

Why the Constitution Matters –

Interview with Shri Dushyant Dave, Sr Advocate and President, Supreme Court Bar Association by Shri Prasanna, Advocate, Supreme Court, on behalf of LiveLaw.

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Shri Prasanna: Welcome Shri Dushyant Dave, Sr Advocate and President, Supreme Court Bar Association. You will be speaking to us today on the topic “Why the Constitution Matters?”

Dushyant Dave: Good evening everybody. Thank you very much Prasanna and thank you Livelaw. It's a pleasure and privilege to be on this platform. The subjects that you have chosen, and the wide range of sub topics that you have selected is very interesting and I hope it proves to be a stimulating discussion this evening. I would therefore request, first and foremost, that you should increase the time of the Q&A to 30 minutes at least so that people can ask questions and that way we will know the views of the people, also in a much broader sense.

Why the Constitution matters and what's the role of the Bar is something which we have to really seriously introspect. What is a Constitution? Constitution is a code of conduct. Constitution is a contract amongst people. The Constitution is way of life. Take, for example - we all live in families. In every family, we have a code of conduct. It's not necessary that it should be written. But we have a code of conduct. Now we follow that code of conduct.

Likewise in society, or a nation also needs a code of conduct and if it didn't have a code of conduct, if it didn't have rules to conduct themselves, then it would be a lawless society so essentially Constitution provides the rule of law. And it provides a means to people to understand what their status in societies and for those in power to understand what their responsibilities and duties are. It's therefore Constitution is a document which is equally relevant for those governed and those governing.

This is something which we have to understand that Constitution is woven into our lives on a daily basis. We all breathe the Constitution all the time without realizing that we are actually breathing the Constitution. For example take the right to life. Now we have therefore right to a better environment or a safer environment. We would therefore expect that when my breathing becomes difficult because of polluted air, do I have a right and do I enforce that right through any mechanism including going to a court, so that we can have a better environment and the pollution levels can be reduced. Likewise, there are millions of rights which the Constitution in one form or the other provides and those rights therefore govern us.

Constitution also creates organs for the governance of the nation, like the Executive, the

Legislature and the Judiciary. Each of these organs governs us in different ways and their powers are defined under the Constitution. Their duties are defined and the checks and balance over each other, are also well defined in the Constitution. These are all done in a modern state in a modern nation, and in a modern democracy like India to ensure that the country grows to become a vibrant democracy in a vibrant nation where the Constitutional principles and Constitutional ethos constantly govern at least those who are in power in Legislature, Executive or Judiciary and of course for the citizens to understand their rights and enforce those rights all the time.

If there was no Constitution there will be no safety for anybody. Everybody will become unsafe for example take right to life. Anybody can take away your life without any established procedure of law or your liberty can be taken away without established procedure of law or your property can be taken away without giving your compensation and without following the Constitutional mandate under Article 300A. Therefore Constitution assumes extremely interesting facets of our daily lives without us ordinary citizens realizing how Constitution matters.

So Constitution actually matters because it's like blood flowing in your veins. Constitution flows into your life in every which way that you can think of and dream of without actually realizing it without actually sensing it all the time but it is all-pervasive. In one form or the other, whether it is in form of rights or in duties or in form of governance.

So the Constitution therefore is really very, very crucial to a modern democracy and particularly a democracy like India where the Constitution must matter the most. The preamble of the Constitution tells us about equality and social justice. Now, these are all concepts which are so important in a society where there is a tremendous divide amongst the people and the gap between the haves and have-not has increased manifold. Constitution therefore strives at bringing about social justice and equality and equal distribution of resources. Now all that is something which really is extremely helpful for a nation to grow in a systematic way, in a responsible way and in a way where everybody is happy. Ultimately, what's the purpose of an orderly society? The purpose of an orderly society is that everybody is happy and gets that happiness which a citizen deserves. So in that sense the Constitution as extremely interesting facets.

So far as the role of the Bar is concerned, we must realize that it is only the lawyers who understand and read the Constitution. Everybody is actually expected to read, especially those in the Executive and the Legislature, are expected to read and follow the Constitution. Unfortunately in this country, very few people really in governance understand or even care to read the Constitution. As lawyers we're trained to read the Constitution. And our role therefore becomes extremely important because as lawyers, we have to constantly create awareness amongst the people, the citizens at large, as to what their rights are, and what are the responsibilities on the part of those in governance. And if those rights are violated in any manner, which they are on a daily basis, then how they can get redressal against violations of those rights.

In a country where illiteracy is so widespread in a country; where people are extremely poor; in a country which is so deeply divided on caste considerations for thousands of years; in a country where religious differences are constantly simmering and creating an unfortunate problems. In

a country like this, it's very important that the lawyers can make a Constitution or rather be rather take it to the people, so that people can understand what these rights are about. And unless we do that, the Constitution becomes a meaningless document because the people must know and everybody must live or swear by the Constitution. Everybody must understand the Constitution and respect it as they would respect their religious scriptures like the Gita or the Bible or the Quran or the Guru Granth Sahib. Likewise the Constitution must be respected and loved by citizens and for creating that respect, for creating that love, lawyers play a very, very important role. So that's one aspect of the Bar, namely educating the people.

The other is enforcement of the rights of the citizens, which is extremely serious. Because large number of citizens are deprived of their Constitutional rights, fundamental rights, other legal rights or basic human rights from time to time, and they must therefore have redressal mechanism where they can approach the court. Lawyers, therefore, have a great responsibility to defend the citizens against the arbitrariness of the State against the illegal actions which violated the rights of the citizens in any manner. So this becomes very important.

The third of course most important role that the Bar can play is to see that the three organs of the state remain within the limits of their powers. Now this is very important because although the Constitution provides checks and balance amongst the Executive, Legislature and the Judiciary. But all of these three must be checked by an outside force and that outside force can be the Media or the Bar and they must constantly therefore keep a vigil as to transgressions of the Constitutional limits by any of these organs of the state.

As and when the transgression take place by whichever entity, they must be able to discuss that, take it to the media and must put it to the nation that these are the transgressions so that some kind of a moral pressure develops and these transgressions can be controlled. Because the whole purpose of the stopping this transgression seems to see that the Constitutional principles and Constitutional morality is enforced in the country and if we are unable to enforce that strictly, which unfortunately we are not today, then it is bound to result into a very serious failure of the state and which we are witnessing in many forms today that state has failed in so many areas and citizens are left without any remedy whatsoever.

Prasanna: On that note, I'm reminded of the lecture that you had given to the Supreme Court Bar Association in 2018 when you were its former President. So you had mentioned the Bar Council of India rules that that members of the Bar shall not be servile vis-a-vis the Judiciary. You had lamented that we have a lot of senior members of the Bar who are not speaking up against the transgressions of the Judiciary and not keeping the bench the check. So I wonder if that has changed over the last couple of years and what are your views on where we are right now on that count.

Dushyant Dave: The Bar must speak and speak more often, of course, in a responsible and respectful way, but in an extremely persuasive and forceful way, if necessary. In fact, besides the rules under the Advocates Act which the Bar Council has very beautifully framed, the Supreme Court Bar Association's aims and objects also speak about this. But in a recent judgment from the Supreme Court written by honorable Mr Justice Arun Mishra himself in a Tamil Nadu case,

where he spoke about the responsibility and the role of the Bar. He in fact puts it so beautifully. He says that the Bar and the bench are ultimately cornerstones for democracy and the Bar has a great role to play in ensuring that democracy in this country not only survives but thrives. And he therefore calls upon the members of the Bar that they must really stand up and speak. So that's a very, very interesting judgment and I would definitely recommend to members of the Bar to read that judgment, because some of the passages of that judgment are very, very powerful.

Prasanna: *I'm sure many of those passages of that judgment are going to be pressed into service soon because it is a season for contempt petitions, particularly against members of the Bar as we know, but because it is a sub-judice matter I don't want to go get into the details of that matter. But we go on to the next topic that we have - on civil liberties.*

In fact, one of the recent cases that you appeared in, one of the more celebrated judgments of late from the Supreme Court was the Anuradha Bhasin case. Where although there was no relief was granted in terms of all the telecom restrictions in the state of Jammu and Kashmir. But the ratio of the judgment apart there is a feeling among certainly several scholars that in matters of civil liberties, the Supreme Court appears to have differed logic to the Executive and what the government has to say and juxtapose with the general perception that the Supreme Court is in fact the most powerful court in the world. So how do you rationalize both of these?

Dushyant Dave: Well, in theory, the Supreme Court of India is the most powerful court in the world I would agree, but in reality, I think the Supreme Court is definitely sitting back and it needs to be far more pro-active than what it has been in in many areas. In fact, not just the Supreme Court but the Judiciary in the country as such because it's not just ADM Jabalpur which has been a black spot in the history of India's post-independence Judiciary.

I think the Judiciary's role especially in 1984 riots in Delhi and 2002 riots in Gujarat has been extremely disappointing. And as we have all seen that none of the perpetrators of those riots, the political leaders or the top bureaucrats or the top police officers, who were responsible in failing I would say - I wouldn't say they were actively did it- to protect the lives of thousands of innocent men, women and children, they should have really been taken to task.

The Judiciary has developed this beautiful weapon called public interest litigation, but it is rarely used when it comes to the lives of people, especially of those who belong to the minority communities and this is a very, very, disappointing and disheartening approach on the part of the Judiciary. They had a duty and they had sufficient powers to have intervene at that point of time to at least order fiercely independent investigations and to bring to the book, those who were responsible for actions or inaction as the case may be.

For example look at the situation in Uttar Pradesh. In the last two years, almost 200 people have been "encountered" in UP. Now, it's very shocking that the Supreme Court has not taken suo moto cognizance. We are now creating this culture. This started in Maharashtra when Congress government was there when one particular police officer was known to be an encounter specialist and he was proud to be one and he was hailed as a hero and given many medals. Later

it turned out that he was actually taking money from persons to kill their opponents. So it was sad. I would say that these judiciary had a duty to stop this kind of encounters. Judges must realize that these encounters reflect a failure of the Judiciary.

Because, why is it that the police indulges in encounters and why is it that society at large approves it. It is because the Judiciary is delaying criminal cases to such an extent and ultimately when the cases are heard, the percentage of conviction in this country is just about 15%. In a country like Japan the conviction rate is 99.9%. Now there are two reasons for it, one that in Japan rarely is the wrong person brought to justice. In India, it happens all the time. So that's first reason. Secondly, the investigation is very scientific in Japan, which is not there today in India. And thirdly, the Judiciary acts very quickly.

Now we need we need Judiciary must understand that if we want people to believe in the justice delivery system, because they are fast losing their faith, then Judiciary will have to act, and it's not willing to act. See, for example, since Covid came for last three months virtually the entire Judiciary in the country is paralyzed except for so called urgent matters. Now that doesn't augur well for society at large. Because there is a responsibility to ensure that at least in cases of civil liberties, where people are in jail need bail, because what happens is that large number of people in this country face jail for any number of years and ultimately they are acquitted either by the first, second, or the third court and it has virtually ruined their lives for no reason.

Now, in a country like the United States, or in Europe, almost everybody gets bail, excepting rarest of rare cases where somebody would be denied bail on charges of terrorism or something like that. The Judiciary here does not grant bail and does not decide the cases well in time. So liberties of citizens are seriously are not only challenged but virtually taken away for all those years.

Take for example, the recent riot cases in Delhi. The Judiciary needs to look at it very differently than what it has done. Far from the provocateurs being brought to justice, innocent people are being brought to justice and nobody is able to say anything about it. So it doesn't speak well for us as a nation because the Judiciary is expected and must be fiercely independent. In one sense, Judiciary is really in the status of a parent of a citizen. And as parents, they should really be extremely balanced. They should not have any side. A father or a mother would never if they have two children, they would never pick up one against the other and they would always give the same love and affection to both of them. Judiciary therefore needs to look at citizens with love and affection towards every citizen and once they do that then the whole justice delivery system will change. It's slightly skewed against certain sections of the society. It's not just the minorities, but even the underprivileged and the Dalits face a lot of problem and are not getting justice in most parts of the country, for whatever reasons.

So I would therefore appeal to the Supreme Court - because the judges of the Supreme Court of have a far broader understanding, viewpoint and a far more liberal approach - they would be well advised to take note of the prevailing situation in the country and send very powerful messages through their judgments and so that the subordinate judiciary really understands as to what is right and what is wrong. Today, that there is no guiding principle which guides the

subordinate judiciary to deliver justice fiercely independently and in terms of the Constitutional ethos and four corners of the Constitutional limitations.

So that is something which people have to be made to understand that the right to life and right to liberty is something which is so sacrosanct, it is so basic and Justice Khanna very beautifully puts it in his judgment in ADM Jabalpur in his powerful dissent, which every lawyer must read. It is that these fundamental rights are not fundamental because they've been put in Chapter 3 of the Constitution. They are fundamental because they are basic human values. And if these basic human values are not protected, who will protect them ultimately? The state is expected to protect, but then the state fails who then comes into play? The Judiciary comes into play and Judiciary has therefore to ensure that those rights are protected to the hilt and without any kind of discrimination of religion, caste or gender. They must enforce them absolutely and literally. Then alone, we can say that we are successful as a democracy and that the Constitution that has been given to us is really working for the welfare of the people.

Prasanna: Staying on the topic of Judiciary: You've looked at some of the functional aspects, what is it that the judges can do better, and what this that we may need to know. But for a moment, if we have to focus on the structural aspects, what are the reforms that you think are necessary and urgent in our Judiciary - whether it is it the office of the CJI, is it the appointment process. Do we have more safeguards in the removal process? So what are the structural reforms that you think are urgent and necessary.

Dushyant Dave: Structural reforms are very virtually impossible to bring in this country. The Judiciary, essentially by temperament, is status quo-ist and they don't want any changes to be made. So that's first thing you must understand about judges. We have excellent judges - some of them are outstanding, they are world class judges. The difficulty is that collectively they are not able to do what is expected of them. Individually, they may give good judgments. They will do absolute justice. They are very, very fine and they are very learned. But what is to be expected. What is to be done is that they must put their energy, their intellect, and their resources to get there. They must pull the judiciary out of the slumber that it is in virtually every part of the country. Somebody must guide them.

It is wrong for the Supreme Court to think that High Courts are independent and we can't guide them. It's very important for Supreme Court to have constant [interaction]. It's not enough to have one conference in a year of Chief Justices and you have some nice speeches and just forget about it. I think it would be better if the SC Judges were to interact with the High Courts on a weekly basis to talk to them as to what should be a judicial approach. What should be the administrative approach? Which are the cases which require to be dealt with early? What is it that to be done about how to work within the limited resources that the government give. How to have to better management techniques, so that the docket moves quickly. All kinds of things can be talked about amongst the judges.

The Bar should be involved in that process in an extremely positive way and I have no doubt Bar will have a lot of suggestions to make. But this kind of an approach of an all-India commonality

of mind or meeting of mind has not taken place at all. And that's one of the reasons why the subordinate judiciary, which is really the back one of the Judiciary is unguided. Subordinate judiciary has outstanding judges and they do tremendous hard work with extremely poor conditions of working. But they need guidance. They need support. And both must come from the Supreme Court and the High Court constantly. Then they can work better.

You have almost something like 40 million cases pending in subordinate courts today that doesn't augur well. It's not just civil liberty which is important today - citizens' private rights are also extremely important. Somebody's probably farm has gone, somebody's house is gone, somebody's job is gone, somebody's pension is gone and likewise the disputes that citizens have with the government which is the biggest litigant, because today government is omnipresent. So there are many disputes between citizens and government.

Even if there is a dispute as to payment of GST from a trader. The government has demanded an exorbitant sum from the trader. The court expects him to deposit that today. The trader deposits it. Now you are not going to decide this case for five or ten years, he would have economically died. Therefore, there are many ways where the judiciary needs to have some kind of an approach, which will really go a long way to improving the functioning, the performance and the outcome of their verdicts. Then alone perhaps we can say that the administration of justice has been well, so,

With so many good judges it's not difficult. It's just the initiative that is to be taken. I don't know who will should do. That's a big problem. I have many a times in the past discussed with the Honorable Chief Justices as to why they don't constitute some kind of a committee to give them a report about this kind of internal reforms without structural reforms but I have never seen a positive response in the last 30 years that I've been in Supreme Court. So it's difficult for us to be [optimistic]. We have to wait and watch what happens.

Prasanna: Moving on from the Judiciary because the Constitution is much more than that to just the judiciary and its functioning. I also want to dwell on secularism as a value. Where does the Republic stand in terms of secularism as a value, particularly in the backdrop of the CAA, the protests that have followed, the cases that have followed and the riots that have followed. Where do we stand?

Dushyant Dave: See people have seriously misunderstood secularism in fact now it's become a word which is being condemned by a lot of people. But secularism is nothing but respect for each other. Ultimately, basic principle of human life is respect for others. And that basic principle is to be found in our Constitution. Under our Constitution, the word secularism was inserted in the preamble much later. But the original Constitution is founded on the principle of secularism and the protection of the minorities in Articles 26 to 30 is really something which is founded on that principle.

The Constitutional framers were extremely conscious that we must protect the culture, heritage and the religious beliefs of the small group of people who are not going to be the majority in the country and they will be minority. The minority in that sense was on the basis of the size of the population and not on the basis merely on religion. It is seriously misunderstood. So the

Constitutional framers wanted these small group of people who did not profess the religion of the majority to be protected at any cost. And that is why they gives as various measures.

Now so far as secularism is concerned it can everything cannot come from the written document. It has to come from the mindset we have to learn to respect each other. We have to learn to love each other as citizens and unless and until we do, that it is very difficult for us to have genuine secularism. In addition, because there is so much of a distrust amongst us about certain communities, which is extremely unfortunate, especially for educated people. One of the things that that educated people must understand is that Constitution creates equality everybody is expected to be equal and that equality is not just on paper that equality is in everything and you can't therefore treat a group of people separately except so far as the cultural and religious beliefs are concerned, which are protected.

In fact Dr Ambedkar was so worried about this aspect of the minority community the Muslims. He was extremely worried. He had said prophetically, something very important, on the last day of the constituent assembly debates. He said that I am criticized for these provisions in the Constitution to protect the minorities. But let me tell the diehards, that those Muslims who had a choice to go to Pakistan have gone. But those Muslims who have remained in India have decided to remain in India despite that choice to go to Pakistan. And he says that therefore they have placed their faith in the hands of the majority. And the majority, therefore, is expected to really take positive steps to ensure that this minority which has remained back becomes part and parcel of the society. And he warns that minority is an explosive force and if they are not well treated, then it will result into serious issues for the nation. Now that is the warning which Dr Ambedkar gave on 25th November 1949.

Sardar Patel, one of the greatest leaders of this country... had warned more than once during Constituent Assembly debates and said - you the majority must make minority feel comfortable. You must make them feel at home, you must look after them. And if you don't look after them, the consequences are serious. Now secularism therefore is very, very interesting. Ultimately you cannot, you cannot dictate the personal beliefs of anybody. You cannot dictate the personal clothes of anybody or personal habits of anybody. Everybody has a right in society, so long as the decency and morality are not violated.

Now, this is where we are seriously today at a crossroad. We are looking at a group of people and, trying to condemn them for their beliefs for the way they live, the way they were clothes etc. which doesn't really augur well for us as a democracy. We have 5,000 years of history and our religion, the religion of the majority - I am a Hindu myself - Hinduism has survived for 5000 years the onslaughts by everybody. Jainism came and went away, Christianity came, and Islam came. And in these numbers flourished. And the reason why does flourished over centuries, thousands of years is because it was willing to encompass every other belief and still move forward.

So I feel that today we are becoming more and more shallow in our approach towards religion. We are not really understanding the true tenets of Hinduism and trying to belittle other religions. We don't have to see the weaker points of the other religions. We have to see the stronger points of every religion and follow it. And I think the Judiciary as a great role to ensure that the

secularism, that is, the existence of the minorities in every form is protected by it against the onslaught of the majority. And this is something which needs a very serious pro-active approach on the part of the judges and I hope and trust that judges will do so as widely and as strongly as they can.

Prasanna: *We have unwittingly come back to the Judiciary at the centerpiece of all this. I want to dwell on that a little bit more. On the role of the court as a counter majoritarian institution. And where do you think that our Supreme Court as it currently stands, where do you think it fits? And related to that, are there other structural issues, for example, we have only three minority judges now in our Supreme Court with nearly 30 judges. Do you think we may me to alter our appointments process? What is your view on the collegium system? In fact there is another audience question as well on the collegium system, what is your view on that as opposed to NJAC and if there is an NJAC, what in your mind is an ideal NJAC?*

Dushyant Dave: So let me answer your last question first. I am against the collegium system. And the reason is simple. It was conceived with great ideas. And one of the most important ideas was that to bring the best from amongst those available. That's the word that Justice Verma uses in his powerful majority opinion in the second judges case. Judges who have tremendous character they are completely free from political interference and who can stand up and protect the Constitution to the hilt. Now unfortunately over the years, there have been serious disappointments in the elevation of judges and the whole process is very seriously skewed today where we are not able to get the best from amongst those available.

We are only following seniority rule and which is really very, very detrimental to the development of the Judiciary. We need judges who can really develop jurisprudence, who can really develop a law which becomes of universal application and a law which commands universal respect. So that's something very important for judges to understand that if they lay down law which doesn't meet the approval of the people and does not command respect then it has failed. So I feel that collegium system definitely has failed.

To my mind there are very serious question marks about many of judges' integrity. Although majority of them are extremely clean but still many judges with questionable integrity of crept in and there have been serious question marks on her own, but that happens in the system. But I would say on the aspect of selecting the best intellectuals with great qualities, that is not really happening and this seniority system is they not helped us at all.

I have seen when I started practice in 1978 in Gujarat High Court, we had I think 12 judges and I would say all 12 were outstanding. They were so fiercely independent and their own lifestyle was completely of so pure, and it was amazing to see what level of those judges were and they were getting salary in those days of Rs 1800 to 2000 but yet their own character was impeccable and but that does unfortunately at the level it has certainly deduce I'm not happy about the collegium system for one simple reason that we are unable to criticize the appointments. If the in NJAC were to make the appointments, at least we will have right to go there and tell them that the candidate that you are selecting is wrong for the following reasons.

Today the collegium doesn't want to hear anybody. On more than one occasion, I have personally intervened with the collegium to tell them that a particular judge should not be elevated in high court or Supreme Court, and yet they have been elevated and I've never even been communicated a response to my letter of which was based on facts, not on imagination. So in the collegium system, it is completely opaque and we don't know what happens behind their closed-doors and what other considerations which weigh with the honorable collegium members to elevate judges to the High Court or Supreme Court.

But if it was NJAC, it would be transparent and at least we would have a right to question, besides giving material and to criticize the appointments now that something yes of course very difficult to choose between the two systems because the Executive today has become such that it is not expected to select the best. So, one would hope that NJAC would be constituted of fiercely independent people and therefore those fiercely independent people will put all their minds together and do something. But the problem is that in this country I think we have lost a lot of ground in the last three or four decades and it is therefore very difficult for us to find men and women of sterling qualities who can take this country out of the problems that are in the appointment of judges or in every other field. So public life has certainly suffered immensely.

So far as the protection of secularism is concerned, I would say that Judiciary is fairly balanced. I would not say that Judiciary does not in fact [protect the minorities]. Time and again I've seen judges coming to the rescue of people, but, but judges need much more, much more proactive approach when it comes to treatment of minority by the Executive and by the majoritarian community. And to that extent they should have more healing touch than what they had so far. So that is definitely that would go a long way in the healing the wounds that minorities feel in the country.

Prasanna: What do you think about reservations of the Judiciary and judicial appointments?

Dushyant Dave: Well, I am in favor of reservations. Period. We have had caste system over 5,000 years and you can't wish it away in 75 years. Even today, in every case we let that you go. You'll find our system is so strongly entrenched that the underprivileged and the Dalits are not able to walk shoulder to shoulder with people of the higher caste society. So, therefore, the disadvantage with which the Dalits and others are born and brought up on are very difficult for us to really imagine. We can't really go into their mental framework to understand what kind of challenges that they face what we kind of treatment they are confronted with and what kind of mindset that they constantly have on account of these considerations. So I feel that reservation is extremely good reservation must be there and reservation should be properly implemented and I feel that it would be. Although I'm very clear that on religious or reservation grounds, we should not make appointments to higher Judiciary. It should be only on the basis of excellence, but I have no doubt that there are a large number of candidates available from either the religious minorities or from the vulnerable sections of the society or the Dalit communities who are outstanding and who must be considered for appointment to the higher judiciary and they should be considered. So to that extent I do feel that they are being ignored over a couple a few decades. And that is not a good sign. So you don't have to compromise quality, you don't have

to compromise competence, but you can still give effective representations to these people and that should be done.

Equally women must have representation because India is almost what about 48% plus population of and we have just about three honorable judges in the Supreme Court. So I think women should be given representation because they're they are outstanding lawyers. There are so many of them who deserve to be considered. So I think the judicial system must be representative and if it becomes representative on excellence basis not on compromising quality. On excellence bases, if you make it representative then the justice delivery automatically changes because the injustices suffered by the vulnerable sections of the society be it women, Dalits or the minorities, these judges then can appreciate the problems. And can fine-tune the justice which is being meted out to them. So to that extent I would say it will have serious positive impact on administration of justice.

Prasanna: So we do this, we can now go to the questions and so I'm curating some of the questions that have come in from our viewers here. The kind of melds with one of the questions that I left out as well, so I take this first. This is particularly [to you] as the president of the SCBA. The courts have all effectively shut down for most causes except for the most urgent causes as you indicated earlier. How far suspension of these rights, the right to access justice should be permissible to stretch given the idea of our Constitution. How far access to justice may be labored with urgency.

Dushyant Dave: See I personally feel that it is not right for Judiciary to have gone into a lot. Because to me right to justice is right to life. And therefore, that right cannot be suspended even for a day. Nobody is suggesting that judges lives is cheap and therefore they should die or that the court staff should take unnecessary risk and they should all be open to Covid 19. No, that's not the situation. We love our judges, we love our court staff, and we wish them long life and good health, but. Keeping that in mind, I think it went. Every segment of society has opened up the government itself has lifted the lockdown. There is no reason for Judiciary to continue to have this lockdown and to have these farcical video hearings. I think, to that extent, the judges and particularly the Supreme Court has done great disservice to the nation and because Supreme Court has done it every High Court and every subordinate court is also refusing to really open up.

I feel that the physical hearings must restart forthwith. In fact yesterday only we had a joint meeting of the Executive Committee of the Supreme Court Bar Association and the Supreme Court on Record Association ...and we had very positive and fruitful discussion for about 1.5 hours on Zoom and we unanimously agreed that the physical hearings must as start as soon as possible and they must start, of course, with strict conditions so that we can protect, not only the lives of the members of the Bar, but also the court staff and all other stakeholders. But unless we do that we are doing, great, great harm to administration of justice. No country in the world has shut down.

What is really sad is that two of the most important checks in our Constitution, the Parliament and the Judiciary, both have virtually shut down, leaving the Executive a complete free hand. Now

this is well there is serious issue. Because the Executive actions during this Covid 19 - whether right or wrong I'm not going into that - but must be subject to test by the Parliament and by the Judiciary.

One of the reasons why Dr Ambedkar justified parliamentary democracy over the presidential form of democracy was that there will be daily testing of the Executive, of the government on the floor of the parliament. Now you have shut down Parliament for four months, you've virtually shut down the every court performance and the High Courts and the Supreme Court are the ultimate protectors of the fundamental rights of citizens. So it's not good. It doesn't speak well for us as a nation that this is happen and I would really I would I would appeal to the Honorable Chief Justice of India and his colleagues in the Supreme Court with folded hands that they should really immediately start physical hearings. They should sit down with the Bar. They have refused to talk to us for four months. They should sit down with the bot to take to decide as to what kind of precautions should be taken and then restart today they have said that they have appointed a committee of seven judges and in four weeks, they will decide.

Now why did they wait for four months to constitute a committee of seven judges? It's sad they even though they should have done it on 23rd March, so that we would have had the entire system in place. So I've said this is nothing but just an act to defer the ultimate. Apparently there must there may be some fear amongst the judges but then everybody has to take the risk. I have said no publicly that millions of safai karamcharis have been working every day across every street in India for what. And they are the most vulnerable to Covid 19. The policemen, the doctors, and the nurses, you name them, the people have been working so why should they, why should the Judiciary decide upon itself. We are service providers. We cannot do this, it's sad that judges have done this, but in any other country through that this would have been unacceptable. So I feel in the Indian context judges at a greater responsibility and I would have expected much greater majority on the part of the judges to have looked at the entire exercise. I think it's sad I only can say that.

Prasanna: It is interesting you mentioned the court as a service providing entity. There is a general feeling certainly among litigants that the court is designed such that it is very court oriented and not very litigant oriented in several of its processes in several of its procedures and all of that. Is that true in your experience or has there been a change over the year? Is it still viewed as an authority which is oriented towards itself rather than litigant oriented.

Dushyant Dave: There is no doubt about the fact that our judicial system follows these British form without really following the changes that the British themselves have made. And none of the single biggest problems of our Judiciary is that it is too procedurally driven. And because of that insistence on procedure, yes injustice is being done. So that is something where judges need to be much more relaxed. They need to be much more liberal, much more broad-minded to give relief because you must understand, and I no doubt judges understand this well enough that there is tremendous injustice in our society, either it is at the hands of the government to citizens or it is at the hands of the rich and the powerful to the others. So there is tremendous injustice.

We are a highly litigious society because, those who can do drag the other person to what are strong enough to sustain the court system for a long, long time, but the person who was dragged by them is unable to sustain it. And that creates a very serious problem because financially you can't fight it. The legal aid system is in complete chaos where it doesn't engage the best of the lawyers to defend these people and he generally all these legal aid matters you find in court, virtually every one of them is filed after the time has expired and virtually everyone gets dismissed because the representation is not good. When I sit in court, many a times I see counsels saying it's only a legal aid brief. That's not the way to do it.

The time has come that government must and the judges must revamp the legal aid system so that the best of the people are briefed for a common man who is unable to defend himself because he doesn't have the resources. He comes to legal aid because he is unable to get private lawyers. So you can't then thrust upon any lawyer. I am not making any comment on in no lawyers all that I am saying is that we need excellence even in legal aid services and to that extent I think judges owe a great duty because the legal aid is entirely virtually controlled by the judges in the country and they need to sit and seriously introspect about it.

Prasanna: Moving on, there are several questions about the NJAC. ...So one thing that is interesting is - What is your opinion on prominent jurists or academics being appointed as a Supreme Court judge even somebody with virtually no practice.

Dushyant Dave: I think [they] must be appointed because one of the things that Supreme Court is lacking today that you see in the judgments being delivered these days which are hardly judgments is the absence of intellectualism. There are some outstanding judges who are great intellectuals but by and large the High Courts and the Supreme Court over the last two decades are not giving [] judgments. You read the judgment of the Supreme Court in the '50s, '60s, '70s, even '80s, early '90s right up to Chandrachud, Bhagwati, Krishna Iyer, Tulzapurkar, or Chinappa Reddy. They really gave fantastic judgments which were really laying down law in an extremely beautiful sense. Take for example anticipatory bail judgment C... case I wouldn't the kind of approach that Chief Justice Chandrachud has in that and how beautifully he expounds it, is something which people must understand, and that's, that's something which is missing today in last few year,

See the United States, for example, it's a misnomer in India only that only lawyers are supposed to know the law and they are always I think they are always sought after for opinions even by a civil society, and by politicians and bureaucrats, you go to America or Europe, you'll find that the best of the opinions are given by law professors. And these are the professors who are highly respected you'll see anywhere, whether you see CNN, whether you see BBC or whether you see anywhere else or you read top magazines Economist, Time magazine or any other magazine the opinions of these professors are so highly respected.

We have to create therefore that kind of a situation where we respect these kind of people. Take for example Professor Upendra Baxi that was a man like them had come to the Supreme Court in its heyday he would have contributed immensely to the development Buffalo. So they're like Professor Madhava Menon outstanding, and the Vice Chancellor of NALSAR, I forget his name. He is also outstanding.

There are many such people across the spectrum who are so good, that the institution will benefit with their thoughts, with their level of intellectualism and law can never remain static. Law is a constantly expanding process. And that law must be expanded to sub-serve human kind. You cannot sub serve it with old ideas, with antiquated ideas and borrowed ideas. So you have to do it with fresh ideas and for that I would say that Jurists must be must be involved must be considered and must be appointed, and I'm not at all worried whether they have even single days' experience as a lawyer or not.

Prasanna: *Then are a few questions that on topics that we've not covered so far or discussed but they relate to contemporary political developments, and therefore I thought these are interesting and we can take one of them. Is whether the Constitution places too much faith on the institutions of the Governor and speaker who are by definition party appointees?*

Dushyant Dave: No, there is no doubt about the fact that over the years and they started with the Congress government, so one can't blame the present BJP government alone. But the kind of people that we have appointed in the Office of the Governor is sometimes pathetic. We have seen governors who have contact misconduct it themselves so badly that one is even ashamed to talk about it, it's not an office, which is to be filled up by retired politicians or even retired chief justices. It is an office which must be in a filled with fiercely independent people who really can be a kind of guide to a whole state. They must be role models and they must be in a position to be to take extremely independent [stands].

Because ultimately a governor is a representative of the President in a state and as a representative of the President, the Governor must ensure that the state functions within the limitations of the Constitution. These state government and the state conducts itself in a proper way, so to that extent, has a great role to play, although it's a passive role, it's not an active role. He's merely a Constitutional head of a state but he can certainly can certainly guide in a brilliant way and that is what it should be - the Governor's position.

In the good old days the Governors were absolutely amazing. We had when I was young in Gujarat we had Mr Mehdi Nawaz Jung as the Governor. He was a role model. We had Mr BK Nehru who has Governor when I started practicing and what an amazing people live their own content was absolutely unbelievable. The way, did their level of intellectualism was very high, the way they conducted, the way they guided, the way they spoke. The governors they spoke they spoke with a message to people as also to the politicians and it was a very subtle message that we are watching you, so please make sure that you don't make mistakes. Now that is something which is seriously missing in our Governors and Speakers and we, as a result of that, there is constant violation of the Constitution on a daily basis as we see all the time and it. It is something which is not good for us as a nation.

Prasanna: *The next one interestingly links criminalization of politics to custodial violence and police atrocities that we've seen in recent times. Given that be moved in the past 30 years from lamenting the criminalization of politics to almost celebrating it, is there a case now to isolate the police from the Executive under some Constitutional mechanism? So this is another structural suggestion by someone.*

Dushyant Dave: It's a good question, but you must remember that every Constitutional authority that we have created today has not remained away from the political influence. So whether it is the Judiciary, whether it is the CAG, you name the Constitutional functionary, and we are unable to find fiercely independent institutions. All institutions have suffered over the years, under the onslaught of the politicians and which is sad because the whole purpose of creating these Constitutional bodies was to keep check on the Executive, namely the political Executive and which has not really worked well. Mrs Gandhi started that kind of an onslaught on the institutions, and that has continued even under the present Prime Minister and which is not healthy because Prime Minister Modi in fact can provide a system which can be so good for generations to come where he can be remembered but it's not happened. Well, it's not happening and which makes one wonder. I've been as to why a powerful Prime Minister like him or Mrs Gandhi would not leave behind a legacy of strong Constitutional checks and balances, so that the democracy is nourished and nurtured in a proper way.

So police reforms in this country are very difficult for two reasons. One, the recruitment of the constabulary over the years as is seriously mired in controversies of corruption. We know how these constables are being recruited across the states in the country. Secondly, the nexus between the politicians, the criminals and the police is a matter to be seriously worried about, and I don't think we can wish it away overnight, it requires a very serious introspection and it's only a person like Mrs Gandhi or Mr Modi, who could have really tried to dynamite that nexus but sadly both don't seem to have really done.

We find that even in the present Parliament, there are large number of honorable Members of Parliament who are having criminal cases behind them. And in the assemblies it's very common across the country. Irrespective of political party. It has nothing to do with the party. Every political party is encouraging the criminals. So it's, it's something which is which is which doesn't augur well for us as a democracy and I think we are leaving behind for future generations in nation full of problems and problems alone. I don't know whether they have anything to really hope for in the future.

Prasanna: One of the questions is on the Bombay High Court having refused to recognize lawyers as essential services and how the Bombay High Court has disallowed their travel by suburban local train services for emergency workers. This I had not really read about it, I have not really followed this but if that is the case and I'm sure there are some like that Bill now is not to be censured at least early on during the lockdown period so that was that something that you agreed with what that something at the Bar generally agreed with.

Dushyant Dave: And with great respect to the Bombay High Court, but I don't think it has taken the view correctly. You may not call a lawyer providing an essential service. But a lawyer is part and parcel of the administration of justice, which is an essential service, which is a fundamental service. The basic structure of the Constitution is Judiciary and justice delivery. Now if you interpret in that sense, you can't isolate the lawyers saying that lawyers will not be allowed to go and yet the system will be treated as basic or fundamental to the functioning of the Constitutional system because without lawyer you can't. So I think I, it is a very narrow view

which Bombay High Court has taken and I hope the Supreme Court will reconsider that view because lawyers should be allowed to go.

I remember Chief Justice PD Desai who was then judge of the Gujarat High Court and riots and taken place way back and as a result, the city of Ahmedabad was in lockdown. I was a young assistant government pleader and somebody mentioned to him in the morning at 11 o'clock that lawyers are unable to come from the old part of the city because of the curfew. He called me and you said that you please tell the Commissioner of Police that if any lawyer is prevented from coming to the court I will initiate contempt proceedings. Now that's the level of love that judges had. PD Desai is my role model. He became chief justice of Calcutta and Bombay High Court and refused to come to the Supreme Court when he was invited by Chief Justice Venkatachaliah. His heart used to throb for justice. And this is one example.

Another example. I remember there was a common municipal playground where you state police said during the riots pitched a tent and occupied it and the children just telephoned the high court to say that our playground is taken away and he called me and he said I want this tent to be removed within one hour. So we had to do it and the whole administration knew who PD Desai was, and they never ever made the mistake of not following his directions because the power of contempt that he wielded in the right way was so beautiful. And if you genuinely believe that Judiciary must be respected and respect must be commanded by the Judiciary by exercising this power to that since singularly missing the judges are just refusing to take any contempt initiative against the Executive while they are quite willing to take against the citizens so it's doesn't speak well because the authority of the Judiciary is diluted. On the concept I would say that lawyers are providing essential service in an overall structure of the system.

Prasanna: And a few more on the structural questions of Judiciary this one that is asking, well, what are your views on the establishment of a National Court of Appeal and separating the Constitutional court. So it is basically to break up the Supreme Court.

Dushyant Dave: No, I don't think I'm against any kind of National Court of Appeal. Frankly, time has come for us to realize the greatest damage that we have done to this country is tribunalization of administration of justice. We have taken away from the High Courts, powers under every Act and conferred on these tribunals which are law to themselves. These tribunals are so unsatisfactory. They are totally inefficient they are manned by incompetent people and the allegations of corruptions are very serious. And therefore, I am very much against these kind of creating additional [tribunals]. What we need, we can easily answer the problems that we have by appointing the best people in the subordinate Judiciary, in the High Court and the Supreme Court.

If you have the best people giving the judgment, the Supreme Court and the High Court knows that the judgment given by these subordinate judges must be good judgments. They are well written. We know that their integrity is unimpeachable. We would therefore not interfere. Likewise when High Court gives the judgment, the Supreme Court must know that these judges are giving judgments which are not only sound in law are well considered on facts, but they are

by judges were impeccable in character. Why should we therefore interfere with their view? Even if they have taken a particular view.

So this system has to be inbuilt to reject this kind of multi-layer appeals that we have and every case appeal need not be filed and even you filed in the Supreme Court and if filed, need not be entertained. So what is really happening today is that the Supreme Court is too liberal in considering cases and therefore bad cases are getting in sometimes that I think is not getting so I think a national liability is not the answer unsaid is to strengthen the existing legal system by many people of absolute competence and excellence and unimpeachable integrity and that's a process which is very difficult for us to achieve.

Prasanna: And another one, to put you on the spot as the Bar President, what are your views on the establishment of different benches perhaps in South India and Eastern India.

Dushyant Dave: No, I don't think it would be good for the Supreme Court to be split like that. Even within the same building the judges are not following the judgments of their brother judges. So if you have these benches in other cities they would perhaps start ignoring the other court altogether. Yes, what we need is to the litigant the cost is very heavy, therefore, we may need to really improvise the legal aid system in a much better way so that litigants who cannot approach the Supreme Court because of cost considerations are really taken care of. Otherwise, I don't see why we should have any other bench in there of the Supreme Court anywhere I am against even the benches of the High Courts in states. In fact, they should not create so we need benches. They should have only one seat and that's the end of the matter.

Prasanna: Thank you very much sir. We'll close with one must still question that I keep dismissing but that that question seems to be seems to keep popping up. Why did you personally choose to remain in law practice as against joining the Judiciary? I think you might not have expected the question here but please go ahead.

Dushyant Dave: So is, I must tell you that it is not difficult to answer. My father was a judge of the High Court. He was a district judge directly appointed and became High Court judge said it was not when you tried to it. But I have grown up in a family when I have seen that we had serious financial hardships at home. I have seen days in the last week of every month my father would not even have money to buy rations or petrol for the car to go to the High Court and in those days there was no government car he would not even call for a high court car. He would rather walk down or go in a 3-wheeler. I have seen very difficult times, throughout my college career. I had an allowance of 30 rupees per month.

I was very clear that you can contribute as much as a judge as you can contribute as a lawyer and I when I think back over my 42 years of practice I do feel that I have not disappointed myself about my contribution to the society and to the nation generally. I'm quite happy about it and I have been able to provide good life to my children, my wife and myself, which is what I really wanted to. I was offered to be a High Court judge by Chief Justice Venkatachaliah and I was very young 37 or 38 or 39. They were very keen but I told Chief Justice Venkatachaliah that I don't have the temperament to be a judge. I have a short fuse temperament and it's not good for

person like me to be a judge. I'm much better on this side of the Bar than becoming a judge and I have not regretted it, honestly.

Prasanna: Thank you very much sir. For this very enlightening discussion with your characteristic candor and forthrightness. I'm sure our viewer and audiences have also enjoyed it as much as I did. Thank you very much once again for spending the time to talk to us.

Dushyant Dave: Thank you Prasanna. Thank you Livelaw. Thanks to all the participants.