

“CONSTITUTIONAL MORALITY – IS IT A DILEMMA FOR THE STATE, COURTS AND CITIZENS?”

1st D.V. Subba Rao Memorial Lecture
delivered on April 24, 2016

by

Shri Gopal Subramaniam

Senior Advocate Supreme Court and
former Solicitor General of India

**Centre for Policy Studies
&
Visakhapatnam Public Library
Visakhapatnam
May 2016**

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by Shri Gopal Subrahmanium April 24, 2016**



Shri Gopal Subrahmanium garlanding the portrait of
late Shri D.V. Subba Rao
from left Prof. R. Venkata Rao, Prof. A. Prasanna Kumar
and Dr. S. Vijaya Kumar



Felicitations to Shri Gopal Subrahmanium
by
Prof. A. Prasanna Kumar, Shri D.S. Varma,
Shri D.V.S.S. Somayajulu, Dr. S. Vijaya Kumar and Prof. R. Venkatarao

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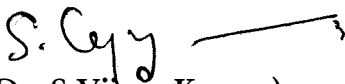
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PREFACE

Centre for Policy Studies and Visakhapatnam Public Library of which late Shri D.V.Subba Rao was the president, jointly organized a memorial lecture to pay homage to his memory. Shri D.V.S.S.Somayajulu thoughtfully invited Shri Gopal Subramaniam former Solicitor General and legal luminary, on behalf of Centre for Policy Studies and Visakhapatnam Public Library to deliver the memorial lecture in honour of his illustrious father. To our good fortune Shri Subramaniam graciously accepted the invitation and chose April 24 which happened to be the 85th jayanthi of late Shri D.V.Subba Rao. Such is the respect of Shri Subramaniam for late Shri Subba Rao that he refused to accept travel and hotel expenses. Prof. R.Venkata Rao, Vice Chancellor of National Law School of India University gladly accepted our invitation to be a guest of honour on the occasion and came all the way from Bengaluru despite heavy work to participate in the function.

Shri Subramaniam chose for his lecture the theme ‘*Constitutional morality: Is it a dilemma for state, courts and citizens?*’ The huge Dr.Y.V.S. Murthy auditorium on the Andhra University’s Engineering campus was packed to the full with quite a few standing to hear the renowned advocate who enthralled the audience with his oratory and profundity. For two hours everyone heard him with rapt attention and admiration. For a moment we felt how happy late Shri Subba Rao, himself an orator and lover of good speeches and intellectual meetings, would have felt if he were present on the occasion in the midst of so many

learned people being addressed by a brilliant advocate and eloquent speaker. Thanks to Shri Subramaniam who generously sent us the text of his lecture we are able to bring it out in a small book form. We thank Shri V. Seetaramaiah, the respected elder, retired Chartered Accountant and educationist for his valuable suggestions, Shri D.S.Varma for his silent yet solid support and Prof. R.Venkata Rao for his kind gesture. To Shri M.K.Kumar of Sathyam Offset Imprints and his able assistant Shri K.Prakash and to Shri B.Ramana of our office for bringing out this publication in a short time. We deem it an honour to present this thought-provoking and scholarly work by one of India's leading lights of the legal profession in memory of an iconic elder statesman of the City of Destiny.


(Dr. S. Vijaya Kumar)

Chairman
Visakhapatnam
Public Library


(A. Prasanna Kumar)

Director
Centre for Policy Studies



Address by Shri Gopal Subramaniam

LATE MR. D.V. SUBBA RAO AND HIS CONTRIBUTION TO THE SOCIETY

Durvasula Venkata Subba Rao, a great legal luminary, who was also former Visakhapatnam Mayor and president of Andhra Cricket Association left us at the age of 83.

Late Mr. Subba Rao had the rare achievement and distinction of being elected twice as Chairman of the Bar Council of India, and was perhaps the only lawyer who could reach to such zenith from a mofussil centre. Achieving renown in the field of law, Mr. Subba Rao, almost from the time of his enrolment in 1957 had been associated with the large and distinguished body of work from Vizag Steel Plant, Vishakapatnam Port Trust, Dredging Corporation of India, Hindustan Shipyard Limited and many others.

Being a man of great profundity, who participated in various diverse branches of law, the late Mr. Subba Rao was an avid participant in the field of arbitration, both international and domestic, and contributed to the development of a substantial body of law. Appearing in various international arbitrations before the International Chamber of Commerce, he also had the privilege of sitting with Lord Mustill as a Co-arbitrator. Mr. Subba Rao appeared before late Justice M. Hidayatullah, Late Justice Y. V. Chandrachud, and Justice P. N. Bhagawati (Former Chief Justices of India) not to mention the numerous Judges of Supreme Court in a number of domestic arbitrations as well.

The late Mr. Subba Rao was one of the rare men who contributed not only the legal field but made noteworthy contributions to academia, sports and social and cultural spheres. Coined an outstanding writer way back in 1975 by the Lions International Oak Brook, Illinois, USA, he authored many articles in different legal journals and edited Sanjiva Row's "Commentary On Advocates Act". He truly motivated the younger members of the Bar.

He was the only mayor selected out of 82 mayors in the country to represent India at the World Conference of Mayors held in Dakar, Senegal Africa, organized by UNICEF on "Mayors as defenders of Children". As Mayor of Vishakhapatnam from 1987 to 1992, he pursued the completion of Indira Gandhi Municipal Stadium which brought International Cricket to Vishakhapatnam. He also oversaw slum improvement works in as many as 171 Slums in the Municipal Corporation Area with the help of ODA Great Britain Assistance which brought out about measurable positive change in people's lives. He also personally supervised many other public works.

He was a founder of Lions Cancer Hospital, Vice-chairman of Sankar Eye Foundation, President of Gayatri Vidya Parishad and President of Public Library, Vishakhapatnam are some of the examples which establish his commitment to public life.

As Trustee of Visakha Music & Dance Academy, Late Mr. Subba Rao was also President of the Bharatiya Gana Sabha. He was a great connoisseur of music, culture, and art.

During his younger days, the Late Mr. Subba Rao was a great sports enthusiast, a source of joy that stayed close to his heart in his later years as well. He was President of the Andhra Cricket Association from 1991 to 2003 and in that capacity, a Member of the Board of Control for Cricket in India for 12 years. Anything said about the great Mr. Subba Rao would truly not suffice to convey the immense contributions he has made to every sphere he touched.

I met Late D.V. Subba Rao on many occasions. He was warm and affectionate. His smile would make me feel how well he knew me. I miss him deeply.

I am honoured to have been invited to deliver the First D.V. Subba Rao Memorial Lecture titled **“Constitutional Morality: Is it a Dilemma for State, Courts and Citizens?”**

CONSTITUTIONAL MORALITY: IS IT A DILEMMA FOR STATE, COURTS AND CITIZENS?

By

Gopal Subramaniam

Senior Advocate, Supreme Court of India
(former Solicitor General of India and former Chairman,
Bar Council of India)

“The greatest of all the means for ensuring the stability of constitutions – but one which is nowadays generally neglected – is the education of citizens in the spirit of their constitution. There is no profit in the best of laws, even when they are sanctioned by general civic consent, if the citizens are themselves have not been attuned by the force of habit and the influence of teaching, to the right constitutional temper”¹

- Aristotle

I. INTRODUCTION

1. Is Constitutional Morality a sentiment? Is the essence of the sentiment self-imposed restraint?² What is that indispensable condition for a Government? What does disregard of Constitutional Morality mean? Is that disregard constitutionally justiciable?
2. There can be no doubt that power has a tendency to at least corrupt one's motives or exalt one's individual motives in a different light. There would be impatience with constitutional restraints. One must also bear in mind that no institution can claim

infallibility. No institution can claim that it can do no wrong. No institution can claim that its verdict is to be taken as the voice of God. What happens when legislatures are inefficient?

What happens when legislators are corrupt? What happens when people have fundamental distrust of the representatives of the people in legislative bodies? Is constitutional supremacy at stake? What is the extent of the power of judicial review? Is there a democratic deficit in so far as the judiciary is concerned to be able to substitute its judgment both for the executive as well as for the legislature? If supreme power was vested in any one organ exclusively, undoubtedly, there would be chaos. It is inconceivable that if all the power including judicial power was vested in the legislature, then Parliament could well be a complete source of tyranny and people would be subject to complete helplessness. If the executive was tyrannical, then again there would be a total breakdown and annihilation of the human freedoms of individuals. If the judiciary were to be completely unbound by any form of self-restraint or adherence to the letter and spirit of the Constitution and discover its true charter with reference to laws made by the legislature, it could well be held to be in breach. It is important that the substance of the faith in the different organs of the State has to be restored. That can only be done by what I believe to be acts of restorative character which must be assiduously undertaken by those who adorn offices in

government, legislature and the judiciary. It is through this process of restorative rebuilding of confidence that one will be able to ensure that constitutional morality is sufficiently ingrained that constitutionalism is no longer at stake because of caprice, whims and excessive power concentrated in certain individuals. In fact, one notices with great profit that William D. Guthrie in 'Magna Carta And Other Addresses' (Columbia: New York) way back in 1916, noted that:-

“.....Of course, Judges make mistakes as the wisest and best men make mistakes. They are not infallible but neither are our legislative bodies infallible, nor is the crowd. There must be the fullest liberty of criticism and if need be of censure of our Judges as of all other public officials. Fair and just criticism, however, would be distinctly educational, and it could tend only to restore the courts to public favour and confidence. The danger is not in freedom of criticism, but in unfair and unfounded criticism supported by distorted or false statements. Our judicial system is sound enough and strong enough to withstand and overcome any fair criticism. We should, therefore, encourage the fullest discussion of judicial decisions in constitutional cases in order that constitutional principles may be adequately explained and the necessity for the observance of constitutional morality brought home to the people....”

Even he goes on to add that:-

“....Let us, however, insist that the facts be truthfully stated. If the reasons and principles of justice which support most of the decisions criticize could be explained to all classes in simple language and in terms intelligible to layman as well as to lawyers, much of the misapprehension of judicial decisions and prejudice against the courts and constitutional restraints would be dispelled.....”

3. In my speech, I would explore and ascertain the scope of the term ‘Constitutional Morality’ and the effect that the term has on the Indian Constitution, the Citizen, the State and the Judiciary. The initial part of my speech would deal with understanding the Constitution and Constitutionalism. I would then speak on the historical and juridical underpinning of ‘constitutional morality’. Thereafter, I would explain the role and centrality of the principle of Constitutional Morality in India and why it has been viewed as a dilemma, between the judiciary and the State, with rights of citizens being considered in the process. After describing the Indian position, I would speak on parallels to the comparable principle in international law. I conclude by arguing that the principle of Constitutional Morality as introduced by Dr. B.R. Ambedkar in the Constituent Assembly is of increasing significance, and the Indian society is ‘yet to learn it’.

II. A WRITTEN CONSTITUTION

4. The Constitution of a country may be regarded as fundamental law or reflection of grundnorm. It normally delineates the powers and responsibilities of the Government including the process of its selection. It also embodies and strives to provide a common national identity for the people for whom it is meant.
5. People generally, especially those of nascent nations, often start with a written document which they call the Constitution. There may or may not be a written document for every country. Examples of Britain, Israel or New Zealand evince that the Constitution of a country need not necessarily be consolidated into a single written document as has been done in the case of India or South Africa. Whether it may be a written or an unwritten document, changes to the Constitution, are generally avoided. Rules of interpretation have been deployed time and again to keep the Constitution in line with the changes in the society and to accommodate the growing needs of a maturing society which may or may not be reflected in the original text of the Constitution.
6. Generally viewed the Constitution is regarded as embodying the will of the people, who get together to form a (new) system, which is superior to the organs of the government which are creatures of Constitution itself.³ It does follow that constitutions cannot be written in “epistemic vacuum”⁴. Therefore,

in view of the fact that there is always a history that results in making of the Constitution, the interpretation and reading of the text of the Constitution, whether documented in writing or otherwise, cannot be divorced from the values that are embodied in the Constitution.

7. Therefore, depending upon the historical context that results in the emergence of a document that can be called a constitution, a constitution may be a reflection of a dynamic and transformative social process and may thus be a framework for development in addition to being a fully functional machine for governance. A constitution may be a continuation of the earlier dispensation or may be a system essentially embodying the functional machinery of the previous dispensation albeit with a new vigour of idealism and principles. In certain cases, a constitution may also be the basis for establishing a completely new system for a new administration. However, given that it is difficult to divorce the Constitution from the historical context in which it emerges, it usually embodies functionalism of the previous dispensation and combines it with the ideals, values, principles and experiences behind the emergence of the new dispensation. The Constitution of India is a good example of the same.⁵
8. Because it is not possible to divorce or ignore the historical context from which the Constitution emerges (except by perverting it), the complexity of

the historical context is bound to have a reflection on the Constitution itself. For instance, in the Indian context, even though today we stand as one nation, it took great effort during the freedom movement to unify various princely states into one unit having quasi-federal character. It is for this reason that the Indian Constitution has extensively dealt with the Centre - State relationship, and the journey of post-Constitution has also not been free from political speed breakers.

9. The necessity for having a written Constitution arises out of the necessity to assert the supremacy of the Constitution. Supremacy of the Constitution means that the Constitution is binding on the Federal and State governments. The Constitution limits the powers of the government. The overriding authority is accorded only to the provisions of the Constitution, and neither the individual nor any government has any precedence over the Constitution. As Dicey puts it, “to base an arrangement of this kind upon understanding what conventions would be certain to generate misunderstandings and disagreements”.⁶
10. Written documents also tend to lessen the erosion of substance, and provide rigidity. It is to be noted that that rigidity may not be a natural corollary of the supremacy of the Constitution, yet the safeguard of immutability provides a safe harbour for those whose rights are guaranteed by the Constitution. In the backdrop of political competitiveness prevailing at

the time of the framing of the Constitution of India, a written document was sine qua non. It promised rights to everyone, a promise given in writing, with a guarantee of enforceability of the rights in relation to their freedoms, and limits on the power of the Governments.

11. I am concerned at an important aspect of constitutional morality which is the nature and perception of fundamental rights in our country. We have an outstanding Constitution. Undoubtedly, the Constitution has given us the best possible charter of rights. But are these clearly understood? Are they understood in their full amplitude? Is it an understanding of an institution of these rights which matters or is it the understanding of these rights by the individual citizen which matter? This is indeed a question which has vexed me for considerable period of time while practicing constitutional law. The emergence of judicial imposition of standards on what can be the liberty of a citizen is worrisome to my mind. Freedom and liberty must indeed to some extent be subjective.
12. What may appeal to one as right and righteous conduct or fair conduct, may not necessarily be co-equivalent with the idea of freedom as is capable of being defined in the Constitution. Freedom to develop, freedom to explore, freedom to learn, freedom to believe, freedom to disbelieve, freedom to contract, freedom to love, freedom to despair,

freedom to be quiet, freedom to speak, and the freedom to say anything under the sun which doesn't get restricted by law. Man-made law is indeed a wide array of freedoms, in recognition of human nature itself. It is open to a citizen to discuss the widest possible alternatives and constellations in philosophy and abstractions and real life ranging from the most vociferous theories of absolute ideals in traditional texts of religious philosophy and the complete negation of an intelligent design as found in modern scientific teachings and philosophical writings. The choice must be left completely to the individual citizen. Even the State cannot take a position in respect of such beliefs and choices. However, the fact that such a wide array of knowledge is available as a part of growing education is indeed necessary even for any impartial stream of education to be available for young children and those for citizenry of a country. They must elect to know, they must elect to be informed and they must also come to their conclusions by themselves.

13. It is important that doctrinaire education which is subtle, which can be creeping and which can lead to formations and crystallization of belief structures which may be formed by the individual in his middle age to be completely unsustainable must not be allowed to happen. It would mean that the State has interfered with the development of its citizens. The minimal scope of interference by the State in the lives of its citizens is the hallmark of constitutional

morality at least under our Constitution. The attempt to have educational academies espousing a certain belief structure is completely an anathema to the Constitution. If it receives any sponsorship from the State, it destroys the very concept of the State being a truly secular State which means it does not take positions in matters of subjective belief. As Amartya Sen has rightly observed that demands for democracy are complex and manifold.⁷ I am afraid, this definition of constitutional morality is one, which might have to be tested over and over again, if we mean to progress truly in realms of knowledge, in terms of scientific, historical, economic, philosophical and archeological research and further undertake audit of our own selves in coming years.

14. What about human rights? What is the proper relationship between human rights and democracy? We have certain institutional arrangements to protect human rights, such as the Human Rights Commission, the constitutional charter of rights and more importantly, the constitutional remedies which are vested in the Supreme Court and the High Courts. But I am afraid, that the appointment of Human Rights Commission was never meant to dilute the importance of human rights. They were also not meant to provide an alternative fora for enabling the courts to abstain from taking on record any grievance which relates to violation of human rights. The presence of jurisdiction must always imply an effective exercise of jurisdiction. It is easier to deny

the exercise of jurisdiction. It is more challenging for a Judge to exercise jurisdiction and truly render justice in a case.

15. In my view, to employ parameters of judicial review in changed circumstances would mean to come as close as possible to mathematical scrutiny of the decision-making process because even a single error may be completely fatal. Such an error could be vital. It may be small, yet monumental.
16. The decisions of courts fortunately in our country are not described as undemocratic in the context of human rights; that is because the founding fathers of our Constitution were deeply inspired by the concept of Bill of Rights and provided for fundamental freedoms in very clear and definitive terms. The preambular ideals of the Constitution do form the basic structure. If liberty is indeed the ideal of men, if fraternity is the ideal of men, if justice and equality are the ideals of men, obviously, these ideals are being guaranteed by a Constitution. Thus, no government or any organ of the State can attempt to work in a manner which either obstructs justice or which attempts to divide fraternity or which attempts to deny equality or which attempts to clog liberty. I would like to bring to your notice that we are far better off than England, and I quote that the Home Secretary on 8th July 2013 in the House of Commons' debate said that:-

“.....We have to do something about the crazy

interpretation of our human rights laws.... I have made clear my view that in the end the Human Rights Act must be scrapped. We must also consider our relationship with the European Court very carefully, and I believe that all options – including withdrawing from the Convention altogether – should remain on the table.....”

I found that this was extraordinary and I am glad that no member of our legislature says anything to this effect and hopefully will not say it as long as India is shining.

III. UNDERSTANDING CONSTITUTIONALISM

17. The Constitution is a unifying document. It captures to the extent necessary cultural, economic, legal, political and social concepts of a society. It speaks about the constitution of a society. It establishes State institutions. But the content of constitutionalism is the manner in which institutions conduct themselves to further the very objectives of the Constitution. The theory of constitutionalism is necessary to understand the division and limitation of governmental power, the recognition and protection of certain individual rights, the protection of property and the notion of representative or democratic government.
18. One of the important functions of the Constitution as explained earlier is to also limit the powers of the government. The idea that government can and should be legally limited in its powers, and that its

legality and legitimacy depends on adherence to such limits is associated with the political theories of John Locke. While dealing with constitutionalism it is important, in my view, to look at the position of Locke in the past and Ronald Dworkin in the present. Both Locke and Dworkin can be said to be two important proponents of constitutionalism. They were concerned with 'legitimacy of governance' and foundations of constitutional truthfulness. Absolute, unbridled and arbitrary power in government may itself constitute a betrayal of the trust of the people by those who govern. The concept of rights in Dworkin's works is primarily the way in which absolute, unbridled and arbitrary power are meant to be checked. In other words, they can never be exercised in a manner to defeat rights. In my view, the theory of Locke of natural law of background rights is translated into the rights, which flow from democratic constitutionalism as described by Dworkin. However, as pointed out again by Upendra Baxi, Dworkin does not have an explicit theory of State.

19. Constitutionalism is associated with the following features:

“...a fundamental law expressed in a written constitution drafted by a special convention or assembly, ratified by the people and amendable only by an extraordinary supralegislative process, which prescribes the rule of general standing laws produced

by representative institutions operating on the basis of some form of separation of powers and limited by a charter recognizing judicially enforceable basic rights reserved by individuals.”⁸

20. Thus, foundations of liberal Constitutionalism could be traced to the works of John Locke. Professor Jeremy Waldron, while critiquing the concept, has explained the concepts in the following simple words:

“A ‘constitutionalist’ is one who takes constitutions very seriously and who is not disposed to allow deviations from them even when other important values are involved. ‘Constitutionalism’ therefore refers to the sort of ideology that makes this attitude seems sensible.... [And] includes the claim that society’s Constitution matters, and that it is not just decoration, that it has an importance that may justify making sacrifices of other important values for its sake.”⁹

21. It is, however, not necessary that the presence of a Constitution implies the presence of Constitutionalism. Professor Paul Magnarella, has explained¹⁰ this in the following words:

“A key identifying criterion of constitutionalism is the existence of limited government under a higher law. By definition, every state, even one with a dictatorship, has a constitution—a set of legal norms and procedures that structure its legal and governmental systems. This, however, does not necessarily imply the existence of a constitutional

document. Further, the mere existence of a constitutional document or a constitution, as defined above, is not equivalent to the existence of a state of constitutionalism. In the absence of the ruling elite's commitment to limited governmental powers under the rule of law, a state may have a constitution without constitutionalism. In such a case, comparativists would label its constitution "nominal" rather than "normative".¹¹

22. Different nations have come to embrace and express constitutionalism in various forms, be it rigid adherence to the written word contained in a Constitution or the constitutional norms that come through practice in an unwritten one.
23. In the United Kingdom, one of the only three developed nations without a written Constitution, Lord Chief Justice Woolf observed that there has never been the need for a written Constitution due to the constitutional ability to evolve with society's changing needs. There can be both benefits as well as disadvantages to this.¹² The absolute presence of constitutionalism in the United Kingdom is apparent from the fact that there is a recognition of the importance of the rule of law and the independence of the judiciary. "Ultimately, it is the rule of law which stops a democracy descending unto an elected dictatorship"¹³.
24. Lord Chief Justice Woolf has attributed the ability of the United Kingdom to adhere to the precepts of

constitutionalism due to traditions of mutual respect, restraint and co-operation. He has further, in exemplifying the tradition of self-restraint given the example of the Human Rights Act wherein, by enacting Article 3 Parliament directed that judges interpret legislation in compliance with the Convention as far as possible. Here, in consonance with Lord Chief Justice Woolf, Lord Hope has observed that while this is just an interpretative rule, it does not mean to allow judges to act as legislators.¹⁴

25. In the United States, another form of constitutionalism has been gaining traction, that of progressive constitutionalism. It envisions that to give effect to all the freedoms due to the people by virtue of the Constitution, sometimes it would be better for the Supreme Court to stand back and allow political processes their head. The aim is that through this, political deliberation would be greater and more in-depth with a greater sense of constitutional responsibility.¹⁵ Justice Ginsberg, an eminent supporter of women's rights and gender equality has been in agreement with this form of constitutionalism. While never abandoning sanctity of judicial review, judicial modesty and reluctance to overstep into the legislative scope is a concept that progressive constitutionalism applauds.
26. While the idea put forth by progressive constitutionalism appears optimistic and idealistic in relation to the abilities of legislators, I personally do

not ascribe to the notion that power should be vested or reliance should be placed so heavily in one arm of the government. To do so in the Indian context may not be advisable.

27. Another view on constitutionalism in the United States is that of Justice Kennedy in adherence to the theory of the 'living constitution'. While sometimes being subject to criticism for this view, he subscribes to the stand that constitutional meanings must change with changing circumstances¹⁶. While never asserting that he subscribed to the theory of a living constitution, his judgments have shown a trend towards the exemplification of that approach.
28. Evolving and expanding the scope of judicial interpretation of the Constitution, in the landmark decision of **Obergefell v. Hodges**¹⁷ Justice Kennedy, explained 'liberty' as inclusive of sexual identity under the Due Process Clause of the Fourteenth Amendment in the followings words:

“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.”
29. The idea of a living Constitution, to my mind, is to some extent the manner in which the Courts in India

seek to interpret our Constitution. To evolve and expand the scope of the rights granted to us by the Drafting Committee in their wisdom and knowledge in meaningful ways has been one of the paramount contributions of the Supreme Court and the High Courts. The underlying impulse is no impulse – it is a principle to justice that means – to tailor the notion of rights as per facts, and to use right itself as a norm to deal with similar situations.

30. In my view, it is this quest of normativity under the rule of law that poses a dilemma for the State, Courts, and Citizens – and all of this arises in the backdrop of ‘Constitutional Morality’.

IV. THE IMPORTANCE OF JUDICIAL INDEPENDENCE

31. It must be noted that there is a difference between democratic deficit and constitutional deficit. An independent judiciary appointed in accordance with the Constitution must necessarily be held to have been constitutionally appointed. However, in order that it can be said to have been truly appointed in accordance with the Constitution, it must fulfil the three-fold criteria of ability, impartiality and judicial independence. These three are manifested into various other subsidiary virtues which are meant to be found in individuals. The Constitution, however, does not ask our Judges to be elected or appointed through Parliament or through any procedure which is similar to other jurisdictions. As a consequence of the

procedure which obtains in place today, the need for the judiciary to establish its independence by self-evident processes of the quality of its appointments is very vital. It is important that in order to bear true faith and allegiance to the Constitution, people truly look forward to an independent judiciary. The judiciary for them is a vital organ. If indeed there is a breach of faith of the people in the performance of judicial functions, the breach is somewhat irreversible. In such cases, unlike democratic self-correction which can happen at regular intervals, it is not possible to do the same with the judiciary. To that extent, it is very essential that members of the judiciary must indeed self-reflect on a continued and continuing basis almost to point of self-doubt that they are able to see and perceive as clearly as possible where does truth and justice lie. It is indeed an arduous task in today's circumstances given amounts of inadequate financial allocation to the judiciary, inadequate facilities, and also inadequate numerical strength of the judges in the subordinate judiciary.

32. It was observed by Dr. Ambedkar during the Constituent Assembly debates that:

“There can be no difference of opinion in the House that our judiciary must be both independent of the Executive and must also be competent in itself. And the question is how these two objects could be secured.”¹⁸

This observation goes to the heart of what the framers

of our Constitution intended, a free judiciary, the very foundation that underpins a democratic society. While all Constitutions provide for a free judiciary to some extent, the realization of this independence can subsist only when there is a favourable environment created by other organs of government as well.¹⁹

33. Judicial independence has to be understood not only to mean the freedom of the judicial arm of the government, but also the individual liberty of each and every judge so that they may discharge their duties free from interference from other judges.²⁰ This theory of independence has been universally recognized as the International Bar Association (IBA) Standards under Article 47 provide that “in the decision making process, a judge must be independent vis-à-vis his judicial colleagues and superiors”²¹.
34. It is an accepted fact that for justice to prevail, those who are administering it must be free to do so without interference or fear of censure, either from other organs of the government or from other judges. The creation of an independent and professional judiciary lies at the heart of the Constitution’s judicial articles. Judges have been offered more independence than any other institution. The purpose of securing this independence has been clearly well thought out by the founding fathers. The purpose of introducing a life tenure in the United States, according to Hamilton, “....was to construct an excellent barrier

to the encroachments and oppressions of the representative body....” but also because it offered “.....the best expedient..... to secure a steady upright and impartial administration of the law.....”.

35. In 1972, Lord Reid in the UK hinted at the policy implications of “Judges as Lawmakers”.
36. Lord Phillips when observing the necessity for an independent judiciary stated:

“... It is the only basis upon which individuals, private corporations, public bodies and the executive can order their lives and activities. If the rule of law is to be upheld it is essential that there should be an independent judiciary. ... The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that the judges require particularly to be protected.”²²
37. However, we must bear in mind that the UK’s Human Rights Act departs from the traditional view of how a Bill of Rights functions which is to invoke the machinery of the courts and to set binding constraints on political decision making and combine judicial review with strong judicial remedial power. The Human Rights Act incorporates the European Convention on Human Rights into domestic law. It draws a greater distinction between judicial review

and judicial remedies than in more conventional models of a Bill of Rights. It does not authorize courts to impose binding remedies such as to invalidate legislation or refuse to enforce laws that are inconsistent with rights. Thus short of using the interpretive power to render a rights friendly application of otherwise inconsistent legislation, courts in the United Kingdom can only declare legislation to be incompatible with protective rights at which point redressing judicially identified rights violations is dependent upon a political willingness to implement remedial measures. The Human Rights Act in England departs in a major way. It contemplates regular parliamentary arrangement with questions of compatibility with rights. Thus, legislation needs to be justified from a rights perspective in Parliament, i.e. a legislative rights review. The political decision to introduce legislative rights review is indeed significant. Proposed legislation implications have to be studied in the context of rights. It does indicate a substantially idealized vision of how rights will be protected.

38. The idea of a legislative rights review arose out of the introduction of the Canadian Bill of Rights in 1960. The Canadian Bill of Rights dealt with a novel idea. It married the idea of a statutory bill of rights with an expectation that the government and Parliament consider whether legislation is consistent with rights as a regular part of policy and legislative processes. Thus, the Justice Minister was required to inform

Parliament when government Bills are inconsistent with rights which was expected to precipitate pre-legislative rights based review of proposed legislation. The introduction of a pre-legislative rights review within a Westminster based parliamentary system was considered as a robust way to protect rights that could rival if not surpass the kind of rights protection associated with the US goal of rights. It was explained that:-

“.....All future laws are purified before they become laws.... This process is possible only under a parliamentary system of government, where officials are responsible to ministers, ministers to the House of Commons and the House of Commons to the Electorate. The whole machinery of government – apart from the courts – is enlisted by the Canadian Bill of Rights to ensure that fundamental rights and freedoms are safeguarded.... This kind of control is not possible with a congregational system of government, where there is complete separation between the executive and the legislature and where the executive cannot control the content of Bills submitted to the legislature.....”

39. New Zealand subsequently borrowed this idea when it developed the New Zealand Bill of Rights Act. The then Prime Minister, Jeffrey Palmer included it in the Bill of Rights Act in an effort to compensate for a weaker form of judicial power than initially proposed.

40. The need for more effective national implementation of European Court of Human Rights judgments became the principal focus of the human rights work of the Council of Europe.
41. Of course, Parliament is supreme in the UK. However, the principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament has the right to make or unmake any law whatever. Parliamentary sovereignty according to Dicey's famous formulation is as follows:-
- “The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.....”
42. In India, this formulation would read as follows:-
- “The principle of parliamentary sovereignty means that Parliament has under the Indian Constitution the right to make or unmake laws in accordance with the Constitution subject to the Constitution.”
43. In India if Judges had to be periodically elected and the principal mode of political accountability was also meant to be the norm to select Judges, then Courts would have too great a disposition to consult popularity to justify reliance that nothing would be consulted but the Constitution and the laws. In my

view, even though the Supreme Court has held that we do not have a provision like Article 3 of the American Constitution, the provisions of the Indian Constitution sufficiently indicate that judicial power must be vested in Courts and Tribunals which are analogous to Courts. It was observed in the case of **R. Gandhi**²³ that:

“87. The Constitution contemplates judicial power being exercised by both courts and tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by legislative enactments. The High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of the High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals.

88. The argument that there cannot be “wholesale transfer of powers” is misconceived. It is nobody’s

case that the entire functioning of courts in the country is transferred to tribunals. The competence of Parliament to make a law creating tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word “tribunal” in place of “the High Court” necessarily there will be “wholesale transfer” of company law matters to the tribunals. It is an inevitable consequence of creation of a tribunal for such disputes and will no way affect the validity of the law creating the tribunal.”

44. In my view, the election of the legislature in favour of tribunalisation in preference to regular courts discharging adjudicatory functions on the ground of domain expertise is not well founded. Further tribunalisation eroded the credibility and the quality associated with the adjudicatory process, which expects trained judicial minds to apply their prowess. Prior to the introduction of the collegium system, under Articles 124 and 217 of the Constitution the President appointed the judges of the Supreme Court and the High Courts in consultation with the Chief Justice of the Supreme Court or High Courts along with the Governor of the State. Hence the Constitution expressed that the Chief Justice of India was to be a ‘consultee’ during the appointing of judges. While considerable debate has taken place on

this point, the evolution of law from the time of **S.P. Gupta's case**²⁴ where the term concurrence became synonymous with the term consultation. The error in **S.P. Gupta's Case** was sought to be corrected in the **Second Judges case**²⁵ where the Supreme Court interpreted that the opinion of the Chief Justice was actually an 'institutional opinion' arrived at in a collegiate forum. Observing the need for an independent judiciary Justice Pandian stated:

“203. Even though all the constitutional functionaries have their own constitutional duties in making appointment of Judges to the superior judiciary, the role of one of the principal constitutional functionaries, (namely, the judiciary) is incontrovertibly immeasurable and incalculable. The task assigned to the judiciary is no way less than those of other functionaries — legislative and executive. On the other hand, the responsibility of the judiciary is of a higher degree. As frequently said, ‘judiciary is the watchdog of democracy’, checking the excessive authority of other constitutional functionaries beyond the ken of the Constitution. It cannot be disputed that the strength and effectiveness of the judicial system and its independence heavily depends upon the calibre of men and women who preside over the judiciary and it is most essential to have a healthy independent judiciary for having a healthy democracy because if the judicial system is crippled, democracy will also be crippled.”²⁶

45. While there is still need to strengthen the collegium system, profiling of candidates/ judges is undesirable and leads to dilution of inner strength of the judiciary. It is expected that no judge in office carries his personal predilections or political views, and would not allow such factors to influence decision making.
46. The Supreme Court by striking down the Constitution (Ninety-Ninth Amendment) Act, 2014 has been successful in protecting the independence of the judiciary from complete destruction. The National Judicial Appointments Commission Act, 2014 was a complete deviation from the foundational precepts of an independent judiciary. Madan Lokur, J. observed correctly in NJAC case that:

“991. Fortunately for the people of the country, the independence of the judiciary is not a ‘task of administration’ nor is the Constitution of India a failed experiment nor is there any need for ‘making provision for another’. If the basic structure of the Constitution is to be changed, through experimentation or otherwise, then its overthrow is necessary. It is not a simple document that can be experimented with or changed through a cut and paste method. Even though the independence of the judiciary is a basic structure of the Constitution and being a pillar of democracy it can be experimented with, but only if it is possible without altering the basic structure. The independence of the judiciary is a concept developed over centuries to benefit the

people against arbitrary exercise of power. If during experimentation, the independence of the judiciary is lost, it is gone forever and cannot be regained by simply concluding that the loss of independence is a failed experiment. The independence of the judiciary is not physical but metaphysical. The independence of the judiciary is not like plasticine that it can be moulded in any way.”²⁷

47. The independence of the judiciary is critical to the nation, a part of the basic structure of the constitution and the very bulwark that protects our democracy.

V. CONSTITUTIONAL MORALITY AS THE ESSENCE OF CONSTITUTIONALISM

48. One of the prodigious democracies in the world today, India possesses one of the largest written Constitutions. Yet it had to be kept in mind that as a nation, we are one of the youngest democracies as well. While providing for express provisions of governance, the Indian Constitution embodies rights, limitations and duties. In addition to the obvious text of the Constitution, the sub-text and spirit of the Constitution also add force and understanding to its implementation. The essence of Constitutionalism that gives immutable feature and serves as a moral compass in the implementation and interpretation of the Constitution is the principle of Constitutional Morality.
49. There are many political theorists of the modern period who have used the concept of a political

constitution. It can be used in a restrictive way or in an expansive way. However, by and large, constitutional law practitioners do employ it in an expansive way to suggest governance in accordance with the letter, the spirit and ethos of a Constitution and also the fundamental concepts which underlie the Constitution. In the Indian context, it would necessarily mean republicanism, democracy, integrity and sovereignty of India and above all, the fundamental four pillars, namely, equality, justice fraternity and liberty, and obviously, securing individual dignity and human freedoms which are so important for living. The Indian Constitution seeks to respect the verdict of 'We, the People', ensures participative democracy, regular elections to ensure democratic legislatures, but the underlying principle is that all will act in accordance with the Constitution and not override it. The *dramatis personae* in States who are appointed as Governors are not expected to topple the democratically elected Governments and allow their conduct to be questionable.

50. I use distinctly rationalist grounds for explaining the design of why constitutionalism and constitutional morality must be viewed literally as interchangeable and possible synonymous expressions. While morality seems to have a more subjective connotation in its ordinary use, but in the understanding of a Constitution, it means literally the ethos or constitutionalism. In particular, I think it is important to bear in mind that the use of the expression

‘republicanism’, ‘dignity’, ‘justice’ and ‘liberty’ necessarily involve by themselves far reaching concepts of ‘modernism’ as well as ‘liberalism’. This obviously implies that the founding fathers were farsighted and very liberal and were agreed upon democratic principles in the context of liberalism of thought, behavior as well as respect for human dignity. However, it did not follow that the Constitution contemplated market economics in its liberal sense when the country became a free republic.

51. First propounded by the English classicist George Grote in “A History of Greece”, the term constitutional morality, despite its rather simple appearance, attempts to convey the complex value of what the written constitution stands for. For any real understanding of the term, it is pivotal that Grote himself must be quoted to convey the gravitas of the expression:

“... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own.”²⁸

52. It is apparent that the fact Grote was not speaking of

the actual written word of the Constitution, rather the ideals it was meant to encapsulate. Locating the ideals of the Constitution, especially by a generation that did not draft it is not a simple task. It may require ascertainment of true historical facts and interpretation of the thought process (and not just thoughts) of those who stood for the values or texts that found their way into a written Constitution.

53. A simplistic approach to Constitutional Morality would be to assume that principles of fundamental rights such as the right to life and liberty, the right against discrimination and the freedom of speech are just some examples of Constitutional Morality that had been drafted into the Constitution.
54. Though this cannot be said to be entirely incorrect, the term 'Constitutional morality' is a term that attempts to immortalize the very ideals, aspirations, and visions of the future that were held dear and immutable by the Constituent Assembly.
55. It is necessary to understand that while there is a relationship between the Constitution and Constitutional Conventions, they are not necessarily the same as Constitutional Morality. However, in view of the fact that Constitutional Conventions are expressions of traditions and customs, in many cases they may also be expressions of Constitutional Morality.
56. Constitutional convention, by its very nature, though ambiguous and without written promise of

enforceability is beneficial for this very reason. Munro distinguishing the need for uncoded constitutional convention in relation to a written constitution stated:

“...the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring”²⁹

57. The presence of Constitutional Conventions itself indicates that not everything that a Constitution could contain ought to be put in writing. It assumes that certain degree of tradition, conventions and customs would be followed in the matter of constitutional governance, which need not be spelt out.
58. ‘Self-restraint’ and ‘freedom’, according to Grote were a precondition of ‘constitutional morality’. Like Grote, Dr. Ambedkar was opposed to the concept of revolution and violence and believed that for constitutional morality to exist, there needs to be an exercise of self-restraint. Dr. Ambedkar took it a step further and staunchly stood against the idea of satyagraha as well. He believed that though satyagraha was non-violent, nonetheless it was merely another form of coercion. Civil disobedience as a mechanism of protest was not capable of being justified with reference to defined legal and Constitutional methods of seeking accountability.³⁰
59. To further develop the concept Grote recognized plurality in all its multifaceted forms. Unless the

Constitution recognized plurality and differences (or special needs), it would lose its universal appeal as well. As observed by Learned Hand, pluralism was:

“the temper which does not press a partisan advantage to its bitter end; it can understand and appreciate the other side and feels an unity between all citizens.”³¹

60. Grote postulated that, for constitutional morality to reign, there had to be a management and adjudication of differences. Former Chief Justice M.N. Venkatachaliah while making an observation on plurality in the context of India observed;
“India, in particular, is such a typical pluralist society – a model of unity in the mosaic of diversities.”³²
61. Constitutional morality hinged on the presupposition that there are differences of opinion in a political society. Despite the diversity, there would be a profound understanding of opinions, claims, and beliefs of others. Essentially, the ability to abstract from one’s beliefs. In a nation as diverse as India, pluralism of identity also plays a great role.
62. Contemporary India is a nation amassed with diverse cultures, religions and faiths. For there to be pluralism of belief, there has to be complete acceptance of, and promotion of individual identities of all people. It is only through this nature of acceptance that there can be peace and a collective furthering of society. In my opinion, in light of the nascent nature of our democracy and our historical past, we have already

taken great strides to further these aims, and the Judiciary has to a great extent attempted to further and embolden diversity of individuals.

63. There is an element of inter-connectivity that the Constitution propounded in the idea of “Fraternity”. The idea of fraternity was never meant to discourage the idea of individual potential or full blooming of that potential but only meant that each one would always respect the space and the freedoms of others.
64. Another tenet of Constitutional Morality was the adjudication and management of differences. Considering the above in the light of respect for pluralism, it was essential that there be reliance on adjudication by Courts and free discussions in Parliament, and resort to peaceful methods.
65. Both Grote and Dr. B.R. Ambedkar were advocating a kind of disassociation from one’s views and beliefs that could lead to the understanding of the views and beliefs of others. Perhaps, guided by the values of the freedom movement and great leaders who also served as a moral compass for the then generation of youth, despite odds and challenges, we were able to navigate and arrive at a Constitution, which contained certain core values as an expression of morality. The ability to offer guaranteed space to others to think and feel differently is the summum bonum of equality. Here the State becomes the teacher and practitioner of equality. The First practitioner of Constitutional Morality must be the “Indian State”.

66. The next tenet of constitutional morality was a deeply abiding suspicion of all claims that were said to be a personification of the expression ‘will of the people’. A clear corollary of this is that such a manifestation would lead to the usurpation of power or overreaching of the fundamental provisions of the Constitution. The principle of Constitutional Morality cannot allow expressions of the will of the people, or alleged expressions of the will of the people to eclipse the values of the Constitution. One would have to give credence to the claim that any organ of government, when asserting that they are a manifestation of the will of the people, would be vesting themselves with an extraordinary amount of undeserved power over others. Recent expressions of police power by the State exemplify the same. To be sworn in to act according to the Constitution is a daunting task. It requires constant inner scrutiny and self-awareness apart from the understanding of social phenomena objectively.
67. Dr. Ambedkar, while a fierce supporter of the importance of religious worship (bhakti) of God, (by whatever name He be called) was against the concept of hero worship in politics, observing that it was a “sure road to degradation and to eventual dictatorship”³³.
68. This view took into its scope Dr. Ambedkar’s aversion to the caste system in India as exclusionist and just another manner for the stronger majority to

impose its will on the weaker minorities. He asserted a relationship between caste and class in India and heavily criticized as the concept that “closed doors” of one caste on another creating an endemic divide that could not be transversed and ensuring that the ‘lower varnas/castes’ would remain powerless while securing further power for the ‘higher varnas/castes’.³⁴

69. Next, constitutional morality negates any form of agent or agency that promoted itself on the basis of doing the good of the whole. In other words, it disallows absolute utilitarianism. All claims of popular sovereignty are therefore contrary to that concept.
70. For constitutional morality to subsist and proliferate, there has to be a culture of open criticism. The presence of the culture of ‘open criticism’ needed to be encouraged in the Indian context. In the current political situation, one can say with certainty that he was not very far from his estimate of the Indian populace and its cultural beliefs. Not long ago, in 2006, Fali S. Nariman said:

“We will never be able to piece together a new Constitution in the present day and age even if we tried: because innovative ideas—however brilliant, howsoever beautifully expressed in consultation papers and reports of commissions—cannot give us a better Constitution. In Constitution-making there are other forces that cannot and must never be ignored—

the spirit of persuasion, of accommodation and of tolerance—all three are at a very low ebb today.”³⁵

71. When looking at these principles as a whole there are some clear observations that come to the fore. Constitutional morality paid homage to a manner of political organization that could only survive if there was constant adherence to its principles and constant vigilance against the desire to make outcomes take precedence over the method of reaching them. The principle encourages every ‘citizen’ to be vigilant of not only his or her individual rights but also group rights. It poses a dilemma for every citizen, in that it expects of him to shun opportunism and distance himself from circumstances of personal gain where they conflict with national or public interest. A similar dilemma exists for Governments which find their agenda driven programs forbidden by the principle of Constitutional morality that does not allow its ‘supreme’ power to be used for a context other than for which it was granted. Thus, it is now settled (for instance) that the power of eminent domain, though available, could not be invoked to ‘steal’ private property. I would not be off the mark if I say that it took the judiciary a little over three decades to reach this position, reference to which first made by Ambedkar in 1952 by exhorting the doctrine of “spirit of the Constitution”.

VI. THE PLIGHT OF INDIA & PROMULGATION OF THE CONSTITUTION

72. When the Constitution was being drafted, it was by design being created to serve in a modern society (which was not yet modern) and was intended to be a futuristic document. Inheritors of a hierarchical social structure and burdened with a pervasive caste system, India was still recovering from the violent and bloody fight for freedom it had just endured. Construction of a new social order based on the tenets of liberty, fraternity and equality were a rather uphill task. Dr. Ambedkar was aware that India had never been possessed with any manner of democratic tradition and to bring order at such turbulent social times and heal the damages wrought by colonialism was difficult at best.

73. While introducing the Draft Constitution to the Constituent Assembly, Dr. Ambedkar quoted Grote who had said:

“The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.”

Thereafter, Dr. Ambedkar added further and stated:

“While everybody recognized the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.

.....The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic.”³⁶

74. Unlike the United Kingdom, a nation that has had a long and illustrious Parliamentary democracy, and yet has had no need for a written Constitution, India was unprepared for the task that lay before it. It was erosion of democratic tradition and social trust during the colonial regime that leads to one of the lengthiest written constitutions. As critically observed by Sir Ivor Jennings in 1951 while delivering a speech at Madras University he said, that Indian Constitution was:

“Too long, too rigid, too prolix”³⁷

I must respectfully disagree.

75. Dr. Ambedkar justified the length by stating that since there was a patent lack of diffusion of Constitutional Morality, it was necessary that the Constitution be written out in much greater detail as guidance for people. It could be said that the stronger the tradition of Constitutional Morality of a nation, the lesser was needed to put down everything in black and white.³⁸ This is the reason why the Indian Constitution goes to great lengths in explaining the complex web of administration, something that normally absent from a 'constitutional document'.
76. It is further to be remembered that 'diffusion of constitutional morality' is a necessary precondition for working of the Constitution. This is more so because written constitutions often require persistent and unspoken efforts to ensure continued adherence to the principle. In fact, there is a silent assumption of an independent judiciary in every written Constitution guided by the principle of Constitutionalism.

VII. JUDICIAL ROLE IN DIFFUSING CONSTITUTIONAL MORALITY

77. As observed before, there are matters enumerated in the Constitution that could be considered expressions of Constitutional Morality. Fundamental Rights and Directive Principles of State Policy enumerated in Part III and Part IV respectively are actual expressions

of the guarantees and aspirations of the framers of the Constitution. Such expression of guarantees and idealism may also hold a key to understanding the silence of the Constitution where constitutional morality is eloquently encapsulated. In my view, such rights or ideals by themselves are not the goals that the Constitution seeks to achieve.

78. With a fierce and independent judiciary, the attempts on the incursion of rights and subversion of the Constitution (including by attempting to change the flavor of rights) have successfully been repelled. Yet there are no full stops of complacency. In the process, tools of interpretation traditionally available to lawyers and judges have been adequately deployed to build a perimeter fence around the Constitution.
79. In my view, the enunciation of the Doctrine of Basic Structure is a manifestation of one of the ways in which the judiciary has protected the Constitution. The Doctrine, it appears, was evolved to implement ‘Constitutionalism’ and to protect the Constitution from what Dr. Ambedkar termed as efforts to ‘pervert’ the Constitution.³⁹
80. An ideal description of Doctrine of Basic Structure is given by Carl J. Friedrich is as below:

“A Constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay yet the basic structure or pattern remains the same with each of the organs having its proper function, so also in a

Constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed.”⁴⁰

81. In the initial days, way back in 1952, in the case of **State of Bihar v. Kameshwar Singh**⁴¹, reference was made to the spirit of the Constitution. The tenor of Dr. Ambedkar’s arguments reflect the ideals of what the Drafting Committee was attempting to protect. The Constitution (First) Amendment Act, 1951 that inserted Articles 31-A and 31-B into the Constitution related to agrarian reforms. Dr. Ambedkar, who himself appeared for some of the Zamindars from State of Uttar Pradesh submitted that:

“Dr. Ambedkar... maintained that a constitutional prohibition against compulsory acquisition of property without public necessity and payment of compensation was deducible from what he called the “spirit of the Constitution”, which, according to him, was a valid test for judging the constitutionality of a statute. The Constitution, being avowedly one for establishing liberty, justice and equality and a government of a free people with only limited powers, must be held to contain an implied prohibition against taking private property without just compensation and in the absence of a public purpose.”

Notwithstanding the erudite submissions of Dr. Ambedkar, the Supreme Court held that:

“In the face of the limitations on the State’s power of compulsory acquisition thus incorporated in the body of the Constitution, from which “estates” alone are excluded, it would, in my opinion, be contrary to elementary canons of statutory construction to read, by implication those very limitations into entry 36 of List II alone or in conjunction with entry 42 of List III of the Seventh Schedule, or to deduce them from “the spirit of the Constitution”, and that, too, in respect of the very properties excluded”.

The Court expressly rejected Dr. Ambedkar’s argument that “...the spirit of the Constitution is a valid test for judging the constitutionality of the impugned Act.”⁴² An argument rejected – but resurfaced as the “basic structure”!

82. In 1967, in **I.C. Golaknath v. State of Punjab**⁴³, the Supreme Court (through Chief Justice K. Subba Rao) had laid down that even Constitutional Amendment is “law” within the scope of Article 13, and thus, a law that abridges fundamental rights guaranteed in Part III of the Constitution is invalid. The Supreme Court held:

“98. This brings us to the question whether the word “law” in Art. 13(2) includes an amendment of the Constitution, and therefore, there is an express provision in Art. 13(2) which at least limits the power of amendment under Art. 368 to this extent that by

such amendment fundamental rights guaranteed by Part III cannot be taken away or abridged. We have already pointed out that in Sankari Prasad's case, as well as Sajjan Singh's case, it has already been held, in one case unanimously and in the other by majority, that the word "law" in Art. 13(2) does not include an amendment of the Constitution, and it is the correctness of this view which is being impugned before this Bench, Article 13 is in three parts. The first part lays down that "all laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void". Further all previous constitutional provisions were repealed by Art. 395 which provided that "the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed". Thus it is clear that the word "law" in Art. 13(1), does not include any law in the nature of a constitutional provision, for no such law remained after the repeal in Art. 395."

83. Late Member of Parliament, Sri Nath Pai had moved a Bill in the Parliament to "restore" the power of Parliament to amend the chapter on fundamental right as he believed that the Supreme Court had (wrongly) doubted the wisdom of the elected. Perhaps, this could be regarded as the origin of the

phrase “Tyranny of the Unelected”.⁴⁴ However, looking back, it can be safely said that the Supreme Court was only attempting (bravely) to locate and propagate constitutional morality amongst the citizens and the State. Though Nath Pai was not successful, however, others later did move a Bill called the Twenty Fourth Constitutional Amendment Bill, 1971 to get over the difficulties posed by Golaknath. The Twenty Fourth Constitutional Amendment was an attempt by Parliament to overcome Golaknath.

84. The Twenty Fifth Constitutional Amendment Bill intended to irrevocably divest the Supreme Court of the power to go into the quantum of ‘compensation’ for take-over of property for public purpose, and accordingly the word ‘compensation’ was to be replaced by the word ‘amount’. The Bill was described by the then Government as a “small but necessary step” towards the fulfilment of the goal of socialism.
85. In my view, the Twenty Fifth Constitutional Amendment was a significant affront to the principle of Constitutional Morality, which sought to dilute the promises of a written Constitution, just by changing a few words in the document. This is exactly the perversion that Dr. Ambedkar had referred to in his Motion re Draft Constitution on 4th November 1948.
86. The Twenty Fifth Constitutional Amendment had two main amendments. Firstly, to Article 31(2) that

allowed the State to acquire any person's property, subject to the payment of an 'amount' instead of 'compensation'. This would essentially lead to the expansion of the powers of the State/ Executive to confiscate the property of the citizens and the citizen would be subject to the convenience of the State for return on the requisite amount. The obvious intention of Parliament (in the exercise of its constituent powers) was to obviate judicial review in such matters. The second addition was the insertion of Article 31-C. Any law under the guise of being beneficial to the economic system would find safe haven under its provisions.

87. This amendment, one can clearly see was a weapon. A weapon that not only could be used against the Fundamental Rights most effectively but even more so, was a weapon of convenience, one that any law could use to protect itself, while it destroyed Rights of the citizens and through that, constitutional morality. W. B. Yeats had said:

“No Government has the right, whether to flatter the fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used”⁴⁵

88. The case of **R.C. Cooper v. Union of India**⁴⁶ was a call for such realization. Popularly called the **Bank Nationalization case**, here it was observed that there needs to be a balance between the public good and the needs of the State. There can be no overturning

of this fine balance and negation of either one would be catastrophic to all. Fundamental rights cannot be abrogated by the State. The Court had made it clear that Fundamental Rights are a gamut of rights and have to be viewed as being indispensable. Thus, constitutional morality involves not merely the observance of restraint but requires a greater participation in plainly self-democratisation which means to a considerable degree, self-negation and yielding to concepts of social good and public trust.

89. A case that truly identified the judicially manageable standard of ‘Constitutional Morality’ by evolving what came to be called the Doctrine of Basic Structure was that of **Kesavananda Bharati**⁴⁷. More popularly known as the **Fundamental Rights case**, many have observed that it was truly the pinnacle of the State action to mould the Constitution to fulfil a need that was considered prevailing at the time.
90. In **Kesavananda Bharati**, it was observed that while the power of amendment is unreserved, nonetheless there could be no alteration of the essence of the Constitution. The Supreme Court allowed Article 31-C to stand to the extent that it did not alter the basic structure of the constitution. Hence, all features that were held integral to the Constitution were immune to the amending powers of the Parliament.
91. It is fair to heed Baxi’s warning that:
 “...it is simply unforgivably naïve, for anyone to look for, or to claim to have discovered, the ratio decidendi

of a case; all that one can aspire to do is to elucidate a set of principles and to indicate the weight of agreement or disagreement attaching to each principle.”⁴⁸

92. N. A. Palkhivala, who also appeared in **Kesavananda Bharati** commented that:

“Parliament cannot, in the exercise of its amending power, alter the basic structure or framework of the Constitution. For instance, it cannot abolish sovereignty in India or the free democratic character of the State; nor can it impair the integrity and unity of India or abolish the States. The amending power cannot be so exercised as to make the Constitution suffer a loss of identity”⁴⁹

93. Various subsequent judicial pronouncements show that courts began to prioritize Fundamental Rights after guidance was made available in the **Kesavananda Bharati case**, recognizing the importance of societal rights, sometimes over those of the individual. Considering themselves as trustees of the Constitution, the Judges of the Supreme Court could not allow State sponsored abrogation of the Constitution, and devised a method to limit the Constituent power of Parliament.⁵⁰ It was reasoned by the Supreme Court that if Basic Structure of the Constitution was distorted to fulfil any presently prevailing need, it would leave the Constitution unrecognizable, and all the commitments made by the Drafting Committee in 1950, and constitutional

morality itself, would be left as a vague memory.

94. One of the dark periods that comes to my mind was that of the case of **A.D.M. Jabalpur case v. Shivkant Shukla**⁵¹ or the **Habeas Corpus case**. This, in recent memory, was a divestiture by the Supreme Court of many of the principles that have come to hold great preeminence in our Constitutional scheme. In essence, the judges of the Supreme Court abrogated rights in relation to life and liberty.
95. The judgment disallowed any person, in light of the Presidential order passed to file any writ in the nature of Habeas Corpus or any other, against an order of detention on the ground that the order was not in consonance with the statute or was malafide. This was truly the darkest of hours, when we forgot everything that made us a democracy. Justice H.R. Khanna's lone dissent in **A.D.M. Jabalpur** appeared as a ray of hope and he has gone down in the history as one of the most valiant judges of India.⁵²
96. It is evident that the various opinions of individual judges in **Kesavananda Bharati** clearly show that there is an unspoken dilemma arising out of the principle of Constitutional Morality.
97. The fact that we have to keep in mind is vigilance, Constitutional Morality demands continuous vigilance, against oneself, against all organs of government and against the arbitrary use of power. During **ADM Jabalpur**, that is what we lacked, and

as a result, we came very close to losing who we are, a democracy.

98. In **Dr. D.C. Wadhwa & Ors. v. State of Bihar & Ors.**⁵³, it had been held that any challenge to the constitutional validity of a law could be tested on the touchstone of the ‘core of our constitutional scheme’⁵⁴. Laws needed to be tested on a value that was outside the black and white text of the Constitution. There could not be promulgation laws that would not adhere to the very core values that the Constitution stood for. This also, to my mind, exemplifies the judicial discovery of ‘constitutional morality’, although without specific regard to it.
99. From rejection of Dr. Ambedkar’s argument of “spirit of the Constitution” in 1952⁵⁵ to **D.C.Wadhwa’s** test of the core of the Constitution – the theory of Constitutional Morality has accompanied the Supreme Court in its journey.
100. Another case that made a severe impact was that of **I.R. Coelho v. State of Tamil Nadu**⁵⁶. The case is one of the recent judgments that delineated the enigmatic nature of basic structure. At this stage a rather appropriate quote in **M. Nagraj v. Union of India**⁵⁷ (a case that came before Coelho’s) comes to mind, one that can bring to mind the idea that the basic structure doctrine, though not found in text, was indeed an expression of constitutional morality; “Systematic principles underlying and connecting the provisions of the Constitution, these principles give

coherence to the Constitution and make it an organic whole. These principles are part of Constitutional law even if they are not expressly stated in the form of rules”.

101. It was observed in Coelho’s case that it was necessary to examine “whether invasion was necessary and if so to what extent.”⁵⁸ Coelho’s case developed a distinction between two types of values that form part of the Constitution. The textual provisions and the overarching values that form part of basic structure. It may be considered that this is the first time that constitutional morality was actually being expressed with reference to its definition, albeit by another name. This recognition of the preeminence of the foundational values behind textual rights is just an expression of what the Drafting Committee envisioned.
102. The case lead to the “rights test” and the “essence of rights test”. The names of these tests make the outcome clear, it is the essence of the right that would fall within the ambit of basic structure. In my view, the essence of the right is close to the principle of Constitutional Morality, and I would say is an expression of Constitutional Morality. It was held that the very essence of rights that have to be protected and adhered to, no matter what the motivation might be to contravene them.

In **Coelho**, the Supreme Court has further held that “147....The point to be noted is that the application

of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368....”

103. In **Supreme Court Advocate on Record Association v. Union of India**⁵⁹ or the NJAC Case, the Supreme Court repelled the suggestion that Basic Structure Doctrine was outside the Constitution. Speaking, in a judgment written with great care and strength of reasoning, Khehar, J. held that:

“348. This Court, while carving out each of the above “basic features”, placed reliance on one or more Articles of the Constitution (sometimes, in conjunction with the preamble of the Constitution). It goes without saying, that for carving out each of the “core” or “basic features/basic structure” of the Constitution, only the provisions of the Constitution are relied upon. It is therefore apparent, that the determination of the “basic features” or the “basic structure”, is made exclusively from the provisions of the Constitution...”

104. Thus, while constitutional morality is an important feature of the Constitution, grounded in Constitutionalism, the doctrine of basic structure, is only an expression of that principle of constitutional morality.

VIII. OTHER TOOLS TO REALISE CONSTITUTIONAL MORALITY

105. The nature of the relationship between the citizen and the State is a rather tenuous one. The citizenry, by nature are suspicious and skeptical of the State as, in exercising its powers, it has been known to impinge on the rights of the people. It is this situation that constitutional morality attempts to ameliorate.
106. When formulating the Constitution, the Drafting Committee, and Dr. Ambedkar were cognizant of the fact that the nation was unprepared for the task that lay ahead. To propagate constitutional morality into the general populace, there needed to be certain checks in place, to control the new regime of government and arm the citizens with certain tools that would further these aims. The Courts, interpreted the provisions of the Constitution in wide terms to aid in realizing the aims of the Drafting Committee and provide safeguards against the unilateral action of the State in the exercise of its powers. This aided in realization of constitutional morality.
107. What could be considered one of the most effective tools in enabling constitutional morality, and against arbitrary action by the State is the right of freedom of the press. Read into the right of freedom of speech and expression under Article 19(1)(a), the right of freedom of the press is critical to buttress the tenet of constitutional morality.

108. Unlike the Constitution of the United States, while there is no express written provision for the freedom of the press, the Courts while interpreting the ambit of the right to freedom of speech and expression under Article 19(1)(a) have come to read the right to freedom of the press into its provisions. The freedom of speech and expression is an expression of one's opinions, beliefs, and thoughts by word of mouth, the written word or in any other form.
109. The right of freedom of the press grants the people with intrinsic power in relation to the decision-making processes. A free press, that is neither directed nor controlled (directly or indirectly) by the State is essential to a democracy. The role of the freedom is to keep the citizen informed, so when the time comes to make political decisions, the citizenry is completely informed and keeps the roads of dialogue and information between the State and Citizens open.⁶⁰
110. It is apparent that the Supreme Court when interpreting Article 19(1)(a) was intent to enabling the citizenry to have the most comprehensive knowledge of the workings of the State. This knowledge would both educate the citizens of the nation and would effectively impart information so that they may make informed decisions when relating to their government. While subject to reasonable restrictions as laid out by Article 19(2) it was aptly observed by Patanjali C.J., in the case of **Romesh Thapar** that:

“9. ... Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible.”⁶¹

Undoubtedly, free speech and expression is not possible unaccompanied by education. In fact, the Right to Education may well have been incorporated as a fundamental right, or alternatively courts could have interpreted as subsidiary to right to speech and expression. What could one speak if one is not educated ?

111. The right to education was a duty, put upon the State through the provisions of Articles 41 and 45. Enshrined in Part IV of the Constitution, a duty was cast upon the State to provide both effective provisions for education, within a State's financial capacity⁶² and the more stringent demand that education is provided to all children up to the age of 14 years within a period of 10 years⁶³.
112. While this could be seen as effective steps towards educating the populace, the Courts of India have furthered the ambit of these Directive Principles of State Policy by likening them to Fundamental Rights. As the end aim is to have an educated and free

thinking nation, in my opinion, no step towards furthering these aims, in adherence to the law is too great. It was observed in **Mohini Jain (Miss) v. State of Karnataka**⁶⁴ by Kuldeep Singh J. that:

“9. The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into fundamental rights. Both are supplementary to each other. The State is under the constitutional mandate to create conditions in which the fundamental rights guaranteed to individuals under Part III could be enjoyed by all. Without making “right to education” under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.”

113. In **Unni Krishnan, J.P. and Others v. State of Andra Pradesh and Others**⁶⁵ the Supreme Court again observed :

“165. It is thus well established by the decisions of this Court that the provisions of Part III and IV are supplementary and complementary to each other and that fundamental rights are but a means to achieve the goal indicated in Part IV. It is also held that the fundamental rights must be construed in the light of the directive principles. ...”

114. These observations make it patently clear that the Courts understood the pressing need to ensure that the right to education be given to all. Indeed the

intervention by the State lead to inclusion of Article 21A in the Constitution.

115. In furtherance of the aim to grant an education to everyone, the Eighty-sixth Amendment Act, 2002 inserted Article 21-A into the Constitution that provides the right to education under Part III formalizing it as a fundamental right. Article 51-A (k) under Part IV-A was also inserted, that cast a duty on parents or guardians to provide opportunities for education for their children or wards. This requires the State to take concrete steps to provide high quality education in schools as well as colleges. Reliance upon private sector schools is hardly an answer. The floating of schemes including mid-day meal schemes for children is not sufficient by itself unless the State acts out of conviction and ensures that deliverables are qualitatively commensurate with true intent.
116. When the Preamble was being drafted, despite the fact that the word “secular” was not present (it was inserted by the Constitution (42nd Amendment) Act, 1976) there can be no doubt that despite the lack of nomenclature, India was indeed a secular country. In other words, there could not be an asymmetry based on religion.
117. In a nation that is both vast in size and divergent in beliefs, Dr. Ambedkar and the Drafting Committee were aware of the fact that State can never be either theocratic or anti-religion⁶⁶. Articles 25 to 28 constitute the freedom of religion, and putting those

rights outside the amending power of the State makes it clear that they are (as intended by the Drafting Committee) indeed a basic feature of the Constitution.

118. While the term religion was not defined anywhere in the Constitution, likely due to the foresight of the Drafting Committee to not limit the word by defining it, the Supreme Court has in **Commr. Hindu Religious Endowments v. Sri Laxmindra Thirtha Swamiar of Sri Shirur Mutt**⁶⁷ observed that:

“17. ...Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.”

119. This necessary expression of the people has to be protected as, in India, personal identity is intrinsically

entwined with one's religious beliefs. Articles 25 to 28 are the Drafting Committee's commitment to allowing true expression of a person's most personal beliefs, no matter if they are not in consonance with others.

120. The Supreme Court, in a true enunciation of the progressive expression of the rights enshrined in Articles 25 to 28 and while expressing true understanding of the religious rights of the individual and promoting expression of the same observed in **Bijoe Emmanuel and Others v. State of Kerala and Others**⁶⁸ on the question of expulsion of Jehovah's Witness students for not singing the National Anthem but instead standing respectfully while it was sung that:

“18. ... Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25.”

121. In my opinion, while religion plays a crucial role and is part of the very bedrock of our nation, it has also been a cause for social division and stratification. And while critical to the history of a nation, it could be considered to be an antithesis to the ideals of constitutional morality.
122. Yet, it is apparent that the Courts are aware of this

fact. In **Bal Patil v. Union of India**⁶⁹ the Supreme Court took the view that:

“37. ...Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people getting special protections, privileges and treatment as part of the constitutional guarantee. Encouragement to such fissiparous tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multinationalism. Our concept of secularism, to put it in a nutshell, is that the “State” will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.”

This view, I believe has the right of it, while maintaining the freedom of religion, it ensures that no single faith can reign supreme.

123. India is home to a vast array of minorities. A cornerstone of the nation is the fact that despite the divergence of religion, caste, creed etc., all minorities should live together in peace and amity. They should

be able to contribute unhesitatingly to the common culture and have a right to participate in the moulding of the political destiny of the nation.⁷⁰ This aim is essentially the furtherance of constitutional morality.

124. There is an intrinsic danger in this as well. As propounded by Grote, there should never be any form of popular majority. Any form of power that puts itself forward as being the will of the people would be in very real danger of turning despotic and overpowering the minority.
125. Couched in negative language, Article 21 is a right that the Drafting Committee saw that would protect both citizens and non-citizens as well. Concisely observed by Field J. in **Munn v. Illinois**⁷¹ the right to life was:

“By the term ‘life’, as used here, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed”

126. The security of Article 21 is a safeguard against executive encroachment. For the citizenry to be empowered and free to make decisions regarding their future and their nation they cannot fear the State. The objective of the Drafting Committee was simply to restrain the State from proceeding against the life or personal liberty of the individual without the express backing of law.
127. The judgment of **Kharak Singh**⁷² was the first time

that the Supreme Court made a defining judgment on the term ‘personal liberty’. While granting the term the widest possible amplitude, it was observed:

“13. ...The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that “personal liberty” is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the “personal liberties” of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, “personal liberty” in Article 21 takes in and comprises the residue...”

128. It is clear from this decision that, the Supreme Court intended that the widest possible amplitude is given to the provisions of Articles 21 and 19(1)(d). There is a clear basis for this, and in my opinion, this is the best manner to effect constitutional morality, and through that a fearless and confident nation where ideas and thoughts cannot be the subject of penalization.
129. In the landmark judgment of **Maneka Gandhi v.**

Union of India⁷³ the amplitude given by the Supreme Court to Article 21 can be considered a true manifestation of the essence of both the Article, as well as a true intention of the Courts to elevate the citizens of the nation, thus empowering them.

“76. To sum up, personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment—not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Article 21. Absent liberty, other freedoms are frozen.”

130. In my opinion, this right is pivotal to aid the citizens of the nation and here I believe that the Supreme Court has, by vesting the nation with this safeguard, has taken strides towards the end goal that is constitutional morality.
131. In my view, the study of Indian constitutionalism is indeed one of the most fertile grounds for scholars and sociologists to understand the way in which the Constitution is written and the way in which it suffers, its spirit being violated on more than one occasion. I must add that in his characteristically perceptive way Baxi describes that: -

“...the Indian Supreme Court’s impressive achievements perhaps disturb the culture of sentiment

and sensibility that regards the American Supreme Court as both an exemplar of judicial process and power in the global paradigm...”.⁷⁴

132. The importance of a State and the criticism pointed out by Baxi is relevant because the idea of State itself has undergone tremendous change. If the State is a protector, in what way does it protect its citizens? Does it de-nationalise them? Does it disinvest its natural resource? Does it mean greater de-regulation? What does “de-nationalisation, disinvestment and de-regulation” called ironically the three Ds by Baxi lead to the status of citizens? Where do rights stand when citizen feels de-nationalised or disinvested or de-regulated? But who are citizens? Is it the majority who are still struggling to keep the body and soul together much less to dream of the ideals which are contained in the Constitution? There would be an instance where the rights of individuals would be pitted against the rights of corporations (where such rights are not group rights of the citizens themselves).
133. In my view, the Government as the custodian of power, and often, in compliance of or in discharge of its obligations and responsibility to protect the citizens must make active choices in favour of the citizens. If such choices are exclusively in aid of capital inflow, they might be loaded with questionable value judgments and irreversible repercussions. Thus, the flow of capital into a country must never compromise dignity, justice, equality and fraternity.

134. I am not very clear what would have been the position of the Union of India which enacted a law to act as ‘*parens patriae*’ to protect the interest of the Bhopal victims if such an accident had happened now and if the shareholding of Union Carbide India could not be directly traced to the American parent company in a corporate structure incorporated in various international jurisdictions.⁷⁵ Thus, the fundamental access of judicial functions in constitutionalism is also to question legitimacy of such structures, which may provide a smoke-screen from direct accountability to law as well as due process in India. The ultimate beneficiary of any due process in a democracy are its citizens. Legitimacy is not only an outcome of Constitutionalism but is also its ingredient.
135. In India, while the due process clause was not incorporated *per se* but over a period of time the manner in which the fundamental rights have been defined, expanded and understood, the Supreme Court did become conscious of moral intentment the founding fathers as if the founding fathers were alive when the Constitution came up for reinterpretation.⁷⁶
136. Baxi says that “the sheer bulk as well as the stunning verbosity of the Indian Constitution remains unparalleled in the annals of contemporary Constitutionalism...”⁷⁷

IX. THE INTERNATIONAL PERSPECTIVE

137. In my experience, Constitutional Morality is not simply a concept that prevails in India. Though differently named, Constitutional Morality has indeed surfaced in different jurisdictions in different guises the world over. One that, I feel could be taken as a direct corollary in relation to our concept of constitutional morality is the doctrine of 'Margin of Appreciation' promulgated by the European Convention on Human Rights. Surfacing at around the same time that India was gaining independence, this can be seen as an international representation of attempts to locate the immutable feature of a Constituent document, which cannot be compromised.
138. As a body of law, developed by the Strasbourg Court, under the European Convention on Human Rights, the "Doctrine of Margin of Appreciation" was essential to understand whether any practice or law adopted by a State contravened the Convention. Aptly put, the doctrine allows a limited latitude that could be given to States in their observance of the Convention⁷⁸, who could not make a law or act contrary to the core of the rights contained in the European Convention.
139. In my view, the doctrine is similar to that of constitutional morality to the extent that it regards Constitutionalism and rule of law as supreme and makes them incapable of being compromised. Often

to apply the doctrine, there is a 'balancing exercise' that has to be done, i.e. what is the extent the right in question is at a cross-roads between community interest and individual liberty. The doctrine of Margin of Appreciation is aimed at resolving inherent conflicts between the individual's rights and national interests,⁷⁹ without sacrificing the core.

The adjudication of margin of appreciation involves examination of (a) what is the right; (b) what is the incursion; (c) was it necessary at all; (d) and if it was, what was the extent of justification.

140. Thus, State claims of public interest are not going to be unverified dogmas but will necessarily involve 'strict scrutiny' of Governmental action. The theory of margin of appreciation according to Constitutional Morality will necessarily involve strict scrutiny of Governmental behavior. Theory of margin of appreciation is different in respect of legislation, whose validity for the purposes of reasonableness is tested on the principles of reasonable classification. Even while determining how reasonable is the class, the theory of margin of appreciation has been farsightedly explained by the Indian Supreme Court as the furnishing of nexus between the classification and the object sought to be achieved. In view of the advancement of the principles of equality to include non-arbitrariness, the theory of margin of appreciation in the Indian context will also enable the courts to examine the nature of the class and is the class well formed.

141. The principle of margin of appreciation further deploys doctrine of proportionality. It may be observed that the main aim of the doctrine is that member States exercise self-restraint. It is hardly necessary to state that in essence, this is exactly what constitutional morality intends to impart as well.

X. CONCLUSION

142. We have, as a nation, understood the principle of Constitutional Morality, and have through trial and error tried to implement it. Most recently the Supreme Court, while balancing constitutional values and Fundamental Rights observed in **Adi Saiva Sivachariyargal Nala Sangam v. State of T.N.**⁸⁰;

“48. ...The requirement of constitutional conformity is inbuilt and if custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs and practices.

49. The difficulty lies not in understanding or restating the constitutional values. There is not an iota of doubt on what they are. But to determine whether the claim of State action is furtherance thereof overrides the constitutional guarantees under Article 25 and 26 may often involve what has already been referred to as a delicate and unenviable task of identifying essential religious beliefs and practices, sans which the religion itself does not survive. It is in the performance of this task that the absence of any

exclusive ecclesiastical jurisdiction of this Court, if not other shortcomings and inadequacies, that can be felt...”

143. This observation makes it clear that the Supreme Court is making a conscious effort to diffuse constitutional morality during the process of interpretation of the Constitution and imparting justice.

144. To leave you with the words of Nani Palkhivala, (during the **Privy Purses case**⁸¹ where a midnight executive order by the Government of India derecognized Princes, in flagrant disregard of procedure) said that:

“The survival of our democracy and the unity and integrity of the nation depend upon the realization that constitutional morality is no less essential than constitutional legality. Dharma (righteousness; sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment can save it.”⁸²

145. We must admit that there have been times when we have lost all that we hold dear through one arbitrary act of the Legislature, the Executive or the Judiciary. Further, in a nation as political as ours, there are times when political motivations move the Judiciary as well as they may move any other organ of the Government. We have to be ever vigilant of the temptation to act arbitrarily. We as individuals, nation, and a democracy need to be ever watchful.

146. The rising trajectory of Indian youth has perhaps more rational foundations. They observe and there is something of “the rational humanist in them” which seems to be exercised. When Nirbhaya happened they decided to make their protest felt and perceived. The Justice J.S. Verma Committee attempted to respond to it as best as it could. Legislative amendments happened in record time. Where there is a will there is always a way. India’s citizenry is enlightened. It is considerate. It is compassionate. We must place faith in our own people. At the same time, we must develop a certain indigenous respect for our own genius. We must respect what we produce, what we can make for our own selves.
147. More importantly and above all, we all have to cultivate and propagate Constitutional Morality. This, in my view, is the unwritten Constitutional Duty on every citizen and obligation of every officer of the State.
148. The Constitution was drawn up under the leadership of a man like Dr. Ambedkar whose writings display a unique understanding of his knowledge of world history. If one reads carefully, one should be able to discern in his writings the glimpses of world history which fashioned his beliefs. It is necessary that we pay tribute to him by living up to his ideals of secular as well as rational living under the Constitution.*

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- 28 A History of Greece by George Grote – Reissue by Routledge, London 2000 at page 93: cited in Pratap Bhanu Mehta, “What Is Constitutional Morality?,” Seminar 615 (November 2010), 17–22. 87.
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- 31 Learned Hand, “The Contribution of an independent Judiciary to Civilization” in Irving Dillard (Ed) The Spirit of Liberty, (A A Knopf, 1960) p. 155.
- 32 Venkatachaliah, M. N., “Common Law, Humanism and Constitutions”, Constitutionalism and Constitutional Pluralism, Ed. P. Ishwara Bhat. Gurgaon: Lexis Nexis, (2013) 53-64.
- 33 Baxi, Upendra – How not to recall an icon - <http://indianexpress.com/article/opinion/columns/how-not-to-recall-ambedkar-2758030/> - last accessed on 19th April 2016
- 34 Bandhopadhyay, Sibaji – Four shades of irony, one of fury - <http://www.outlookindia.com/magazine/story/four-shades-of-irony-one-of-fury/296953> - last accessed on 19th April 2016. In my view, The rights of political participation to millennially exclude Dalits, the scheduled casts and the scheduled tribes in

derogation through reservations is also an important constitutional feature. Although I have described the pursuit of four sovereign virtues as equality, justice, liberty and fraternity, I appeal to Baxi that they do involve rights, justice, development and governance.

- 35 Nariman, Fali S., *The Silences in Our Constitutional Law*, (2006) 2 SCC (Jour) 15.
- 36 *Id.* See also *Naz Foundation v. GNCT of Delhi*, (2009) 160 DLT 277, para 79 (Cf. reversed by Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1).
- 37 *Supra* Note 35. However, as the article notes, when Ivor Jennings attempt to write a Constitution for Ceylon, he took about 7 years.
- 38 See also Beteille, Andre. "Constitutional morality." *Economic and political weekly* (2008): 35-42.
- 39 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 at page 616.
- 40 Friedrich, Carl Joachim. *Man and his government: An empirical theory of politics*. McGraw-Hill, 1963. p. 272.
- 41 AIR 1952 Supreme Court 252.
- 42 *Id.*, Para 74.
- 43 (1967) 2 SCR 762.
- 44 There is a strange coalescence in the opinion of the Baxi and Seervai when Baxi remarks that the makers of the Indian Constitution installed detailed conceptions of equality and fraternity. Because they were '....distrustful of judicial power whose colonial face was oppressive and whose future visage was illegible...'. (See *Infra* Note 73)
- 45 Foster, Robert Fitzroy. *WB Yeats: The arch-poet, 1915-1939*. Oxford University Press, 2003. p. 376
- 46 *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 24.
- 47 *Supra* Note 38.

- 48 Baxi, Upendra. "The Constitutional Quicksands of Kesavananda Bharati and the Twenty—Fifth Amendment." (1974) 1 SCC Jour 45.
- 49 Palkhivala, N. A., "Fundamental Rights: Case Comment" : (1973) 4 SCC (Jour) 57 p.
- 50 In my view the lack of perception of a State, and understanding of the true obligation of a State has been foundational causes of insufficient discharge of constitutional duties. While those who occupies the positions of power do not realise that it is their lack of 'concept of State' or 'perception of State' which leads to a breach of constitutionalism. In other words a State is meant to be a protector, a symbol, a guarantor, one which stands for sovereign protection of the Constitution, one which is meant to maintain and work through the Constitution, by the Constitution and for the Constitution at all points of time.
- 51 A.D.M. Jabalpur v. Shivakant Shukla, (1976) Supp S.C.R. 172
- 52 See Khanna, H.R., Role of Judge, (1979) 1 SCC Jour 17.
- 53 (1987) 1 SCC 378.
- 54 Id., at 393-94, pr. 7.
- 55 In my view, in 1952, Ambedkar was cautious that diafferent prevailing "needs" (or projection of needs by the Government) could muddy the values behind the Constitution in an attempt to solve any presently emerging dilemma. There seemed to be various amendments to find 'quick fixes' to problems, overlooking the immutable principles behind them. This was essentially the fear that the Drafting Committee had had. The fear that indiscriminate promulgation of laws by the majority would eclipse the values of Constitutional Morality.
- 56 I. R. Coelho (Dead) by Lrs. v. State of Tamil Nadu, AIR 2007 SC 861.
- 57 M.Nagaraj v. Union of India, AIR 2007 SC 71.
- 58 Supra Note 56.
- 59 2015 SCC OnLine SC 964.
- 60 Shukla, Vijaya Narain, ed. The Constitution of India. Eastern Book Company, 2013, pg. 134

- 61 Romesh Thappar v. State of Madras, AIR 1950 SC 124.
- 62 The Constitution of India, Article 41.
- 63 Id., Article 45.
- 64 (1992) 3 SCC 666.
- 65 (1993) 1 SCC 645.
- 66 Supra Note 60, Pg. A-23.
- 67 AIR 1954 SC 282.
- 68 (1986) 3 SCC 615.
- 69 (2005) 6 SCC 690.
- 70 Bachal, V. M. "Judicial Interpretation of Article 21 of the Constitution of India." *The Indian Journal of Political Science* 25.3/4 (1964): 231-240.
- 71 24 L Ed 77 (1877).
- 72 Kharak Singh v. State of U.P., AIR 1963 SC 1295. It may be relevant to note that the majority rejected the Respondent's argument that the Petitioner's claim would lie before civil court as the gravamen of the case is essentially a tortious act. The Supreme Court noticed that they were unwilling to read any restrictions on the right (in the nature of exhaustion of remedies) to approach the Supreme Court for enforcement of fundamental right under Article 32 of the Constitution. Thus, while there is an element of tort in almost all cases of violation of fundamental rights, they are often not considered in that perspective. It is for this reason that despite allowing the writs under Article 32, payment of damages is not the rule.
- 73 (1978) 1 SCC 248.
- 74 Baxi, Upendra. "Known But an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence, A." *Int'l J. Const. L.* 1 (2003): 557, 558. The story of reservations has also been one by which the Indian State has attempted to empower people who were clearly marginalised and were denied the title deeds as Baxi refers to '....The Title deeds of humanity...'. However, it must be borne in mind by the State that action in favour of the one by way of a reservation must never lead to an

under utilisation of talent in the general pool. This needs creative and effective planning, imaginative constructs and above all the optimum utilisation of resources within the availability of the Government in a positive, honest and determined manner. This caveat is necessary because even while strengthening the judicial institutions the Government had a great role to play. To provide judiciary with infrastructure, with tools and ensure that the basic requirements of judicial functioning, both in numbers, qualitative assistance as well as component assistance were suitably handled.

- 75 In the contemporary development of the law, the Fundamental rights of Indian citizens will stand definitely superior to rights of multinational corporations which might have purely business interests and may even be at variance with those of the Fundamental Rights of the Indian citizens. The Supreme Court in my view, while protecting Foreign Direct Investments and means of tax structuring in case *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 613 did not consider what would be its implications in terms of tortious liability. It would be an interesting academic analysis if one were to apply the facts of *Bhopal Gas Case* (1989) 2 SCC 540 to the corporate structure in *Vodafone case*, and still a similar exercise could be done.
- 76 Baxi's criticism that Indian justices rely upon the same passages from the Constituent Assembly Debates only to reach different outcomes is a valid point. In my view, the correct way to read the Debates would be to read them as a whole, and speeches therein need to be read over a number of times to determine the (common) principles that were being communicated. Perhaps, it was too early to discern a principle at that point of time because it was still a draft that was being discussed. Many rights came to be judicially pronounced using such tools of interpretation, including the right to privacy.
- 77 Supra Note 74, at 571. This article would not have been possible without remembering Upendra Baxi. Upendra Baxi, in my opinion, is perhaps one of the all-time great philosophical and legal scholars, and it was unfortunate that Baxi despite being a 'distinguished jurist' was not appointed as a judge of the Supreme Court in terms of Article 124(3)(c) of the Constitution. The same can be said in respect of Prof. Lotika Sarkar and Prof. P. K. Tripathi.

- 78 See O'Donnell, Thomas A. "Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, The." *Hum. Rts. Q.* 4 (1982): 474.
- 79 Benvenisti, Eyal. "Margin of appreciation, consensus, and universal standards." *NYUJ Int'l L. & Pol.* 31 (1998): 843.
- 80 (2016) 2 SCC 725.
- 81 *Madhav Rao Scindia v. Union of India*, AIR 1971 SC 530.
- 82 Kumar, Maj Gen Nilendra, ed. *Nani Palkhivala A Role Model*. Universal Law Publishing, (2014). pg. 50
- * I acknowledge the research assistance of my junior Mr. Talha Abdul Rahman and Ms. Aakanksha Sinh in research assistance for this lecture.

Shri D.V. Subba Rao

The quintessential Vizagite

"THE justice delivery system in the present economic dispensation, i.e, market economy, has become most essential, if not vital. Hence it requires regulation, both statutory and self. The challenge before the system is to inspire the respect and regard of the entire nation."



That is the belief of D.V. Subba Rao, the first mofussil lawyer to adorn the seat of the Bar Council of India Chairman. "Lawyers and judges continue to be the sentinels of our democracy. With my experience of over 40 years in the profession, I am convinced that subordinate courts and mofussil lawyers who constitute 90 percent of the national bar are the backbone of the judicial system."

Inside the court or the tribunal, for that matter outside too, the soft-spoken Subba Rao's views are heard with respect and admiration because beneath the eloquent and skilful presentation is his unwavering adherence to high ideals. That is why eminent judges like Chandrachud, Bhagawati, Jeevan Reddy and Kirpal and jurists like Nariman, Sorabjee, Parasaran and Venugopal hold him in high esteem.

Says the former Chief Justice of India, P.N. Bhagawati: "I was deeply impressed not only by his intellectual calibre but also by the great sincerity and diligence with which he argued his client's case. He is a man of high integrity and exceptional character, with large

experience in public life and breadth of vision which is not confined to law but extends to a wide range of activities."

As a member of the prestigious Justice V.S. Malimath Committee on reforms of criminal justice system - it has since submitted its report - and of the Justice M. Jagannadha Rao Committee, constituted by the apex court to suggest ways for effective implementation of Section 89(2) of Code of Civil Procedure, besides being associated with the National Judicial Academy, which provides training for judges, lawyers and teachers of law, Subba Rao has done AP - and Vizag in particular - proud. It must be a most satisfying and rewarding work for Subba Rao to be so actively involved in the reform and reconstruction of the national judicial system and legal education and profession in general which he has been serving with distinction and dedication for 46 years.

All this work is in addition to the arduous task undertaken by him as BCI chief in laying down standards of legal education and in initiating steps for inculcating discipline in the legal profession. The BCI, which he heads for the second term now, has embarked upon several programmes to refurbish the image of the bar and the legal profession by organising seminars and workshops.

He was born with a 'legal spoon' in his mouth as both his grandfather, Srirama Sastry, and father, Somayajulu, were lawyers of repute. It was, however, his father's brother, Seetaramamurthy, popularly known as Seetababu, who was a source of strength and support for young Subba Rao when he enrolled as a lawyer in 1957. By then Subba Rao was already popular in Vizag as former president of the Andhra University Law College Society,

as a debater and as captain of the AU cricket team that won the inter-collegiate championship for the Tirumurthi Shield in 1955. The university's famous physical director, the late K. Sudarsana Rao, made a correct assessment of the university's sports potential. The cricket team of 1955 had players who were individually good but collectively ineffective. The physical director chose Subba Rao to weld the team into a match-winning outfit and the result was triumph for the team in the zonal match at Vizag and the finals at Anantapur. Twenty years later Subba Rao displayed similar leadership qualities as Lions Governor when Lions International Oak Brook, Illinois, called him "an outstanding writer".

Jawaharlal Nehru was Subba Rao's icon and Tenneti Viswanadham his role model. But it was N.T. Rama Rao who drafted him into politics first as Chairman of Visakhapatnam Urban Development Authority in 1985 and two years later as Mayor of Visakhapatnam, The decision to plunge into politics was as hard as the election he fought to become the Mayor in 1987.

Some of his friends advised him against getting into politics, first as VUDA chief and later as Mayor. His reply was that if all good people shied away, politics would never become good. He proved his friends and critics wrong by demonstrating that honesty and integrity do count in public life if only one had the will and the vision to achieve a goal. His term as VUDA Chairman and Mayor saw many things happening in the 'City of Destiny'. Beautification of the beach and the city's environs, the completion of the Corporation Stadium where eight international cricket matches, including a World Cup tie, had been played, launching such projects like Gurazada Kalakshetram,

museum, Appu Ghar, VUDA Park and aquarium, widening of roads and greening the hill range were among the gains for Visakhapatnam. He was the only Mayor selected from India to participate in the UNICEF Conference, held at Dakar (Senegal) in 1991, known as 'Mayors as Defenders of Children'.

For the last 12 years, he is heading the Andhra Cricket Association. Subba Rao went to the West Indies with the Indian cricket team led by Sachin Tendulkar as its administrative manager in 1997. He is a life-member of Prema Samajam and of several socio-cultural and educational organisations, including Ramakrishna Mission, Bharati Gana Sabha and Viskha Music Academy. A moment he cherishes was the welcome he extended to M.S. Subbulakshmi when she and her husband T. Sadasivam came to Vizag. Touching her feet in respect, Subba Rao recalled the famous words of Jawaharlal Nehru adding that "after all he was a city Mayor before the Queen of Music".

Subba Rao's only disappointment has perhaps been his inability to get elected to Parliament. To represent the city he so passionately loves, to articulate its needs and plead for its development, who is better qualified than Subba Rao whose family has ties with the place and its ethos for over a hundred years?

Durvasula Venkata Subba Rao is the quintessential Vizagite. His rise in public life coincided with the city's rise to national and international prominence. Fame and exalted positions have failed to corrode his innate goodness just as age has not dimmed his capacity for hard work. He embodies the spirit of Vizag marked by cultural catholicity, vibrancy of outlook and enduring humility. He is gentle

in disposition but firm in conviction; soft in expression but uncompromising in his adherence to values. An accomplished public speaker, he is also a delightful conversationalist with a penchant for anecdotes laced with humour. His broad and disarming smile puts even strangers at ease. A secret of his smooth and quiet completion of the Biblical span of three score and ten is his ability to take the rough and smooth of life in the stride, to laugh at himself and to strive to live up to the ideal of doing good to society without any quid pro quo. Service with humility transcends every boundary, including that of law and justice.

A. Prasanna Kumar

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**1st D.V.Subba Rao Memorial Lecture
by Shri Gopal Subramaniam April 24, 2016**



Shri Gopal Subramaniam
delivering the Memorial Lecture



saying it with flowers

Thanking Shri Subramaniam for his masterly presentation



Shri Gopal Subramaniam

Gopal Subramaniam, a Senior Advocate of Supreme Court, was educated in the Delhi University, called to the Bar in 1980 and designated as Senior Advocate in 1993. Was Additional Solicitor General of India (2005-2009), the Solicitor General of India (2009-2011) and Chairman, Bar Council of India (2010-2011). He has appeared in a large number of courts and tribunals throughout India on diverse areas of law and has been invited by the Supreme Court as amicus curiae in various matters of national importance. Counsel to the Verma Commission (1991), which dealt with the security lapses relating to the assassination of Prime Minister Rajiv Gandhi and the Wadhwa Commission (1999), which inquired into the murder of the Australian missionary Reverend Stains. Assisted and appeared as Counsel in the Union Carbide Case (Bhopal Gas Tragedy) and Justice K. Venkataswamy Commission inquiring into Tehelka Tapes exposing corruption. Served as a Member of the Justice J.S. Verma Committee on Amendments to the Criminal Laws appointed by the Government of India in the wake of rape of Nirbhaya which submitted its report in January 2013. Edited and contributed to the Book "Supreme But Not Infallible.. Essays in the Honour of the Supreme Court of India" published by Oxford University Press. Appointed as a Judge of the Qatar International Court in April 2015. Advisor, National Human Rights Commission, New Delhi. Conferred Degree of Doctor of Law (Honoris Causa) by Central University Orissa, Koraput in 2013. Gopal Subramaniam takes a sustained interest in matters relating to law, justice and the Constitution.