THE ROLE OF THE SUPREME COURT OF INDIA IN CONSTITUTIONAL GOVERNANCE*

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When speakers commence their presentations with the statement that they are privileged to be asked to deliver that particular lecture, it is more often than not treated as a platitude. But, believe me. in this case, I feel genuinely privileged to deliver this lecture in honor of a person for whom I have had great admiration and affection ever since I first met him in 1979, when I went over to **Delhi** as the Additional Solicitor General of India.

Very much has been written about Justice V.R. Krishna Iyer, but **having** known him personally for about 25 years, what overwhelms **you** is his humanism and his simplicity. All this is reflected in his **writings,** his speeches, his judgments and his actions. I have **listened** to him not only in India, but also in Bangladesh and **Pakistan** at SAARCLAW conferences, when, with intense passion **and** in ringing tones, he painted the tragic situation of the poor and **the** underprivileged in all our countries. I have seen the judges and **lawyers** in these countries crowding around Justice Krishna Iyer **with** admiration, bordering on reverence and basking in the warmth **of his** personality.

During a long career spanning many decades, Justice Krishna Iyer **has** excelled in whatever he has been engaged in as a brilliant **lawyer, a** judge with his heart overflowing for the common man,

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the underdog and the underprivileged, a jurist with over 70 books and innumerable articles to his credit, a revolutionary, a statesman, an orator and above all, a good human being. Add to this his picturesque language and wonderful vocabulary which vividly brings home to his readers the point that he is making. Imagine a judge describing the difference between the Presidential system of Government in the United States and the Westminster system prevailing in Britain, in these terms:

> Not the Potomac, but the Thames, fertilizes the flow of the Yamuna, if we may adopt a riverine imagery.

In my opinion, Justice Krishna Iyer's contribution to the development of jurisprudence in the country places him in the same class as a Denning or a Felix Frankfurter. This is the reason why I feel greatly honored to be able to be present here and to dedicate this paper on 'The Role of the Supreme Court in Constitutional Governance' to this great Jurist.

We go back to the beginning, when the great leaders, who had fought and won Independence from Britain, joined in the stupendous venture of ironing out Constitution for as diverse a population as one could find anywhere in the world - a diversity based on religion, ethnicity, race, language, and also on caste.

The first and foremost question before the Constituent Assembly was the nature of the new State that was to be brought into existence. It was logical that with the experience of the working of the Government of India Act, 1935, the founding fathers would opt for the Westminster system of Parliamentary Democracy. The existing Provinces had a certain amount of autonomy in regard to some subjects. On the withdrawal by the British Parliament of its responsibility for governance of British India, legal sovereignty reverted back to the people of those Provinces. At the same time, with to the lapse of suzerainty of Britain over the Princely States, the sovereignty, which would have vested in the Rulers, was extinguished through the various Instruments of Accession which brought about the merger of these States with the new Union of States. Unlike a true federal government where sovereign states

enter into a compact for surrendering, in their mutual interest, part of their sovereignty in favour of a strong Central Government, the units which formed part of the Dominion of India existed only for administrative convenience. In the larger interests of the unity of the country, the distribution of legislative powers leaned heavily in favour of Parliament. Emergency powers and special powers were retained by the Union, which could be used to undermine the autonomy of the States. As a matter of fact, it was open to Parliament, by merely consulting the States, to wipe out of existence any State by merging its territory with any other State or to divide an existing State into two new States

In this background, it would not be permissible to describe the new Constitution as a federal one and at the most it could be described as quasi-federal. The hopes and aspirations of the people were contained in the Resolution of the Indian National Congress on the objects of the Constitution which, on the 20th November 1946, declared:

> — [T]hat it (the Congress) stands for an independent sovereign republic wherein all powers and authority are derived from the people and for a constitution wherein social objectives are laid down to promote freedom, progress and equal opportunity for all the people of India, so that thjs ancient land attain its rightful and honored place in the world and make its full contribution to the promotion of world peace and the progress and welfare of mankind—.".

However, the terrible catastrophe which overtook the people of the country resulting in a bloody carnage and the loss of thousands of lives, resulted in the partition of the country, and on the 15th of August 1947 two new nations, India and Pakistan, were born. In this background, when the Constitution was being drafted, instead of the diversity arising out of the multi-cultural, and multi-lingual pluralistic character of the new nation being treated as an asset, fears were expressed that these very characteristics would be

regressive factors which would affect the unity of the nation. Dr. Ambedkar, a day before the Constitution was adopted, said:

> I am of the opinion that in believing that we are a nation, we are cherishing a great delusion. How can people divided into several thousands of castes be a nation? The sooner we realize that we are not yet a nation in the social and psychological sense of the word the better for us —. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national because they generate jealousy and antipathy between caste and caste.

Dr. Rajendra Prasad expressed his anxiety on the day the Constitution was adopted on 26th November 1949. He said:

> If the people who are elected are capable and men of character and integrity they would be able to make the best even of a defective constitution. If they are lacking in these, the Constitution cannot help the country. After all, a constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it. India needs today nothing more than a set of honest men who have the interests of the country before them— . We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and will rise over the prejudices which are born of these differences—. In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no powers to share. We have all these now, and the temptations are really great. Would to

> God that we shall have the wisdom and the strength to rise above them, and to serve the country which we have succeeded in liberating.

Constitutional governance, would, therefore, according to the President of the Constituent Assembly, depend upon the men and women 'who control and operate' the Constitution.

The challenges of governance therefore commenced amidst the fears expressed by the founding fathers. We will now proceed to examine whether the hopes and aspirations of 'We, the people of India', who had given themselves the Constitution, have been fulfilled during the period of the last five decades.

Looking at the practical implementation of these ideals, there are a variety of aspects which we would have to address ourselves to. India has undoubtedly made great strides during the past five decades in the field of governance, the first and foremost aspect being that democracy has come to stay as a permanent feature of the Indian ethos. The greatest success of the country is of its being able to feed a population nearly three times larger than what it was in 1947. Industrialization has taken place rapidly and we are today ranked tenth amongst the industrially developed nations of the world. Our GDP has according to the recent reports exceeded 8% during the last quarter. We are now a global leader in the field of information technology and telecommunications. The Rupee continues to strengthen against the Dollar and our Foreign Exchange reserves have crossed the $ 10G billion mark. These indicators, if taken by themselves, would make us proud to be Indians. But, unfortunately, there are very many regressive factors, which we will have to address ourselves to. First and foremost will be the accountability of the political wing and the bureaucracy of the State through which the parties in power at the Center and the States evolve policy and implement the same. There is a need to ensure that elections are totally and wholly free and fair. We have to maintain basic rights and the rule of law for which purpose the Independence of the Judiciary will have to be guaranteed. Access to justice should be available not only to the rich and the powerful but also to the disadvantaged, the illiterate,

the underprivileged and the deprived sections of society. For participatory democracy to function, we will have to have transparency and responsiveness in Government as well as access to information. Civil society, including the social, economic, cultural, religious and political groups has to be given greater freedom to participate in the process of governance. Above all, corruption, which is all pervasive, has to be eradicated. When one thinks of the fact that over 34% of the population of the country is illiterate and 26% live below the poverty line, one wonders as to whether the positive indicators set out earlier are offset by these negative factors. When we talk of percentages it means, in absolute terms, that about 375 million persons are illiterate smd about 286 million live in poverty.

Addressing ourselves to Constitutional governance, we have to ask ourselves the question as to what exactly is the meaning conveyed by this term. The word 'governance' has now become extremely popular in regard to corporate governance, e-governance and so on. I would understand 'governance' to mean the decision making process and the implementation of those decisions. In the case of the Constitution of India, we have very little difficulty in identifying the objectives of Constitutional governance, as these are contained in the very Preamble of the Constitution, - namely, 'JUSTICE; social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and opportunity; and FRATERNITY, assuring the dignity of the Individual and of the nation.' The Preamble describes India as a 'SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC Achieving these objectives, undoubtedly, are the ultimate goals of Constitutional governance.

THE EMERGENCY

I have commenced this lecture by declaring my confidence in the permanence of democracy and democratic institutions in the country. But, naturally, there have to be caveats. How can one ever forget the period of the Emergency declared on 26th June 1975 and which continued till 18th January 1977. The tragedy was that the very provisions of the Constitution were utilized for suspending

civil liberties. A fear psychosis pervaded the entire country and enveloped democratic institutions including the Supreme Court of India itself. Censorship of the media was institutionalized. Political opponents including the present Prime Minister and the Deputy Prime Minister were arrested and detained. Wherever High Courts were bold enough to strike down the detentions, on oral mentioning in the Supreme Court of India, the judgments releasing the political leaders were stayed, without a scrap of paper having been filed.

The issue before the Supreme Court in the cases of the preventive detentions was whether the detenu could invoke his right to life and liberty once Article 21 of the Constitution stood suspended by reason of the declaration issued under Article 359 of the Constitution. The argument that the right to life and liberty was basic and that Article 21 was not the sole repository of the right to life and liberty was negatived by a majority of four judges with Justice H.R. Khanna dissenting. In his dissent, this is what Justice Khanna had to say:

> I agree with the learned Attorney General that if we are to accept his argument about the scope of the Presidential Order of June 27, 1975, in that event we have to accept it in its entirety and go the whole hog; there is no halfway house in between. So let us examine the consequence of the acceptance of the above argument. This would mean that if any official, even a head constable of police, capriciously or maliciously, arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts against such detention during the period of emergency. This would also mean that it would not be necessary to enact any law on the subject and even in the absence of any such law, if any official for reasons which have nothing to do with the security of State or maintenance of public order, but because of personal animosity, arrests and puts behind the bar

> any person or a whole group or family of persons, the aggrieved person or persons would not be able to seek any redress from a court of law.

It now transpires that a specific question was put to the Attorney General as to whether there would be any remedy if a police officer, because of personal enmity, killed another man.

The episode is best described in the words of Justice H.R. Khanna himself, in his book *Neither Roses nor Thorns:*

> I sought some clarifications about certain aspects to which Niren De (the Attorney General) gave replies. It was, however, found by me that some of my colleagues who used to be very vocal about human rights and civil liberties were sitting tongue-tied. Their silence seemed rather ominous. In the course of discussion I put it to Mr. Niren De that Article 21 related not merely to personal liberty but also to life. In view of his submissions would there be any remedy if a police officer because of personal enmity killed another man? The answer of Mr. De was unequivocal: 'Consistently with my argument', he said, 'there would be no judicial remedy in such a case as long as the emergency lasts', and he added: 'It may shock your conscience, it shocks mine, but consistently with my submissions, no proceedings can be taken in a court of law on that score.' The above answer put the matters in plain light and left nothing in doubt so far as the position of the State was concerned.

Obviously, the fear psychosis had overwhelmed the Judges of the Supreme Court while, on the other hand, a large number of judges of the High Court were bold and fearless and upheld the rights of the individual notwithstanding, the Emergency.

The bold and independent judges, who were parties to these judgments, were transferred from one High Court to another High

Court. These transfers obviously, were punitive in nature. With the blanket censorship covering all access to information the only manner of knowing the despotic and dictatorial events taking place were through pamphlets that were sent from foreign countries to Indian citizens, which escaped the censorship of postal authorities. Along with democracy, constitutional governance was a casualty and the question to be asked is how is it that all these institutions including the media and the courts were unable to resist the onslaught on basic rights and freedoms enshrined in the Constitution. It is in this background that one finds that those judges who had during normal times withstood pressures from the Government were now supine and had miserably failed the people of the country. Of course, the shining exception was the dissent of Justice H.R. Khanna, who when he signed the judgement, knew that was he sacrificing his appointment to the highest judicial office in the country, that being the Chief Justice of India. He resigned without regret when he was overlooked for the office.

However, there is some little consolation which one can derive out of this great tragedy that had befallen the democratic foundation on which the Constitution was built being that the people of the country gave a resounding vote against the perpetrators of the Emergency by sweeping them out of power when the next elections were held. This meant that never again would this country have to face the trauma of the Emergency that was imposed on them, for the reason that the political rulers would look at the writing on the wall and know the fate which would overtake them if they were to repeat the same mistakes.

It is obvious that unlike many of the High Courts, the Supreme Court of India did not cover itself with glory in seeking to stand up for the people of the country against the oppression brought by the imposition of emergency; but the story is different when we look at the role played by the Supreme Court of India in regard to ensuring the conduct of free and fair elections in the country.

ELECTIONS

There are two areas where the Supreme Court has exerted itself to ensure that democratic institutions are insulated and protected so

that they may function independently and effectively to safeguard democracy. One is the print media and the other is the institution of the Election Commission of India.

The provisions of Article 324 of the Constitution, which confer the powers of .superintendence, direction and control of the conduct of elections on the Election Commission of India, were capable of many interpretations. In the case of *Mohinder Singh Gill* being a judgement of Justice Krishna Iyer, the Supreme Court ensured that the primacy and the plenary powers of the Election Commission in regard to all matters relating to elections were upheld. Justice Krishna Iyer in that case said:

> Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad maybes', too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a Constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the systems into elected despotism - instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with a potency of its benignant power and within the leading strings of legal guidelines can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as the Great National Parchment.

Having assured the Election Commission its independence, the Supreme Court of India embarked upon a course that would entitle the common man to exercise his franchise fairly and effectively. In ensuring intelligent exercise of the right to vote obviously the voter

'(1978)1 SCC 405.

had to be armed with all necessary information regarding the qualifications as well as antecedents of the candidate. The Vohra Committee Report had painted a bleak picture of the standard of many of the politicians who were representing the people in the Legislatures and in Parliament. The Report described the tragic state of affairs to which the political system in the country had descended due to the induction of gangsters, criminals and members of the mafia into politics. It said:

> Some political leaders become the leaders of these gangs, armed senas, and over the years get themselves elected to local bodies, State Assemblies and the National Parliament. Resultantly, such elements have acquired considerable political clout, seriously jeopardizing the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people—. These syndicates (the smuggling syndicates) have acquired substantial financial and muscle power and social respectability, and have successfully corrupted the government machinery at all levels and wield enough influence to make the task of investigative and prosecuting agencies extremely difficult; even the members of the judicial system have not escaped the embrace of the mafia.

In this background, the Supreme Court of India in *Union of India* v. *Association for Democratic Reforms*[2] decided that it was time **thai** it stepped in and through judicial activism exposed the **background** of these criminals, gangsters and smugglers who were **seeking** seats in the legislatures and in Parliament. A mandamus **•as** issued directing the Election Commission to compel **candidates** to disclose their past convictions along with criminal **cases** pending against them, to declare their assets and liabilities, as **well** as their educational qualifications.

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It is a tragedy of Constitutional governance in this country that all political parties, without any exception, vociferously condemned the decision on grounds that could only be described as pretexts and excuses. Would not one then come to the conclusion that political parties across the board desire to enlist the support of such criminal elements who would be able to capture booths and constituencies at the point of the gun, while at the same time seeking to repudiate the judgement on high and noble grounds like encroachment by the judiciary on the preserve of Parliament?

The sequel was that while pretending to do lip service to the judgement, an amendment was passed to the Representation of the People Act, 1951, merely providing for disclosure of convictions which were disqualifications under the existing law and expressly declaring that a candidate need furnish information only under the Representation of the People Act notwithstanding any judgement of the Court or the direction of the Election Commission. Happily, the judges of the Supreme Court had no hesitation in striking down the amending act which sought to negate the very basis of participatory and informed democracy through the people electing not gangsters and criminals, but enlightened socially oriented, committed persons as their representatives.

It is obvious that Constitutional governance in the country would be in jeopardy if in areas relating to the politics of the country where the politicians are *ad-idem* on a particular policy, the Supreme Court were not to intervene with a strong hand.

CORRUPTION

I believe that in this country there is no individual who has not been exposed to the influence of corrupt forces operating on his daily life. The ubiquitous presence of corruption in various forms has led to the saying, 'In India, corruption is a way of life.' Bribery through money is not the only facet, but nepotism and influence-peddling are the different ways whereby corruption starting at the top among the Ministers of Government at the Center and State levels legitimizes corruption by the bureaucracy and the public services and then trickles down to the public sector and the private

sector. I hasten to **add** that there are many exceptions at all levels. There are Cabinet Ministers and high functionaries who cringe at the very thought of being associated in any manner with any aspect of corruption.

It is a well-known fact that when tenders are floated for public projects, the bidder builds the bribe element into his cost of the project. That is the reason why economists think of corruption as increasing transaction costs and conceptualize it as a tax on a project charged by politicians or government officials. Of course, **the** more the regulation, the more the licenses, quotas and permits **are** made a part of everyday life, and windfall profits are granted to those entrepreneurs who, through corrupt or other means, obtain such licenses.

India has been placed as the 71st most corrupt country in the world **with** Sri Lanka at number 52 and China at number 59. It is no consolation that Pakistan is 77th and Bangladesh, as the most **corrupt** among nations, is at 102. The Prevention of Corruption **Act,** 1947, replaced by the Prevention of Corruption Act, 1988, has **made** a small dent in regard to the all-pervasive nature of this **malaise.** And what we find is that it is the public servants at the **lowest** levels who are charged under this Act, with the political **wing** of the State wholly impervious to the rigors of this Act. **The** depth to which the cynicism of the political wing has sunk is **seen** from the repeated election promises made by the major **political** parties to the effect that the Prime Minister and the Chief **Minister** downwards, (including the Secretaries to Government) **would** now be subjected to the jurisdiction of the Lok Pal, consisting of retired Chief Justices and judges, whose **independence** is totally guaranteed. The first Lok Pal Bill was **moved** in 1968 and, as if it was premeditated, it was allowed to **lapse.** In 1971, the Lok Pal Bill was also allowed to lapse on the **dissolution** of the 5th *Lok Sabha.* No government was prepared to **frankly** confess that the last thing that the\. would ever do, notwithstanding election manifestoes, was to abandon their **privileged** position as the rulers of the country and allow themselves to be subjected to investigation, trial and conviction, **like** any other public servant. They, therefore, persisted in their

charade. The 1977 Lok Pal Bill was moved and, to prove the Government's sincerity, was even referred to a Joint Committee but again the Bill was allowed to lapse when the Lok Sabha was dissolved. History repeated itself again when the Lok Pal Bill, 1985, the Lok Pal Bill, 1989, the Lok Pal Bill, 1996 and the Lok Pal Bill, 1998 were all allowed to meet the same fate. And now, as we all know, the present Bill of 2001 is also going to lapse in the next one week. My only hope is that the hypocrisy involved in making promises in the election manifestoes about how courageously the Prime Minister, the Cabinet Ministers and the Members of Parliament are going to boldly and fearlessly expose themselves, like other public servants, to the discipline of the Prevention of Corruption Act, will not be repeated again in the election manifestoes that are around the corner.

However, by reason of the intervention of the Supreme Court we have the Central Vigilance Commission Act, 2003. In the now famous case of *Vineet Narain* v. *Union of India,*[3] popularly known as the *Jain Hawala case,* the premier investigating agency in the country, the Central Bureau of Investigation (CBI), set up under the Delhi Special Police Establishment Act, was subjected to the jurisdiction of an independent Central Vigilance Commission (CVC), replacing the existing Central Vigilance Commission and requiring that statutory status be given to the CVC. The appointment of the Director of the CBI was to be made by a committee headed by the CVC. A large number of guidelines were issued to ensure fearless and independent investigation of cases by the CBI. But what is interesting is the statement in the judgement to the effect:

> — [T]hese directions made under Article 32, read with Article 142, to implement the rule of law, wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India, to act in aid of this Court.

[3] (1998)1 SCC 226.

A series of judgments of the Supreme Court, which had laid down guidelines in respect of a large number of areas, not expressly covered by statute, were relied upon in support of the exercise of this power, which otherwise would have had the flavor of legislation.

The Central Vigilance Commission Act, 2003 covered members of All-India Services and Group 'A' officers of the Central Government, meaning thereby, Secretaries to Government downwards till Under-Secretaries. In addition, the different levels of officers of public corporations and local authorities under the control of the Central Government were also included. Significantly the Prime Minister and other Ministers were left out, apparently, for being covered by the Lok Pal Act, which, has not yet fructified and may never fructify. It is now obvious that constitutional governance in the country is facing its greatest threat by reason of the massive and large-scale corruption affecting every walk of life. As long as the Legislatures and the Executive are not prepared to ensure the active implementation of the criminal law of the country, I am afraid India will continue to descend lower and lower in the scale of corruption among the countries of the world.

It is true that the Lok Pal Bill, which includes Members of Parliament within its scope, has not become law. But again the Supreme Court has stepped in and in *P. V. Narasimha Rao* v. *State* the Supreme Court, through judicial activism, has interpreted "public servant' in the Prevention of Corruption Act, 1988, to include Members of Parliament. Of course there was a massive hue and cry about this but the Supreme Court did not hesitate to dismiss the review petition, which was filed by the Center to dismiss the petition.

THE JUDICIARY

It is a historical fact that in the first three decades of the working of the Constitution, the Executive and Legislative wings of the State

[4] (1998) 4 SCC 626.

came into conflict with the Supreme Court. A number of laws bringing about agrarian reforms had been struck down by the Supreme Court as being violative of Article 31 of the Constitution. Every effort by Parliament at amending the Constitution and validating the laws met with failure. The breaking point came when in *Golaknath's* case[5] where the Supreme Court held that an act amending the Constitution was not itself an organic law and was subject to the prohibition contained in Article 31 of the Constitution, which invalidated any law inconsistent with the fundamental rights contained in Part III of the Constitution. However, the doctrine of prospective overruling was invoked by the Supreme Court to declare the land reforms laws invalid, albeit prospectively. But what enraged the Executive and the Parliamentarians was the judgment of the Supreme Court in the *Kesavananda Bharati* case.[6] The Supreme Court declared that no amendment to the Constitution was permissible that would violate the very foundation or the basic structure on which the Constitution was structured; for example, the rule of law, the secular character of the nation, the republican Constitution and some of the fundamental rights were all declared to be part of the basic structure of the Constitution. No exhaustive definition of those characteristics which would relate to the basic structure was ever set out in any judgment of the Supreme Court. The result was that at no time would Parliament know with certainty as to whether the proposed amendment of the Constitution would withstand judicial review.

With the declaration of the Emergency in 1975, an aggressive Congress Party, through the then Union Law Minister, sought to put the judiciary in its place. In a speech, which if made today, would have resulted in contempt proceedings being initiated against the Law Minister he had the following to say, with the deliberate intention of browbeating the highest judicial institution in the country:

> An atmosphere of confrontation was sought to be created by those whose duty it was to see that they

[5](1%7)2SCR762. [6]
(1973) 4 SCC 225.

> did not encroach upon the field which did not legitimately belong to them. Nothing should be left undone now to ensure that such a situation did not recur. If even after the amendment (that is, the forty second Amendment to the Constitution) confrontation continues, then I think it will be a bad day for the judiciary.

b was only when the Congress Party was wiped out of political **power** at the elections which were held in 1977, that the Supreme **Court** was able to redeem itself from the loss of credibility, which **it** suffered, when it delivered the *ADM, Jabalpur* case.[7] Even **though** the three organs of the State are equal and coordinate under **the** Constitution, historically the aftermath of the Emergency with **the** perpetrator being disowned by the people, turned out to be a **fortuitous** opportunity for the Supreme Court to gain primacy **among** the three wings of the State. As a result, a resurgent Court **was** able to freely, and with little dissent from the Legislative and **Executive** Wings of the State, ensured that the failure of governance on the part of the Executive and Parliament did not **afiect** the people of the country with the Supreme Court **intervening** in matters of far-reaching public interest under - **purported** exercise of the judicial powers of the State. The areas of **judicial** activism of the Supreme Court touched every aspect of **koman** life including prison conditions, environment, forests, **women** and children, the weak, the disadvantaged and illiterate and **poverty** stricken sections of the people of the country, the ancient **monuments,** heritage of the country, the rights of minorities and so **on.** In *Sunil Batra* v. *Delhi Administration** Justice Krishna Iyer **declared** in his inimitable language:

> For what is punitively outrageous, scandalizing unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part

'(1976)2 SCC 521.
'(1978) 4 SCC 494.

> company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority.

This was the stepping-stone for many more judgments on prison justice, by the Supreme Court of India.

We have only to open the newspapers today to find in the headlines the far-reaching effect of the judicial activism of the Court. It is possible to argue that in very many cases the Supreme Court is virtually encroaching upon the exclusively domain reserved under the Constitution to the Executive and to the Legislatures. It may be so, but we do not find any complaint to that effect being vociferously articulated by the political wing of the State. The reason is not far to see. It is the corruption, the indifference and the apathy of the legislature and of the executive to the rights of the people and the violation of such rights that has forced their submission to the will of Othe Court. Truly, it can be said that even if the Supreme Court of India were not able to wipe away every tear from every eye, it is not because of any failure on its part to do its utmost in this direction.

But we have to reconcile ourselves to the fact that the higher judiciary in the country as well as the subordinate judiciary suffer from weaknesses and the greatest failure of the court system in the country is to tackle the huge arrears which are pending in the courts in the country. The statistics submitted to Parliament in the year 2001 states 'that a staggering 2.4 crore cases are pending in the country's courts as on October 31, 2001; 2,03,25,756 cases in the High Courts and 21,995 in the Supreme Court.' What is frightening is not the mere volume of pendency but the time taken for the disposal of cases at all levels. Criminal cases, on an average would take 3 to 4 years at the trial stage, and with the civil cases taking a much longer time of about 8 years in the trial court, 3 to 4 years in the High Court and if the matter were to come to the Supreme Court another 3 to 4 years. The system practically denies the middle and the lower middle classes access to justice, as they cannot possibly afford to wait for a period of 15 or 20 years before

their cases reach a final conclusion. I have no doubt that a large number of litigants do not dare to enter the portals of the courts with their claims because of this one reason alone and the concomitant huge expenses involved in carrying on the protracted litigation. The fast track courts set up about 2 years back have sought to make a dent but it is not an answer to the malaise. I wonder how the judges can be complacent about this situation when they so freely entertain and issue orders in public interest litigation for compelling government to fulfill its obligations swiftly and expeditiously? Obviously if the judges are asked about this, their answer would be that they do not have enough judges, enough court halls, enough staff and enough infrastructure. Surely, the Supreme Court of India can *suo motu* take up the issue as art of public interest litigation and chart out guidelines, as they have done in innumerable cases, for compelling the swift and expeditious disposal of cases for bringing down the arrears? I ask myself the question - of what use is the catena of fundamental rights granted by the Constitution if an Article 32 petition, which itself is a fundamental right, is rejected with a direction that the case should be filed in the High Court. What purpose is served if a violation of a fundamental right is not remedied within a reasonable period of 3 months to 6 months, because otherwise the right would then cease to be fundamental and would merely pass off as any other right? Unless and until the Supreme Court sets its own house in order, it would appear that in this area which deals with the dispensation of swift and effective justice, constitutional governance would be the casualty.

1 now come to a deeper malaise. The breaking news is the issue by a Magistrate, in Ahmedabad, of non-bailable warrants for the arrest of the President of India and the Chief Justice of India, after taking a bribe of Rs. 40,000 We have been hearing of the dreadful state of affairs prevailing in the subordinate judiciary so far as integrity and rectitude are concerned.

In an article, which I contributed to the Journal of the Bar Council of India inl981[9] that is, over twenty years back, this is what I had to say:

'Vol. 8,JBCI459(1981).

> However, like distant thunder, we start hearing rumors of corruption, nepotism and favoritism entering the portals of the courtroom as well. The subject is taboo and like the Chinese monkeys, one shall not see, hear or speak of this evil; but if there is a likelihood of this nightmare ever becoming a reality, then it is necessary to hunt down the causes and neutralize the same before it becomes a reality.

At least three Chief Justices of India have spoken about this most terrible among diseases, which is afflicting the judiciary; two of them after retirement and Chief Justice Bharucha while he was in office. According to Justice Bharucha, about 20% of the judges, and this includes the higher judiciary, are corrupt. A Bill for amending the Constitution, by setting up a National Judicial Commission and also for disciplining judges belonging to the higher judiciary was to be moved in Parliament. But, unfortunately, this Bill would also be a casualty on the dissolution of Parliament in the next few days. If a Judicial Commission consisting of the Chief Justice of India and other Judges of the Supreme Court or the Chief Justices of the High Courts was to be set up for entertaining complaints against members of the higher judiciary, one could at least hope that there is some likelihood of accountability being enforced on this powerful wing of the State. I am afraid that if there is any further delay in the setting up of the National Judicial Commission the credibility of the institution itself will be affected, including, unfortunately, that of the vast number of judges belonging to the higher judiciary, who are upright, fearless and conscientious.

There are very many areas which would legitimately have to be dealt with when dealing with constitutional governance. This includes the freedom of information, transparency, the accountability of the holders of high offices, the caste system which Dr. Ambedkar in his speech in the Constituent Assembly had described as anti-national, the attacks on secularism and the abuse of power by the Central Executive in dismissing State Governments and imposing President's rule in the States. All

these, and more, would have to be dealt with, but on another occasion. We have, however, the satisfaction that, above all, India is a vibrant, functioning democracy. In spite of poverty and illiteracy, we may hope that over a period of the next 10 years a rapidly expanding economy would provide for the 'trickle down **effect'** where the Government would be able to manage its budget so as to set apart substantial amounts for poverty alleviation, **primary** education, drinking water, health services and all those **basic** needs which will go to make up a complete human being. **The** Supreme Court of India has declared that the fundamental **right** given to every person in this country under Article 21 of the Constitution, namely, protection against the deprivation of life and **liberty** other than by the procedure established by law, is not a **mere** right to an animal existence but a right to live with human **dignity** with all faculties intact, with a roof over one's head, with **clothes** on one's back and possessing the tools of one's trade. This is how Justice Krishna Iyer has understood Article 21 in his judgement in the *second Sunil Batra* case:[10]

> So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure.

I have no doubt that whatever may be the regressive and negative **factors,** the country, in spite of the fears that coalition governments **can** never succeed, would be able to rise to the task of improving **the** quality of life of the poorest among the Indians so that constitutional governance in future would not be directed towards **the** well-being of those who are already rich and affluent and **educated** but also towards the 300 million illiterate and poverty **stricken** people of this country.

" *Sunil Batra (II)* v. *Delhi Administration,* (1980) 3 SCC 508.