

CONSTITUTIONALISM, SOCIAL JUSTICE AND BLACK ECONOMY

(JUSTICE DESAI ENDOWMENT LECTURE)

BY

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At the very outset, let me express my gratitude for the organisers of this memorial lecture in Honour of late Shri Justice Desai, former Judge of the High Court of Karnataka and Vigilance Commissioner of the State of Karnataka. While I did not have the honour of interacting personally with Justice Desai, and I consequently believe I am poorer on account of that, I believe there is a personal connect, which I will explain in a short while. However, I have had the occasion to come across the work of Justice Desai, both as a lawyer and as a judge, and his scholarship and judicial wisdom always left me with a sense of admiration for him as both a man and a judge. Ultimately, as lawyers or as judges, we seek to find meaning of justice and the finer qualities of human beings, as individuals and as members of human collectives. Justice Desai's work clearly reflects such a striving. His reports on various commissions he has chaired, from the Mooly to illicit Hooch cases, reflects his keen ability to distil evidence and make the right and judicious inferences from it. And that too without succumbing to the pressure of public opinion and public outcry. Justice is indeed a matter of refined interrogation of evidence, and of ensuring that the State always upholds the majesty of the law and not the baying of the mob. Indeed it is an honour to be asked to speak at an event organized in the memory of such a judge.

But I sense another connect with Justice Desai, at a deeper level. This is on account of his humble beginnings. Born in Ketagriri Village, in the hinterlands of Bagalokot District, Justice Desai seemed to have also brought with him the innate humility, a sense of interdependence among people, and an intuitive sense of right and wrong that an agrarian background provides. I was also born and raised in a similar hardscrabble village of Ranga Reddy District, in your neighbouring state of Telangana, prone to frequent droughts, and where people had little and yet developed a keen sense of community, and inter personal empathy. Such a background seems to make people intuitively appreciate the need to temper the sword of the law with softer, but in the long run more productive, edge of humanism. Whenever I read Justice Desai's works, that quality always came through and strengthened similar inclinations in me. Bagalkot is the cradle of an ancient civilization, and is marked by the remnants of incomparable aesthetics of that civilization. From the cave shrines of Badami to the sandstone masonry temples of Aihole and Pattadakal, Bagalkot stands as testimony to a syncretic culture, of cohabitation in peace of many peoples of many faiths without the harshness of the jingoistic and monotonic chest thumping that is increasingly being advocated as the sole platform for realization of national ideals. Justice Desai represented those finer qualities of the ancient civilization of Bagalkot. And we in the judiciary were all made better by his life of law and the civilizational ethos he brought to bear in his professional life.

To his family members, I must express my gratitude for sharing Justice Desai with the field of law – which is a very jealous mistress. Families of dedicated lawyers are known to often chaff and grumble that the profession takes over lives and leaves little for the family. Let me assure them that their sacrifices have made the profession better. And the lives of many thousands of citizens of India better. Thank you for your forbearance during the life of Justice Desai and for helping organizing his memorial lectures.

There is yet another reason as to why I must thank the organizers. As I have repeatedly maintained when I was a judge and continue to do so as a common citizen after demitting office, it is always an honour to be asked to deliver lectures at platforms that further reasoned and reasonable debate and public discourse. In the theatre of democracy, and even as spaces for reasoned and reasonable debates shrink under the onslaught of politically and culturally organized gangs and when most major media outlets seem nothing more than cheap mouthpieces for this or the other political party, such events are of vital importance. And they cast a heavy burden on the organizers, the speakers as well as the audience. This would be so, because over and above any substantive discussions we might have, the fact that discussions are being kept alive should be viewed as a willingness to shoulder a civic responsibility. It is imperative that in a constitutional democracy, the freedom and the fearlessness to speak, appreciate, analyze and criticise the powers that be are both sustained and nurtured. Hence it is heartening to see the Karnataka State Law University, its Vice Chancellor, faculty and the students are taking on such responsibilities with vigour. And I thank you all, for doing that.

I have strived to be a humble servant of our Constitution and the values that it seeks to promote and instantiate in our social-economic and political theatres of individual and collective action. The contributions of my seniors in this profession, such as Justice Desai, and the fervour of youngsters has helped me remain that humble servant. So my acceptance of this invitation is an expression of that humility.

The organizers have asked me to speak about the constitutional implications of the Black Economy. It is with some unease that I agreed to speak on this topic. That is so because of the fact that I, as a judge of the Supreme Court of India, authored what has come to be known as the “Black Money Case”. There are certain traditions and norms that guide us as judges – both when we serve and after demitting office. They place restraints on us as to how and in what manner may we speak about issues that we had formerly delivered an opinion on. One of the primary concerns is about not attempting to further add any gloss to the decision itself, for: (a) the decision was of the Supreme Court, and not a personal one; and (b) it is for the Supreme Court (i.e., other judges and benches) to interpret that opinion. The judgement should speak for itself. So, the care that one needs to exercise on that count will substantially restrict the range of issues I would be speaking on.

Secondly, the topic itself covers a very, very vast field. Hence, in the course of 30-40 minutes one could at best only hope to paint a hazy picture in the broadest of brush strokes. Furthermore, the topic also traverses many areas that could be deemed to be legitimately controversial. And many more areas that maybe needlessly made controversial. These limitations, of course cannot be treated as fatal to our project of furthering reasoned and reasonable public discourse. If my lecture today can fuel further debate and disseminate a more nuanced, reasoned and reasonable debate about the issues that emerge under the topic on hand, I believe it would have served my responsibility as a citizen beholden to the Constitution of India.

The topic for today's lecture is **Constitutionalism, Social Justice and Black Money**. As I said earlier, the area is very vast – hence I will have to restrict myself to broadest of brush strokes of a small set of issues to highlight the nature of constitutional debate, and the balance that one needs to strike to achieve the values of modern constitutionalism. Yet, towards the ending I will argue that not being able to propose a definitive end result, ex ante as it were, does not imply that the project of Indian constitutionalism is itself flawed. Rather, it is a reflection of the fact that, while the specific consequences are not always in sight, an anxious fealty to the larger value premises of the Constitution necessarily need to guide us.

Let me start with what ought to be an unexceptional premise, but which unfortunately we seem to have lost along the way. That fealty to the Constitutional values is required of all the stakeholders and not just the Constitutional courts alone. While the Courts are needed to resolve a genuine dispute of law, or to find minimal action as being normatively needed by the State when abdication of responsibility towards a citizen or a group of citizens is of such magnitude and of an egregious nature, the Constitution places an obligation on all the major players to ensure that constitutional values are adhered to.

This point needs to be made explicit, because of late there seems to be a tendency to assume that as long as a law, and the action by the state that law mandates or gives rise to have not been examined by a constitutional court and its vires or constitutionality not ascertained the other stakeholders have no responsibility to assess the legality of their actions on the touchstone of Constitutional values. I was aghast recently, when I heard on television one prominent politician telling the anchor of a TV channel that he does not want to hear about how the decision by his party could be contrary to the Constitutional provisions. At first the politician blustered on about the law not being contrary to the Constitution, and when he realized that he was actually wrong he went on to claim that all of that does not matter as the people will support their move. The claim implicitly was that popular support itself is sufficient to make any kind of action lawful and moral. While we could all be spouting about Kenneth Arrow's insight, that barring a referendum on each issue, no one can ever know whether a majority/plurality of the populace actually supported one amongst the many issues on which the individuals votes get cast on, there is a far simpler and preliminary reason to be aghast: it seems many of the powers that be have begun to assume that we are a majoritarian democracy and not a constitutional democracy.

The collapse of the distinction between the two, and incidence of such transgressions in an increasing number of arenas and assertions –rights of the minorities, re-subjugation of Dalits, safety of women, and high arenas of executive and even legislative action –point to the limits of constitutionalism. Yet, that only further underlines the importance of constitutionalism to protect the citizens from the vagaries and rapacity of the elites and the powers that dance not to the benefit of all the people, but to the interests of the few.

Modern constitutionalism is a product of a long historical debate of how to restrain collective power vested in a small group of people – restraining them against the collectives of people as a whole or against particular groups of them. The second facet of the debates, about vesting of collective power in rulers or institutional arrangements, revolves around what the scope of the work of the State needs to be. As we look at historical developments, we should not expect that when an idea, especially regarding liberty or justice, is first formulated it would be visualized as being universal in coverage. Who were expected to be covered by the permissive structure of a liberty or enjoy the benefit of the uplifting blanket of justice would depend on who were thought of as lesser or greater, who was deemed to be worthy or unworthy, who was deemed to be an insider or an outsider and who was deemed to be a freeman or a slave – these were all matters of intense contestation, and the scope of coverage expanded over long spans of time covering many centuries. However, a progressive idea applicable to some necessarily raises questions about its non-applicability in the case of others. The intrinsic nature of liberties and principles of justice is that they are often founded on a core morality that speaks to essential aspects of humanity of all. The strength of a particular normative formulation would then depend on the robustness of its logic regarding the extent of its applicability. Extension of rights and principles of justice to groups hitherto excluded have occurred for multiple reasons, including but not limited to: (1) diffusion and spread of ideas, along with their adaptation; (2) spread on account of dominant cultures, both at the international level and also at the level of individual nations, whether involving colonialism or not; (3) adaptation of values and normative structures as a part of modernization of state and society; (4) struggles, both peaceful and violent, for inclusion by hitherto excluded groups, or by entire populations seeking new rights or measures of justice, etc.

Thus, one of the primordial modes of characterizing constitutionalism would be the degree to which the State has been enabled and/or achieved extension of equal rights: (a) to periodically vote in or vote out governments, beginning with restricted franchise to a model of universal adult franchise, along with a vertically and a horizontally divided branches of government; (b) equality before the law and equal (and effective) protections of the law (including but not limited to protection from economic forces, natural forces and foreseeing the potential risks and protecting the populace from them) and benefits of armed forces – both civil and armed; (c) the nature and kinds of freedoms conceived, their distributions across groups within the jurisdiction; (d) the nature of fundamental rights assured or guaranteed, and coverage across the entire populace and/or groups; and (e) nature and principles of justice that are conceived and extended to the populace, and distributed across groups. But any which way we understand it, because of the relentless pressure from populaces in each nation for extension of values implicit in each of the organizing categories as listed by me above, all of them or some combinations of them, central normative theme of the debates in and about constitutionalism, and its progress, has been around the question of equality - equality conceived as both procedural and substantive., in actuality and as an ontological assumption and a normative imperative.

What level and kind of equality, along with liberties and policies for substantive justice, do constitutions of modern democracies envisage in the modern world? It would be useful to begin this analysis from a conception of the state as a “nightwatchman”, providing defence and possibly policing coupled with a legal system to protect property and enforce contracts. At the other end of the spectrum are collectivized communist models, with alleged intra-party democracy.¹

The first model is often associated with Friedrich Hayek². It is unfortunate that more often than not, our homegrown neo-liberal elites chant Hayek’s name to propose a complete evisceration of any and all roles of the State in the market. While Hayek’s orientation was generally informed by a suspicion of any form of coercive regulation of markets by the State, he recognized that in addition to the role of a night watchman, the State would be needed to regulate activities that destroy nature (protection of environment), activities that will endanger health (as for instance spurious and unverified drugs, or broadly speaking against fraud in markets and in favour of laws against deception) and efforts to provide a security net against hunger and bad health (as minimal charity in societies that have enough or can afford). The obvious problems associated with this model would be about what happens when there are no substantive improvements in the lives of those already poor, and competing with those with much. Could such a state of affair undergird a stable social and political structure? Why couldn’t the elites capture governmental machinery, in the name of greater liberties for themselves, eliminate any and all forms of regulation and suppress even the political freedoms of the poor? Who is to prevent the destruction of nature, and engendering of all sorts of externalities that destroy the political freedoms and liberties – including right to life – of the many? And if all that matters are the choices made by individuals – as those are to be considered to be the sole measure of goodness, then if the poor and the ones who have lost form a collective to topple the state controlled by elite, why shouldn’t such an event also be treated as a natural expression of choice? For the youngsters here, I would recommend the works G.A. Cohen, particularly his “On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy”, and “Rescuing Justice and Equality” to read and absorb the debates about what ought to be the purpose of the State.

The second model is akin to the collectivized communist models in which groups of bureaucrats decide not just what gets produced but also how it gets produced, prescription of what is acceptable culture and is not, and distribution not according to what one “deserves” but according to what one needs (also to be determined by a bureaucrat). The obvious problems associated with this would about the destruction of freedoms and liberties, as individuals and being subjected to the whims and caprice of those deciding on behalf of the collective. Because vast powers are vested in small numbers of experts, and the coercive machinery of the State is in their hands, they could take wrong decisions (even if intentions were genuine). And this could happen, even if we assume that they are genuinely concerned about the welfare of the populace, because they do not take into account all the information available, and being used to centralized decision making process in which

¹ I am deliberately avoiding the “anarcho-capitalist” model, because we have seen no modern society built on alleged principles which advocate such complete absence of the State and any kind of collective action that even protection against child kidnapping is seen as detrimental to individual liberty.

² Friedrich Hayek, “Road to Serfdom” and “The Constitution of Liberty”.

only small coteries are permitted they do not have any feedback loops of criticism and helpful critique. Moreover, the temptation to bureaucratize all decisions by inflexible rules is an all too tempting factor for the bureaucrat. For instance, it is speculated that China could have industrialized in the 12th century itself, but the Chinese bureaucrats, comprised of the upper caste/upper class elites, decided that they knew everything that was all there to know, and prescribed specific ideals beyond which there was nothing to seek. And, if sought, the seeker to be punished. And China declined to become a colony where a vast majority of its people were made to be addicted to the opium being sent there by the British. For the students here, I would recommend that they also read Frank Dikotter's "The Tragedy of Liberation" that describes the horrific consequences, in which five million civilians were driven to their deaths by Mao and his unilateral decision to drag scores of millions of peasants away from agriculture to cottage industry. It is such experiences in governance that have informed modern constitutionalism to always be wary of the one policy as being the solution for all evils.

For India, neither of these models in their purer form were deemed to be ideal for us. At the time of independence, in our Constituent Assembly debates, and in the early years of our Republic there was a significant debate amongst our founding fathers. It was about whether we would choose to adopt an evolutionary path to social justice, in which progressively we would eliminate conditions that kept us poor and living in a socially unjust society. The other option explored was the revolutionary path, in which all property and wealth would be taken over by the State or a more egalitarian structure be established through a massive redistribution of resources. The violence implicit in the latter options did not appeal to our founding fathers. And this was not just on account of some inherent incapacity for violence, as some chest thumping nationalists seem to think today, but because history seemed to support the idea that violence for equality only ends up promoting one set of new elites in the place of the old.

A glance at what India was emerging out of, and the problems it confronted at the time of independence and the framing of the Constitution would underline the necessity of the structure carved out by the Constitutional pledges and mandate. For nearly fifty years prior to Independence, India's GDP had grown at less than 1% per annum, and in no year in that period did it exceed 1%. In the decade immediately preceding 1947, India's GDP grew at -3.5% per annum. India's economic surplus had been drained out by the imperial forces, and an essentially feudal structure implied that whatever little surplus was being generated was being enjoyed mostly by the indolent few. We slipped from the second largest economy, with a global product share of over 15% to less than 1% under the British rule. Our ancient crafts, and village industries were in shambles. A huge numbers of our artisans and skilled labourers were transformed into rural labourers, unskilled and producing opium.³

³ Roy, Tirthankar: Economic History and Modern India, Redefining the Link. ([Journal of Economic Perspectives](#) 16(3):109-130 · February 2002)

Add to the above, our own problems that have plagued our societies for centuries. Of casteism, that divided the society and imposed horrific hardships on the lowered castes, of rampant illiteracy and ignorance, again largely due to casteist restrictions on knowledge acquisition, and absolute poverty rates were well over 75%. Of communalism that divided us on religious basis. From middle of 1800s India faced a succession of famines – one more devastating than the other, one every 7-8 years. Some were large enough to alter the demographic course itself and none which killed fewer than a few millions. Our per capita income was, in inflation adjusted 1973 rupee terms, Rs.7.20 per annum, while poverty ceiling was estimated at Rs 23 per annum! Many from our elite segments had willingly collaborated with the colonialists in denuding this country, for the sake of continuance of their domination. We were enslaved as a nation by a foreign power, and we had also managed to enslave and/or deprive most of our populace to serve a few of us.

The above is of course a rather quick and a very rough image of what India was reduced to, and what most Indians were subject to at the time of independence. Whenever I listen to or read Panditji's speech after he took oath as independent India's first Prime Minister, and as the first sentence rolls through my mind, "Long years ago, we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially", I am reminded that our Constitution is a continuing rededication to the task of liberating our people from the effects of not just the colonial past, but also the traits in our culture that hierarchizes and deprives. The words of Seamus Heaney, of course written well after India's independence, and written in the context of dismantling of apartheid in South Africa, sums up the moral and emotional foundations for a constitutional project of rebuilding a nation of pluralities into a just nation state:

*"History says, Don't hope
On this side of the grave,
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up
And hope and history rhyme."⁴*

In order to ensure that hope of justice is translated into reality, so that history begins recording the righting of wrongs and instantiation of a just society, we also need to be ever conscious of the risk of core national purposes being side-tracked, and the nation-state's endeavours subverted for the benefit of the few. In this regard we necessarily need to pay heed to Dr. Ambedkar's warning, at the ratification of the Constitution, that though we have instantiated a democracy based on notions of political equality, the continuation of systemic, deep and widespread inequalities, and unconscionable deprivation and oppression as a consequent result of graded inequalities in the social and economic contexts, will likely destroy the foundations of democracy. His prognosis was that the contradictions, if

⁴ Heaney, Seamus: From the Cure at Troy, http://www.pbs.org/newshour/bb/entertainment-july-dec98-pinsky_10-29/

allowed to persist for long, will destroy the project of establishing, sustaining and nurturing a constitutional democracy in which social justice in all walks of life would be established.

It pays to cite extensively from that speech, because I believe Dr. Ambedkar's understanding of the tension between political economies that guarantee only empty political freedoms and the demands for social justice was one of the finest expositions in the annals of scholarship in this area. He said:

“On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again. This is the second thought that comes to my mind and makes me as anxious as the first.

It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. A study of the Buddhist Bhikshu Sanghas discloses that not only there were Parliaments-for the Sanghas were nothing but Parliaments – but the Sanghas knew and observed all the rules of Parliamentary Procedure known to modern times. They had rules regarding seating arrangements, rules regarding Motions, Resolutions, Quorum, Whip, Counting of Votes, Voting by Ballot, Censure Motion, Regularization, Res Judicata, etc. Although these rules of Parliamentary Procedure were applied by the Buddha to the meetings of the Sanghas, he must have borrowed them from the rules of the Political Assemblies functioning in the country in his time.

This democratic system India lost. Will she lose it a second time? I do not know. But it is quite possible in a country like India – where democracy from its long disuse must be regarded as something quite new – there is danger of democracy giving place to dictatorship. It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater.

*If we wish to maintain democracy not merely in form, but also in fact, what must we do? **The first thing in my judgement we must do is to hold fast to constitutional methods of achieving our social and economic objectives.** It means we must abandon*

the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.

The second thing we must do is to observe the caution** which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, **not “to lay their liberties at the feet of even a great man, or to trust him with power which enable him to subvert their institutions”**. There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O’Connell, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. **This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

***The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well.** Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the*

few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality by which we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.

What the above meant, as India emerged after centuries of colonial oppression, was that the State necessarily had to take a lead role in building a democratic polity and an executive apparatus that would ensure the rule of law, and also undertake the affirmative obligation of ensuring that at least some measure of resources are diverted for uplifting the people from the vicious cycle of ignorance, poverty and exploitation that they were stuck in. They needed to be protected from potential plunderers and exploiters within, and also invest in building up their capacities so that the masses could themselves be given the skills, resources and space to be able to use the machinery of the state in protecting their fundamental rights. And it needed to be done urgently, and it is this urgency that Dr. Ambedkar spoke so eloquently of when he talked about the dangers of the democratic experiment failing if the situation of graded inequality in economic and social spheres continued.

So, how did we do? How did we construct our tryst with destiny?

As a political democracy, we have certainly thrived. So far. At the time of framing the Constitution, many respected scholars from across the Globe ridiculed the idea that democracy could take root here. Especially, because of illiteracy and poverty, it was assumed that universal adult franchise would be a failure. Yet, we must largely admit that it is the poor, and those who have little, particularly in the rural areas, who vote in large numbers. They are the true believers and saviours of

democracy in India. Yet, very little gets written about the fact that it is the poor voting in large numbers have repeatedly voted out of power autocrats powers, and corrupt and the inept regimes.

This was no mean accomplishment. After all, having a say in the political process and about who gets to hold the reins of the state is a key feature of being an equal citizen (at least at some level). It meant that they could exercise some measure of control over what is deemed to be the main purposes of the nation-state itself were, even if the realization of those goals were to be in some indeterminate distant future. Political freedom is itself a form of development, or rather one element of development, because it assures human beings an important measure/element of their human dignity.

However, when we come to evaluating how well we did, as a people and as a nation, in the social and economic sphere, we are immediately confronted with significant underachievements. Writing a bit over a decade ago, Amartya Sen in his book the Argumentative India assessed it as “measurable underachievement and not necessarily one of immeasurable failure” – a characteristically muted academic criticism. However, a decade later, in Uncertain Glory, a book he co-authored with Jean Dreze his tone had changed to one of urgency. We are an increasingly younger nation, and instead of hoping to reap the windfall gains of the demographic dividend we seem to be staring at the sand that drops ever so faster into the bottom half of the developmental hourglass. The question that ought to be uppermost in our minds is: are we racing against time, and staring at a potential demographic disaster? Because of non-investments into social and economic sector to substantially reduce the horrific graded inequality that Dr. Ambedkar speaks about.

One does not have to reel off pages and pages of statistics to figure out we haven't done too well. While the votaries of neo-liberal political economy gloat about the most significant reduction in levels of poverty level, they essentially mean that the number of people below the starvation level have come down significantly. That would be true. However, from the perspective of social justice, would we think of a person who has just escaped starvation level poverty as not poor. Take one parameter – would a person who is just above the absolute poverty line be in a position to demand and protect his core fundamental rights? For instance - not to be assaulted by a policeman on the street? By what ethical standards could we possibly gloat about how much we have reduced poverty if most of the populace cannot even begin to approach an authority, such as a court or for that matter even an elected politician, for redressal if an agent of the State chooses to grab a little from the meagre earnings of a street vendor?

The point I am making is that we ought not to be misled nor mislead ourselves into thinking that we have made giant strides towards realizing constitutional goals by achieving goals of lifting people out of poverty. We have made giant strides, it would seem, in how we can keep redefining poverty to ensure that figures seem better and better for us. On every front: education, health and health care, who bears the consequences of externalities such as pollution, violence (random and deliberately perpetrated)..... on every parameter that could be an indicia of Human Development we seem to be sorely lagging behind.

Our health indices are awful. Even though the average life span has gone up, we are sorely lagging behind on many key factors. We have the highest number of stunted children in the entire world. The impact of childhood nutritional deprivations on our populace is humongous, in terms of their overall health, their lifetime productivity, and yes even in terms of their cognitive and intellectual abilities. Barring the education that a few elite segments of the populace can afford, and most of the lower middle class may be able to afford only if they have staked all of their assets and leave nothing for the parents as they grow old, few can afford the world class primary education that is required to enable our children to truly revel in, explore and acquire knowledge along with abilities to discover or develop new knowledge. Education has been eloquently called the “cultural action for freedom” – freedom from the shackles of illiteracy and ignorance, and incapacity to think critically and grow up to be reasoning and reasonable citizens of the country and denizens of the world. Yet very few of our children receive such an education.

Black Money

One of the keys to achieving such objectives was to build appropriate state capacity. For this the State needed sufficient financial resources, which in turn would have depended on our investments in capital – both physical and social (which includes human resources as a subset) – and the systems we have to ensure that the amounts due to the State are actually received and spent on legitimate constitutional purposes. Most reasonable people would agree that we have failed significantly in this regard. While some part of the failure is on account of governmental wastage, leakages due to corruption, and wrong policy choices and program designs, a large part of the failure was on account of the State not receiving a significant portion of what is due to it as tax revenues, bulk of which is what is known in popular parlance as “black money”.

There are many different estimates about the size of the black economy and the magnitude of black money. Prof.Arun Kumar estimates the black economy in India to be around 62 percent of the GDP, which would, in 2016-2017 prices amount to Rs 93 lakh crore (USD1.4 trillion approximately). How large is that? To get a perspective Prof.Arun Kumar points out that it is much larger than the combined income generated by agriculture and industry. It is much larger than the combined spending of the central and all the state governments put together. Prof.Arun Kumar also estimates that the country's economy has been losing, on an average 5% growth from 1970s. He also estimates that if we hadn't seen such leakages our economy would have been seven times larger than the Rs 150 lakh crore GDP/annum economy we have at present. The loss to the Government's coffers, at the current rate of taxes is said to be to the tune of Rs 36 lakh crores/per annum, which means that after wiping out our fiscal deficit we would have had a surplus of Rs 30 lakh crores. Every year.⁵

According to C. Rammanohar Reddy, another scholar in this area, “the Government commissioned three studies from three independent organizations for the preparation of the 2012 White Paper. The results of those studies have not been made public, though media reports of the

⁵ Kumar, Arun: “Understanding the Black Economy and Black Money in India” (2017)

estimates of one of the studies place the black income in 2014 at as high as 75 percent..."⁶ Arun Kumar finds that the black economy has grown from 21 percent of the GDP in 1980 to as much as 62 percent of GDP in 2012. ⁷

A large black economy and huge stashes of black wealth in various forms would have a tremendous impact on how resources are distributed across the economy. Taxation is also expected to serve another purpose: redistribution of the benefits of social action and lessen the degree of inequality. Tax evasion, and illegal and undue rents from exploitation of natural resources or through operation of businesses, would necessarily reduce the efficacy of the tax system in achieving that goal. A little over two decades ago, Prof. Arun Kumar also estimated the numbers who controlled this black economy. According to him, it was mostly in the hands of the wealthiest 3% of the population. In his more recent book, he suggests that this number has not really changed much. In fact we would probably have to assess that the concentration has tightened considerably. In some recent reports it has been estimated that the wealthiest 1% of this country own nearly 58% to 60% of all the wealth of this country. In large part this increasing concentration of wealth in the hands of the few has been on account of the working of the black economy.

Obviously, the loss of tax revenues, insufficient realization of revenues from illegal exploitation of natural resources, and undue economic rents that are not properly accounted for by the avoidance of regulatory regimes implies that the State would have a lot less financial resources under its command. We have already noted as to what impact it may have had on our economy, in terms of its size. It has been estimated that it could have been about seven times bigger than what it is. This would mean that an argument can be advanced that, but for the black economy, the State could have also been realizing greater revenues to undertake programs that would push forward the goal of social justice at a faster pace. And we would have also had less to do in terms of numbers of our citizens we would be protecting from deprivations.

We need to firmly grasp that a black economy necessarily implies that the resources needed for building state capacities have been severely restricted. Even with respect to the numbers of police personnel we employ, and the training that is giving to them, has been adversely impacted on account of funds crunch. We simply have not invested enough in our legal system to be able to provide our citizens with speedy justice. And in many instances our capacity to project our strengths in the geo-strategic sphere has also been severely restricted by virtue of paucity of financial resources at our command.

Let us take note of the the text of just a few of the Directive Principles of State Policy, that are said to be foundational to governance and see what the impact of black economy has been on the State's primordial promises:

⁶ Reddy, C. Ramamanohar Reddy: Demonetisation and Black Money (2017)

⁷ Ibid, page 32.

Article 38(1) provides that “The State shall strive to promote the welfare of our people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.

Article 39(b) mandates that the State shall direct its policy towards securing.... “the ownership and control of the material resources of the community are so distributed as to sub-serve the common good”

Article 39(c) mandates that the State shall ensure “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment...”

Article 39(f) provides mandates that the State should seek to ensure “that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that children and youth are protected against exploitation and against moral and material abandonment.”

Article 41 provides that “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

Let me reiterate that I am only mentioning a few of the Directive Principles to provide us with a broad picture of important areas of human welfare that we have failed in.

Take Article 38(1), which mandates that the State shall undertake such steps as to ensure that all institutions of our national life are informed and guided by principles of complete justice – social, economic and political. Now consider the issues faced by our women, our female children and even our female fetuses. How horrific is the scale of injustice that is being perpetrated on a daily basis? How many millions of fetuses are aborted in India every year, primarily because of our preference for boys? How many new born female infants are being killed every year, again on account of preference for boys? Look at the horrendous sex ratios in our population. The shocking fact is that our sex ratio today is worse than what it was in the early 1900s. And then consider the incidence of sexual violence against our women. Every day, a new headline screams about one more horrific instance of rape, gorier than the previous one.

Obviously, the issue is on one plane also a matter of law and order – an institution that affects our national life. What are the resources we have been able to allocate to tackle these problems, given that they place at risk nearly 40% of our people? A few years ago there were promises made that every district would get a centre to handle the issues of battered and sexually assaulted women. Apart from providing shelter to victims for a few days, these centres were also to help the victims secure medical attention, get justice by interfacing with the police to ensure that action is quickly taken against perpetrators and the guilty brought to justice, and also undertaking locally contextualized programs to change the attitudes about women. Each of these centres were envisaged to be independent and to be developed at a cost of about Rs 10 to 11 crores. The promise was that these centres would be developed rapidly. However, it seems that powers that be have decided to pare down the program considerably, and while the development of the centres is still being pursued it is moving at a much slower pace than what the nature of the issue warrants. Obviously budgetary issues have a constraining impact. And then we have not really begun to bring to the table the resources that would be consonant with the urgency with which we should be treating female infanticide and feticide. An argument could be made that if the black economy had been curtailed, then people and policy makers would have been less lax in taking steps to combat such issues.

Take Articles 39(f) and 41. How do we expect poor children to grow in a healthy manner, and in conditions of freedom and dignity, if we do not invest in building good schools with proper facilities and well trained teachers? Especially in the rural areas? Article 41 talks about “undeserved want”. What can be more undeserved than deprivation of education to a child. Article 41 recognizes that we can undertake such activities only to the extent that the State has the economic capacity. However, the case here, with the size of the black economy and wealth being what they are, is that the State’s economic capacity is being undercut severely, and is being prevented from undertaking those activities that can secure a better future for our children

I have already observed how natural resources can be exploited in a manner that deprives the State of revenues. In fact many forms of illegal exploitation of natural resources lead to other problems, especially where they affect the lives of the locals adversely, Mining mafias have often spawned revolutionary counters thereby creating major threats to the welfare of the people of that area, and their fundamental rights. This in turn also imposes huge financial burden, among other things, upon the State in combating revolutionary activities and getting embroiled in a never ending saga of tussle with the local populace too. Article 39(b), which I read out a few minutes ago mandates that the State shall endeavour to ensure that ownership and control of material resources, such as natural resources, be vested in a manner that subserves the common interest. The operation of mining mafias, and other forms of illegal mining/extraction of natural resources generates huge amounts of black money and black wealth, attracting more people to such activities, so much so that it begins to appear like a vicious cycle. And the “common interest” that the Directive principles sought to protect are thrown by the wayside.

As pointed out earlier, Article 39(c) mandates that the State shall not allow the economy to function in such a manner that it leads to concentration of wealth. This principle has obviously been violated, as 58% to 60% of all national wealth is now held by the top 1% of our country. And black economy has contributed towards intensifying such concentration. This would have implications for our democracy as the 1% funds political parties, and in return get more opportunities to further corner nation's resources even more. The ordinary political freedoms then might just become inconvenient customs to be squashed when exercise of such freedoms is uncomfortable to the 1%.

In summum bonum we would have to categorically assert that to a significant extent we have not really adhered to the guiding principles of our Constitution and in fact a legitimate conclusion would be that we have actually abandoned the Directive Principles. It is almost as if we have read the Directive Principles out of the Constitution, an excision of the soul of the Constitution without any constitutional amendments. And that too, notwithstanding the fact that the judiciary used the text of the Directive Principles in fleshing out the content of Fundamental Rights in general, and Article 21 in particular, and mandating that the State shall fulfil at least some obligations.

How did this happen? The easy answer would be to suggest that if the Directive Principles had been judicially enforceable, fully, then litigation against the State would have compelled the politicians and the permanent establishment to pursue policies that would have hastened the achievement of the goals set forth in the Directive Principles. I would submit that would not only be an easy answer, but in fact an incorrect answer. The fallacy of such claims is easily demonstrable: the judiciary has, albeit not very consistently, read many of the Directive Principles of State Policy into the Fundamental Rights and issued orders from time to time. One famous one, and which is critical to any notion of social justice, was the declaration of right to education until the age of 14 as a fundamental right. It took the political dispensation 20 years to enact a statute to give that decision legislative legitimacy and I am sure most reasonable people would accept the fact that its implementation is shoddy at best. Even today. Twenty years ago, Justice B.P. Jeevan Reddy, in his pragmatic idealistic approach, posited that this would be a part of the minimal moral content of Article 21. Most analysts agree that implementation of the Right to Education laws are spotty at best. We are entering a world in which many people speculate that Artificial Intelligence is likely to be the next big revolution, and that it would make many or even most human skills obsolete. Only those who have developed the skills at much higher levels of artistic and cognitive skills could find themselves useful and fulfilling work. How will our children even attempt scaling such heights, if they are deprived of basic education? And we still have elites, who control almost all of the black money and nearly 58 to 60% of the nation's wealth, grumbling about how any attempts by the State to raise revenues to educate our masses, to get them to be barely functionally literate would mean economic disaster, and how their incentive structures to be "productive individuals" and their "animal spirits" would be dampened.

Over the past two and half decades, increasingly the discourse has been against the State undertaking any welfare and social justice programs even as subsidies after subsidies and tax breaks after tax breaks were being extended to the big players in the private sector. With the discourse increasingly turning neo-liberal, the attitude of powers was that they could turn a blind eye to the tax evasion issues, and also issues relating to realizing appropriate revenues from exploitation of natural resources.

Given the impact that black economy and black money has on the State capacity, and the extent to which the constitutional responsibility of ensuring social justice informs all walks of national life was compromised, I believe that it would be amoral, and socially and constitutionally irresponsible to suggest that tax collection regime, and the regime of allowing private players to exploit natural resources, both under and outside contracts and without the state realizing appropriate revenue from them, be allowed to continue in the same fashion.

Post the decision by the Supreme Court in ordering a SIT, because the Court felt that the State was not being sincere in its efforts to prevent illicit outflows of black money, and tackling black economy in general, it appears that the Gol has taken some steps to address the issue with greater urgency and focus. While ordering the SIT, the Supreme Court also cautioned the Government and the people of two things: (a) the first was that the issue was extremely complex, especially with regard to identifying and attempting to bring back black money from abroad; and (b) that the battle would be a long one, with hits and misses and hence requiring patience. In order to ensure that, in the long and hard road ahead, the enthusiasm of the Government does not flag, the Supreme Court converted a High Level Committee looking into the issues surrounding black money and black economy into a Special Investigation Team.

I would not like to go into a number of steps, and some may say even missteps, by the Gol to tackle this issue. That would make my lecture unnecessarily long. Yet, I suppose the thousand pound elephant in the room has to be touched upon – “Demonetisation.”

Let me start with a word of caution, after asserting a fact. Given the magnitude of currency withdrawn, and the numbers of people affected at one go, irrespective of whether we agree with the decision of the Gol on November 8, 2016 or not, we have to admit that it was a historic and an unprecedented move. It is not as if others had not spoken of demonetization as a means to combat the black economy. In recent years, Kenneth Rogoff, a professor of Economics at Harvard University, and the author of a book “the Curse of Cash” has been one of the strongest voices in favour of limiting or eliminating high denomination currency from circulation, permanently, as an effective means of combating criminal activities and tax evasion. In his interviews about demonetization decision in India, Professor Rogoff, taking on board the stated claims of Government of India, noted that the motivations seemed to be similar to the ones he advocated in his book the “Curse of Cash.” However, he also outlined two specific ways the demonetization in India was proceeding differently from what he had advocated – the first was that he had advocated that demonetization be done over a long period of time, some seven years, and that too with respect to large notes; and the second was that

he had recommended that large notes be done away with all together, whereas India was issuing an even bigger denomination note than the one demonetized.

From the available record, it seems that the White Paper of 2012 of the Government of India did contemplate the possibility of using demonetization as a means of combating the black economy. In particular the White Paper of the Government of India says:

“...given the primary importance of cash in relation to both the generation and use of black money, there is no alternative but to target cash transactions in a way that will not affect those complying with the law, while making it difficult for those intending to generate and utilise black money.”⁸

So at a broad level it would appear that an internal study of the Government had indicated that demonetization could be a legitimate policy tool, provided however it was effectuated in a manner that it would not affect those complying with the law. Given the secrecy, scale and speed with which the Government of India proceeded on November 8, 2016, we would have to conclude that the Government of India decided on a course of action that was not in consonance with what a study commissioned by it had recommended. This is so because demonetization affected not just or mostly the ones who were suspected as hoarding black wealth in cash, but also everyone else. And it affected the poor the most adversely.

The chief concern obviously was with the impact of demonetization on such a massive scale would be on the weaker segments of the population who essentially depended on cash transactions, both to earn a livelihood and to sustain themselves. As most of you are aware, there were many, many reports in the media, both print and electronic, that there was disruption in the lives of the people at a massive scale and that suffering was also wide and intense. There have been many reports of entire industries in certain regions having to shut shop, and many economists have opined that the negative impact from demonetization and the time taken to inject cash back into the system in new notes, would be extensive and deep.

My own impressions are that ordinary citizens have suffered a lot more than the better off, the salaried classes and the rich. Whatever our own estimates may be as to the extent of black wealth stored in cash, when demonetization was announced, surely we would have to agree that the largest numbers feeling the pinch were the ones least likely to have black money/ black wealth. And it is my belief that any policy decision that seems to affect the poor the most, and especially on this scale and intensity needs to be subjected to intense analysis, prior to its implementation with regard to what elements went into the decision making process, with regard to the impact on the people during the implementation phase, and also after the process has been completed. In fact, we are not yet sure whether the process has really been completed even now, because we still keep hearing about cash shortages for days on end, in at least a few ATMs and banks.

⁸ White Paper 2012, Gol. P. 55, cited in Reddy, Ramamanochar C., supra note 4, page 62.

What the gains are, of course we will have to wait and see. The early indications are not very encouraging; however, we need to wait and see what follow on and collateral benefits there might be. However, the situation with the poor, or at least a large number that I have interacted with, is that they have suffered a lot but still believe that it may do good for the country. And many of them have consistently stated that even if they suffered more than the the ones with black wealth, it would still have been worth it. Because it sends a message that accumulation of black wealth is not acceptable to them. Dr. Y.V. Reddy argues that the decision by the Government is of questionable merit; he nevertheless finds that the more important message from the manner in which the poor have behaved may be that the people are unwilling to abide by the amoral conduct of the well to do and agents of the state with regard to the black economy.⁹

It is my belief that the manner in which then poor have taken on the burden of demonetization raises some very important moral questions about what is to happen next. I will try to raise a few, to give a sense of what has been engrossing me for the past three months or so:

- (1) Are there any attempts by the Government to assess as to the full extent of suffering and damage to the sectors and economic spheres in which the lives of the poor are most implicated? And the steps to be taken to make sure that the poor do get the succor and help to be made whole again rapidly?

That the poor have shown immense forbearance cannot be taken to mean that those of us who are better off, and the powers that be who have taken the policy decision are off the hook in being solicitous of their welfare. Nor does a victory in election absolve the ruling party of the responsibility of taking all the steps necessary to attempt ameliorating the continued negative impact on the poor. The message by the Government of India to the poor was that their suffering was in aid at reclaiming the soul of our country. To not truly reclaim that soul, in terms of the constitutional morality, would be a betrayal of the trust that the poor have placed, again, in the State, and those who control it. That should not and cannot be allowed to happen.

Is the Government of India doing everything possible on this front? I don't know. We need to ask, and it is imperative that the Government of India explain what is being done.

- (2) It has become clear that whatever gains we may reap, in terms of reducing the size of the black economy because of demonetization, there are many other segments of the population which hold and enjoy immense amounts of black wealth and who have not

⁹ Ibid, Foreword page xviii

been affected by demonetization. In fact, many reasonable people would probably say that demonetization, even if one were to assume it to be well intentioned, has not even really dented the real holders of black wealth. The battle of black economy now really needs to move to the big players in this.

India cannot afford to perpetuate the sense that crony capitalists, the big babus and the political operatives and parties looting this country have been allowed to get away scot free. The suffering that the poor have undergone and undergo everyday implies that the goal of social justice cannot be compromised.

Yet we hear about strange things. For instance the reported new law that sources of political funding need not be revealed. How do we even begin to conceive the nature of such a move to make political funding less transparent when it is widely acknowledged that political funding plays a key role in how the power of the people vested in elected representatives and the permanent establishment gets exercised in a manner that is detrimental to public interest? And that political funding is the fount of black economy? I am at a loss as to what I should say about the contradictions in public values and destruction of constitutional morality by such a step. Can such a cynical move be the grand gilt edging for our Constitution?

There are yet other questions that arise about maintenance of integrity of institutions and bodies of governance. The houses of parliament, the judiciary, the army, the RBI etc., are intricately implicated in a finely wrought fabric of governance by our Constitution. They cannot be compromised willy nilly. So we need to ask questions such as:

- (1) Were there consultations with a wider array of experts and/or heads of various institutions as to whether such a massive policy step ought to be taken, under what circumstances, and with what sort of preparatory steps being taken?
- (2) Given that a Government of India commissioned White Paper cautioned against inflicting a burden on those who abide by the law, in the course of demonetization exercise, the sheer scale of demonetization effected on November 8, 2016 implies that everyone was caught up in the maelstrom. Surely, the Government would not have been unaware that even the law abiding citizens, and especially the poor were also going to be hit. What are the reasons

and rationale by which the Government of India convinced itself that the warning in the White Paper need not be heeded?

From the perspective of constitutionalism, irrespective of whether the demonetization exercise turns out to be a roaring success or not, questions need to be asked about whether Indian constitutionalism ought to countenance such a mode of policy making and implementation. From all accounts, this was a big step, a big decision. With potentially humongous implications for the lives and welfare of the people of India. The questions then would have to be about whether such a decision ought to be taken without wide consultations, and obtaining the inputs of the widest range of experts? Constitutionalism implies a wariness of decision making by one person or even a small coterie of people surrounding the main power centers. This is so because the risk of failure, and catastrophic consequences goes up exponentially as the scale and complexity goes up, and the coverage extends to most of the populace. Moreover, once such decisions are accepted, they become a precedent. Modern constitutionalism is always worried about the exercise of unquestioned power by a tyrant unwilling to be stopped by the magnitude of negative consequences. We need to be worried about what exercise of power on this scale, and apparently without involving other institutions, would mean to make elected officials accountable to constitutional principles.

I think most of the answers to the questions I have raised above are covered by Babasaheb Ambedkar's speech at the ratification of the Constitution. He cautioned us that if we were to succeed as a constitutional democracy, we would need to do the following three things:

- (a) Forswear unconstitutional means of pressurizing the State to do something or not do something and hold fast to constitutional methods of achieving our social and economic objectives.
- (b) Not engage in such hero worship of the big man, or believe that one big man will solve all of our problems, that we end up suspending our faculties to see, observe, analyse, and critique the decisions being made by the big man.
- (c) Finally, never waver from the goal of instantiating social justice in all walks of life, and being particularly solicitous of the welfare and progress of the weakest among us, and reduce inequalities. And bring an urgency to our endeavours in pursuing the goals set forth in our constitution. If we do not genuinely do that, and show concrete results, the poor might stop believing in the promise of democracy. And that would be disastrous for our country.

The broad contours of responsibilities citizens, in how they should evaluate social and political action initiated by powers that be, as summarized by Dr. Ambedkar do not give us a specific road map. Obviously, generalizations at such a high level of abstraction necessarily imply that citizens have to think, question, debate, and seek answers. Such responsibilities are not easy to bear, and it might be very tempting into thinking that we should abandon them. Nothing could be more disastrous than that. If we were to do that, then surely the Constitution would fail, and as Dr. Ambedkar pointed out, the failure would not be because the Constitution is bad, but that man was evil.

I see many young faces in the audience. Most of you I believe are aspiring lawyers. On your shoulders would lie even greater burdens of ensuring the success of our Constitution. That is the bargain you struck when you elected to study law. Your profession cannot only be about making money, nor even just dabbling in ordinary law. Your training is meant to equip you with the tools necessary to interrogate the powers that be, and help our people shoulder their constitutional obligations. I am sure each one of you would take this nation forward, and help in delivering constitutional promises to our people, starting with the weakest amongst us first.

Thank you all.

Jai Hind.