

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE SUDHANSHU DHULIA
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA
HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal No. 1012/2002

PROPERTY OWNERS ASSOCIATION & ORS

Petitioner(s)

VERSUS

STATE OF MAHARASHTRA & ORS

Respondent(s)

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RAKESH DWIVEDI: I was on the most crucial aspect of my submission My Lords. Respect, to how we look at Article 368 and the procedure for making a Constitutional Amendment.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

RAKESH DWIVEDI: There are three kinds of situations where the court may make a declaration that the legal instrument is void. First is the case where, My Lord, a Constitutional Amendment is declared void either because the procedure has not been followed, or because of constituent incompetence. This word I point, to make a distinction from legislative incompetence, because 368(1) talks of constituent power. So, it has described itself as a constituent exercise. And Doctrine of Basic Structure really means that the constituent power does not contain the power or it does not enable the Parliament, by the special procedure, to destroy or emasculate the basic features of the Constitution. So, it is a case of constituent incompetence. That would be a case where the provision or entire bill or a particular provision of the bill, in this case, Section 455 which were introduced by the 42nd Amendment Bill, they will have to be treated as if they were never there. It goes out of the bill. There is a distinction between the procedure of ordinary lawmaking power and 368. Here the terms of the bill become part of the Constitution itself. The expression thereupon, the Constitution shall stand amended in accordance with the terms of the bill. Because of parliamentary procedure, they say that once it has been assented by the President, it becomes a Constitutional Amendment Act. But 368 doesn't envisage any such thing. The moment the bill is passed and assented, the Constitution stands amended in terms of the bill. And, in para 75 of *Minerva Mills*, what was struck down was Section 4. As far as we are concerned, Section 4 of the Bill. And in as much as, the declaration would operate retrospectively from the very inception, that is, the date when the assent was given by the President. Paragraph 75 of *Minerva Mills* does not contain any limitation with respect to its declaration. It doesn't say it will not be retroactive, or it will be retroactive with certain conditions. Yes, My Lord.

JUSTICE RAJESH BINDAL: 368(1) says amendment in terms of the bill after it is passed. Suppose after discussion in the Parliament or the Rajya Sabha, there is some change proposed in that.

RAKESH DWIVEDI: Some change in the...

1 **JUSTICE RAJESH BINDAL:** Change proposed in the bill. Some language is proposed to
2 be changed.

3

4 **RAKESH DWIVEDI:** I am sorry, My Lord, I couldn't get...

5

6 **JUSTICE RAJESH BINDAL:** Some bill is presented. After discussion in the Parliament,
7 some change is proposed in the language.

8

9 **RAKESH DWIVEDI:** Yes.

10

11 **JUSTICE RAJESH BINDAL:** Now that change is never made in the bill, it will come only
12 in the Act. Now the language says, in terms of the bill. And the Parliament says...

13

14 **RAKESH DWIVEDI:** If an amendment is proposed and the amendment is passed by the
15 Parliament, it will be treated to be a part of the bill itself then. That's my humble response.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Because the amendment is proposed before
18 the bill is converted into an Act....

19

20 **RAKESH DWIVEDI:** Passed.

21

22 **JUSTICE B.V. NAGARATHNA:** Into an Act.

23

24 **RAKESH DWIVEDI:** Yes. So during debate, somebody will move a motion...

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That shall be deemed to be.

27

28 **RAKESH DWIVEDI:** instead of like, as Your Lordships saw in the Constituent Assembly,
29 there were K. T. Shah and other members, they moved amendments. So, before it is put to vote
30 finally, either the proposer of the bill, or in this case, the government, they will... somebody
31 who is moving the bill, will accept it or it will be referred to Select Committee. It will go there
32 and come back with a recommendation. So the bill will be ultimately passed either defeating
33 the amendment or approving the amendment, and then it becomes part of the bill itself.

34

35 Therefore, this theory which the Petitioners rely upon, that once it is declared by the Court,
36 the Court do not have legislative power, this not repealed, all these things are actually
37 completely foreign to the structure and phraseology of Article 368. They don't fit in there.

1 Either the Constitution stands amended or it does not stand amended. These are the two
2 situations only. Once the declaration is of its void, then we should not to adopt the principle
3 of eastern dwelling, we should not allow the mind to boggle. Just because there is a gap mode
4 in the proceedings of the Court and the declaration comes after a certain period of... a certain
5 lapse of time, in this case, in *Mineral Mills* case nine years' time. So, certain things happen.
6 Court may save it. Court may say, it will be retroactivity but whatever has been done, will not
7 be disturbed. Or as in *Indra Sawhney's* case, Your Lordships still went a little further in
8 crafting. So the court today acts scientifically, like a surgeon, My Lords, it may involve grafting.
9 As in *Indra Sawhney*, Your Lordships said this promotions, reservation in promotion, not
10 permissible. But this will operate five years hence. So, from a later date. So, as I've said in
11 *Golaknath*, where they've propounded the principle of prospective overruling, that the
12 courts we should shed the impression that the courts do not make law. The courts do make
13 law, and the very doctrine of basic structure is something which has emerged from the pen of
14 the court. So, the courts are making law, Interregnum legislation, interstitial legislation, filling
15 in the gap. There are so many forms in which the court today is, and very rightly, My Lords.

16

17 **JUSTICE B.V. NAGARATHNA:** Rightly put, it is called, judgment law.

18

19 **RAKESH DWIVEDI:** Judgment law. So therefore, the....

20

21 **JUSTICE B.V. NAGARATHNA:** Sometimes as a critique.

22

23 **RAKESH DWIVEDI:** Now, to bank upon *Keshavan Madhava Menon* and all those
24 earlier cases in the 50s, *Pesikaka* and so on, are back to those and bring them back on the
25 table for discourse. Today that's well accepted, well entrenched that the Courts do make law,
26 and so therefore, the Courts... if the Court can say that our declaration will not operate
27 backwards, it will save something, it will be treated as if in the past it was operating, Your
28 Lordships can say that until this date, it cooperates but hereafter, it will not, because we have
29 declared it to be void. All these things show that once the declaration is there, that declaration
30 operates, in this case, being unrestricted, unqualified, it will go back to the root. It is as if it
31 was never there. It is as if the Constitution never stood amended in terms of Section 4 of the
32 42nd Constitutional Amendment Bill. So, this is constituent incompetence. Now, this is, this
33 stands on a stronger footing than legislative incompetence, where the State Legislature or
34 Parliament may trench upon the 'exclusive field of the other Legislature'. Even in that case all
35 these judgments, which my learned friends have referred, even though they are of the 1950s,
36 they have took caution to say, that if the defect is of legislative incompetence, then I'll show
37 that My Lords when I refer to those judgments, then they are *void ab initio* of no effect. So,

1 this court has distinguished between a case of Legislative incompetence and while an invalidity
2 arising out of breach of either fundamental rights, or some other Constitution provision.

3

4 **JUSTICE HRISHIKESH ROY:** Article 368, specifically refers to Constituent power?

5

6 **RAKESH DWIVEDI:** Yes.

7

8 **JUSTICE HRISHIKESH ROY:** I think, that is why you are coining the phrase
9 'Constitutional Incompetence'?

10

11 **RAKESH DWIVEDI:** Constituent Incompetence.

12

13 **JUSTICE HRISHIKESH ROY:** 'Constituent Incompetence'. Now, legislative
14 incompetence, you are differing, and is it because one is trying to make a 'change or variation'
15 in the Constitution, or is it because, the other exercises, is in respect to a Legislation, you are
16 making the difference or there is any other Constitutional apart from the words used in Article
17 368?

18

19 **RAKESH DWIVEDI:** The reason for my making this distinction is that in the case of a law
20 being passed, and the procedure prescribed in 196 to 200, Article 196 to 200.

21

22 **JUSTICE HRISHIKESH ROY:** Yes.

23

24 **RAKESH DWIVEDI:** Even in these Articles, Your Lordship will not find the word 'Act'. The
25 bill is passed, goes to the Governor or the President and assented. But in Article 123 and 213,
26 which is Ordinance making power there is special mention, 'that once the Ordinance is passed,
27 within six months, it must be placed before the houses and converted into an Act'. So, therefore
28 there the position is that the Legislative Amendment, once it is passed it 'itself' becomes a
29 'Statutory Provision and Act'. Here the bill, here the Constitution stands amended in terms of
30 bill.

31

32 **JUSTICE HRISHIKESH ROY:** Bill has to be introduced in the Parliament to be passed.

33

34 **RAKESH DWIVEDI:** There the Amendment Act is an Act by itself. It's another matter that
35 in the publications, we find that that is incorporated. And, at the foot Your Lordship will find
36 that, that is an Amendment Act inserted by this Amendment Act. But that Amendment is a
37 'Separate, Independent Enactment which then inserts itself into the main Enactment. Not a

1 matter of great substance, but this is a distinct procedure there. There is no provision which
2 says that the moment the bill is passed, the Original Act will stand amended in terms of the
3 bill. So this is a very 'potent expression'. Mr. Nariman, Fali Nariman, My Lord, employed, this
4 expression for getting the reference, and I am banking on that very expression, for a different
5 conclusion. What he wanted to say was that once the bill is passed, then it becomes
6 incorporated, the earlier provision is gone forever. It will not return. That was his logic.

7

8 **JUSTICE HRISHIKESH ROY:** You are using Nariman's *gadaa* for another purpose?

9

10 **RAKESH DWIVEDI:** Yes. The *gadaa* is there in 368, but we are swinging it in different
11 directions. One on the right, one on the left.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But, on the third, the third situation, of course,
14 is the -- the second was legislative incompetence violative of the Fundamental Rights.

15

16 **RAKESH DWIVEDI:** The third is where, the law is reaching, My Lord, the Fundamental
17 Rights or some other Constitutional limitation, like in Article 286.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now, 13(2) says that any Law, which is in
20 breach of Part III is void. So how is that voidness distinguished from a Law which is, which
21 Law, which is void on the ground that, or an Act which is void, on the ground that it is in breach
22 of the basic structure?

23

24 **RAKESH DWIVEDI:** So, on 13 there is some divergence in the judgments of this Court.
25 Initially from... So Constitutional... this *Keshavan Madhava Menon*, *Pesikaka* and
26 *Sundararamier... Sundararamier* was dealing with breach of Article 286. So, the cases
27 from *Keshavan Madhava Menon* up to *Pesikaka*, they were dealing with Article 13(1),
28 which is existing law, which continues by virtue of Article 372. And since it was a law made
29 before the advent of the Constitution, it will never be void from inception. So, it becomes void
30 with effect from the date when the Constitution was made and to the extent of inconsistency.
31 Article 13 in both 13(1) and 13(2) says 'to the extent of inconsistency', which will always be the
32 case. So, the Doctrine of Eclipse, et cetera, came into play.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

35

36 **RAKESH DWIVEDI:** Now, in that respect, there is no difference between 13(1) and 13(2).
37 Both say to the extent of inconsistency, void. But because of the very nature of 13(1), the laws

1 which are being considered being of the past, therefore, it is said that the law remains on the
2 statute book. One, it is good for the past. Second, if the breach of ease of Article 19... now that's
3 another feature that these cases are dealing with cases of breach of Article 19, which is limited
4 to citizens. That's the rights conferred exclusively on citizens, not on non-citizens. And
5 companies are not citizens, as the law stands. There is some debate on that because of the wide
6 range of activities which the companies today are regulating and operating on. But keeping
7 that aside, the 19 is limited to citizens. So, the debate was that, even if the law has been declared
8 void on the ground of 19(1)(f), that was **Balsara**, and that's how **Pesikaka** emerged, to find
9 out what is the effect of the declaration. So it is said that even if... though it is non-existent,
10 ineffective, unenforceable with respect to citizens, because their rights have been affected and
11 found to be and declared to be void. But with regard to non-citizens, it survives and remains
12 on the statute book therefore. So, these observations which the Petitioners want to deploy, are
13 completely in a different context where fundamental right under Article 19, which is limited
14 to citizens, is impacted. And consequently, a distinction between citizen and non-citizen,
15 surviving *qua* non-citizen. And this is where **Ambica Mills** case said, that if in such a
16 situation the laws is covered by 13(1) would survive by non-citizens, it would equally survive
17 *qua* the non-citizens in case of 13(2).

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Sorry?

20

21 **RAKESH DWIVEDI:** If the law survives on the statute book *qua* non-citizens in the case of
22 Article 13(1), the same would be the solution with regard to Article 13(2). That is what Justice
23 Matthew says, that even with regard to 13(2), if there is a breach of Article 19 which is limited
24 to citizens, so there can't be a different result.

25

26 So, that is a debate which is centring on this citizen, non-citizen difference, which is limited to
27 Article 19. Yesterday, My Lord the Chief Justice asked me what would be the position if there
28 is a breach of Article 14, 21. Now they are not limited to citizens. This differentiation and this
29 consequence over which there is a debate would not be there in case of breach of 14 and 19.

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There's a breach of 14 or 21?

32

33 **RAKESH DWIVEDI:** It could be *void ab initio* that the result is same. Because Fundamental
34 Rights are also imposing an incapacity on the legislature, in a different way. My Fundamental
35 Right is a restriction, a limitation on the competence, unless they justify as a reasonable
36 restriction under various heads, or otherwise on the various parameters which have been
37 declared by Your Lordships *qua* Article 14 or 21. There are certain, none of the Fundamental

1 Rights are absolute. So, there are certain criteria to judge the law. That test has to be passed.
2 And today they don't stand in independent silos. Therefore, each of wherever the impact is,
3 wherever the effect falls, that Fundamental Right, that test has to be.

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Therefore, in other words, according to your
6 submission, a law which is in breach of Articles 14 and 21, would suffer from the same
7 consequence as a Constitutional Amendment...

8

9 **RAKESH DWIVEDI:** Yes.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** ... which is in breach of the constituent
12 incompetence or which is in breach of the doctrine of constituent competence. That is, it either
13 vitiates the procedure which is spelled out in 368 or alternately, it violates the basic structure.

14

15 **RAKESH DWIVEDI:** So, I would bring it at par with the legislative incompetence, because
16 we are dealing with the Legislative Law. The constituent power stands on its own. It's a
17 standalone provision, Article 368, which will be judged on the anvil of 368, what is the effect.
18 But legislative incompetence arises from, on two aspects. One is that you have to have the
19 subject matter in your field. And the second is that you should be on the right side of the
20 various provisions of the Constitution. What you cannot do under the Constitution, any
21 provision of the Constitution, beyond you. So, the resultant is same. The only debate arises
22 under 19, because of citizen, non-citizen, which in my respectful submission, once the Court is
23 declaring a provision under 13(2) as void, then it is up to the Court. Unless the Court says that
24 we are making this declaration and limiting it to the citizens alone, the declaration of voidness
25 will have full play. These aspects have not been considered in *Sundararamier*. And
26 *Mahendra Lal Jaini's* case is right.

27

28 **JUSTICE HRISHIKESH ROY:** Have you captured this part of your submissions in your
29 note Mr. Dwivedi?

30

31 **RAKESH DWIVEDI:** Yes. I have, My Lord.

32

33 **JUSTICE HRISHIKESH ROY:** We'd just also like to read along.

34

35 **RAKESH DWIVEDI:** So, when *Ambica Mills* says, that even in the case of 13(2), the law
36 would survive *qua* non-citizens, that would be a matter of for the Court's declaration. That's
37 my humble submission. When the Court is declaring the provision law as void being in breach

1 of 13(2), it's for the Court to declare. For there may be so many laws which may not be
2 applicable to non-citizens. May be applicable only to citizens. Then why should that
3 consequence....?

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It is for the Court to either save all the
6 consequences of the declaration of voidness or give it untrammelled effect. Which the Court
7 will say everything goes. The Court may say, well, we'll do it prospectively or that we will save
8 transactions which have taken place under the law. It has a variety of options open.

9

10 **RAKESH DWIVEDI:** Variety of options with the power of declaration, doctrine of *ultra*
11 *vires* gives wide power.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, if third party rights have taken place under
14 the law, the people have been regularized under a law which is found to be void. 'They say that
15 it will not affect the consequences, which have already emerged. So, that we don't want to
16 'displace' the creation of third-party rights or third-party entitlements, which have ensued
17 under the law'.

18

19 **RAKESH DWIVEDI:** So, if the declaration is absolutely wide, then it would not lie in the
20 mouth of any authority or any person to say that we will read the whole judgment and see that
21 it was, challenge was made by a citizen and the fundamental right was...

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** A question which arose before the seven-judge
24 bench in the 'Ordinances Case'. What happens when an ordinance is either held to lapse or an
25 ordinance is held to be a fraud on power? What happens to the consequences which took place
26 when the ordinance was in operation? One view was that, well, those consequences survived,
27 because they were made by a constitutional authority, which had the power to make that
28 ordinance. So we applied the test of public interest. Justice Gajendragadkar took a very clear
29 view in the sense that he said everything which was done would survive. So we took a more
30 nuanced view in *Krishna Kumar Singh* and said it depends upon how the Court perceives
31 it. You may apply the test of public interest and save consequences even under an ordinance
32 which is otherwise been held to be void or to have lapsed.

33

34 **RAKESH DWIVEDI:** Your Lordships, went to the extent of saying that the ordinance
35 making power does not contemplate creation of a permanent state of affairs, because the
36 ordinance has to be placed before the house and the house can disapprove it, and then the
37 executive can never say, I have created a permanent state of affairs. To hell with it, whether

1 you have passed it or not passed it, or approved or disapproved. The Parliamentary democracy
2 demands that, that will prevail.

3

4 **JUSTICE B.V. NAGARATHNA:** Because, it is an exception to the law-making power of the
5 Legislature or the Parliament, so there can't be an Ordinance Raj?

6

7 **RAKESH DWIVEDI:** Yes, My Lord the Chief Justice rendered the judgment, in that
8 *Krishna Kumar Singh's* case. So, it is better to leave it to the Court My Lords, and not to
9 the authorities and later on to say that even though you have declared it void....

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Your submission than, in summation is this,
12 that what following the Declaration of Section 4, being null and void in para 75 of *Minerva*
13 *Mills...*

14

15 **RAKESH DWIVEDI:** Yes.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** ...it is as if, that the Bill which proposed to
18 amend the Constitution, was stillborn, it was never, it never attained, the status of a bill which
19 was validly passed, and therefore once that is effaced, the original Provision of Articles 31C
20 was never, in that sense, substituted. The substitution never took effect, according to you.

21

22 **RAKESH DWIVEDI:** So, Doctrine of Basic Structure, it goes to the very first step,
23 introduction of the bill. They don't have any power to introduce a bill, which amends, seeks to
24 destroy the basic feature.

25

26 **JUSTICE B.V. NAGARATHNA:** But, who is to say that?

27

28 **RAKESH DWIVEDI:** The court will say this.

29

30 **JUSTICE B.V. NAGARATHNA:** Later.

31

32 **RAKESH DWIVEDI:** Later, Your Lordships have said in in *Kesavananda* and that on a
33 case-to-case basis, Your Lordships will decide My Lord.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Would you like to just show us, my learned
36 Brother Mr. Hrishikesh Roy was asking the note, which you'd like to just read out, that how
37 you have formulated it.

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JUSTICE SUDHANSHU DHULIA: Which volume? In which...

RAKESH DWIVEDI: Volume 2A, My Lord deals with this part. If I may just draw My Lord's attention before reading to one more aspect of it. That 368 says that in terms that you may amend by addition, variation or repeal. Even, if these words were not there, the word amend will include all these forms. But they did not leave it for implication, expressly mentioned. Now, this is an additional alternative submission that in this case, we have to look at the nature of Section 4 as My Lord, the Chief Justice said that it was a case of expansion, enlargement.

So, the intent was not to... the intention of the Parliament in introducing 42nd Amendment Bill, was not to simpliciter repeal unamended 31C. The intention was to add, to bring in some more directive principles or the entirety of Part IV in addition to 39(b) and (c). So, Section 4 is a substitution by addition. It will not be a case of variation, because variation would mean putting 39(b) and (c) in some different way. If the same thing is to be put in a different way, then that would be variation. But, if a plus b, then it is to be c plus d and e are also to be brought in, that's a case of addition. So, the result of declaration would be that the addition goes. And this aspect, My Lord, has been brought out in the case of Tobacco... International Tobacco... *India Tobacco*. That is Volume 5-A, page 3218. 217 at page 3223, Volume 5-A, page 3218. And the relevant portion is at page 3223, it's a case of 'Repeal of Repealing Act' in the context of tax on sale of cigarettes.

CHIEF JUSTICE D. Y. CHANDRACHUD: 3233?

RAKESH DWIVEDI: 3223.

CHIEF JUSTICE D. Y. CHANDRACHUD: 3223.

RAKESH DWIVEDI: Para 14 to 17.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

RAKESH DWIVEDI: 'The ratio of the two separate but concurring judgments of the Appellate Bench of the High Court is, that the 1954 Act had the effect of completely repealing the 1941 Act, in relation to cigarettes. And the repeal of 1954 Act in relation to cigarettes by the 1958 Act, did not revise the operation of 1941 Act in regard to cigarettes on the principle that the Repeal of Repealing Act does not revive the Repealed Act. Since the 1941 Act stood

1 completely obliterated from the statute book in relation to cigarettes, no sales tax would be
 2 payable in regard thereto either under the 1954 Act or under the 1941 Act. Upon these
 3 premises, it was held that the company as a dealer in cigarettes and smoking mixture, is not
 4 entitled to any certificate of registration under the Act of 1941, as it is neither a dealer within
 5 the meaning of that Act nor liable to pay tax. The general rule of construction is, that the Repeal
 6 of a Repealing Act does not revive anything repealed thereby. But the operation of this rule is
 7 not absolute. It is subject to the appearance of a different intention in the Repealing Act. Again,
 8 such intention may be explicit or implicit. The questions, therefore, that arise for
 9 determination are, whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act
 10 and the latter by the 1958 Act. Whether the 1954 Act and the '58 Act were repealing
 11 enactments. Whether there is anything in the 1954 Act and the 1958 Act, indicating a revival
 12 of the 1941 Act in relation to cigarettes. It is now well settled that repeal connotes abrogation
 13 or obliteration of one statute by another from the statute book as completely as if it had never
 14 been passed. When an Act is repealed, it must be considered except as two transactions passed
 15 and closed as if it had never existed. Repeal is not a matter of mere form, but one of substance,
 16 depending upon the intention of the legislature. If the intention indicated expressly or by
 17 necessary implication in the subsequent statute was to abrogate or wipe off the forward
 18 enactment wholly or in part, then it would be a case of total *pro tanto* repeal. If the intention
 19 was merely to modify the former enactment by engrafting an exception or granting an
 20 exemption or by super adding conditions or by restricting, intercepting, or suspending its
 21 operation, such modification would not amount to a repeal. Broadly speaking, the principal
 22 object of repealing is to excise dead matter full of superfluities.'

23

24 So, what I rely upon is this that, please look at the intent of the Assembly when they were
 25 introducing Section 4, what was the intention.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, for instance, to take your line of argument
 28 further, when they substituted the words, the principles contained in Articles 39(b) or (c); they
 29 said all or any principles in Part IV. What Parliament was intending really was to do this,
 30 according to you. Suppose they had said, instead of 39(b) and (c), they had said 38, 39, 39(a),
 31 40 they produced all the provision of the Directive Principles, right, including 39(b) and (c),
 32 and that was invalidated by *Minerva Mills*. 39(b) and (c) would still stand.

33

34 **RAKESH DWIVEDI:** Still stand.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Because that had been upheld in
 37 *Kesavananda*. So instead of physically enumerating all the provisions of the directive

1 principles, namely 38 to 51, what they did was they said all or any of the principles in Part IV.
2 So does that make much of a difference? If they had done the former, obviously it couldn't
3 have been argued that the entirety went because they would have struck down everything, but
4 39(b) and (c). So the fact, that instead of physically enumerating all the Articles and the
5 directive principles, Parliament used the catch all phrase, all or any principle should really not
6 make any difference according to your submission, because that was the intent. The intent was
7 to expand.

8

9 **RAKESH DWIVEDI:** Yes. And that intention cannot be ignored. That's the primary thing,
10 very important aspect.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** A substitution in a sense, also involves some
13 degree of repeal because, when in exercises of the constituent power or the legislative power,
14 the Legislature is substituting a provision, it is also implicitly repealing a provision, because
15 you are substituting in the sense you are repealing the earlier provision and bringing a new
16 provision in it.

17

18 **RAKESH DWIVEDI:** As I said, once we bring in the intention, we have to see there are
19 substitutions and substitutions. There can be a substitution by addition, substitution which is
20 intended to vary, substitution which is intended to repeal.

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** A substitution may be of a completely new
23 provision.

24

25 **RAKESH DWIVEDI:** Completely new provision.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You want to completely obliterate an erstwhile
28 provision and bring in a new provision which doesn't even deal with the same subject matter.

29

30 **RAKESH DWIVEDI:** So the Amendment Bill could have said that Article 32C is repealed,
31 and then would have said that we are inserting something else in its place. Instead of splitting
32 up this substitution *dehors* the context of Section 4, and saying that it involves two steps, split
33 it up. One is erasure, and other is insertion. And therefore it is subsumed. Now, this theory of
34 split up and subsuming, militates with the context of Section 4. The purpose, the intent of
35 Section 4, quite apart from the fact that in terms under 368, it would mean that it never
36 happened. So even if we treat it, that it became part, the only thing which goes out is, what was
37 added.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Now what is the next? Now anything else now remains in your submission?

RAKESH DWIVEDI: In this context, there was a reference to an earlier exercise where Parliament, it is said wanted to reduce but Rajya Sabha...

CHIEF JUSTICE D. Y. CHANDRACHUD: They wanted to bring it in conformity with *Kesavananda* but the bill never passed the Rajya Sabha.

RAKESH DWIVEDI: Never passed. So, in the first case, when they inserted 32C- expanded, so they were emboldened by *Kesavananda Bharati* that it has upheld 39(b) and (c). So we can now have the whole of it. So completely shut out, avoid the courts completely. No scrutiny.

CHIEF JUSTICE D. Y. CHANDRACHUD: Then they wanted to bring the amended 31C back to the pre-amended stage.

RAKESH DWIVEDI: And then consequently, they wanted but Rajya Sabha said no, no, why reduce the powers which we have gained? But that is all prior, to the declaration by the Court.

CHIEF JUSTICE D. Y. CHANDRACHUD: And ultimately that will not affect.

RAKESH DWIVEDI: That is only irrelevant.

CHIEF JUSTICE D. Y. CHANDRACHUD: Legislature wanted to do... there may be a variety of reasons why a bill lapses. Maybe the Parliament that, of course, through the Raja Sabha, but in a given case, the term of that Legislature, the Lower House may come to an end. The government of the day, may not have the majority in that Rajya Sabha in the case of the Rajya Sabha. But that shouldn't affect how we construe the provision. We'll have to construe it independently.

RAKESH DWIVEDI: It is another matter that had they accepted that amendment, perhaps it would not have been necessary for the Court to go into it, because it's reduced. They would have only just examined nothing because *Kesavananda Bharati* has already upheld 30, unamended 30. So there was nothing. So of course, they did not want to give up, and Your Lordships made them give it up, in *Minerva Mills* when Your Lordships struck it down. So what they did not do it, the Court did it. Now kindly have just two-three cases only on that

1 point, which I'm building up that is **Sundararamier**. All these cases have expressly said that
2 if it is incompetent legislatively, it's of no effect. And in fairness, the Petitioners did not say
3 that in a case of legislative incompetence, it will still remain on the statute book. And,
4 incompetence case, never bring it on the statute book at all.

5

6 **JUSTICE HRISHIKESH ROY:** Page?

7

8 **RAKESH DWIVEDI:** At page 421. So, this was a case... So, if Your Lordship accepts my first
9 two submissions which I have made, then My Lord, it may not be necessary to go into this
10 debate about 13(1) 13(2), etc. It doesn't arise directly in our case. But since it has been raised
11 and made... the principles have been tried to be lifted up and utilized...

12

13 **JUSTICE RAJESH BINDAL:** By them?

14

15 **RAKESH DWIVEDI:** Yes.

16

17 **JUSTICE RAJESH BINDAL:** So, after a provision is struck down by the Constitution Court,
18 any provision of the Constitution or maybe some Act also, that attains finality. Is there
19 automatic change in the Act also? Because this is never made. You have seen in
20 **Kesavananda** also, you have **L. Chandra Kumar**, there were a lot of... Now you don't see
21 those changes in the Constitution. They are bound to do it or not, or is it automatic?

22

23 **RAKESH DWIVEDI:** Revival?

24

25 **JUSTICE RAJESH BINDAL:** Not revival. Provision is struck down. Whether the
26 Constitution is deemed to be amended to that...

27

28 **RAKESH DWIVEDI:** In my respectful submission, the statute stands corrected as it is, once
29 Your Lordship declares.

30

31 **JUSTICE RAJESH BINDAL:** It has to be... It has been deemed to be...

32

33 **RAKESH DWIVEDI:** I'm not aware of a single act which this Court has declared or any High
34 Court has declared *ultra vires*, where the Legislature has proceeded to pass an act to remove
35 it from the statute book.

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37 **JUSTICE RAJESH BINDAL:** Yes, we have not seen that.

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RAKESH DWIVEDI: So, subject to correction from my learned friend...

JUSTICE RAJESH BINDAL: We have also not seen that. These are still there...

RAKESH DWIVEDI: It's never done, My Lords. And I'm grateful for this question. The Parliament has never passed, the Legislatures... no State Legislature has ever passed. They abide by the dictum of the Court, and that's because of the mandate of the Constitution flowing from Article 136, 141, 142, and more importantly, 144, which specifically says that all civil authorities will have to act in aid, very strong word, act in aid of the Supreme Court.

JUSTICE RAJESH BINDAL: That doesn't create an anomalous situation, if somebody sees now.

RAKESH DWIVEDI: So, there's no anomaly at all. Parliament never does it in India. We don't need to go abroad, across the seven seas and find out what America is doing or what UK is doing, what they feel like.

JUSTICE RAJESH BINDAL: Parliament had not been doing, whether it should be done or not.

RAKESH DWIVEDI: And they have also not created any Taj Mahal, where all these dead acts can be placed as a mausoleum. So it goes, it's gone.

JUSTICE B.V. NAGARATHNA: No. Only when an Amending Act, after the amendment is made and it comes to the statute, then the Amending Act is repealed.

RAKESH DWIVEDI: Amending Act.

JUSTICE B.V. NAGARATHNA: Amending Act is repealed. That has all become dead wood.

JUSTICE SUDHANSHU DHULIA: That is the kind of a...

JUSTICE B.V. NAGARATHNA: That exercise the legislature does.

RAKESH DWIVEDI: Once they incorporate it.

1 **JUSTICE B.V. NAGARATHNA:** Yes.

2

3 **RAKESH DWIVEDI:** But that's meaningless. But once the Court declares word....

4

5 **JUSTICE B.V. NAGARATHNA:** That's a situation verdict unless they remove the basis of
6 the judgment and pass another validation.

7

8 **JUSTICE SUDHANSHU DHULIA:** No, but they do it. They do it. That's to remove the
9 clutter.

10

11 **RAKESH DWIVEDI:** That is only removing the clutter, My Lords. That is not a dead wood.
12 Since, it has been incorporated therefore. But the dead wood which is resulting from the
13 declaration of the Court, I have not come across. It is subject to correction, My Lord if there is,
14 and that is of no effect. One more aspect....

15

16 **JUSTICE B.V. NAGARATHNA:** It gets effaced from the Constitution or from the statute.

17

18 **RAKESH DWIVEDI:** It's not simply unenforceable. There was one other, My Lord. I'm
19 grateful for the question. There was one other aspect which the petitioner presented, and that
20 was that since after declaration of voidness, it remains on the statutory parchment and it's not
21 a case of repeal, the Court cannot repeal it. Only Parliament can repeal it and therefore, there
22 can't be two provisions on the statute book, side by side. Now, this may sound attractive, but
23 what really is happening is, there will never be a case of two provisions on the statute book.
24 One is alive, the other is dead. And in our society, My Lord, where being and becoming is a
25 process which continuously goes on, people getting born, people dying. So the living and the
26 dead are part of this world. So every living organism which the Constitution is, so therefore,
27 this is nothing strange that there is a provision -- I am assuming the worst-case scenario, that
28 something is remaining there unenforceable. So, there is no nothing militating. There is no
29 inherent contradiction between revived alive provision and a provision which is dead, having
30 been declared by the Court of law to be so. We have cemeteries, so it can lie there dead, no
31 problem. We have to look at what is operating.

32

33 **JUSTICE RAJESH BINDAL:** There is one more question on that. Now it is at the option or
34 free will of the publisher only what to publish in the book. Suppose some provision is struck
35 down.

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37 **RAKESH DWIVEDI:** I'm sorry, My Lord. I....

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JUSTICE RAJESH BINDAL: Any provision is struck down by the Supreme Court finally, right? One is that 144 says, everybody will come in aid, so in that context, why the Parliament or the State or the Constitution or the Central statutes or the State statutes would not follow that mandate, by amending the Act because they are to come in aid, number one. Number two, it's a free will of the... You see this Constitution, you must have a copy of it.

RAKESH DWIVEDI: Yes. My friend has.

JUSTICE RAJESH BINDAL: Article 323-A(2)(d), approved by this court. *L. Chandra Kumar*, 323-A(2)(d). This is at page 310.

RAKESH DWIVEDI: 323B?

JUSTICE RAJESH BINDAL: 2D. Judicial review.

RAKESH DWIVEDI: Explored the jurisdiction of all Courts, except the jurisdiction of the Supreme Court under Article 136.

JUSTICE RAJESH BINDAL: This was struck down in *L. Chandra Kumar*?

RAKESH DWIVEDI: Yes.

JUSTICE RAJESH BINDAL: This book doesn't mention it?

RAKESH DWIVEDI: So these are the publications.

JUSTICE RAJESH BINDAL: This is, this is what I'm asking. It is at the free will of the publisher only. How will the layman come to know? He will not search the law for anything.

RAKESH DWIVEDI: Publisher should not include what is struck down.

JUSTICE RAJESH BINDAL: Any note, anything? No, nothing is there, 323B, 3D also same.

GOPAL SANKARANARAYANAN: The note is below, after the entire provision at page 313. If, Your Lordships can... then we will be out of business.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Mr. Sankaranarayanan, but one thing to your credit. If you see a little bit of what's happening in this time of the year, I've noticed that your book of the Constitution, yours means, the one which is edited by you, it's been bandied around quite a bit of late. So you might take credit for it.

RAKESH DWIVEDI: My friend has presented to all of us.

JUSTICE RAJESH BINDAL: [UNCLEAR] publication also, there nothing is mentioned?

GOPAL SANKARANARAYANAN: Under 144, they should have complied.

JUSTICE RAJESH BINDAL: Published by the Government of India in 2015?

RAKESH DWIVEDI: So, these are executive exercise of publications.

JUSTICE RAJESH BINDAL: So this is, the question is then only. If 144 is there, why don't they come ahead and give effect to the judgment? Giving effect to the judgement.

RAKESH DWIVEDI: Yes, at least they should mention somewhere boldly that it doesn't survive.

JUSTICE RAJESH BINDAL: Why can't they make the act on your Constitution corrected as declared by this?

RAKESH DWIVEDI: They should do it.

JUSTICE RAJESH BINDAL: Will it come in the Legislation? Directive Legislation?

RAKESH DWIVEDI: In the universal publication My Lord in the footnote they have mentioned.

JUSTICE RAJESH BINDAL: Yes, in some books it is there. Some books it is

RAKESH DWIVEDI: What they should be doing is that they should eliminate it from there, and in the footnote they should provide that this was the provision which had been struck down, that one reads it.

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JUSTICE RAJESH BINDAL: This is the automatic.

JUSTICE HRISHIKESH ROY: And in order to protect their skin, if they had to be questioned, that so and so Counsel has suggested, that this is how it should be done.

RAKESH DWIVEDI: Kindly have this, My Lord.

CHIEF JUSTICE D. Y. CHANDRACHUD: With Article 286.

RAKESH DWIVEDI: 286.

CHIEF JUSTICE D. Y. CHANDRACHUD: So they said that the Act 286 doesn't say that a law which contravenes 286 is void. So he says the Law was valid as, to a part which was enforceable, then that cloud was lifted, and therefore it became valid in its entirety once the bar under 286(2) was lifted.

RAKESH DWIVEDI: *United Motors* upheld the provision, *Bengal Immunity* then took a different view.

CHIEF JUSTICE D. Y. CHANDRACHUD: *Pesikaka* and *Dhakras* on the ground that they dealt with Article 13.

RAKESH DWIVEDI: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: Actually, that three are their extracts which are important 421, 427, 428 and 429.

RAKESH DWIVEDI: Absolutely right. 421. May I place it?

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes.

RAKESH DWIVEDI: 'Now, in considering the question as to the effect of unconstitutionality of a statute, it is necessary to remember that unconstitutionality might arise, either because the law is in respect of a matter not within the competence of the Legislature or because the matter itself being within its competence, its provisions offend some constitutional restriction. In a Federal Constitution, where Legislative Powers are distributed

1 between different bodies, the competence of the Legislature to enact a particular Law must
2 depend upon whether the topic of that Legislation has been assigned by the Constitution to
3 that Legislature. Thus a Law of the State or an entry in List I, Schedule VIII of the Constitution
4 would be wholly incompetent and void. But, the Law may be on a topic within its competence,
5 as, for example, an Entry in List II, but it might infringe restrictions imposed by the
6 Constitution on the character of the Law to be passed as, for example, limitations enacted in
7 Part III of the Constitution. Here also, the law to the extent of the repugnancy, will be void.
8 Thus, a legislation on a topic not within the competence of the Legislature, and a legislation
9 within its competence but violation of Constitutional limitations, have both the same
10 reckoning in Court of Law. They are, both of them unenforceable. But does it follow from this,
11 that both the laws are of the same quality and character and stand on the same footing for all
12 purposes? This question has been the subject of consideration in numerous decisions in the
13 American courts, and the preponderance of authority is in favour of the view, that while a law
14 and a matter not within the competence of the legislature is a nullity, a law on the topic within
15 its competence but repugnant to the Constitutional prohibitions is only unenforceable. This
16 distinction has a material bearing on the present discussion; if a law is on a field not within
17 the domain of legislature, it is absolutely null and void. And a subsequent session of that field
18 to the legislature will not have the effect of breathing life into what was a stillborn piece of
19 legislation, and a fresh legislation on the subject would be". So, even subsequent conferment
20 is unhelpful. "But if the law is in this respect of a matter assigned to the Legislature but its
21 provisions disregard Constitution's prohibitions, though the law would be unenforceable by
22 reason of those prohibitions, when once they are removed, the law will become effective
23 without reenactment". Then leaving the rest, if Your Lordship goes...

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now, you can go to 427, I think bottom of 427.

26

27 **RAKESH DWIVEDI:** *Pesikaka* and all are dealt in page 424.

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And, on the discussion at 427 after dealing
30 with *Pesikaka*.

31

32 **RAKESH DWIVEDI:** 427 bottom, the result. "The result of the authorities may thus be
33 summed up. Where an enactment is unconstitutional in part but rallied as to the rest,
34 assuming of course, that the two portions are severable, it cannot be held to have been wiped
35 out of the statute book, as it admittedly must remain there for the purpose of enforcement of
36 the valid portion thereof. And being on the statute book, even that portion which is
37 unenforceable on the ground that it is unconstitutional, will operate *proprio vigore* in the

1 constitutional bar is removed". Please mark this. It is not a general statement. In this case,
2 what happened was that, Parliament had imposed a restriction. Under 286, Parliament
3 specifies, supposing, there are special goods of importance, 4% will be the tax. Now, if the State
4 Legislature makes some law and had said, that as and when the limitation is removed, it will
5 be something different. Now, once the Parliament removes, it starts operating automatically.
6 That was the position here.

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Then you can see at the bottom of page 428,
9 that will be important because Mr...

10

11 **RAKESH DWIVEDI:** The fact that it is invalid, from there.

12

13 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Bottom of 428. The last para of... You're on
14 428, right?

15

16 **RAKESH DWIVEDI:** Yes.

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18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Before you leave the last para, about ten lines
19 from the continuing para... the result...

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21 **RAKESH DWIVEDI:** The fact that...

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23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, "The fact that.."

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25 **RAKESH DWIVEDI:** "The fact that it is invalid as to a part, has not the effect of obliterating
26 it out of the statute book, because it is valid as to the part, and has to remain in the statute
27 book for being enforced as to that part. The result of the enactment of the impugned act is, to
28 lift the ban under Article 286(2), and the consequence of it is, that the portion of the
29 explanation which relates to sales in which property passes outside Madras, but the goods are
30 delivered inside Madras, and which was unenforceable before, became validate and
31 enforceable. In this view, we do not feel called upon to express a new opinion as to whether it
32 would make any difference in the result if the impugned provision was unconstitutional in its
33 entirety". This is very important. So, even 286...

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And now last para there, 428. That then sums
36 it up.

37

1 **RAKESH DWIVEDI:** “There is one other aspect of the question to which reference must be
2 made. The decisions in *Pesikaka* and *Bhikaji Dhakras*, both turn on construction of
3 Article 13, which enacts that law shall be void to the extent they are repugnant to the provisions
4 of Part III. We are concerned in these petitions not with infringement of any of the provisions
5 of Part III, but of Article 286(2). And the point for our decision is as to the effect of the
6 infringement of that provision. Article 286(2) does not provide that a law which contravenes
7 it is void, and when regard is to be had to the context of that provision, it is difficult to draw
8 the inference that...”

9
10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And now you can just see the last sentence of
11 that para, “Whether we consider the question on broad principle...”

12
13 **RAKESH DWIVEDI:** “... broad principle as to the effect of unconstitutionality of a statute,
14 or on the language of Article 286(2), the conclusion is inescapable that Section 22 of the
15 Madras Act and the corresponding provisions in other statutes cannot be held to be null and
16 void and *non est* by reason of their being repugnant to 286(2). And the bar under that Article
17 having now been removed.

18
19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, the substance of the argument was that
20 now that the bar was removed, Parliament then enact a fresh law. This was not necessary, they
21 said, to enact a fresh law. The bar was removed and therefore, they could....

22
23 **RAKESH DWIVEDI:** Therefore, it starts operating. But they took caution that if in some
24 case it is entirely, then it doesn't matter really whether the provision calls it void or not. If your
25 constitutional prohibition anywhere residing.

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27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Really speaking, your argument places the
28 violation of the basic structure on the same pedestal as a law which is lacking legislative
29 competence...

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31 **RAKESH DWIVEDI:** Legislative competence...

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33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So that it's... It is then never... It's null and
34 void.

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36 **RAKESH DWIVEDI:** Null and void.

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And it has never deemed to have entered the
2 statute book at all.

3

4 **RAKESH DWIVEDI:** Absolute... Now, this was again considered in *Deep Chand*,
5 Annexure 22 of Volume.... This is not in that big compilation. It's in Volume 2, Volume 2N.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page?

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9 **RAKESH DWIVEDI:** At page 1027.

10

11 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What is the judgment?

12

13 **RAKESH DWIVEDI:** *Deep Chand*.

14

15 **JUSTICE B.V. NAGARATHNA:** *Deep Chand*?

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17 **RAKESH DWIVEDI:** Yes. 'All Constitution benches....', at page 1036. Kindly have para 14
18 and 15.

19

20 **JUSTICE SUDHANSHU DHULIA:** Dwivedi?

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22 **RAKESH DWIVEDI:** 1036. May I please read. 'It is therefore manifest that in the
23 construction of the constitutional provisions dealing with the powers of the Legislature, a
24 distinction cannot be made between an affirmative provision and a negative provision, for
25 both are limitations on the power. The Constitution affirmatively confers a power of the
26 legislature to make laws within the ambit of the relevant entries in the list and negatively
27 prohibits it from making laws, infringing the Fundamental Rights. It goes further and makes
28 the legislative power subject to the prohibition under Article 32. Apparent wide power is
29 therefore reduced to the extent of the prohibition. If Article 245 and 13(2) define the ambit of
30 the power to legislate, what is the effect of a law made in excess of that power. The American
31 law gives a direct and definite answer to this question, fully in his constitutional limitations
32 under the heading, 'Consequences statute is void.' Skip this, *Willis* and *Willoughby*, and
33 all are quoted. Section, para 18, then they consider right from *Keshavan Madhava Menon*
34 all cases. Para 18 at page 1039. 'We shall now proceed to consider the decisions of the Court to
35 ascertain whether the set principles are accepted or departed from.' That's the American
36 principles. First is *Keshavan Madhava Menon* is there and then para 20 is *Pesikaka*,
37 then *Saghir Ahmad* and then para 25, if Your Lordship has, at page 1048.

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2 Please come to page 1049 towards the middle, 'The result...' The sentence beginning, 'The
3 result of the aforesaid discussion may be summarized in the following propositions: 1)
4 Whether the Constitution...' Lordship, you got this portion? 'The result of the aforesaid
5 discussion may be summarized in the following propositions:

6 1) Whether the Constitution affirmatively confers power on the Legislature to make laws
7 subject wise or negatively prohibits it from infringing any Fundamental Rights. They represent
8 only two aspects of want of Legislative power.

9 2) The Constitution, in expressed terms, makes the power of legislature to make laws in regard
10 to increase in the list of Seventh Schedule, subject to the other provisions of the Constitution,
11 thereby circumscribes or reduces the set power by the limitations laid down in Part III of the
12 Constitution.

13 3) It follows from the premises that a law made in derogation or in excess of that power would
14 be *ab initio void* wholly or to the extent of the contravention, as the case may be.

15 4) The Doctrine of Eclipse can be invoked only in the case of law valid when made, but a
16 shadow is cast on it by supervening Constitutional inconsistency, or supervening existing
17 statutory inconsistency; when the shadow is removed, the impugned Act is freed from all
18 blemish or infirmity. Applying the aforesaid principles to the present case, we hold that the
19 validity of the Act could not be tested on the basis of the Constitution, but only on the terms of
20 the relevant articles as they existed prior to the amendment.'

21

22 Then kindly have **Mahendra Jaini**'s case, which is Volume 5. I'm sorry, it is the same volume
23 at page 157. Paragraph 21 at page 172 - 'We may, in this connection, also refer to the difference
24 in the language and scope of Article 13(1) and 13(2). Article 13(1) clearly recognizes the
25 existence of pre-existing laws in force in the territory of India, immediately before the
26 commencement of the Constitution and then lays down

27 that insofar as they are inconsistent with the provisions of Part III, they shall be void to the
28 extent of such inconsistency. The pre-Constitution laws, which were perfectly valid when they
29 were passed, and the existence of which is recognized in the opening words of Article 13(1),
30 revived the removal of the Constituency in question. This effect is Doctrine of Eclipse, if we
31 may say so with respect, was applied in **Bhikaji Narain** case. Article 13(2), on the other hand
32 begins with an injunction to the State not to make a law which takes away or abridges the right
33 conferred partly. There is thus a constitutional prohibition to the State against making laws
34 taking away or abridging Fundamental Rights. The legislative power of Parliament and the
35 Legislatures of the State under Article 245, is subject to the other provisions of the Constitution
36 and therefore subject to Article 13(2), which specifically prohibits the State from making any
37 law taking away or abridging the Fundamental Rights. Therefore, it seems to us that the

1 prohibition contained in Article 32 makes the State as much incompetent to make a law, taking
2 away or abridging the fundamental right as it would be where law is made against the
3 distribution of power contained in the Seventh Schedule to the Constitution between
4 Parliament and the Legislature of a State. Further, Article 13(2) provides that the law shall be
5 void to the extent of the contravention. Now, contravention in the context takes place only
6 once when the law is made. But the contravention is of the prohibition to make any law which
7 takes away or abridges the Fundamental Right. There is no question of contravention of Article
8 13(2) being a continuing matter. Therefore, where there is a question of a post Constitution
9 law, there is a prohibition against the State from taking away or abridging Fundamental
10 Rights, and there is a further provision, that if the prohibition is contravened, the law shall be
11 void to the extent of the contravention. In view of this clear provision, it must be held, that
12 unlike a law covered by 13(1) which was valid when made, the law made in contravention of
13 the prohibition contained in Article 13(2) is a stillborn law, either wholly or partially,
14 depending upon the extent of contravention. Such a law is dead from the beginning, and there
15 can be no question of its revival under the Doctrine of Eclipse. A plain reading, therefore, of
16 the words in Article 13(1) and 13(2), brings out a clear distinction between the two. 13(1)
17 declares such pre-Constitutional laws are inconsistent with Fundamental Rights. 13(2)
18 consists of two parts. The first part imposes an inhibition on the power of State to make a law
19 contravening Fundamental Rights. Second part, which is merely a consequential one,
20 mentions the effect of the breach.

21
22 Now, what the Doctrine of Eclipse can revive, is the operation of law, which was operative until
23 the Constitution came into force, and had since then, become inoperative, either wholly or
24 partially. It cannot confer power on the State to enact a law in breach of Article 13(2), which
25 would be the effect of the application of the Doctrine of Eclipse to post Constitutional law.
26 Therefore, in the case of 13(1) which applies to existing law, Doctrine of Eclipse is applicable
27 as laid down in *Bhikaji Narain*. But in case of a law made after the Constitution came into
28 force, it is Article 13(2) which applies. An effect of that is what we have already indicated and
29 which was indicated by this Court as back as *Saghir Ahmad*". Then they go on to explain
30 that case of *Keshavan Madhav*, etc. And the last... The next case was *Ambica Mills*, which
31 they rely. In my note at page 10... I'll mention that later on. I'll complete afterwards.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume?

34

35 **RAKESH DWIVEDI:** Same Volume, Annexure 8, page 202.

36

37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 202.

1
2 **RAKESH DWIVEDI:** Para 32. This refers to **Sundaramier, Deep Chand** and etc. But
3 it's necessary to read it to show how **Ambica Mills** is trying to move slightly away from... In
4 **Sundaramier**, Justice Venkatarama Iyer said that, "A law made without legislative
5 competence and law violative of Constitutional limitations on legislative power, were both
6 unconstitutional and both had the same reckoning in a Court of law, and they were both
7 unenforceable. But it did not follow from this, that both laws were of the same quality and
8 character, and stood on the same footing. Proposition laid down by the Learned Judge was
9 that if a law is enacted by the legislature on a topic not within its competence, the law was a
10 nullity. But if the law was on topic within its competence, but it violated some Constitutional
11 prohibition, the law was only unenforceable and not nullity. In other words, law if it lacks
12 legislative competence, was absolutely null and void, and a subsequent session of the
13 legislative topic would not revive the law with still-born, and the law would have to be
14 reenacted. But a law within the legislative competence but violative of constitutional
15 limitation, was unenforceable. But once the limitation was removed, law became effective. The
16 learned judge said that the observations of Justice Mahajan in **Pesikaka's** case that *qua*
17 citizens that part of Section 13(b) of the Bombay Prohibition Act, which had been declared
18 invalid by this Court, had to be regarded as null and void, could not in the context be construed
19 as implying that the impugned law must be regarded as *non est* so as to be incapable of taking
20 effect when the bar was removed. He summed up the result of the authorities as follows,
21 wherein enactment is unconstitutional in part, but valid as to the rest, assuming of course, that
22 two portions are severable. It cannot be held to have been wiped out of the statute book. It
23 admittedly must remain there for the purpose of enforcing the valid portion thereof and being
24 on the statute book in that portion which is unenforceable on the ground that it is
25 unconstitutional will operate *proprio vigore* when the constitutional bar is removed. In **Deep**
26 **Chand**, it was held at a post Constitutional law is void from its inception. But that pre-
27 Constitution law having been validly enacted, would continue in force, so far as non-citizens
28 are concerned, after the Constitution came into force. The Court further said that there is no
29 distinction in the meaning of the word 'void' in Article 13(1) and 13(2), and that it connoted
30 the same concept, but since from its inception, the post constitutional law is void, the law
31 cannot be resuscitated without reenactment. Justice Subba Rao, who wrote the majority
32 judgment said after citing the observations of Justice Das, acting Chief Justice in **Keshavan**
33 **Madhava Menon**, the second part of the observation directly applies only to a case covered
34 by 13(1). Further learned judges say that the laws exist for the purpose of pre-Constitution
35 rights and liabilities, they remain operative even after Constitution as against non-citizens.
36 The said observation could not obviously apply to post constitutional laws. Even so, it is said
37 that by a parity of reasoning, the post constitutional laws are also void to the extent of the

1 repugnancy. And therefore, the law in respect of non-citizens will be on the statute book and
2 by the application of doctrine of eclipse, the same result would flow in its case also. There is
3 some plausibility in this argument, but it ignores one vital principle, the existence or the non-
4 existence of legislative power or competency at the time when the law is made, governs the
5 situation. Chief Justice Das dissented, he was of the view that post constitutional law may
6 infringe either a fundamental right conferred on citizens, or a fundamental right conferred on
7 any person, citizen, non-citizen. And that in the first case, the law will not stand in the way of
8 exercise by the citizens of that fundamental right and therefore will not have any operation in
9 the right of citizens, but it will be quite effective as regards to non-citizens.

10
11 Then they discuss **Jaini's** case. Kindly come to paragraph 36. If the meaning of the word 'void'
12 in Article 13(1) is same as its meaning in 13(2), it is difficult to understand why a pre-
13 Constitution law, which takes away or abridges the rights under Article 19, should remain
14 operative even after the Constitution came into force, as regards non-citizens and a post
15 Constitution law which takes away or abridges them, should not be operative as respects
16 non-citizens. The fact that pre-Constitution law was valid when enacted, can afford no reason
17 why it should remain operative as it respects non-citizen, after the Constitution came into
18 force, as it is, as it became void on account of its inconsistency with provisions of Part III.
19 Therefore, the real reason why it remains operative as against non-citizen is, that it is void only
20 to the extent of its inconsistency with the rights conferred under Article 19. And that its
21 voidness is therefore confined to citizens - *Ex hypothesi*. The law became inconsistent with
22 their Fundamental Rights alone. If that be so, we see no reason why a post constitutional law
23 which takes away or abridges the rights conferred by Article 19, should not be operative in
24 regard to non-citizens, as it is void only to the extent of the contravention of the rights
25 conferred on citizens, namely those under Article 19. So, this is the divergence which emerges
26 but only in the context of Article 19, because Article 19 is limited to citizens. Other
27 Fundamental Rights are not so limited. If, however, the Court finds that any other
28 Fundamental Right is limited, but this is a... we find there are two Constitution benches of
29 equal strength. So this, obviously, cannot amount to over-ruling of the earlier dictum in **Deep**
30 **Chand** and **Jaini** but there is a divergence. All three of them being Constitution Benches of
31 same strength. Now, this was sought to be supported.

32
33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Can you sort of formulate the divergence that
34 **Ambica Mills...**

35
36 **RAKESH DWIVEDI:** The divergence between **Ambica Mills** on the one hand and
37 **Mahendra Lal Jaini** and **Deep Chand** is that both are dealing with a situation in 19, unlike

1 **Sundararamier**. But they are saying that - One says that this proposition that a law which
2 is violative of 13(1) continues to apply for the past transaction as well as *qua* non-citizens,
3 whereas this defect is noted by Justice Matthew in **Ambica Mills**, that if this is the position
4 with regard to the second aspect of non-citizens under 13(1), then the position will remain
5 same under 13(2) also because *qua* 19.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** *Qua* 19.

8

9 **RAKESH DWIVEDI:** Now, my Learned friends want to enlarge this and apply it to 368. If
10 it cannot apply, be translated and apply to Legislative incompetence, it cannot be... So the soil
11 is completely different. Before one applies a law declared in respect in one context, one has to
12 note what were the limitations of Article 19? What is the structure of Article 19? What is the
13 structure of other Fundamental Rights and how it is different from incompetence cases?
14 Incompetence means you don't have that power. Now, to support this migration of the legal
15 dictum in the field of 13(1), and applying it to 368 they sought assistance from the observations
16 of the great Jurist Shri H. M. Seervai. Unfortunately, my learned friend quoted only
17 proposition 4 would have been more appropriate if entire para 8.30, which I have extracted at
18 page 25 of my written note 2N...

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Okay. Page?

21

22 **RAKESH DWIVEDI:** 25. So, what Mr. Seervai does is that he discusses first **Keshavan**
23 **Madhava Menon, Pesikaka** and **Sundararamier** cases and then draws what are the
24 propositions flowing from them, which is extracted in 8.30, para 27 of my note. 'The extract
25 from Shri...' It should have been 'Shri H.M. Seervai, Constitution Law of India, Fourth Edition,
26 Volume 1, page 4156, is actually Proposition 4 stated in para 8.30", which is reproduced.
27 "There is a distinction between a law unconstitutional for lack of legislative power and a law
28 unconstitutional because of violative of provisions of the Constitution other than those which
29 relate to the distribution of legislative power. A law which is unconstitutional for lack of
30 legislative competence is *void ab initio*. A law which is unconstitutional for violation of
31 Constitutional limitation is unenforceable so long as it continues to violate Constitutional
32 limitation. Such a law, whether pre-Constitution or post Constitution is not wholly void if it
33 violates Fundamental Rights. It is merely eclipsed by the Fundamental Right and remains, as
34 it were, in a moribund condition as long as the shadow of the Fundamental Rights falls upon
35 it. When that shadow is removed, the law begins to operate *proprio vigore* from the date of
36 such removal, unless it is retrospective.

1 3) A law void for lack of legislative competence is not revived if legislative power is
2 subsequently given to the Legislature which enacted it. A law partly void because of violation
3 of constitutional limitation operates *proprio vigore* when limitations are removed.

4 4) When a Court declares a law to be unconstitutional, that declaration does not repeal or
5 amend the law, for to repeal or amend the law is a legislative and not a judicial function". This
6 is what my learned friend extracted in his written note. "The word 'void' in 13(1) and 13(2) does
7 not mean repealed, nor is the law declared void under 13(1) or (2) obliterated from statute
8 book. Such a law is not wholly void, but by express terms of the Article, is void only to the
9 extent of its repugnancy too, or contravention of the provision of Part III relating to
10 Fundamental Rights. The above conclusions were drawn by Shri Seervai, after discussing the
11 cases of **Keshavan Madhava Menon**, and **Pesikaka, Bhikaji Dhakras** and **M.P. V.**
12 **Sundaramier**. Shri Seervai proceeds to then consider the subsequent cases in
13 **Bashesher Nath, Deep Chand** and **Mahendra Lal Jaini** and **Ambica Mills"**. Based
14 on the discussion, he culled out the following propositions. That is 8.37. "Justice Matthew..."
15 All this Your Lordships have seen. Your Lordships come to c). In fact, I may read a) also at
16 page 27. "If, as held in **Mahendra Lal Jaini's** case, the word 'void' in Article 13(1)(2) had
17 the same meaning. It was difficult to understand why a pre-Constitution law violating Article
18 19 should remain operative against non-citizens after the commencement of the Constitution,
19 and a similar post Constitutional law should not reveal operative against non-citizens. The fact
20 that the pre-Constitution law was valid when an enacted, was irrelevant in its continuing to
21 operate against non-citizens, notwithstanding the provision of Article 13(1) of the
22 Constitution, came into force. The real reason why the law remained operative was, that only
23 the law became void under 13(1), which took away or abridged the Fundamental Rights in the
24 Part III. And since Article 19(1) does not confer any Fundamental Rights on non-citizens, such
25 a law remained operative against non-citizens. If so, a similar post Constitutional law would
26 also remain operative against non-citizens. Rights do not exist in vacuum. They must inhere
27 in some person, natural or juridical, and under Part III, they inhere even in fluctuating bodies
28 like religious denominations.

29 c), the scheme underlying 13(1)and 13(2) is the same. Article 31 makes the pre-Constitution
30 law to the extent of its inconsistency with Fundamental Rights. Article 13(2) makes a post
31 Constitution law void to the extent of its contravention of Fundamental Rights. In both cases,
32 the law remains operative *qua* non-citizens because Article 19 does not confer any
33 Fundamental Right on non-citizens. The voidness is not in them, but to the extent only of
34 inconsistency or contravention. Therefore, void in Article 13(2) can only be in void as against
35 persons whose Fundamental Rights are taken away or abridged by law. The law might be
36 stillborn, so far as the person, entities or denominations, those Fundamental Rights are taken
37 away or abridged. But there is no reason why this law should be void or stillborn as against

1 those who have no such rights". So, even according to the learned author, in part it is stillborn,
2 which is a theory, which Your Lordships will have to test in some case. In this case doesn't
3 require Your Lordships to go into all this, but since my learned friends have raised it, therefore,
4 only I'm trying to demonstrate that these dictums and the debate is in the context of breach of
5 Article 19 and in the context of a debate of citizen versus non-citizen.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

8

9 **RAKESH DWIVEDI:** Though in some appropriate case, Your Lordships may go into all this,
10 but in the present case, it's a case of incompetence, constituent incompetence, which may be
11 considered to be akin to legislative incompetence, where all these cases, including the learned
12 authors are at one that, in this case of incompetence, it is null and void, *ab initio* beginning as
13 if it was not there at all. As if it had no effect. And in case of 368, it will be a case where the
14 Constitution does not stand amended on account of Section 4.

15

16 **JUSTICE B.V. NAGARATHNA:** Article 368(4) also was struck down because judicial
17 review of the 42nd Amendment also was barred.

18

19 **RAKESH DWIVEDI:** That's right.

20

21 **JUSTICE B.V. NAGARATHNA:** That was also struck down in *Minerva Mills*.

22

23 **RAKESH DWIVEDI:** Yes.

24

25 **JUSTICE SUDHANSHU DHULIA:** Section 55.

26

27 **RAKESH DWIVEDI:** Then they brought in separation of powers and it is well settled. I will
28 not trouble Your Lordships with page 30 and 31, I have mentioned. Your Lordships have said
29 that under the Constitution of India, there is no rigid separation of power. Even this Court
30 makes rules, Rules of Court, Rules regarding to servants, so there are some legislative
31 functions. Then there is, as I said, the Court makes, judicially, also makes law. Not in the way
32 the Parliament does, but through interpretation and declarations under 141.

33

34 **JUSTICE B.V. NAGARATHNA:** So, overlapping of functions.

35

36 **RAKESH DWIVEDI:** Yes.

37

1 **JUSTICE SUDHANSHU DHULIA:** Civil servants make most of the rules.

2

3 **RAKESH DWIVEDI:** That's right. Most of the rules are made by them. So there's no rigid
4 separation. Even in the matter of judiciary, notwithstanding that the fact that it is a basic
5 feature of the Constitution still, the salaries are fixed by Parliament. There's so many things
6 which Parliament does with regard to the Courts, Judiciary, the Legislatures do. So, the
7 separation of power, My Lord, doesn't really... the fact... Court doesn't need to repeal. So, I will
8 just draw Your Lordships, finally coming back to Your Lordship, just note at page 11, I go back,
9 starting from *Kesavananda*, I go back to *Kesavananda Bharati* and I place the ten
10 judges order, which was finally passed in that case. I've extracted at page 11 and the direction
11 number 2. Now, kindly correlate this para 75. Chief Justice Y. V. Chandrachud uses the same
12 expression, 'does not enable Parliament.' So, the ability of Parliament to introduce a bill is not
13 there. The ability of Parliament to pass that Bill is not there. Such a Bill therefore itself, Section
14 4 being part of the bill, goes out, that ability is lacking. Now, this is something not there in
15 13(1), 13(2), so Your Lordship need not enter into that debate. And the next page I have quoted
16 from the *IR Coelho's* observation. The bold portions in 124 and 125. It would fall last four
17 lines of the bold portion in 125 would fall beyond the constituent power. And then at page 14
18 is Para 75 of *Minerva Mills* - identical expression. 'Section 4 is beyond the amending power,
19 therefore void.' So, I'll just wind up, My Lord, with giving to Your Lordships, the four cases
20 which I missed out on the first part of it. On that first one... the first two cases are on material
21 resources, that is, *1992 Supp (1) SCC 692 Assam Sillimanite*, Volume 5, page 2640 at
22 2654.

23

24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 2654?

25

26 **RAKESH DWIVEDI:** Yes, My Lord. And the second is *Jilubhai vs State of Gujarat*,
27 *1995 Supp (1) SCC 596*, Volume 5, page 2676 at page 2700. Para 29. The first one is para
28 34. They've said that material resource has to be consumed widely. The third case is
29 *Jagannath vs Authorized Officer*. That's *1971 (2) SCC 893*. 893, para 18 and 29.

30

31 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume?

32

33 **RAKESH DWIVEDI:** This is Volume 2, Annexure 7... Volume 2N, Annexure 7 at page 184-
34 198. This is, with regard to acquisitions, which I said, is part of the 39(b). So this case directly
35 holds that acquisition and distribution go together under 39(b). And the last is *Pathumma*
36 case, *1978 (2) SSC 1*, para 5 and 8, Volume 2(n), Annexure 18. That's Page 891 at Page 898-
37 900. This is a case of that agricultural credit loans... agriculture debt, which was wiped out and

1 upheld by a Seven Judges Bench of this Court. So even that is a material resource, upheld with
2 reference to 39(b). My Learned, Solicitor General has mentioned this. I'm grateful, My Lord.

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Thank you, Mr. Dwivedi.

5

6 **TUSHAR MEHTA:** I did not assess... I'll take five minutes only, My Lord. Please come to my
7 submissions 2-L, Page 23. Just, My Lord, I am highlighting, because I see some, My Lord,
8 problem... just a word of, caution. Your Lordships are aware, as, My Lord... 42, My Lord, 2-L.
9 L for Lakshadweep. 42. My Lord, Your Lordships would be going into it. I'm just bringing to
10 Your Lordship's notice, without reading it that this is also one more angle.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 2-L?

13

14 **TUSHAR MEHTA:** 2-L.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There's no page 42 actually.

17

18 **TUSHAR MEHTA:** 23, para 42.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

21

22 **TUSHAR MEHTA:** Sum and substance of the argument which I, My Lord, fully support and
23 adopt is that, if there is a legislative incompetence declared by the Court, then it goes. If it is
24 held to be unconstitutional on the ground of violation of Fundamental Rights, it remains as a
25 dead letter, My Lord, according to them. But now there is one nuance, which is not
26 concerned... We are not concerned, but in some other matter it might affect. One provision
27 was declared unconstitutional under 14 and 19. It remained on the statute book. Therefore,
28 the Parliament removed that unconstitutionality, which was based on 14 and 19, and that Act
29 is upheld by this Hon'ble Court. Kindly bear one fact in mind. On page 23 Your Lordships
30 would find all this judgment. I'm not going... *Keshavan Madhava Menon, Pesikaka*, et
31 cetera, et cetera. But, Blackstone Doctrine, in just three minutes, I'll be able to satisfy Your
32 Lordships. And this is accepted with some addition by Indian jurisprudence. Since Your
33 Lordships would be writing on this, it may not be... It should be complete, that's the purpose.
34 Blackstone Doctrine, My Lords are aware, says that if Your Lordship declares a law invalid on
35 the ground of incompetence, constituent incompetence, or legislative incompetence, it relates
36 back to the date on which it was passed. And Your Lordship's declaration of
37 unconstitutionality would mean, it never existed. That is the Doctrine of... that is Blackstone

1 Doctrine. For the first time it came to be considered by Indian Court in ***Golaknath*** case. Your
2 Lordships would find that... I'm not reading, but at para 47 page 25, ***Golaknath***. My Lord, in
3 ***Golaknath*** case, Your Lordships accepted Blackstone Doctrine with one exception. Since
4 Your Lordships have the power under 142, Your Lordships decided that when we declare the
5 law to be invalid, it would go to the root. It never existed. However, we have the power of
6 prospective overruling. So, if we say that it would be overruled from today onwards, then it
7 would not relate back. My Lord, we are not concerned with that situation. Leave that, I am not
8 reading the ***Golaknath*** case. Please come to page 27, para 51. I'm just giving the citations,
9 that is ***Jarnail Singh v/s Lachmi Narain***, where My Lord, this Blackstone Doctrine...
10 Why I'm saying this? When Section 4 of the Amendment Act is declared unconstitutional, it
11 goes to the date on which it was made, and it never existed. That is Blackstone Doctrine. So,
12 whatever was there earlier, remains. It's not a revival. Section 4 never existed. Then Your
13 Lordships would have para 52, ***ACIT v/s Saurashtra Kutch Stock Exchange Ltd.***, 53,
14 ***P.V. George v/s State of Kerala***, 54, ***Chandrashekaraiiah v/s Janekere***, then ***M.M.***
15 ***Murthy***. This is a lead judgment on the point. Your Lordships can at Your Lordships' leisure,
16 go through it para 55. Now, come to page 30, para 56. Other jurisdictions have also accepted
17 this Doctrine, and that's what I wanted Your Lordships to take note also so that if Your
18 Lordships decide this question, our assistance should be complete. Therefore, other
19 jurisdictions also follow the same Doctrine. I'm not reading, My Lord. ***Harper v/s Virginia***
20 ***Department of Taxation***.

21

22 **JUSTICE HRISHIKESH ROY:** We'll look at them, Mr...

23

24 **TUSHAR MEHTA:** This is US. Thereafter, next is Supreme Court of South Africa, para 57.
25 ***Democratic Alliance vs Minister of Home Affairs***. Supreme Court of Appeal of South
26 Africa. Then My Lord, Irish Supreme Court, para 58. Then Australian, High Court of Australia,
27 that's the highest 59. Then 60, Supreme Court of Canada in so and so versus so and so. I have
28 quoted the relevant part. And thereafter again, some judgments of our Court, My Lords.

29

30 So, my respectful submission in cases where there is Constitution... unconstitutionality
31 declaration based on Fundamental Rights, it remains, but it can be cured by the Parliament.
32 But if it is either lack of Legislative Competence or Constituent Competence, like in the present
33 case, it goes, and in any case, alternatively, as per Blackstone Doctrine, it never existed, the
34 moment ***Minerva*** judgement is delivered. These are my submissions. As I have assured Your
35 Lordships yesterday, I have put one pager as page 2U, Volume 2U. It's one page. It's just been
36 mailed, I'm not reading it. What is my interpretation of Article 39(b). I have already made my

1 submissions on that. But yesterday I sought Your Lordships permission to place that one-
2 pager. It is literally a one-pager. Grateful.

3

4 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr. Sankaranarayanan.

5

6 **GOPAL SANKARANARAYANAN:** Before I address you on the points which I'd put in my
7 notes and I'd highlighted yesterday, I thought, I'll just respond to a few things that took place
8 this morning. The first is with reference to Mr. Dwivedi's arguments on the higher standard. I
9 adopt what he says about Constitutional or Constituent Incompetence, but I'd go a step further
10 and say that, as far as the basic structure doctrine is concerned, that is a very ethos of the
11 Constitution. That's the fundamental, the *grundnorm* as it were. I don't think there is a
12 possibility of, in any way, limiting of violation to it. If we accept that, a breach of the basic
13 features have taken place, that cannot be tolerated by this Court or by this country even for a
14 minute. What I mean is, that if therefore, this Court declares at any point of time, that the basic
15 structure has been violated, we cannot possibly consider a situation where that basic structure
16 violation is permitted to have continued even for a short while. It means at its fundament, that
17 constitutional balance has been upset. So, restoration to its very essence, to its very genesis is
18 a constitutional imperative. It is a mandate. I pitch it a little higher than what Mr. Dwivedi did,
19 because a question of Legislative Incompetence may permit this Court, particularly with its
20 powers under 32 and 142 to at some point, carve out remedies which may permit even a
21 legislatively incompetent law to a certain extent, to be saved for whatever purpose. But not so,
22 with the violation of the Basic Structure. Because if it's a Basic Structure violation, everything
23 has to go in my view. It's absolutely fundamental. Linked to this, is the fact that this
24 prospective overruling doctrine with Chief Justice Subba Rao heavily relied upon in
25 ***Golaknath***, was a pre-Basic Structure situation. So there he did not have the advantage,
26 though the arguments were made by Mr. Nambiar about implied limitations on the constituent
27 power, which was not accepted, but subsequently when Mr. Palkhivala argued it before the
28 ***Kesavananda*** bench, it succeeded. So, prospective overruling whether it is available to a
29 constitutional amendment challenge after the basic structure doctrine, is not a question that's
30 ever been explored. But I would say it is not available. It is not available for a Constituent Court
31 to say that, yes our basic structure has been violated. But today, when I am saying that that
32 violation has taken place, I am going to save everything that took place from then till now, but
33 not going forward.

34

35 **JUSTICE B.V. NAGARATHNA:** So, it goes to the root of the matter?

36

1 **GOPAL SANKARANARAYANAN:** Absolutely, goes to the root of the matter. Which is why,
2 if you step back a bit, the way 31C stands today is that 39(b) and (c) doesn't upset the balance.
3 But the minute on this side, apart from 39(b) and (c), you put a, d, e... And then you put 38,
4 37, 30, 40, 41 et cetera, the balance goes. That's why *Minerva Mills* said, "No. We can't send
5 it that far, but maybe those two." But between those two subclause of 39 and the entirety of
6 Part IV, where does that balance stand? We don't know. It's not been explored. But it is because
7 that balance gets completely upset that the Basic Structure is affected, which is why I would
8 say - 'There is no question. It goes absolutely to the root of it, and it cannot be permitted, even
9 for a moment.' The second, I think, just to assist because Your Lordships had put a question -
10 'Is there an instance where a provision has been struck down and then the Legislature has
11 taken steps?' It happened at least once, to our knowledge, which is in *Indira Gandhi vs Raj*
12 *Narain*, 329A was struck down; where they said - 'The election of the Prime Minister cannot
13 be questioned.' But that was in 1975... In November 1975. But in 1979, the 44th Amendment
14 omitted that provision completely. So that has happened at least once. I'm sure there might
15 have been instances where it has come up again. And then, I'm very grateful to Justice Bindal,
16 for highlighting the oversight, which is entirely mine - The provisions which have, in fact, been
17 struck down by the Constitution, at least in this version, we have put them all in italics, which
18 includes the NJAC provisions. Part IXB, Cooperative Societies, because 368(2) proviso was
19 not met. Everything there went, except dealing with Multi-state Cooperative Society. Sort of
20 competence issue. So, we very carefully went through it and put it in italics. But Your Lordships
21 are right. We omitted to do that with the *Chandra Kumar* provision. That's a correction that
22 we need to do.

23

24 **JUSTICE RAJESH BINDAL:** It is not in your book only. It is there in the Government
25 publication also.

26

27 **GOPAL SANKARANARAYANAN:** No, that is there. It's there across publications. But I'm
28 saying here at least I...

29

30 **JUSTICE RAJESH BINDAL:** My question was how to sort it out. They are bound to do it,
31 as you said, "329A , they've deleted."

32

33 **GOPAL SANKARANARAYANAN:** Eventually, My Lords, all authorities will say -
34 "Ignorance of the law is no excuse when it comes to a citizen." So the citizen has to know.
35 Exactly. There has to be some possible... Maybe some PIL will be brought before the Court at
36 some point.

37

1 **JUSTICE RAJESH BINDAL:** Deem, deem... In this case. All are... Everybody is raising.

2

3 **GOPAL SANKARANARAYANAN:** Correct.

4

5 **JUSTICE RAJESH BINDAL:** So if this solution is given immediately after the judgement,
6 the 'dealing deeming' arguments are not required.

7

8 **GOPAL SANKARANARAYANAN:** I would just say, suppose there was a review petition,
9 or a curative, and then that judgement was overturned. The poor draftsman would be going,
10 erasing and putting it back and erasing...

11

12 **JUSTICE RAJESH BINDAL:** Not that immediately. Next day, they have to take.

13

14 **GOPAL SANKARANARAYANAN:** No. I know. Or there may be an overruling at a later
15 stage after...

16

17 **JUSTICE B.V. NAGARATHNA:** Yes. Some larger Bench may say that the striking down
18 was bad.

19

20 **GOPAL SANKARANARAYANAN:** Correct.

21

22 **JUSTICE B.V. NAGARATHNA:** Therefore it gets revived by a Judicial verdict.

23

24 **GOPAL SANKARANARAYANAN:** I think the discipline that the publishers follow
25 effectively is that, look, if the Legislature has done something, we'll leave it there. The Courts
26 have taken a decision, so we'll have to put a footnote or something.

27

28 **JUSTICE HRISHIKESH ROY:** ... [UNCLEAR] ...Mr. Gopal Sankaranarayanan, the Senior
29 Counsel, but Gopal Sankaranarayanan, the editor of the Constitution.

30

31 **GOPAL SANKARANARAYANAN:** No. We will carry out that correction. My Lords, with
32 reference to... I think a very interesting remark that came from, My Lord, the Chief Justice
33 that what would happen if, instead of saying Part IV, each of the provisions were mentioned.
34 That was, in fact, done. There were two amendments moved in the 44th amendment, before
35 *Minerva Mills*, but two private members had moved amendments suggesting not the
36 entirety of Part IV, but 37, 38 39, and they mentioned four or five others. Now, it's very
37 interesting because if that had come up, and Your Lordships had struck that down, then

1 perhaps, I think it would be very valid to say that the provision has no meaning thereafter.
2 Because you've listed 39 among those. But that's not what happened. And there they didn't
3 even place those amendments finally for voting.

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** They would have probably struck down
6 everything but 39(b) and (c), because they were bound by *Kesavananda*.

7

8 **JUSTICE B.V. NAGARATHNA:** That would remain.

9

10 **GOPAL SANKARANARAYANAN:** They may have.

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 39(b) and (c) would have been bound by the
13 13-bench judgement.

14

15 **JUSTICE B.V. NAGARATHNA:** And Doctrine of Severability would have applied that. It
16 would have saved that.

17

18 **GOPAL SANKARANARAYANAN:** Correct. It would have saved that. Now I'll just quickly
19 go through two notes. I'm just telling you what my points are first. The two notes are 2-E. E
20 for extreme...Extreme. And 2-M. M for Middle. So, that's what the Court is being called upon.
21 2-E and 2-M.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Sir, you want us to accept 2-M and discard 2-
24 E, or what is the...

25

26 **GOPAL SANKARANARAYANAN:** In a sense. In a sense so that we can have a balancing
27 one. So I'll just explain what those eleven points are, so that Your Lordship knows immediately
28 what the sense of it. The first is with regard to the background of 31C. I think it's integral for
29 us to understand the historical background as well. Nobody explains this better than Granville
30 Austin, in Working a Democratic Constitution, Chapter 10, I think a very interesting reading
31 about how these three Constitutional amendments came together, 24, 25, 26, and what's the
32 aims were then. Interestingly, this 25th Amendment was part of a set of amendments to get
33 around *R. C. Cooper*, where 10:1, the nationalization of the banks had been rejected. Now,
34 why this is interesting is, apart from bringing in 31(2) by Section 2 of the 25th Amendment, it
35 brought in 31C by Section 3 of the 25th Amendment. All of these were subject matter of
36 *Kesavananda* eventually. But what is interesting is, the three things that took place. The
37 first, is that on 10th Feb, 1970, is when the judgment in *Cooper* takes place. On the 28th of

1 October, 1971, the Law Commission goes into the draft Constitution 25th Amendment Bill to
2 understand exactly how much of it would be approved, would be worth it, etc., etc. The
3 members of that commission are very interesting. It was chaired by former Chief Justice
4 Gajendragadkar, but... I was mentioning that this 46th report of the Law Commission...

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

7

8 **GOPAL SANKARANARAYANAN:** The Law Commission consisted of Justice
9 Gajendragadkar, Mr. P. K. Tripathi, Mr. P. M. Bakshi and former Law Minister and Home
10 Minister from Kerala who was sitting judge of the Kerala High Court, Mr. V. R. Krishna Iyer,
11 at that point of time. The report goes through at some length, with the bill, the 25th
12 Amendment Bill, makes several observations on it, which I don't think leaves any doubt about
13 what it was dealing with. It was very clearly dealing with private property, because in **Cooper**,
14 they were dealing with the private rights of shareholders and of banks, and it was to get around
15 that and they take note of it. I have annexed it as Annexure 1 to this note... to the first note,
16 which is 2-E. Annexed to it. Your Lordship, if you have it open, you just have to tap on it, it'll
17 take you to Annexure 1. Now, they also said that the implementation of the Directive Principles
18 through the Fundamental Right route or its limitation, was marking a new era in
19 Constitutional history. So the Law Commission strongly approved this kind of amendment
20 coming in. They, however, did not approve of the latter part, which excluded judiciary, which
21 is exactly what **Kesavananda** did later. Now, when this came up for debate in Parliament
22 and the bill was piloted through by the Law Minister then, Mr. Gokhale, he said, and I just
23 quote, "The individual's right to private property must yield second place to the supervening
24 right of society to acquire property for a public purpose." Yet again, emphasizing that it was
25 dealing with private property, there wasn't a doubt about it. They didn't categorize how much
26 of private property, what kind of private property but clearly dealing with private property.
27 This is extracted uniquely by Justice Krishna Iyer himself in **Ranganatha Reddy** at para
28 73. He quotes both the Law Commission report, of which he was a part, as well as the Minister's
29 speech. Now, this is point 1. I suggest, Your Lordship should just see that speech... the Law
30 Commission's Report, which exhaustively deals with the origin - point one. Point two - When
31 one looks at Article 31C, My Lord, I think it should be seen as part of a scheme, because the
32 Title of that part of Part III, saving of laws, came much later, only with the 44th Amendment.
33 Now, 31C is part of a scheme, and this many cases have said, which includes 31A, 31B, 31C and
34 31D, which doesn't exist any longer, which was dealing with anti-national laws. But 31A, B,
35 and C, all of them, do two things. One, they definitely deal with private holdings, private
36 property, private management of companies... 31A deals with that while amalgamating
37 companies, etc. It permits private control to be taken over. 31B does the same, when many of

1 these Acts are put in the Ninth Schedule. Most of the initial ones were all dealing with land
2 reforms. But the later ones, like maintenance of internal security, reservations in Tamil Nadu,
3 which has gone up above 50%, etc., haven't just been limited to that. But they have been done
4 to insulate from a challenge, which can be arising out of Part III, in which, 31A and 31C make
5 specific reference as initially drafted to Articles 14, 19 and 31. 31B doesn't. 31B insulates the
6 entirety of Part III, since Part III cannot be used at all. That's what *Coelho* clarified that, look,
7 if it's a Basic Structure impact that had and 14, 19 and 21 together seem to suggest that, that
8 can definitely be used to challenge any of those legislations. So, if you see 31A, B and C
9 together, it is, together, dealing not only with Public or Government, etc., In fact, perhaps, it's
10 not dealing with Public and Government at all. It's only really dealing with private holders.
11 And from that arises a further point that why would you insulate from Article 19, unless there
12 were citizens who had Private Rights under 19, which had to be agitated? Because if you were
13 not touching Private Rights, there would be no need for an Article 19, agitation at all, which is,
14 in fact, if you see the Law Commission's report again, they make a suggestion saying, "Why the
15 entirety of 19(1)(a) to 19(1)(g)? When you want to insulate, insulate 14 and insulate 19(1)(f)
16 and (g). Only property and your right to trade and profession. Why (a), (b), (c), (d), (e), free
17 movement, free speech. Why should that come in? But then they also question themselves by
18 using Sakal papers, etc., and say maybe free speech. maybe a printing press, for example,
19 maybe that needs to be covered. So, I'm just pointing out that Article 19's insulation suggests
20 very clearly that it is dealing with Private Rights. Now, I have... if Your Lordships wouldn't
21 mind, just in that note, which is 2-E.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

24

25 **GOPAL SANKARANARAYANAN:** If Your Lordships can come to the page 2. I have put a
26 chart which is somewhat similar to the chart Your Lordships saw. This is at page 18, it is
27 Annexure 2 to this note. Page 18 of 2-E. It's similar to the note, the charts that the Learned
28 Solicitor had shown Your Lordships, but it's different to this effect, that I have put the
29 highlighted portions to show the journey of 31C from then till now. The present form, which
30 is the last column, is our suggestion of how it stands as of today, without...

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's the matter for adjudication, as to
33 whether the words 'the principles specified in Clause B or C of 39' get restored.

34

35 **GOPAL SANKARANARAYANAN:** Yes. Whether it gets restored. Our suggestion, present
36 form, we believe that this is how it stands. But I put notes at the bottom so Your Lordships can
37 see at the bottom of the second, fourth and fifth column, to show what actually took place, and

1 this is how it has moved. Now, I'll just first deal with 31C points now, and then come to the
2 31E points. As far as 31C is concerned, the first proposition I have is that... this has been dealt
3 with at length by Mr. Dwivedi, so I'm not going to reagitate it or say anything about it. Just
4 that the question of revival would only arise if there was a death. There has, in fact, been no
5 death. The fact that it was only Section 4, I don't think there is a doubt about it. And if Your
6 Lordships come to 2-M, which is the other note, there is an annexure to it, which is Annexure
7 5. Your Lordships have Note 2-M? The second note came after the submissions that they had
8 made on 31C. 2-M. I'm sorry?

9

10 **JUSTICE SUDHANSHU DHULIA:** Page number?

11

12 **GOPAL SANKARANARAYANAN:** It's the second page of the note. 2-M is the second page.
13 It will start with Roman V. The first four are in 2-E, then five onwards are here. Yes. It starts
14 with Roman V.

15

16 **JUSTICE SUDHANSHU DHULIA:** 2-M you said?

17

18 **GOPAL SANKARANARAYANAN:** 2-M. M for Middle, Minerva. The word...

19

20 **JUSTICE SUDHANSHU DHULIA:** There is an N here, there is no M. Anyway...

21

22 **GOPAL SANKARANARAYANAN:** There's no M?

23

24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** M for Minerva, M for mango. This is very close
25 lunch.

26

27 **GOPAL SANKARANARAYANAN:** I'm sorry, My Lord. I won't keep Your Lordships.

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We'll come back after lunch. How long will you
30 take, Mr....

31

32 **GOPAL SANKARANARAYANAN:** I'm just going to finish these two notes.

33

34 **GOPAL SANKARANARAYANAN:** May I please? Instead of taking Your Lordships to and
35 fro between these notes, I thought I'd just finish with Note 2-E to start with. So, I'll just be
36 simpler. Note 2-E, page 3 is where I'm at, this note will end on this page. Page 3, Note 2-E.
37 Item 2-E. All My Lords have that. These are the points regarding the interpretation of 39(b),

1 and if Your Lordships can see the third bullet point - 'The words 'material and resources' are
2 interpreted by dictionaries in a very wide sense. This is also the interpretation offered by the
3 conquering judgment in **Ranganatha Reddy**. The consistent interpretation of 39(b) has
4 been in favour of private property being included.' The list of 16 judgments which interpret
5 39(b), which we have put in this Annexure 4. So with the... it has the judgment, the quorum,
6 as well as the passage which is extracted to show how 39(b) has always consistently been
7 interpreted, to include private property, private resources of whatever sort. 'Article 39(c) seeks
8 to prevent the concentration of wealth and means of production, because it's 39(b) and (c)
9 together, which are dealt with in Article 31C.' So, I think Mr. Shrinivas Murthy, when he was
10 arguing for the Petitioners had made an allusion to 39(c). If Your Lordships would have to take
11 Article 39 for a minute, if I can trouble Your Lordships, it starts with, and I think those words
12 are important at the beginning of Article 39 'The State shall, in particular direct its policy
13 towards securing', and it's a continuation after securing, which is '(a), (b), (c), (d), (e), (f)'. So
14 (a), (d), (e) and (f) are dealing with women, children and equality generally. (b) and (c) fall
15 together. (c), which is the other provision, is that - 'the operation of the economic system does
16 not result in the concentration of wealth and means of production to the common detriment'.
17 I would argue that this possibly could not mean concentration of wealth in public hands in
18 that of Governments and corporations. It would possibly mean and I think that was the
19 intention that it would be the concentration of wealth in a few hands so that they take away all
20 the means of production, et cetera. Now, if that is what it is, and if you were to read because
21 (c) is in negative terms, so that it would not result in concentration of it. (b) is in positive terms,
22 where it says that - 'The ownership and control of material resources of the community are so
23 distributed as best to subserve the common good.'

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What is meant by resources, it doesn't say
26 property, right? It refers to resources.

27

28 **GOPAL SANKARANARAYANAN:** Now, there are these 16 judgments of the passages put
29 out. All of them are Constitution Benches. All of them have consistently seemed to hold that
30 resources are private resources as well. So my suggestion to this Court is that the question
31 that's referred is not about what is the scope of resources. The question is only whether public
32 versus private. That's the only question. Now, if Your Lordships were to answer positively,
33 saying that it includes private, I think that question is best answered as it is a left to (b)
34 interpreted by later courts when a particular situation comes up.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But if we say all private resources, all private
37 property is comprised in resources.

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GOPAL SANKARANARAYANAN: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: There's nothing left for a future basis.

GOPAL SANKARANARAYANAN: I'll give Your Lordship the reason why because in 2019, in February 2019, a manufacturer of vaccines sets up a company, and he starts manufacturing vaccines. At that point of time, it's an entirely private resource, and he's running it perfectly as his domain, but come March 2020 and we have Covid hitting the world, at which point that resource, which is an entirely private resource, pretty much untouched becomes something which is essential for the entire community and then the State has to...

CHIEF JUSTICE D. Y. CHANDRACHUD: You are saying that private property is outside the scope of 39(b).

GOPAL SANKARANARAYANAN: That's all.

CHIEF JUSTICE D. Y. CHANDRACHUD: But we are saying that. Well, there must be some... there must be some parameters laid down. Otherwise the logic of *Ranganatha Reddy* and *Sanjeev Coke* is - 'An individual is a part of the community. Therefore, the individual is a part of... Since the individual is a part of the community, everything that is owned by an individual is community ownership.' So, this is like a hardback to Ayn Rand's 'Atlas Shrugged' and all that... line of Fountainhead.

GOPAL SANKARANARAYANAN: No, that's true. The reason why I would refrain from making any suggestions about what the scope of resources is only because of this. Very honestly, much like the founding fathers were, they had the wisdom of a future day in their minds when they made these provisions. I think if we were to take the thought forward, if today, we were attempting to lay down strict definitions, it could come back and boomerang on us on a future date. If 30 years down the line one interprets a judgment which is then rendered today, which is, for example, that anything within the house, which is meant for the personal use of individuals within the home, would be excluded from this Court. And if, say, in five years' time, we are in Bangalore and there's no water in the lakes and there's no water anywhere but I have tank or I have a borewell in my house and the State needs to command you that so that the water is then shared with everybody. They will use this nine-judge judgment and say - 'I'm sorry, this stops you from coming further.'

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** No, it doesn't. It only makes sure that you don't
2 have the immunity. That's all.

3

4 **GOPAL SANKARANARAYANAN:** No, but the question will...

5

6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You can still justify a law. You can still justify
7 a law for acquisition of private resources on the ground that it's in the public interest, but
8 because immunity is not available, that's all.

9

10 **GOPAL SANKARANARAYANAN:** But, Your Lordships are very familiar with the fact that
11 if somebody were to file a writ here, they'll be told to go to the High Court. They will go to the
12 High Court. Meanwhile, people are dying of thirst and they will file a petition there, and they
13 will be told the nine-judge Supreme Court judgment holds the field and that poor judge will
14 have his hands shackled. So he will have to decide in favour of the Petitioner. I'm saying today,
15 I'm just imagined, just off the cuff. This is an imagination of mine and my imagination is not
16 stretched far enough to think of all possible resources which could or could not in the age of
17 AI, in the age of Cryptocurrency, my friend Nipun Saxena wants to address Your Lordships on
18 that. On the fact that property can have so many different resources, because I think there is a
19 distinction between property and resources. I think we will fairly admit. So, resources means
20 there is some utility coming from that property which is going to be employed for a particular...

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Don't confine the...

23

24 **GOPAL SANKARANARAYANAN:** Correct. My suggestion is since the question is only can
25 you enter the private domain? The answer should be - Yes, you can. To what degree? What can
26 be touched? I think best left to smaller Benches to decide when that question arises, because...

27

28 **GOPAL SANKARANARAYANAN:** Yes.

29

30 **JUSTICE HRISHIKESH ROY:** Example that you gave of somebody having the right to
31 manufacture vaccine, that would definitely be part of what you understand as material
32 resource.

33

34 **GOPAL SANKARANARAYANAN:** Yes, it would.

35

36 **JUSTICE HRISHIKESH ROY:** And can we not think taking a cue from what fell from this
37 Chief Justice and literature.

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GOPAL SANKARANARAYANAN: Yes.

JUSTICE HRISHIKESH ROY: May I describe you as Mr. Howard Roark and say that you are visualizing a world where under the provisions, the material resources can certainly be utilized for situation of the kind that you have visualized.

GOPAL SANKARANARAYANAN: No, I agree, My Lord. But the difficulty I find myself in is one of *syntax*. When we use the phrase 'material resources', are we saying that any particular resource so identified is a material resource for all time to come or... Because in English, the word material has two definitions. One is tangible versus intangible, that is one definition of material.

CHIEF JUSTICE D. Y. CHANDRACHUD: Of value.

GOPAL SANKARANARAYANAN: The other is value. So...

CHIEF JUSTICE D. Y. CHANDRACHUD: Of utility and value.

GOPAL SANKARANARAYANAN: Of utility or value, that's other definition. Now, if I'm using that definition, something which may not have been a material resource yesterday may be in a critical situation as a material resource today. The question is, how do we define on a particular date what is that material resource, because these are Your Lordships...

JUSTICE HRISHIKESH ROY: Today and tomorrow to answer to that material resources to subserve the common good.

GOPAL SANKARANARAYANAN: Correct.

JUSTICE HRISHIKESH ROY: Today it is a material resource, but it is not to subserve the common good because everybody has water, but today I am the only one who is having the borewell with water.

GOPAL SANKARANARAYANAN: Correct.

JUSTICE HRISHIKESH ROY: So now today, material resource becomes to subserve the common good.

1

2 **GOPAL SANKARANARAYANAN:** Your Lordships are right, definitely. The only question
3 that I have in my mind is that when we start looking at resources, is there a possibility there
4 are resources which may not be treated as material resources today, meaning the source value
5 definition, not having that today, but it may have it at a particular day or vice versa. The
6 question is, do we have to go down that path for the purposes of this reference? This reference
7 really calls for only do you enter the domain or do you not? If you do, enter the domain, then
8 the State has to justify. In a given case...

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You tell a manufacturer of a semiconductor
11 chip situated somewhere in Taiwan that -' Well, you manufacture semiconductor chips in
12 India because India needs semiconductor chips, but sorry, this is the material resource of the
13 community. We might just take it away.' He will say -'Sorry, I don't want to invest in your
14 Country. If this is the level of protection which you give me.'

15

16 **GOPAL SANKARANARAYANAN:** I agree. Your Lordship and I have perhaps been reading
17 the same book, if it's 'Chip Wars'. No, I fully agree. So the question is I'm sure democratic
18 decisions will be taken by Legislatures and Governments about going that far. The only
19 question is, do we have a deficit of faith in that system that everything needs to be laid out and
20 defined in a very, very stark fashion today? I feel, for the purposes of the questions that are
21 referred, it's a limited question that is being referred because a question has been raised.
22 Saying, can you go private. Really for the purpose of this case, I don't think anybody is doubting
23 that ownership of physical property, land tenancy, et cetera, would be beyond that. If they do,
24 they will raise that questions before a Bench, once it's answered here.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** My Sister wants to say.

27

28 **JUSTICE B.V. NAGARATHNA:** I wanted to say. See, it is not just material resources per
29 se.

30

31 **GOPAL SANKARANARAYANAN:** Yes,

32

33 **JUSTICE B.V. NAGARATHNA:** It is material resources of the community.

34

35 **GOPAL SANKARANARAYANAN:** Yes.

36

37 **JUSTICE B.V. NAGARATHNA:** And it is for the purpose of distribution.

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GOPAL SANKARANARAYANAN: Correct.

JUSTICE B.V. NAGARATHNA: Now, if you read this in the context of Clause (c) where it speaks about the operation of economic system, 'distribution' is an aspect of the economic system.

GOPAL SANKARANARAYANAN: Yes. Absolutely.

JUSTICE B.V. NAGARATHNA: So it could be read in that context so that the material resources of the community is more distributed, so that ultimately the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Both these have to be read. So, question is if a person invests, puts up a huge factory, starts production. Tomorrow it cannot be said that it is going to be taken away for the purpose of distribution to the workers. That is not the aim of that (b) as such.

GOPAL SANKARANARAYANAN: Perhaps it's not, and Your Lordships will decide so in a particular case.

JUSTICE B.V. NAGARATHNA: It cannot be... You see only private resources also to be included also it may not be...

GOPAL SANKARANARAYANAN: No, the question only in my view...

JUSTICE B.V. NAGARATHNA: A private resource is not a material resource of the community, then the right to property, various other rights, *vis-a-vis* real property. What happens to those rights under the Common Law and the Statutory Law?

GOPAL SANKARANARAYANAN: So, I'm glad Your Ladyship referred to that. The reason why these phrases are used, and I mentioned that in my other note is that all these phrases come from Roman Law, and that's the origins behind how the founding fathers inserted these provisions in, they also have been borrowed from the Irish Constitution. But, in Roman Law, when they talk about ownership, and I've given a chart showing the different types of ownership, there's the type of ownership of property which can be taken, which can be distributed and which can be utilized, and there's a type of ownership that you can't for example, they refer to it as *res nullius*, wild animals, for example. Nobody has ownership over those. Forests, waterways, those kind of things. Nobody has ownership over it. The State

1 doesn't own it. Nobody owns it. It is available for everybody, and the State in public trust holds
2 it. So, I think the only question the way I would convert that question is to say, that if this State
3 is being told today, that you cannot employ 31C for any property that does not belong to the
4 State, then I think that is a very extreme view. The minute we are permitted to embark into
5 private ownership of any sort, it may be a company, it may be land, it may be cars, it may be
6 trucks, it may be any one of these things. For example, any natural disaster takes place and we
7 need to requisite something. Whatever it could be, it could be medicines. It could be food. It
8 could be any one of those things. Food, for example, one could claim for personal use. I need
9 it. But we have starving infants, perhaps, fatherless babies who are left after a flood. We need
10 to take care of them. Surely these powers can be employed for those purposes. It's a little
11 difficult now to stand and determine all of those. I'm saying that if you can go into the private
12 sphere, that's all. That's where the question stops. If you can go into the private sphere, where
13 we can go, in what circumstances? Because Article 21 survives. Article 21 is available for that
14 challenge.

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But the only problem is that you can't go as far
17 as *Ranganatha Reddy*, which says -'An individual is a part of the community that you can
18 think of an individual is that as a community.'

19

20 **GOPAL SANKARANARAYANAN:** Perhaps not.

21

22 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That may be a little farfetched. Maybe certain
23 vital aspects of a resource of an individual in which the community has an interest as well,
24 which is the resource of the community.

25

26 **GOPAL SANKARANARAYANAN:** I think that... I think would be....

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Data or the Airways, Spectrum....

29

30 **GOPAL SANKARANARAYANAN:** All of those. There are many examples. I'm sorry.

31

32 **JUSTICE B.V. NAGARATHNA:** Prior to distribution is always under the particular Land
33 Acquisition Act or whatever?

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35 **GOPAL SANKARANARAYANAN:** Yes.

36

37 **JUSTICE B.V. NAGARATHNA:** Or a Nationalization Act.

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GOPAL SANKARANARAYANAN: All of those....

JUSTICE B.V. NAGARATHNA: And it is after giving a compensation. Fair compensation.

GOPAL SANKARANARAYANAN: Correct. No. If Your Lordships consider intangibles for example, intellectual property. Both the Patents Act and the Copyright Act has compulsory Licensing provisions 84 and I think 31. Now compulsory Licensing provisions permits the State to step in, and take what is your intellectual property and employ it, take it as a compulsory license and ensure that it is employed for a larger purpose. There was a discussion, I think, yesterday about cancer cures. Anything of that sort, for example, which could be utilized. Now there surely it can't be said 14 or 19, because both apply, can be used when you have a provision like this which could be utilized by the State. Because otherwise they could become vulnerable to challenges under 14 and 19. Those are provisions, for example, which we could defend on that.

JUSTICE B.V. NAGARATHNA: Community first.

GOPAL SANKARANARAYANAN: It's arguable. I think it will depend... I think it's arguable, but I'm very honestly I'm not addressing Your Lordships on community and its scope. I don't want to take too much time on addressing that. I haven't gone into that in detail, but I feel it's best left on to a given date for us. Now, if Your Lordships can, then just for 1 minute, in the middle of this note.... I'm done with this note. Middle of this note, Annexure 4, if Your Lordship sees, I have listed out the judgments. If Your Lordships come to page 38, My Lords. Page 38. Just one para of *Bhim Singhji*. Para 16-A. 16-A. It gives a flavour of what could possibly go into this. About ten lines down Your Lordship sees the wide definition of industry? It's underlined. The underlined.... page 38. Bottom is underlined in red. It says...

JUSTICE HRISHIKESH ROY: Begins with 'Certain basic facts'. I mean, the paragraph begins with that.

GOPAL SANKARANARAYANAN: Yes, just about eight lines down you find the part. 'The wide definition of 'industry' or the use of general words like 'any person' and 'any purpose' cannot free the whole Clause from the inarticulate major premise that only a public purpose to subserve the common good in filling the Bill or Article 39(b) and (c) will be permissible. Even a private industry, maybe for a national need and may serve common good. Even a medical clinic, legal aid bureau, engineering consultant's office, private ambulance, garage,

1 pharmacist shop or even a funeral home maybe a public utility. Professions for the people
2 trade up to subserve community and industry in the strategic sector of the nation's
3 development may well be in private hands in the transitional stage of our pluralist economy
4 undergoing a Fabian transformation. Why should lands allotted to such private industries or
5 professionals be condemned the touchstone is public purpose, community good and like
6 criteria. If the power is used for favouring a private industrialist of a nepotistic reasons, the
7 oblique Act will meet with its judicial Waterloo. To presume as probable graph nepotism,
8 patronage, political cloud friendly pressure, or corrupt purpose is impermissible. The law will
9 be good, the power will be impeccable but if the particular act of allotment is mollified or
10 beyond the statutory and constitutional parameters such exercise will be a casualty in Court
11 and will be struck down.' I endorse broadly everything that is included here. Now, this is not a
12 dissent. This has been endorsed as part of the majority itself. Now, if I can trouble Your
13 Lordships, I'm done with this note. If you can just come to note 2-M. 2-M. The first point is
14 that there is no revival. Do all My Lords have 2-M?

15

16 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

17

18 **GOPAL SANKARANARAYANAN:** Justice Masih has it?

19

20 **JUSTICE AUGUSTINE GEORGE MASIH:** Yes.

21

22 **GOPAL SANKARANARAYANAN:** 2-M. The first is the word Revival is a misnomer
23 because there has been no death at all, Your Lordships can skip the first three bullet points.
24 The fourth one refers to Annexure 5, where there's a list of cases dealing with what the effect
25 of void is. I'm not reading. It. Your Lordships may see it but the void, effect of void which is
26 common to 13(2), which is common to 368 and which is common in this kind of circumstance
27 with the Basic Structure violation is that everything is effaced all the way to the beginning, as
28 Mr. Salve put yesterday, entirely, still born. If My Lord will see the last bullet point, which is
29 interpreting Article 368. 'As per 368(2), the effect of a valid amendment is' -this is from 368(2)
30 - 'that the Constitution shall stand amended in accordance with the terms of the Bill.' So, if it
31 is struck down, it means it shall not stand amended, which means there's no amendment at
32 all. That's the effect of it being void because it uses the word 'shall stand amended'. Therefore,
33 it shall not stand amended now, if the amendment is not there.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes. We got that.

36

1 **GOPAL SANKARANARAYANAN:** Next one is that it applies to the Constitution. The
2 primary point is the onus is entirely on the Petitioners when they say that the Doctrine of
3 Revival does not apply to Constitutional amendments. The Doctrine of Revival applies to
4 statutes. There's no doubt about that. There's a whole series of judgments, I put it on at
5 Annexure 6, a whole series.

6

7 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Statutes also, there is a principle that a repeal
8 of a repealing statute.

9

10 **GOPAL SANKARANARAYANAN:** Yes. That's a general...

11

12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** You cannot revive the original statute subject
13 to any intent to the contrary.

14

15 **GOPAL SANKARANARAYANAN:** No, that's been fully dealt with in *NJAC*, so I'm not
16 going to go through that all over again. Here the question is, you have taken one principle out
17 of dozens of principles that we applied day in and day out in courts in this country, whether
18 it's *res judicata*, whether it's special versus general, later versus earlier, et cetera. All those
19 provisions apply whenever Your Lordships are interpreting statutes of any sort. Suddenly the
20 barrier has been put up, as far as we are concerned, and told sorry that all that applies to
21 legislative enactments. For some reason, it doesn't apply to Constitutions. Why it doesn't apply
22 to a constitutional interpretation, is for them to discharge, which from that day in 1997 when
23 they sought this reference, till today, they haven't discharged his onus. They've raised the
24 question and left it hanging. As to why, when you have in Constitution Bench after
25 Constitution Bench, this Court, has applied this principle. Why suddenly, when it comes to the
26 Constitution itself, you will say, 'No'. There is suddenly an onus on us to show how it applies,
27 when in fact, every other principle we have applied.

28

29 **JUSTICE SUDHANSHU DHULIA:** They have touched upon this pen and ink theory,
30 which they have not elaborated.

31

32 **GOPAL SANKARANARAYANAN:** Correct. So I substitute that phrase. I'll address it right
33 now. I'll substitute that with pen and eraser and I'll explain why. When there is a substitution
34 of a provision, whether it's in a statute or whether it's in the Constitution, when there is a
35 substitution, it starts with erasing. So, you rub out the words 39(b) and (c), and then with your
36 pencil, you put in Part IV. All the provisions of Part IV. Now, there are two aspects linked to
37 what Mr. Dwivedi addressed Your Lordships. There are two aspects there. You have first done

1 a deletion, and then you have done an insertion. Now, when both are struck down, your
2 pencilling is reversed and your erasing is reversed. So, you're back to square one, you're back
3 to what was there at the inception. So, this principle of pen and ink has evolved both here and
4 abroad, in the context of provisions of law. No distinction has been made saying, oh, in a
5 Constitution, suddenly we will not apply a perfectly logical principle. There is absolutely no
6 reason why it should not apply the Constitution. So the onus is on them which they have not
7 discharged. The second is, and this has been pointed by our side many times. But the question
8 that was referred was only from three to five judges. This Doctrine of Revival. It was never
9 renewed from five to seven or seven to nine. So only at that stage, from three to five. And that
10 has been answered by this Court in five-judges, in *NJAC*. So if it's been answered, the question
11 that very question, whether Doctrine of Revival will apply to constitutional provisions has been
12 answered. If it's been answered, then a) it doesn't survive for answering now. b) it anyway been
13 answered and it's not so perverse that it needs to be disturbed.

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Sankaranarayanan, I think we...

16

17 **GOPAL SANKARANARAYANAN:** I'm wrapping up. That's why I'm going much quicker
18 than I would. I'm skipping a whole bunches of points. This is just a three-and-a-half-page note,
19 and I'm almost done. On 31C there are eight Constitution Bench judgments. Eight. I've listed
20 six here. There are two more which deal with electricity. *Thana Electric* and *Tinsukhia*.
21 All these. This is point 7 at page 3 of this very note. These eight judgments all deal with this
22 provision specifically. All of them deal with 31C and treat 31C as existing in the form in which
23 we argue it exists today, but most importantly *Coelho*, which is nine-judges, which is
24 important because it's a unanimous nine-judge judgment. 'Employee' is the word at para 52 of
25 *Coelho*. I'll just read that sentence out, 'in *Minerva Mills* while striking down the
26 enlargement of 31C', this is a coordinate Bench's understanding of what 31C did, that it
27 enlarged from just 39 (b) and (c) to the entirety of Part IV. This is the sentence at Para 52 of
28 Justice, Chief Justice Agarwal's judgment. So, the enlargement and the fact that 31C in that
29 State stayed rooted after the *Minerva Mills* decision without a doubt from eight Constitution
30 Benches, including a nine-judge one.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What is that sentence read like?

33

34 **GOPAL SANKARANARAYANAN:** 'The in *Minerva Mills* while striking down the
35 enlargement of Article 31C through 42nd Amendment which had replaced the words 'off or
36 any' of the principles later in Part IV with the principal specified in Clause (b) or Clause (c) in
37 Article 39, Chandrachud ji had said...' And they've referred to Section 4 of the Act and then

1 they've gone on to paragraph 53. But the understanding was that was an enlargement. What the
2 effect of it was only a mere enlargement. So you open the door a wider crack. That door has
3 been shut by *Minerva*, and that's the understanding and how 31C has survived throughout.
4 Now, 'Therefore a long, consistent understanding...' *stare decisis*. One large, substantial point
5 now at the end, which, if Your Lordships will see. Absurd consequences have already been
6 dealt with, in fact, it will surprise Your Lordships to know. Perhaps you know it already that
7 this 42nd Amendment, to the extent that those words, 'socialist' and 'secular', were inserted,
8 has been challenged before this Court by Mr. Ashwini Upadhyay.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Ashwini Upadhyay.

11

12 **GOPAL SANKARANARAYANAN:** Yes, and it's pending, it was listed on Monday. Now if
13 he were to, by some strange mean succeed, then the entirety of that would disappear from the
14 Preamble because what they did was not insert two words, they substituted the entirety of it.
15 There are many other example.

16

17 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Please speak to Mr. Upadhyay's creativity.

18

19 **GOPAL SANKARANARAYANAN:** We will. So Annexure 9 and 10 give an illustration of all
20 the provisions in the Constitution where there has been either omissions or there have been
21 substitutions, and the effect of that, particularly Annexure 10 Your Lordships may see. And
22 now Roman Law, Annexure 11. I have mentioned the roots of that and what I believe. I put a
23 chart to show what could be covered. The last point is an important point, and this is... when
24 any of these matters come up for decision making by a smaller Bench, which is their
25 suggestion, that apart from these other questions, they'll take everything else. The important
26 aspect is going to be about Article 14, 19 and the reliefs that can be granted by Courts. Today
27 unfortunately, because of this recent development, we have a situation where on Article 14,
28 there seems to be a divergence of opinion in this Court, on the reliefs that can be molded when
29 there has been a finding of a violation of a Fundamental Right. The recent judgment in
30 *Supriyo*, which is that same sex marriage case, the majority there, has come to the
31 conclusion. All five Judges agree that the situation is discriminatory. They say - There is a
32 violation of Article 14. However, the majority says that while this Court finds that there is a
33 discrimination, there's not really anything we can do about it, and we leave it to the State to
34 attend to it through a legislative mechanism. The minority takes a different view and says that
35 the Constitutional Court has evolved over years till a stage now, where once the Court has
36 found that there is a discrimination that has occurred as far as the citizen is concerned, it is an
37 obligation of the Court to ensure that a relief is molded and provided. Maybe in interregnum,

1 maybe permanent, whatever it is, a relief has to be granted. The majority view is, there is no
2 incumbent need to provide such a remedy. Now, that judgment, the majority judgment, is very
3 clearly *per incuriam*, because there are three Constitution Bench judgments which have not
4 been considered by.... No. I didn't even appear in that case. And Mr. Solicitor, please take your
5 seat. You can't interrupt like this. I'm not on anybody's side. I'm assisting a Constitutional
6 Court. Now, it is necessary for the purposes of the Constitution and its interpretation..... Mr.
7 Mehta is Heckler's veto in this Court clearly. Whenever he's done My Lord, if I can continue
8 my address. Now it is necessary for this Court to settle the position.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** All right, we got the point.

11

12 **GOPAL SANKARANARAYANAN:** I've mentioned in the note the three Constitution
13 Bench judgments, one of which was cited in the SCC online version of this judgment. All the
14 arguments placed by the various Counsels are also provided, which shows that Mr.
15 Ramachandran specifically referred to one of these judgments, yet the majority doesn't even
16 refer to it. It is squarely on the point, the fact about relief molding when Article 14 violations
17 take place. Now, if I may say, a five-judges Bench cannot take that call of another five-judges
18 Bench being *per incuriam*. So that will compulsory eventually have to go to seven-judges
19 Bench to decide. I would suggest that Your Lordships may declare the law one way or the other.
20 Just consider this. It's very critical. Because everybody, all citizens need to know that if I have
21 a violation of a Fundamental Right and I come to this Court, is the Court going to follow.....

22

23 **JUSTICE RAJESH BINDAL:** [UNCLEAR] in this case?

24

25 **GOPAL SANKARANARAYANAN:** There isn't. But since it's a pure question of law, since
26 it's a pure question of law.

27

28 **JUSTICE RAJESH BINDAL:** Then we will take it up.

29

30 **GOPAL SANKARANARAYANAN:** Your Lordships have that. Your Lordships have the
31 authority to take up any question of law.

32

33 **JUSTICE RAJESH BINDAL:** We will hear many counsels on that. Not only your argument.

34

35 **GOPAL SANKARANARAYANAN:** No, that's fine. Your Lordships can take it up. I'm
36 leaving it entirely. I have to make the argument because I think there's an obligation to make
37 the argument. That may be. I'm assisting on my own. Yes, I'm assisting on my own. This is my

1 submission on my own, which I'm entitled to. I don't need anybody's permission to make a
2 Constitutional submission. I don't need anybody's permission to make submissions in this
3 Court. I'm grateful.

4

5 **TUSHAR MEHTA:** This is neither Central submission, this is not State of Maharashtra's
6 submission and Mr. Dwivedi said -'It's not submission by the State of West Bengal'. It's really
7 unfair, that we have to give rejoinder to somebody who is supposed to be arguing the same
8 point which we are at. I'm saying this respectfully. I won't be able to be rude or rustic.

9

10 **GOPAL SANKARANARAYANAN:** I'm not even remotely claiming it's anybody's
11 instructions. As a lawyer assisting a Constitutional Court, I don't need instructions on pure
12 question of law.

13

14 **RAKESH DWIVEDI:** The Court has not appointed you *amicus*.

15

16 **GOPAL SANKARANARAYANAN:** That's okay. I'm not asking. I'm grateful, My Lord.

17

18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr. Divan. Mr. Divan leave some time for
19 the rejoinder.

20

21 **SHYAM DIVAN:** My Lord, Mr. Andhyarujina assured me at the lunch break that he'd used
22 his persuasive powers to urge you to sit beyond 04:00 p.m. As you have in the past. I will
23 support...

24

25 **ZAL ANDHYARUJINA:** I don't know I have. But, I have used my persuasive powers on my
26 Solicitor to delay my flight. I don't know if I can persuade Your Lordships to go 15 minutes
27 later for tea perhaps. That's about it.

28

29 **SHYAM DIVAN:** All right, then. I'll go as swiftly as I can. I'll just mention the point. So first,
30 My Lord, I am appearing for the JVPD Tenants and Residents Association. I am Respondent
31 Number 3 in Writ Petition No. 660/1998. JVPD Tenants and Residents Association. Second...

32

33 **H. DEVRAJAN:** [NO AUDIO STARTS] We are the Petitioner in 660. [NO AUDIO ENDS]
34 We have not made any submissions[NO AUDIO STARTS] on this should be around. [NO
35 AUDIO ENDS]

36

37 **CHIEF JUSTICE D. Y. CHANDRACHUD:** He's basically arguing a question of law.

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SHYAM DIVAN: I thought I should identify my... Why am I here.

CHIEF JUSTICE D. Y. CHANDRACHUD: Nothing on the facts on who these tenants are. We have one learned Senior Counsel, giving us some new ideas or inputs. That's all, nothing more than that.

SHYAM DIVAN: My written submissions are in Volume 2O. I will supplement those with submissions with an additional note. But let me just indicate to you that I will make points because time is short, and I'll make those points under five broad heads. And if Your Lordships feel that one is straying, Your Lordship will indicate that I should sort of curb it. Let me just preface this by making two statements. The first is that Your Lordships, in a Constitution Bench in *K.K. Kochunni*. My Lords, I'll make my points. Before I give you those clusters of... under five clusters of points, there's just one or two prefatory remarks I want to make. So, Lordships on the 4th March 1959 in a Constitution Bench of five learned judges in *K.K. Kochunni's* case, which is at Volume 5H and the relevant paragraph of that judgment is para 11. I'll just state it, said...

CHIEF JUSTICE D. Y. CHANDRACHUD: What page?

SHYAM DIVAN: It's just... in this volume, there's just one page. If Your Lordship likes I can give you the citation. Yes, *K.K. Kochunni*, it's *(1959) Supp (2) SCR 316*. But in the version which we have given you from SCC Online, there are paragraph numbers. The relevant paragraph number is para 11. And this is for the proposition because a contest was there as to whether this Court could issue a Declaratory relief.

CHIEF JUSTICE D. Y. CHANDRACHUD: All the learned Counsel, please start citing now the digital SCR because I can't tell you, how much our team has worked on it and we've brought it up. It's the official report absolutely up to date. And please do cite our official law report now with the neutral citations. We also have neutral citations.

SHYAM DIVAN: Very well, we'll do that. The contest...

CHIEF JUSTICE D. Y. CHANDRACHUD: It's like a book. It's not even like a PDF in a PDF form. eSCR was in a PDF form. Digi SCR. In fact, you can just while sitting here, just surf it on your iPad. It's in the book form, you flip a page as you flip a book's page. Yes.

1 **SHYAM DIVAN:** So, my Lord, *Kochunni* was on the case because at that point of time,
2 there was a contest, and a preliminary objection raised is to whether this Court under 32 could
3 issue Declaratory relief. And the contest was, were you required to file a suit under the Specific
4 Relief Act, and the Court said that no, we can issue Declaratory relief. The only reason I'm
5 mentioning this is it's very important with regard to the nature of the Declaratory reliefs which
6 Your Lordships have seen granted in *Minerva Mills*. And here I'm just pointing out one...
7 para 75 has been placed repeatedly before Your Lordship.

8
9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** So, what is the principle from *Kochunni* that
10 you are extrapolating Mr. Divan?

11
12 **SHYAM DIVAN:** No, this is just prefatory. Declaratory relief can be granted by this Court to
13 declare. Here thereafter, I point to paragraph 75 of *Minerva Mills*, and please see the nature
14 of the declaration. The language is absolutely clear - 'And insofar as Section 4 of the 42nd
15 Amendment is concerned...' That is set out in Mr. Dwivedi's note and the Solicitor General's
16 note, but you will find it at page 3966 of Volume 4.

17
18 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We saw that.

19
20 **SHYAM DIWAN:** Your Lordships have seen that. Now, I want to just mention a dimension
21 which is under judicial review. So, I'll just state the points under judicial review. If the
22 submission of the Appellants or the Petitioners here is accepted, then in our respectful
23 submission, it will severely impact the power of judicial review of this Court, and that ought
24 not to be allowed. Now, let me indicate how? First judicial review has been accepted right from
25 *Kesavananda Bharati* as an entrenched provision, an entrenched feature, and therefore
26 it's part of our Basic Structure. *Kesavananda*, Your Lordships will find there are
27 observations in *Minerva Mills*, in *L. Chandra Kumar*, all to that effect. I'll give you the
28 paragraph numbers, but this is very, very well established. Now, how does this cripple and
29 undermine judicial review, is the point which I am seeking to press. The theory being put forth
30 is, that on a correct understanding, when Your Lordships issues a declaration or issues or
31 strikes down a particular provision seeking to amend the Constitution, there remains a hole in
32 the Constitution. So, it's some sort of a Swiss cheese full of holes that will result and you'll have
33 a Constitution with hole after hole after hole. Now, that cannot be and ought not to be a policy
34 or a manner of interpretation that ought to be encouraged. An interpretation should be
35 encouraged where the Court is focusing on, what is the provision? How is it infringing a part
36 of the Basic Structure? How is it violating certain essential Fundamental Rights or other
37 features of the Constitution? Not that the Court should be focused on, what will happen after

1 I strike it down? Because there will be X hole or a Y hole, and you will have a number of holes.
2 That's my first point.

3

4 The second point I wish to make is that as far as judicial review is concerned, under our
5 constitutional scheme, it is not co-dependent on any other limb or branch of Government. It's
6 a power entirely vested in our constitutional Courts. The theory being suggested by the other
7 side is, and it develops and requires a co-dependence between not just the Court but also the
8 Court and the Legislature to fill a gap. So, I would respectfully submit that is contrary to
9 separation of powers, it's contrary to the notion of judicial review, which is vested entirely and
10 only in this particular institution. Do not please accept a set of submissions which will result
11 in a situation where despite Your Lordship's judgment and final declaration, there will still be
12 something else required by somebody else for the purposes of a meaningful way forward.
13 That's the second point.

14

15 The third point I wish to make, which also touches on judicial review is... so, the third facet is
16 really the efficacy of the judicial process. This severely undermines the efficacy of the judicial
17 process, if you are going to have a system or a suggestion or a theory which is accepted, which
18 requires another branch to also give complete and complete effect to what this Court seeks to
19 do in protecting rights of citizens. Now, please look at this entire... examine this issue from
20 another perspective. Again, from the judicial review angle. I would respectfully submit, that
21 please put yourselves in the shoes of Parliament. In my respectful submission, had Parliament
22 known that these particular provisions were indeed unconstitutional and stillborn, they would
23 not have enacted the provision at all. It would never have been the intent under Article 368 to
24 remove Article 39(b) and (c). So, they would.... had they the knowledge or the understanding.
25 When they brought about this particular Constitutional change through Section 4, they
26 thought, as Your Lordships correctly put it, they were expanding the scope. But had they
27 known that this is something which will not pass constitutional muster, they wouldn't have
28 done it at all. So therefore, the position we are canvassing, which is to say, that the provision
29 prior to Section 4, which has been now held to be unconstitutional and void, must obtain.
30 Otherwise, of course, there are other submissions also, with regard to the fact that it will result
31 in absurdity. But I am just placing this on another facet, which is judicial review. So that's my
32 first set of points.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** The first set of points are these four, right?

35

36 **SHYAM DIVAN:** These are the points. Now, I come to my second set of points. My second
37 set of points is with reference to *Natural Resource Allocation* case. The Constitution

1 Bench Judgment. Your Lordship will find that in Volume 5D. And here may I just place a few
2 paragraphs. I'll just give you the paragraphs and then just place a few of them. According to
3 us, the relevant paragraphs are 113, 118....

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Volume and page?

6

7 **SHYAM DIVAN:** Yes. Certainly, it is in Volume 5D.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Page?

10

11 **SHYAM DIVAN:** D. And it is at page 474. It's the printed page. 474. PDF is, I think, 476.
12 474. Then the discussion. Yes, it's serial number 14 of the index, and the discussion on Article
13 39 begins at paragraph 113. Now, this was Your Lordship knows in the context as to whether....

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 130?

16

17 **SHYAM DIVAN:** Yes. 113. I'm giving you the paragraph numbers. The relevant paragraphs
18 are 113, 118, 119 and 120.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

21

22 **SHYAM DIVAN:** Now, if you permit, I can take you to a PDF page 558, and just place it, or
23 I'll summarize it for you.

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Just summarize it.

26

27 **SHYAM DIVAN:** I'll summarize the point for you, My Lord. What this Court has held
28 essentially is that, look, as far as Articles... I mean, the Constitution is intended to endure, and
29 so are these provisions, particularly the Directive Principles of State Policy, because they have
30 to guide the Legislature and all branches of Government moving forward, for as long as the
31 Constitution endures. Now, in a situation such as this, the Constitution Bench in *Natural*
32 *Resources* in the paragraphs which I have indicated, thought there was great wisdom in
33 giving a wide interpretation to each of the expressions which was used within Article 39, and
34 to leave it to the wisdom of Governments. And in fact, they use that expression as well, of the
35 future to interpret, to create, to define. So I am relying upon this Constitution Bench
36 Judgment, essentially to advance the proposition that there may be great advantage in a
37 situation where we do not confine the scope of these particular Articles and Sub-Articles and

1 leave it to the future for Governments to recognize their contents, depending on the exigencies
2 of that age. So that's My Lords.... So, therefore, My Lords, what the Court emphasizes is that
3 these are matters of policy which the Government will eventually take a call on, when the
4 Legislature steps in. So My Lord, that's my second set of submission. The third My Lords, I'm
5 going to request Your Lordships to just go to a few paragraphs of *Mafatlal Industry*. So
6 now I'm on my third set of points. So, *Mafatlal Industries*, Your Lordships will find is in
7 Volume 5 at page 2797 and here may I just request you directly...

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We had argued that *Mafatlal Industries* the
10 point was in issue. It was argued.

11

12 **SHYAM DIVAN:** Yes.

13

14 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It was contested, and even the concurring
15 judgment refers to that.

16

17 **SHYAM DIVAN:** I completely support those submissions.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** How do you formulate your point on
20 *Mafatlal*?

21

22 **SHYAM DIVAN:** So, My Lords, I want to just point out that in paragraph 76, which Your
23 Lordship will find at Volume 5, page 2865. The context in which this discussion takes place is
24 mentioned. So there was a judgment of *Kanhaiya Lal*, which they eventually overruled for
25 this relevant particular portion. And it's in that context. So if you permit, I can just show you
26 those a few relevant paragraphs from that.

27

28 **CHIEF JUSTICE D. Y. CHANDRACHUD:** If you can just tell us...

29

30 **SHYAM DIVAN:** All right. So then, My Lords, I'll give you the paragraphs, so please note the
31 paragraphs of this particular of *Mafatlal*. So I am relying on para 76, particularly Sub-Clause
32 4, because there's a discussion on each subclause of para 76 separately.

33

34 **CHIEF JUSTICE D. Y. CHANDRACHUD:** In fact, 74 was also cited. Yes...

35

36 **SHYAM DIVAN:** 74 was cited. And then Your Lordship will just see that as far as the
37 remainder paragraphs are concerned, the ones which... Sorry. Your Lordship will just give me

1 a moment. 2875. Yes. The discussion in IV begins at para 83 on page 2875 and the portions
2 which the Solicitor General has also placed are paragraphs 84 right through till 86. So, it was
3 very much an issue, and this is a nine-judge Bench. We commend the same approach to the
4 Court. So, My Lords, I am done as far as this set of points is concerned. Now, as far as the
5 MHADA Act is concerned, I want with your permission, I want to just read one of the
6 impugned judgments. So, Your Lordships have made it clear that that will probably go before
7 an appropriate Bench to discuss it, but I'd like to read, with your permission, four paragraphs
8 from Justice Pendse's judgment. All right, then I'll give Your Lordships those paragraph. It
9 will explain to you the perspective, My Lords, because he's dealing with this particular Act and
10 what is this common community of resources? What is the common good in the context of the
11 MHADA Amendment Act. So I'll just give Your Lordships the judgment. The judgment, Your
12 Lordship will find is at Volume 5, page 2655. It's at Serial number 55 and the judge... Sorry. It
13 explains the context in which this whole statute arose. And I think this, sorry. This discussion
14 in the context of the peculiar circumstances which was confronting the Legislature and the
15 ground situation is set out and explained by the Division Bench of the Bombay High Court.
16 May I just take Your Lordship to that? It's just Volume 5, there are 5 paragraphs that I'll
17 specifically point to. 2655, Volume 5, Serial number 55. Your Lordships have it? The opening
18 paragraph indicates the challenge to Chapter VIII-A. Then please see, I'll just mention the
19 paras I'm relying on. Paras 2, 5, 6, 13 and 14. 2, 5, 6, 13 and 14. Now just see para 2, for example.
20 'Before adverting to the challenge raised in the petition, it's necessary to refer to the legislative
21 provisions which are relevant to appreciate the
22 contentions raised in the petition. The land available for housing in the island city of Bombay
23 is very limited due to the geographical limitations of Bombay City being the commercial capital
24 of the country. The pressure on the limited availability of land is extremely heavy.'

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Sorry, 2655, right?

27

28 **SHYAM DIVAN:** Yes, 2655. 'The prices of houses were always on the rise, and it is extremely
29 difficult for persons belonging to the lower income group or even the middle-income group to
30 secure shelter by payment of rent, a reasonable rent. The Legislature realized the plight of the
31 people residing in the city as far back as 1938, the Bombay Rent Restrictions Act, 1939 was not
32 in excess of Rs.80 per month. After World War-II, the rents skyrocketed and it was impossible
33 for the common citizen to secure housing accommodation in the city. The break of war resulted
34 into shortages of building material. And the Government was required to step in and issue
35 orders under the provisions, the Defence of India Rules, 1939 in the interest of Legislature.
36 The Legislature thereupon, enacted the Bombay Rent Act, 1947 to replace the earlier Acts. The
37 Bombay Rent Act covers the towns of so and so. The Vidarbha region is governed by the Rent

1 Control Act and is known as the Central Provinces and Berar Letting Act.' Then please go, 'The
2 dominant intention of the Legislature and enacting the Bombay Rent Act was to uphold
3 protection to the tenants from wrongful eviction and also to ensure that the tenants are able
4 to secure housing accommodation at a reasonable rent. With the object in view, the Rent Act
5 provided that the landlord shall not charge rent in excess of the standard rent and the
6 expression 'standard rent' means that the Legislature.... the rent that was payable for the
7 premises on September 1st, 1940. In other words, the Legislature had frozen the rent which
8 the landlords were recovering on September 1st, 1940, and has issued a fiat not to recover rent
9 in excess of the standard rent.' Then please go on, if Your Lordships would, to paragraph 5.
10 'On February 26, 1986, the Governor of Maharashtra issued an ordinance, being ordinance 1
11 of 1986 to amend the MHADA, the ordinance was converted into Amending Act number so
12 and so. The statement of objects and reasons of the enactment of the amendment sets out that
13 there are...

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** My learned brother says that you have given
16 the gist of Justice Pendse's judgment in 2O, page 60.

17

18 **SHYAM DIVAN:** Yes, it is. So, Your Lordships will see that, examine that, but essentially
19 what the judge says in the remaining paragraphs, which I was planning to read, was basically
20 that, look, there is this huge stock of housing. There are these tenants which are affected. This
21 is a community resource, citing the Preamble to the enactment, et cetera, and explains as to
22 how and the context in which these statutes came to be passed. So that was really the purpose
23 in which. So, it takes various different dimensions is the point which I wanted to make. And
24 we have summarized this in our list of dates. Finally, I might just mention this to you. So, this
25 is essentially I wanted to just contextualize the Act. I believe the Division Bench has... we are
26 not deciding on the correctness of the judgment here in this combination, but it sets out the
27 logic of the Legislature and eventually upholds the amending statute, which is, of course,
28 subject to challenge before this Court. My Lords, my final set of points are really with reference
29 to the submissions, written submissions which we have made. And here, may I just mention
30 three paragraphs or four paragraphs to Your Lordships. 35-N. I've indicated to you as to where
31 my written submissions are placed. It's in Volume 2O and I'll just highlight without reading
32 them, three or four paragraphs. So there is 35 sub-para N at page 25, paragraph 39 at page
33 27. 40 to 41 at page 31 of Volume 2O. Now, let me summarize as to what we have included in
34 these four or five paragraphs that I'm just mentioning. One set of submissions that we have
35 made are with regard to this notion of premium or *Pagri* and on the basis of the material which
36 was available and culling out from the material which was also before the Legislature and
37 which was put in the statement of objects and reasons. So, for example, My Lord, there is a

1 reference in our written submissions that the committee, ahead of the 1999 Rent Act,
2 estimated that between 1947 and 1997, more than 70,000 Crores was paid as premium or
3 *Pagri*. So the Legislature is aware of these premiums. Of course, the '99 Act, as Your Lordship
4 knows, legalized *pagri*, prior to that it was not legalized. So, these are some of the features,
5 because there was an emphasis and I don't blame them saying that, look, these rents are
6 frozen, in some certain situations, it is most unfair. So, all I'm pointing out in these three sets
7 of paragraphs is that the Legislature has counterbalanced the, as far as the interests of
8 landlords, et cetera, are concerned by legitimizing and legalizing *Pagri*. Though *Pagri* was as
9 a matter of practice going on, even prior, even under the old regime. Number 1.

10

11 Number 2, it has permitted certain sets of transfers to be allowed in terms of premium. A
12 second part of the package was that certain types of companies with turnovers, multinationals,
13 et cetera, were brought outside of the remit of the Rent Act.

14

15 A third was that there was an escalation, which was mandated by the Maharashtra Rent Act.
16 So, that will again be looked at by the appropriate Bench. But there were a package of measures
17 which Your Lordships have noticed, and I thought we should just mention this. There are
18 references in the written submissions we have filed, in our footnote to various affidavits should
19 that necessitate it. So this is my respectful submissions. I'm very grateful.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes, Mr....

22

23 **SAMEER PAREKH:** Mr. Andhyarujina would be arguing for...

24

25 **CHIEF JUSTICE D. Y. CHANDRACHUD:** We have to give now, everybody, 45 minutes.
26 So maybe, if once Mr. Andhyarujina finishes, if we have little time, we'll give you a hearing.

27

28 **SAMEER PAREKH:** Yes, I just wanted to point out the volume number we are filing..

29

30 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Give us a small, one page note. Yes.

31

32 **SAMEER PAREKH:** Only two small points, and then I'll... The Petitioner Appellant side has
33 filed written submissions from A to I. H and I is a rejoinder submission. H is filed by Mr.
34 Andhyarujina, I by me, and the Respondents have filed Volume 2, A to U. 21 volumes are the
35 rejoinder submissions.

36

1 **ZAL ANDHYARUJINA:** My Lord, I have circulated a rejoinder note which by some small
2 miracle, more or less covers everything that my friends have said today as well. My Lord, may
3 I request Your Lordships to see that?

4

5 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Where is that?

6

7 **ZAL ANDHYARUJINA:** But it is called 1H. Given the fact that we are constrained for time,
8 my approach is to show you the material from what I have put into the number 1.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 1H *hai kya humare pass?*

11

12 **ZAL ANDHYARUJINA:** It looks like this.

13

14 **SAMEER PAREKH:** Emailed and put on the Google Drive, the link. We've emailed it also
15 about one hour back.

16

17 **ZAL ANDHYARUJINA:** Your Lordship and I have a common objective, My Lord. Your
18 Lordships to bring this to an orderly close but we need to reach the airport in time. Hopefully
19 we'll both get there.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Mr. Andhyarujina, the pull of Delhi is
22 infectious.

23

24 **ZAL ANDHYARUJINA:** I have noticed that. But there are certain gravitational forces in
25 Bombay as well as Your Lordship knows but it is... Especially if Your Lordship...

26

27 **JUSTICE HRISHIKESH ROY:** They have gone into cheese holes at the arguments. I think
28 Mr. Shyam Divan brought his arguments from the kitchen cellar.

29

30 **ZAL ANDHYARUJINA:** Your Lordships was very euphemistic. Your Lordships didn't say
31 the junk mail folder. I am obliged for that. Hopefully we'll find it. Yes.

32

33 **JUSTICE HRISHIKESH ROY:** I was acting as a mouse.

34

35 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Deadly combination. Mouse and the blue
36 cheese, as they say. I am vegan, so cheese is out of question. Yes.

37

1 **ZAL ANDHYARUJINA:** If I can just step back from the note for 1 minute. Because a lot of
2 material has been used before Your Lordships in submissions. My attempt in the rejoinder is
3 to, in one sense, give some order to this. The first point I want to make to Your Lordships. I
4 believe that this is a significant point, given the time spent by my learned friend. It is a
5 conceptual error to conflate the idea of voidness, whether it is voidness *ab initio* or otherwise,
6 if the Doctrine of Revival. Now I'll tell Your Lordships why I say so. I was fully conscious of
7 this when I made my opening, and therefore I didn't elaborate on the aspect of voidness.
8 Voidness is something that goes with the declaration of unconstitutional as Your Lordships
9 noted. But it is a doctrine which deals with the effect of Your Lordship's declaratory order on
10 the statute. It makes no difference in my respectful submission whether it is [NO AUDIO
11 STARTS] void or whether it is [NO AUDIO ENDS] The cases are settled on this aspect. The
12 effect is to rob it of all legal effects. It becomes legally destitute. Now, my learned friends' all
13 arguments proceed on the basis that because it is void, we must treat it as factually non-
14 existent in the statute book. But in my respectful submission, that is to conflate two different
15 concepts, and I'll tell Your Lordships why. But I understand this requires little bit of
16 explanation, bear with me a minute. I don't think there is any dispute about the fact that Your
17 Lordships' declaration and I'll deal with the different types of voidness because I noted
18 carefully what My Lord, the Chief Justice spoke to me the other day. It renders the decision
19 void at some level. You may say void on the date of the declaration. You may say void on the
20 date of insertion. You may say void on the date of amendment. But, all of those are statements
21 which go to the legal effect of the remaining language. That, in my respectful submission, is
22 not really the point that we are grappling with. The real point that we are grappling with is a
23 question which is apart from this. It is the question of whether the old provision can be
24 resurrected

25 or come alive again. Now, my learned friends, in their argument and I notice...

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Their argument is that the old provision never
28 died when actually...

29

30 **ZAL ANDHYARUJINA:** It's always latent, and it is always there.

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Because the process by which the new
33 provision was sought to be inserted in substitution of the old provision, that itself was still
34 born. So, in that sense, it was not the substituted provision which ceases to be of effect, but the
35 substituting provision ceases to be of effect.

36

1 **ZAL ANDHYARUJINA:** Fully appreciate that point. And my response to that point is
2 twofold. One is what I've already said. The pen and ink theory, but we may regard that as some
3 sort of abstruse doctrine or Constitutional Law. So, I actually have a better answer for you. The
4 answer is this, that when we declare something to be void, and we rob it of legal effect. It is
5 something that courts do day in and day out. But the voidness doesn't carry with it the
6 consequential actions which may follow as a result of the voidness. But in this case, the
7 legislative clean up or the legislative sweep up or the legislative re-enactment. Now, when Your
8 Lordships put it to me to say that, as my learned friend, Mr. Sankaranarayanan put it, that in
9 fact it's never dead, I respectfully disagree. But I see a situation where that could be the case.
10 My Lord, where under Article 368(2), the procedure for bringing about a Constitutional
11 Amendment has not been followed, the law has never taken effect as prescribed by 368(2). It
12 is entirely possible to say that the old law has not been dislodged and the new law has not
13 become alive. So My Lord....

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** If the Basic Structure is a limitation on the
16 amending power itself, in which case, compliance or consistency with the Basic Structure is a
17 condition precedent to a valid exercise of the amending power.

18

19 **ZAL ANDHYARUJINA:** I see that.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And then, if the condition precedent is not
22 fulfilled, then the process of substitution itself never took effect.

23

24 **ZAL ANDHYARUJINA:** So let me immediately try to answer that point.

25

26 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And that's why the declaration that Section 4
27 was void, was all that was necessary. They didn't have to go all the way to say that 31C is void.
28 Because if the substitution had taken effect, they would have had to declare 31C as void, which
29 they never did. They said that Section 4 is void for the reason that the substitution was never
30 carried out in...as a matter of constitutional doctrine, that seems to be the line of argument.

31

32 **ZAL ANDHYARUJINA:** Let me try to answer Your Lordship with three or four points. But,
33 the first is this. There are various types of voidness. Voidness for lack of legislative confidence,
34 voidness for breach of Fundamental Rights under Part...

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Fundamental Rights... any other constitutional
37 limitation and Basic Structure.

1
2 **ZAL ANDHYARUJINA:** And Basic Structure. Now My Lords, Basic Structure has actually
3 received its own nomenclature as Your Lordship has noticed from *Minerva Mills* and the
4 correct nomenclature. We don't need a new nomenclature for that, is beyond the amending
5 power of the Constitution. That is the language which is consistently used when it comes to
6 Basic Structure. So My Lord, we are in a situation, although a judge made situation of akin to
7 legislative Incompetence. Akin. We are in a situation where it is a limitation on the constituent
8 power. Therefore, my learned friend, Mr. Dwivedi used language with regard to the using
9 constituent. But it has already been dealt with by our Courts and what they say is that it is
10 beyond...

11
12 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Now, because the Basic Structure Doctrine is
13 a limitation on the amending power and something which is done in violations of Basic
14 Structure is beyond the amending power, that means that that exercise itself has no
15 constitutional ...

16
17 **ZAL ANDHYARUJINA:** And does it mean that... is what I just want to...

18
19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It has no constitutional foundation. It's not
20 that you have enacted a valid law, inserted it into this statute book, and that law happens to
21 violate Part III of the Constitution. Here, it's a situation where you have acted on an area where
22 you had no power whatsoever. You are beyond your amending power. In which case, it doesn't
23 enter the process of an effective Constitutional Amendment. It doesn't enter the constitutional
24 fabric of 31C. It remained at a stage anterior thereto, namely an exercise by the Parliament,
25 purportedly in the exercise of its power under 368(1).

26
27 **ZAL ANDHYARUJINA:** My response to this. My respectful response to Your Lordship on
28 this point is. The lack of constituent competence, which is the Basic Structure point. It is very
29 akin to the situation where there is a lack of legislative competence. It is almost identical and
30 therefore I searched, I thought a great deal about this. There are many cases which deal with
31 lack of legislative competence in the context of normal statutes.

32
33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There is one critical difference. Whether the
34 lack of legislative competence, the power to enact the law vests somewhere in this system. You
35 see, in the case of a breach of the Basic Structure, that power does not exist in any organ of the
36 States.

37

1 **ZAL ANDHYARUJINA:** I accept what Your Lordship say there also. So, the Basic Structure
2 Doctrine is an implied limitation. It is an implied limitation which prevented that particular
3 amendment from being passed. But I accept everything that Your Lordship say. The effect
4 therefore of Your Lordship's declaration of unconstitutionality, let us take it at its strongest,
5 declares it *void ab initio* as if it never existed. But, my point to Your Lordships is this: the
6 statement of voidness is a statement limited to legal effect. Now, My Lord, allow me just to
7 elaborate this, what happened with regard to this particular amendment. And I just want to
8 draw a distinction where I believe that your doctrines that Your Lordships put to me holds
9 true. But, if Your Lordship takes up my note for a minute, I have set this out to just prevent us
10 from having to go elsewhere for it. But please come to paragraph 16 at page 111. Now, My Lord,
11 my point to Your Lordship is this and here I want to deal with one of the points raised by my
12 learned from Mr. Dwivedi. Paragraph 16 if Your Lordships have it at 111. But perhaps at
13 paragraph 15 you will get a broader idea of what I'm saying. What the point, another way of
14 looking at the point is a point which is also made by some of my learned friends, Mr. Salve,
15 Mr. Dwivedi, Mr. Sankaranarayanan to say that view Section 4 in isolation, don't view it as
16 becoming a part of 31C. So why I'm trying to deal with that point. Your Lordships have it?
17 Paragraph 16.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** At page?

20

21 **ZAL ANDHYARUJINA:** Page 111.

22

23 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Your Note is only page 22. PDF page 6 in the
24 note. Right?

25

26 **ZAL ANDHYARUJINA:** PDF page 6, I believe. Your Lordships is right.

27

28 **JUSTICE HRISHIKESH ROY:** 'Section 4 Had'. It begins at 'Section 4..'

29

30 **ZAL ANDHYARUJINA:** It begins at 'Section 4 had'. I'll just refer to the paragraph before
31 that if Your Lordship doesn't mind.

32

33 **JUSTICE HRISHIKESH ROY:** Para 15?

34

35 **ZAL ANDHYARUJINA:** Para 15, My Lord. All of Your Lordships? 'The argument, that the
36 order and judgment in *Minerva Mills* merely struck down Section 4 to be unconstitutional
37 and not, you should say Article 31C, as amended by Section 4, is stated to be rejected. Section

1 4 had in accordance with Sub-Clause (2) of Article 368 resulted in Article 31C, standing
2 amended in accordance with the terms of the bill on 18th December '76.' So My Lord, first is
3 the factual position. 'From this day onwards, Section 4 was a part of Article 31C and Article
4 31C stood so amended. Any declaration of unconstitutionality, with regard to Section 4, after
5 3rd January '77, is necessarily to be read as a statement of unconstitutionality with regard to
6 Article 31C as amended by Section 4. To this point, please have a look at the order passed in
7 our list, I have extracted it. But if Your Lordship will kindly go...

8

9 **JUSTICE SUDHANSHU DHULIA:** But the logic you are trying to make [UNCLEAR] Para
10 17 and 18.

11

12 **ZAL ANDHYARUJINA:** Yes.

13

14 **JUSTICE SUDHANSHU DHULIA:** Then it makes sense what you're saying.

15

16 **ZAL ANDHYARUJINA:** Yes.

17

18 **JUSTICE SUDHANSHU DHULIA:** That they have already answered. You read para 17.

19

20 **ZAL ANDHYARUJINA:** Para 17, yes. 'From this day onwards, Section 4 was a part of Article
21 31C, and Article 31C stood so amended'.

22

23 **JUSTICE SUDHANSHU DHULIA:** Now, 18.

24

25 **ZAL ANDHYARUJINA:** 18. 'Any declaration of unconstitutionality with regard to Section
26 4, after 3rd January '77 is necessarily to be read as a statement of unconstitutionality with
27 regard to Article 31C, as amended by Section 4. In fact, it is evident from a reading of the order
28 in *Minerva Mills* that the Honourable Supreme Court also regarded it to be so'.

29

30 **JUSTICE SUDHANSHU DHULIA:** In other words, 31C is not there.

31

32 **ZAL ANDHYARUJINA:** But that part of 31C is no longer...

33

34 **JUSTICE SUDHANSHU DHULIA:** No. What they are saying is 31C is not there. No part,
35 no... they are saying 31C is not there. This is what you mean, isn't it?

36

1 **ZAL ANDHYARUJINA:** What I mean to say is, actually, the amended Part of 31C is not
2 there. But that's what I mean to say. But, therefore, I regard this. That's why I call my note the
3 dead letter. There is nothing meaningful left in 31C. That is the point that I seek to make. I see
4 the fact that this is a conceptually difficult idea. Just bear with me a few minutes. Just have a
5 look at the order in *Minerva Mills*. What did the learned judges think they were doing that
6 is quite clear from their own statement. But, please have a look, I've extracted at paragraph 10.
7 I know we've read it several times. Just I will be very brief with it.

8

9 **JUSTICE SUDHANSHU DHULIA:** Paragraph 10.

10

11 **JUSTICE HRISHIKESH ROY:** Of your notes?

12

13 **ZAL ANDHYARUJINA:** I have put everything into my notes. Hopefully, I won't be able... I
14 won't need to take Your Lordships elsewhere. PDF 4. PDF 4, if all Your Lordships have this.
15 'The Honourable Supreme Court, by its order of 8th May in *Minerva Mills*, passed *inter*
16 *alia*, the following order as far as 31C is concerned, Section 4 of the Constitution Act, which
17 came into force with effect from 3rd January.' - Now please note the language of the Court -
18 'amended Article 31C of the Constitution', by substituting the words and figures, all or any of
19 the principles laid down in Part IV, for the words and figures, the principles specified, in Clause
20 6 and Clause (c) of Article 39'. Sorry, it should say Clause (b), I am so sorry. 'Article 31C, as
21 amended, reads as undone'. Now we have the new Article. 'Section 4 of the Constitution 42nd
22 Amendment Act, is beyond the amending power of Parliament and is void, since it damages
23 the basic and essential features of the Constitution and destroys its Basic Structure by a total
24 exclusion of challenge to any law, on the ground that it is inconsistent with, or takes away, or
25 abridges any of the rights conferred by Article 14 and 19 of the Constitution. If the law is for
26 giving effect to the Policy of State towards securing all or any of the principles laid down in Part
27 IV of the Constitution'. Now, My Lord, I don't want to make too much of this, but the point
28 that I do want to emphasize to Your Lordships, is that, every precept of Constitutional law
29 tells us that once the procedure under 368 stands completed, we have a new amended Article.
30 And My Lord, in my respectful submission, the Doctrine of Voidness is not effective against
31 that. Now, the Doctrine of Voidness, as Your Lordships have rightly noted, is a tool at the
32 hands of Your Lordship for a variety of purposes. Void from the date of the declaration,
33 prospectively void, retrospectively void, *void ab initio*. But, to my earlier point, this is a
34 question of constituent power. This Doctrine of Voidness does not lead into constituent power.
35 If any separation is to be maintained, it is with regard to constituent power. I can understand,
36 and what my learned friend Mr. Dwivedi said, I understand the spirit, but I would put it
37 differently. Under 141, Your Lordship declares the law. But I fully understand that.

1 **Kesavananda Bharati** itself judge made law. The implied limitations, judge developed
2 limitations. But at the same time, that is for Your Lordships to strike that balance. Constituent
3 power, the power.... and that's why I take a little bit of difference with my learned friends when
4 they seem to suggest that the Doctrine of Revival must be equated with an ordinary statute,
5 but it may in some cases be the same in the case of substitution, but this is a power of a high
6 order. It is given only to Parliament. There is a special procedure which is to be followed, and
7 in my respectful submission, this Doctrine A for sure, all the more, applies to the exercise of
8 constitutional substitution. Now this, if there's any point I wanted to make in the rejoinder, I
9 did want to say that the question of voidness does not affect the separation of powers and the
10 constituent power of Parliament, which continues to reside only with Parliament. It's often
11 said, but this is a highly technical point you're raising, it should be swept up. My Lord raised
12 an everyday problem, 'How do we know what is the law?'. If Your Lordship's Court is to work
13 in perfect tandem with Parliament, Parliament should immediately step in and re-legislate it
14 in some way. It doesn't result in a void. It is resulting in a void because Your Lordships' Court
15 has done its job, but Parliament has not, in my respective submission. But there's nothing odd
16 about it. There's nothing strange about it. In fact, if we understand this way, it is in perfect
17 harmony. The Courts work with Parliament. You strike it down, Parliament may re-enact, but
18 in the circumstances which we know. So, in my respectful submission, it would be a conceptual
19 error to conflate voidness with constituent power.

20

21 **JUSTICE SUDHANSHU DHULIA:** This was answered by Mr. Divan...

22

23 **ZAL ANDHYARUJINA:** Yes.

24

25 **JUSTICE SUDHANSHU DHULIA:** Who said that - 'This is curtailing the powers of judicial
26 reviews'.

27

28 **ZAL ANDHYARUJINA:** I just want to deal with that.

29

30 **JUSTICE SUDHANSHU DHULIA:** Because, if we depend upon whatever we decide as a
31 judicial review, we depend upon the Parliament to rectify it, then where's the power?

32

33 **ZAL ANDHYARUJINA:** Let me answer that immediately. As has been said by celebrated
34 Jurist, My Lord, 32 is the soul of the chapter on Fundamental Rights, fully accept that. But
35 what I ask myself, Your Lordships a question, judicial review is always a limited doctrine.
36 When Your Lordships judicially review administrative action, Your Lordship will set aside the
37 decision, but can never take the decision for the decision maker. And that is the point of the

1 balance. Your Lordship's power is plenary insofar as it resides in Your Lordships. But there
2 are limits. The decision must be taken by the decision maker. Parliament must exercise its
3 constituent power. My Lord, I, for one, with great respect, find it to be perfectly harmonious.
4 In fact, I find the other interpretation of voidness to be something that requires a legal exercise
5 and is not in consonance with the separation of powers. But I hope I've answered Your
6 Lordship's question. Judicial review is a doctrine of a limited nature. By its very nature, My
7 Lord. But when Your Lordships judicially review executive action, Your Lordship set aside,
8 quash it.

9

10 **JUSTICE SUDHANSHU DHULIA:** But are with the Parliament 368 are plenary power.
11 They are limited by Basic Structure Doctrine. Now, it encroaches upon that, then it has to be
12 declared as unconstitutional.

13

14 **ZAL ANDHYARUJINA:** It does.

15

16 **JUSTICE SUDHANSHU DHULIA:** Then, after it being declared an unconstitutional, we
17 still depend upon the Parliament to rectify. Where are we?

18

19 **ZAL ANDHYARUJINA:** So My Lord, may I venture to suggest that Your Lordships have...

20

21 **JUSTICE SUDHANSHU DHULIA:** Then all the *Kesavananda Bharati*, they have no
22 relevance then. The Basic Structure Doctrine has no relevance then.

23

24 **ZAL ANDHYARUJINA:** No, My Lord, the Basic Structure Doctrine, with the greatest of
25 respect to this great doctrine that we have here, goes so far as to make a declaration of
26 unconstitutionality. Those are the limits of the Basic Structure Doctrine. But we must also
27 accept the fact. The Basic Structure talked about in a slightly different. It's not an uncharted
28 sea, as was said in *Minerva Mills* in a different context. So we accept the fact that powerful
29 is the Basic Structure Doctrine is, it also has some cognate limits. When we say that this is
30 unconstitutional, the Courts intentionally do not say that revive the old. The Courts are
31 intentionally silent on that. And they are advisedly so because...

32

33 **JUSTICE B.V. NAGARATHNA:** What about the observations made in *Waman Rao*,
34 which is a judgment which came later after *Minerva Mills*? The author of the judgment, is
35 aware of what is stated in *Minerva Mills*, but, nevertheless, there are observations in
36 *Waman Rao*. Should those not be read?

37

1 **ZAL ANDHYARUJINA:** So the observations in *Waman Rao* do present a difficulty.

2

3 **JUSTICE B.V. NAGARATHNA:** No, it is with regard to another challenge, but the author
4 of the judgment is aware as to what has happened when *Waman Rao* was being delivered
5 *vis-a-vis* Article 31C.

6

7 **ZAL ANDHYARUJINA:** No, My Lady is right. They present a difficulty.

8

9 **JUSTICE B.V. NAGARATHNA:** Is there any import from there?

10

11 **ZAL ANDHYARUJINA:** There is great import. In one sense, it could be argued that
12 *Waman Rao* is completely against my argument. *Waman Rao* shows a consciousness on
13 the part of those judges that, in fact, the old revive. But, My Lord, my answer to *Waman Rao*
14 is that we must understand the peculiar circumstances in which *Waman Rao* moved in
15 lockstep with *Minerva Mills*. It was not possible for the judges in *Waman Rao* to actually
16 pass a decision on this aspect because it moved simultaneously along with *Minerva Mills*.

17

18 **JUSTICE B.V. NAGARATHNA:** But the judgment actually came later. The reasoning, in
19 November, 1980.

20

21 **ZAL ANDHYARUJINA:** And My Lady is right. And I would venture to suggest *Waman*
22 *Rao* is absolutely correct, because it was dealing with a situation till the amendment. So the
23 question in *Waman Rao* is till 1976, when the amendment takes place. Is it valid or not?

24

25 **JUSTICE B.V. NAGARATHNA:** But chronologically, if you see from the historical
26 perspective in November 1980, this Court was aware of what has happened on 31st July 1980?

27

28 **ZAL ANDHYARUJINA:** Yes. There's no running away from that. That is the ...

29

30 **JUSTICE B.V. NAGARATHNA:** They have not shut their eyes to it. They know about it. It
31 has to be read as together.

32

33 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Another thing, Mr. Andhyarujina, the Basic
34 Structure Doctrine, its strike law doesn't apply to the original provisions of the Constitution.

35

36 **ZAL ANDHYARUJINA:** Only amendment...

37

1 **CHIEF JUSTICE D. Y. CHANDRACHUD:** There's a reason for it. You can't say that some
2 part of the original provisions of the Constitution are so out of sync with the overall theory of
3 the Constitution has to be violative of the Basic Structure. In other words, however much you
4 find that an original provision of the Constitution is perhaps out of sync with what the other
5 part of the Constitution does. It's not hit by the Basic Structure. The Basic Structure Doctrine
6 are limitation only on the amending power. Right? Now, actually, the Basic Structure Doctrine
7 is a very curious amalgam of process and substance. It's a limitation on the power to amend
8 the Constitution, which is a processual power. But those limitations are not of a processual
9 character. Those limitations are born from the substantive provisions of the underlying
10 Constitution. That is, you draw those limitations from the substantive provisions of the
11 existing Constitution and read them as limitations on the processual power to amend.
12 Therefore, in that sense that's how we say that the Basic Structure Doctrine is a limitation on
13 the amending power. If you breach those limitations, the very exercise of the amending power
14 was null and void. It's not a case where a provision which is otherwise inserted into the
15 Constitution is held to constitute a violation of a substantive constitutional safeguard like
16 Article 286, which we saw in *Sundararamier* case. This is a case where, if you breach the
17 Basic Structure, the very process by which you sought to amend the Constitution stands
18 constitutionally invalidated. In which case the very act of insertion doesn't see the light of the
19 day.

20

21 **ZAL ANDHYARUJINA:** So, My Lord, I see that point. May I once again attempt to answer
22 it with two points. But if Your Lordship has any other point, I will deal with that also. But the
23 first is this. Your Lordship is perfectly correct. The Basic Structure deals with amendments
24 and the limitation of those amendments. But, I would request Your Lordships to bear in mind
25 that 31C itself came in by way of an amendment.

26

27 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Right.

28

29 **ZAL ANDHYARUJINA:** So it was not, as it was originally at inception in the Constitution.
30 So the basics...

31

32 **CHIEF JUSTICE D. Y. CHANDRACHUD:** And therefore, it could be challenged, it was
33 upheld in *Kesavananda Bharati* case.

34

35 **ZAL ANDHYARUJINA:** Your Lordship is perfectly right. Exactly the point. It could be
36 challenged, it was upheld in *Kesavananda Bharati*. Now, the second challenge was to this
37 amendment and therefore Basic Structure was correctly deployed against the amendment, to

1 say let us test it against the amendment. But when Your Lordship puts it to me to say that it
2 renders the insertion as if it had never been in my respectful submission, I would submit this
3 is an extension of the Basic Structure Doctrine for this reason. But the Basic Structure Doctrine
4 accepts the constituent power of Parliament, one. Secondly, to Your Lordship's own point, but
5 it is a self-limiting doctrine. It doesn't go, for example, to the original features of the
6 Constitution. So basic powers doctrine... it has limitations. This question is, in one sense, a
7 question of where do we draw the line with the limitations of basic power.

8

9 **CHIEF JUSTICE D. Y. CHANDRACHUD:** But therefore, to sustain your argument, what
10 we'll have to postulate is this, that, though 31C, as amended, was held to violate the Basic
11 Structure, the very act of amendment was complete. Once the President...

12

13 **ZAL ANDHYARUJINA:** That is my point. I don't think I could have...

14

15 **CHIEF JUSTICE D. Y. CHANDRACHUD:** That's right. According to you, the very act of
16 amendment to the Constitution was complete at a formal level certainly, because Parliament
17 enacted the amendment, it passed the amendment; the President signed the amendment into
18 law. And therefore it took effect. Now, the fact that it took effect and was held to be void, show
19 is a subsequent event, but it took effect before it was declared as void. That's what we'll have
20 to hold to accept your point.

21

22 **JUSTICE B.V. NAGARATHNA:** Yes.

23

24 **ZAL ANDHYARUJINA:** I think Your Lordship has put my point very articulately. I, for
25 myself, see no conceptual fallacy in that point. But, and I readily accept... Give me a moment
26 to elaborate on this. That Your Lordship's point would be perfectly correct if the procedure of
27 368(2) remain incomplete, it could never be written into law. Now that My Lord, I respectfully
28 submit, is a very important counterfactual indication that we have in the Constitution itself.
29 368 tells us that in a situation where it's not written into the law, it is not the law. It is set aside,
30 the old law has not been displaced. But we have a constitutional lead in this regard, which is
31 368(2). It has now been written into the Constitution. Right or wrong, it has been written in.
32 Your Lordship scored with the Basic Structure Doctrine, as wide sweep, I accept that, must be
33 developed and can be developed further, but on its current recognition in my respectful
34 submission, stops short at this to say that I declare this to be unconstitutional. In these
35 circumstances, Parliament must do its job again. I find that to be a perfectly harmonious and
36 symmetric reading of the Constitution. In fact, this Doctrine of Voidness does great violence,
37 for example, to 368(2).

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JUSTICE SUDHANSHU DHULIA: No. And if Parliament doesn't do, then?

ZAL ANDHYARUJINA: This is exactly the situation we have...

JUSTICE SUDHANSHU DHULIA: What happens then?

ZAL ANDHYARUJINA: So, it is ineffective, but it remains on the statute. It is ineffective, but remains on the statute.

CHIEF JUSTICE D. Y. CHANDRACHUD: And you are there drawing a distinction between the procedure is not followed...

ZAL ANDHYARUJINA: Yes.

CHIEF JUSTICE D. Y. CHANDRACHUD: Or a situation like ours, where the procedure is followed, but after having followed the procedure, the President has signed. So, according to you, that will not result in the... but then, the moment we hold that, we are directly finding fault with a declaration in *Minerva*. Because the *Minerva* declaration is only on Section 4.

ZAL ANDHYARUJINA: If Your Lordship permits me to say, the *Minerva* declaration was flawless.

CHIEF JUSTICE D. Y. CHANDRACHUD: We'll have to hold that your declaration in *Minerva* was wrong and you should have invalidated 31C itself.

ZAL ANDHYARUJINA: But My Lord...

CHIEF JUSTICE D. Y. CHANDRACHUD: But, nobody has really argued.

ZAL ANDHYARUJINA: But as I see the order. And that's why I showed Your Lordship the order. The order invalidates the amended part of 31C. As I read the order, it invalidates that amendment. Now, I want to just...

JUSTICE B.V. NAGARATHNA: Clauses 4 and 5 of Article 368 also were struck down.

ZAL ANDHYARUJINA: Exactly.

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JUSTICE B.V. NAGARATHNA: in *Minerva*.

ZAL ANDHYARUJINA: Exactly.

JUSTICE B.V. NAGARATHNA: But nevertheless, you see, we have *Waman Rao's* observations.

ZAL ANDHYARUJINA: Yes.

JUSTICE B.V. NAGARATHNA: Despite this.

ZAL ANDHYARUJINA: So, my respectful submission with regard to *Waman Rao*, is that, it should be understood in the limited context in which it was passed and the limited challenge before them, namely, up to the date of the amendment. So that is how I deal with these two points. Now, I just want to deal with a related aspect. It's already dealt with actually, the argument which is made to say that Section 4 of the Amending Act, should somehow be viewed in isolation. But I've already actually said what I want to say on that. But in my respectful submission, that is factually difficult to understand, given the fact that Section 4 under 368(2) became a part of the Constitution. It's very difficult to understand how Section 4, after that process is complete, can still be regarded as separate and distinct. It has now embedded itself in the Constitution. If you are going to declare Section 4 unconstitutional, by any system of logic, what you are effectively doing is rendering a part of the Constitution, unconstitutional. So, this argument in my respectful submission...

JUSTICE SUDHANSHU DHULIA: Part of the...?

ZAL ANDHYARUJINA: Constitution, as amended, unconstitutional.

JUSTICE SUDHANSHU DHULIA: So that's it. You're right. Part of it.

ZAL ANDHYARUJINA: Yes.

JUSTICE B.V. NAGARATHNA: Whereas their argument is, it has not entered the Constitution statute at all.

ZAL ANDHYARUJINA: But that I've already said what I did want to say.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Could have been right. According to you, the procedure was not.

ZAL ANDHYARUJINA: Yes, I would readily concede that. Now, My Lord, I move to the third point. Much has been said and I was trying to deal with it when Your Lordships just put it to me twice or thrice - Parliamentary intent. So, Your Lordships spoke about Parliamentary intent and one of my learned friends also spoke about that and the submission was that Parliamentary intent could never be to result in such an absurd situation. Your Lordship put it to me also, 'Parliamentary intent is relevant. Let us see what is the Parliamentary intent. We must have some extrinsic view or material evidence on this.' Now my answer to it is this. Once again Parliamentary intent, I would consider relevant in this situation where it doesn't come onto the Statute book, and one of the cases relied on by the learned Solicitor General. I have put it in my note and I'll just tell Your Lordship where. Para 20, My Lord at page 112. 112 is exactly this. This is the *State of Maharashtra Vs Central Provinces Manganese Ore*, exactly this situation where actually there was a problem of procedure. Exactly the situation. In these circumstances, the Court said - 'Let's look at intent. It could never been the intent of Parliament to delete, but not to bring about the substitution.' And they expressly say. In this case, fortunately, we don't have the present problem because, in fact, it's not substituted in law. Now, My Lord, I understand I present Your Lordships with this problem, but I, for one don't see it as a problem, My Lord. I see it as the ordinary working of the Constitution, which from time to time hands over the baton for Parliament to do a necessary action. But I find it difficult to conceive how Your Lordships would say that this is void, and that is revived. As Your Lordship said - Parliamentary intent, we must look into these matters. How is it to be decided? It is best left to Parliament to do its job and it's job is this, that when such a situation arises, it immediately steps in and rectifies.

So, My Lord, in answer to that, is our Judicial Review Doctrine falling short? Are we falling short as the Judiciary? The answer is - No. The Basic Structure document has been stretched to the fullest, but it has limits. And now it is for the other arm, Parliament, to step in and take the corrective steps. My Lord, that is my respectful response on these aspects of the matter. I just want to point out to Your Lordships.

CHIEF JUSTICE D. Y. CHANDRACHUD: Are you going to argue on 39(b)?

ZAL ANDHYARUJINA: And a few minutes on 39. But can I make two more points on this? I understand I'll be keeping Your Lordships perhaps a little later.

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CHIEF JUSTICE D. Y. CHANDRACHUD: No, absolutely. What is it?

ZAL ANDHYARUJINA: Two points I want to make. The first point I want to make is that in *Minerva Mills* there was a very interesting discussion between the learned Attorney General and the Solicitor General in the Court. They requested the Court to actually read down the amendment to its original unamended form. The Court declined to do it.

CHIEF JUSTICE D. Y. CHANDRACHUD: You have quoted that.

ZAL ANDHYARUJINA: I quoted that here. And the reason it declined to do it is that 'look, the amendment, by reading it down, is being made something it is not. In fact, it is the very opposite of what you have done by way of the amendment.'

CHIEF JUSTICE D. Y. CHANDRACHUD: They also cite the Law Minister's statement in Parliament - 'The reason why we wanted to amend it was we wanted laws to be saved without the let or hindrance of the Fundamental Rights.' That's what the Law Minister said.

ZAL ANDHYARUJINA: I am obliged Your Lordships. Now, My Lord, in the... So My Lord, the result, which could have been obtained by another method. You read it down, was expressly declined. They said we can't do that, because that was another way of achieving this very method. That the unamended 31C survive.

JUSTICE J.B. PARDIWALA: Quickly read both the paragraph. 64, 65. We expected you to read 15 minutes before.

CHIEF JUSTICE D. Y. CHANDRACHUD: Page 5 of...

ZAL ANDHYARUJINA: Paragraph 11.

JUSTICE J.B. PARDIWALA: One has to understand whether your interpretation as propounded in para 12, is correct or not?

ZAL ANDHYARUJINA: Please allow me. 'What the learned Attorney General and learned Solicitor General strongly impressed upon us that Article 31 C should be read down as to save it from the challenge of unconstitutionality.'

1 **JUSTICE J.B. PARDIWALA:** Sorry, because one of your submissions is don't go by the
2 operative part of *Minerva*. Don't just go by the declaration. If you read declaration alone,
3 perhaps as my esteemed Sister said, *Waman Rao* will not. It will spoil the show. But try to
4 read 64, 65 and then...

5
6 **ZAL ANDHYARUJINA:** I'm obliged. 64. 'The learned Attorney General and learned
7 Solicitor General is strongly impressed upon us that Article 31C should be read down so as to
8 save it from the challenge of unconstitutionality. It was urged that it would be legitimate to
9 read into Article the intended that only such laws would be immunized from the challenge
10 under 14 and 19 as do not damage or destroy the Basic Structure of the Constitution. The
11 principle of reading down provisions of law for the purpose of saving it from a Constitutional
12 challenge is well known. But we find it impossible to accept the contention of the learned
13 Counsel in this behalf. Because to do so will involve a gross distortion of the principle of
14 leading down, depriving that doctrine of its only or true rationale when the words of width are
15 used inadvertently. The device of reading down is not to be restored to, in order to save...'

16
17 **JUSTICE J.B. PARDIWALA:** Resorted. The word is resorted.

18
19 **ZAL ANDHYARUJINA:** Resorted. 'Not to be resorted to in order to save the susceptibilities
20 of Lawmakers nor indeed to imagine a law of one's liking to have been passed. One must at
21 least take the Parliament at its word when especially it undertakes a Constitution.'

22
23 **JUSTICE J.B. PARDIWALA:** Now 65.

24
25 **ZAL ANDHYARUJINA:** 'But, Mr. Palkhivala read out to us an extract from the speech of
26 the then Law Minister, who, while speaking on the amendment to Article 31 C, said that 'the
27 Amendment was being introduced because the Government did not want the let and hindrance
28 of Fundamental Rights. If Parliament has manifested a clear intention to exercise an unlimited
29 power, it is impermissible to read down the amplitude of that power so as to make it limited.
30 The principle of reading down cannot be invoked or applied in opposition to the clear intention
31 of Legislature. We suppose that in the history of Constitutional Law, no Constitutional
32 Amendment has ever been read down to mean the exact opposite of what it says and intends.
33 In fact, to accept the argument that we should read down Article 31 C...'

34
35 **JUSTICE J.B. PARDIWALA:** Now, this is important. 'So as to make it confirmed to the
36 ratio of the majority decision in *Kesavananda Bharati* is to destroy the avowed purpose of

1 Article 31C, as indicated by the very heading saving of certain laws under Articles 31A, 31B,
2 and 31C as group'. Now read further.

3

4 **ZAL ANDHYARUJINA:** 'Since the Amendment to Article 31C was unquestionably made
5 with a view to empowering the Legislatures to pass laws of a particular description, even if
6 those laws violate the discipline of 14 and 19. It seems to us impossible to hold that we should
7 still save Article 31C from the challenge of unconstitutionality by reading into that Article
8 words which destroy the rationale of that Article and an intendment which is plainly contrary
9 to its proclaimed purpose.'

10

11 **JUSTICE J.B. PARDIWALA:** Now, Para 12 is your interpretation, right? Even if we accept
12 it, you will have to still overcome *Waman Rao*.

13

14 **JUSTICE B.V. NAGARATHNA:** Yes.

15

16 **JUSTICE J.B. PARDIWALA:** So first hurdle, you have to overcome this.

17

18 **JUSTICE B.V. NAGARATHNA:** *Waman Rao*.

19

20 **JUSTICE J.B. PARDIWALA:** Yes, from the aforesaid?

21

22 **ZAL ANDHYARUJINA:** Yes, 'From the aforesaid, it is evident that Chief Justice
23 Chandrachud expressly declined the suggestion by the learned Attorney General and learned
24 Solicitor General to read down Article 31C to save it from being declared unconstitutional. The
25 reasons in paragraph 65, namely, to accept the suggestion and argument of reading down so
26 that it would conform with the ratio of the majority decision in *Kesavananda Bharati* is to
27 destroy the above purpose of 31C, as amended, indicated by the very head, saving of certain
28 laws makes it evident that Chief Justice Chandrachud declined the suggestion, that the statute
29 should be read down to its unamended form.' So, to My Lord Justice Pardiwala's point, I've
30 already said two things with regard to *Waman Rao*. One, the circumstances in which it were
31 passed. The second, the fact that it was dealing with a pre-amendment situation, and perhaps
32 the third is that they were two...

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34 **JUSTICE J.B. PARDIWALA:** Your argument is, that *Minerva Mills* merely struck down
35 Section 4.

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37 **ZAL ANDHYARUJINA:** Absolutely.

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JUSTICE J.B. PARDIWALA: That it merely struck down Section 4 to be unconstitutional. But the entire 31C as amended...

ZAL ANDHYARUJINA: The amended part stands struck down. That is my argument precisely. It is not the entire 31, because 31, of course, was the subject matter of case of *Kesavananda Bharati*. But, My Lord, it is the amended portion that...

JUSTICE J.B. PARDIWALA: We are again back to square one. Then we have to only read the operative part of *Minerva*. There is inconsistency in your submission.

JUSTICE SUDHANSHU DHULIA: Which means 39(b) and (c) also go. That's logically...

JUSTICE J.B. PARDIWALA: To be precise, come to para 15, quickly.

JUSTICE SUDHANSHU DHULIA: And if 39(b) and (c) also goes, then what is the purpose of 31C?

JUSTICE J.B. PARDIWALA: This is what you are trying to drive at.

ZAL ANDHYARUJINA: But may I come to Your Lordship in just a minute? Just a minute.

JUSTICE J.B. PARDIWALA: Para 15. 'The argument that the order and judgment in *Minerva Mills* merely struck down Section 4 to be unconstitutional.'

ZAL ANDHYARUJINA: Yes, that is what I said.

JUSTICE J.B. PARDIWALA: 'Article 31C is amended by Section 4 is stated to be rejected.'

ZAL ANDHYARUJINA: No, Your Lordship is right. So, My Lord, I do say that Article 31C, as amended, has been struck down. Now, My Lord, the problem, of course, which stares all of us in the face is *Kesavananda*.

JUSTICE J.B. PARDIWALA: Yes.

ZAL ANDHYARUJINA: It is... So, My Lords, there are two ways of viewing it to be fair. One is My Lord, irrespective of *Kesavananda Bharati*, 31C is struck down. The other is that the

1 amendment in 31C is struck down. There are two ways of viewing the problem. There are two
2 ways of viewing the problem. It is a difficult conceptual problem, but it is there. It requires to
3 be solved by Your Lordships. Now, My Lord, I just want to say two or three more things on
4 31C if Your Lordships will permit me. The *NJAC* judgment in two minutes. The *NJAC*
5 judgment...

6

7 **JUSTICE J.B. PARDIWALA:** That's not a problem we have to solve it.

8

9 **ZAL ANDHYARUJINA:** I do hope I can assist you in a few minutes with that. Now the
10 *NJAC* judgment. My Lord, my short point on the *NJAC* judgment is this. It is only Justice
11 Khehar, who grapples with the Doctrine of Revival, point number one. My Lord, the other two
12 learned judges, Justice Kurian and Justice Goyal, say that 'Of course it must be so', but they
13 don't actually grapple with the doctrine. So there is no reasoning with the Doctrine of Revival.
14 Justice Chelameswar descends and Justice Lokur expressly says that - 'I want to leave the
15 question open.' So, My Lord, in my respectful submission, there are two or three points that
16 emerge. The first is this that there is no discernible ratio from the *NJAC* judgment to read a
17 single judgment in this regard, in my respectful submissions...

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It should be music to the Solicitor's ears.

20

21 **ZAL ANDHYARUJINA:** No, no, on this aspect. Only on this aspect.

22

23 **TUSHAR MEHTA:** My Lord, if that line comes in nine-judge Bench, on the lighter side.

24

25 **ZAL ANDHYARUJINA:** On this aspect, My Lord, on this aspect Doctrine of Revival, it has
26 no precedential value. That is the first. The second, of course, that Your Lordships put to me
27 and immediately noticed, the 99th Amendment is not a case of substitution, it's a case of
28 supersession, which has also been noticed in the *Zail Singh* case which My Lady put to me
29 and the substitutions which were made were merely of a consequential nature but it was an
30 entire independent scheme which was being put in place. So, it was actually a supersession, a
31 distinction noted in law, noted by *Zail Singh's* case, noted by other cases, et cetera, and it is
32 not a case of a substitution. So, that is what I wanted to tell Your Lordships very briefly with
33 regard to the *NJAC* judgment. My Lord just to conclude, the 31C point. Everything I have said
34 does not result in a constitutional vacuum. It does not result in a constitutional crisis. I take
35 Your Lordship back to the words of *Minerva Mills*, where the learned Chief Justice, Justice
36 Chandrachud said, that - 'If the pith and substance of 39(b) is what the law is about, we have
37 no fear of a challenge from 14 and 19.' And My Lord, the third point I leave Your Lordships

1 with is that there are some possible problems with the *Coelho* judgment with Article 31C. My
2 Lord, about what is the effect now of the remaining part of 31C given the fact that 14 and 19
3 have now been defined as being part of the Basic Structure. It is best that Parliament should
4 re-legislate on this aspect. So, that is what I wanted to say with regard to 31C. Now My Lords,
5 few minutes, if Your Lordships would indulge me on the second aspect, which is the 39(b)
6 aspect. May I?

7

8 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

9

10 **ZAL ANDHYARUJINA:** My Lord, 39(b). First point My Lord is, can we say that the
11 judgment in *Mafatlal* is actually *obiter*. My Lord, my learned friend, the Solicitor General
12 did forcefully argue that, in fact, it was noticed and applied and therefore, it cannot be *obiter*.
13 But in my respectful submission My Lord, the question is whether it is *obiter* on this point?
14 The point that we are discussing is whether private interest should be included within 39(b),
15 on that it was a passing reference merely saying that *Ranganatha Reddy* onwards has
16 recognized it to be so. Yes, it is true that it was then accepted as true and applied, but as far as
17 this point is concerned, it was certainly *obiter*. So My Lords, it was applied in the context, as
18 Your Lordship knows, of the tax which was already collected and the question is, do you give
19 it back to the SSC when the SSC has already passed on the burden to the customer? Or do we
20 then distribute it for the purpose of 39(b)? So there was no decision on this aspect of the matter
21 in *Mafatlal*, in my respectful submission, *obiter* it is. Now My Lord, I have what date in the
22 day, but upon having the benefit of Your Lordship's points and heard my learned friends, My
23 Lord I want to suggest to Your Lordship that the problem with regard to 39(b) may not be such
24 an insuperable problem. Now I will tell Your Lordships why. Your Lordships are fully aware
25 that there are powers of acquisition of private property. The power to make that law is under
26 246 read with the relevant Entries in the Lists. If I'm not wrong List III, 18 or something of
27 List III provides for the Power of Acquisition...

28

29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Entry 42 actually, Entry 42 of List III.
30 Acquisition and Requisitioning of Property, Entry 42.

31

32 **ZAL ANDHYARUJINA:** Sorry, My Lord, but it is definitely a power which can result in a
33 law with regard to acquisition. Now, the suggestion that was made by some of my learned
34 friends to say, that 39(b) is the power to acquire, I respectfully submit is not correct. 39(b) is
35 the policy that the State has to work to secure towards. It is a statement of policy which is
36 contemplated in 39(b). The Constitution has other powers which provide for acquisition. Now
37 My Lord, my proposition to Your Lordship is this, that if there is a policy which requires the

1 acquisition of private interests, which is done in accordance with the powers of acquisition,
2 the problem solves itself. But in this sense, that 39(b) at the end of the day is a policy statement.
3 We must work towards the policy of distribution, of ownership and control of the material
4 resources of the community. 39(b) by itself does not have the power of acquisition. The power
5 of acquisition is 300A, elsewhere. Once it is acquired under the provisions of 300A, the issue
6 does not survive. So My Lord, the issue in one sense, translates to this, will you acquire for no
7 value? Or will you acquire on the principles of 300A following the due process of law? But if
8 that is there, the question doesn't arise. So, I request Your Lordship to consider this.

9

10 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 39(b) and (c) also not comprehend a law. I
11 mean, it's not a power. Part IV is not a power at all. Part IV is only an object. It's hortatory as
12 we call it. It's a goal. But when Article 39(b) says that -'The ownership and control, the State
13 shall secure its policy toward securing, that the ownership and control of the material
14 resources of the community shall be so distributed to so as to subserve the common good.'
15 Does this not also factor in the reasonableness of a law which also provides for acquisition so
16 that you will distribute?

17

18 **ZAL ANDHYARUJINA:** I would readily agree with Your Lordships.

19

20 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It would be very technical to say that this does
21 not allow the State to justify Law of Acquisition on the ground that what this contemplates is
22 only distribution of what you already have.

23

24 **ZAL ANDHYARUJINA:** I would respectfully agree with Your Lordship. I think that would
25 be an over technical view and that is not a submission I make. But the point that I do wish to
26 make to Your Lordships is that the problem with regard to private interest, that part of the
27 problem with 39(b) is solved elsewhere through the constitutional mechanism, through the
28 power of acquisition. If there is a policy and the policy translates into a law, which is made
29 under the legitimate use of 246 towards the pith and substance of 39(b), adhering to all the
30 principles of acquisition, the question does not arise.

31

32 **JUSTICE B.V. NAGARATHNA:** Then, if there is an acquisition, it would squarely come
33 within the concept of material resources of the community.

34

35 **ZAL ANDHYARUJINA:** Yes. I'm just going to address it.

36

1 **JUSTICE B.V. NAGARATHNA:** That is going to be distributed for the common good. Here
2 it is distribution from a to b. That is your case.

3

4 **ZAL ANDHYARUJINA:** That is once again, My Lady has hit it on its nail. Because My Lord,
5 I also have put one part about the limits of this doctrine. And My Lord, perhaps the most
6 enthusiastic proponent of this document Justice Krishna Iyer himself, in *Bhim Singhji* says
7 that -'The limits of this Doctrine are reached when you try to distribute from private party a to
8 private party b.' And that is actually what we are concerned with in the challenge.

9

10 **JUSTICE SUDHANSHU DHULIA:** That is not the question before us.

11

12 **ZAL ANDHYARUJINA:** Yes. That is not a question before Your Lordships. But, in trying to
13 assist Your Lordship on what we should do and what we should say with regard to 39(b), I
14 wanted to point out to Your Lordships for two or three things in my note, but I do want to
15 indicate the outer boundaries of this document. But the outer boundary of this document is it
16 does not contemplate an exchange of these material resources between two sets of private
17 individuals. My learned friends hasten to add is the only question. It's the only question in the
18 challenge which will now take place after Your Lordship send it down to an appropriate Bench.
19 Yes, of course it is there.

20

21 **CHIEF JUSTICE D. Y. CHANDRACHUD:** It is also not be strictly correct. The idea is
22 sometimes you are redistributing wealth from those who have a monopoly over wealth. That's
23 what our land reform laws did to redistribute wealth from the *zamindars* to the tillers. So it
24 was really from one set of private individuals to another.

25

26 **ZAL ANDHYARUJINA:** Once again, My Lord. No, once again. Your Lordships' point is very
27 well taken but the only thing I would add to that is, those acquisitions were done pursuant to
28 the power to acquire under the Constitution and for a particular purpose, Agrarian reform,
29 which is now well known. So 31A, 31B, and 31C really can be fully understood if we read them
30 together. But I do accept that and My Lord, that is a part of my note. Could I just read now
31 four or five paragraphs of my note? And I am done.

32

33 **JUSTICE B.V. NAGARATHNA:** And under those laws of Agrarian reform, all these lands
34 first stood vested in the State. It became community resource, then the tiller had to file an
35 application seeking occupancy right. And if he is really the tiller, then order is passed by the
36 Land Tribunal to give it to the tiller.

37

1 **ZAL ANDHYARUJINA:** I'm deeply obliged to My Lady.

2

3 **JUSTICE B.V. NAGARATHNA:** And law directly to the tiller.

4

5 **ZAL ANDHYARUJINA:** Exactly the point I want to make with regard to acquisition. That
6 actually, it is not such a problem if we intersperse the concept of acquisition. This argument,
7 which has been made thus far on my part as well, My Lord, has left out that part. It is important
8 to understand this Directive Principle in the context of the power to acquire under 300A. I
9 have kept Your Lordships so long. Can I just show Your Lordships four or five paragraphs and
10 I'm done with this? May I take Your Lordship to my note at page, just to indicate at page 124,
11 at 124 in the first three paragraphs, I've dealt with the *Mafatlal* judgement. But there I made
12 the point that I have made to Your Lordships with regard to *obiter*. I have sought to make a
13 second point also, that the judgment is totally distinguishable. It deals with unjust enrichment
14 and the distribution of tax, so it is totally different. But in my respectful submission, the
15 reference was rightly made and Your Lordship ought to entertain it. Now, the second set of
16 points, 4 and 5, what I have said with regard to 300A. If I can just read my formulation in para
17 5.

18

19 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Yes.

20

21 **ZAL ANDHYARUJINA:** 'Once the property is acquired with the authority of law, the
22 question with regard to the inclusion of private property within the sweep of 39(b) falls away.
23 The Petitioner submits that the acquisition with the authority of law of private property may
24 be pursuant to a policy formulated by the State under 39(b)' - to My Lords' point - 'and the
25 distribution of ownership and control thereof, may be in accordance with the principles of
26 Article 39(b).' Now some suggestions to Your Lordships about how we will deal with the
27 observations on 39(b), I have sought to make here. Your Lordships may consider that. 'The
28 debates of the Constituent Assembly with regard to 39(b) make it evident that the language of
29 the articles in Part IV, was deliberately drafted to ensure they were not given a fixed or rigid
30 form, but could be fundamentally changing having regard to the circumstances of the time', I
31 referred to the speech of Mr. Ambedkar. 'But it is relevant that the Constitution also provided
32 for Fundamental Right of Ownership to Property, Article 19(1)(f) and 31 at its inception. The
33 Constituent Assembly was therefore fully conscious of the fact that private ownership of
34 property was then a Fundamental Right. As is well settled, it is also a part of the constitutional
35 scheme that the Fundamental Rights and Directive Principles of State policy were to be
36 balanced against each other'. My Lord *Minerva Mills*. 'Despite the socialist aims of the
37 Constituent Assembly, in incorporating the Directive Principles in Part IV, private property

1 was also respected as a Fundamental Right. Article 39(b) provides for the distribution as best
2 to subserve the common good of ownership and control of material resources of the
3 community. The expression, 'material resources of the community'. 'Now, My Lord, this I want
4 to stress - 'is a composite expression, and each word is a necessary ingredient of the same. To
5 determine if the requirements are met, it is necessary to consider each of the ingredients being
6 met individually and in the aggregate.' But that's paragraph 9. Now Paragraph 10. My Lord,
7 the expression... It is necessary to meet each of the conditions individually, but also in the
8 aggregate. So it is a self-limiting provision in one sense. It is very difficult to find something
9 which meets each of the criteria in aggregate. All of them. Not and/or. Not one of them, but
10 each of them for every part of this particular Article 39(b). My Lord, 'The expression...' Para
11 10 - 'The expression 'material resources of the community' must also be in accordance with
12 the intentions expressed by the members of the Constituent Assembly, be interpreted not in a
13 fixed or rigid form, but in a manner which is fundamentally changing.' Now about my
14 submissions. 'It is submitted that 39(b) has been deliberately given the language that, it has to
15 maintain its open texture, to give it flexibility, to adapt to changing constitutional and social
16 values. My Lord, keeping with the spirit of the Constituent Assembly and the manner in which
17 39(b) has been drafted, it ought not to be limited and/or straight jacketed and/or canalized. It
18 is preferable to test each individual case against the ingredients of 39(b), keeping in mind
19 current constitutional social values, not to give a particular temporal interpretation to the
20 Article. Current constitutional and social values, i.e., the importance of private property...' -
21 My Lord, the Chief Justice said repeatedly.- ' Enshrined in 300A and the importance to the
22 role of private enterprises...' - My Lady Nagarathna, referred to it repeatedly.- 'The sweep of
23 Article 39(b) provides that the distribution must be to best subserve the common good of all.
24 All of these considerations must be cumulatively considered on a case-to-case basis for the
25 aspect of community...' - Was repeatedly stressed by My Lord, the Chief Justice, by My Lord
26 Justice Dhulia, repeatedly. That it has to have a community element to this. - 'The limits of
27 39(b) may also be born in mind. Justice Krishna Iyer himself, in **Bhimji Singh's** case stated
28 that the whole story...

29

30 [NO AUDIO/VIDEO OR TRANSCRIPT]

31

32 Ms. Agarwal, Ms. Jethmalani, Ms. Bisni are part of the team who have worked very hard on
33 this. My learned solicitors, Mr. Jadeja and Mr. Unnikrishnan and of course my learned Seniors
34 whom Your Lordships know.

35

36 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Thank you. Please give our compliments to the
37 entire team of your juniors who have worked very hard.

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ZAL ANDHYARUJINA: Deeply obliged Your Lordships. It has been a great privilege for us.

SAMEER PAREKH: My Lords permit me... can I?

CHIEF JUSTICE D. Y. CHANDRACHUD: One second my learned Brother...

JUSTICE HRISHIKESH ROY: Mr. Andhyarujina, I think you are leaving for Mumbai today, right?

ZAL ANDHYARUJINA: But I don't have to, if Your Lordships want me to...

JUSTICE HRISHIKESH ROY: No, in fact, perhaps when you go back home, you have young children?

ZAL ANDHYARUJINA: I do, My Lord.

JUSTICE HRISHIKESH ROY: They might ask you - 'Papa, what were you doing in Delhi?' Right? So you will say that - 'I have gone and argued a case.' So the children is curious. Might say - 'What was the case all about?' You can't be talking to him or her 31C, 39(b). You will say that - 'We are discussing a case which relate to cheese. The uncle from... another uncle was saying that the cheese had... Swiss cheese, it had holes. I was saying that it was a Amul cheese, which does not have holes.'

ZAL ANDHYARUJINA: My Lord, I take Your Lordship's declaratory point on this very seriously. I am deeply obliged.

H. DEVRAJAN: I request to seek clarification. Petitioner 660 and other Petitioners related to Rent Act were also on Board, My Lords. Just like to know....

CHIEF JUSTICE D. Y. CHANDRACHUD: We are going to answer the point of reference with a Bench of nine judges and thereafter it will be placed before the regular Bench for hearing their challenges.

H. DEVRAJAN: Could I make a small -- I know it is generally not done before Constitutional Benches, but given the fact that these Landlord have been languishing from '92 till today and they're still getting 1949...

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CHIEF JUSTICE D. Y. CHANDRACHUD: After the reference is disposed of, you can move the Chief Justice in the administrative capacity, and the matters will be listed assigned to the regular two-judge or three-judge Bench of the case.

SAMEER PAREKH: If My Lord permits...

CHIEF JUSTICE D. Y. CHANDRACHUD: You have to go for a regular Bench, right, three-judge Bench. Doesn't have to go before a five-judge Bench.

SAMEER PAREKH: Your Lordships, I wanted 1 minute of My Lord's time. There's a Note 1-I. I just wanted to point out what are the four points I've made. I'm not going to argue them. But just to place them. One, My Lord, on 31C, we made, I described, et cetera and given details. It was a short, so to say, departure of the balance between Part III and Part IV. From 1971 to '80. '71, 31C came in and 1980 it was declared void. So there is no vacuum of void. It was for a very short period of nine years that it survived. Then on 39(b), I have also given the rules of interpretation of Constitution, harmonious construction, et cetera. I just want to make one last point and I'll close it. That I described all this interpretation of 39(b). But what 39(b) says is 'so distributed,' it doesn't say 'distributed.' Now, 'so distributed', as many of My Lords mentions, for example, Airways. Airways is only two players is for the common good. Electricity sometimes a monopoly is for common good. In some cases it is many. 'So distributed' is not what the Respondents argued, namely, give it to everybody. You can't. So, therefore...

CHIEF JUSTICE D. Y. CHANDRACHUD: No, they didn't argue that at all.

SAMEER PAREKH: You have to see what is in public interest, so therefore...

CHIEF JUSTICE D. Y. CHANDRACHUD: You can't dispute. These are... I mean the spectrum has to be necessarily...

SAMEER PAREKH: Therefore, in my note, I've given the... using the rules of interpretation of a Constitution, I have given my submissions on 39(b).

NIPUN SAXENA: My Lords, we just wanted to seek indulgence.

1 **HARSHVIR PRATAP SHARMA:** My Lord, the community should be assigned some
2 meaning in the sense, a group of persons who do not have potential other than the policy of
3 the Government and one thing that by the time they fought the *Minerva Mill* and the
4 *Waman Rao* were pending, 44...

5
6 **CHIEF JUSTICE D. Y. CHANDRACHUD:** What do you have to say?

7
8 **NIPUN SAXENA:** We just wanted to point out one important face. There is a comparative
9 constitutional law question also involved here, because the original Irish Constitution from
10 which we have taken Article 39(b) has a near identical provision, My Lords. And that has been
11 interpreted by the Supreme Court of Ireland by giving reference to our provisions also and that
12 is quoted in my Volume 2P for Your Lordship's consideration. And that's the second part of it
13 is under 2T, T for technology where I have only requested Your Lordships to keep the
14 expression as fluid as possible because of the changing dimensions of technology, namely,
15 there could be an open source. There could be a specific... there has been 100% FDI investment
16 in space. And very recently, the first private satellite has gone out. So, there could be mapping
17 constraints. There could be constraints in respect of finding out as to the crop rotation
18 schemes, et cetera. So, that particular information which is tabulated by the satellite also, over
19 that, perhaps, the Government might want to exercise control at some point of time for the
20 purposes of distribution in order to facilitate the farmers to know as to how exactly the crop
21 functions or whether there would be a monsoon, et cetera, et cetera. So the scope and the
22 width...

23
24 **CHIEF JUSTICE D. Y. CHANDRACHUD:** 2P right?

25
26 **NIPUN SAXENA:** The first is to 2P, P for 'Preamble', and the second is 2T. The second is 2T,
27 which is for 'technology'. My Lords, I am Nipun Saxena.

28
29 **CHIEF JUSTICE D. Y. CHANDRACHUD:** Nipun Saxena, 2P...

30
31 **NIPUN SAXENA:** 2P, P for 'Preamble', and 2T. I'm so grateful..

32
33 **HARSHVIR PRATAP SHARMA:** So, My Lord, may I conclude by one word, the impact of
34 the *Minerva Mills* and the amendment of *Kesavananda Bharati*, the specialty attached
35 the saving or the immunity was taken away and it became a two way, reduced to a normal
36 Directive Principle of State policy, which cannot give a better right to the Government, that
37 remains. And lastly, one judgment of Justice B. V. Nagarathna, 2023.

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CHIEF JUSTICE D. Y. CHANDRACHUD: Justice Joseph, right?

HARSHVIR PRATAP SHARMA: Yeah, with Justice Joseph and lastly, what I say...

CHIEF JUSTICE D. Y. CHANDRACHUD: That has been cited.

VARUN CHOPRA: Your Lordships, my submissions, 2C and 2J, My Lords. By Varun Chopra.

SHYAM DIVAN: This will load by tomorrow.

CHIEF JUSTICE D. Y. CHANDRACHUD: Yes, certainly. Thank you to all of you, and we are grateful, very much for all your assistance.

HARSHVIR PRATAP SHARMA: I'm so grateful. We have completed our hearing before dynamic and young Chief Justice.

CHIEF JUSTICE D. Y. CHANDRACHUD: Thank you, all of you for all your very comprehensive Shyam Divan and all of you. Gopal Sankaranarayanan as usual, for your very comprehensive...

HARSHVIR PRATAP SHARMA: [UNCLEAR] State of West Bengal.

JUSTICE B.V. NAGARATHNA: You missed the compliment. They have argued before a dynamic and...

HARSHVIR PRATAP SHARMA: I say - We have argued before Hon'ble dynamic and young Chief Justice. That stands for D and Y. Grateful.

END OF DAY'S PROCEEDINGS