SUPREME COURT AND DEMOCRACY

Honourable Justice S. Rajendra Babu
Former Chief Justice,
Supreme Court Of India

I have known Mr. Chengappa for over three decades as a Lawyer, as a Lion being a member of the Lion's Club and as a Social Worker. He was a good Lawyer, a good member of the Lion's Club, he was live wire in social activities, a good friend and above all a good human being. I consider it a privilege and honour to speak in his memory under auspices of Lahari Advocates Forum. I have known Mr. Chengappa's family and his daughter Anu is an upcoming Lawyer. It is a great tragedy that his life was cut short by an accident too terrible for any family to bear with. I pay homage to him and wish the family to sustain the loss. I am thankful to the Lahari Advocates Forum for giving this opportunity to share some of my thoughts.

The Supreme Court was established in Delhi on 1950. It was a successor to Federal Court and the substitute of Privy Council. The Supreme Court owes its existence to the Constitution which in substance is an adoption of the Government of India Act 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 Courts and members of the Bar, though a wider choice is available. Supreme Court is neither representative nor reflective of the entire society and it is not meant to be so. But its pronouncements are by Constitution the law of the land. Its jurisdiction is plenary, original, appellate and advisory. 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 position is clear in the Constitution by reason of Articles 141 and 142. In its judicial activities it is accountable to none as it is ultimate and final. 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 not 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 of the Court over all Governments, 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 by 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. The court has always acted 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. The dominating ideas amongst the people govern the activities of the Court during any particular period. The values that the Court seek to uphold shifts and turns from period to period due to pull and push of the 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 depend upon the philosophies of individual judges who at any point of time constitute the Court. After all a judges personality is the funnel through which the value norms enter judgement. Out of such a welter during different periods 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. Supreme Court is after all a political institution. The executive is its real rival. If the Court found a liberal and enlightened executive irremovably occupied the Center, it tried to share power with the executive. If the executive was aggressive and bellicose, the Court stepped aside. If the willing executive moved away from the Center, 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 opening decade in the 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, Mukherjea 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 future activities of the Court. The Court

moved forward and backward and ultimately drew a line. The Court blended the orthodox judicial function with policy making. It tried to protect the rights to property, particularly of the rural land owning class from the clutches of legislation.

During the second decade from 1961-1970, finding 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, went into policy making on a grand scale. It curbed the power of parliament, struck down major economic decisions and over-ruled public policies of the Government. It acquired a judicial sovereignty. It appeared as though in India there existed Government by Judiciary. In this decade it leaned in favour of urban, commercial middle class protecting their economic and political interest.

During the succeeding period from 1971-1975 when Mrs. Gandhi's Government supported by public opinion reiterated against the Court usurpation of political and economic power by Constitutional amendments, the Court fought with its back to the wall under the collective leadership of Chief Justice Sikri and Justice Hegde and Shelat. The Court in the long run could not stand united and firm. The Court was divided, the people were baffled and judiciary was injured.

Then came the Emergency, from 1975-1977 with the executive assuming aggressive postures when under Chief Justices Ray and Beg the Court gave way and abdicated its power of judicial review though it delivered a magnificent judgment in Mrs. Gandhi's Election Case. During those few tumultuous years, the Court occupied zero existential space in the Indian society.

Thereafter during the tenure of the Janata Government, 1977-1980 it bounced in with a 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 political atmosphere was relaxed, the new executive was liberal in finding

the atmosphere, and the Court tried to retrieve lost judicial territory. It extended its jurisdiction and acquired immense power of administration. The Court became 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.

Mrs. Gandhi returned to power in 1980. 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 on 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. It provided a spring broad for PIL. Within the bounds of economy the Court could afford marginal egalitarianism and a small dose of socialism. In the hands of five judges Justices Krishna Iyer, Bhagwthi, Desai, Chinnappa Reddy and Thakkar who had constituted a fraternity, new judicial activities were pursued with missionary zeal and crusading vigour. In applying the new jurisprudence they had scant regard for the existing procedure and precedents. They became atavistic and dynamic. Some of the other brother judges did not share their views. The open commitments of the judges to one or the other social philosophy caused anxiety amongst the litigants. This known judicial philosophy eroded the image of collectiveness and impartiality of the judiciary at the apex.

Then came 1985, a year that saw great significance. With a new Government at the Center 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 judicial power of the Court, to enlarge its constituency, made the Court a meaningful and relevant institution for the benefit of the masses. Now he was confronted with a still 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 behaved

like a partner to the Government lending co-operation in wider fields, chastising whenever it should and protect wherever possible. It openly and categorically set its goal implementing social justice which is 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 1987 to the end of 2000 India witnessed 20 Chief Justices, 8 Prime Ministers, fragmented political parties, unholy alliances amongst politicians and bureaucrats and criminals. Massive public issues relating to corruption and pollution in gigantic proportions appeared 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 policy of liberalization, privatization, and globalization. The future prospects were looked down 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. There were number of scams, demolition of the Masjid, large scale cast violence, highly explosive public issues appeared before the Court as legal questions.

The first half of this period did not have any particular doctrine or any specific cause or any particular direction. The Court functioned collectively and effectively responding to all the challenges. The second part of the last decade witnessed a new significant phenomenon momentous in its dimensions – the explosive role of the media. It had the 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 Indian psyche. The courage to take all, the boldness put on social events, the devoted pursuit of greatness, crowned the Court with glittering glory during this eventful period.

The legislature, the executive and the judiciary are the three co-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 Schedule III to the Constitution. They swear to bear true faith and allegiance to the Constitution. All the three wings of the State have to function in complete harmony. A

decision of the Court either disapproves a decision of the legislature or of the executive. In either case the Court either disapproves or approves a decision of the legislature or of the eExecutive. 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 has to examine the rationality of the statute. Similarly when the Court strikes down an executive action or order, it is not in a spirit of confrontation or to assert its superiority but in discharge of its Constitutional obligation and acts as a judicial watch dog. In interpreting the law the Court is required to keep the particular situation in view and so as to provide a solution to the problem to the extent possible. This is the legitimate exercise of the judiciary in discharge of the obligation under the Constitution. The gaps in the existing law which are filled up by updating the law, result in the evolution of juristic principle and in due course of time get incorporated in the law of the land thereby promoting its growth. 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 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 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 thereby every action of the executive can be tested as 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 anti-theses of arbitrariness.

The expansive meaning given to Article 21 in respect of the expression life an liberty has covered wide variety of problems in society. The Court has interpreted the term ‘Right to Life’ as meaning not a mere animal existence but includes the right live with human dignity and all that goes along with it, namely the bare necessaries 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. 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. At one stage it includes even the right to livelihood. Questions relating to Euthanasia were raised before the Court. It has considered cases for relief against effects of radiation on employees, leakage of toxic oleum gas from a chemical plant, appalling conditions in a home for destitute women, remand homes and observation homes for children, right of a prisoner, relief against pollution and protection of environment, and relief against telephone tapping. 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 released and rehabilitated in terms of Articles 21 read with 39, 41 and 42. Women have right to work with dignity and without sexual harassment. The Court following international convention formulated several principles to prevent this problem. It held that for residents of hilly areas, access to road is life itself.

The concept of liberty is of widest amplitude and it covers a wide variety of rights which goes to constitute the personal liberty of man and some of them have been raised to the status of distinct Fundament Rights and given additional protection under Article 19. It 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 right, just and fair and not arbitrary, fanciful and oppressive cause. In a batch of cases, the Court held that fair procedure contemplated under Article 21 includes right to speedy trial. In the matter of education it was held that the content of the right must be understood in the light of Articles 41 and 45 thereby (a) every child and citizen of the country has a right to free education until he completes 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, now Constitution has been amended to include Article 21-A confining the right to compulsory free education to children above 6 years and below 14 years subject to law to be made but 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. Thus this right is the right to be left alone.

This aspect was examined in the context of surveillance and maintenance of history sheet. Unique ID Number may affect privacy and human dignity issues. Possibly if a 'password' on online transaction is stolen, the same may be replaced but if identity of the man himself is lost or replaced the question is how to redeem the situation. In the case of a HIV positive patient and the duty of the doctor to disclose his illness to his future bride, the Court held 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. In appropriate cases the Court granted damages or compensation when there was violation of Fundamental Right. Questions relating to environment and public health have also been considered under this Article. Thus in making use of Article 14 and 21 the Courts have acted on a wide canvass.

Judicial activism arises when the executive fails to perform it duty as envisaged under the Constitution or the Law. The duty of the Court is to give an alarm to the sleeping executive or blow the whistle when it plays foul. One of the most important decisions our the Court in recent times is one relating to upholding the direction issued by Election Commission while filling 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. Though the Court had held on earlier occasions that the right to vote, to contest in election, 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 to the legislative assembly of the States on the basis of adult suffrage. Thereby the Court recognized the Constitutional Right to vote to every adult in the country, of course, subject to the law made by the Parliament. As long as an adult satisfied the provisions relating to the Representation of Peoples Act as regards qualifications and disqualifications of a voter he has a right to vote, thus attaining the Constitutional right to vote. Such a right when exercised becomes a kind of expression made in favour of a candidate or not preferring a candidate which is in fact protected under Article 19(1)(a) of the Constitution which guarantees the Fundamental Right to Freedom of Speech. The concomitant right of expression includes the right to freedom of expression thereby needing the necessary information regarding the candidate contesting an election as to his criminal past. If such information is not available the voter cannot appropriately exercise his right. The support given to the directions of the Election Commission was thus juristically explained.

The Court has exercised many powers in relation to environmental protection. The Court developed the concept of healthy environment as part of Right to Life under Article 21 of the Constitution and reading into it the Directive Principle of State Policy under the Constitution as provided under Article 48-A of the Constitution. Indeed the Court went ahead with the policy relating to providing clean environment in the city of New Delhi by imposing upon the Government to make provisions for running vehicles with CNG within the city apart from the environmental friendly motor vehicles using petrol. Though the Government of Delhi resisted the course of action taken by the Court initially it yielded to the directions of the Court ultimately. 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 proudly took credit for the same.

Articles 4, 169 and 229 may be amended by a simple majority by introducing 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 State and the 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 2/3rd of the majority of those present and voting and also get the same ratified by not less than ½ of the state legislatures before presenting the same to the President for his assent.

Scope of amendments to the Constitution have been considered in *Shankari Prasad vs. Union of India 1952 SCR 89* and *Sajjan Singh vs. State of Rajasthan 1965 1 SCR 933* and *Golaknath vs. State of Punjab 1967 SC 1643*. In the first two decisions amendments to the Constitution affecting the Fundamental Rights were upheld while in the last of the said decisions, it was held by a majority that it is not permissible to amend the provisions relating to the 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 arrived at and the reason thereof was the subject matter of several academic discussions and Prof. Black Shield was severely critical of the approach made 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. Firstly, by specifically excluding a Constitutional amendment within the scope of law falling to be considered under Article 13 and the marginal heading of Article 368 was altered from 'procedure' to 'power' of amendment. These amendments along with the 24th and 25th Constitution amendments were challenged in *Keshavananda Bharathi vs. State of Kerala 1973 SC 1461*. In that decision, the Supreme Court held (a) power to amend the Constitutional is in Article 368, (b) it noticed that 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 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 noticed that 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 to 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 the Constitution itself or to be inferred by necessary implication. Further even 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 legitimacy of the interpretation placed by the Supreme Court. The best course would be to adopt the structural interpretation as 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 is maintained. Further the said implications allowed the Court to reconcile the 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 made to the particular Constitutional issue at hand. The principles so generated are not simply aides to interpretation but is equivalent to the text of the Constitution itself. Thereby the preamble to the Constitution which sets the philosophy of the Constitution and many of the rights which have got a fundamental nature or a character 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, the core of the Constitution will be lost and the Constitution will be reduced to a cipher. That kind of amendment to the Constitution cannot be provided at all.

The decision in *Keshavananada Bharathi,* acquired legitimacy by specific evidence eroding democratic values such as emergency and the 39th amendment to the Constitution which wanted to over-rule the decision of a court and uphold the election of Mrs. Gandhi and certain consequential amendments. The decision in *Indira Gandhi vs Raj Narain, AIR 1975 SC2299* 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; here was a case of naked abuse of power manifesting itself in the form of amendment to the Constitution solely to keep one individual in vast power 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. That judgement was a unanimous judgement rendered by 5 judges of whom, 4 had not subscribed to the basic structure theory in *Keshavananda Bharathi*. Nevertheless, all of them relied upon the basic structure doctrine as law laid down in the *Keshavananda Bharathi case* and 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 view in *Keshavananda Bharathi* was re-affirmed in *Minerva Mills Case, AIR 1980 SC 1789* and also and in *Waman Rao vs. Union of*

India 1981,2SCC 262 and in *Coelho vs. State of Tamil Nadu* and in several other cases dealt with by the Supreme Court not necessarily requiring the application of doctrine of Basic Structure though, it would have been imprudent for application of the same in respect of examination of the validity of the executive order or the validity of the statute not affecting the Constitution. They could be dealt with by merely examining on the touch stone of the Constitutional validity and not necessarily on a high principle such as the basic features of the Constitution referred to in the context to the amendment of 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, a very high principle applicable to the validity of the Constitutional amendment 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 restraints it will not be difficult to work with the Constitution on the basis of 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 some time 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 manoeuvre majority in the House and form 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 he ought to resign his seat and seek fresh election. Such Member defections are rare.

b) The other class of defections takes place out of selfish motives as the defectors hope to be appointed as minsters or get some official position which they do not get.

In 1997, Kalyan Singh formed a Government with the support of defectors from Congress and BJP, almost all defectors were appointed as Ministers and the size of the Cabinet was of 97 Ministers. To contain this evil of this political defection, Constitution 52nd Amendment Act made modifications to Articles 101, 102, 190 and 191 and the 10th Schedule. A person disqualified under 10th Schedule becomes disqualified to be the member of the House. There are restrictions on the number of members to be in the Cabinet being 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 *Kihota Hollohon vs Zachilhu*. 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 view is that main provisions of 10th Schedule are indeed 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 ½ of the number of the state legislature 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 of and could stand apart from the other provisions the 10th Schedule was held to be severable from paragraph 7 as they were complete, workable and not truncated as a result of 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. But so far as the minority is concerned it did not agree that Schedule 10 could stand in the absence of paragraph 7 which excluded the jurisdiction of the judicial review and therefore, they could not agree with the majority. But they expressed also a doubt as to whether the Speaker can play the role of sole arbitrator in defection cases and it would be appropriate that an independent adjudicator machinery should be set up for resolving the disputes relating to the competence of the members of the House. The majority took a view that the speaker when he decides the question of disqualification of a member of the legislature under 10th 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 10th Schedule have been amended subsequently by doing away with a distinction between the split in the party and defection as such. However, the Speakers who have been elected by the majority of the house have not always acted independently nor have they taken timely action. Therefore, it is still reasonable to expect the Union legislature to amend the Constitution to make the Election Commission or some other authority decide the question of defection.

Another aspect which needs to be examined is as to the justiciability of Proclamation under Article 356. Till the decision in *S.R. Bommai v/s Union of India*, the 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 arouse a question as to whether his ministry enjoyed majority support in the House. The Chief Minister proposed to the Government that an Assembly session can 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 but 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, Proclamation 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 disputed Babri Masjid structure in Ayodhya. The Government in these states belonged to BJP which by their inaction were 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) putting a ban on judicial review on the issue of Proclamation had been repealed. The Supreme Court by majority decision declared that 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 judicial proclamation under Article 356 while others adopted somewhat activist stands. However, several propositions can be enunciated as being the consensus among the judges. The validity of the Proclamations issued under Article 356 is held to be justiciable on the grounds such as whether it was issued on the basis of the material at all or whether the material was relevant enough or the *malafide* 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 and he also had a duty to explore the possibility for forming the alternative ministry in the event the ministry loses support in the House.

The proclamation had to be approved within 2 months by both the Houses of Parliament otherwise it automatically lapses which means 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 the Proclamation such House can be kept under suspended animation for a period not more than six months. Once the Proclamation is approved by the Parliament, the same lapses at the end of 6 months or it is revoked earlier. Neither dismissed State Government nor will dissolved legislature revive. 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 revive 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 an emphasis on Secularism which is part of the basic feature of the Constitution. Therefore, if a Government is not carried on in accordance with Constitutional provisions, Union government can hold such a circumstance as the breakdown of the Constitutional machinery. Caution was struck that as federalism has been regarded as a basic value of the Constitution, 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 *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 secular concept Union Government can lawfully rely on such reason that the government cannot be carried on in accordance with Constitution. The State Government may enjoy support in the Assembly but it is subject to observance of Secularism and it can be dismissed under Article 356(1).

Subsequent to *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, Governor made a report recommending imposition of President's Rule in the State and the Central Government recommended for invocation or 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 breakdown of the Constitutional machinery was of doubtful validity. Again in 1998 Central Government recommended to the President for invocation of Article 356 in the state of Bihar. The main

allegation against the Government was worsening of law and order situation in the State; but, the state government enjoyed majority in Assembly. The President was of the view that acts complained of should be break down of the Constitutional machinery in the state to use Article 356, but, he made a distinction between bad governance and breakdown of Constitutional machinery in terms of the decision in *Bommai case*. These decisions advance the steps to strengthen the democracy in the country, Except for the imaginative interpretation given to the various provisions of the Constitution such result could not be achieved by the Supreme Court.

I have chosen 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 will deal with this topic in the evolution of the Supreme Court in different phases of the first decade, the second decade, during the period of five years prior to the emergency, its role during emergency and thereafter. I will summarise these various periods with reference to broad aspects dealt with by the Supreme Court and the impact of several decisions on democracy. In particular the criticism of academicians and other legal writers 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 the 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 the various sections Supreme Court has become an institution on whose legitimacy there seems to be a national consensus. May be it is despised by the environmental activists as against developmental activists or by the Hindu militants for is secularist stand, by educationists for 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 decisions on disinvestments from the Public Sector Units. There are severe institutional limitations but all sections 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 required more and more to engage itself in political issues as to whether a person could continue to be a Minister after exhausting 6 months after being elected to the legislature or whether the Election Commission was bound to hold elections to

a legislature within a period of 6 months of its dissolution. There are issues of whether the Court over used its powers of contempt of court; of parliamentary supremacy and limits of judicial activism. I have demonstrated the various aspects by reference to some of the decisions of the Court which have become controversial or have contributed to the strengthening of Rule of law and democracy. I have also referred to decisions in which Court has failed to measure up to the people's expectations. There has been vacillation between hope and disappointment but ultimately hope has survived; 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 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 second part of the last decade new significant phenomenon emerged which has a momentous dimension and disturbing in impact by exposures of sordid events in media both print and electronic. The movement has been for right to information, the call for open governance, the demand for accountability of public functionaries and for transparency in their activities. Temptation for the sensational media, aggravated the situation and brought the issue of corruption to 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 religious and caste conflicts, the street crimes, the corruption, the pollution, the poverty, the social aberration has intensified uneasiness amongst Indians. The people started asking as to how civilized we are. A 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 growing feeling that 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 the 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, telecommunication department scandals, housing scandal, petrol pump and LP scandal, uniform and medicine purchase scandal, Pathak's bribe case, Indian Bank, noticed corruption

in all facets of public life. The modality that the Court adopted in corruption cases is that first notices would 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, Court used the CBI releasing it from Government control and making it accountable to itself. The coercive process continued until charge sheets were filed by the CBI thereafter regular trial in courts commenced. Petitioners in PIL cases often have adequate moral indignation but incomplete information. Court often engaged *Amicus Curie* to assist the petitioners and to conduct the case. Often it took upon itself the responsibility of elicit facts to see that the delinquents land in regular court for prosecution. The response of the Parliament and government was not too cheery. The Supreme Court having entered the 60th year and the world entering the third millennium India will commence a new beginning it will privatize by disinvestments of it equity in public sectors undertakings which were once at commanding height of Indian economy. Urban India will henceforth be dominated by new generation obsessed with computer, e-mail, internet and living in pizza culture. A new life style demanding quick beneficial results will assert. Where, when, how fast, and to what extent and in what degree process will expand depends upon limits of the possible and ambiguity. This new emerging socio economic scenario will be the context of the future Supreme Court to operate.

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