Death of Democratic Institutions: The Inevitable Logic of Neo-Liberal Political Economy and Abandonment of Directive Principles of State Policy

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First KG Kannabiran Commemoration Lecture on Law, Justice and Human Rights

At the very outset, let me unreservedly place on record that I feel it to be a great honour to have been asked to deliver this lecture in memory of Shri. Kannabiran – a remarkable senior advocate who was an indefatigable warrior for justice, a scholarly expositor of law and the political economy, a human being endowed with an abundance of understanding for the human condition and above all an optimist with an indefeasible empathy for human potential. As members of the Bar would be all too aware, the humility one ought to feel is also an indication that achievements, in instantiating justice and democratic practices, are not dependent on whether one holds high constitutional office or not. The potential for success of conjoined projects of democracy and justice is functionally more dependent on the efforts that members of the Bar than what the constrained operational width of those serving on the bench allows. This is especially true when we deal with stalwarts of the Bar who have devoted their entire life to the protection of civil liberties like Shri. Kannabiran did. His life and service to the bar and the temple of justice are too well known to reiterate here. It would suffice to say that –especially when most reasonable people are beginning to air foundational questions about whether institutions of justice are even attempting to serve the cause of justice –it is only apt that we gather to engage in some soul searching in memory of a remarkable human being who fought, throughout his life, for the cause of the weakest against what he perceived were instances of misuse of the institutions of an ostensible constitutional democracy.

I must of course place on record my personal debt of gratitude to Shri. K.G. Kannabiran. By the time I began to practice law in full earnestness, in the mid 1970s, he was already a star to whom neophytes could turn to for advice and guidance. And I do not recall even a single instance when Shri K.G. Kannabiran did not extend the benefits, to junior advocates, of a very capacious and brilliant mind that he possessed. His role in founding the PUCL is well known, and I, as its member almost from the days of its founding immensely benefitted from the sense of security – intellectual and moral - that it provided younger and idealistic lawyers who believed that the foremost of the promises of a Constitutional Democracy are with regard to safeguarding civil liberties, especially of the weakest, while also promoting the State as a platform for collective action to quickly transform the Indian society, from its moorings in graded hierarchies of difference and discrimination. It was my honour to have assisted him in a number of cases, as indeed it was a humbling experience when I appeared against him. If the former occasions were didactic, the opportunities to go up against him were occasions of chastisement delivered with courtesy. In either case, he was a born teacher. I must also place on record the fact that, after I was elevated to the Bench, Shri K.G. Kannabiran appeared before me – and each of those occasions was a privilege and his appearances are cherished.

I would like to briefly talk about one case in which I worked closely with him. In the mid-1980s, the State of A.P., had enacted a legislation that gave the State very sharp and deep tentacles of control over institutions of higher education. My inclination was to frame the arguments against that particular law on the basis of lack of legislative competence – essentially framing the issue in black letter law terms. As a senior advocate, Shri. Kannabiran insisted that protection of the autonomy of institutions of higher education, was not merely a matter of the positive law, but also one of the essential scaffolds of normative foundations of what the Indian Constitution sought to inscribe in our lives. He modulated the arguments of legislative competence through the sieve of essential autonomy for institutions of higher education as an aspect of free exploration of knowledge and human dignity. As he explained it then, constitutionalism in its essence is about constant reaffirmation of human dignity, and continuous reconstitution of the social, between individuals, between groups and those in turn with the State. Universities as spaces in which knowledge itself is constituted and reconstituted, both as a matter of learning existing knowledge and affirmation of the ever present possibility of new knowledge, necessarily had to have a significant measure of autonomy, not merely as a matter of statutory concessions, but as an inherent feature of a constitutional order that cared about human dignity.

And such memories of Shri. K.G. Kannabiran must necessarily underscore the angst we must feel, about the continued imprisonment of an elder wheel chair bound academic, suffering grave illnesses, for the mere possession of certain texts and literature for deliberation in academic setting. And that angst assumes greater acuity as reports filter in of the shooting dead of a teacher who was allegedly sharing images of a “messenger of God” for discussion in a class room. The State and the society are always locked in a dialectic process, and whether the institutions of both the civil society as well as the State conscientiously try to promote the core values of the Constitution, and give expression to the moral urgency of the consequential changes needed to protect innate humanity of citizens and groups they belong to, has a crucial bearing on whether the Constitution continues to be worked or not. It just seems that we have fewer and fewer people willing to boldly work the Constitution.

If you detect a tone of wistfulness in my voice, it is of course for the man – for men such as K.G. Kannabiran were rare, even in his day and arguably much rarer today. But that tone is also for myself, beset by confusion about the particular denouement we find ourselves in – not just in India but across the World. Buffeted for the past 4-5 decades by a framework of amorality - in which greed was to be the sole good, the individual to be the sole end point of any decisional matrix, and the better off to be the first to be served justice, societies across the Globe are now marked by record levels of inequality (primarily in the economic sphere which in turn multiplies the impact of socio-cultural and political inequalities manifold times), increasing abandonment of the constitutional projects and emerging kernels of serious social unrest. For the good part of the last two decades I have been expressing my unease at the arc of events, globally and in India, in various public lectures. I believe that the unease is now increasingly shaping into alarm, given the events across the World in general, more particularly in India, especially over the past few years.

Much has been written about the failures of judiciary, as revealed more particularly by its obvious reluctance, of a recent iteration and vintage, to fully bear its burden of being a check on the inherent tendency of the executive to over-reach and go beyond the limits of the law, and also abandon many of the core elements of the constitutional project. If there was one tenet that seemed beyond the pale of doubt - as far as the Constitutional projects that emerged in the first flush of hope after World War II are concerned –it was that democracy necessarily has to be accompanied by a constitutional restraint, guarded and articulated by the judiciary, on the contexts in which the executive exercises force, the modes of exhibition of that force – including but not limited to adherence to the principle that the State should have an exclusive monopoly to eliminate the violence by social groups - and the extent of its use. For a brief, but horrifying, period in the mid-seventies we confronted the possibility of, and to a large extent instantiated in reality, the prospects that a democracy modulated by constitutional restraint was but a brief flash of hope that was to disappear, as it was to with many other post-colonial societies and nation states. As images emerged, again and again, in some news papers, and in a few other forms of the media, of mobs of private individuals and social groups (openly identifying themselves with a particular form of a particular religious expression and the political formations that underwrite those expressions) attacking and targeting specific localities and particular segments of the populace, the reluctance of constitutional courts to exert or even seriously attempt articulation of any tenets of constitutional morality as guides for the law makers, the law keepers and the subjects of law, was marked. As visuals emerged that the law breakers were ostensibly acting with impunity under the active protection of the police, it seemed that the reluctance might actually be a case of abdication; and many reasonable people might even believe that they have valid grounds for opining that it was deliberate. Many of the fears of the mid-seventies return to write increasingly deeper lines of worry.

One of the essentials of determining whether the law is prima facie valid, are questions about which forum enacted the law, and whether it was done in a manner that warrants legitimacy. This is, of course, in addition to the constitutional norm that law cannot violate Part III of the Constitution. For long, many scholars have been talking about how imperial executives have used legislatures as mere rubber stamps. However, over the past two decades, what has become even more likely – and sadly also in jurisdictions that claim pride in being properly functioning constitutional democracies – is that enactment of law and framing of policy takes place without much debate, the absence being much more marked in the ruling cliques. The absence of debate underscores the overarching themes of neo-liberalism that much of the economy or almost all of it, and maybe even life – including social life – are beyond the pale of law. This necessarily has a chilling effect on the importance of legislatures as bodies of public deliberation, and indeed of public welfare and common good. Policy, which can be carried through into effect only by the sanction of the law, becomes the exclusive prerogative of the dealings between the executive and the elites, especially the monstrous power wielders - the oligopolists and a handful of autocrats- and legislatures are relegated to being perfunctory rubber stamps. The underlying logic, and the forces that it unleashes as well as is underscored by, means that the relationships between the legislatures and the imperial executives across the World are now marked by suicidal partisanship and subservience.

From a public law perspective, the twinning of the fates of legislatures to their efficacy of serving as fora for extolling the alleged virtues of the imperial executives, manufactured by a fawning media - financed and controlled by the big business - also implies that legislators are less “law makers” but more akin to cheer leaders, one tip of the leading edge of the storm troopers to attack any attempt at critiquing of law and policy instantiated at the behest of the imperial executive. Not just that. Even critiquing the performance, whether it be inside the legislative halls or outside in public for a, of the executive in implementing the law, is increasingly being treated as “anti-national” and/or treasonous. This slippery slide hasled us into a morass where we seemingly do not even have to bother to count the votes in the legislative halls. Not even when majorities are razor thin. The speakers of the legislatures, who for long now have been partisan party members, seemingly are now willing orchestrators of painting a thin veneer of institutional acceptance of the desires and commands of the imperial executive.

Once we accept the overriding assumption that the political processes have nothing to do or say about public welfare, common good and cherished national goals (most of which are not acknowledged with any degree of seriousness any longer), then the question of whether there is an actual majority or not becomes irrelevant. The processes of debating proposed laws, of voting on them in legislatures, and counting of those votes by people’s representatives are no longer a necessary indicator of legality. At best, they have begun to resemble a formality that is also now likely to be dispensed with.

And even that is likely to be picked off soon enough – we, after all, have recently been witness to repeated claims of one of the more powerful protagonists of the imperial executive, that vast numbers of citizens voting through early voting mechanisms sanctioned by law, are “stealing” the elections. Some of his party members have even accepted that more people voting has normally been inimical to their chances of winning the position of the Commander-in-Chief. In our own country, there have been three parallel sets of arguments made in some segments of public discourse: (i) that universal voting rights should be withdrawn, with one set of voices claiming that they ought to be withdrawn on grounds of membership of particular socio-religious identities; and (ii) yet another set of voices claiming that vast segments of the populace should not even be granted a right to vote, on the grounds that their alleged levels of productivity does not warrant their treatment as equal to the rich and those at the top of totem-pole of socio-economic hierarchies. Yet another set of voices has begun to articulate the position that may be public elections themselves may be unnecessary. One is tempted to claim, given the inordinate control that big business has over the executive, and through it, over the legislatures, that the substantive core of what we had hoped, in terms of dispersal of social and political power, with a one person one vote system is no longer a reality. And this necessarily undermines one of the foundations of the concept of social justice, for political equality as expressed through one vote and one co-equal voice is to be the first step in protecting citizens and human beings from the depredations of the powerful.

We were promised, in the early years of this republic, that the executive will have the moral obligation to implement the law, and extend protections for the citizens within the constraints imposed by the Constitution, not the least of which were to be the tenets of Article 14 and Article 21 against arbitrary action by the State. In the recent past we repeatedly witnessed brazen abdication of responsibilities in this regard, and that too with regard to sexual violence against women. In one instance four youngsters from the lowered classes were picked up, allegedly on suspicion of raping and burning to death a young upper caste woman. Even before the preliminary investigation was concluded, they were taken to the alleged scene of the crime to ostensibly "reconstruct the crime scene" and were shot dead in an "encounter" with the police. Seemingly the entire articulate section of the populace endorsed the action by the police – and it was widely accepted in public circles that the four youngsters from lowered classes were shot dead on a mere suspicion, that the encounter was in fact a fake one, and that in fact the police ought to be honoured for such an action. Very disturbing.

What was seemingly lost was the understanding as to why the law – and particularly constitutional principles – needs to restrain arbitrary action by the police. For once we grant normative sanction to arbitrary action, we also then inevitably make it possible that the police will then render its services in a manner that does not take into account the tenets of the rule of law; and extraneous factors such as the convenience of the political class and/or the benefits of an oligarchic class become the actuators, and misuse, of the force of the State. We had a situation, not too long ago, whence one young woman had to threaten public suicide, before the gates of the residence of a Chief Minister, in order to have an FIR lodged on her complaint that she was raped by the local MLA. It is alleged that, because the young woman had dared to complain, the police picked up her father and thrashed him so brutally that he died in custody. And now we hear of an even more gruesome incident of violence. A young Dalit woman, who was brutalized in an unimaginable manner, allegedly complained of being raped by four young men of the dominant upper caste in the village. From news reports it seems that the police had failed to register the complaint properly and failed to investigate in a manner mandated by law for many days. The young lady was hospitalized and finally passed away due to her horrific injuries. What did the police then do? No, they did not hand over the body to the family; instead, it is being alleged, that the family of the victim was locked up, and the body cremated by the police. The family, according to news reports, was barred for many days from meeting any journalist and/or politician, their cell phones taken away and – this gets to be incredible – there are reports that the police had contemplated administering "pentathol sodium" to the members of the family of the victim. In a matter involving the alleged rape and the killing of a young dalit woman, due to the actions of four upper caste youngsters, her family was to be subjected to a "Narco Test", and her dying declaration seemingly of no consequence to the police. There were also reports that the State was allegedly planning to engage the services of a Public Relations firm.

Surreal. Just surreal. And horrifying. So much so, that the Allahabad High Court had to ask the officials, who were all members of various upper caste, as to whether they would have behaved in the same manner had the victim been either their own daughter or from a family belonging to the upper classes.

Let me hasten to add, that this complete and total disregard of the law is not entirely new. Nor is it exclusively in the provenance of this or that political party. It was not too long ago, that the Supreme Court had to declare as unconstitutional the policy of the State arming young tribal men to their teeth, forming a vigilante force, in aid of the coal mafia. However, what makes this even more alarming now, is that the rulers and their afficianados seem to think that the "image" of the ruling party, and that of its leaders, is to be protected at any cost. Furthermore, they also seem to hold the position that the reputation of the party and its leaders is not dependent on upholding the rule of law in protecting the fundamental rights of the citizens at the bottom of the socio-economic totem pole; but rather, that it is dependent on their ability to project absolute power over the citizens and ensuring the absence of any discourse that is contrary to the narrative they seek to present. Like any large corporation. The law is thus necessarily to be subordinate to the rule. When we embarked, in 1991 on the path of neo-liberalization, late Shri. S. Jaipal Reddy, a former Union Minister and known throughout his life for his honesty and indefatigable fight for democratic values had famously warned the main protagonists: "Please be careful, lest the market begins to act as the State and the State begins to act as the market". It seems that what he warned us about has come to pass.

Surreal, yes. But should it be shocking, or even surprising, to us? My reply would be a resounding no. How could it be shocking and unexpected, when for nearly three decades now we have been guided by a philosophical and moral framework in which the dignity of the human being is subservient to the basal calculus of the market? When the Directive Principles of the State Policy – the vital soul of a transformative constitution - have been elided even from effective discourse? When the very programmatic elements of the Constitutional project that seeks to achieve the preambular promise of fraternity with dignity (and recognizes as a self evident truth that unity and integrity of the nation is dependent on instantiation of social justice in all institutions of national importance) is effectively deemed to be irrelevant, and even inimical to national purpose, at least by the tenets of the neoliberal polity that the elites and power holders seemed to have subscribed to lock stock and barrel? How could we have expected any different when the notion of dignity of human beings as an essential element of justice has been degraded?

The angst that many of us feel, and the shock at the near demise of rule of law – indeed the very notion of rule of law as being opposed to the arbitrary rule of "man"/"regime" – is well described by many committed democrats. The many, many examples of violations of fundamental rights – a few of which I have broadly described as examples earlier – are testimony to the wider failure of the collective pacts of constitutional democracies. However, the mere expression of angst and limiting ourselves to a superficial analysis of what went wrong in terms of political rights (that have mostly been more fully enjoyed by the elite segments of the populace as they have the resources to work the levers of the State/polity and of the society), will not suffice. In fact, such analytical frameworks are fundamentally misguided and mislead us into forgetting the very problems that Babasaheb had warned us about in his speech to the Constituent Assembly when our Constitution was ratified. More about that a little later.

Amartya Sen had very presciently proposed, in his book Argumentative India, that the basic political freedoms were to be treated as essential elements of "Development" broadly conceived and then went on to bemoan the fact that the practice of "democracy" had failed and had measurably underachieved on another set of parameters that those committed to a genuine social democracy ought to pursue: protection of the essential dignity of human beings by equipping them with the capacities to self actualize, starting first with the removal of institutional and social hindrances to such a project. In the Indian context, that necessarily meant elimination of the depredations of endemic and graded inequalities in the socio-cultural, economic and political spheres that had normative support in institutional frameworks of governance and social control.

That brings us to how our founding fathers visualized what the foundations of a true social democracy would be. In the first instance, let us be clear that a conception of "ballots" as the sole outer limit of democracy was not countenanced, even if they did recognize that each electorally imposed change was a triumph of the belief in the small "r" revolution, in order to prevent the big capital "R" Revolution – if we use the distinction so presciently explained by Julius Stone in his book the Province of Law. It was realized, early on, that the desire, to tamp down the instincts for the big capital "R" Revolution on the streets, could not be premised on repetition of small "r" based changes of the power wielders through the operation of the ballot box. The changing of the government by ballots was thought of as a means to ensure that the new power wielders would be more zealous in pursing the essential transformative goals of the Constitution. The normative end points of the "big/capital R" Revolutions, they realized, could not be static utopias, but to be reimagined and reaffirmed on two facets of bedrock of equality: (a) an indefeasible commitment to the right to the ballot box and participate in the public discourse; and (b) an uncompromising commitment for the elimination of institutional and social blocks that hinder the building of capacities of self actualization, the core of human dignity. People of India were to be valued as contributing members of the public discourse individually and/or by forming coalitions of groups that transcend traditional and limiting identities so that a nation based on fraternity can be continuously imagined and built.

It is often complained that the concept of "democracy" is alien to the societies of the east, and hence, it is argued, the eastern countries will never really be in a position to create and sustain genuine social democracies. One of the things that Amartya Sen talks about, in his book "Idea of Justice", is that a greater appreciation of various proto democratic experiments - from the Buddhist councils during the hey days of Maurya Empire and elected councils of the City of Shushan in South Western Iran to the Athenian Democracy and the "Constitution of Seventeen Articles" that was enacted during the reign of Buddhist Prince Shotoku in the Seventh Century - is needed to understand that instinct for democracy is not alien to Asia. Sen also points out that the philosophical frameworks of Asia had been able to take into account, much earlier than in the West, the understanding that even irreconcilable differences need not tear up societies – as long as human empathy for each other, and respect for each other's dignity, are treated as primordial normative rules of all forms of social engagement. It would of course be particularly relevant to remember that one of the Seventeen Articles of Prince Shotoku emphatically asserted that "[D]ecisions on important matters should not be made by one person alone. They should be discussed by many." Another one proclaimed "[N]or let us be resentful when others differ from us.

For all men have hearts, and each heart has its own leanings. Their right is our wrong, and our right is their wrong." And Babasaheb Ambedkar, the great scholar that he is, made the definitive assertion that philosophical moorings for establishment of a genuine social democratic society were far better understood in India, citing two Mahakavyas from Mandoka Upanishads: "AhamBrahmasmi, TatvamAsi" – translated loosely by the great man as "I see the universal principle in myself; and I recognize the same in you too". He emphatically grounded his arguments regarding the feasibility of a social democracy in India on such ancient wisdom.

One of the abiding questions of theory of democracy, and its practice, has been about how, notwithstanding the fact that "their right is our wrong, and our right is their wrong", people could continue to respect each other without resentment? There are lessons from history – that growth of acceptance of democratic practices was inextricably tied to levels of material and cultural inequality and how the struggles for having a say in the protocols of governance, and consequent stability of the political order and of compacts for governance, invariably turned violent when levels of inequality threatened the assumptions of what constituted a fair distribution of social product and also eliminated meaningful public participation by vast segments of the populace. Some recent researchers have seemingly uncovered a historical fact:

> "*For thousands of years, civilization did not lend itself to peaceful equalization. Across a wide range of societies and different levels of development, stability favoured economic inequality….." Consequently, "[V]iolent shocks were of paramount importance in disrupting the established order, in compressing the distribution of income and wealth, in narrowing the gap between rich and the poor. Throughout recorded history, the most powerful leveling invariably resulted from the most powerful shocks. Four different kinds of violent ruptures have flattened inequality: mass mobilization warfare, transformative revolution, state failure, and lethal pandemics….. Sometimes acting individually and sometimes in concert with one another, they produced outcomes that to contemporaries often seemed nothing short of apocalyptic. Hundreds of millions perished in their wake. And by the time the dust had settled, the gap between the haves and the have-nots had shrunk, sometimes dramatically.***" (***Walter Scheidel:"**Violence and the History of Inequality from the Stone Age to the Twenty-First Century**".)*

An implied argument is often made, both overtly and covertly, with regard to the above proposition: a cynical shrug by the elites that if that (violent upheaval) is what has to happen, then it will happen. And hence, the misguided argument goes, we might as well get on with our present proclivities, of uninhibited pursuit of individual welfare and enjoy it in our current disposition for ostentatious consumption. The problem with that argument is that the great and violent struggles, when they emerge, do not provide a time line as to how long they last. Nor do they specify who will emerge as the real winners and losers. That is what history teaches us. Furthermore, history also teaches us that, even from the perspective of those at the bottom, violent restructuring seldom results in a genuine social democracy. Instead, as Ted Honderich argues in "Violence for Equality", violence invariably lends itself to the enthronement of a new class of elites, that may initially not be rapacious, but will eventually get to be predatory. And the cycle goes on.

As we emerged from the detritus of the Second World War, and two hundred years of pillage and plunder of India and Indians -in a collaborative colonialism of British masters supported and even underwritten by native elites selling the interests of their fellow Indians down the river - the founding fathers visualized a democratic order that was to, not only build a platform of public discourse but a robust social order in which most, if not all, citizens are provided such capacities as to defend themselves against the possibility of "epistemic injustice" in the context of policy formulation, implementation and governance. Furthermore, they also recognized that, if we are to forestall violent upheavals caused by inequality, then the State – as a forum of collective action – was to be informed by certain principles that were to be fundamental to state action: prevent mal-distribution of resources in a manner that is inimical to the welfare of all, and undertake such measures as will be needed to eliminate institutionally and socially imposed group and individual disabilities that prevent self-actualization as well as limit the capacity of citizens to be fully empowered participants in public deliberation.

The foregoing needs to be unpacked, and briefly examined, at a conceptual level the historical processes that had led to the enslavement of India – which essentially meant a rapacious denuding of its vast numbers of people of all shred of humanity. A colonial regime, built with the connivance of small proportion of elite communities, did not just drain India of most of the social product created here; it lined the pockets and the mansions of the few. As it made India's elite communities more outward looking, on trade with the far distant parts of the British Empire, the local populace was seen more as part of the land to be exploited, an input at best, with no moral standing of its own. This had impacted the lives of a vast majority of Indians in two ways: it intensified the dehumanization already in place in a caste based feudal order that pre-existed the advent of the Company Rule, as every local norm of shared rights to produce – at whatever minimal level they may have existed -were eliminated; and with the decline of whatever little syncretic impulses that had been generated under the dominant empires of the pre 1700s, most of India became merely a land for extraction of unconscionable rents for a few dominant regional satraps, local elites and of course the John Company's expropriating thugs.

The macro level contours of horrendous damage inflicted on India during the period of colonial rule have been well described by various scholars. From how a people who were producing 28% of the global output were reduced to the runt of the litter, how all its manufacturing capacity was destroyed resulting in a reverse migration back to the villages, and over 40 Trillion dollars of value was siphoned off to Britain – all of that, and plenty more, has been well recorded. What is less reflected upon, and may be even deliberately glossed over, is the fact that the rapine and plunder of India was made possible by elite segments of the population who were more than willing to form extractive and expropriating alliances with any ruler, foreign or domestic, as long as their rights of sharing in the spoils were preserved, and hence aided and abetted the plunder of India. This is an important aspect to keep in mind in order to understand why the Directive Principles of State Policy were thought of as being necessary, especially those, inter alia, insisting that every institution of national importance be informed by values and practices of social justice, that the operation of the economy ought not to result in a distribution of material resources of the community in a manner that will derogate from public welfare, and that the State shall take necessary steps to ensure that productive employment is available, that

citizenry would have access to good quality education and be provided with the skills necessary to be able to acquire, interact and produce modern scientific knowledge. The history of behaviour of the elites vis-à-vis the masses did not engender the kind of confidence that Gandhi's belief in a "trusteeship" role for the same elites took for granted. Babasaheb wanted an explicit commitment, as a textual marker that could aid the political discourse as to what the true national purpose was.

That compact, most people would have to agree is substantially in tatters well prior to reaching the substantive goals of social justice that we set for ourselves. We have again begun to extol the alleged achievements of the few, even if they be founded upon the plunder of India's resources and its polity. What was expected to be an evolutionary process of informing all walks of life be informed by principles of social justice that was made morally more urgent by the making of Directive Principles of State Policy foundational to making of law and policy, to forestall a revolutionary and hence violent equalization has now been turned on its head. The full fledged adoption of the tenets of neo-liberalism and the project of Globalisation has ensured that most are left with little and the few gain disproportionately of the social product.

On a chilly wintry day in Delhi, after Jawahar Lal Nehru read out his "Resolutions Regarding Aims and Objectives", it was critiqued by Babasaheb Ambedkar:

> ***" If this Resolution has a reality behind it, and a sincereity, of which I have not the least doubt, coming as it does from the Mover of the Resolution, I should have expected some provisions whereby it would have been possible for the State to make economic, social and political justice a reality and I should have from that point of view expected the Resolution to state in most explicit terms that in order that there may be social and economic justice in the country that there would be nationalization of industry and nationalization of land. I do not understand how it could be possible for any future Government which believes in doing justice socially, economically and politically, unless its economy is a socialist economy."***[1]

While Babasaheb, eventually chose to frame the national purpose free of any nomenclature of a specific "ism" – and he explicitly stated that this was in order to be able to carry forward groups of people who differed widely – the fact remains that, in his mind, and the minds of other fathers of the nation that the nation-state was to be founded on two principles: of an indefeasible recognition of human dignity of all that could sustain a fraternal order, and in turn be sustained by a fraternity so that the unity of the nation is assured. This was amply reflected by the warning sermon of Babasaheb on the day that the Constitution was ratified. It is worth citing him at length:

> ***"On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people……. thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again……***
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> ***It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. …….***

[1]Cited in Aakash Singh Rathore's "Ambedkar's Preamble: A Secret History of the Constitution of India", page xxxi.

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

If we wish to maintain democracy not merely in form, but also in fact, what must we do? ……not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has to laboriously built up.

As the many lakhs of daily wage earners began their long, arduous and dangerous trek back to their villages, carrying their measly belongings on their heads, their feet being scorched on the hot tarmacs of our highways and byways, I was forced to utter again, another set of words of Babasaheb in the same speech – and I think they are worth repeating again:

"But there can be no gainsaying that political power in this country has too long been the monopoly of a few and the many are only beasts of burden, but also beasts of prey. This monopoly has not merely deprived them of their chance of betterment, it has sapped them of what may be called the significance of life".

Much has of course been written about the different eras of the Supreme Court relating to how Directive Principles of State Policy were understood. I do not want to go into those well known debates, except to point to the fact that Gautam Bhatia has presented a rather fine synopsis of the place of Directive Principles in the Constitution of India and the extant constitutional gloss. In particular, his articulation of the foundations laid by the Supreme Court in Re The Kerala Education Bill[2] that even as Article 37 sets for the non-enforceability condition, it also lays down the scope for use of Directive

[2]1958 SC 956.

Principles in interpretive contexts[3] is sound. The use of the Directive Principles in such instances is not tantamount to an "enforcement" but actually an assumption that the legislature has acted "reasonably" in undertaking its responsibilities of a Constitution that makes the principles enunciated in the Directive Principles of State Policies foundational to making of law and policy. Bhatia also maps, with great perspicacity, the necessity of understanding Directive Principles of State Policies as markers of reasonableness, and also as establishing a framework of values. I would at this stage not wish to engage in a lengthy analysis of all the three prongs of the roles that the Supreme Court has ascribed to the Directive Principles of State Policies; there will not be enough time to do that.

All of the foregoing relate to whether the Constitutional Courts did the constitutionally permissible thing by using the Directive Principles, in any manner or form whatsoever – howsoever slight – in adjudicating whether the positive affirmations in Part III relating to fundamental rights were significantly derogated from. The implicit assumption in the above is that it is the exclusive duty of the legislature and the executive to act upon the imperatives etched in the Directive Principles, and the constitutional courts do not have any role to play, in finding an overlap between the values enshrined in the Directive Principles and the Fundamental Rights guaranteed in Part III. But such a position would have been possible if and only if one had concluded that Fundamental Rights were themselves completely empty of positive content, the non protection of which can lead to substantive derogation of the rights in Part III itself. The second essential condition would have to have been the legislatures and the executives be fully informed of the moral urgency of the problems of vast hordes reduced to living and dying in poverty, squalor, hunger, disease and illiteracy – generation after generation.

More often than not the questions that implicate values in the Directive Principles as a part of Part III rights arise before the constitutional courts when both the legislatures and the executives have significantly allowed the underperforming of the State with regard to making an effort at achieving the goals within the orbits of both Parts III and Part IV. For instance, where the Supreme Court of India asserted that right to life cannot mean a mere animal existence, but that it encompasses the right to a life of dignity what exactly were its critics saying, whether they intended to or not? Though couched in the language of constitutional text, particularly the term "enforceable", and drawing stricter lines of demarcation between law making and law interpretation, they fail to take into account the fact that consequences of the failures of the legislatures and executives in modulating the political economy in accordance with the directives in Part IV, and their implications in terms of non-realization of guarantees in Part III, are horrendous. And not for just a handful of people here and there, but large swathes of the populace. Indeed, one might even add a vast majority of the populace. The central concerns of the Directive Principles of State Policy were of the kind to liberate the citizens of India from squalor, illiteracy, hunger and powerlessness that had led to unconscionable levels of debasement of their humanity.

Any number of cases can be cited when the Supreme Court and other constitutional courts in India have used the Directive Principles of State Policy to read positive content into both rights guaranteed by Part III because no individuals with a conscience could possibly have found, under the

[3]Bhatia, Gautam, "Directive principles of State Policy", in Choudhary, Khosla and Mehta (Eds) "The Oxford Handbook of the Indian Constitution", pages 644-649.

circumstances of those particular cases, that lack of socio-economic and cultural rights were not limiting their ability to more fully enjoy the benefits of the rights guaranteed under Part III. The alternate would have been that even the one forum, in which issues of whether constitutional fealty are to be decided on a case by case basis on principles of justice, would not recognize the dehumanization they were subject to – both by virtue of their material conditions as well as that being further intensified by the State being indifferent even to the point of refusal to articulate the moral unease mandated by the Constitution.

While deontological foundations of the ethics of social action against debilitating inequalities and socio-economic deprivations themselves ought to be sufficient justification for declaratory judgements and directions by the constitutional courts, the consequentialist logic is no less persuasive. There is considerable amount of literature and discussions about how extreme forms of deprivation are counter productive in terms of both the larger issues of economic growth and development of the country and also severely limiting in terms of realization of full potential by individuals to such deprivation. The time allowed for this lecture would not be sufficient to go into all those matters. However, there is another consequentialist view that must be taken into account and is often not sufficiently recognized or discussed: and that relates to the issues of stability of the nation-state and the possibility of the constitutional project itself being derailed when societies are marked by extreme inequalities, of wealth, economic opportunity and also institutionalized inhibition of access to socio-political capital for a dignified life.

As I sit at my desk and dictate this lecture, I hear that the people of Chile have voted in an overwhelming majority – 78% - in favour of changes to the constitution to make the State commit to eliminate unconscionable levels of inequality, and to make education, health care and core infrastructural facilities part of the obligations of the State to provide. The referendum was held because of the massive protests of the people of Chile, particularly the youngsters in November 2019 raising fears of large scale massacres by armed forces. Fortunately, public pressure seems to have prevailed in allowing the people to express their views and has created the potential to change the constitution to reflect the core desires of the people of Chile. What makes this remarkable is that by no metric could one consider Chile to be an underdeveloped or even a developing economy. And yet the maldistribution of economic pie that results from social action, based on the aggressive neoliberal policy prescriptions of the Chicago Boys, has provoked massive levels of angst. It is fortunate of course that the capital “R” of revolution was transmuted into the less bold, albeit still a capital “R” style of constitutional revolution. It is of course but a first step, and we have to wait and see whether there is a greater accommodation of the wishes of the people expressed in such unequivocal terms.

The social movements and political revolution in Chile is of course not the only indication of a great churning. We have had many visuals, over the past three decades, of those who are left behind and not given a fair share of the social produce and feel that the gravy train is leaving them by taking to many forms of anti-democratic, and even “bloody means of revolution”, to use Babasaheb’s expression. Almost no country has remained immune. The response of the neo-liberal ideology, and the political economy of massive benefits for the few and very little for the many, has been to inflict a form of

"epistemic injustice" – of treating the anxieties and the angst of those being left behind as not worthy of consideration in the legislative halls, in the clubby offices of the political executives, in the boardrooms of corporate executives who buy out law and policy, and even finally, in the media. To the point that those being left out begin to feel that the nation-state is not theirs anymore. Or at least that the institutions of democratic governance are not legitimate.

Neo-liberal globalized political economy has created a thin veneer of global elites, whose preoccupations with the trivial (especially seen to be so when compared with the existential concerns of the poor and those being left behind) suggest a clear break between their worlds and the worlds of the vast majority. Nation-states were products of a movement of self identification of a group or groups of people as belonging to a common nation with shared compact of joint purposes. While initially they were premised upon narrow ethnic considerations, and of an "us versus them" struggle for resources and survival, it was realized that for nation-states to exist in peace with each other, and also remain stable and prevent violence within, they were to be premised on conclaves of inclusion based on empathy for the human condition. However, as Manuel Castells points out in his three volume tome, "Network Society", the socio-economic conditions that arise as a result of increasing levels of inequality that accompany neoliberal Globalization, its consequent precariousness of life's prospects and a sense of abandonment by the nation itself – potentially creates fertile ground for social unrest. The consequent search for identity, is likely to push the masses into choosing divisive platforms of hatred for the "others" who are then promoted as the ones who have misappropriated their chances and have created their anxieties. Partisanship is likely to reign supreme, the prospects of a common platform dim or non existent as at the root of the political economy that we allowed to be inscribed was not based on principles of social justice, empathy and inclusion but was structured as a zero sum game.

The above necessarily implies that politics is no longer the civilized discourse based on core democratic principle: "[N]or let us be resentful when others differ from us." In a neo-liberal world view, in which only greed and self interest are the legitimate guides to normatively valid social action, politics is viewed only as a zero sum game that pits neighbour against neighbour. Are we now hearing the sounds of the "death struggle" of the idea of a liberal constitutional democracy? I will leave that to you listeners to decide whether we are at least hearing the early warnings of that possibility.

Even if we were to assume that "death of democracy" is way too strong an expression, and offends our delicate dispositions, surely we ought to be worried about whether the platform for public discourse and democratic decision making can extract commitment to the rule of law when collective action requires considerable sacrifice of the individual self interest? We are likely to face many, many more vital questions implicating the need to commit to collective action. In a sense the on going Global Pandemic (Covid19), horrifying as it is in terms of the consequences to its victims and the economic mayhem it has unleashed, is probably likely to be a small blip compared to the monstrous problems we are likely to face in the future. From the potentially catastrophic consequences of climate change to the creation of ineradicable gaps between the rich and the poor, that Youval Nova Harari talks about as a possibility on account of Artificial Intelligence and leaps in Biotechnology, we will need to depend more on our empathetic core, and our potential instinct for mutual recognition of indefeasible human dignity

of each other. Surely, the horrifying images of the daily wage earners walking 1000+ kms in a hot summer with their meagre belongings should at least make us pause to think about whether we are being compelled to abandon the possibility of building a society based on empathy for the human condition.

Let me end this lecture here. But before I take leave, I need to say a few words that affirm the possibility of greater sanity in human interactions. There are many, many reasons for our society to be independently thankful to Smt. Vasantha Kannabiran. Her own individual contributions have been no less than that of the man in whose memory these lectures are being organized. What a remarkable couple, that they gave so much of themselves to make the society better for others. In addition to the thanks I must express for all of that, I must of course thank you, Smt. Vasantha Kannabiran for giving me this opportunity to speak on this occasion. I truly feel humbled. I must also thank Dr. Kalpana Kannabiran and other members of the family for organizing these lectures. They are much needed, and it will always be my privilege to be associated with any such activities in memory of your father, Sr. Advocate K.G. Kannabiran.

Long live the Constitution of India.

Jai Hind.

The KG Kannabiran Lectures on Law, Justice and Human Rights are a series of lectures by jurists, lawyers and judges that celebrate his life, work and its futures. The series is organised by the family of KG Kannabiran (1929-2010).