

# CONTRIBUTION OF THE SUPREME COURT TO THE GROWTH OF DEMOCRACY IN INDIA

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## I. INTRODUCTION

I consider it a great privilege and honour to speak in memory of D.D. Basu. Justice M.N. Venkatachalaiah and Mr. K.K. Venugopal, who delivered lectures in previous years in the same forum, have elaborately referred to the life and works of D.D. Basu. Thus to avoid redundancy, I will refrain from reiterating what they have already elucidated on. I have not known D.D. Basu personally, but I have great admiration for the commentaries he has offered on various subjects in his classics, particularly on Constitutional Law. I was intrigued by his work on ‘Comparative Constitutional Law’ in which he makes thought provoking comments on important decisions of the Supreme Court such as *A.D.M., Jabalpur v. S.S. Shukla* (‘Habeas Corpus case’),<sup>1</sup> *Kesavananda Bharati v. State of Kerala* (‘Kesavananda Bharati case’),<sup>2</sup> and *Indira Gandhi v. Raj Narain*.<sup>3</sup> He did not get influenced by the populist views on issues dealt with in the Habeas Corpus case. He criticizes both the majority and minority opinions in the first two cases, and the manner in which the latter was decided. He opines that the majority in the Habeas Corpus case ought to have taken note of the fact that Article 226 had not been suspended, and therefore judicial review on matters other than Article 21 could have been invoked in the ordinary course of judicial review. He feels that notwithstanding Justice Khanna’s heroic attempt to save the rights of the citizens to move for *habeas corpus*, his reasoning was based on aspects *ultra vires* the Constitution of India. Furthermore, he goes on to observe that in the presence of a written Constitution, taking note of situations outside the Constitution will not be sound in law.

He is highly critical of the basic feature theory in the Kesavananda Bharati case as in his view the amending power is applicable to all aspects of a written Constitution, and there is no area which could be taken out of the purview of such a power. However, given the development of law in the contemporary context, it can be inferred that the basic feature theory has stood the test of time, since its inception forty years ago. I do not wish to delve into the

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\* Former Chief Justice of India. The speech was delivered on the occasion of the 6th D. D. Basu Memorial Lecture at The West Bengal National University of Juridical Sciences, Kolkata on February 23, 2013.

<sup>1</sup> (1976) 2 SCC 521: AIR 1976 SC 1207.

<sup>2</sup> (1973) 4 SCC 225: AIR 1973 SC 1461.

<sup>3</sup> 1975 Supp SCC 1: AIR 1975 SC 2299.

jurisprudential aspect of this matter, and will instead limit myself to a different aspect.

While dealing with *Indira Gandhi v. Raj Narain*, D.D. Basu points out that a layman is likely to ask – if the courts cannot interfere to prevent the intrusion of autocracy, then who should do it? The answer is – the people themselves. In short, the remedy is political and not legal. He observes that the doctrine of basic feature has no leg to stand on, and to base a decision on such a doctrine would be inappropriate. The Supreme Court should decide matters on the principles of constitutional jurisprudence and not based on political exigencies. His view is that people themselves would resolve issues arising from political exigencies. In answer to autocratic rule, the history of the 1975 Emergency and its aftermath has taught us the lesson: that if need be, the peace loving masses in India will rise from their slumber to exercise their political sovereignty, to take back from their representatives their solemn trust. The role of the judiciary, however, is to adjudicate – not to amend the Constitution, nor to participate in any revolution, peaceful or violent. Similarly his views on the omission of the right to property are very innovative. Although, Seervai in his ‘Classic Work on Constitution’ is of the view that the omission of Article 19(1) (f) and introduction of Article 300A in the Constitution is more advantageous, Mr. Basu is highly critical of this view. He adopts the stance that the right to property as a constitutional right is completely lost. I could elaborate on instances that illustrate his point, given that all of you are aware of these, I do not deem it necessary to do so.

I have chosen to elaborate on the relationship between ‘Democracy and the Supreme Court’. The underlying rationale for this choice is that the Supreme Court has been instrumental in reinforcing democracy, through its decisions. Certain instances include, but are not limited to the following: its interpretation of Article 12 to impart a broader connotation to instrumentalities of State; its interpretation of Article 14 so as to include non-arbitrariness; the expanded interpretation of Article 21, introducing a concept analogous to that of ‘due process’ in interpretation of laws and executive actions. The development of public interest litigation in its various facets such as class litigation, representative litigation, complaints regarding governmental inaction or for enforcement of good governance and various aspects of judicial activism, have all strengthened the different facets of democracy. The manner in which the Supreme Court strengthened the functioning of the Election Commission, the decision in *S.R. Bommai v. Union of India* (‘Bommai case’)<sup>4</sup> of upholding the anti-defection law, has further laid strong foundations for working of the democracy in India.

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<sup>4</sup> (1994) 3 SCC 1: AIR 1994 SC 1918.

I should not be understood as merely paying encomiums and compliments. During the course of my speech I will advert to certain unwanted aspects of the Supreme Court. Although, keeping in mind the bigger picture at hand, I must say that the Supreme Court has made an unparalleled contribution to the sustenance and growth of democracy.

## II. DEFINING HISTORICAL AND POLITICAL ANTECEDENTS

The Supreme Court was established in Delhi in 1950. It was a successor to the Federal Court and the substitute of the Privy Council. The Supreme Court owes its existence to the Constitution, which in substance is an adoption of the Government of India Act, 1935, to which the preamble, the fundamental rights, directive principles and amending provisions were added. The judges of the Supreme Court are appointed by the President of India. So far they have been chosen from amongst the judges of the High Court and members of the Bar, though a wider selection pool is available. The Supreme Court is neither representative nor reflective of the entire society and it is not meant to be so. But its pronouncements are in accordance with the Constitution which is the supreme law of the land. Its jurisdictional powers encompass plenary, original, appellate and advisory jurisdictions. The reach and sweep of its power is unparalleled. Its orders are binding on every person, authority, executive, legislature and other courts in the country and are enforceable throughout the territory of India. This binding authority is provided for in Articles 141 and 142 of the Constitution. In its judicial activities it is accountable to none, given the finality of its pronouncements. The exercise of judicial power manned by a chosen few is not subject to any democratic process. Yet, in India, as in America, vital problems are entrusted to the Court for solution. The Court has neither purse nor sword. It has no means of enforcing its orders; not even the orders of punishment that it can inflict for disobedience of its own authority.

The superior authority the Court exercises over the Government, Legislature and tribunals is derived from the supreme will of the people as expressed in the Constitution. This is the source of legal authority. Its moral authority over the people is sourced from contemporary public opinion. The Court is adored, condemned or ignored from time to time in accordance with the role it chooses to play in the life of the community. It has always acted in accordance with the spirit of time, on the basis of the values and norms that it has set for itself, the mood of the country, the prevailing economic situation. Prevalent social notions are instrumental in shaping the Court's pronouncements as well. The values that the Court seeks to uphold undergo a transformation from period to period, due to the pull and push of such forces; and the Court so appreciates the requirement of the society. The understanding of the nature of these forces, and the perspective which moulds the vision of such

requirements, depends upon the philosophies of individual judges who at any point of time constitute the Court. After all a judge's personality is the funnel through which value norms enter judgment. It is out of such a welter during different periods, that perceptible trends and major policies of the Court emerge. The Court has always sought to be the major centre of political power in the interest of the society. It is after all a political institution; with the executive being its real rival. If the Court found that a liberal and enlightened executive irremovably occupied the Centre, it tried to share power with the executive. If the executive was aggressive and bellicose, the Court demonstrated deference. If the willing executive moved away from the Centre, it sought to occupy the seat of power itself. If it could not do any of these, it created its own field of operation. Vicissitudes in the fortune of the successive executives perpetually made the Court readjust its position.

The history of the Court shows that during its decade in the opening 1950 – 1960, finding itself in a Nehruvian era of economic progress, political stability and nascent optimism in the country, the Court lead by four erudite Chief Justices, Shastri, Mahajan, Mukherjee and Das, functioned with commendable dexterity. While seemingly maintaining the balance of power among the three wings of the State, the Court gradually and cautiously extended its own authority. It laid the foundation for its future activities. The Court blended the orthodox judicial function with policy making. It tried to protect the right to property, particularly of the rural land owning class from the clutches of legislation.

During the second decade from 1961 – 1970, given the presence of a crippled economy, instability of political authority, immorality in public life, unbridled exercise of the plenary power of constitutional amendment, the Court lead by Chief Justices Subba Rao, Hidayatullah and Shah, engaged in policy making on a grand scale. It curbed the power of Parliament, struck down major economic decisions and overruled policies of the Government. It acquired judicial sovereignty. It appeared as though in India the Government was run by judiciary. In this decade the Court leaned in favour of the urban commercial middle class, in order to protect their economic and political interest.

During the subsequent period from 1971 – 1975, Mrs. Gandhi's Government supported by public opinion sought to curb the Court from usurping political and economic power, through constitutional amendments. The Court fought back against the suppression, under the collective leadership of Chief Justices Sikri and Justices Hegde and Shelat. In the long run, however, the Court could not stand united and firm, much to the chagrin of the public.

Thereafter followed the imposition of the Emergency, from 1975 – 1977, with the executive setting up an aggressive front. In the face of this aggression, the Court under the leadership of Chief Justices Ray and Beg, abdicated

its power of judicial review. However, it delivered a magnificent judgment in Mrs. Gandhi's election case. During those few tumultuous years, the Court all but receded from the dominant space it occupied in the Indian society.

Subsequently during the tenure of the Janata Government in 1977–1980, it bounced in with vengeance against the emergency and with massive public support, the Court under the leadership of the Chief Justice Chandrachud endorsed the policy decision of the new Government. The relaxed political atmosphere made the executive more liberal in its approach, providing an opportunity for the Court to retrieve its lost judicial territory. It extended its jurisdiction and acquired immense power of administration, becoming the most powerful judiciary in the world. It extended the meaning of 'State', prescribed limits to executive discretion, and redefined the scope of judicial interference, which was in fact unbounded and limitless. The Court and Executive shared the glory of this brief but significant period in the history of the country. These were the Court's finest years.

In 1980 Mrs. Gandhi returned to power. The embarrassed Court did not interfere with new economic measures and political decisions. The Court directed its attention to the causes of the poor, the oppressed and the submerged. It shifted the focus of judicial activity to public interest litigation ('PIL'), in championing the causes of tenants, workers, employees and prisoners in the name of socialism, rule of law and constitutional conscience. A new subsidiary class had emerged in the Indian scene with politically and socially inspired patrons, and legally assisted, it became a loud and effective pressure group with a wide constituency. The Court chose to listen to the new class, thus providing a launching platform for PIL. Within the bounds of economy, the Court could afford espousing marginal egalitarianism and a small dose of socialism. In the hands of five judges, Justices Krishna Iyer, Bhagwathi, Desai, Chinnappa Reddy and Thakkar who had constituted a fraternity, new judicial activities were pursued with missionary zeal and crusading vigor. In applying the new jurisprudence they had scant regard for the existing procedure and precedents. They became activist and dynamic. A few of their colleagues did not share their views. The open commitment of the judges to one or the other social philosophy caused anxiety amongst the litigants. This public polarization of judicial philosophy eroded the image of collectiveness and impartiality of the judiciary at the apex.

Following this came another significant year: 1985. With a new Government at the Centre, the Court too had a new leadership in Chief Justice Bhagwathi. Justice Bhagwathi during the preceding 12 years, had done all he could to expand the judicial power of Court, to enlarge its constituency. Through his actions he had made the Court a meaningful and relevant beneficial institution for the masses. Now he was confronted with a larger problem- the survival of the judicial system itself. The Court assumed a gestalt perception and had

adopted a holistic perceptive towards the administration of law and justice in the country. Apparently the Court partnered with the Government, lending cooperation in wider fields, chastising whenever it should and protecting wherever possible. It openly and categorically set its goal of implementing social justice, which is actually the primary and essential function of an enlightened executive. It showed the high way and abandoned the bye-ways for achieving its objectives.

During the period between 1987 and 2005, India witnessed 16 Chief Justices, 8 Prime Ministers, fragmented political parties, and unholy alliances amongst politicians, bureaucrats and criminals. Public issues of great significance relating to corruption and pollution appeared in increasing numbers, as legal issues before the Court. The economic situation which had deteriorated fast since 1980, was taking a different shape in 1991 with a change in the policy of liberalization, privatization, and globalization. Future prospects were looked at with trepidation by many. The collapse of the Berlin Wall symbolized the collapse of USSR and socialism. The only option left for mankind was to abide by the market forces. Due to an increasing number of scams, communitarian conflict with the demolition of the Masjid, and large scale caste-based violence, highly explosive public issues appeared before the court as legal questions.

The first half of this period did not see the emergence of any particular doctrine, espousing of any specific cause or the gravitation of the Court towards any particular direction. The Court functioned collectively and effectively, responding to all the challenges. The latter part of the last decade witnessed a new significant phenomenon momentous in its dimensions – the explosive role of the media. It had an impact on the judiciary and democracy itself. The Court responded to the spirit of time and chose to accept the evidence proposed by media which inflicted new strokes on the Indian psyche.<sup>5</sup> The manner in which the Court dealt with prominence given to social events in the public forum, and devoted itself to the pursuit of greatness, crowned the Court with glittering glory during this eventful period.

### III. EXPANSIVE INTERPRETATION OF CONSTITUTIONAL PROVISIONS IN A BID TO BROADEN THE HORIZONS OF DEMOCRACY

The legislature, executive and the judiciary are the three coordinates of the State and are bound by the Constitution. The ministers who represent the executive, the elected candidates who represent the central or the state legislature and the judges of the Supreme Court or High Courts who represent the judiciary, have all taken oath prescribed by the Third Schedule to the Constitution. They swear to bear true faith and allegiance to the Constitution.

<sup>5</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, (2006) 3 SCC 374; AIR 2006 SC 1367.

All the three wings of the State have to function in complete harmony. A decision of the Court either disapproves or approves a decision of the legislature or of the executive. In either case, the Court neither approves nor condemns any legislative policy nor is it concerned with its wisdom or expediency. The concern of the Court is to determine whether the legislation is in conformity with or contrary to the Constitution, and quite often to examine the rationality of the statute. Similarly when the Court strikes down an executive action or order, it is not in the spirit of confrontation or to assert its superiority, but in discharge of its constitutional obligation to act as a judicial watch-dog. In interpreting the law the Court is required to keep the particular situation in mind, so as to provide a befitting solution to the problem to the fullest extent possible. This is a legitimate exercise the judiciary undertakes in discharge of its obligation under the Constitution. The gaps in the existing law are filled by the evolution of juristic principles, which in due course of time get incorporated into the law of the land thereby promoting its development. Judicial review is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed when the occasion arises by reason of a doubt raised in that behalf before the Court. The function of the Court is to administer justice and in discharge of that duty, it has to respond to the aspirations of the people because the people of the country in no uncertain terms have committed themselves to secure justice – social, economic and political, besides equality and dignity to all.

The Court has given a very expansive meaning to Article 14 of the Constitution. Consequently, every action of the executive can be tested with respect to its reasonableness because the Government has to follow the rule of law, which ordains that all action of the government must be informed with reason. The Government cannot behave as a private party. The concept of equality is to be understood as antitheses of arbitrariness.<sup>6</sup>

The expansive meaning given to Article 21 in respect of the expression ‘life’ and ‘liberty’ has covered a wide variety of problems in the society. The Court has expanded the scope of right to life as not being limited to mere animal existence, but including the right to live with human dignity<sup>7</sup> and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing and expressing in diverse forms, freely moving with fellow human beings.<sup>8</sup> This principle was further extended to include protection of health and strength of workers, prevention of abuse of children, opportunity and facilities to children to develop in a healthy manner and in condition of human dignity, education facilities, just and humane conditions of work and maternity relief. The Court held that the

<sup>6</sup> E. P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3: AIR 1974 SC 555.

<sup>7</sup> Francis Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608: AIR 1981 SC 746 (discussing *Munn v. Illinois*, 94 U.S. 113 (1877)).

<sup>8</sup> *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; *Id.*

right to life included within its ambit, even the right to livelihood.<sup>9</sup> It held that for residents of hilly areas, access to road is life itself.<sup>10</sup>

The questions relating to euthanasia were raised before the Court.<sup>11</sup> It has considered cases for relief against effects of radiation on employees, leakage of toxic oleum gas<sup>12</sup> from a chemical plant, appalling conditions in a home for destitute women, remand homes and observation for children, right of a prisoner to write and publish a book,<sup>13</sup> relief against solitary confinement of prisoners, relief against pollution and protection of environment,<sup>14</sup> and relief against telephone tapping.<sup>15</sup> Economic empowerment through distributive justice for the poor, dalits, and tribes is an integral part of the right to live. Equality of status and dignity for bonded labourers has to be identified and contextualized in terms of Article 21 read with Articles 39, 41 and 42. Women have the right to work with dignity and without sexual harassment.<sup>16</sup> Following the international convention<sup>17</sup> relating to the same, the Court formulated several principles to prevent sexual harassment.

The concept of liberty has the widest amplitude and it covers variety of rights which constitute personal liberty of man. Some of them have been raised to the status of distinct fundamental rights and have been given additional protection under Article 19.<sup>18</sup> Liberty includes the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint unless by due process of law. The personal liberty of the citizen cannot be deprived except for a just and fair cause and not an arbitrary, fanciful or oppressive one.<sup>19</sup> In a batch of cases, the Court held that fair procedure contemplated under Article 21 includes right to speedy trial.<sup>20</sup> In the matter of education it was held that the content of the right must be understood in light of Articles 41 and 45 whereby (a) every child and citizen of the country has a right to free education until he completed age of 14 years; (b) after the age of 14 years his right to education is circumscribed by the economic capacity of the State and its development. However, the Constitution has now been amended to include Article 21-A confining the

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<sup>9</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

<sup>10</sup> *State of Himachal Pradesh v. Umed Ram Sharma*, (1986) 2 SCC 68; AIR 1986 SC 847.

<sup>11</sup> *Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454.

<sup>12</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395; AIR 1987 SC 1086.

<sup>13</sup> *Prabha Dutt v. Union of India*, (1982) 1 SCC 1; (1982) 1 SCR 1184.

<sup>14</sup> *See M.C. Mehta v. Union of India*, (1987) 1 SCC 395; AIR 1987 SC 1086; *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645; AIR 1993 SC 2178.

<sup>15</sup> *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; AIR 1997 SC 568.

<sup>16</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; AIR 1997 SC 3011.

<sup>17</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res.34/180, U.N. Doc. A/Res/34/180.

<sup>18</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; AIR 1978 SC 597.

<sup>19</sup> *Id.*

<sup>20</sup> *Hussainara Khatoun v. Home Secy., State of Bihar*, (1980) 1 SCC 93; AIR 1979 SC 1360.



right to compulsory free education to children from 6 to 14 years, subject to the enactment of law which is yet to be enforced.

Right to privacy also came up in several cases. Justices Subba Rao and Jeevan Reddy held that right to privacy is implicit in Article 21. This right was understood as the right to be left alone. This aspect was examined in the context of surveillance and maintenance of history sheet.<sup>21</sup> Unique ID Number may affect privacy and sacrosanct human dignity. If a password for an online transaction is stolen, the same may be replaced but if a man's identity itself is lost or replaced, the question is how to redeem the situation? In the case of an HIV positive patient and the duty of the doctor to disclose his illness to his future bride, the Court held that although the right to privacy is included in Article 21, it is subject to certain restrictions as in the case of a doctor who has a duty to protect the health of a lady intending to marry such a person.<sup>22</sup> In appropriate cases the Court granted damages as compensation when there was a violation of a fundamental right.<sup>23</sup> Questions relating to environment<sup>24</sup> and public health have also been considered under this Article.<sup>25</sup> Thus in making use of Articles 14 and 21, the courts have acted on a wide canvass.

#### IV. JUDICIAL ACTIVISM: A CHECK AGAINST EXECUTIVE TYRANNY AND A PROPONENT OF DEVELOPMENT

The need for judicial activism arises, when the executive fails to perform its duty as envisaged under the Constitution or the law. The duty of the Court is to sound an alarm for the sleeping executive or blow the whistle when it plays foul.

One of the most important decisions given by the Court in recent times is one upholding the direction issued by Election Commission, with regard to the filing of nomination papers by prospective candidates. In that context the technique adopted by the Court is that the right to cast vote arises under the Representation of Peoples Act, 1951. Though the Court had held on earlier occasions that the right to vote, to contest in election, and challenge an election in a Court are all statutory in nature, due significance is not given to Article 326 of the Constitution. The said Article provides for elections to the House of People and the legislative assembly of the states, on the basis of adult suffrage. Thus the Court recognized the constitutional right of adult franchise, subject of course, to the law made by the Parliament. As long as an adult satisfied the

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<sup>21</sup> Kharak Singh v. State of U.P., AIR 1963 SC 1295.

<sup>22</sup> 'X' v. Hospital 'Z', (1998) 8 SCC 296.

<sup>23</sup> Rudul Sah v. State of Bihar, (1983) 4 SCC 141; AIR 1983 SC 1086.

<sup>24</sup> Shantistar Builders v. Narayan Khimalal Totame, (1990) 1 SCC 520; AIR 1990 SC 630.

<sup>25</sup> Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645; AIR 1993 SC 2178.

provisions relating to the Representation of Peoples Act, 1951 as regards qualifications and disqualifications of a voter, he has a constitutional right to vote. Such a right when exercised, becomes a kind of expression of preference for or against an electoral candidate; such expression being accorded protection under Article 19(1)(a) of the Constitution, which guarantees the fundamental right to freedom of speech and expression. The concomitant right of expression includes the right to information. Thus the right to vote when exercised becomes a right to freedom of expression thereby requiring the necessary information regarding the candidate contesting an election with respect to his criminal past. If such information is not available the voter cannot appropriately exercise his right. This was the underlying rationale proffered by the Court, for supporting the directions of the Election Commission.

The Court has actively exercised its power in furtherance of environmental protection.<sup>26</sup> It developed the concept of healthy environment as being a part of right to life under Article 21 of the Constitution, and read into it the Directive Principle of State Policy under the Constitution as provided under Article 48–A. Furthermore the Court espoused the policy of providing a clean environment in the city of New Delhi. In pursuance of this objective, it directed the Government to mandate the usage of CNG as fuel for vehicles within the city. Though the Government of Delhi resisted the course of action taken by the Court initially, it ultimately yielded to the directions of the Court. The United Nations awarded a prize to the city of New Delhi as one of the cleanest cities in the world and on that occasion the Government took credit for the same with pride.

## V. ANALYSING THE BASIC STRUCTURE DOCTRINE AS THE TOUCHSTONE OF DEMOCRACY

Articles 4, 169 and 229 may be amended by a simple majority with the introduction of a bill in the Parliament. Provisions regarding the election of the President in Articles 54 and 55, executive power of the Union or State contained in Articles 73 and 162 and matters pertaining to the Supreme Court and High Court as contained in Articles 124 to 147 and 214 to 231; the scheme of distribution of legislative, taxation and administrative powers between the States and Union as contained in Articles 245 to 255 and Lists I, II and III of Schedule VII of the Constitution; representation of the States in Parliament; Article 368 itself, need a majority of total membership and two-third of the majority of those present and voting, and also require ratification by not less than half of the state legislatures, before presenting it to the President for his assent.

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<sup>26</sup> *Id.*

The scope of amendments to the Constitution have been considered in *Sankari Prasad v. Union of India*,<sup>27</sup> *Sajjan Singh v. State of Rajasthan*<sup>28</sup> and *Golak Nath v. State of Punjab*.<sup>29</sup> In the first two decisions, the amendments to the Constitution affecting fundamental rights were upheld while in the third one, it was held by a majority that it is not permissible to amend the provisions relating to fundamental rights and adopted the doctrine of prospective overruling to save the amendments that had been made hitherto. However the basis upon which the conclusion was arrived at, and the reason given thereof was the subject matter of several academic discussions. Prof. Blackshield was severely critical of the approach adopted by the Court and indicated that there should have been a more fundamental approach to the consideration of the scope of amendments that can be made to the Constitution. In as much as the Court had held that an amendment to the Constitution is also a law falling within the scope of Article 13, and that Article 368 does not empower the Parliament to amend the Constitution for it only provides for a procedure, fresh amendments were made to these two provisions. These were made by specifically excluding a constitutional amendment within the scope of law under Article 13 and the marginal note of Article 368 was altered from 'procedure' to 'power of amendment'. These amendments along with the 24th and 25th Constitution amendments were challenged in the *Kesavananda Bharati* case. In that decision, the Supreme Court held:

- (a) Power to amend the Constitution is in Article 368;
- (b) It noticed the distinction between ordinary law and constitutional law and a constitutional amendment does not fall within the scope of Article 13;
- (c) Amendment covered by Article 368 will extend to all provisions of the Constitution but subject to the limitation of keeping those amendments within the basic features of the constitution; and
- (d) The expression 'amend' has restrictive connotation and does not extend to basic change, or in other words there are inherent or implied limitations. It was observed by several Judges who constituted the majority that supremacy of the courts, democracy, secular character, separation of powers, federal character and rule of law were certain aspects of the basic features of the Constitution.

In a Constitution which runs into 395 Articles with 12 Schedules and 3 Appendices, it is difficult to perceive that the Constitution makers would not have spelt out the scope of amendment but left the same to be implied in

<sup>27</sup> (1952) SCR 89.

<sup>28</sup> (1965) 1 SCR 933.

<sup>29</sup> AIR 1967 SC 1643.

the Constitution itself or be inferred by necessary implication. Furthermore, the fact that such an important power is inherent in the Constitution could also have been spelt out specifically. Therefore, several authors have criticized this line of reasoning. On the other hand a different approach is made to understand the basic feature or the basic structure of the Constitution. To understand the scope of the amendment as envisaged in Article 368, we must understand the architecture of the Constitution and thereafter attempt an interpretation on structural basis. There may be several methods of interpretation in support of the legitimacy of the interpretation placed by the Supreme Court. The best course would be to adopt the structural interpretation as a justification of the basic structure doctrine. Several authors like Professor Sathe, Robin Elliot and others are of the view that the structural interpretation features the Constitution in totality, accounting for its philosophy and spirit. The implications in the basic structure are provisional in character. Whatever implication arises thereto, the Constitutional document has to be interpreted in its totality so that the integrity of the document is maintained. Further the said implications allowed the Court to reconcile various provisions which apparently conflicted with each other in a principled fashion. Analyzing the structural interpretation of the Canadian Supreme Court, Robin Elliot advances structural argument as a form that proceeds by way of drawing implications from the structures of Government created by the Constitution; and the application of the principles generated by those implications to the particular constitutional issue at hand. The principles so generated are not simply aides to interpretation but are equivalent in terms of authority, to the text of the Constitution itself. Thus the preamble to the Constitution which sets the philosophy of the Constitution, and many of the rights which are fundamental in nature contained in Chapter III of the Constitution or any other provisions like those pertaining to independence of judiciary or provisions relating to democracy, could all be taken note of. If some of these principles are taken away from the Constitution, its very core would be compromised and it will be reduced to a cipher. In light of this, such an amendment to the Constitution cannot be provided for at all.

The decision in the Kesavananda Bharati case acquired legitimacy by specific evidence indicating the erosion of democratic values, such as the emergency and the 39<sup>th</sup> Amendment to the Constitution which sought to overrule the decision of a court and uphold the election of Mrs. Gandhi and certain consequential amendments. The decision in Indira Gandhi v. Raj Narain showed the futility of theories of parliamentary supremacy in the face of hard reality. Courts normally are not affected by the arguments *in terrorem* and hold that the possibility of abuse of power is not the test of its existence. This case however was illustrative of naked abuse of power, manifesting itself in the form of amendment to the Constitution solely to concentrate power in the hands of an individual by a plain majority, while the members of the opposition were in jail. The basic structure doctrine, characterised as anti-democratic, was used to prevent the murder of the democracy. The judgment was a unanimous one,

rendered by 5 judges, of whom, 4 had not subscribed to the basic structure theory in the *Kesavananda Bharati* case. Nevertheless, all of them relied upon the basic structure doctrine as the law laid down in the *Kesavananda Bharati* case. Additionally, they invariably relied on various grounds such as freedom, democracy, equality and rule of law being parts of the basic structure of the Constitution. Thereafter and in the post emergency phase, the basic structure doctrine has been consolidated and has stood the test of time for nearly 37 years. The views in the *Kesavananda Bharati* case were re-affirmed in the *Minerva Mills v. Union of India*<sup>30</sup> and also in *Waman Rao v. Union of India*,<sup>31</sup> *I.R. Coelho v. State of Tamil Nadu*<sup>32</sup> and several other cases dealt with by the Supreme Court. These cases did not necessarily require the application of the doctrine of basic structure though, and it was imprudent for the application of the same in respect of the examination of the validity of the executive orders or the validity of the statute not affecting the Constitution. They could have been merely examined on the touch stone of constitutional validity and not necessarily on a high principle such as the basic features of the Constitution referred to in the context of the amendment to the Constitution. Basic structure review is a distinct form of constitutional review and is independent of judicial review. The formulation and practice of basic structure determine mediators between two values – democracy and constitutionalism.

The basic feature is a great principle, and one of great significance, applicable for testing the validity of constitutional amendments, wherein principles are stated and the policy is set out by the appropriate legislature. Thus, if both the courts and the Parliament act with sufficient restraint it will not be difficult to work with the Constitution on the basis of the basic features theory.

The politics of defection is a bane to the parliamentary system. The voice of defection has been rampant in India for quite sometime especially at the state level. By defection, I mean floor crossing by a member from one political party to another. Defection causes government instability, is undemocratic and it negates the electoral verdict. A party which fails to get majority in the house through election may still be able to maneuver majority in the house and form a government by inducing defection from other parties. Thus the party which may have won the majority may yet fail to form the government because a few of its members defect from the party. There are two kinds of floor crossing:

- (a) Member may change his political party out of conviction because he may consciously disagree with the policies of the party to which he belongs. If he leaves the party with whose support he is elected,

<sup>30</sup> *Minerva Mills v. Union of India*, (1980) 3 SCC 625: AIR 1980 SC 1789.

<sup>31</sup> (1981) 2 SCC 362.

<sup>32</sup> (2007) 2 SCC 1: AIR 2007 SC 861.

he ought to resign his seat and seek fresh election. Such defections are rare.

- (b) The other class of defections takes place out of selfish motives as the defectors hope for appointment as ministers or get some official position which they do not hold.

In 1997, when Kalyan Singh formed a Government with the support of defectors from Congress and Bahujan Samaj Party, almost all defectors were appointed as ministers and the Cabinet comprised of 97 ministers. To contain this evil of political defection, the Constitution 52<sup>nd</sup> (Amendment) Act made modifications to Articles 101, 102, 190 and 191 and 10<sup>th</sup> Schedule. A person disqualified under 10<sup>th</sup> Schedule becomes disqualified to be a member of the House. The restriction on the number of members in the Cabinet extends to 15% in terms of Articles 75 (1A) and 164 (1A). The constitutionality of anti-defection law has been upheld by the Supreme Court in a 3:2 decision in *Kihoto Hollohan v. Zachillhu*.<sup>33</sup> At the same time, the Court ruled that the Speaker's order under the law disqualifying the members of the legislature on the ground of defection, is subject to judicial review. The majority was of the opinion that the main provisions of 10<sup>th</sup> Schedule are in place to provide a remedy for the evil of unprincipled and unethical political defection. However, paragraph 7 which excluded speaker's decision from judicial review, had not been ratified by half of the number of the state legislatures in accordance with Article 368 (2) of the Constitution and as such it was held to be invalid. The other portions of the constitutional amendment being independent, the 10<sup>th</sup> Schedule was held to be severable from paragraph 7 as they were complete, workable and not truncated as a result of the invalidation of paragraph 7. The Court held that the majority of the provisions relating to defection, disqualification on defection did not violate any rights of freedom guaranteed to the legislature under Articles 105 and 194 of the Constitution. So far as the minority was concerned however, it did not agree that Schedule 10 could stand in the absence of paragraph 7, which excluded judicial review and therefore, they did not agree with the majority. But they also expressed doubts as to whether the Speaker can play the role of a sole arbitrator in cases of defection, and whether it would be appropriate that an independent adjudicatory machinery should be set up for resolving the disputes relating to the competence of the members of the house. The majority took the view that the speaker, when he decides the question of disqualification of a member of the legislature under 10<sup>th</sup> Schedule, acts as a statutory authority in which capacity his decision is subject to judicial review by the courts. The provisions that had been made earlier in the 10<sup>th</sup> Schedule have been amended subsequently by doing away with a distinction between the split in the party and defection as such. However, speakers who have been elected by the majority of the House have not always acted independently nor have they taken

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<sup>33</sup> 1992 Supp (2) SCC 651; AIR 1993 SC 412.

timely action. Therefore, it is still reasonable to expect the Parliament to amend the Constitution to empower the Election Commission or some other authority to decide upon the questions of defection.

Another aspect which needs to be examined is that of justiciability of proclamation under Article 356. Till the decision in the Bommai case, attempts made to bring the matter of a proclamation under Article 356 before the courts for scrutiny had not succeeded. The 1989 Janata Dal ministry headed by S.R. Bommai was in office in Karnataka. A number of members defected from the party and there arose a question as to whether his ministry enjoyed majority support in the House. The Chief Minister proposed to the Government that an Assembly session could be called to test the strength of the ministry on the floor of the House, but the Governor did not explore the possibility of an alternative Government and reiterated to the President that Sri. Bommai had lost majority support in the House, and as no other party was in position to form the government, action can be taken for proclamation. Accordingly, the President issued the Proclamation in April 1989. Similarly, proclamations issued in respect of States of Meghalaya and Nagaland were also under challenge. Besides these, there were 3 more proclamations before the Supreme Court made in respect of the Governments in Madhya Pradesh, Himachal Pradesh and Rajasthan in 1992 in the wake of demolition of the disputed Babri Masjid structure in Ayodhya. The Government in these states belonged to Bhartiya Janata Party which by their inaction was responsible for the public unrest in the wake of demolition of the masjid. By the time the Bommai case came before the Supreme Court, Article 356 (5), which imposed a ban on judicial review of the issue of proclamation, had been repealed. The Supreme Court by majority decision declared the Karnataka, Meghalaya and Nagaland proclamations as unconstitutional but the proclamations in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh were held to be valid. The Bench of 9 judges rendered 7 opinions. Justice Ahmadi and Justice Ramaswamy adopted a passive attitude towards judicial review of proclamation under Article 356 while others somewhat adopted an activist stand. However, several propositions can be enunciated as being the consensus among the judges. The validity of the proclamations issued under Article 356 was held to be justiciable on various grounds, such as whether it was issued on the basis of the material at all or whether the material was relevant enough or based upon the *mala fide* exercise of power or absence of relevant grounds. The question whether the Chief Minister had lost his majority in the assembly has to be decided on the floor of the House and not by the Governor in his office. Furthermore, the Governor also had a duty to explore the possibility for forming an alternative ministry in the event the ministry loses support in the house.

The proclamations had to be approved within two months by both the Houses of Parliament, otherwise they would automatically lapse, which meant that the President ought not to take any irreversible action such as

dissolution of the houses till the proclamation is approved by the Parliament. But on the issue of proclamation such house can be kept under animated suspension for a period not exceeding six months. Once the proclamation is approved by the Parliament, the same lapses at the end of six months unless it is revoked earlier. Neither the dismissed state government nor the dissolved legislature is revived. If the Court invalidates the proclamation, even if approved by the Parliament, the action of the President becomes invalid. The state government which was dismissed will be revived and if state assembly is dissolved, it will be restored. The power under Article 74 (2) does not come in the way of calling upon the Government to disclose the material upon which the President had formulated the requisite satisfaction. Several other aspects have been dealt with and the Court laid emphasis on secularism, which is a part of the basic feature of the Constitution.<sup>34</sup> Therefore, if a government is not carried on in accordance with constitutional provisions, the Union can consider it as a breakdown of the constitutional machinery. Caution was struck that as federalism has been regarded as a basic value of the Constitution,<sup>35</sup> interference with an elected state assembly by the Central Government is really a negation of the federal concept, and wrong exercise of such power can damage the federal fabric and disturb the balance. Till the Bommai case was rendered, the power under Article 356 had been used on more than 90 occasions and in almost all cases opposition political parties were in power in the state. If a state government acts contrary to the secular concept, the Union government can lawfully rely on such reason that the government cannot be carried on in accordance with the Constitution. The state government may enjoy support in the assembly but it is subject to the observance of secularism and it can be dismissed under Article 356(1).

Subsequent to the Bommai case, it has become extremely difficult to invoke Article 356. On October 21, 1997, the Chief Minister of Uttar Pradesh could not obtain a vote of confidence amidst pandemonium in the House. Therefore, the Governor made a report recommending imposition of President's rule in the state and the Central Government recommended invocation of Article 356 but the President returned the recommendation for re-consideration by the Cabinet. Particularly when the Chief Minister had seemingly won the vote of confidence of the House, the Governor's view as to the breakdown of the constitutional machinery was doubtful. Subsequently in 1998, Central Government recommended to the President the invocation of Article 356 in the State of Bihar. The main allegation against the Government was the deterioration of the law and order situation in the State; but the state government enjoyed majority in the Assembly. The President was of the view that acts complained of should illustrate a breakdown of the constitutional machinery in the state to invoke Article 356; but, he made a distinction between bad governance and breakdown of constitutional machinery in terms of the decision in the

<sup>34</sup> See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461; See *Indira Gandhi v. Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299.

<sup>35</sup> See *S.R. Bommai v. Union of India*, (1994) 3 SCC 1: AIR 1994 SC 1918.



Bommai case.<sup>36</sup> These decisions advance the steps to strengthen the democracy in the country; had it not been for the imaginative interpretation given by the Supreme Court to the various provisions of the Constitution, such result could not have been achieved.

## VI. CONCLUSION

I have dealt with a topic on the performance of an institution of which I was a part, and its impact on Indian democracy of which I am a citizen. I have dealt with this topic in the evolution of the Supreme Court in different phases of the first decade, the second decade, during the period five years prior to the emergency, its role during emergency and thereafter. I have summarised these periods with reference to the broad aspects dealt with by the Supreme Court, and the impact of several decisions on democracy. In particular academicians and other legal writers are strongly of the view that judicial activism and judicial review of the amendments to Constitution by relying on basic structure theory, and interference with political decisions such as the imposition of President's rule and assumption of powers in the matter of appointment of Judges, are all anti-democratic and do not promote democracy.

The Supreme Court plays a pivotal role in the Indian political economy, in a society which is fractured and polarized on communal lines, where ideology has disappeared. Despite occasional failures and not measuring up to the expectation of various sections, there exists a national consensus on the legitimacy of the Supreme Court. Maybe it is despised by the environmental activists as against developmental activists or by the Hindu militants for its secularist stand; by educationists for the pro-privatisation stand on education; by secularists for its soft *Hindutva* stand; and by the leftists for its decision not to intervene in the Government's decisions to disinvest from the Public Sector Units. There are severe institutional limitations but all sections of society have approached it for adjudication of their social, political and religious disputes. Judges also have shown severe limitations while dealing with complex social issues. At times they have been legalistic and populist in approach. The Court has been increasingly involved in political issues as to whether a person could continue to be a Minister after exhausting 6 months since his election to the legislature, or whether the Election Commission was bound to hold elections to a legislature within a period of six months of its dissolution. There are other issues, such as, whether the Court over used its powers of contempt of court; the issue of parliamentary supremacy and limits of judicial activism. I have demonstrated various aspects by reference to some of the decisions of the Court which have become controversial or have contributed to the strengthening of the rule of law and democracy. I have also referred to decisions in which the Court has failed to measure up to the people's expectations. There has been vacillation

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<sup>36</sup> *See Id.*

between hope and disappointment, but ultimately hope has survived; the Court is indeed the forum for legitimising the establishment as well as the dissent. There is a general feeling that whatever the failures and disappointments, the Court has inspired an anti-establishment force to seek its intervention in defence of democracy and the rule of law, and thus the Court remains the main bulwark of Indian democracy because other organs of the state have not shown any promise of rejuvenation.

In the latter half of the last decade new significant phenomena emerged which have a momentous dimension and disturbing impact by exposures of sordid events in media, both print and electronic. The movement has been for the right to information, the call for an open government, the demand for accountability of public functionaries and transparency in their activities. The temptation for the sensational media aggravated the situation and brought the issue of corruption to intense focus. In the past, the law provided the source of authority for democracy. Now the law seems to be replaced by public opinion as a source of authority and the media served the purpose.

The communitarian and caste-based conflicts, the street crimes, the corruption, the pollution, the poverty and the social aberration have intensified uneasiness amongst Indians. At this juncture people have started to question society's civility. The deeper cause of alarm was the deterioration of civic values; a loss of confidence in future and a sense of failure to control the events, with a growing feeling that the quality of life was declining. People in power did not respond to the same, but the Supreme Court did. Instances of corruption arose in the background of economic, political liberalization. The emergence of regional elites, market oriented model of development, altered value system with growing tax havens and off shore financial centres aggravated the temptation to be corrupt. The sugar scandal, security scandal, hawala transactions, veterinary and animal scandal, JMM bribery case, urea scandal, tele-communication department scandals, housing scandal, petrol pump and LP scandal, uniform and medicine purchase scandal, Pathak's bribe case, Indian Bank, spectrum scandal, CWG scandal, procurement for armed forces scandal, are illustrative of corruption in all facets of public life. The modality that the Court adopted in corruption cases is that at first, notices will be issued to the person in authority to show cause; if he failed or played truant the Court cracked the whip and threatened with contempt power. At the second stage when the delinquent persons surrendered, the Court used the CBI after releasing it from Government control and making it accountable to itself. The coercive process continued until charge-sheets were filed by the CBI and thereafter, regular trial in courts commenced. Petitioners in PIL cases often have adequate moral indignation but incomplete information. The Court often engages *amicus curiae* to assist the petitioners and to conduct the case. Often it took upon itself the responsibility to elicit facts to ensure that the delinquents land in regular Court for prosecution. The response of the Parliament and government was not

too enthusiastic. The Supreme Court having entered the sixth decade and the world entering the third millennium, India will commence a new beginning. It will privatize by disinvestments of its equity in public sectors undertakings which were once at commanding heights of the Indian economy. Urban India will henceforth be dominated by a new generation that is in the throes of a consumerist capitalist culture. This fast paced lifestyle will result in the assertion of the need for quick beneficial results. Where, when, how fast, to what extent and in what degree the judicial process will expand, depends upon the existing limitations. This new emerging socio economic scenario will be the context in which the Supreme Court will operate in future.

The Indian experience, with representative democracy during the last six decades, has recorded crucial shifts in public policies owing to electoral verdicts, on going emphasis on social reform laws, strengthening the process of free and fair elections and extension of democracy to *Panchayati Raj* institutions, retention of basic features of democracy except during emergency between 1975-1977, which in a vast nation ridden by serious problems, has helped the course of planned social change. We have witnessed judicial insistence on free and fair election, corrupt free franchise, transparency through compulsory declaration of candidates of their assets and antecedents supplemented by the Election Commission, which has grown into a strong institution. Thus democracy is firmly rooted in India.

