

Is Good Governance a Right of a Citizen in Democracy?

Justice N. Santosh Hegde
(Retd.)

**The Twelfth Nani A. Palkhivala
Memorial Lecture**

September 2015



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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Miss S. K. Bharucha, *Trustee*

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INTRODUCTION

The Nani A. Palkhivala Memorial Trust was privileged to have Mr. Justice N. Santosh Hegde, former Judge, Supreme Court of India and former Lokayukta, State of Karnataka, deliver the twelfth Nani A. Palkhivala Memorial Lecture on the subject “Is Good Governance a Right of a Citizen in Democracy?”

In a hard-hitting lecture, Mr. Justice Hegde talks about the failure of the Executive to provide an administration that is sensitive and responsive to the needs of the people and the widespread existence of corruption at all levels. As he says, “When one speaks of corruption and maladministration it is not only a question of degree or percentage of corruption in administration, but it is about the lack of probity which is the foundation of good governance”.

In examining the causes of this malaise, he makes an interesting and perceptive distinction. He says that the Executive, which is one of the three main pillars of our Constitution, can be broadly divided into the political executive (i.e. the Cabinet) and the bureaucracy who actually should administer the country at various levels in their hierarchy. While the members of bureaucracy are selected with prescribed educational qualification and through competitive examination, the political executive, that is, the Cabinet, is selected from the elected representatives, to whom no educational qualification or experience is prescribed. Though political executive and bureaucrats have to work independently in their own areas, in fact, the political executive has acquired excessive domination over the bureaucracy which for its own reasons the bureaucracy has not resisted. Allied to this is the fact that though the Constitution contemplated an independent legislative, executive and judiciary, “the

legislative and bureaucracy seem to have merged into one group like conjoined twins, one supported by the other”.

The issues identified by Mr. Justice Hegde including the issue of corruption have often been raised, including as he has pointed out, by the highest authorities in the country. However, no remedial measures have been taken by successive governments. If, as he says, good governance is our fundamental right, it is necessary that all sections of the public should raise their voice to demand it.

In publishing Mr. Justice Hegde’s lecture and giving it wide distribution, the Trust hopes that it will create within the public greater awareness of the issues which the lecture has identified.

Y.H. Malegam
Chairman

November 21, 2015 Nani A. Palkhivala Memorial Trust



NANI A. PALKHIVALA

16th January 1920 - 11th December 2002

NANI ARDESHIR PALKHIVALA

In 1972-73 the full Bench of thirteen judges of the Supreme Court of India heard with rapt attention a handsome lawyer argue for five months before them that the Constitution of India, which guaranteed fundamental freedoms to the people, was supreme, and Parliament had no power to abridge those rights. The Judges peppered him with questions. A jam-packed Court, corridors overflowing with members of the Bar and people who had come from far-away places just to hear the lawyer argue, were thrilled to hear him quote in reply, chapter and verse from the U.S., Irish, Canadian, Australian and other democratic Constitutions of the world.

Finally came the judgment in April 1973 in *Kesavananda Bharati v. State of Kerala*, popularly known as the *Fundamental Rights case*. The historic pronouncement was that though Parliament could amend the Constitution, it had no right to alter the basic structure of it.

The doyen of Indian journalists, Durga Das, congratulated the lawyer: "You have salvaged something precious from the wreck of the Constitutional structure which politicians have razed to the ground." This "something precious" - the sanctity of "the basic structure" of the Constitution - saved India from going down the totalitarian way during the dark days of the Emergency (1975-77) imposed by Mrs. Indira Gandhi.

Soon after the proclamation of the Emergency on 25th June 1975, the Government of India sought to get the judgment reversed in an atmosphere of covert terrorization of the judiciary, rigorous press censorship, and mass arrests without trial, so as to pave the way for the suspension of fundamental freedoms and establishment of a totalitarian state. Once again, braving the rulers' wrath, this lawyer came to the defence of the nameless citizen. His six-page

proposition before the Supreme Court and arguments extending over two days were so convincing, that the Bench was dissolved and the Court dropped the matter altogether. Commented a Judge: “Never before in the history of the Court has there been a performance like that. With his passionate plea for human freedoms and irrefutable logic, he convinced the Court that the earlier Kesavananda Bharati case judgment should not be reversed.”

This man who saved the Indian Constitution for generations unborn, was Nani Ardeshir Palkhivala. His greatness as a lawyer is summed up in the words of Justice H.R. Khanna of the Supreme Court: “If a court were to be made of the ten topmost lawyers of the world, I have no doubt that Mr. Palkhivala’s name would find a prominent mention therein”. The late Prime Minister, Morarji Desai, described him to Barun Gupta, the famous journalist, as “the country’s finest intellectual”. Rajaji described him as, “God’s gift to India”.

Nani A. Palkhivala, was for four decades one of the dominant figures in India’s public life. An outstanding jurist, redoubtable champion of freedom and above all a great humanist.

Born on 16th January 1920, Nani Palkhivala had a brilliant academic career. He stood first class first in both his LL.B., (1943) exams and in the Advocate (Original Side) Examination of the Bombay High Court.

Nani Palkhivala was Senior Advocate, Supreme Court of India; Professor of Law at the Government Law College, Mumbai; Tagore Professor of Law at the Calcutta University; and a Member of the First and Second Law Commissions. He was elected in 1975 an Honorary Member of the Academy of Political Science, New York, in recognition of his “outstanding public service and

distinguished contribution to the advancement of political science.”

Nani Palkhivala argued a number of historical cases in the Courts of India and abroad, including the cases between India and Pakistan before the U.N. Special Tribunal in Geneva and the International Court of Justice at the Hague.

He authored a number of books including *The Law and Practice of Income-Tax*, a monumental work, which is the definitive treatise on the subject. His other books included *Taxation in India*, published by the Harvard University in the *World Tax Series*; *The Highest Taxed Nation in the World*; *Our Constitution Defaced and Defiled*; *India's Priceless Heritage*; *We, the People and We, the Nation*.

His expositions on the Union Budget in Mumbai and other places were immensely popular and attracted attendance in excess of 1,00,000. He eloquently espoused the cause for a more rational and equitable tax regime.

Nani Palkhivala was India's Ambassador to the U.S.A. from 1977 to 1979. He was in constant demand during this period and delivered more than 170 speeches in different cities, which included speeches in more than 50 Universities, on subjects as varied as Gandhi, the nuclear issue, human rights, India's foreign policy, civil liberties in India, Indian agriculture, apartheid and the Third World.

Two American Universities – Lawrence University, Wisconsin and Princeton University, New Jersey - bestowed honorary doctorates on him. Princeton was the first to do so on 6th June 1978. The citation reads:

“Defender of constitutional liberties, champion of human rights, he has courageously advanced his conviction that expediency in the name of progress, when at the cost of freedom, is no progress at all, but retrogression. Lawyer,

teacher, author and economic developer, he brings to us as Ambassador of India intelligent good humor, experience, and vision for international understanding. As we see the bonds of trust and respect grow between our two countries, Princeton takes pride in now having one of its own both in New Delhi and in Washington.”

Lawrence University honoured him with a doctorate of Laws on 28th March 1979. The citation said:

“What is human dignity? What rights are fundamental to an open society? What are the limits to political power? Ambassador Palkhivala, you, more than most, have pondered these great questions, and through your achievements have answered them.

As India’s leading author, scholar, teacher and practitioner of constitutional law, you have defended the individual, be he prince or pauper, against the state; you have championed free speech and an unfettered press; you have protected the autonomy of the religious and educational institutions of the minorities; you have fought for the preservation of independent social organizations and multiple centres of civic power.

As past president of the Forum of Free Enterprise and as an industrialist, you have battled stifling economic controls and bureaucratic red tape. You have always believed that even in a poor and developing country, the need for bread is fully compatible with the existence of liberty...

You are also an enlightened patriot and nationalist. You have successfully defended your country’s cause in international disputes before the special tribunal of the United Nations and the World Court at the Hague.

Never more did you live your principles than during the recent 19 month ordeal which India went through in what was called ‘The Emergency’. When those who had eaten

of the insane root, swollen with the pride of absolute political power, threw down the gauntlet, you did not bow or flinch. Under the shadow of near tyranny, at great risk and some cost, you raised the torch of freedom...”

In 1997 Nani Palkhivala was conferred the Dadabhai Naoroji Memorial Award for advancing the interests of India by his contribution towards public education in economic affairs and Constitutional law. In 1998 he was honoured by the Government of India with PADMA VIBHUSHAN. The Mumbai University conferred upon him an honorary Degree of Doctor of Laws (LL.D.) in 1998.

Nani Palkhivala was associated with the Tata group for about four decades. He was Chairman of Tata Consultancy Services, Tata International Ltd., Tata Infotech Ltd., A.C.C. Ltd., and Director of Tata Sons Ltd. He was President of Forum of Free Enterprise from 1968 till 2000, and Chairman of The A. D. Shroff Memorial Trust from 1967 till his death.

MR. JUSTICE N. SANTOSH HEGDE (RETD.)

After graduating in Law from Govt. Law College, Bangalore, Bangalore University, in 1966, he enrolled as an Advocate in Karnataka Bar Council and started legal practice. From February 1984 till August 1998 he was Advocate General of Karnataka State. He was appointed as Additional Solicitor General of India in November 1998 and then as Solicitor-General of India before was elevated directly from the Bar as a Judge of the Supreme Court of India in January 1999. Only three others have been elevated directly from the Bar in the history of the Court. He retired as a Judge of the Supreme Court of India in June 2005.

During 2005-06 Mr. Justice Hegde was Chairman of Telecom Disputes Settlement Appellate Tribunal before being appointed as Lokayukta of Karnataka State on 3rd August 2006. He held this position till he retired. on 2nd August 2011. His tenure as Lokayukta was remarkable. It saw as many as 2350 raids/traps of public servants, elected representatives and top officers in administration. During this period as Lokayukta he also entertained 4932 complaints against mal-administration.

One of the highlights of Mr. Justice Hegde's career was when the Govt. of Karnataka asked him to conduct an investigation into illegal mining in the state between 2000 and 2010. This resulted in the unearthing of an estimated loss of nearly Rs.16,000 crores suffered by the state. His report on this investigation, running into nearly 26,000 pages, also named two former Chief Ministers of the state, including the then Chief Minister, one Minister, irrespective of party affiliation, and 797 officers, both from administrative and police services for being parties to the irregularities. Consequent to this

report, on the advice of Central Empowered Authority, the Supreme Court of India banned mining in Karnataka and has recently given directions to control mining activities in the state. The Court has also directed the CBI to look into the criminality involved in illegal mining in the state and take necessary steps.

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As often quoted, good governance implies an Administration that is sensitive and responsive to needs of the people and is effective in coping with emerging challenges in society by enacting and implementing appropriate laws and policies. It includes strict rules of transparency and accountability. Good governance is centered on a notion of rights as inherently comprising duties. Rulers must be strictly bound by generally accepted norms and controlled by institutions to enforce these requirements.

It is in the above understanding of good governance, I propose to speak on the topic “IS GOOD GOVERNANCE A RIGHT OF A CITIZEN IN DEMOCRACY?”

India fought for its independence not only to be free from foreign domination but also to be governed by ourselves. It wanted a Government of the people, by the people and for the people. Under the Indian Constitution, people

* *The author is a former Judge, Supreme Court of India and former Lokayukta, Karnataka State. The text is based on the 12th Nani A. Palkhivala Memorial Lecture delivered in Mumbai on 1st September 2015, under the auspices of Nani A. Palkhivala Memorial Trust.*

who administer the country have a special status. They have been recognized as the 'Executive'. The Executive, the Legislature and the Judiciary form the three main pillars of our Constitution.

The Constitution of India envisages an independent Executive. Its connection with the Legislature is only through the Cabinet. The duties and powers to be exercised by the Executive are governed by the Transaction of Business Rules made under Articles 77 and 166 of the Constitution. The Executive can be broadly divided as the political executive (i.e. the Cabinet) and the executives who actually should administer the Country at various levels in their hierarchy. To give good governance, the Constitution provides for separate administrative services both at the Centre and at the State levels. The members of the bureaucracy are selected with prescribed educational qualification and through competitive examination. Thereafter they are trained in the art of public administration. The political executive, which is the cabinet, is selected from the elected representatives, for whom no educational qualification or experience is prescribed. They come to the legislature through elections and on being appointed to the Cabinet as Ministers become the political executive. Obviously, this type of dual executive system is adopted by the Indian Constitution with a view to give 'the Executive' a people friendly look. In their own areas political executives and bureaucrats have to work independently. But political executive by its presumed popularity has acquired excessive dominance by misusing the Transaction of Business Rules. If these rules were to be used only for the object for which they were adopted, then the bureaucracy would have been the true administrators and would have been instrumental in providing good administration.

Over the years political dominance in the guise of representing people's will has overshadowed the importance of bureaucracy. This dominance is not resisted by many in bureaucracy. On the contrary many bureaucrats willingly or meekly submitted to this dominance because of which good governance has suffered.

Lack of good governance was perceived by the country as far back as in 1960's itself. Therefore, then the Government referred the problem to the Administrative Reforms Commission which in its report submitted in 1964, among other recommendations also suggested creation of any Indian type of Ombudsman called 'Lokpal' at the Centre and Lokayukta at the States' level. However, till date no Lokpal is appointed, though a law is enacted. Some States have enacted Lokayukta Acts. Need for the existence of this institution is reiterated by the II Administrative Reforms Commission in its report made in the year 2007.

Good governance can be provided by public servants only if they realize that they are not masters of the people, but they are only servants of the people and that they owe a duty to the people. For this they will have to follow certain principles of 'Raj Dharma'. The ingredients of 'Raj Dharma' are enumerated in a report prepared by Lord Nolan of U.K. which is known as 'Standards in Public Life'. This report, though prepared with reference to governance in Great Britain, the same is *ipso facto* applicable to governance in India.

Lord Nolan has laid down seven principles of Public Life and they are:-

"Selflessness i.e.,

Holders of public office should take decisions solely in terms of the public interest. They should not do so

in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity, i.e.

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

Objectivity, i.e.,

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability, i.e.,

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness, i.e.,

Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty, i.e.,

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership, i.e.,

Holders of public office should promote and support these principles by leadership and example.”

The above principles were accepted by the Hon'ble Supreme Court of India in its judgment in the case of

Vineet Narain v/s. Union of India (AIR 1998 SC 889). While accepting the above principles, the Supreme Court stated:

“These principles of public life are of general application in every democracy. And one is expected to bear them in mind while scrutinizing conduct of every holder of a public office. It is trite that the holders of the public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated... The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to underdeveloped countries may be subject to the requisite step being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant.”

So said the Apex Court in the above cited case.

In the case of State of Assam v/s. P.C. Mishra (AIR 1966 SC 430), the Supreme Court stated that:

“It is incumbent for each occupant of every high office to be constantly aware that the power invested in the high office he holds is meant to be exercised in public interest and only for public good, and that it is not meant to be used for personal benefit or merely to elevate the personal status of the current holder of that office.

Constant awareness of the nature of this power and the purpose for which it is meant would prevent situations leading to clash of egos and the resultant fall out detrimental to public interest”.

There is no doubt, under the Indian Constitution, the Executive, both political and bureaucratic are very powerful organs. Still they should always bear in mind their obligation to the people, as also the prophetic words *“Be you ever so high, the law is above you”.*

Having analyzed these dos and don'ts by the administration in good governance, let me consider whether the above principles laid down by Lord Nolan are followed by the Administration in the present day context. The public perception is that there is lack of ethics and fairness in governance both at the Centre and at the State. The lack of ethics and fairness in governance is felt not only by the common man, but also by the people holding very high offices. For example, none other than the then Hon'ble Prime Minister of this Country, on 15th April 2007, addressing the 2006 batch of IAS probationers stated, (see Deccan Herald dated 16/5/2007) *“the barriers of administrative and political corruption. should be tackled by the upcoming bureaucrats and quality of governance be improved at all levels to build an India ‘worthy of our dreams’. If there are barriers in our Country, in our good governance, in our governance processes, it is a fact there is lot of corruption, both at the political level and at the administrative level. We must take it head on”.*

In 2009, the very same former Prime Minister inaugurating the Conference of CBI stated that there is large scale corruption, even in high places and many big fishes are escaping and they should be caught and severely punished at the earliest. Obviously, the said Hon'ble Prime Minister was talking about the corruption in

Governance. These words of the Hon'ble Prime Minister are certainly not complementary and he was certainly speaking with all responsibility. His words indicate that apart from lack of good governance, there is corruption in the administration.

When one speaks of corruption and maladministration, it is not only a question of degree or percentage of corruption in administration but it is about the lack of probity which is the foundation of good governance.

The former Governor of Karnataka Shri T.N. Chaturvedi, who was a bureaucrat himself, in his last Republic Day address said *“Corruption is not merely a dirty word. It describes a dirty act. We need to have a policy of zero tolerance towards all acts of corruption. We need to assert that there is no difference between a small act of corruption and major instances of malfeasance. There is no such thing as petty corruption - there is corruption, per se. It is necessary to strike at the very root of corruption, for if we allow its tentacles to grow we will be firmly in its grip, with no way out. This is a very real danger. Corruption in any walks of life can corrode, decay and annihilate our democratic system. We can ignore or minimize its evil effects at our own risk. Corruption and unrefuted allegations of misuse of power for self and pelf do shake the faith of ordinary citizens in our democratic system.”*

The views expressed by the then Prime Minister of the Country and the then Chief Executive of the State truly reflects the perception of the common man also.

The Hon'ble former Prime Minister has spoken, the then Governor of a State has spoken, many leaders holding high political offices have spoken about corruption. But who amongst them will bell the cat? Certainly they cannot expect an ordinary citizen to take steps to bring

about this change without there being a will power on the part of the people in governance to tackle corruption. It is one thing to talk of corruption and maladministration and another to act against it, but what action have the people at the helm of affairs taken to stem the rot. The Country does not need to be reminded time and again about this evil. The Country wants to know what is being done about it.

Having understood that there is corruption in administration, both political and bureaucratic, let me recapitulate some instances of corruption which must have affected directly the economy of the country and indirectly life of an ordinary man. In 2008, it is reported in the newspapers that for the year 2006-07, out of many lakhs of crores released by the Government of India, for the benefit of the rural poor, a sum of Rs.50,000 crores has not been accounted for. This report was based on a report submitted by the CAG. In the recent past, it is reported by the CAG that a sum of Rs.70,000 crores have been lost in the Commonwealth Games scam. The said CAG has also reported that the country's exchequer lost Rs.1,76,000 crores in the 2G scam. Added to that, the loss suffered by the country in the Coalgate scam is a sum of Rs.1,86,000 crores. This is between 2010 and 2012. In the year 1988, the then Prime Minister of India had stated that out of every rupee the Government gives for the benefit of poor, the beneficiary gets only 15 paise. Assuming against reality, if 15% is all that the Government spends, then it is high time that a mechanism should be evolved to prevent this type of siphoning of public funds. As stated above, in spite of 51 years after the recommendations of the first Administrative Reforms Commission, no Lokpal has been set up at the Center. Certainly, the agitation initiated by Anna Hazare Ji, has had some effect. If

nothing else, a law for creating an institution of Lokpal has been passed, though the appointment of Lokpal has not taken place.

Let me try to find out briefly the cause of this malice. Our Constitution contemplated an independent legislature, executive and judiciary. Over the years, for reasons well-known, the legislature and bureaucracy seem to have merged into one group like conjoined twins, one supported by the other. If our constitutional organ like the executive is independent and honest, there could be no political corruption and vice-versa. If there is corruption as stated by the then Prime Minister in 2009, which I believe to be true, then it is because of the collective greed of the elected representatives and bureaucrats.

Originally when Indian Penal Code was drafted, it contained provisions against almost all crimes that were perceived by society which included corruption. When a particular crime grows out of proportion, the legislature makes special laws to fight the same like Anti-Terrorist Act, Offences against Women, etc. In 1947 itself the Government of that time perceived that corruption had reached a stage which required a special law other than the Penal Code to deal with it. Hence, the Prevention of Corruption Act, 1947 was codified. With the tremendous growth in corruption and number of people involved in corruption, one would have expected the law makers to make stricter anti corruption laws. Alas, that did not happen. But what has happened on 23rd December 2008 is something unbelievable. While approving 17 Bills in 12 minutes, the Lok Sabha along with other 16 Bills approved the amendments to Prevention of Corruption Act, which if passed would have literally nullified the powers of the prosecuting agency, but fortunately the bill did not go to the Rajya Sabha because of public out cry.

One of the commonest method by which a bureaucrat could be made subservient or even corrupt is by way of 'transfer'. Today, Government servants are used to 'cushy' postings which is a gift of political bosses. Transferring officials is not and should not be the prerogative of political bosses. It is a potent weapon by which one can control the honest bureaucrat or reward a dishonest one. I strongly believe that the power of transfer should be vested with the bureaucracy itself and politicians should not have any role to play in it. Way back in 2007 itself, I had written to the Administrative Reforms Commission about the evils of transfer in the hands of political bosses. But nothing seems to have happened except reproducing my letter in one of its reports.

Transparency and accountability are other factors which make or mar good governance. Unfortunately - both are lacking inspite of Right to Information Act coming into force.

Good Governance requires foresight and master planning. Administration should be able to foresee natural calamities and provide measures in advance to face such calamities. But today, as is well said, any calamity is a boon to large section of governance. Cynics say, in a democracy people get the Government they deserve. I do not believe in it. May be in life many events happen, over which we may not have any control. But in a democracy many changes can be achieved if people fight for it collectively. According to me, good governance is our fundamental right. Collective voice for this will have its own effect. Everyone should raise their voice about it. If that happens, one day in future I am sure good governance will be the rule of the day. No doubt, an eternal vigilance is the price one has to

pay in democracy and that eternal vigilance should be a collective one.

In conclusion, I state if one reads the assurances given to the citizens of this country, in the Constitution of India, it is clear that Good Governance, even if it does not come under Part III of the Constitution, is certainly a basic right contemplated under the Constitution of India.

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

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NANI A. PALKHIVALA MEMORIAL LECTURES

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12.1.2005	Prerequisites of Freedom	Arun Shourie
16.1.2006	Separation of Powers: The Myth & the Reality	Dr. Bimal Jalan
15.1.2007	Making Globalization work for India	N. R. Narayana Murthy
11.1.2008	Judicial Activism - Boon or Bane?	Soli J. Sorabjee
5.10.2009	The Emerging Challenges to Civil Society	P. Chidambaram
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