MK NAMBYAR MEMORIAL LECTURE

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"FORESIGHTED MR M K NAMBYAR - CONSTITUTIONAL JOURNEYS BEYOND ORIGINAL INTENT"

1. A very good evening- Mr KK Venugopal, Senior Advocate, Mr CS Vaidyanathan, Senior Advocate, family of Mr MK Nambyar, distinguished judges, members of the bar, ladies and gentlemen.

2. It is a pleasure and honour to be speaking in the memory of the inimitable Meloth Krishnan Nambyar, someone who has been an inspiration to generations of lawyers and judges including my humble self. Born in 1898, in the present-day Kasargod district, Kerala, Mr Nambyar stepped into the legal profession in the 1920s. He joined the chambers of the revered Sir CP Ramaswamy Iyer, a stalwart at the Madras Bar. Sir Ramaswamy was the force behind the progressive Temple Entry Proclamation of 1936, which ended caste-based restrictions on temple entry in the then princely state of Travancore. Deeply influenced by the principles his mentor espoused, Mr Nambyar embodied them through the course of his journey- both professional and personal. Mr Nambyar went on to join the Mangalore District and Sessions Bar in 1924. He obtained his masters in Constitutional and Administrative law from the London School of Economics and was called to the Bar from Lincoln's Inn.

3. At the cusp of India's independence, Mr Nambyar moved his practice to Madras. This was of course only a step before he would be catapulted to independent India's Supreme Court, arguing in a first-ever interpretative examination of the newly enacted constitutional guarantees. Mr Nambyar famously addressed the Court in ***AK***

Gopalan[1] with nothing but the bare text of the Constitution in his hands. His interpretation of the sweep of our fundamental rights was resisted initially. French poet and author Victor Hugo said that *'nothing is more powerful than an idea whose time has come'.* Mr Nambyar's interpretation of the Constitution is an exemplar of an idea whose time eventually came. His exposition of the law was significantly ahead of its times and became a part of the law much after he had envisaged it.

4. After his deeply impactful appearance before the Supreme Court in ***AK Gopalan****,* Mr Nambyar's practice at the Madras High Court soared. His jam-packed schedule frequently saw him on his feet between many courtrooms, often in a single day- walking through the famously long corridors of the High Court. Legend has it that if one of his juniors would apprise the bench that Mr Nambyar was on his way in one of these corridors, the judges would adjourn the matter to another day. In a befitting ode to his legacy of constitutional exploration, we must continue conversations about the transformative potential of our Constitution.

5. Legacies are not a function of novelty alone. The reason we are discussing MK Nambyar's ideas today is not only because they were new and unheard of when he first presented them, which they very much were. The primary reason is that his ideas and interpretations have stood the test of time. They continued to be relevant through social, legal and political changes until they were elevated from the pages of history and embedded in the legal framework. Legacies of constitutional visionaries such as Mr Nambyar's, are embedded in the larger legacy of the Constitution itself.

6. In my lecture today, I posit that Nambyar's journey is integral to the journey of our Constitution itself. First, I will make a brief reference to

[1] AIR 1950 SC 27

the enduring legacy of our Constitution. Second, I will argue that while a significant part of this legacy is attributable to the foresight of the framers of our Constitution, there is more to it. The Constitution continues to be relevant because it is sensitive to the changing needs of its constituents. Third, I will attempt to explore how Mr Nambyar's arguments were seminal to this legacy and marked a departure from originalism and shaped our jurisprudence.

Legacy of Constitutions and the role of the framers

7. The Indian Constitution, simply put, exemplifies a bargain between countervailing values. Unlike, say, contractual bargains, constitutional bargains bind not only those who are a part of the framing process, but even those who inherit the Constitution. At its framing, the Constitution carried the hope that it would afford stability and direction to democratic institutions while preserving flexibility to accommodate changing social realities.

8. The framers of the Constitution are crucial to deciding the terms of this bargain. Understandably there is a sense of deference and presumptive validity attached to the process of framing of Constitutions. This deference extends naturally to the framers' views, or at least what are believed to be their views about a constitutional provision. In his work on the American democratic system, *Democracy in America*, **Alexis de Tocqueville** extolled Constitution making as a greater cause of celebration than the independence of the nation itself. He believed that while independence was a routine event, it was in the framing of the Constitution that the country "*showed itself capable of rising for a few moments to that lofty degree of renown ….*"[2]

[2] Alexis de Tocqueville, *Democracy in America*, University of Chicago Press (2002 Reprint).

9. Unlike the American experience, the Indian Constitution was a break from our colonial past and represented the aspirations of a newly independent India. The Constitution was deeply influenced by the values which stemmed from our independence movement and were uniquely Indian. We find examples of this narrative about the exceptionalism of the framers as the force behind the Constitution and its persistence in the Indian context as well- Granville Austin recorded that it was the "charismatic leadership" of the founding fathers of the Constitution that allowed it to work as well as it did.[3] Zachary Elkins et al. have spoken in their work about the endurance of national Constitutions. They argue that a constitution continues "*because it makes sense to those who live under its dictates*[4]". This understanding that the framing of the Constitution is a sanctified, once-in-a-century exercise that epitomises creative social expression merits a somewhat critical consideration.

Originalism and the framers' intent:

10. A sequitur of this veneration appeared in the context of the American Constitution where increasingly, references were being made to the 'original intent of the framers of the Constitution'. The debate between originalism and the idea of a living constitution has been a longstanding and contentious issue in the context of the US Supreme Court – not only among legal scholars but also judges sitting on the bench, At its core, originalism posits that the Constitution's meaning is fixed and should be interpreted based on its original understanding at the time of its adoption, giving primacy to the purported intent of the framers. Proponents of originalism on the bench, such as Justice Antonin Scalia, argue that this approach prevents judges from imposing their own values and biases on the Constitution.

[3] Ibid.
[4] Zakary Elkins et al. The Endurance of National Constitutions, CUP 2009, p 7.

11. On the other hand, the concept of a living constitution suggests that the meaning of the Constitution evolves and should be interpreted in light of changing social values. Proponents of this approach argue that the broad language of the Constitution intentionally allows for flexibility and adaptation to future generations. They contend that originalism is overly rigid and ignores the complexities of modern society.

12. A recent and contentious example of this debate is the decision of the United States Supreme Court in **Dobbs v. Jackson Women's Health Organization** (2022)[5], which overturned the precedent in **Roe v. Wade** (1973)[6]. The majority opinion, written by Justice Samuel Alito, employed an originalist approach in concluding that the right to abortion is not explicitly mentioned in the Constitution and, therefore, not protected. In other words, the view taken by the majority was that the framers of the Constitution never intended to recognise this right. In contrast, dissenting justices argued that the Due Process Clause of the Fourteenth Amendment protects individual liberties, including reproductive autonomy, and that the Constitution's guarantees of liberty and equality should evolve to reflect contemporary understandings of dignity, autonomy, and equality. In this way, a rigid obsequence to the text of the Constitution and the purported intention of the framers, although tempting, can often result in a restrictive reading of citizens' rights.

13. Similarly, in India too there is sound principle behind a historical inquiry of the provisions and the intention of their inclusion by the framers. The discussions in the Constituent Assembly in India were unique in more ways than one. The members of this body represented the socially diverse fabric of the nation. For over 165 days-members of the Assembly discussed threadbare the provisions that now form a part of the Constitution. Often, members of the

[5] 597 U.S. 215.
[6] 410 U.S. 113.

Assembly would propose amendments which involved alternate phrasing of various provisions. These were debated in the Assembly before the members voted on the final text. The debates were recorded for public consumption, offering a rare insight into the minds of the framers- an uncommon phenomenon for constitutional processes across the world.

14. However, such an inquiry should guard against 'originalism' as the primary axis of interpretation. Even a limited inquiry of the "original intention of the framers of the Constitution" must be undertaken with great caution. In one of its dominant forms, "originalism" asserts that those who created the Constitution intended a definite effect and all interpretation of the provisions must, therefore, conform to it. This primacy of the framers' intent is problematic for several reasons.

15. **First,** Originalism wrongly presumes that the intent of the framers can be precisely ascertained. It presumes that history speaks in one voice and this voice is capable of consistent interpretation by different readers. The Constituent Assembly consisted of people with different political and social leanings including socialists, Gandhians, and cultural nationalists. Each one of them had differing and sometimes countervailing views about the dominant philosophy of the Indian Constitution. The voluminous "Constituent Assembly Debates" are a record of all of these varied voices, which are sometimes incompatible with each other. And, therefore, it is often difficult to infer a clear and singular interpretation from the texts of the debates alone.[7]

16. **Second**, Jack M Balkin writes that constitutional principles are often justified by stories about decisions and actions taken in the past. The logic goes- "*we do this now because we did that then*"[8]. Unpacking

[7] Tarunabh Khaitan, Directive Principles and the Expressive Accommodation of Ideological Dissenters, (2018) 16(2) International Journal of Constitutional Law 389-420.
[8] Jack M Balkin, Constitutional Redemption (Harvard University Press 2011).

constitutional questions necessarily entails a story about the past, about hopes, goals and fears. But answering these questions may not necessarily require us to tether ourselves to the elusive original intent of the framers. Should a Constitutional Court freeze the content of constitutional guarantees and provisions to what the 'Founders' perceived? The Constitution was drafted and adopted in a historical context. The vision of the founders was enriched by the histories of oppression and subversion of human rights in India and across the world. The framers were conscious of the widespread abuse of human rights by authoritarian regimes in the two World Wars over two decades. They were equally conscious of the injustice suffered under a colonial regime and the more contemporary horrors of partition. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present in the minds of even the most perspicacious drafters.

17. Bruce Ackerman argues in his work, that 'generations' are the basic unit of constitutional evolution. Constitutional law is created by a "conversation between generations".[9] As the common cliché goes – one cannot step into the same river twice. No two generations are reading the Constitution in the same social, legal or economic context. No generation, including the present, can have a monopoly over solutions or confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy.

18. **Third,** besides subjectivity, the problem with an unreasoned tethering with the framer's intent is that it renders the Constitution susceptible to inflexibility. The Constitution was never meant to be a set of iron-clad *rules* governing the social and legal relations. It was meant to be a broader framework of principles which would

[9] Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution', The Yale Law Journal 93, no. 6 (1984): 1013–1072, 1017

constitute the bedrock of our new political reality. Paradoxically, fixation with the original intent of the framers is contrary to their own vision. Former Judge of the US Supreme Court, Justice Louis Brandeis said that the framers of the US Constitution believed "*courage to be the secret of liberty*". They were not married to only singular interpretations of the constitutional text.

19. A conservative reading of the framers' intent belies their foresight. It was never their intention to lock the provisions of our Constitution in place, for eternity. This would have militated against the necessary flexibility, which is the key for constitutional longevity. The framers hoped that with time, we would acquire greater insight and use that to explore the transformative potential of the Constitution. Dr Ambedkar himself believed that the Constitution was a flexible, workable and resilient document and that its spirit was not the spirit of its founding moment, but rather, its spirit was the "spirit of the Age".[10]

Nambyar's Foresight

20. These criticisms of relying solely on the intent of the framers' have now been widely accepted in Indian constitutional jurisprudence. However, back in the 1950s, with little jurisprudential guidance, Mr Nambyar's foresight was truly remarkable. From arguing the first-ever constitutional decision before the Supreme Court to drawing up the lead petition in **Kesavananda Bharati**, MK Nambyar's journey as a reader of the Constitution can be traced in many a jurisprudential landmark.

21. In 1949, before he began practising before the Supreme Court, Mr Nambyar was defending his clients who had allegedly committed the offence of cheating in Travancore. Since Travancore was considered

[10] "Constitution is not a mere lawyers document, it is a vehicle of Life, and its spirit is always the spirit of Age." — BR Ambedkar, Writings And Speeches: A Ready Reference Manual.

outside ‘British India’ at the time, the Indian Penal Code (IPC) applied to these accused persons only with a prior sanction for prosecution. The accused persons were never granted the prosecution sanction. However, by the intervening Independence of India Act, and consequential accession of Travancore to the Dominion, an amendment to the IPC, the sanction requirement was obviated. Barely a few months old at the Madras Bar, Nambyar challenged the amendments to IPC and argued that notwithstanding those, without a prior sanction before the accession, his clients could not be prosecuted.

22. His argument was rejected by the Court. Yet Nambyar’s position was secured as someone who could link seemingly banal criminal and civil matters with constitutional underpinnings.[11] It was during one of his passionate defences of a death-row convict that Mr Nambyar caught the attention of Mr VG Row- a towering barrister who would serve as the bridge between Nambyar and the first-ever constitutional case of Independent India. Having witnessed Nambyar’s intricate eye for constitutional argument, Row suggested that he handle the case of **AK Gopalan** before the Supreme Court. Nambyar’s reading of due process into Article 21 of the Indian Constitution, while arguing the **AK Gopalan** case, was to become his foremost contribution to Indian constitutional jurisprudence.

23. Let me summarise the facts of the case. AK Gopalan, a prominent leader of the Communist Party of India, was preventively detained in 1941. 6 years later, even as the country gained independence, and all British detainees were liberated, AK Gopalan found himself continuing to be detained. He lamented that once a member of the freedom movement, he was compelled to celebrate independence in a paradoxical, continuous and oppressive detention by Indians and not by the British.[12] VG Row was handling Gopalan’s case before the

[11] AB Tonse v. The King 1949 MWN Cr 45.
[12] AK Gopalan, *In the Cause of the People: Reminiscences* (1973) Page 167.

Madras High Court. He invoked independent India's new Constitution to petition the Supreme Court in the matter. He chose Nambyar- barely two years old at the Madras Bar, to pursue Gopalan's remedies under the new constitutional regime. A doyen of the Bar himself, VG Row's choice of counsel before the Supreme Court was rather surprising. Nambyar, a lawyer who had never appeared before the Federal Court or the new Supreme Court, swiftly rose to the occasion. VG Row was so impressed by Mr Nambyar, that he chose him to even lead the arguments, instead of stalwarts of the Delhi Bar.[13]

24. Due process was a principle of substantive law that stemmed from the Fifth and the Fourteenth Amendments to the US Constitution. The rule essentially placed limits on the legislative, executive and judicial powers of the State and enjoined it with the responsibility to frame not just any processes, but *just* processes. Aware of the US experience, the Indian framers were hesitant to include such an omnibus restraint on the legislative powers. The Principal Adviser to India's Constituent Assembly, BN Rau, took the proposed first charter of the Indian Constitution to the experts in the US. Justice Frankfurter of the US Supreme Court objected to Rau's borrowed 'due process' clause. In 1948, the first draft Constitution conspicuously omitted the phrase "due process of law" and replaced it with "procedure established by law"- a phrase which the current Constitution contains in Article 21.

25. Heard in the very first month of the inception of the Supreme Court, AK Gopalan's case presented a unique interpretational challenge. Appearing for the detenue, Nambyar argued that Articles 14, 19 and 21 ought to be read as a set of guarantees vested in an individual. On due process, the Constitution had clearly deviated from the US model. Yet, despite the obvious limitations posed by the text of the Constitution and the Constituent Assembly debates, Nambyar argued

[13] Page 56-57.

that “procedure established by law” in Article 21 was *jus, not lex.* Relying on the arguments of Daniel Webster in the 1819 US Supreme Court case of *Trustees of Dartmouth College v Woodward,*[14] Nambyar argued that a law with mere legislative sanction was not *per se* beyond reproach. As against this, his adversary in the case, MC Setalvad, the then Attorney General of India argued that Nambyar’s reading was unsupported by the obvious intention of the framers of the Constitution- which was to not adopt the US model of due process.

26. A tongue-in-cheek tale has been passed down at the bar, through the years. While making these submissions, Mr Nambyar, in his characteristic flair, said “I seek permission to quote from an authoritative book from a respected author”. Reading the palpable tension around the Attorney General, the Chief Justice got a whiff of what was to follow. Mr Nambyar, of course, was citing a passage from the Attorney General, Mr MC Setalvad’s book on Civil Liberties. Chief Justice Kania smiled and asked if it was really necessary. Justice Mahajan egged on Mr Nambyar, who read many passages from Setalvad’s book which ran counter to his arguments before the court, in support of the preventive detention law.[15] Years later, Palkhivala’s recourse to Seervai’s book to rebut Seervai’s argument in Court reportedly ended a long friendship at the bar.

27. Riveting as this exchange must have been, Nambyar’s endorsement of due process did not immediately find favour with the majority. Nambyar’s view was, however, accepted by Justice Fazl Ali, whose minority opinion drew heavily from Nambyar’s interpretation of Article 21. It was nearly two decades later, in the **RC Cooper**[16]

[14] 17 U.S. 518.
[15] Inder Malhotra, Present at the Creation, Supreme But Not Infallible: Essays in Honour of the Supreme Court, BN Kirpal (OUP 2000).
[16] RC Cooper v. Union of India, 1970 AIR 564.

decision and three decades later *in* **Maneka Gandhi**[17] that his interpretation would find judicial force.

28. This was not the only example of Nambyar leading constitutional courts towards an interpretation that was foresighted and reflected a departure from 'originalism'. In addition to his arguments about due process, back in the 1950s, Nambyar argued before the Madras High Court in a seminal case - **VG Row v State of Madras**.[18] The case pertained to a government order by which an education society was declared as an unlawful association for allegedly constituting a danger to the public peace. VG Row was the general secretary of this society. Nambyar argued that the power was exercised arbitrarily and thus, violative of Article 14. In other words, arbitrariness was antithetical to the guarantee of equality.

29. We know, that this approach to Article 14, in contrast to the traditional classification test, has gained wide currency in Indian jurisprudence. In the early years of our jurisprudence, inspired by the Fourteenth Amendment of the US Constitution, the Supreme Court devised the classification test to determine the compliance of a law with Article 14. This test entailed asking two questions: firstly, whether the classification made was based on an intelligible differentia; and second, whether the classification has a reasonable nexus with the object the law sought to achieve. The assumption behind this approach, which Nambyar doubted, well before its time, is that the right to equality is invoked only when there is a classification. In the 1970s, in **EP Royyappa**,[19] the understanding of Article 14 evolved to include the arbitrariness doctrine and there has been no looking back. Following this trend, in more recent decisions such as **Shayara Bano** and **Navtej Singh Johar**, the Supreme Court has further endorsed an idea of equality, which has transcended the

[17] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[18] VG Row v State of Madras, AIR 1951 Mad 147.
[19] 1974 2 SCR 348

traditional notion of classification, and rooted the doctrine in concepts such as ‘manifest arbitrariness’.

30. The landmark High Court decision in **V.G. Row** reached the Supreme Court in 1952.[20] Although the bench did not have the privilege of Nambyar addressing the Court, Justice Patanjali Sastri's opinion remarkably echoed Nambyar's foresight. This seminal judgment is widely regarded as an early effort in our jurisprudence to delineate the contours of reasonable restrictions on fundamental rights, particularly under Article 19. In a frequently cited observation, Justice Patanjali Sastri held that when assessing the reasonableness of laws restricting fundamental rights, both substantive and procedural aspects must be scrutinized. He identified key factors to consider, such as the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, the disproportion of the imposition and the prevailing conditions. This test laid down by Justice Patanjali Sastri, inspired by Nambyar, in many ways, laid the groundwork to evolve the proportionality doctrine used by constitutional courts to evaluate the reasonableness of restrictions on fundamental rights.

31. Similarly, in **AK Gopalan**, Mr Nambyar had argued that the fundamental rights are not silos unto themselves. The argument was rejected by the majority in **AK Gopalan**, subsequent decisions of the Court in **RC Cooper** and **Maneka Gandhi** wholeheartedly endorsed the idea that fundamental rights are not independent of each other. Hence, a law depriving a person of personal liberty and prescribing the procedure for that purpose, under Article 21 has to stand the test of other fundamental rights contained in Articles 14 and 19 as well. This approach has informed the recent jurisprudence of this Court,

[20] 1952 AIR 196.

including the decision of nine judges in **KS Puttaswamy**[21] recognising a right to privacy in Part III.

32. Undeterred by the outcomes in **AK Gopalan**, Mr Nambyar consistently pursued this understanding of Article 14, 19 and 21. The Indian Press (Emergency Powers) Act of 1931 allowed the State to demand security from publishers of material that supposedly incited violence. Mr Nambyar unsuccessfully argued before the Madras High Court that the provisions of the law were overbroad limitations on the freedom of speech and were unsustainable in view of Article 19(1)(a). However, in 1954, again before the Madras High Court, he successfully argued that Section 49A of the Madras Police Act which criminalised publications of information related to wagers, violated Article 19(1)(a). His repeated dents to broaden the ambit of fundamental rights and their cohesive reading culminated in **Benett Coleman**[22] - his last major constitutional case before the Supreme Court. Mr Nambiar, appearing alongside none other than Mr KK Venugopal successfully challenged the speech-inhibitory Newspaper Control Order of 1962.

33. Today his repeated efforts to highlight the interlinked nature of fundamental rights have borne fruit and become an integral part of our jurisprudence. In fact, we have moved beyond recognising that fundamental rights gain colour from one another. We have devised tests to balance one right against the other in situations of potential incompatibility. For instance, in the recent decision of **Association of Democratic Reforms**[23]**,** the Supreme Court was dealing with apparently countervailing rights- the donors' right to privacy on the one hand and the electorates' right to know about political donations on the other. The Court applied the double proportionality test and struck down the electoral bonds scheme. In many ways, it was Mr MK

[21] 2017 10 SCC 1.
[22] AIR 1973 SC 106.
[23] [2024] 3 S.C.R. 417.

Nambyar's foresight in **AK Gopalan** that lies at the very core of this jurisprudential journey. The idea that a factual situation or state action only creates consequences on one single fundamental right is an unimaginable proposition of law.

New World, New Problems

34. Mr Nambyar's approach echoes with the jurisprudence around several jurisdictions, including notably, the constitutional courts of Canada, the United States, and Australia, which have used the metaphor of a "living constitution" in their judgements. The metaphor used in Canada is that of a "living tree", which postulates that the Constitution is capable of growth and expansion. However, this must be within its natural limits. Just like a large banyan tree, the tree is rooted in past and present institutions but must be capable of growth to meet the future.

35. As new problems emerge, the branches must be capable of spreading to accommodate the new interpretations of the law. For instance, in **Reference re Jurisdiction of Parliament to Regulate and Control Radio Communication**,[24] the Supreme Court of Canada was called upon to decide the authority of the Dominion to legislate on a subject which ostensibly fell within the provincial legislative jurisdiction. To Chief Justice Anglin, it appeared that though Hertzian waves and radio communication were both 'unknown to' and 'undreamt of by' the framers, every effort should be made to find some head of legislative jurisdiction capable of including the subject matter.

36. Technology, as we experience it today is far different from what it was in the lives of the generation which drafted the Constitution. Information technology together with the internet and social media

[24] 1931 CanLII 83

and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolete.[25]

37. Hence, it would be an injustice both to the drafters of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. In India, we describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.

38. Another significant example is the evolution of environmental constitutionalism, which lies at the confluence of constitutional law, international law, human rights, and environmental law. The world today stands in a precarious situation. International bodies such as the UN Governmental Panel on Climate Change (IPCC) have raised alarm bells and contend that the impacts of climate change could be irreversible by 2030. The International Organisation on Migration (IMO) estimates that millions of people will be displaced by climate change, potentially causing a climate refugee crisis. The extent of environmental degradation and the very real existential threat caused by climate change was, of course, not foreseeable by the framers of our constitution. However, as the crisis becomes more apparent, courts are increasingly becoming aware of the ramifications of the environmental crisis.

[25] Puttaswamy I (supra).

39. In **MK Ranjitsinh**,[26] the Supreme Court recognised a right against the effects of climate change. Without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not fully realised. The right to health (which is a part of the right to life under Article 21) is impacted due to factors such as air pollution, rising temperatures, droughts, storms, and flooding. The inability of marginalised communities to adapt to climate change or cope with its effects violates the right to life as well as the right to equality. For instance, if climate change and environmental degradation lead to acute food and water shortages in a particular area, poorer communities will suffer more than richer ones. The right to equality would undoubtedly be impacted in each of these instances.

40. The understanding of the Constitution as a living document aids constitutional courts in understanding new, novel problems. It also facilitates the Court in finding a jurisprudential basis for solutions to existing social problems. Let's take the example of Article 17 of the Constitution, which abolishes untouchability. The context of this provision was the stratified society we found ourselves in. Caste was an important axis of social organisation and those who found themselves at the bottom of this occupational, social hierarchy were subjected to untouchability solely on account of their caste. The basis, remember, was occupational hierarchy of castes and ritual impurity associated with certain occupations. The framers of the Constitution debated the scope of this prohibition in some detail. The argument was essentially that if untouchability were not defined and limited in its application to caste, it would lead to unwarranted over-broad application. KT Shah, a member of the assembly had in fact warned against its potential use to include women who are subjected to notions of purity and subordination, comparable to occupational hierarchy. Privileging the historical context of occupational purity, the

[26] 2024 INSC 280.

Supreme Court once believed that untouchability was tethered to caste-based untouchability alone.[27] In 2018, a bench of which I was a part was faced with this very interpretative conundrum. Reading through the Constituent Assembly debates, I concluded that the framers deliberately left untouchability untethered to caste; that Article 17 provided a guarantee against notions of impurity and pollution-and caste was but one manifestation.[28]

Conclusion

41. It is tempting to pit the framers' so-called original intent against the notion of living constitutionalism. Nambyar demonstrated that the solution lies between a complete abandonment of their vision and its uncritical acceptance. While he was meticulous in his understanding of the intent of the framers, he was never overcome by it. For instance, in ***IC Golaknath[29],*** Nambyar relied upon the framers' intent to secure fundamental rights from parliamentary onslaught. He relied on HM Kamath's unsuccessful attempt to amend Article 368 to empower the Parliament to alter fundamental rights. Therefore, he argued that there are certain "implied limitations" on the Parliament's power to amend fundamental rights. Not even hopeful of an admission of the case, Nambyar's submissions managed to find a place in the dissent of Justice Subba Rao[30]. Then accepted only in part by Justice Subba Rao, Nambyar's "implied limitations" came to be successfully argued in ***Kesavananda Bharati[31]*** by none other than Nani Palkhiwala.

42. The constitution of a country, which is more than the mere text, is the foundation of this democratic culture and not the culmination of it. It merely stems from the framers' intent, but as Mr Nambyar showed

[27] State Of Karnataka vs Appa Balu Ingale and Others, AIR 1993 SC 1126.
[28] Indian Young Lawyers' Association v. Kerala, 2018 9 SCR 561.
[29] IC Golaknath v. State of Punjab, 1967 2 SCR 762
[30] Fali Nariman, Before Memory Fades (2010) Page 321.
[31] Kesavananda Bharathi v. State of Kerala (1973) 4 SCC 227.

us, it blossoms in the lived realities of its constituents in their specific social contexts. As we celebrate the legacy of Mr MK Nambyar, we must remember that there were many more like him, who left their imprints on the Constitution, enhanced it, infused it with meaning, and took the texts to its legal destiny. The reason we celebrate them is that they read in between jurisprudential lines, and travelled beyond the text, beyond obsequious obedience of the supposed 'intent of the framers'. Legal scholars, lawyers, and people who used the Constitution to challenge the status quo, and to assert their rights are as much a part of the Constitutional order as those who framed it.

43. A thriving democratic order must account for each of them, encourage more assertion, creative interpretation and engagement with our constitutional culture.

44. Mr. Nambyar's story tells us that the story of the Constitution is a constant dialogue between generations of citizens. This dialogue reflects a dynamic process where each era interprets and applies constitutional principles to contemporary challenges and aspirations. It highlights how the Constitution evolves through judicial interpretations, legislative amendments, and societal changes, adapting to new contexts while preserving fundamental rights and values. This continuous dialogue ensures that the Constitution remains relevant and responsive, reflecting the collective vision and aspirations of the people across different epochs.

45. Lawyers play an indispensable role in shaping constitutional discourse. While judges have the ultimate authority to interpret the Constitution, it is the lawyers who craft and present the interpretive frameworks for the judiciary to consider. In this sense, interpretation is as much a job of a lawyer as it is of a judge, for without robust legal arguments and advocacy, constitutional interpretation would lack the necessary depth and diversity of perspectives.

46. Unlike Mr MK Nambyar, we will of course not have the privilege, or the responsibility of starting with a blank slate. However, I am hopeful that young lawyers, will learn from his experience and view every opportunity before the Court as a platform to enrich the Constitution. For this, future generations will forever be grateful, as we are to Mr Nambyar.