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## JUDICIAL ACTIVISM OR CONSTITUTIONAL OBLIGATION: STUDY OF THE INDIAN SUPREME COURT'S GUIDANCE FOR STANDARDS IN PUBLIC LIFE

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Question: *Are you taking steps to correct [corruption]?*

Answer: *We are trying. I would not claim that we have succeeded.*

*But one thing that is helping also is the independence of  
judiciary.<sup>1</sup>*

### Introduction

Six days after the United Nations General Assembly Resolution on *Action against Corruption*,<sup>2</sup> but with no knowledge of the Resolution, the Supreme Court of India pronounced a landmark judgment against corrupt Indian politicians.<sup>3</sup> These included the former Prime Minister of India, Mr. P.V. Narasimha Rao, some of his erstwhile cabinet colleagues, leaders of opposition parties and high-level bureaucrats. The Supreme Court took the decisive action by monitoring this case for nearly four years (popularly known as the *Hawala*<sup>4</sup> or *Jain diaries*)<sup>5</sup> on holding 'continuing *mandamus*', directed the Central Bureau of

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<sup>1</sup>Interview: Inder K. Gujral, Indian Prime Minister, "Democracy Is the Key" (1997) *Far Eastern Economic Review*, August 27, at page 42.

<sup>2</sup>United Nations General Assembly Resolution 51/59, "Action against Corruption", December 12, 1996 reported in (1997) 36 *International Legal Material* 1039. See UNDP: New York "Corruption and Good Governance", Discussion Paper 3 (1997).

<sup>3</sup>*Vineet Narain and others v Union of India and another* (1998) 1 Supreme Court Cases 226.

<sup>4</sup>Hawala, a channel of transferring money illegally to India on trust, has been in vogue for decades. For details, see Kapoor, S., *Bad Money, Bad Politics: The Untold Hawala Story* (1996) New Delhi: Har-Anand; Bhargava, G.S., *Hawala Scam: Politics of Corruption* (1996) New Delhi: Arnold; see also Prakash, R., *Constitution, Fundamental Rights and Judicial Activism in India* (1997) Jaipur: Mangal Deep, at pages 273-293.

<sup>5</sup>Discussed below in brief history of the case.

Investigation<sup>6</sup> (hereafter CBI) to report its progress to the court without reference to any other authority, until the filing of charge sheets before the competent courts.<sup>7</sup> In his leading judgement, Justice Verma,<sup>8</sup> Chief Justice of India (as he then was), pointed out that the international financial institutions such as the World Bank and the International Monetary Fund were worried about corruption in India.<sup>9</sup> He advocated the "Seven Principles of Public Life" recommended in the Lord Nolan Committee report of "Standards in Public Life"<sup>10</sup> as a guide for Indians in public life. The following discussion will examine the role of the Supreme Court of India in relation to Judicial Activism,<sup>11</sup> that is, making the legislative and executive branches function properly in accordance with the rule of law or Constitutional Obligation,<sup>12</sup> that is, the Constitution aims to preserve the independence of the judiciary, and the powers of the judiciary to subserve the constitutional purpose to control corruption and to rescue the standards in public life.

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<sup>6</sup>The Central Bureau of Investigation of India was established on 1 April 1963, to investigate cases not only of bribery and corruption but also those relating to the breach of central fiscal laws, frauds in government departments and public sector undertakings and other serious crimes. Narasimhan, C.V., "Prevention of Corruption: Towards Effective Enforcement", chapter 10 in Guhan, S. & Paul, S., Eds., *Corruption in India: Agenda for Action* (1997) New Delhi: Vision.

<sup>7</sup>"Court Removes Rao as Head of Political Bribe Investigation", *Times*, 12 March 1996.

<sup>8</sup>"Quiet Man Leading India's Velvet Revolution" (1997) 11 *Lawyer* 2.

<sup>9</sup>*Op cit.* 3, paragraph 56, at page 268. See also Myrdal, G., "Corruption as a Hindrance to Modernization in South Asia", chapter 4 (22) in Heidenheimer, A.J., ed., *Political Corruption: Readings in Comparative Analysis* (1970) London: Holt, at pages 229-239.

<sup>10</sup>HMSO: London, *Standards in Public Life*, First Report of the Committee on Standards in Public Life, Volume 1 (1995).

<sup>11</sup>Justice Anand, A.S., "Protection of Human Rights - Judicial Obligation or Judicial Activism" (1997) 7 *Supreme Court Cases* (Journal Section), at page 10.

<sup>12</sup>Justice Verma, J.S., "The Constitutional Obligation of the Judiciary" (1997) 7 *Supreme Court Cases* (Journal Section), at page 1.

### Brief History of the Case<sup>13</sup>

During March-April 1991, the Delhi Police arrested Ashafak Ahmed Lone, the Deputy Intelligence Chief of Hezbul Mujahidin (a Kashmiri militant group demanding independence from India) and, on searching his premises found cash to the value of Rs. 1.6m<sup>14</sup> and bank drafts favouring various Kashmiri militants. The case was referred to the CBI for further investigation. The CBI discovered that a patron of the Islamic Jamaiyat-e-Tulba, Dr. Muhammad Ayub Thakur of London, via an Indian student, Shahabuddin Ghauri (a volunteer of the South Asian Human Rights Documentation Centre) had illegally transferred money into India. Subsequently, monies were distributed to various Kashmiri militant organisations. The CBI conducted simultaneous raids in different parts of Delhi. At the house of J.K. Jain, an employee of S.K. Jain (a major hawala agent), they found Rs. 5.8m, US\$ 20,000, two diaries and two notebooks. In the diaries were code names referring to 115 top politicians and bureaucrats who had been given money at various times. Due to pressure from the political and bureaucratic circles, the CBI manipulated the charge sheet to conceal the fact that raids occurred at Jain's premises and the statement recorded by them.<sup>15</sup>

When the militants and others, including some hawala agents, were tried under the Terrorists and Disruptive Act of 1987, the real culprits (Jains) were left out at the behest of politicians. In the meantime, Vineet Narain, a television film producer and journalist, gathered

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<sup>13</sup>*Op cit* 3, paragraph 54, at page 267. For details, see *op cit* 4, Kapoor, S., *Bad Money, Bad Politics*, at pages 36-37.

<sup>14</sup>£1 = approximately Rs. 70.

<sup>15</sup>*Op cit* 4, Kapoor, S., *Bad Money, Bad Politics*, at page 49: "The charge sheet was a classic case of a cover up ... The charge sheet was also silent on the identity of the persons under whose instructions the money was distributed. The statement was ignored by the CBI, to ensure that Jain's name did not figure anywhere in the probe." According to Bhargava, "Though there was apparently enough evidence to book the Jains in the hawala case, nothing happened. The Jains were not interrogated for almost two years. It was believed to be due to their influence with the government and the industry." *Op cit* 4, Bhargava, G.S., *Hawala Scam: Politics of Corruption*, at page 24.

evidence, including statements from the former Deputy Prime Minister and an opposition party leader, which showed that they had received this clandestine money for election purposes. He also obtained a photocopy of the Jain diaries.<sup>16</sup> On the basis of this evidence, he approached the Supreme Court under Article 32<sup>17</sup> of the Constitution of India, through public interest litigation. The relief sought in the writ petition was:

*...as to investigations in the matter of the Jain diaries, and to the manner in which the investigation of offences of a similar nature that may occur hereafter should be conducted.*<sup>18</sup>

#### **Role of the Supreme Court**

Initially the case came before a Division Bench consisting of Justice M.N. Venkatachaliah, Chief Justice of India (then) and Justice S.P. Bharucha (party to the present judgment). The CBI was requested to look into the facts of the case, but the Division Bench tried to minimise the political impact of the case by handing the matter over to a Special Prosecutor or to a retired judge to investigate.<sup>19</sup> However, with Justice Venkatachaliah's retirement, the case eventually came before a Full

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<sup>16</sup>*Op cit* 4, Kapoor, S., *Bad Money, Bad Politics*, at 106 18.

<sup>17</sup>Rights to Constitutional Remedies, *Remedies for enforcement of rights conferred by this Part -*

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs; including the writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*; whichever may be appropriate, for the enforcement of any of the rights conferred by this part

(3) ...

(4) ...

<sup>18</sup>*Op cit* 3, paragraph 5, at page 236.

<sup>19</sup>*Op cit* 4, Kapoor, S., *Bad Money, Bad Politics*, at page 67: "Every time the matter came up for hearing in the SC, it generated considerable enthusiasm, but the court could not break the impasse..."

Bench presided over by Justice Verma. The Full Bench was outraged by the manner of the CBI's investigation.<sup>20</sup> On holding 'continuing mandamus', pressure was put on the CBI by the Full Bench, so that the investigation was accelerated on a weekly hearing. Nearly 34 charge sheets were filed against 54 persons, including Mr. Rao, the former Prime Minister of India and some of his erstwhile cabinet colleagues, and placed before the competent courts.<sup>21</sup> Prior to the concluding judgement, the Full Bench delivered nearly ten interim and final orders directly or indirectly connected with the present case.<sup>22</sup> On one occasion, the Full Bench directed the CBI to furnish its progress with the investigation directly to the court without reporting to any authority<sup>23</sup> and warned the politicians and the CBI by quoting Lord Denning's statement, namely:

*I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State...No Minister of the Crown can tell him that he must; or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one...The responsibility for law enforcement lies on him.*<sup>24</sup>

Justice Verma presented a number of directions to the Government of India. The court gave 16 directions<sup>25</sup> to the Government of India in

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<sup>20</sup>*Ibid.* At page 67, the Full Bench observed: *If we are meant only for punishing people for petty offences and letting people who spend lakhs on birthdays scot-free, we had better close down the courts.*

<sup>21</sup>*Op cit* 3, paragraph 11, at page 240.

<sup>22</sup>*Vineet Narain v Union of India* (1996) 2 Scale (SP) 42; *Vineet Narain v Union of India* (1996) 2 Supreme Court Cases 199; *Vineet Narain v Union of India* (1996) 2 Scale (SP) 84; *Anukul Chandra Pradhan v Union of India* (1996) 6 Supreme Court Cases 354; *Vineet Narain v Union of India* (1997) 4 Supreme Court Cases, at page 778; *Vineet Narain v Union of India* (1997) 5 Scale 254.

<sup>23</sup>*Op cit* 3, paragraph 29, at page 256. For details, see *The Times*, 12 March 1996.

<sup>24</sup>*R v Commissioner of Police* (1968) 1 All ER 763, at page 769.

<sup>25</sup>*Op cit* 3, paragraph 58, at pages 269-270.

respect of the CBI and Central Vigilance Commission (hereafter CVC).<sup>26</sup> It directed that statutory status should be given to the CVC<sup>27</sup> and that the appointment of the CVC should be made after consultation with the Prime Minister, Home Minister and the Opposition leader in Parliament.<sup>28</sup>

### Judicial Activism or Constitutional Obligation

Anglo-Saxon jurisprudence of *locus standi* has been given a wider meaning by the Supreme Court of India. A letter or telegram addressed by a public-spirited citizen to a judge of the Supreme Court or High Courts can be treated as a Writ Petition and relief granted as asked for, if the case is found.<sup>29</sup>

According to Justice Pathak, the former Chief Justice of India, in a developing society, judicial activism reflects a dynamic court's conception of its duties.<sup>30</sup> Another former Chief Justice of India propounded the theory of judicial activism and claimed himself as a protagonist of it saying:

*...in a democratic society which has a Constitution with a Bill of Rights or which has subscribed to regional or international instruments on human rights and which is seeking to build a fair and*

<sup>26</sup>The Chief Vigilance Commission is a non-constitutional watchdog for government employees. The senior Indian Administrative Officers (IAS) will be appointed as Chief Vigilance Commissioner. In other words, the CVC is a traditional dumping ground for senior IAS officers passed over by political rulers in key appointments (1997) *India Today*, 29 December.

<sup>27</sup>*Op cit* 3, paragraph 58, at page 769. Direction No. 1, *The Central Vigilance Commissioner (CVC) shall be given statutory authority.*

<sup>28</sup>*Ibid.* Direction No. 2, *Selection for the post of Central Vigilance Commissioner shall be made by a committee comprising the Prime Minister and the Leader of the opposition in the Parliament from the panel of outstanding civil servants and others with impeccable integrity, to be furnished by the Cabinet Secretary. The appointment shall be made by the President on the basis of the recommendation made by the committee.*

<sup>29</sup>Arora, K.K., "Enlargement of *Locus standi*: A Reflection of Judicial Activism", chapter 14 in Bhatia, K., ed., *Judicial Activism and Social Change* (1990) New Delhi: Deep & Deep.

<sup>30</sup>*Ibid.* Inaugural address by Justice R.S. Pathak, at page 33.

*just society, judicial activism on the part of the judiciary is an imperative, both for strengthening participatory democracy and for realisation of human rights by a large number of people in the country.*<sup>31</sup>

Further, judicial activism depends on the judge; where one denies being a judicial activist; he/she denies him/herself the role of a judge.<sup>32</sup> Baxi proposed a theory for the activist judge as:

*...a judge who wields enormous executive and legislative power in his/her role as a judge and that this power and discretion have to be used militantly for the promotion of Constitutional values.*<sup>33</sup>

In other words, it is a value reflection of Part IV of the Constitution of India, a dream to be turned into reality.<sup>34</sup>

Justice Verma has said that, by enlarging the rules of *locus standi*, the scope of the judiciary's role in public administration could be achieved.<sup>35</sup> By its judicial activism, the Supreme Court established fundamental rights such as a right to go abroad, the right to privacy, the right to protection against solitary confinement, the right not to be held in fetters, the right of an indigent person to have legal aid, the right to a speedy trial, the right against handcuffing, the right against custodial violence, the right against public hanging, a right to medical assistance, a right to the provision of physical shelter, a right to dignity

<sup>31</sup>Justice Bhagwati, P.N., "The Role of Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint" (1992) 18 *Commonwealth Law Bulletin* 1262, at page 1262. See also Bhagwati, P.N., "Judicial Activism and Public Interest Litigation" (1985) 23 *Columbia Journal of Transnational Law* 561.

<sup>32</sup>Bansal, J.P., *Supreme Court: Judicial Restraint versus Judicial Activism* (1985) Jaipur: Unique, at page 91.

<sup>33</sup>Baxi, U., "On the Shame of Not Being an Activist: Thought on Judicial Activism" (1984) 11 *Indian Bar Review* 254, at page 263.

<sup>34</sup>Justice Desai, D.A., "Constitutional Values and Judicial Activism" (1982) 9 *Journal of the Bar Council of India* 258.

<sup>35</sup>*Op cit* 12, at pages 6-7.

and livelihood, a right to education, a right to gender equality and the right to protect the environment.<sup>36</sup>

Justice Verma shuns the phrase 'judicial activism'.<sup>37</sup> But, recently he stated that the Constitution confers power on the judiciary, that this power must be utilised for the public good and always in the public interest in the service of the people.<sup>38</sup> He is opposed to the conservative argument that the Constitution did not make the judiciary a substitute for other branches of the government's failure (both legislature and executive).<sup>39</sup> In the present judgement, Justice Verma cited a number of Articles of the Constitution of India<sup>40</sup> to give strength to his judgement and challenged the politicians by stating the Concept of Equality in democracy as:

*Be you ever so high, the law is above you*<sup>41</sup>.

Justice Verma claimed that the present case is a new dimension of justice and further added:

*Activating the administrative machinery in case of failure in performance of their obligation can be achieved through the judicial process. Judicial process achieves not merely initiation of action where there is inaction but also may monitor and channelise action in the proper direction when necessary.*<sup>42</sup>

<sup>36</sup>Kirby, M., "Judicial Activism" (1997) 27 *University of Western Australia Law Review* 1, at page 22.

<sup>37</sup>Karp, J., "Judge Dread" (1996) *Far Eastern Economic Review* March 21, at page 18.

<sup>38</sup>*Op cit* 12, at page 10.

<sup>39</sup>Andhyarujina, T.R., *Judicial Activism and Constitutional Democracy in India* (1992) Bombay: Tripathi, at page 54.

<sup>40</sup>Article 14, Equality before law; article 21, Protection of life and personal liberty; article 32, *supra* 17; article 73, Extent of executive powers of the Union; article 141, Law declared by Supreme Court to be binding on all courts; article 142, Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.; article 144, Civil and judicial authorities to act in aid of the Supreme Court; article 162, Extent of executive power of State.

<sup>41</sup>*Op cit* 3, paragraph 3, at page 235. See also Sorabjee, J.S., "Rule of Law in India" (1997) 147 (6805) *New Law Journal* 1249.

<sup>42</sup>Justice Verma, J.S., "New Dimensions of Justice" (1997) 3 *Supreme Court Cases* (Journal Section) 1, at page 7.

It is pertinent to mention that, in the present judgement he posed the question whether the matter is within the domain of judicial review and questioned whether judicial review could be an effective instrument for activating the investigative process, which is under the control of the executive.<sup>43</sup> To resolve this question, he cited the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region:<sup>44</sup>

"Objectives of the Judiciary

Under Principle 10 of the Statement of Beijing, objectives and functions of the Judiciary are set out as follows:

- (a) to ensure that all persons are able to live securely under the rule of law
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights, and
- (c) to administer the law impartially among persons and between persons and the State."<sup>45</sup>

The present Chief Justice of India defended the judicial activism at the South Asia Association of Regional Co-operation (SAARC) Law Conference at Colombo:

*Criticism notwithstanding, our experience is that the activist role of judiciary, used with proper self restraint, is desirable for the general good of the people, for whom the courts of law ultimately exists.<sup>46</sup>*

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<sup>43</sup>*Op cit* 3, paragraph 1, at page 233.

<sup>44</sup>*Op cit* 3, paragraph 51, page 266.

<sup>45</sup>Justice Verma in *Vishaka v State of Rajasthan* (1997) 6 Supreme Court Cases 241, at pages 249-250.

<sup>46</sup>"CJI defends judicial activism", *Indian Express* (daily) 29 October 1998.

### Causes for Corruption

There were studies in India focused on both political and bureaucratic corruption.<sup>47</sup> For most of the period following independence, Jawaharlal Nehru and his family have ruled India. Though Nehru was not corrupt himself he tolerated his corrupt friends. Later his daughter, Indira Gandhi, institutionalised corruption and her son Rajiv Gandhi, became involved in the Bofors scandal.<sup>48</sup> Only now, after fifty years of independence, has the Prime Minister of India called the people to participate in *Satyagraha* (non-violent movement) against corruption.<sup>49</sup> By this time, however, Vineet Narain had already started action in the Supreme Court. The present Chief Vigilance Commissioner, appointed following the Supreme Court's direction,<sup>50</sup> has identified five vital factors causing corruption in India:

1. Scarcity of goods and services
2. Lack of transparency
3. Delay in procedures and red tape

<sup>47</sup>See Dwivedi, O.P., "Bureaucratic Corruption in Developing Countries" (1967) 7 *Asian Survey* 245; Monteiro, J.B., "The Dimensions of Corruption in India", chapter 4 (21) in Heidenheimer, A.J., Ed., *Political Corruption: Readings in Comparative Analysis* (1970) London: Holt, at pages 220-228; Hager, L.M., "Bureaucratic Corruption in India: Legal Control of Maladministration" (1973) 6 *Comparative Political Studies* 197; Wade, R., "The System of Administrative and Political Corruption: Canal Irrigation in South India" (1982) 18 *Journal of Development Studies* 287; Singh, G., "Understanding of Political Corruption in Contemporary Indian Politics" in Heywood, P., Ed., *Political Corruption* (1996) Oxford: Blackwell, at page 210; Pavarala, V., *Interpreting the Corruption: Elite Perspectives in India* (1996) London: Sage.

<sup>48</sup>Book Talk: Blame Nehru for Corruption in India: Review of Gill, S.S.'s, *Pathology of Corruption Deccan Chronicle* (daily) 25 October 1998. When Rajiv Gandhi was Prime Minister of India, it was stated, "32 million Kroner (\$4.92million) had been paid to an Indian as commission on the Rs.17.05 billion (\$1.3 billion) deal to purchase Swedish Bofors 155mm howitzers. Later reports confirmed the payment of an estimated \$38million in commissions." See Kochanek, "Briefcase Politics in India: The Congress Party and the Business Elite" (1987) 27 *Asian Survey* 1278, at pages 1297-1298.

<sup>49</sup>"PM calls for Satyagraha against Corruption", *The Hindu* (daily) 16 August 1997.

<sup>50</sup>"Vittal appointed CVC", *The Hindu* (daily) 2 September 1998.

4. Cushion of safety
5. Tribal instinct of people belonging to an organisation or a cadre to shield the black sheep amongst them.<sup>51</sup>

In 1962, the Ministry of Home Affairs appointed the Committee on Prevention of Corruption,<sup>52</sup> headed by Mr. Santhanam MP. One of the Committee's main findings was that:

*There is a widespread impression that failure of integrity is not uncommon among Ministers, and that some Ministers who have held office during the last sixteen years have enriched themselves illegitimately, obtained good jobs for their sons and relations through nepotism. The general belief about the failure of integrity among Ministers is as damaging as actual failure.<sup>53</sup>*

The following scenario could be a textbook example of the above. A former Supreme Court judge, while discussing the Bhopal gas leak incident, said that an officer who had been objecting to the planning permission for the Union Carbide industry in a residential locality had been transferred, instead of the industry being located at a different site. Most of the state (Madhya Pradesh) politicians' and bureaucrats' children and their relatives obtained employment in the Union Carbide industry.<sup>54</sup> In his leading judgement, Justice Verma cautioned that if corruption was not eradicated in India, the future of foreign investment and financial aid from the World Bank and the International Monetary Fund would be in question.<sup>55</sup>

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<sup>51</sup>Bhatnagar, R., "Bureaucracy may Stall CVC's Action", *Times of India* (daily) 28 September 1998.

<sup>52</sup>Government of India: Ministry of Home Affairs *Report of the Committee on Prevention of Corruption* (1964) New Delhi.

<sup>53</sup>*Ibid.*, at page 108.

<sup>54</sup>Justice Krishna Iyer, V.R. in "Union Carbide's "Bhoposhima" and Indian Justice in Somno-Coma", chapter 19 in Anand, R.P., et. al. (Ed.) *Law Science and Environment* (1988) New Delhi: Lancer.

<sup>55</sup>*Op cit* 3, paragraph 56, at page 268.

There is legislation to control corruption in India, namely:

1. The Prevention of Corruption Act 1988;
2. Indian Penal Code 1860, Chapter IX dealing with offences by or relating to public servants; and
3. The Representation of People Act 1950.

The following measures have been adopted in the political sector:

1. Appointment of commissions of inquiry as and when serious allegations of corrupt practices against ministers and chief ministers have come to its notice under the Commissions of Inquiry Act 1952; and
2. Empowering the state (regional) level ombudsmen (Lok Ayukta), where they exist, to inquire into the cases of corruption in addition to other complaints of citizens against administrative injustice.<sup>56</sup>

However, there were criticisms of these measures, in practice. Such as, persons indicted by the Inquiry Commissions were allowed to go scot-free as a result of influence from various quarters.<sup>57</sup> An example of the latter was seen in Andhra Pradesh (a state in India) where the chief of the Lok Ayukta was a close relative of the Chief Minister of the State.<sup>58</sup>

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<sup>56</sup>Khanna, B.S., "Ethical Standards in Indian Politics", chapter 18 in Bhatnagar, S. & Sharma, S.K., Eds., *Corruption in Indian Politics and Bureaucracy* (1990) New Delhi: Ess Ess. See also Parmar, M., "Ombudsman (Lok Ayukta) in Indian States" (1989) 35 *Indian Journal of Political Administration* 114.

<sup>57</sup>Jain, R.B., "Fighting Political Corruption: The Indian Experience" (1983) XVII *Indian Political Science Review* 215. See The 1964 Santhanam Committee Report, at page 8, "Complaints against the highly placed were not dealt with in the manner that they should have been dealt with if public confidence had to be maintained. Weakness in this respect created cynicism and the growth of belief that while Governments were against corruption they were not against corrupt individuals, if such individuals had the requisite amount of power, influence and protection".

<sup>58</sup>Pavarala, V., *Interpreting Corruption: Elite Perspectives in India* (1996) London: Sage, at page 187.

### Guidance for Standards in Public Life

Kapoor quotes from an unpublished report sent to the Director of CBI during the Jain Diaries investigations. In the public domain, such a report is politically explosive:

*The document coupled with huge sums of money conclusively proved that monies were being clandestinely brought into country against the provisions of the Foreign Exchange Regulation Act 1975...The recipients included an Ex-President, two Ex-Prime Ministers, an Ex-Deputy Prime Minister and his son (an M.P) and an Ex-Speaker and scores of Ministers in the governments headed by Shri Rajiv Gandhi, V.P.Singh, Chandrashekhar and the present Council of Ministers. The list also included some top-bureaucrats (including the Cabinet Secretary, Secretaries to the Government, Director of Intelligence Bureau, the then Delhi Police Commissioner, top brass in the Public Sector Undertakings in Power Sector, Chief Secretaries of the State Governments and some industrialists...<sup>59</sup>.*

This report, if true, gives an indication of the intricate interrelations between politicians, bureaucrats and criminals in India. The probity of politicians in India is in a deteriorating condition. The judges in court or when heading inquiry commissions regarding political corruption, advise the politicians by citing various rules and authorities available in other countries. Justice Khanna in his Commission of Inquiry Report<sup>60</sup> applied Winston Churchill's Rules on Ministers Interests to the Indian context as:<sup>61</sup>

*A person becoming a Minister becomes the custodian of public interests. A great trust devolves upon him and he owes it to the*

<sup>59</sup>Op cit 4, Kapoor, S., *Bad Money, Bad Politics*, at pages 42-43.

<sup>60</sup>Khanna Commission headed by Justice Khanna (1967), to inquire into the charges of corruption and improprieties allegedly committed by Shri Biju Patnaik and other ministers of Orissa who were in office from 1961-1967. See *supra* 39, Jain, R.B., "Fighting Political Corruption: The Indian Experience" (1983) 17 *Indian Political Science Review* 215.

<sup>61</sup>Cited in Halayya, M., *Corruption in India* (1985) New Delhi: Affiliated East-West, at page 92; see also *HC Debates*, 25 February 1952, Col. 702-703 for Winston Churchill's Original Text.

*exalted office he occupies that he should so formulate his policies and plan his activities that there is no possibility of a clash between his personal interests and the public interests. This is especially true in the set up of a nascent democracy like ours wherein the role of a Minister, ought to be that of a pioneer rather than that of a pirate, a public sentinel rather than of a self seeker, of one dedicated to the public weal and not one obsessed with the desire of public gain. The minute a Minister gets into a situation wherein there may be conflict between his personal and public interests he is bound to make tongues wag and his conduct must necessarily become the subject of criticism and censure.*

Recent academic studies of corruption in India<sup>62</sup> have made the following suggestions for adoption by people in public life:

1. Openness in the sense of having wide contact with the people administered.
2. A sense of justice, fair play and impartiality in dealing with men and matters.
3. Sensitivity and responsiveness to the urges, feelings and aspirations of the common man.
4. Securing the honour and dignity of the human being however humble he or she might be.
5. Humility and simplicity in the persons manning the administrative machinery and their easy accessibility.
6. Creating and sustaining an atmosphere conducive to development, growth and social change.
7. Honesty and integrity in thought and action.

Moreover, the following are essential to ensure the practice of administrative ethics among administrators and politicians: faith and determination, infusing ethics into politics, practice of administrative ethics, ethical commitment to the ideals, effective involvement of the

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<sup>62</sup>Goel, S.L., "Ethical Standards in Indian Politics and Administration: Essential Ingredients", chapter 15 in Bhatnagar, S. & Sharma, S.K., Eds., *Corruption: Indian Politics and Administration* (1991) New Delhi: Ess Ess, at page 162 cited M.G. Devasahayam's article.

public, the need for character building, emphasis on education, study and practice of true religion.

Justice Verma incorporated in his judgement<sup>63</sup> some general recommendations<sup>64</sup> and the Seven Principles set out in the Lord Nolan Committee Report of Standards in Public Life.<sup>65</sup>

### **The Seven Principles of Public Life**

#### **"Selflessness**

Holders of public office should take decisions solely in terms of public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends

#### **Integrity**

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in performance of their official duties

#### **Objectivity**

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit

#### **Accountability**

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

#### **Openness**

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands

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<sup>63</sup>*Op cit* 3, paragraph 54, at pages 267-268.

<sup>64</sup>*Op cit* 10, at page 3. General Recommendations : 5. Principles of public life; 6. Codes of Conduct; 7. Independent Scrutiny; and 8. Education.

<sup>65</sup>*Ibid* at page 14.

**Honesty**

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve conflicts arising in a way that protects the public interest.

**Leadership**

Holders of public office should promote and support these principles by leadership and example.

These principles apply to all aspects of public life. The Committee has set them out for the benefit of all who serve the public in any way."

**Conclusions and Consequences**

There have been instances in the past when their juniors who were promoted to the position of the Chief Justice of India as a result of political influence when those senior judges had gone against the government's interest in their judgements superseded senior judges.<sup>66</sup> This occurred on two occasions, both when Indira Gandhi was Prime Minister.<sup>67</sup> Recent past governments (particularly the ones of Gowda

<sup>66</sup>In the Fundamental Rights Case (*His Holiness Keshavananda Bharati Sripadagalvaru v State of Kerala* (1973) 4 Supreme Court Cases 225), the Supreme Court Bench consisted of Justices Sikri, Khanna, Shelat, Hegde, Grover, A.N. Ray, Reddy, Palekar, Mathew, Beg, Dwivedi, Mukherjea and Chandrachud. Out of this Justices Sikri, Shelat, Hegde, Grover, Reddy and Mukherjea delivered against the State and rest of them in favour of the State. On 25 April 1973 Justice Ray was appointed as Chief Justice of India, succeeding Chief Justice Sikri and superseding three senior judges Shelat, Hegde and Grover who, resigned thereafter. See Das, G., *Supreme Court In Quest of Identity* (1987) Lucknow: Eastern, at page 101. Again in January 1977, the government appointed Justice Beg, M.H. as the Chief Justice despite the fact that Justice Khanna was senior to him, who later resigned in protest. The vindictive act of the government towards him due to his celebrated dissenting judgment in the *Habeas Corpus* case (*A.D.M. Jabalpur v S.C. Shukla* (1976) 2 Supreme Court Cases 521). See Dube, M.P., *Role of Supreme Court in Indian Constitution* (1987) New Delhi: Deep & Deep, at page 17, "Justice Khanna knew his dissenting judgement would cost his appointment of the Chief Justice of India." See Khanna, H.R., *Neither Roses Nor Thorns* Lucknow: Eastern, at page 80.

<sup>67</sup>For details see Palkhivala, N.A., Ed., *A Judiciary Made to Measure* (1973) Bombay: M.R. Pai; see also, Tate, C.N., "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies" (1993) 46 *Political Research Quarterly* 311.

and Gujral) were minority and coalition governments as is the present government.<sup>68</sup> In this situation, the possibility of a rift between the judiciary and the legislature or interference with the independence of judiciary is very limited. But the system is still susceptible to corruption, and one must not be lulled into a false sense of security when there is a coalition government.

### Follow Up<sup>69</sup>

The Law Commission of India proposed new legislation for "forfeiture of ill-gotten wealth and property of public servants, including the Ministers and Members of Parliament". The proposal is cited as, "The Corrupt Public Servants (Forfeiture of Property) Act 1999".

According to the Law Commission Chairman, Justice B.P. Jeevan Reddy, under the Act, the CVC and other Commissioners could give a notice to the public servant seeking an affidavit on the means of acquisition of property. Failure to authenticate the means of acquisition would result in its forfeiture. Further he said,

*...Corruption has been severely affecting the country's economy, security and administration. To weed out this dreaded disease from public life, we need a bitter medicine.<sup>70</sup>*

In my opinion, though India obtained freedom from the British in 1947, the above analysis indicates that freedom is not for the welfare of the people but for the politicians and bureaucrats, with the exception

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<sup>68</sup>Thakur, R., "A Changing of the Guard in India" (1998) 38 *Asian Survey* 603. It is pertinent to mention that the present government has lost its majority in the Parliament, and now functioning as caretaker government until the next general election in September 1999. See "BJP-led Govt. quits after losing by one vote", *The Hindu* (daily), 18 April 1999; "Caretaker status: President talks to Govt.?", *The Hindu* (daily), 2 May 1999; "Polling to be held in Sept.-Oct", *The Hindu* (daily), 4 May 1999.

<sup>69</sup>"Law on Forfeiting Property of Corrupt Public Servants Proposed", *Times of India* (daily), 13 December 1998.

<sup>70</sup>"Law Commission Proposes Bill Against Corruption", *The Hindu* (daily), 13 December 1998.

of a few. To substantiate my view, I quote Justice M. Srinivasan's judgment (Judge, Supreme Court of India):

*...those days of statesmen who rendered selfless service to the country are gone and alas! These are days of politicians who want the country to serve for them.<sup>71</sup>*

If the corruption has not been eradicated, the consequences will be, as stated by a Division Bench of the Madras High Court (when dealing with a case against the government relating to granting permission to build a hotel in a hill place, contrary to the rules):

*"In this case the Government has exempted the law-breaker from the operation of the law which would be tantamount to cutting a man to the size of the cot. Of the disastrous consequences we need not say the great saint Thiruvalluvar said it two thousand years ago." Behold the King who doth not oversee his administration everyday and remove the irregularities therein; his sovereignty will wear away day by day.<sup>72</sup>*

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<sup>71</sup>Justice Srinivasan, M. in *Mayawati v Markandeya Chand* (1998) 7 Supreme Court Cases 517, at page 540.

<sup>72</sup>Justice Srinivasan, M. in *Palani Hill Conservation Council rep. by its President Navroz Mody v The State of Tamilnadu and others* (1995) 2 Writ Law Reporter 737, at page 769.

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## THE PROTECTION OF GEOGRAPHICAL INDICATIONS IN MALAYSIA

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Many expressions used on goods in the course of trade encompass geographical terms. Expressions such as 'Langkawi Marble', 'Thai fragrant rice', 'Indonesian teak furniture', 'Japanese green tea', 'Korean ginseng', 'Western Australian honey', 'Californian prunes', 'Swiss watch' and 'Swiss chocolates' are but a few of the numerous geographical terms used on goods in commerce. Geographical expressions are used by traders for various purposes. Sometimes they are used to indicate the geographical origins of the goods concerned, particularly where the goods enjoy specific characteristics which are attributable to their geographical origins. Instances include such terms as 'Cameron Highlands Tea', 'Menglembu groundnuts', 'Scotch Whisky' and 'Champagne'.<sup>1</sup> Some geographical expressions have become so associated with certain goods that the expressions are used generically to mean the goods themselves. The terms 'French fried potatoes', 'Worcestershire Sauce', 'French horn' and 'Brussels sprouts' are examples which fall within this category. Geographical expressions are at times used by traders in a fanciful and arbitrary manner without

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<sup>1</sup>In some jurisdictions, the term 'Champagne' has been held to mean a naturally sparkling wine made from grapes produced in the Champagne district of France by the champenoise method. See for instance the English case of *J Bollinger v Costa Brava Wine Co Ltd* [1960] RPC 16. However, in other jurisdictions such as Australia, New Zealand and the United States, the courts have taken a contrary view. For instance, courts in Australia have held that the term 'Champagne' has acquired a generic meaning which denotes a type of wine regardless of its geographical place of production. See for instance the Australian case of *Comite Interprofessionnel du Vin de Champagne v NL Burton Pty Ltd* (1981) 38 ALR 664. A similar, but more liberal view, was taken by the New Zealand courts which held that the term 'Champagne' meant French produced wine. See for instance, the New Zealand case of *Wineworths Group Ltd v Comite Interprofessionnel du Vin de Champagne* (1991) 23 IPR 435.