Guardian Angel of Fundamental Rights

Hon'ble Mr. Justice R. F. Nariman
(Judge, Supreme Court of India)

The Sixteenth Nani A. Palkhivala Memorial Lecture

Published by
Nani A. Palkhivala Memorial Trust

NANI A. PALKHIVALA MEMORIAL TRUST

We hardly need to introduce you to the life and work of the late Nani A. Palkhivala. He was a legend in his lifetime. An outstanding jurist, an authority on Constitutional and Taxation laws, the late Nani Palkhivala's contribution to these fields and to several others such as economics, diplomacy and philosophy, are of lasting value for the country. He was a passionate democrat and patriot, and above all, he was a great human being.

Friends and admirers of Nani Palkhivala decided to perpetuate his memory through the creation of a public charitable trust to promote and foster the causes and concerns that were close to his heart. Therefore, the Nani A. Palkhivala Memorial Trust was set up in 2004.

The main objects of the Trust are the promotion, support and advancement of the causes that Nani Palkhivala ceaselessly espoused, such as democratic institutions, personal and civil liberties and rights enshrined in the Constitution, a society governed by just, fair and equitable laws and the institutions that oversee them, the primacy of liberal economic thinking for national development and preservation of India's priceless heritage in all its aspects.

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INTRODUCTION

The Nani A. Palkhivala Memorial Trust was priviledged to have the Honorable Justice R. F. Nariman, Judge of the Supreme Court, deliver the 16th Nani A. Palkhivala Memorial Lecture on 15th December 2018 at the Tata Theatre, NCPA, Mumbai.

In a brilliant lecture, delivered ex tempore, Justice Nariman provides a clinical analysis of various provisions of the Constitution of India and particularly of the central role that fundamental rights occupy in it. Commenting largely on Part III of the Constitution which deals with Fundamental Rights and Part IV of the Constitution which deals with Directive Principles of State Policy, he points out that while fundamental rights are basic rights which a citizen reserves to himself and enforces through the medium of courts, directive principles essentially are principles of governance, not meant to be enforced by law but only principles which the government is supposed to follow when it makes laws.

In an interesting discussion which covers the background in which various provisions of the Constitution were formulated and several amendments to the Constitution were made, Justice Nariman leads us to the fundamental issue raised in the Kesavananda Bharati case as to whether there is an implied or inherent limitation on the power of the legislature to amend the Constitution, in as much as such amendment cannot be used to alter the basic structure or the essential features of the Constitution.

Justice Nariman deals at some length with Mr. Palkhivala's submission in this historic case, particularly with regard to what he submitted were twelve essential or basic features of the Constitution and which cannot be touched or damaged and which persuaded the court by a

wafer-thin majority to accept the “basic structure doctrine”. In doing so, as also dealing with the infructuous later attempt to review this decision and also in the subsequent Minerva Mills case (where, incidentally, Justice Nariman was Mr. Palkhivala’s junior) he pays an eloquent tribute to Mr. Palkhivala’s advocacy and his significant role in establishing the basic structure doctrine, which, as has been repeatedly pointed out, has been the shield which has protected the Constitution against several attempts by the legislature to subvert it.

Justice Nariman’s scintillating lecture is important as it provides a clear and instructive understanding of the relevant clauses of the Constitution and of the place that fundamental rights occupy in it. As such, it makes for compulsive reading by all those who are concerned with attempts to encroach upon those rights. The Trustees of the Nani A. Palkhivala Memorial Trust are publishing this important lecture and giving it wide circulation to create greater awareness among citizens about the fundamental rights which the Constitution has bestowed upon them and which each one ofus should be dedicated to protect.

Y.H. Malegam
Chairman
20th February 2019 Nani A. Palkhivala Memorial Trust

NANI A. PALKHIVALA

16th January 1920 - 11th December 2002

Guardian Angel of Fundamental Rights

Hon'ble Mr. Justice R. F. Nariman*

Ms. Bharucha, Mr. Malegam, Mr. Parekh, Justice Sujata Manohar, Justice Variava, Dr. Farokh Udwadia, my brother and sister judges, ladies and gentlemen. I wish to dedicate this lecture to the memory of Shri Behram Palkhivala. Behram Palkhivala, the younger brother of Nani, was an outstanding lawyer himself. He was modest, self-effacing, and he was the co-author of the famous book which bears the name of Kanga and Palkhivala. I wish he were alive and with us today. He would have loved hearing this lecture for the simple reason that his great brother, being the subject-matter of today's discussion, is the person who is actually the centrepiece, if I may call it that, of the rights of the citizen and all the rights that we take for granted and enjoy today.

At the stroke of the midnight hour, when India awoke to freedom and life on 15th August 1947, we did so, legally speaking, by an Act of the British Parliament, the Indian Independence Act of 1947. That Act, in Section 8, recognized the fact that a constituent assembly had to be set up so that we could now govern ourselves, having been

* *The author is a Judge, Supreme Court of India. The text is based on the Sixteenth Nani A. Palkhivala Memorial Lecture delivered under the auspices of Nani A. Palkhivala Memorial Trust on 15th December 2018 in Mumbai.*

rid of the British yoke. As a matter of fact, this Constituent Assembly was set up by the Cabinet Mission Plan of 1946 which, as you all know, failed. It started its deliberations on 9th December 1946 and continued for a period of three years after which it produced a document which was called the Constitution of India and which contained as many as 395 Articles. It was much longer than anything else that had ever been devised by man so far. So, the first thing that happened was that it attracted criticism. Sir Ivor Jennings, a well-known British constitutional expert, called it far too long and far too rigid. Another Constituent Assembly Member, Shri Hanumanthaya, said that he expected to hear the music of the Veena and the Sitar, instead of which he heard music coming from a British band. Both criticisms were incorrect. The document had to be long because it had to deal with the special problems of a country as diverse as ours. Rigid it certainly is not, and as for the music of a British band, this criticism is most unfair because, as a matter of fact, the symphony is the symphony of India, and this symphony was played by the leading members of orchestras from the United States as well as Europe. What our Constitution actually banded together was this - it was a great leap ahead, and a democratic nation like ours has to thank our founding fathers for having scoured the Constitutions of many nations, beginning with the ancient US Constitution and actually ending with the newly-framed Constitution of Japan, which was just one year after the end of World War II, and then coming out with this fabulous document. The difference between this Constitution and what we were governed by, which was incidentally another British Act of Parliament (which was the Government of India Act of 1935) is the fact that there is a Fundamental Rights Chapter. There were no fundamental rights in the Government of India Act of 1935. The Fundamental

Rights Chapter, which is Part III of our Constitution, is the difference between what we were governed by and what was to govern us. These rights were borrowed, as I said, from various constitutions, starting with the US Constitution and ending with the newly-framed Japanese Constitution. In fact, Article 21, which is the single most important Article in our Fundamental Rights Chapter, which is the Right to Life and Personal Liberty, was directly taken from Article 31 of the Japanese Constitution. So, we borrowed from things as diverse as the US Constitution, the Swiss Constitution, the Australian Constitution, etc. the Japanese Constitution, even from a little-known Constitution of the Free City of Danzig, which was post World War I, of 1920.

Now, most of this talk will be dealing with Part III and Part IV of our Constitution. Part III, as I have just told you, speaks of fundamental or basic rights, and Part IV which is equally important, speaks of Directive Principles of State Policy. Please remember one thing, fundamental rights are basic rights which the citizen reserves to himself and enforces through the medium of the superior courts. In fact, our Constitution is unique in having an Article, Article 32 which itself is a fundamental right, to invoke and knock at the doors of the Supreme Court, for enforcing the other fundamental rights. So please remember, fundamental rights are meant to be enforced in courts of law. Directive Principles of State Policy, contained in Part IV, are not meant to be so enforced. They are only principles which the government is supposed to follow when it makes laws.

Now, what are these fundamental rights? It is necessary for us at the outset of this lecture to tell you something about these rights. The Chapter begins with an Article which deals with a definition of what is State - that is

important because most fundamental rights are directed against the government of the day. And the government consists of many authorities. It consists of Parliament, the state legislatures, the Executive of both the Centre and the States, local and other authorities, etc. The definition is an inclusive one and a very wide one. The idea being, that wherever infraction of fundamental rights is found, the courts step in to save the citizen. Article 13, which follows, is again very important, which I must ask you to keep primarily in the front of your minds for today's discussion, because Article 13 is the Article which states that any law which violates a fundamental right is void to the extent that it violates such a right. A lot of our early constitutional law consisted of what was meant by the expression 'law' in Article 13. This again is an inclusive definition. So, it's not watertight, it can take in things which are not expressly mentioned. And it begins with the lowliest executive order and goes right up to legislation that is made by Parliament and the states. The big question, of course, posed in Shankari Prasad Singh's case in 1951, was whether this would include constitutional law as well. We will come to that a little later.

Article 14 is a very important article because it speaks of equality before the law and the equal protection of the laws, which is taken both from England as well as the 14th Amendment of the US Constitution. Articles 15 and 16 flesh out these concepts further. Article 17 is very important, because it abolishes untouchability and makes untouchability an offence. Article 19 again is a very important Article because it contains 7 fundamental freedoms. The very first freedom is the freedom of speech, so crucial to any democracy which, of course, subsumes within itself the freedom of press. The second is the freedom to associate freely. The third is the freedom to

form associations and unions. The fourth is the freedom to move freely throughout the territory of India. The fifth is the freedom to reside in any part of India, wherever you may belong. The sixth, which has been done away by the Janata government in 1979, was the fundamental right to own, acquire and dispose of property. And the seventh, and equally important right, is the right to do your own business, profession, etc. What is important to remember is that none of these rights are absolute. Most of them are subject to reasonable restrictions that are made by the government of the day, through legislation, in public interest. Article 21, of course, is called the kingpin of all other rights because it gives us the Right to Life and Personal Liberty. And thanks to the Supreme Court's decisions, this simple one-line Article has given rise to something like 30 other rights, the most recent of which is the right to privacy, which was laid down by 9 of our judges. Article 23 is very important because it abolishes slavery, it abolishes begar, it abolishes human trafficking. Article 24 makes it clear that children will not be made to do hard labor in factories, etc. Then comes a whole chapter on religious freedoms, which again are subject only to public order, morality and health. Article 29 is a little-known article which deals with cultural rights, because this is a very diverse country. So, the idea is to protect languages, cultures, scripts, etc. Article 30 is an important minority institution right, the right of minorities to establish and administer institutions of their choice. Article 32, as I have told you, is the right to actually knock at the doors of the Supreme Court itself in order to enforce all these other rights.

We now come to the Directive Principles Chapter. Directive principles essentially are principles of governance. Now the most basic principle is laid down in Article 38, which

is, that ultimately, all legislation must see to it that there is justice, not in the sense of what we administer in courts of law but justice that is social, economic and political. Article 39 is a very important Article which you must keep in mind again for the purposes of future discussion, which is, that the material resources of the community must be distributed so as best to subserve what is called the common good. Incidentally, this was borrowed directly from the Irish Constitution, word-for-word, which was a Catholic Constitution. And being a Catholic Constitution, this particular Article 39(b), in fact, goes back to a papal bull of Innocent III, who was the great Pope who annulled Magna Carta itself in the year 1215. Then we come to Article 39(c), which speaks of seeing that there is no concentration of wealth to the common detriment and so on and so forth. We then go into village panchayats; we go into a uniform civil code; we go into protecting weaker sections of society including the scheduled castes and scheduled tribes; we go into raising nutritional standards, keeping the judiciary apart from the executive, etc. etc.

Now the importance, therefore, of these two chapters is that one consists in goals of legislation which is the end that is to be achieved and the other is the means to attain that end. As I told you earlier, most fundamental rights are hedged in with restrictions of their own. What is “public interest” is made out by the directive principles of State policy. What are “reasonable restrictions” is that the means must be pure to attain these particular ends because if these restrictions are not reasonable, they are arbitrary, they are excessive, and then courts step-in, in order to help the citizen against the State.

Giving you this brief background, the Preamble of our Constitution itself declared, for the first time, that we will

be a sovereign democratic republic. Now, each word is pregnant with meaning. We are sovereign because we have just overthrown the sovereignty of a foreign power. We are democratic because, for the first time, universal adult franchise is there for persons who may vote in and vote out governments of their choice.

The Government of India Act 1935 divided the country into provinces, and to vote for persons in these provinces, you had to either be an income tax payer or a person who was otherwise qualified educationally - all this has been removed. So, with one stroke of the pen, we became a democracy in the real sense. Equally, we are a republic in the sense that we are not a monarchy, we are therefore governed under a presidential form of government which is the Westminster model well known to all of you.

The next thing in the Preamble is the goals that we have to attain, which have been set out in Article 38, which is justice - social, economic, political. What then follows is nothing less than the war cry of the French Revolution - liberté, égalité, fraternité. Now, liberty takes you straight away to the core of fundamental rights and this Liberty is to be not only of thought and expression but equally of religious belief. Equality is to be of status and of opportunity. And fraternity, which is an extremely important cardinal value, leads directly to secularism, which again is a pillar of this Constitution. Because unless you love your brother, whoever he may be, the unity of the country is imperiled, because that is what follows. Fraternity leads to the unity of the nation. Now, very early in our constitutional history, and I must tell you that our Constituent Assembly continued as the provisional Parliament until elections took place in 1952, the very first thing that the Prime Minister Jawahar Lal Nehru had promised, was agrarian

reform on a massive scale. The very first cases that came up before the High Courts dealt with agrarian reform. And of the three High Court judgments that were pronounced in 1951, one judgment, namely the Bihar judgment, actually struck down a Bihar land reforms law. But the other two, Madhya Pradesh and Uttar Pradesh, upheld that law. The provisional Parliament got jittery and could not wait until the Supreme Court would deal with this extremely important aspect of what they considered was the very first thing to do in a nation with such massive and rampant poverty. So, what they did was, they passed a first Amendment which was the exact opposite of the first Amendment of the US Constitution. You will remember that the Bill of Rights was not contained in the original US Constitution. So, you had rights from number 1 to 10, which were all fundamental rights - the Ninth Amendment being very important, because it said - don't think that we have conferred all these rights on you; rights which are reserved to the people, in any case, which do not form part of amendments 1 to 8 before this, are equally recognized. But anyway, our Constitution's first Amendment went in the exactly opposite direction. And our first Amendment, by the very Constituent Assembly which gave us Part III, gave us two extremely draconian Articles, 31A and 31B. 31A said, for the first time, that all fundamental rights will be out of the window when it comes to agrarian reform, which means that despite the fact that a law (of course it dealt with property), but suppose the law was wholly arbitrary, suppose it was discriminatory, suppose it provided no compensation whatsoever, it would be held to be good because the war cry of Jawahar Lal Nehru at that point of time was agrarian reform. And unfortunately, that first Amendment didn't stop here. It went on to have another extremely draconian Article, which was 31B and which said that even if a court, a superior court, whether it is the High Court or the Supreme Court, strikes down a

land reform law, the moment you put that law into what is called a Ninth Schedule to the Constitution (because there were only 8 schedules to start with), without more, that law becomes good and the Supreme Court judgment or High Court judgment gets wiped out. Now, this was the nature of the very first amendment that was made by this provisional Parliament. And as you can imagine, it was challenged immediately, in Shankari Prasad Singh Deo's case. And the entire discussion in that case was before a constitution bench, which is really 5 judges of the Supreme Court sitting together. Incidentally, Article 145 says that the last word on interpretation of the Constitution is a minimum of 5 Supreme Court judges: the wisdom of 5 Supreme Court judges is what was trusted by our founding fathers. So, the citizen went to these five wise men, and the wise men specifically went into whether Article 13 and the word 'law' therein would actually include a constitutional law. What was not pointed out was that in the early debates there was a member called K. Santhanam, and Santhanam actually tabled an amendment which Sardar Patel passed, saying, making it explicit in Article 13, that constitutional laws will not be included. And this amendment was passed. Somehow, when it came to the drafting committee, this Santhanam amendment was dropped. So, a very powerful argument, therefore, at that point of time, could have been taken but wasn't pointed out, that in point of fact the drafting committee thought that this part should be left out because constitutional laws are actually included in Article 13. The idea was therefore to have a chapter on fundamental rights which would be away from majorities that are elected by persons to form a democratic government.

Now the court therefore went into this Article, went into Article 368, which is another very important Article, which will be referred to by me, which is the power of Amendment

and it said that you have to balance these two things. Now, amendment is also by a law, but a law which is constituent in nature is not legislative. So, the court decided that the correct balance would be that the constituent law would be something which would be not included in Article 13, and that therefore, Article 368, the power of amendment, would trump Article 13. Now, this was our constitutional law for a period of 14 years thereafter. The 17th Amendment then embarked on a massive population of the 9th Schedule by adding 44 land agrarian or reform measures. And this got challenged in 1965 in Sajjan Singh's case. In our system, the moment a five-Judge bench says something, we are bound by it. However, it is possible for you to say that look, we find for some good reason that this earlier judgment requires a fresh look and therefore, it should go to a larger bench strength. Now, three of the judges didn't think that Shankari Prasad Singh's case required any relook. Two of them, however, did. Justice Hidayatullah again revisited Article 13 and Article 368, Article 13 being that if a law violates a fundamental right it will be struck down as void; and Article 368, being the power of amendment, and said that it is curious that there is no proviso in 368 itself which says that fundamental rights are excluded. So, he put it the other way round. And then he referred to the recent Japanese Constitution, German Constitution post World War II, where these rights were expressly made inviolable so that majorities could not touch them. And he finally said that I am not willing to adopt the role of a grammarian. Now, this one sentence epitomizes constitutional law. Constitutional law really belongs more to the field of philosophy than law because the whole object of a Constitution is that it is a living document, and being a living document, it has to respond to the felt need of the times, and in responding to this felt need, it is very important that such laws then ultimately reflect

them. Anyway, he said, therefore, that words must yield to principles and this is the single most important thing that you can pour into words being vessels, so to speak, Constitutional principles. I give you one example. In 1992, it was assumed that when judges got appointed to the post of the High Court and the Supreme Court, all that you need to do was to consult the Chief Justice, after which, the then government of the day can appoint whoever they want. In 1992, for the first time, we poured into this vessel, namely the word 'consult', the word 'concurrence' and said that the word 'consult' must really yield to another principle because the principle here is independence of the judiciary, and if you see that principle, then it is very easy to say that 'consult' doesn't merely mean 'consult' and pay lip service to the provision, it means something much more. It means that unless the Chief Justice actually concurs with the appointment, the appointment is no good. So, to come back to this, the role of a grammarian is what is expressly eschewed by constitutional lawyers. It in fact brings to mind Shankaracharya's great Bhaja Govindam. Shankaracharya begins these 31 beautiful verses by saying, 'Oh, you fool'. He starts off like any Old Testament Prophet, and uses very strong language - 'Oh, you fool, you are caught up in the bark of words in grammar and where do you think your grammar is going to lead you, nowhere'. So, it is important therefore that when you are leading to something like the absolute, words don't matter, it is concepts that matter. And here, what Shankaracharya said and what Justice Hidayatullah said coalesce, because in constitutional law, words must yield to concepts so that ultimately, the governed are not let down. So, doubts were cast by Justice Hidayatullah. Another doubt was cast by another great Judge - Justice Mudholkar. He used the expression 'basic structure' for the first time, and he said that there are certain things

which are kept away from majorities, fundamental rights being one of them. And it is very important to remember that these rights are not the subject matter or the plaything of ordinary majorities, who may come and who may go. So, there is therefore a 'basic structure' to a Constitution which can be gleaned from our Preamble. Now I just told you what our Preamble was all about. What did the Preamble say? It said we were sovereign, it said that we were democratic, and it said that we were a republic with fundamental rights. So, he said all these pertain to what one can call the basic structure of a democratic constitution. And if you have such a basic structure then this basic structure can never be damaged or destroyed by any so-called amending body. And so, it came that the seeds of doubt were sowed by these 2 judges on the first judgment in Shankari Prasad Singh's case. This led to an 11-judge bench then being constituted by Chief Justice Subbarao, and this is where Nani Palkhivala steps in for the first time in this entire narrative. He had a very small role to play in this first very important case. In fact, he was caught up, ironically enough, appearing for the Union of India in Geneva and, therefore, could come down only for one day. And apparently on that day, M. K. Nambiar, a great constitutional expert, who is the father of our present Attorney General, was on his legs and Palkhivala was assured that Nambiar would sit down and allow him to address the court. Now, Nambiar droned on and after an hour when there was a barrage of questions, he said he required some time to reflect and think on these. If you give me that time just now, Mr. Palkhivala can step in and address you. So, the judges were good enough and that's how Nani Palkhivala got to address this august body of 11 judges. The report doesn't exactly tell us what he said, but it appears that he did argue for that one day, and what he argued was something like the basic structure doctrine

argument which was later laid down. He argued that there are implied limitations. Now, what does that mean? You have express limitation: you can do this, you cannot do this. But when no express limitation is forthcoming then you say that given the circumstance that the word 'amend' is an elastic term, what is implied is the fact that there are so many things which are kept away from the amending power, so to speak, that ultimately you will have an implied limitation on this concept of amendment. Now, by a razor thin majority of 6 is to 5, Chief Justice Subbarao did not go into this question at all. What he went into in fact was Article 13 (and here we refer to Justice Hidayatullah's doubt, Justice Mudholkar's doubt), and said that Article 13 for very good reason should include constitutional law. Now if Article 13 included constitutional law, straightaway any constitutional amendment that was made which impacted a fundamental right would be declared void. So, it was a very momentous decision and 6 to 5, therefore, the court laid down that fundamental rights are beyond the pale of being touched at all by the constituent body which is Parliament. This led directly to Parliament's reaction and the reaction was the tabling of what is called the famous or the infamous 24th and 25th amendments.

Before getting into the 24th and 25th Amendments, it is important to give you some small background of the amending power itself that is contained in Article 368. When the founding fathers framed Article 368 they had a number of models before them and these models divided themselves into four parts. You had a model where the central legislature became the constituent body. You had a model where a certain percentage of the state legislatures became the constituent body. You had a model where you went to the people after the legislature first saying yes, a Constitution requires to be amended. And fourth you

had a combination of these. Somehow or the other our founding fathers didn't choose any of these models, and they chose a completely different model for themselves. Now, there are some indicators in our Constitution as to why they chose this model. One perhaps could have been that since this body itself was a body which was more nominated than elected and reflected only 16% of the actual adult franchise, they wanted to leave amending the Constitution to a Parliament which was elected by universal adult franchise. This would come from, say, Article 11, which speaks of citizenship and which leaves it to Parliament after Articles 5 to 10 are laid down in the Constitution itself to thereafter, by ordinary law, improve upon, delete, add, do whatever it feels like. But then on the other hand, you have an indicator in Article 35 which says the exact opposite, which is that notwithstanding anything in this Constitution, - notwithstanding means, notwithstanding 368 equally, which means the amending power cannot be used for this purpose. If Parliament wants to curtail fundamental rights when it comes to the military, for example, Parliament alone may do so, and the state legislatures cannot do so. So obviously, this is the exact opposite of Article 11. Equally, you had, in Article 368, procedure for amendment, not power. And so, the question arose - did it deal with or did it contain the actual power to amend or was it merely procedural? And most importantly, the word 'amendment' was used by itself. It did not say by way of variation, addition or repeal, which various other provisions of the Constitution had. They also had before them the model of the Irish Constitution, Article 46 of which specifically used these words in the context of amendment. All these things had to be put together, and then, what was the picture? A very confused muddled one.

So, finally coming back to what these people chose, what the constituent assembly, chose was, they left it to Parliament, provided that at least half of the Lok Sabha and half of the entire strength of the Rajya Sabha were present and voting, and two-thirds of that body were ready to pass a constitutional amendment. Most Articles would have passed muster only with the Lok Sabha and Rajya Sabha with this strength saying, yes, a constitutional amendment should be made. It is only when you come to the judiciary, High Courts as well as the Supreme Court, you come to the federal structure, which is what do the provinces, what is the relationship between the provinces and the Centre - legislative, administrative, etc.; and amendment of the amendment Article itself that you also need to go for ratification to at least half of the state governments. So ultimately, you had a scheme under our Constitution by which you could amend the Constitution straightaway, that is in a very few Articles, by ordinary legislative action, like 11. Equally, if you want to change a state, for example, you want to add to a state, subtract from a state or subtract territory from a state, add it to some other state, you may do so by ordinary legislation. But in the bulk of matters, it is enough that two-thirds of our Parliament, that is the Upper House and Lower House, pass a particular law which then becomes a constitutional amendment and there are a few cases, in which you have to go for ratification. Now, with this facing the Court in the next great battle that was to be fought over the 24th and 25th Amendments. First the 24th Amendment sought to do away with the 11-judge bench. If you remember, Golak Nath by that razor thin majority said, 'law' in Article 13 will include constitutional law. So, this amendment said it will not include constitutional law. So straightaway, the fundamental, if I may put it that way, the fundamental bulwark of the Golak Nath judgment was destroyed. Apart

from that, what it also did was, for the first time to add what was called an Article 31C. You remember Articles 31A and 31B were added by the very first Amendment when they dealt with only agrarian reform. Article 31C now, for the first time, said that any law made in pursuance of a directive principle, which was the Pope Innocent III directive principle, if I may call it that, any law made in pursuance of this particular directive principle would be shielded from various fundamental rights, the most important of which were Article 14, which is the equality principle; Article 19, the seven freedoms and finally, Article 31, which was removed, which dealt with property rights. So, the 24th and the 25th constitutional amendments were the subject matter of challenge before an even larger bench and this larger bench is the famous judgment, most famous judgment of His Holiness Kesavananda Bharati. Now, here again, it was happenstance which made Nani Palkhivala the person who led the argument in this case. So many things happened, so many important things happen by happenstance. Chief Justice John Marshal became Chief Justice by happenstance. President Adams, the second President of the United States, wanted to appoint John Jay after the third Chief Justice left and John Jay said no. After that a senior judge's name came up, and again President Adams said no. And he was conversing with his then Secretary of State, which is John Marshall himself, as to who should then be appointed and he suddenly turns and looks at him like this and says, "Sir, why not you?" And this is what actually happened. So, Marshall then became Chief Justice in this off-hand kind of way, ruled the Supreme Court for 34 long years and laid down American Constitutional Law as we know it. Equally, P. V. Narsimha Rao, most of you will know how he became Prime Minister. He packed his bags to go and he was suddenly pulled out of a closet, like a turkish sultan

was from the cage in the old days, and was told that now he will be Prime Minister and he got the shock of his life and look what he did for this country. So, happenstance equally led to Nani Palkhivala arguing this mammoth case. The original arguments were to be led by none other than M C. Chagla, our great Chief Justice at the Bombay High Court. And M. C. Chagla was then an old man, so he felt that the burden would be too great. So, he consulted C. K. Daphtary, another great legal luminary and our Ex-Attorney General, and asked him why don't you take on this burden. Equally Daphtary said no. And then both of them said, the only person who could be requested to do this is Nani Palkhivala. So, Nani was requested. And when Nani was requested he first said no, it will take too long, I have so many other onerous things, etc., but then fortunately for us, these two gentlemen persuaded him. And he argued for some 32 out of 66 days. Imagine! 66 days of argument. Arguments went all over the world. They cited from Constitutions all over the world. Because now what was at stake was no longer the Golak Nath case. All of the 13 judges told Mr. Palkhivala as he started, "forget Golak Nath. Please argue on what the word 'amendment' means in Article 368." So, the entire focus, therefore, shifted to an implied limitation/basic structure argument. And here again, Nani was told by his juniors in one of the very first few conferences that there is no court in the world that has struck down, ever struck down a constitutional amendment. So, he was faced with this because if a judge asks, "all very well, I mean, your theories are good but which other court has done this?", the answer is, no other court has done this. So, what did Nani have with him? He only had an article by a German professor called Dieter Konrad of Heidelberg University. Now, this professor was somebody who had lived in Nazi Germany, suffered in Nazi Germany, and seen the

Constitutions of Germany and Japan post-World War II and the fact that fundamental rights were considered eternal, inviolable, inalienable, and were kept away from majority governments. He said, unfortunately in India there is no such express Article like 11 of the Japanese Constitution, but, according to him, a doctrine of implied limitations ought to be put or presented before a Supreme Court. And he said, almost prophetically, and this was said way back in 1965 mind you, he said almost prophetically that look, none of you have been faced with an extreme amendment made yet. He said when there is something Hitlerian in the amendment, then you will know. And when that Hitlerian amendment comes, then implied limitations will become something real. And he gave three examples. He said, suppose, for example, Article 21 which is the single most important fundamental right that you and I have which is of life and personal liberty, is taken away. Under the present dispensation, two-thirds of the two houses can take it away, where is the difficulty? Suppose again, we were to hand back our country to a Mughal emperor or hand it back to the British, this could be done constitutionally, no problem. And equally, suppose, we were to give the power to amend to the executive, we could have a constitutional amendment saying, “forget the legislature, forget these two-thirds, forget everything, just say the power is with the President to be aided and advised by the Prime Minister.” Look at the examples he gave! And he said, therefore, with these examples, the very width of the power would show that there are implied limitations to it. So, this is what Nani Palkhivala went to court with. And even though he did not succeed on implied limitations, he succeeded on what we call ‘basic structure’ today. Now, what was the basic structure of the Constitution according to Nani Palkhivala? Fortunately, we have his arguments with us. He took the

basic structure essentially from the Preamble and from Article 368 which is the amendment article itself. He said you have 12 such essential or basic features which stare one in the face and which cannot be touched or cannot be damaged. You may add to them, but you cannot damage or destroy them by a constituent power such as we have. The first is the supremacy of the Constitution itself. We must not forget that the Constitution has laid down 3 organs under it - legislative, executive and judicial. The legislative organ cannot arrogate to itself something beyond or cannot rise above its source to say, that I will efface the very Constitution which gives me this power. So, the first thing that he said was supremacy of the Constitution. The second thing was the sovereignty of the nation. Now here, like Dieter Konrad, in that article, he actually argued that you could give this country over to a foreign power. If I may venture to give my own example, it's not something that is that far-fetched. Suppose the princes who have also become politicians, become Chief Ministers, etc., were to band together in one particular political party, and suppose, those princes were then to say, having won the election, that we will amend the Constitution and have something like a Commonwealth of Australia Act. Because, as you know Australia again is a democratically governed country but it owes its allegiance to the Queen. So, suppose we were to say, that democracy will continue, everything will continue, but we still prefer monarchy as a concept because we ourselves are princes, so why not have the Queen's suzerainty as in the old days? Now the answer to this can only be that it is part of the basic structure of your Constitution that you are sovereign in yourself and that therefore, this sovereignty cannot be bartered away or parted or given to anybody else. Equally, you can have another example, which he brought up in that case. Article 83 says that the life of the

Lok Sabha will be five years. You can unilaterally extend that life to 10 years. Nothing prevented you, Parliament, in your constituent capacity, if you have the necessary two-thirds. So, suppose every five years, instead of facing an election, you said, no, we continue it for another five years. What was wrong? Nothing was wrong. You could do it under Article 368, you could do it without going to the states. The only answer would be that, sorry, you cannot do it because you will impact the basic structure of our Constitution, which is, that you will have free and fair elections every five years. Now another example, you may well say that look, adult franchise has been recognized from the beginning. It was 21 years, it was reduced to 18 years. Why not go back to the old Government of India Act system, which is, only taxpayers and/or only those persons who are BAs or B.Sc. at least, can vote? Nothing stops you from doing this. All that stops you is again the fact that universal adult franchise is a basic feature of your Constitution, nothing else would stop. Now these and another lovely example that he gave, under this 31C, as enacted, because it included 19 being wiped out the moment a law was framed under Pope Innocent's directive principle. Suppose you nationalize the press, no difficulty again, constitutionally speaking. Go ahead and say, "look, according to us, false news is rampant, why have a so called free press, the press tells us everything that's false every morning, so why not have one government owned press which will tell us the truth." So these, and many of the other examples that he gave, shook the bench, and he had 12 such features which he listed, 7 or 8 from the Preamble and 3 or 4 from 368 itself, and finally, again by a razor thin majority of 7:6, what was laid down was that there is such a thing as the basic structure of the Constitution, which you cannot destroy or tamper with, you the government of the day having a two-third majority

in the Parliament. And what was important was that this razor thin majority was only because one learned judge, Justice Khanna, who was the pivot vote, so to speak, accepted the doctrine but then also accepted that 31C, as added, was valid. The other 6, consistently with the basic structure doctrine, said that you cannot put a directive principle above a fundamental right, the whole object then of the two chapters goes. It is like two wheels of a chariot. One wheel has a puncture, how will the chariot go forward, how will the car go forward? You can't puncture one wheel. The means have to be as good to secure the ends prescribed. But anyway, our Constitutional history, therefore, is that by a razor thin majority, basic structure was laid down and used in that very judgment itself for the first time. How was it used? 31C itself had a paragraph which says that no court can even go into whether the law is actually made in pursuance of this directive principle or not. There Justice Khanna said, "No, this is going too far, judicial review must remain open, it should be open for us to see that your law is actually made in pursuance of this directive, if it's not, it doesn't receive protection". So anyway, basic structure was used to strike down that little portion of 31C for the first time. One didn't have to wait long to see that what Dieter Konrad said in 1965 would actually happen. And what actually happened was that Indira Gandhi, as you all know, lost her election in the Allahabad High Court and she clamped an emergency as a result. Now, she also moved what was called the 39th Amendment Act at that point of time and what did this 39th Amendment do? In essence it put the Prime Minister and the Speaker of the Lok Sabha above the law. How did it do so? It said that suppose you have a High Court which has struck down your election, that particular striking down will now be tried before the Supreme Court by a law yet to be framed. The old parliamentary law, which is the

Representation of the People Act, will not apply to it and will never be deemed to have applied. So, there will be a law now which is yet to be framed, not framed. The Supreme Court will dispose of your petition in conformity with this law, which is yet to be framed. So what are you told, in essence, you are told that the Supreme Court will allow your appeal without applying any law whatsoever. So Dieter Konrad's extreme constitutional amendment took place for the first time, and imagine, it came before five learned judges. Four of these judges were minority judges in Kesavananda. Four of them said there is nothing like basic structure, such a law could pass. Each one of those four struck down this particular law, and this happened within a period of two years from Kesavananda. Now, each one struck it down on a different ground. Chief Justice Ray, who was a minority judge there, said that if you apply no law, the rule of law gets offended. The rule of law is part and parcel of your basic structure. Justice Matthew, who in Kesavananda said "I have wrestled with this theory of implied limitation argued by Palkhivala like Jacob in the Old Testament, but unfortunately not been able to arrive at any positive result", now wrestled with this new amendment, and said that the new amendment was violative of fundamental principles of democracy. Justice Khanna, who was the pivot judge, said free and fair elections have gone to the wind, again part of the basic structure, and Justice Chandrachud, who was equally a dissenting judge in Kesavananda, said "how can you put these two people above the law, the equality principle is directly infracted." Again, one more aspect of the basic structure. So imagine, five judges, four of whom were minority judges in Kesavananda, actually applied what Dieter Konrad said you would apply when there would be an extreme constitutional amendment to strike down this law. And in comes Nani Palkhivala again, at this

juncture, to save basic structure. How did this happen? Within 10 days, it's amazing, within 10 days of this judgment, in Indira Gandhi's case, striking down this 39th amendment, Chief Justice Ray constituted a 13- Judge bench. Nobody knew how this 13-Judge bench was constituted, it was a bolt from the blue. Palkhivala was told this and he was told "look all the hard work you put in in Kesavananda will go to naught, so please come back to save it." He came back, and he apparently argued before this new 13-Judge bench for two full days. People who saw this performance said it was probably the greatest performance by any advocate ever and, fortunately for him, he had the 41st Constitutional Amendment Bill. It had not become an Act yet, and was in the wings to become one more extreme amendment. Now what was this Bill? This Bill was that if you are the President, Vice President, Prime Minister or Governor, mind you, and Palkhivala said, "you can be a Governor even for one day because there is no fixed term." What happens then is that, every crime that you have ever committed, you cannot be tried for, for the rest of your life. So, he said, "become a Governor for one day and then do whatever you feel like, you are beyond the law." This brings to mind, (of course, my friend Khushroo Suntook will know the Opera) Verdi's Un giorno di regno, his second Opera which was a flop, which is that you are king for one day. It also brings to mind the famous story of Emperor Humayun. Humayun, after the battle of Chausa, which he fought against Sher Shah Suri and lost in 1541, was crossing a river and was about to drown. At that point a bistiwala - water carrier - jumped in, caught hold of the emperor, and dumped his bisti and took the emperor on his shoulders to safety. So the emperor being grateful said, "I will make you emperor for one day," and when he came back from exile, he stuck to his promise. So the bistiwala was made emperor for

one day, made to sit on the throne-on the takht - and issued some orders - farmans - etc. all of which were carried out by the State. So we come back to this, you are governor for one day and everything gets wiped out-clean slate-it's as if you dipped yourself in the Ganges and out you go from the crime net. So fortunately, he was able to point out examples like this. Now eight of these 13 judges were new judges. So they were new to this, they were asking questions. At one point, one question was asked and the Chief Justice had to answer. Who has constituted this bench? Who has asked for this bench to start with? So he said, "you have", to Palkhivala. So Palkhivala said "I wouldn't, why should I ask for it, if I ask for it my basic structure doctrine gets imperilled, I have not asked for it." He said, "very well, the State of Tamil Nadu has asked for it." Fortunately, the Advocate General, who was Govind Swaminathan, got up and said, "I have done nothing of the kind, we stand by this judgment." So the Chief Justice then said, "All right maybe some other state government." At which point, Shankar Thakore got up for the State of Gujarat and said, "We have not asked for it." So, all the judges realized that it was really Chief Justice Ray himself who wanted somehow or the other, to get Kesavananda Bharti overturned. Fortunately, Palkhivala's performance was such, aided and abetted by one more extreme amendment which was on the anvil, that the Chief Justice came on the third day, said, "Bench dissolved", and walked out. Now this was the second occasion on which Nani Palkhivala saved the citizenry of this country.

One more was yet to come in which I was involved. Now let me tell you how. What happened was, that the emergency, as you know, got lifted. The Janata government came in. The 42nd Amendment Act had been passed by Mrs. Gandhi, which took away or impacted basic structure down

the line. Ambassador Palkhivala, as he was at this time, he was in the United States, swore that when he demitted office and came back as a citizen, that he would get struck down, in a court of law, what the Janata government could not do in order to overturn the 42nd Amendment. And what the Janata government could not overturn in the 42nd Amendment, were two extremely pernicious Articles. One was, the doing away with Kesavananda Bharati, this time not judicially, but legislatively. How was that purported to be done? You had Article 368 (4) and (5) now added by the 42nd Amendment. What did (4) say? (4) said, the moment a constitutional amendment is passed, no court can judicially review the same. So, out goes the court; it can not touch a constitutional amendment. And (5) said, there is no limit whatsoever on the constituent power. Which means, out goes basic structure. So this is what 368 (4) and (5), which remained after the 44th Amendment, was in our Constitution. Equally, you had a new Article 31-C now. If you remember, the old Article 31-C was only Pope Innocent's two directive principles. Now, 31-C replaced this with all directive principles, so that the moment there is a law framed in pursuance of any directive principle, out goes your equality right, out go your 7 freedoms under Article 19, and out go your property rights under Article 31 which went out anyway, being repealed by the Janata regime.

So, Palkhivala promised that he would get these two pernicious Articles struck down. He comes back to India. And I was just out of law college. I must've been 2-3 months in the profession. And Jimmy Dadachanji, the doyen of solicitors of yesteryear, walked in and said that, "I will give you a brief which you will never forget. It is an unpaid brief, but you will be the only person assisting Nani in this particular case", and he gave me the background,

etc. And we picked up a petition called Minerva Mills. Something like his Holiness Kesavananda Bharati, which was just picked up out of the blue. Nobody had seen this gentleman, but anyway, 13 judges deliberated and decided on it. A similar thing happened here. Minerva Mills concerned the Sick Textile Nationalization Act of 1974 which was an Act passed under the old 31-C. So, it had nothing to do with the amended 31-C. And this was brought to the fore pretty early in the arguments. Nani had to get over this. So he got over it by saying, “Look, basic structure has gone, your judicial review power has gone”. Nothing affects a judge more than for a judge to be told that you don’t have the power to do X or Y. My brethren will bear me out. Nobody can tell us, “You don’t have this power!” So, he played this up and said, “You don’t have the power now.” “Alright, we don’t have this power, so we must go into it.” So anyway, they went into it. And the genius of this man, I saw day after day. And what put him apart from any other advocate of the day, if I may put it in my own language, is the fact that for every word that an advocate would use, he would invariably use the simplest. If you had a thesaurus which gave you 6 words, he’d choose the simplest. Second, he was extremely clear in what he said. And third, he buttressed what he said with examples, one after the other.

Now I’ll give you an example of how he attacked the new 31-C. He said, “Article 31-C has turned the Constitution on its head (full stop). Whereas fundamental rights are enforceable in courts of law, they have been rendered unenforceable (full stop). And whereas directive principles of state policy are not meant to be enforced in courts of law, they are now enforceable over and above the head of fundamental rights.” Just imagine! These three pithy sentences bring out the entire fallacy in Article 31-C

better than anything else. I remember at one stage of this mammoth argument - again, it lasted for a month, we had a garrulous judge called Untwalia, a very fine judge. And he kept asking Palkhivala questions, and then at one point he said, “Look, you have been giving us harangue after harangue about fundamental rights. What about socialism?” And then he went into a harangue of his own on socialism. So, Palkhivala, who was nervous and he kept on beating his cheek until finally he says, “Has your Lordship quite finished?” He was a very polite man. “Yes I have finished.” So he said, “Not even a LUNATIC” (he yelled this word) and everybody got up with a start, “would ever jump the wall from West Berlin to East Berlin.” Now, this was the kind of advocate this man was. He could demolish and destroy something that was built up over days in one sentence. And he gave examples which destroyed things like this; utterly destroyed things like this. Now, I must tell you that Minerva Mills was a judgment where 4 out of 5 judges struck down the new Article 31-C. All 5 judges, including Justice Bhagwati, who was in the minority qua Article 31-C, struck down 368 (4) and (5). So, this was the second time Nani Palkhivala saved basic structure. And, it is thanks to this doctrine that every constitutional amendment, that, in Dieter Konrad’s words was extreme in nature, has then been struck down.

After this, we have had several examples. We have had the example in Sambamurthy’s case of Article 371-D (5) struck down. Now what was this provision? This provision set up an Administrative Tribunal to decide matters between the government in Andhra Pradesh and government employees. Suppose the tribunal renders a judgment in favour of the employee, under sub-Article 5, it would be open to the State Government as a party to the lis, to modify, annul and do whatever it wanted with

the Administrative Tribunal Order. One more extreme constitutional amendment was struck down using basic structure. Chandrakumar's judgment comes later in 1997. Again a remnant of the 42nd Amendment in tribunalization. Here again, when Article 323 A &B sought to do away with the High Court's powers of issuing high prerogative writs under a very important Article 226 of our Constitution. Again it said that this amendment impacts judicial review. Struck down! And so on and so forth, until you come to the very recent 99th Amendment, which was struck down by 5 judges of our Court saying, "Sorry, this so called independent judicial commission impacts appointment of judges, etc. It must remain with the judiciary. Bad, because it interferes with the independence of the judiciary." Not only had this doctrine been used, but, with any majoritarian government, in future as well, this is what ultimately and alone will come to the aid of the citizenry.

Just the other day, I was listening to a very interesting speech that was given by the young Nani Palkhivala, at the time the 25th Amendment was passed in 1971. And Rajagopalachari, who was our last Governor General, presided over the function. He was 93 years old. His speech of 8 minutes was even better than Palkhivala's. In those 8 minutes, he said something about the then Prime Minister Mrs. Gandhi, which was derogatory. So there was a muted kind of clap. He said, "Why are you afraid? All of you have a spirit which is indestructible. Clap loudly, what is wrong with you!" Another thing he said was, "Mr. Palkhivala will no doubt now challenge this 25th Amendment. I don't know what kind of judges are appointed these days, but, I take it that they will be true to their oath." Fortunately, they were, and you had basic structure as a result. But Palkhivala, in this speech had said, that eternal vigilance is the only thing that will

keep these majoritarian governments from harassing the citizen. And according to me, unless the lamp of liberty burns bright and hard in every citizen's mind and heart, no basic structure, no court, no doctrine will be of any help to anybody! Thank you very much.

* *The booklet is issued for public education. The views expressed in the booklet are those of the author.*

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