

INTRODUCTION

1. Good evening to all of you. At the outset, I would like to thank the Jain family for having invited me to speak at this edition of the LC Jain Memorial Lecture. I did not have occasion to meet him personally, but I have read a great deal about him and his stellar work and contribution to Indian society.
2. He would have been a young man when Mahatma Gandhi passed away in 1948, but he embodied the spirit of Gandhian values in the best possible way. Indeed, he has been described as “*an impassioned crusader of what Gandhi called the second freedom struggle for a just and equitable India*”.
3. Mr Jain’s autobiography, titled *Civil Disobedience* is a fascinating book, especially, and very revelatory. In that, he makes extensive observations on the Emergency years. Recall that he was among the few brave ones who mobilised people for an anti-Emergency movement. What he says in the book is relevant even now, and remembering him in today’s times could not be more apposite.
4. What I found especially interesting was his view that, after independence, “State” and “Society” had separate spheres. He felt that Nehru and others associated with him were building the state and running the government, while Mr Jain himself and those around him

were building and running “Society”. This was based on the notion that freedom was now secure as there was a Constitution which laid down the ground rules. The Emergency came as a shock for people like him, who had spent the previous decades restoring peace and structure to a country that was recovering from a century and more of fighting for independence. Mr Jain said that the Emergency was a wake-up call, and freedoms could not be taken for granted.

5. This emotional upheaval that Mr Jain and his peers probably went through during the 1970s is not unique to India. In their recent book, appropriately titled, *How Democracies Die*, Steven Levitsky and Daniel Ziblatt, write of how “*most democratic breakdowns have been caused not by generals and soldiers but by elected governments*”. They document the many instances of how “*elected leaders have subverted democratic institutions*” across the world.
6. This subversion is carried out by the constitutional sanction of the ballot box, and even with approval from the legislature and the judiciary. Throughout, there is always the assurance that the democratic wheels are still turning. Levitsky and Ziblatt call the leaders who thrive in such situations “elected autocrats”. Such elected autocrats weaponise institutions, to use them as political ammunition. They compel the media and the private sector into silence, and they redraft rules to suit their

interests over those of their political opponents. Critical voices still rise up in the backdrop of the chorus of the hoi polloi, but those who dare to question the powers that be end up at the receiving end of all kinds of trouble - they are charged with making seditious remarks, or evading taxes, or some such thing. In this way, they use *“the very institutions of democracy ... to kill it”*.

7. As for all of us, if we look closely enough, we can see such patterns in today's India too. Ever so often, we hear of the collapse of yet another institution that is central to the country's functioning - whether it is the Reserve Bank or the Election Commission. And then we see how agencies like the Central Bureau of Investigation or the police are used to intimidate political opponents, and harass political activists. The country appears to be completely polarised because of the communal agenda followed by the ruling regime. Hate speech has become normal, with national-level politicians leading the charge. The government has taken upon itself the mantle of deciding who is entitled to protections and who is not, by othering entire segments of the people, with party leaders labelling Muslims variously as beef-eaters, infiltrators, traitors and potential terrorists. To any observer, this conversion of an entire community into an imagined enemy is clearly an expression of paranoia on the part of the ruling establishment. There is also a divisive, jingoistic

idea of nationalism that is being encouraged, centred on religion and cultural identity, which is deeply discomforting. Combined with this, we are in a situation where anyone who opposes or disagrees with government policies is branded as anti-national.

8. This is also the first time that there are serious issues with federalism in the country, marked especially by Centre-State disagreements on the Citizenship Amendment Act, the NRC and the NPR. Even police investigations, Bhima Koregaon being one such, are representative of this federalism challenge. And all of this is happening in the backdrop of an economic slowdown which seems to have blindsided the government.
9. In the midst of all of this, there is a positive, heartening moment like the protests we are seeing today, against the Citizenship Amendment Act, and everything that it stands for. When students - from all over the country, including from institutions like JNU, Jamia Milia, AMU, St Stephens, who collectively embody the future of a nation - come together in a peaceful protest against an unjust and unconstitutional law, it is an act that citizens of any democracy should be proud of. Such an act is not merely a protest. It shows that the young people know, understand and believe in the constitutional values that our founding fathers sought to embody, and that they will work to protect these values.
10. It is with this background that I will be speaking today. The focus of my

speech will be on how the Supreme Court of India has evolved in the recent years, roughly in the last decade or so, in the context of the democratic upheavals that India has been facing, and the kinds of protections and freedoms we have won and lost as a result of this judicial evolution. I will begin with a brief overview of what the vision for the Supreme Court of India was, to set the stage to examine whether it has fulfilled that vision, and to what degree. I will then discuss a few cases that reveal how the Court has functioned, and what it has meant for the various kinds of freedoms we have asked for, such as the freedom of identity, whether religious or sexual; the freedom to dissent; the freedom of movement and peaceful assembly; the freedom to ask questions and seek transparency in government; and the freedom of the press. I will conclude with what I feel is the state of affairs with the Supreme Court, and where challenges and opportunities lie, in order for the institution to remain an integral part of the healthy democracy that India seeks to remain.

THE ROLE OF THE SUPREME COURT

11. We are marking 70 years of the coming into force of the Constitution, just as we are marking 70 years of the establishment of the Supreme Court too. In 1952 itself, in *State of Madras v VG Row*, the Supreme Court assumed for itself the role of the sentinel on the *qui vive* (meaning “on the

alert” or “vigilant”), in defence of citizens’ fundamental rights. Later, Justice Bhagwati observed in *State of Rajasthan v. Union of India* that the Supreme Court is the ultimate interpreter of the Constitution, and it is for the Supreme Court “to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of rule of law.”

12. Unfortunately, in the initial period, the Supreme Court adopted a conservative approach, by reading only the literal text of the Constitution, treating each fundamental right as a separate chapter. In doing so, as it turned out, the Court essentially ended up working as the protector of the landed gentry, reaching a climactic conclusion with the infamous *ADM Jabalpur* case, in the aftermath of the Emergency. Recall that a majority of the constitutional bench in that case, barring Justice HR Khanna, agreed with the government that there was no right to life and personal liberty during an Emergency. After the Emergency was lifted, though, there was a sort of catharsis in the judiciary, between 1977 and 1979, when, as Prof. Upendra Baxi points out, the Supreme Court judges “apologized, in word and deed, to the people of India for judicial abdication during the... Emergency period”. After that, the Court switched tack, and began focussing on what we now call “public interest litigation”, where it sought to protect the rights of those who could not otherwise approach the court themselves, or as one judge famously put

it, to become “*the last resort of the oppressed and the bewildered*”¹.

13. This new-found fascination for judicial activism acquired an energy of its own, which some scholars have described as being “euphoric” even. In the process, the Supreme Court underlined the meta-morphosis in its attitude towards article 21. The 1980s and 1990s saw a dominance of PILs and social justice matters in court. (Do note that I do not intend to speak on the subject of PILs today, which, in my opinion, have become completely unrecognisable from their original purpose, and I have only mentioned it here for setting the context).

14. In recent times also, the Supreme Court, in some judgements, has interpreted the Constitution with deeper insights and analyses, going far beyond the literal word of the law, and examining legislative purpose more closely. As scholar Gautam Bhatia puts it, these judgements represent a radical transformation, with the Court breathing new life into the fundamental rights through these decisions. I can name a few Constitutional Bench judgements delivered in this spirit, some of which I discuss here.

15. At least two of these are judgements in matters that I am very much personally associated with. These are the judgements in *Navtej Singh*

¹ State of Rajasthan vs Union of India (1979) 3 SCC 634 at 670

Johar v. Union of India, and *CPIO, Supreme Court of India vs. Subhash Chandra Aggarwal*. In the former matter, I had delivered the original judgement in *Naz Foundation v. Govt of NCT of Delhi*, where we had read down Section 377 of the Indian Penal Code which had criminalised homosexuality. This was later reversed by the single stroke of a pen, leaving millions of people re-criminalised overnight. I honestly never thought that such a colonial practice as contained in Section 377 would be sustained in modern India. Then, the Supreme Court decision in *Navtej Johar* happened, and finally, we can boast of an India where sodomy law has gone forever. The second case, involving the applicability of the Right to Information Act on members of the judiciary, was something I had decided during my time in the Delhi High Court as well. The outcome of the case was problematic and satisfying at the same time. It was problematic because the majority judgement placed too many caveats and riders to the applicability of the RTI on the judiciary. That said, Justice Chandrachud's dissenting opinion counterbalanced this majority view, when he said that judges must be accountable to the people they serve, and more importantly, he explicitly wrote that "*the basis for the selection and appointment of judges to the higher judiciary must be defined and placed in the public realm.*"

16. Then we have the judgement that decriminalised adultery in India, which

was also a dramatic turnaround from the position taken by the court previously. It was particularly unique because the earlier judgement was written by the senior Justice Chandrachud, and his son was on the bench that repealed that decision.

17. Another notable case is the privacy judgement in *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*, where the judges have practically offered a treatise on privacy law, not seen since the judgement in *R Rajgopal v. State of Tamil Nadu*. This judgement was also unique, as one of the judges, Justice Chandrachud wrote that that the *ADM Jabalpur* case was an aberration in the constitutional jurisprudence of the country and that the majority opinion deserved to be buried “ten fathoms deep” with “no chance of resurrection”.

THE SUPREME COURT AND OUR FREEDOMS

18. But then there are instances where freedoms that we have taken for granted are on unsteady ground, and where we are being made to doubt whether the Supreme Court is actually able to protect our rights at all or not. It is disturbing and unfortunate that we should still be asking questions of this kind, but some recent judgements and orders prompt such reflection. These judgements beg us to ask if the sentinel remains on the *qui vive* after all. I will be discussing some of these judgements in this section.

SABARIMALA

19. One area where the Court's decision making is coming under intense scrutiny is in the realm of personal liberty and religious freedoms. In 2018, the Supreme Court in a progressive judgment, permitted the entry of women into the Sabarimala Temple in Kerala. The judgment, however, became controversial, and faced some problems with implementation. Notably, a senior Union Minister criticised the Kerala Government for implementing the Court's judgment, saying that in "*Sabarimala, nation has seen a fight between dharma, belief & bhakti on the one side & an oppressive Kerala govt on the other*" and that the BJP stood firmly with the Ayyappa devotees. There should have been no controversy or doubt regarding the implementation of the Supreme Court's judgment, especially since no stay had been granted; but the Central Government's actions seemed to raise the spectre that the judgment was not final.

20. Immediately after the judgment was passed, review petitions were filed. However, in November 2019, while hearing these review petitions, the Supreme Court passed a curious order in *Kantaru Rajeevaru v Indian Young Lawyers Association*, directing that the Sabarimala review petition as well as other writ petitions – concerning the entry of Muslim women in a Durgah/Mosque, entry of Parsi women married to a non-Parsi into the holy Agyari, female genital mutilation in the Dawoodi Bohra community

– remain pending until the determination of the questions (formulated by the majority) by a larger bench, to be constituted by the Chief Justice. Notably, the review petition itself was not referred to a larger bench; and was only kept pending till the adjudication of the referred questions by the larger bench.

21. The majority's order in the Sabarimala review petitions seems to be beyond the scope of Article 137 of the Constitution. Review powers are used rarely, only when there is an error apparent on the face of the record, or a glaring omission or mistake. A review is not an appeal or a fresh consideration of a case. However, in *Kantaru Rajeevaru*, the Court directed a fresh hearing of the Sabarimala matter, by a larger Bench, without any reasons for the review, and without pointing out any grave errors in the judgment under review. The order did not even endorse Justice Malhotra's dissent in the original Sabarimala judgment. Instead it tagged the Sabarimala matter with other pending cases that raised common issues regarding the interpretation of Article 25 and 26, even though those cases were not before the Court. Strong dissents were recorded by Justices Nariman and Chandrachud to this reference.

22. While passing the referral order, the majority did not pass any order staying the operation of the main judgment. Earlier, in November 2018 itself, the five judge bench had also refused to grant a stay. In these

circumstances, it is peculiar, and unfortunate, that in December 2019, the Supreme Court declined to pass any order on the petition by two women activists seeking a direction to ensure safe entry in the Sabarimala temple on the ground that the issue was "very emotive"; it did not want the situation to become "explosive"; and that despite there being no stay, the fact of the referral meant that the judgment was "not final".

23. The Supreme Court has often been characterised as supreme (in the sense of final), but not infallible. The Court's order in *Kantaru Rajeevaru* has now upended the assumptions about its judgments being final.

24. The aftermath of the Sabarimala judgment has given rise to various causes of concern, including the impunity of the Central Government in ignoring the judgment of the Supreme Court, the re-opening of the judgment through a referral in the guise of a review, and the implications for the rule of law.

AYODHYA

25. The issue of rule of law and finality arose once again in the Ayodhya judgment, where the Court tried to give legal quietus to an essentially political issue.

26. The Court's judgment was unanimous, but anonymous. Contrary to judicial practice, the name of the judge who authored the unanimous opinion was absent. Even more peculiar was the 116 page anonymous

“addendum” to the judgment, that sought to reinforce and reiterate the *“faith, belief and trust of the Hindus”* that the *“disputed structure is the holy birthplace of Lord Ram”*. The need for this addendum is highly questionable given that the bench had already unanimously decided the case on constitutional principles, and the addendum was not serving the role of a concurring opinion. Instead, the addendum seems to reinforce the supremacy of Hindu theological considerations.

27. A key issue that arose in this judgement was the issue of equity. The Supreme Court was of the view that the Allahabad High Court’s decision to divide the property into three parts was not “feasible” in view of the need to maintain peace and tranquillity. However, whether the Supreme Court’s judgment resulted in complete justice is questionable since it still seems like despite acknowledging the illegality committed by the Hindus, first in 1949, by clandestinely keeping Ram Lalla idols in the mosque, and second, by wantonly demolishing the mosque in 1992, the court effectively rewarded the wrongdoer. This goes against the doctrine of equity, which requires you to approach the Court with clean hands. Given the Court’s findings, one wonders if the mosque had not been demolished, would it still have been given to the Hindus?

28. Part of the problem lies in the fact that although the judgment is an unimaginable scholarship on Hindu law, the dispute was not ideally

placed to be settled by courts; and should have been resolved politically. As Suhas Palshikar notes, *“courts, when they broker peace, do not necessarily bring closure to disputes; they only give momentary space for disputes to reconfigure.”* Maybe a South African style Truth and Reconciliation Commission would have been a greater idea.

29. The issue of impunity, discussed in the context of (non)-implementation of the Sabarimala judgment and the failure of the Court to provide/ensure safe passage of women devotees, comes up once again in Ayodhya. Relying on the tenor of the Court’s decision – which recognises the illegality of the demolition of the Babri Masjid, but does not act on it – the Hindu Mahasabha has begun pressing for the withdrawal of criminal cases against the kar sevaks involved in the demolition in 1992, and involved in the ensuing violence. Not only that, it is also demanding that the kar sevaks be given government pensions and their names be listed in the temple that will eventually be built on the site of Babri Masjid! The Visva Hindu Parishad, not to be left behind, states that it will make similar claims in respect of 3000 other mosques. Whether the Supreme Court’s assurances that the Places of Worship Act imposes a non-derogable obligation towards enforcing India’s constitutional commitment to secularism will amount to anything in practice or will the judgment only serve as a shot in the arm for the Hindus, will depend in part, on the

Court's ability to ensure the proper enforcement of its judgment. More fundamentally, though, does this judgement actually strengthen or even sustain secularism at all?

30. Beyond this, is the question of actual implementation of the judgement. I am inclined to agree with Madhav Godbole, former Home Secretary in this regard. He asks whether giving five acres of alternate land to Muslims for constructing a mosque is the most appropriate or adequate compensation. He also asks, what happens to the psychological hurt caused to the Muslims by destroying this place of worship? In an ideal situation, he says, the Court should have asked the state and central governments to rebuild the mosque. Indeed, PV Narasimha Rao, the prime minister when the mosque was demolished, had announced this in Parliament, and later wanted it fulfilled. The Gujarat High Court, too, has ordered compensation for wherever religious buildings - mainly mosques - were damaged during the riots. Instead of providing a simpler solution, the court has complicated the implementation and enforcement process.

KASHMIR

31. The Supreme Court's orders on Kashmir represents a missed opportunity for the Court to come out strongly in favour of fundamental rights, and fulfil its role as the sentinel on the *qui vive*.

32. Three sets of petitions relating to Kashmir were filed before the Court.

The first related to the communication shutdown and Section 144 orders (prohibiting public gatherings) that were imposed on 05.08.2019. The second set related to the habeas corpus petitions that were filed against the illegal arrests and detentions of individuals, including minors, under the draconian Public Safety Act. The third set relates to the constitutional challenge to the government's decision to amend Article 370 of the Constitution and breaking up the State of Jammu & Kashmir into Union Territories.

33. In all three cases, the Court has failed to give a satisfactory resolution, even after six months. For the purpose of this speech, I want to primarily focus on the internet shutdown case (*Anuradha Bhasin*), which was finally decided in January. The Court's judgment is laudable in many respects – it directed the government to publish all orders, present, and future, authorising the suspension of the internet/landline services and prohibiting public gatherings. It rejected the government's argument that national security considerations precluded judicial review. It also gave constitutional protection to the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet. Though it did not go as far as to declare the right to access the internet a fundamental right.

Most importantly, the Court made it clear that an indefinite suspension of internet services is patently unconstitutional.

34. Unfortunately, despite these observations, the Supreme Court failed to actually decide the matter. The purported reason seems to be that it did not have all the orders in front of it, and the situation was changing on the ground daily. However, this reasoning seems tenuous, when we consider that a few sample shut down orders were placed before it (with detailed arguments being made about their unconstitutionality), and the Court could have easily directed the government to file the remaining orders. While the reliance on Lon Fuller's famous statement that "*there can be no greater legal monstrosity than a secret statute*" is praiseworthy, it did not result in any practical benefit, given that the government was effectively allowed to take advantage of its own wrong of not publishing all the orders or submitting it before the Supreme Court. After ruling that the suspension of communication services must adhere to the principles of necessity and proportionality, the Court failed to apply these principles to actually decide the legality of the communication shutdown in Kashmir. Instead, it directed the fresh publication of all orders, with the Review Committee reviewing all these orders. The reliance on Lord Diplock's aphorism '*you must not use a steam hammer to crack a nut, if a nutcracker would do*', was, at least for the people of Kashmir, meaningless.

35. Judicial review involves more than a mere declaration of the law. It requires the application of law to the facts at hand. And the facts, quite simply, are that for more than 150 days, and even today, the people of Kashmir are without a proper functioning internet. The impact of the communication shutdown has been severe. It has affected medical supplies, attendance in school, tourism, and resulted in a loss of business, of approximately Rs 15,000 crore between August 05 and December 05 2019, as per the Kashmir Chamber of Commerce and Industry. The loss of jobs in the handicrafts industry is said to be 50,000 and in the hospitality industry, is around 10,000. As per the data of the J&K Tourism Department, there is a drop of 86% of tourists visiting the state. People, ordinary citizens, have been prevented from performing the simplest of tasks that we take for granted, whether it was filing GST tax returns, upgrading driving licenses, or applying for college admissions, and had to rely on the “Internet Express”, as reported by the Quint – the train from Srinagar to a town called Banihal, where broadband facilities were functioning – to attempt to finish these tasks. This is apart from the fear that gripped the Valley, and the emotional and mental stress caused by not being able to get in touch with your loved ones.

36. To these people, the Supreme Court’s judgment in *Anuradha Bhasin* has offered scant relief. We now have a situation where the government has

“whitelisted” various websites and permitted the resumption of 2G services, although empirical analysis has shown that of the 301 whitelisted websites and services, only 126 were usable to some degree. Social media websites and peer to peer communication apps are still prohibited. Deep questions remain about whether whitelisting is proportionate, and the least restrictive alternative available with the government, and the legality of these orders will probably have to be addressed by the High Court of Jammu & Kashmir in the foreseeable future.

37. Meanwhile, Kashmir continues to face the longest intentional internet shut down ever recorded in a democratic country. As Aniket Aga and Chitrangada Choudhary note, *“we seem to not care that in ‘integrating’ a people via an armed siege, in silencing their voices and dismissing their pain, we are also abrogating our own humanity.”*

38. Unfortunately, the lack of an effective remedy, and the trend of judicial evasion, is also visible in the Court’s handling of other cases dealing with Kashmir. Dr. Sameer Kaul, had filed a PIL before the Supreme Court seeking restoration of internet facilities in hospitals and other medical establishments in Jammu and Kashmir, highlighting how the internet shut down was resulting in delays in accessing medical reports, delays in surgical and other medical procedures, and difficulties in accessing life

saving drugs and baby food items that were mostly available online. He was told by the Supreme Court to approach the High Court to avail the appropriate legal remedy.

39. Similarly, another petition had been moved on behalf of the detained CPI(M) leader, Md. Yusuf Tarigami challenging his illegal detention. The Supreme Court permitted Sitaram Yechury to visit his colleague, Mr. Tarigami, *only* on the condition that he file an affidavit on his return and that he not engage in any political activity during the course of his visit. Subsequently, while allowing Tarigami to visit Delhi to avail of medical treatment, the Supreme Court held that the challenge to his allegedly illegal detention was not urgent, and would come up in due course. The directions by the Court are surprising considering that a *habeas corpus* petition is meant to decide the legality of detention, and are not an occasion for the Court to impose conditions and place restrictions on the free movement to Kashmir. We must remember that there was no prohibition in place against visiting Kashmir, and the Court's order had the effect of putting in place such restrictions. In doing so, the Court seemed even more executive minded than the Executive itself.

40. Even the PIL against the alleged reported illegal detention of juveniles and police excesses in dealing with juveniles in the context of the aftermath of the Article 370 decision in Jammu & Kashmir was disposed

off on the basis of the report of the Juvenile Justice Committee of the High Court of Jammu & Kashmir, despite media reports to the contrary. The Court directed that if there was any case of illegal detention, the Petitioners were at liberty to approach the appropriate legal forum (namely the High Court) for redressal of their grievances.

41. These cases represent instances where, despite the urgency of the matter and the increase in the sanctioned strength of the Supreme Court, it has failed to decide these matters expeditiously. Instead it has passed the buck to the High Court, which has reportedly received over 250 habeas corpus appeals since August 5, even though it is functioning with half its sanctioned strength of 17 judges. As the Senior Advocates, Raju Ramachandran and Chander Uday Singh have pertinently asked, *“As the Court turns 70 in a few months, is the sentinel sufficiently alert, or is it in danger of losing the plot?”*

DRIFTING TOWARDS AN EXECUTIVE COURT

42. Moving on, several orders of the Supreme Court, including some orders in the Kashmir matter, suggest that the role of the Supreme Court as a counter-majoritarian institution, that is, as one that seeks to keep majoritarian impulses in check, is diminishing. On the other hand, as suggested by constitutional scholar Gautam Bhatia, the Court seems to

be slowly taking on attributes of the executive itself. It seems to be drifting from a rights' court to an executive court, as Bhatia points out, behaving in a way that is indistinguishable from the government, often issuing important policy decisions through its judgements, prioritising cases in specific - and sometimes worrisome - ways, and undertaking actions that would ordinarily be considered the domain of the government.

NRC

43. The most obvious example of this was the preparation of the National Register of Citizens, or the NRC. The NRC was intended to tackle concerns of landlessness, migration and cultural issues in Assam. The Supreme Court had already, years ago, described the illegal immigration happening in Assam by Bangladeshi muslims as an “external aggression” and an “invasion” of India. The Supreme Court decided to ask the persons claiming citizenship of India to prove their status, shifting the burden of proof away from requiring the state to show that that person was a foreigner. As it turns out, this migration theory has been proven to be completely incorrect. Out of the 1.9 million identified as foreigners, a majority of 1.2 are Hindus!

44. Inarguably, this was an administrative exercise, which the executive and the bureaucracy ought to have been responsible for. Instead, we had a

process that was “overseen” by the Supreme Court, and primarily under Chief Justice Gogoi, although many would argue that the Court “oversaw” it less, and “controlled” it more. As a result of this, we were faced with a situation where any concerns with the NRC became impossible to challenge judicially, for the judiciary itself was conducting the process!

45. The burden that has been caused to millions of people as a result of the NRC process is immense, and I can vouch for this personally based on my experience as part of the Peoples’ Tribunal that studied some of the cases of those involved. These are mostly poor and illiterate people who are being made to prove that they are Indian citizens, based on documents such as of birth, schooling and land-ownership. These documents are not easy to find or put together. Even if they are put together, they are rejected for issues with the English-language spelling of Bengali names, or in ages and dates of birth.

SEALED COVERS

46. And what may be travesty of the worst order, perhaps, is the Court’s new found attraction for sealed covers. Secrecy can - in limited circumstances - be justified by the executive, but the distinguishing feature of a judicial institution is transparency, for only then, can the institution assure the people that it is giving everyone a fair and equal chance to be heard. This

has happened far too often to be brushed aside as a mere idiosyncrasy of one particular judge, or a bench. It has happened in the NRC case, the Rafale case, the CBI chief's case, and the electoral bonds case, to name but a few. By shoving documents and facts that otherwise ought to be made public into sealed envelopes, the Court is signalling that it prefers the work ethic of the executive, believing truly that such secrecy is essential to deliver justice.

PRIORITISATION OF CASES

47. Another instance is the court's worrisome practice when it comes to the prioritisation of cases. The Court found it had no time to deal with the many civil rights- related cases that were lying before it pertaining to the situation in Kashmir. Mr. Gautam Bhatia tells us about the case pertaining to electoral bonds. Electoral bonds allow private individuals and corporate entities to make donations to political parties. Reports suggest that over 6000 crore rupees have been collected by parties under this scheme, the majority by the ruling establishment. The Supreme Court refused to stay the issuance of such bonds, and instead asked for details of the contributors to be submitted in a sealed cover, which it would assess in due course. But that assessment never came, and many elections - central and state - have happened since then. Inaction also sends out powerful signals, as we can see in this case. This inaction also

spoke louder than words when the Court found it had no time to deal with the many civil rights- related cases that were lying before it. In the case of the CAA, too, the Chief Justice of India first says petitions will be heard only after people stop violence, as though good behaviour were a condition precedent for seeking protection of rights. Scores of petitions were filed in the month of December 2019. The whole country was polarised, and there was even violence perpetrated against peaceful protesters by state authorities themselves. In this scenario, the Supreme Court proceeds to push the matter by four weeks, instead of commencing hearings immediately. This is deeply disappointing, to say the least.

CONCLUSION

48.As I was putting this talk together, I realised that even if I was critical of certain decisions of the Supreme Court, the fact remains that there is a high degree of “constitutional faith” in India today. Prof Baxi uses this phrase “constitutional faith” to describe the belief in society that the judicial process is key to anchoring India back onto the path of democracy, or the “redemocratization of democratic polity”, as he puts it. I agree with him. As a people, I think we still believe that one of the few things to be proud of in the Indian democratic setup is the free and fair judicial process that we are promised through the Constitution, which

keeps the executive and the legislature in check, be they at the centre or the state. The institution that is the judiciary is what we always turn to whenever the state abuses its power, or our fundamental freedoms are threatened. We truly believe that the courts can be our saviour.

49. Just playing saviour, though, is rarely enough. The value of a judiciary is measured by its fidelity to the constitutional scheme that birthed it. When George Grote used the term “constitutional morality” in his study of Athenian democracy titled, *A History of Greece*, he was referring to the commitment to the processes and structures of the constitution, as well as a commitment to freedom, embodied in things such as free speech, accountability, and transparency. This resonated with Ambedkar too, when he recognised the role constitutional morality had played in the working of the Athenian democracy. But he also recognised that constitutional morality had to be cultivated, and it did not merely come into existence because the Constitution was written in a certain way, and that constitutional *order* was always vulnerable and at risk.

50. Our Supreme Court has used the phrase constitutional morality several times in its judgements, particularly in recent years. But instead of pointing outwards, I think the Court should be self-reflective, and should ask whether the institution itself is loyal to the spirit of constitutionalism, to this idea of constitutional morality? Equally, I believe it is for the

Supreme Court, as the custodian of the Constitution and the ultimate protector of our fundamental rights, to decide whether or not it deserves the constitutional faith that the people of India repose in it, and whether or not it lives up to those expectations. The right answers will lead to the Supreme Court retaining its status as one of the world's powerful democratic institutions. As an eternal optimist, I believe the Supreme Court of India will recognise the missteps it has taken, and correct course sooner than later.

51.Thank you.
