifies a cribbing construction for the power. The proper answer, it is submitted with due respect, can only be in the negative. The reason for this must take us to the fundamentals of governmental, and, particularly, of legislative authority.

The basic problem of the science of government is that, on the one hand, without granting power the purposes or objectives of government cannot be achieved ; i.e. government cannot function. When a police constable is given the warrant to arrest, he may let the criminal go, or he may arrest the wrong person. When a board is given the power to issue licences, it may refuse licences in cases where they ought to have been granted and issue them in improper cases ; when a Judge is empowered to adjudicate, he may adjudicate properly, or erroneously or whimsically ; when a legislature is given the power to make laws, it may make improper laws which will inconvenience and harass the people rather than serve them ; and, finally, when a Constituent Assembly assumes the power to make a Constitution, it may make a wretched Constitution rather than a good, popular and useful one. Yet, none of these powers can be denied. We can, of course, in most cases, provide checks and correctives and balances ; and that we do. The constable is supervised and controlled by his superiors, and by the Courts ; the licensing authority is checked and controlled, generally, by an Appellate Authority, then by the Minister, the legislature and, to a certain extent, also by the judiciary ;

the Judge is overlooked, generally, by superior or appellate judicial authority, and also, in certain respects, by the legislature ; and the legislature itself is checked by the electorate and, marginally, by the judiciary.

It is important to note that every grantee of power has alternatives open to him about the time, place, manner, extent, etc., of what he is authorised to do. This is true of all lawful exercise of power to which alone we confine our attention in this analysis, without taking into account excess of power, or illegal exercise or abuse of power. The options just mentioned constitute an inseparable part of the grant of the power itself. In other words, there is discretion and scope for the exercise of individual judgment inherent in the granted power, and it is in the exercise of that discretion or judgment that a wise, competent, successful or popular grantee of power is distinguished from another who may not possess or exhibit those qualities.

As we move upwards from the lowest executive officer towards the legislature, an unmistakable and invariable phenomenon is to be observed. It is that the area or scope for the exercise of discretion and individual judgment increases from a very tiny beginning to an almost limitless expanse ; and, correspondingly, the checks become less and less stringent. The lowest executive with a warrant of arrest has very little choice. He may, perhaps, choose whether he will effect the arrest in the office of the person named in the warrant or at his residence, and so forth. In this also he may be controlled by his superiors who may order him to arrest only at the office or only at the residence of the named person. He is also liable to be pulled up both by his superiors and by the Courts if he is unduly harsh or indiscreet in the performance of his duty. There are fewer and less stringent checks as the scope of discretion and judgment expands until, by the time we reach the legislature, very few of them survive, and they tend to be of a very general character. In other words, as we climb up the hierarchy of grantees of governmental power we move towards a region in which freedom in the exercise of the power increases commensurately with the quantum of the power itself. Consistently with this, when we come to deal with the powers of a legislature we begin to apply doctrines like that in Queen v. Burah66, which forbids the judiciary from cribbing the legislative authority by narrow construction or implied restrictions. The checks at that level change even in their quality, from legal, to political, and moral.

The same is also true, for example, in the case of the judicial hierarchy. The lower courts are checked, both administratively and by the appellate procedure, by the higher courts. But as we ascend upwards, the administrative checks begin practically to disappear, and even the appeals are open in fewer cases. When we reach the apex, the Supreme Court in our country, the only checks left are those of an internal and ethical nature ; and, of course, there are no more judicial appeals. There are only political appeals in the sense that the decisions may be altered by legislative action which, in appropriate cases, has to be only of the level of constitutional amendment.

Two points clearly emerge. The first is that in spite of the checks, controls and restraints, the possibility of unwise and harmful, albeit legitimate, exercise of authority and power cannot be altogether ruled out whether at the lowest or the highest levels. The effort is to diminish the chances of such exercise and to minimise the damage therefrom, but the possibility and even actual incidence, particularly at the lower rungs, remains. And, yet for that reason, the grant of power cannot be withheld. It is a practical risk without taking which government just cannot be conducted. There is a perfect analogy between this risk and the risk we must every day take when we drive cars, or ride scooters or even walk on the streets. The possibility of accidents, even fatal ones, cannot be ruled out ; and several accidents actually do take place. We invent, apply and enforce several devices and rules to minimise those accidents ; yet, we can neither stop driving, riding and walking, nor hope to eliminate altogether the possibility of accidents. Both in this case as in the matter of government, we choose the risks without which it is not possible to function.

The other point that emerges is that, at the highest level, the checks can be only ethical and political. It is because of this ethical element in the ultimate control that law retains its base in ethics and morality ; and it is the political component of the ultimate control that determines the nature of the government, i.e. whether it is democratic, dictatorial, colonial, autocratic or any other.

The foregoing discussion will explain the basis for the universally recognised judicial principle that the possibility of unwise, or improper use of power can furnish no reason for its denial. At the bottom of this principle is the realisation that if such possibility were good reason for denying power, power could never be granted to any one for any purpose. There is, and there can, indeed, be no authority for the opposite proposition, namely, that power should be denied or strictly construed to avoid the possibility of erroneous or unwise use, or even abuse, by a legislature, much less by a body competent to amend the Constitution.

With due respect, the cases cited by Shelat and Grover, JJ., having nothing whatsoever to do with the proposition they propound, namely, that the power of a legislature may be narrowly construed to avoid the possibility of unwise legislation.67 In Ajaib Singh case68 cited by the learned Judges, the Court gave a narrower construction to the term "arrest" because the consequence of a broader construction would "render many enactments unconstitutional". That goes against the proposition that legislative power should be narrowly construed to prevent its unwise exercise. And, Liyange case from Ceylon,69 which also they cite, is no authority for that proposition either. In that case, the Privy Council held that the Criminal Law (Special Provisions) Act, No. 1 of 1962, and the Criminal Law Act, No. 31 of 1962, were unconstitutional, inasmuch as they violated the provisions of Part 6 of the Ceylonese Constitution dealing with the Judicature. These Acts, as read by the Privy Council, interfered with the judiciary and invaded its independence by

requiring the Judges to decide certain criminal matters in a particular way and not as the Judges should deem proper. The judgment was, therefore, neither based on implied limitations on the legislative power, as some of the learned Judges in the present case thought, nor did it lay down the proposition that the possibility of unwise use of power was good reason for denying or curtailing it. The legislation was found to be in conflict with the express provisions of Part 6 of the Ceylonese Constitution, and the Ceylonese Parliament simply possessed no power to legislate in violation of that Part, at least when, as in Liyange case, it had not followed the procedure for amendment laid down in sub-section (4) of Section 29. The Privy Council specifically refused to answer the question whether the result would be different if that procedure had been followed, saying, "such situation does not arise here". With due respect, therefore, it is difficult to see how the Liyange case can support the proposition that power must be restricted to avoid the possibility of its unwise use. The possibility of unwise use is a part of the very concept of power, and it can be eliminated only by eliminating the power itself.

While there was no support either in principle or in authority for the doctrine that legislative, and much less, constitutive power should be denied or curtailed in order to avoid the possibility of its unwise use or even abuse, the fortuitous circumstance that the respondents conceded that the power under Article 368 could not extend to the repeal of the entire Constitution seems to have lent valuable foothold to the doctrine. With the concession that the power under Article 368 must stop short of total repeal, the difficult and elusive inquiry as to where the line must be drawn acquired the desperately needed imprimatur of legitimacy. The result was that not only did all the six Judges led by the Chief Justice set store by this concession but even some of the other six Judges either conceded that the entire Constitution cannot be repealed, or doubted whether it could be so repealed, or evaded the issue altogether.

The compulsion for the concession is said to arise from the words "the Constitution shall stand amended" which occur in the text of Article 368. It is said that after the amendment the Constitution should "stand" in an "amended form" and should not vanish altogether. This argument, it is submitted, seems to be based on a fallacy. English idiom is not offended when a programme "stands" cancelled, or, nearer home, when a law or a statute "stands" repealed, although after the cancellation or repeal neither the programme nor the statute may survive in any form. Why should it be any the different then, in the case of a total repeal under Article 368, as far as the plain meaning of the expression "shall stand amended" is concerned? If "amend" includes "repeal", the Constitution will "stand repealed" if the Constituent authority operating under Article 368 so desires. True, such a desire will be very unwise, whimsical and, perhaps, even socially reprehensible, but that takes us again to the problem of the possibility of unwise exercise of power, and, we need not repeat the argument against the doctrine that power may be denied or pruned by narrow construction to avoid that possibility. It is important to appreciate, however, that at bottom, the concession that the whole Constitution cannot be repealed at a stroke is based on the same anxiety to prevent the unwise exercise of power on which the argument that the essential elements or basic features of the Constitution must be excluded from the scope of the amending power is based.

VII

What are the propositions of law established by the eleven judgments in Kesavananda Bharati case? With due respect, we agree with the views expressed by Shri H.M. Seervai in his recent article70 on the present case, that this will have to be authoritatively determined by a Constitution Bench after hearing arguments. Before delivering their judgments Judges can, and do, confer to determine what conclusions, if any, should be announced as the conclusions of the entire Court. But after the various judgments have been delivered, the parties have a right to be governed by those judgments and not by what even the Judges themselves think the judgments to be. The document signed by the nine Judges purporting to state the majority view, does not seem to have been preceded by a hearing given to the parties to canvass their own contentions as to the outcome of the eleven opinions. Its force has been further undermined by the refusal of the remaining four Judges to sign it, and, perhaps, to an even greater degree, by the revelation by one of the nine signatory Judges that he had "the benefit of knowing fully the views of only four" Judges at the date of writing his own opinion.71 If the Judges did not have enough time, before writing the various opinions, to know one another's views, and if each Judge had to know the views of his other colleagues only from their written opinions after they had been delivered, then, it is submitted, the parties had the right to present to him their own views as to the import of those opinions, and, as to the result of the interaction of all the opinions taken together, before he could reach his own conclusion on the same. After studying the eleven opinions, each in the light of the others, an academic assessment of their final outcome may be attempted as under.

As discussed earlier, the two majority judgments in Golak Nath case have been clearly overruled and have ceased to be law.

The twenty-ninth amendment has been upheld, without any reservations, by Khanna, J., and also by the other six Judges. The six Judges led by the Chief Justice have upheld it subject to examination of the Acts included by that amendment in the Ninth Schedule for the purposes of ascertaining that these do no abrogate any essential elements or basic features of the Constitution. But these opinions are in a minority and, therefore, that amendment in its entirety seems to have survived the attack on its validity.

The twenty-fourth amendment has been unanimously upheld by all the eleven opinions on behalf of all the thirteen

Judges. Of these, the other six Judges in their six opinions have upheld the amendment as it is, without putting any conditions as to the width of the power wielded under the amended text of Article 368. The six Judges led by the Chief Justice have, however, said that the amended Article is valid on the construction they have placed upon it. That construction is that the power under the amended article is not wider than the power under the original article ; and since the power under the original article did not, according to these Judges, extend to "abrogating" the "essential elements" or "basic features" of the Constitution, including the Fundamental Rights, the power under the amended article also suffered from that limitation. But, these learned Judges have also maintained, in the course of the reasoning in their four judgments, that the expression "amend" or "amendment" did not have a wide import because it was not accompanied by the amplifying words, and by the word "repeal" in particular. It is submitted that under these circumstances, two views are possible for the purposes of ascertaining the ratio of the opinions of these six Judges.

One view would be to accept as ratio not only the conclusion of these six Judges that the twenty-fourth amendment is valid, but also their reasoning as to the significance of the amplifying word "repeal". In that event, it will be necessary to apply that reasoning to the amended text of the article with a view to construing its scope in preference to the scope recommended by these six Judges themselves. This preference may be further justified by the consideration that, after all, the Bench of the thirteen Judges was called upon to interpret and apply the text of the original article and not of the amended article ; and, consequently, whatever observations were made as to the scope of the amended text were, obiter dicta, the force of which was considerably weakened by the reasoning of these four opinions themselves.

In this connection, it may also be regarded significant that Khanna, J., has specifically rejected the view taken by the six Judges led by the Chief Justice that the power of amendment under Article 368 could not be enhanced by the exercise of the very same power under clause (e) of the proviso.

The alternative view will be to treat the construction put by the six Judges led by the Chief Justice on the amended text of Article 368 also to be the ratio of their four opinions. In that event, it will be necessary to examine whether it is possible to unite the judgments of the six Judges led by the Chief Justice with that of Khanna, J., and work out a common ratio decidendi which can claim the support of a majority of seven against six. But in attempting this delicate task one has to move with extreme caution and will have to be sensitive to the integrity of the elements he seeks to combine. The combination he produces should not be something like a chemical compound which betrays no qualities of either of the elements which produced it. In other words, his task is not to take inspiration from the two ratio decidendi and produce a third one. His task is to point to a certain holding in one opinion, and point to a corresponding holding in the other opinion which must be the same as the former holding or of which the former holding is an identifiable, severable, and independent part. Thus, if one opinion lays down a clear proposition X, and another opinion lays down two clear and independent propositions X and Y, it will be legitimate and proper that the proposition X be recognised as the common ratio of the two opinions. The test is that it should be possible fairly to say that the latter opinion laid down the proposition X, as the former, ex-hypothesi, did. Obviously, it will be possible fairly to attribute the proposition X to the latter opinion only if the proposition X has been laid down in it independently of the proposition Y, i.e. it is neither conditional upon the proposition Y, nor is it so integrated with the proposition Y that when separated from Y it cannot be supported by the reasoning of the opinion and cannot be attributed to its author or authors. In the light of these principles, let us proceed to examine whether the ratio of the opinions of the six Judges led by the Chief Justice can be attributed to Khanna, J., or whether, in the alternative, the ratio of his opinion can be attributed to the six Judges led by the Chief Justice.

If the six Judges led by the Chief Justice had enumerated specific constitutional provisions which may not be abrogated by the exercise of the power under Article 368, and, Khanna, J., had also enumerated another set of specific provisions similarly protected, there would have been no difficulty in finding out the common ratio. The common ratio would then be that the provisions which found mention in both the lists could not be abrogated by amendment. But the six Judges who hold that the "essential elements" or "basic features" of the Constitution cannot be abrogated do not give any such definite list. The following points may be noted about the details furnished by these Judges about the "essential elements" or "basic features".

First, the features they mention are mostly not concrete provisions of the Constitution, but are, instead, themselves statements of general principles like Republican and Democratic form of Government. There can be wide differences of opinion about the scope and application of each of these principles. In fact, one may be inclined to take the view that the Constitution has violated some of them, like the federal character and separation of powers, right from its commencement in 1950. But that apart, these principles are too general to provide either guidance or any real basis of agreement.

Secondly, these principles are treated by the learned Judges only as illustrative and not exhaustive. Therefore, what matters again, at least as much as these enumerated features, is the general doctrine that the "essential elements" or "basic features" cannot be abrogated. In the application of this doctrine, an expansionâ€”and perhaps also a pruningâ€”of the lists is necessarily contemplated.

Thirdly, although each of the four opinions gives its own list of these general principles, there are some differences in the lists finally provided by each opinion. Sikri, C.J., mentions supremacy of the Constitution, Republican and Democratic form of government, secular character of the Constitution, separation of powers between the legislative, executive and

judicial organs, federal character of the Constitution and dignity and freedom of the individual.72 The enumeration in the opinion of Shelat and Grover, JJ., includes every one of these features with the difference that it expands what Sikri, C.J., refers to as "dignity and freedom of the individual" to read, "the dignity of the individual secured by the various freedoms and basic rights in Part III". They also add to the list two more items, namely, "the mandate to build a welfare State contained in Part IV" and the "unity and integrity of the nation".73 The opinion of Hegde and Mukherjea, JJ., does not number the items it lists. It includes the items of national unity and welfare State added on by Shelat and Grover, JJ., but does not repeat the entire list given in the Chief Justice's opinion. The omissions include the items regarding the supremacy of the Constitution, the secular and federal character of the Constitution, and the separation of powers.74 Reddy, J., does not mention, in his final collection, the federal character of the Constitution mentioned by Sikri, C.J., and replaces the Chief Justice's item on separation of powers by a mere mention of "the three organs of State" without mentioning "separation".75 He does not mention unity and integrity of the nation, the "secular" element, the federal character of the Constitution, or the supremacy of the Constitution, in this final collection.

Fourthly, the enumeration in each of the four opinions on behalf of these six Judges specifically includes the Fundamental Rights, and, what is more, in the summary towards the end of the opinions, three of them (the only exception being the opinion of Hegde and Mukherjea, JJ.) again mention the Fundamental Rights specifically, while none of them mentions any other feature.

And, fifthly, "essential elements" and "basic features" are not the only terms uniformly or consistently used by the four opinions. The terms used include, besides "essential elements" and "basic features", a whole array of terms like "basic structure", "basic foundation and structure", "fundamental features", "essential features" and "identity" of the Constitution ; and "basic elements of the Constitutional structure", "essential elements of the basic structure", and, "essential elements in the basic structure".76 These have been used without discriminating between shades of meaning, if any, attributable to the various phrases. It is not claimed that this listing is exhaustive.

The above analysis of the opinions of the six Judges led by the Chief Justice will show that it was the essence of their position that the Fundamental Rights could not be abrogated, although some other features or provisions may also be found to be entitled to the same protection or immunity if the Court found them to be as important or basic as the Fundamental Rights. It will also be evident that there was no special significance to be attached to any particular formulation or phraseology like "essential features" or "basic structure", the essential idea being that the provision referred to is one which the Supreme Court might in its judgment regard as important in the scheme of the Constitution as the Fundamental Rights themselves and, therefore, immune from the power of repeal or abrogation under Article 368.

It is evident from the above analysis, therefore, that any fair statement of the ratio decidendi of the opinions of these six Judges must include two elements. It must, in the first place, indicate that these Judges regard the Fundamental Rights protected from and outside the reach of the powers of repeal or abrogation under Article 368. Equally, it must also indicate that a similar protection or immunity from the exercise of the power under Article 368 will be extended by the Supreme Court to any other provision of the Constitution which, in the opinion of the Court, may be as important or basic as the Fundamental Rights. It is submitted that any statement of the ratio decidendi of these four opinions on behalf of the six Judges which omits any of these two elements will represent accurately neither the general thrust and tenor of these opinions nor the conclusions reached by their authors. Further, it is also submitted, on the basis of the same analysis, that these two elements are intimately connected and inter-dependent, forming an integrated whole, and it will not be possible to separate them and attribute any one of them singly to the six Judges led by the Chief Justice. For instance, it cannot be said to be the ratio of their opinions merely that the Fundamental Rights cannot be abrogated. That will distort the ratio of their opinions, because, having overruled Golak Nath, they could not be saddled with the view that the Fundamental Rights as such are immune from certain exercise of the amending power from which no other provision of the Constitution is immune. Equally, they cannot be saddled with the truncated view that certain provisions other than the Fundamental Rights are immune from that power, because, immunity of the Fundamental Rights from the power of abrogation under Article 368 is the quintessence of their opinions.

Assuming, therefore, that the ratio decidendi of the opinions of the six Judges led by the Chief Justice is that the Fundamental Rights, and any other provision of the Constitution which the Supreme Court might regard equally important or basic, cannot be abrogated by amendment of the Constitution under Article 368, the question that falls to be considered is whether this ratio decidendi can also be said to be the ratio of the opinion of Khanna, J., or to be a part of that ratio.

With due respect, it is difficult to see how that can be done for the simple reason that Khanna, J., does not regard Fundamental Rights, as such, to be what he calls the "basic structure of framework" of the Constitution. He regards Fundamental Rights subject to repeal or abrogation in the same way as any other provision of the Constitution. He has categorically observed :

"The word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging Fundamental Rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution."77

In regard to one of those rights, namely, the right to property, which, incidentally, had occasioned all the challenges to the power of amendment, the learned Judge has specifically said :

"So far as the question as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution while right to property is a matter of detail."78

It is, no doubt, true that Khanna, J., declares protection against discrimination on the ground of religion to be a part of the "basic structure or framework".79 But that is not because such protection is a part of a Fundamental Right. He includes that protection purely because he regards it as essential to safeguard the national unity and integrity. It is not possible, therefore, to attribute to Khanna, J., the ratio of the opinions of the six Judges led by the Chief Justice, nor to them the ratio of his opinion.

With due respect, it will be unsound to argue that since the six Judges led by the Chief Justice have employed the formulations "essential elements" and "basic features", and Khanna, J., has employed the formulation "basic structure and framework" to indicate what in each view will be immune from the power of repeal or abrogation, the narrower of these formulations should be taken to represent the common ratio. If what Khanna, J., meant were really capable of being acceptable as the common minimum area of consent, it was not unlikely, for instance, that he and the Chief Justice, or he and Hegde and Mukherjea, JJ., would have signed a common opinion. But that would be obviously unthinkable, because beneath the crust of the phraseology employed on either sideâ€”which concealed their ratio decidendi rather than reveal themâ€”lay their basic differences in regard to the immunity of the Fundamental Rights from the power of repeal and abrogation under Article 368.

The fact is that the views of Khanna, J., as to the scope of the power of amendment, are closer to the main submission of the respondentsâ€”who conceded that the entire Constitution cannot be abrogated or repealed and that some limitations on the power were implicitâ€”rather than to the views of the six Judges led by the Chief Justice. No wonder, therefore, that his entire approach pulls in a direction almost opposite to that of these six Judges. This is apparent not only from the telling passages he quotes from Jefferson,80 Paine,81 Burke,82 Jennings and Jawaharlal Nehru83 in support of an uninhibited amending power, but also from his stand on a number of more concrete matters. Thus, he accepts Mr Seervai's submission that the provisions in sub-clause (2) of clause 7 of Schedule V, and in sub-clause (2) of clause 21 of Schedule VI indicate that the power in Article 368 includes the power to "repeal"84 ; apart from this, he goes further and squarely holds that "the word "change" has a wide amplitude and would necessarily cover cases of repeal and replacement of earlier provisions by new provisions of different nature" ;85 he rejects the skepticism about the genuineness of representation by the special majority of Parliament and treats the requirement of a special majority as a "guarantee that power would not be abused"86 ; he rejects referendum as the better means of expressing people's will87 ; he rejects the natural rights argument as based on fiction88 ; he sees no difficulty in regarding the Preamble as subject to the power of amendment89 ; he rejects the theory that the safeguards to the minorities are the result of a compact, or constituted a condition for acceptance of the Constitution, and, therefore, are beyond the amending power90 ; he takes a different view of the Canadian cases,91 of the Ranasinghe92 and Ryan cases93 from Ceylon and Ireland, respectively, and of the McCawley94 and Trethowan cases95 ; and, above and most important of all, he rejects the view that Parliament could not, by the use of clause (e), in the proviso of the original Article 368, enlarge its own power of amendment, and holds :

"The argument that Parliament cannot by amendment enlarge its own power is untenable. Amendment of the Constitution, in the very nature of things, can result in the conferment of powers or the enlargement of powers of one of the organs of the State . . . . There is nothing in the Constitution which prohibits or in any way prevents the enlargement of powers of Parliament as a result of Constitutional amendment and, in my opinion, such an amendment cannot be impermissible or beyond the purview of Article 368. Indeed, a precedent is afforded by the Irish case of Jeremiah Ryan . . . ."96

In view of such radical divergence of approach and reasoning, it is submitted that any attempt to cull out a common ratio between the six Judges led by the Chief Justice and Khanna, J., would be highly artificial and insupportable.

If the view is correct that no common ratio decidendi can be found between the opinions of the six Judges led by the Chief Justice and Khanna, J., the only ratio to emerge from the eleven opinions of the thirteen Judges in regard to the twenty-fourth amendment will be that the amendment is valid. The construction and scope of the amended provisions of Article 368 will, in that case, have to be treated as res integra.

In regard to the twenty-fifth amendment, no difficulty is presented by the new clause (2-B) inserted in Article 31, inasmuch as all the opinions upheld it as valid. Some difficulty could have been presented by the word "amount" which is substituted for "compensation" in clause (2) of Article 31. Of the other six Judges, all but Chandrachud, J., understand the new expression "amount" to have the effect of withdrawing the sum awarded or the principles laid down in the impugned law altogether from judicial scrutiny. Khanna, J., treats it to mean that the amount "may be, if the legislature so chooses, plainly inadequate" and observes that "whatever may be the connotation of the word 'amount', it would not affect the validity of the amendment made in Article 31(2)".97 That makes six votes approving the introduction of the

word "amount" and holding that neither the "amount" nor the "principles" contemplated in the amended provision will be subject to judicial scrutiny. On the other side, all the six Judges led by the Chief Justice hold that the "amount" as well as the "principles" are justiciable, and the Court can intervene if the amount awarded is "illusory" or fixed "arbitrarily" or if either the amount or the principles fixed by the legislature do not bear a "reasonable relationship" to the market value of the property. Needless to say that this position, in practice, would eviscerate the amendment and restore the position as it obtained before the substitution of the word "amount" for the word "compensation". The view taken by Chandrachud, J., who thus held a determining position in this nicely balanced division of six against six, should have become crucial. The learned Judge held that although the Court could not intervene on the ground that the "amount" is not "adequate", it could strike the law down if the amount is "illusory" or if the "law is in the nature of a fraud on the Constitution". The principles, if any, laid down by the legislature for the determination of the "amount" cannot be scrutinised for the purpose of adjudging whether they bore a "reasonable relationship with the market value of the property", conceded the Judge, but that was "a different thing from saying that it bears no such relationship at all, none whatsoever". In the latter case, "the payment becomes illusory and may come within the ambit of permissible challenge".98 The basic stand-point from which Chandrachud, J., views the amended Clause (2) of article 31 is brought out in his own words :

"Not only does Article 31(2) not authorise the legislature to fix 'such amount as it deems fit', 'in accordance with such principles as it considers relevant', but it enjoins the legislature by express words either to fix an 'amount' for being paid to the owner or to lay down 'principles' for determining the amount to be paid to him. If it was desired to authorise the legislature to pass expropriatory laws under Article 31(2), nothing would have been easier for the Constituent Body than to provide that the State shall have the right to acquire property for public purpose without payment of any kind or description."99

What difference, in application to concrete cases, will survive between the scrutiny of a Judge who insists upon "reasonable relationship" between the "amount" and the value of the property and another who only insists that there should be a "relationship" between the two, is difficult to surmise, especially, when the former concedes that the "amount" need not be adequate, and the latter insists that it must not be illusory or arbitrary. History of the judicial construction of Article 31(2) does not encourage great optimism for the difference. Subba Rao, J., as he then was, insisted in Vajravelu1, that the Court could not go into the question of "adequacy" and could only intervene if the principles were irrelevant and the compensation illusory. And Shah, J., in R.C. Cooper v. Union of India,2 did not claim that he made a major departure from Vajravelu. Normally, therefore, the integration of the construction put on the words "amount" and "principles" by Chandrachud, J., with the construction put on them by the six Judges led by the Chief Justice should have presented somewhat the same difficulty as was witnessed in attempting to integrate the opinion of Khanna, J., with their opinion on the construction of Article 368. However, there is a difference. Chandrachud, J., does not question the power of Parliament to amend Article 31 as it may please, and to authorise confiscation of property for illusory compensation, or even without any compensation. As far as he is concerned, therefore, the question of the validity of the twenty-fifth amendment which he, like all the other twelve Judges, upholds, is completely insulated from the question of the construction of the amended text of clause (2) of Article 31. The learned Judge was himself conscious of this position ; he considered it "unnecessary" to pursue this matter of construction of clause (2) of Article 31 "because we are really concerned with the constitutionality of the Amendment and not with the validity of a law passed under Article 31(2)".3 We thus find that the seventh Judge takes the position that the twenty-fifth amendment is valid irrespective of meaning and scope of the words "amount" and "principles". In the circumstances, the construction put by the six Judges led by the Chief Justice must be understood to have been rejected by a majority of seven against six. At the same time, the construction put on the amended clause (2) of Article 31 by five of the other six Judges and Khanna, J., also cannot be said to have the support of the majority. Consequently, the construction of the new clause also emerges as res integra to be expounded by the Supreme Court when the occasion arises.

There cannot be much difficulty about ascertaining the majority view on the remaining part of the twenty-fifth amendment. Excepting Article 31-C the rest of it is approved by all the opinions unanimously. About Article 31-C there is no unanimity. But it is quite clear that the latter part of the Article, i.e. the part providing that the declaration by the legislature will put the law beyond judicial scrutiny on the ground that it does not give effect to the policy of the relevant directive principles has been declared unconstitutional by a majority of seven Judges against six. Five out of the six Judges led by the Chief Justice, declare the whole of Article 31-C unconstitutional. The sixth, Reddy, J., declares the second part unconstitutional ; and Khanna, J., does the same. The latter, holds the second and unconstitutional part severable from the part that precedes it, called the first part, and holds it constitutional and valid. This holding together with that of the other six Judges who upheld both the parts of Article 31-C secures a majority of seven for saving the first part as valid and constitutional. In view of this majority, it is not necessary to go into the details of the opinion of Reddy, J., who declares a fraction only of the first part of Article 31-C valid, and that too, subject to certain conditions.

VIII

Although the Golak Nath doctrine that there was no distinction between "law" and "constitution" was specifically rejected by ten of the thirteen Judges, the remaining three at best abstaining, the full impact of this rejection does not seem to permeate most of the opinions delivered, and, in a sense, even the arguments presented by the respondents themselves.

The six Judges led by the Chief Justice very nearly hold that the power of amendment under Article 368 is subject to reasonable restrictions, and has to be scrutinised like an ordinary statute challenged on the ground of violation of the rights guaranteed in Article 19. They do not use the phrase "reasonable restrictions" in their formulations lest this isomorphism between the test they prescribed for the scrutiny of a constitutional amendment and that laid down in Article 19 for ordinary statutes should be dramatised. They use the formula that an amendment will be invalid if it "abrogates" a "basic feature" or "essential element" of the Constitution. They explain that the power to amend includes the power to add, alter or repeal the provisions of the Constitution so long, however, as the amendment keeps clear of the line of abrogation of an essential element of the Constitution. They also explain that the essential elements cannot be exhaustively stated nor can any clearer idea of what amounts to "abrogation" be given, these matters being left to be judicially determined from case to case. There can be no doubt, therefore, that in actual application, the test will approximate very closely to the test of reasonable restrictions. In fact, to meet the charge that the test of "abrogation" of "essential elements" is vague, the learned Judges refer to the test of reasonability for comparison and justification.4 Consistently with this lurking, albeit sub-conscious disregard of the distinction between law and Constitution, all these learned Judges, with the exception of Reddy, J., refer at length to precedents, both Indian as well as foreign, concerned with implied limitations on the exercise of the ordinary legislative powers, especially under federal Constitutions. It is true that under a federal Constitution, a good number of precedents can be found for the proposition that neither the Central nor the regional government should so exercise its grants as to destroy or severely inhibit the exercise of a corresponding grant to the other government. Some may treat such limitations as express inasmuch as the restricting grants are express, and others may regard them as arising only from implication. But the point remains that the restrictions involved are those on the ordinary legislative power and not on the power of a sovereign State to amend its own Constitution. It might, indeed, appear anomalous that precedents on the scope of Article V of the Constitution of the United States, or of Article 50 of the Irish Constitution, are branded irrelevant while those having nothing to do with the power of amendment are accorded lavish indulgence.

Nor has this disregard for the distinction between law and Constitution been confined to precedents. Even doctrines appropriate only to the scrutiny of ordinary legislation have been applied without examining their credentials for crossing over to the field of constitutional amendment. Thus, for instance, in the opinions written by Shelat and Hegde, JJ., the doctrine of harmonious construction has been advocated. Shelat, J., says that where two constructions are possible, the Court must eschew the construction which will "make well established provisions of existing law nugatory"5 ; and Hegde, J., says that "the various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368".6 Obviously, the principle of harmony which is salutary in other contexts is wholly inapplicable to the area of constitutional amendment, because the power to amend is the power just to change, destroy or repeal. There can conceivably be no harmony between the power to repeal and the provision to be repealed. Also, if we look for the basis of the doctrine of harmonious construction, it will be found in the wholesome assumption that when the Constituent Assembly has laid down two provisions in the same Constitution and these appear in conflict, the Constituent Assembly could not be presumed to have intended that one or the other of those should become wholly inoperative. Therefore, to carry out the intention of the Constituent Assembly as best as they can, the Courts give a construction under which both the provisions will survive and function harmoniously. Clearly, that consideration does not apply when one of the provisions is the provision to amend the others.

Another doctrine similarly applied without scrutiny is the doctrine of delegation. Here, again, the constitutional basis of the doctrine may be usefully looked into. The Constitution provides that the Union and the State Legislatures will make laws on the subjects allotted to them under Article 246. The Courts have therefore held that no other body can be authorised by the legislatures to perform this function without violating the constitutional command that they should carry out that function. In other words, the rule that the legislature must not delegate the legislative function is based on an implied prohibition in the provision of the grant. This implication binds because the legislature is bound by the Constitution and cannot defy it. A Constituent Assembly and a Constitution amending authority are in a different position. They can defy and change the Constitution subject, of course, in the case of the latter, to compliance with the procedure prescribed by the Constitution. Obviously, limitations arising from implications, like, for instance, the limitation emanating from rule of non-delegation, cannot control the operations of the aforesaid bodies who can make or unmake those very express provisions which the contending implications claim to be their originating source.

In two respects the arguments presented by the respondents can also be said to have contributed to the phenomenon of disregarding the distinction between "law" and "Constitution". In the first place, the heavy reliance put by respondents on the precedent of Queen v. Burah,7 was bound to tune the entire discussion to the level of deliberations concerning the validity of ordinary legislation rather than to the higher stratum touching upon the scope and operation of the amending powerâ€"to the region of the doctrine of ultra vires rather than to the up-staged plane charged with the implications of the supra-legal moorings of the sovereign power. In the process, the qualitative distinction between ordinary legislation like the one involved in Queen v. Burah, and constitutional amendment for which there can hardly be any truly apposite precedents under the English law and much less under the colonial law was severely underplayed. Once the respondents advanced Queen v. Burah as their foundation authority, those who did not accept their case were bound to point to cases like In re : the C.P. and Berar Motor Spirits Act, 19378 to show that the doctrine of Queen v. Burah is not without its exceptions. And, with due respect, it cannot be denied that some implied limitations are recognised even by the English Courts and the Privy Council on the express grants of legislative powers. It is only the power of amendment of the Constitution in regard to which the case of implied limitations can be supported by no precedents whatsoever. The

truth of this is evident from the fact that the petitioners could point to no such authority, and all they could do was, either to distinguish the United States and Irish cases on the basis of fig-leaf differentia, or fancy the express prohibition in sub-sections (2) and (3) of Section 29 of the Ceylonese Constitution as an implied limitation. But, the advantage was scuttled by putting Queen v. Burah at the centre of the stage.

Yet another stand taken by the respondents which seems to have proved counter-productive is the concession that the power under Article 368 did not extend to the repeal, simpliciter, or abrogation of the whole Constitution. No Parliament can be imagined capable of taking that extremely unwise step. With due respect, there was no compelling reason to concede that some implied limitation was necessary to prevent such a catastrophic exhibition of puerilism. Once the initial concession as made, it became difficult to resist the argument that some other possible unwise uses of the power must also be similarly excluded. In a sense, the concession made by the respondents amounted to a concession in favour of reasonable restrictions on the power under Article 368 ; and the only difference between their contention and that of the petitioners was, in essence, about what exactly should be regarded reasonable, or as to "where the line is to be drawn". The six Judges led by the Chief Justice have drawn the line at one site, defined by the rule that essential elements or basic features of the Constitution cannot be abrogated ; Khanna, J., drew it at another, said to have been somewhat more favourable to the amending authority, by forbidding only such amendments as can be said to abrogate the "basic structure or framework" of the Constitution ; and most of the remaining Judges drew it even more favourably to the amending authority by forbidding only the total repeal or abrogation of the Constitution. Is it possible to view these different sites for the line of demarcation as indicative merely of three different assessments of what restrictions, when implied for the purposes of bridling the amending power under Article 368, ought to be regarded reasonable? If the answer to this question is in the affirmative, Kesavananda Bharati case has left the amending power far more attenuated than Golak Nath did. It will be some irony if a Court so severely concerned with saving the "essential elements" or the "basic structure and framework" of the Constitution should end up with destroying the most essential and basic principle of Constitutional law, namely, that the restrictions, if any, on the power of the amendment of a sovereign constitution can be imposed only by the Constituent Assembly or its nominee, the amending authority, both of whom operate upon the Constitution, and not by a Court which must operate under the Constitution and subject to it.

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- (1973) 4 SCC 225 : AIR 1973 SC 1461. Return to Text
- (1967) 2 SCR 762 : AIR 1967 SC 1643 : (1967) 2 SCJ 486. Return to Text
- 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 2 1/2 days ; Respondents' arguments lasted 33 1/2 days and reply lasted 1 day. Return to Text
- See n. 2, supra. Return to Text
- H.M. Seervai : Constitutional Law of India, Ch. XXX (1967), p. 1095. Return to Text
- Dr P.B. Gajendragadkar : The Indian Parliament and the Fundamental Rights, Tagore Law Lectures, Eastern Law House, 1972, at p. 175. Return to Text
- P.K. Tripathi : Some Insights into Fundamental Rights, University of Bombay, (1972), Ch. I, Golak Nath : A Critique, p. 17. Return to Text
- (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 Article 372": earlier, at p. 469, para 622 (AIR para 638), they characterise the Constitution as "not only a law but the paramount law of 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. Return to Text
- Ibid. Return to Text
- Supra, n. 1, at p. 984, para 2068 (AIR para 2081). Return to Text
- Those written by Hegde and Mukherjea, Ray, Reddy, Palekar, Khanna, Mathew, Beg, Dwivedi and Chandrachud, JJ. Return to Text
- 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 Article 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). Return to Text
- 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 Return to Text

- 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). Return to Text
- 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). Return to Text
- Ibid., at p. 680, para 1239 (AIR para 1249). Return to Text
- Ibid., at p. 832, para 1567 (AIR para 1581). Return to Text
- Ibid., at p. 981, para 2059 (AIR para 2071). Return to Text
- Ibid., at p. 794, para 1483 (AIR para 1496) ; also at p. 824 (AIR para 1904), Conclusion (viii). Return to Text
- Ibid., at p. 770, para 1435 (AIR para 1446). Return to Text
- Ibid., at p. 824 (AIR para 1903), Conclusion (vii). Return to Text
- Reference to this concession is made, for instance, by Shelat and Grover, JJ. ibid., at p. 414, para 497 (AIR para 514). Return to Text
- Ibid., at pp. 775-76, para 1443 (AIR para 1454). Return to Text
- C.A.D., Vol. IX, 17 September, 1949, at p. 1661. Return to Text
- 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). Return to Text
- The Bribery Commissioners v. Ranasinghe, 1965 AC 172. Return to Text
- See, for instance, H.M. Seervai : The Position of the Judiciary under the Constitution of India, Sir Chimanlal Setalvad Lectures, University of Bombay, 1970. Return to Text
- Supra, n. 26, at pp. 193-94. Return to Text
- Ibid., at p. 179. Return to Text
- Ibid., at p. 179. Return to Text
- 1968 AC 717, at pp. 742-43. Return to Text
- Attorney General of New South Wales v. Trethowan, 1932 AC 526. Return to Text
- Supra, n. 31. Return to Text
- 1920 AC 691 : AIR 1920 PC 91. Return to Text
- The amendments affected the foundations of the Constitution of the United States, especially, in view of the provision in the 10th amendment thereof which says : "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." (emphasis supplied). Return to Text
- Supra, n. 1, at pp. 483-84, para 659 (AIR para 675). Return to Text
- Ibid., at p. 374, para 326 (AIR para 336). Return to Text
- Ibid., at p. 484, para 659 (AIR para 675). Return to Text
- 282 U.S. 716. Return to Text
- Supra, n. 1, at pp. 434-35, para 545 (AIR para 562). Return to Text
- Ibid., at pp. 373-74, paras 324-25 (AIR paras 334-35). Return to Text
- Ibid., at pp. 616-17, para 1112 (AIR para 1124). Return to Text
- Ibid., at p. 486, para 664 (AIR para 680). Return to Text
- Ibid., at p. 768, para 1429 (AIR para 1440). Return to Text
- The State (at the prosecution of J. Ryan) v. Captain Michael Lennon, 1935 Irish Reports 170. Return to Text
- Supra, n. 1, at pp. 378-87, paras 348-90 (AIR paras 358 to 405). Return to Text
- Ibid., at p. 627, para 1139 (AIR para 1150). Reddy, J., also says that according to the Attorney General clause (e) was "added by way of caution to meet a similar criticism which was directed against Article V of the U.S. Constitution". It is submitted that this hypothesis is also subject to the same criticism as Mr Seervai's suggestion. Return to Text
- In his recent article, supra, n. 13, Mr Seervai observes, at p. , f.n. 66 117, as follows : "It may be mentioned that an amendment of 'this Constitution' would include Article 368 even if no express mention was made in proviso (e) to the amendment of Article 368. However, such an express provision was necessary, because a provision apparently general might be restricted by judicial construction . . . . " It appears, with due respect, that this observation confuses an incidental consequence with the primary object ; in any case, it misses or underplays a very important consequence of the express provision in clause (e), namely, the involvement of the States in the amending process. Return to Text
- Supra, n. 1, at p. 318, para 67 (AIR para 73). Return to Text
- Ibid., at p. 318, para 69 (AIR para 75). Return to Text
- Ibid., at pp. 415-16, paras 499 and 500 (AIR paras 516-17). Return to Text
- Ibid., at p. 445, para 567 (AIR para 584). Return to Text
- Ibid., at p. 476, para 640 (AIR para 656). Return to Text
- Ibid., at pp. 632-33, para 1149-A (AIR para 1161). Return to Text
- 1935 A C 500 : AIR 1935 PC 158. Return to Text
- Supra, n. 1, at p. 774, para 1442 (AIR para 1453). Return to Text
- Ibid., at p. 795, para 1484 (AIR para 1497). Return to Text
- Ibid., at p. 814, para 1519 (AIR para 1531). Return to Text
- Vide Law Commission of India, 46th Report on "The Constitution (25th Amendment) Bill, 1971, at p. 12, where the Commission recommends deletion of the second part of Article 31-C. Return to Text

- Supra, n. 1, at p. 814, para 1520 (AIR para 1532). Return to Text
- Ibid., at p. 814, para 1521 (AIR para 1533). Return to Text
- Ibid., at p. 365, para 285 (AIR para 295). Return to Text
- Ibid., at pp. 427-30, paras 533-36 (AIR paras 549-53). Return to Text
- Ibid., at p. 480, para 650 (AIR para 666). Return to Text
- Ibid., at p. 629, para 1143 (AIR para 1154). Return to Text
- (1878) 3 AC 889 : 5 IA 178. Return to Text
- Supra, n. 1, p. 426, para 527 (AIR para 543). Return to Text
- State of Punjab v. Ajaib Singh, 1953 SCR 254 : AIR 1953 SC 10. Return to Text
- Don John Francis Douglas Liyange v. Queen, 1967-1 AC 259. Return to Text
- Supra, n. 13, pp. 47-48. Return to Text
- Per, Chandrachud, J., supra, n. 1, pp. 959-60, para 1997 (AIR para 2009). Return to Text
- Ibid., at p. 366, para 292 (AIR para 302). Return to Text
- Ibid., at p. 454, para 582 (AIR para 599). Return to Text
- Ibid., at p. 486, para 666 (AIR para 682). Return to Text
- Ibid., at pp. 637-38, para 1159 (AIR para 1171). Return to Text
- Sikri, C.J., uses the terms "basic foundation and structure", "basic structure", "fundamental features", and "identity". Shelat and Grover, JJ., use the terms "basic elements of the Constitutional structure", "identity", and "basic features". Hegde and Mukherjea, JJ., use the terms "basic elements" and "fundamental features". Reddy, J., uses "essential features" "basic elements", "basic structure", "essential elements in the basic structure", and "essential elements of the basic structure". These are just stray illustrations : no attempt is being made to prepare an exhaustive catalogue. Return to Text
- Supra, n. 1, at p. 770, para 1435 (AIR para 1446). Return to Text
- Ibid., at p. 794, para 1483 (AIR para 1496). Return to Text
- Ibid., at p. 767, para 1426 (AIR para 1437). Return to Text
- Ibid., at p. 754, para 1392 (AIR para 1404). Return to Text
- Ibid., at p. 755, para 1393 (AIR para 1405). Return to Text
- Ibid., at p. 750, para 1383-A (AIR para 1395). Return to Text
- Ibid., at p. 755, para 1393 (AIR para 1405). Return to Text
- Ibid., at p. 755, para 1393 (AIR para 1450). Return to Text
- Ibid., at p. 774, para 1442 (AIR para 1453). Return to Text
- Ibid., at p. 763, para 1418 (AIR para 1429). Return to Text
- Ibid., at pp. 757-58, paras 1401-02 (AIR paras 1412-13). Return to Text
- Ibid., at pp. 781-83, paras 1456-62 (AIR paras 1467-73). Return to Text
- Ibid., at pp. 787-88, para 1473 (AIR para 1484). Return to Text
- Ibid., at p. 796, para 1487 (AIR para 1500). Return to Text
- Ibid., at pp. 799-800, para 1496 (AIR para 1509). Return to Text
- Ibid., at p. 803, para 1504 (AIR para 1516). Return to Text
- Ibid., at pp. 779-80, para 1453 (AIR para 1464). Return to Text
- Ibid., at pp. 804-05, para 1505 (AIR para 1517). Return to Text
- Ibid., at p. 804, para 1506 (AIR para 1517). Return to Text
- Ibid., at p. 795, para 1484 (AIR para 1497). Return to Text
- Ibid., at p. 809, para 1512 (AIR para 1523). Return to Text
- Ibid., at p. 1000, para 2123 (AIR para 2137). Return to Text
- Ibid., at p. 1000, para 2121 (AIR para 2135). Return to Text
- Vajravelu v. Special Deputy Collector, (1965) 1 SCR 614 : AIR 1965 SC 1017. Return to Text
- (1970) 1 SCC 248. Return to Text
- Supra, n. 1, p. 1001, para 2124 (AIR para 2138). Return to Text
- Thus, Sikri, C.J., observes : "The Constitution itself uses words like 'reasonable restrictions' in Article 19 which do not bear an exact meaning, and which cannot be defined with precision to fit in all cases that may come before the Courts ; it would depend upon the facts of each case whether the restrictions imposed by the legislature are reasonable or not."Ibid., at p. 366, para 290 (AIR para 300). See also, Hegde and Mukherjea, JJ., Ibid., at pp. 484-85, para 661 (AIR para 677). Return to Text
- Ibid., at p. 426, para 527 (AIR para 543). Return to Text
- Ibid., at p. 476, para 639 (AIR para 655). Return to Text
- Supra, n. 66. Return to Text
- 1939 FCR 18 : AIR 1939 FC 1. Return to Text