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Demosprudence and Socially Responsible/Response-able Criticism: The NJAC Decision and Beyond

The Ninth Durga Das Basu Memorial Lecture WBNAJS, Kolkatta

Upendra Baxi

PREFATORY OBSERVATIONS

It is a proud privilege and great pleasure to be invited to deliver this Dr Durga Das Basu Endowment Lecture at the WBJUS. And I deeply thank Professor (D.) Ishwara Bhatt for inviting me so graciously. He has done an inestimable service by editing Durga Das Basu's Tagore Law Lectures *Limited Government and judicial Review* and also in bringing together many past memorial lectures, under the provocative book entitled *Constitutionalism*: *Constitutional Pluralism*.[1] The West Bengal Academy of Juristic Sciences is indeed fortunate in having his able, continuing, and scholarly leadership

I had the privilege of knowing Dr. Basu for a long time, although we met in person infrequently. I have grown in the understating of Indian constitutionalism by reading his works all my life. I read him, in Bombay, as young student in constitutional law and I marvelled at his ability to explain such a complex subject domain in simple words. My initial admiration grew in leaps and bounds.

As a fighter for lost but just causes, allow me to mention that Basu believed that "infusion of academic jurists of the right order into the highest tribunal may lead to its enrichment." He recalls Justice Frankfurter as saying once: "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero." He makes a remarkable point, when he points out that in jurisdictions like France and Germany academicians are elevated to the highest court even when they have no background as lawyers.[2] Basu commenting on the removal of Sub-clause (c) of article 217(2) writes: "Logically the omission of sub-clause (c) from article

[1] New Delhi, LexisNexis (2013); for fuller details see Note 4 *infra*.

[2] D.D. Basu, *Commentary on the Constitution of India* Vol H at 238(1990); see also, for a detailed analysis, Rabindra Pathak, 'Distinguished Jurist: A Tale of a Failed Constitutional Experiment' Rostrum's Law Review (May, 2014): downloaded from academia.edu. The page span in the text refers to the book by Basu.

217(2) after having once inserted it by amendment would show that it is deliberate, and suggests that a distinguished jurist is a misfit for the high Court though eminently fit for the Supreme Court."[xxv] High Court along with the Supreme Court is the only court entrusted with the jurisdiction to interpret the constitution, and therefore, there are reasons enough to look askance as to ability of a judge to decide constitutional cases when he has "no pole-star of jurisprudence to guide him, (and when) he is most likely to drift in a turbulent sea."[xxvi] A' judge who has no sure foundation of constitutional jurisprudence would fail to perform the primary function of a judge of a superior court' [xxvii].

Dr. Basu was perhaps the only eminent authority to lend his voice so cogently and articulately; his was a sane voice that was lost in the wilderness of the judiciary, the executive, and the many legal professions who constitute 'the' legal profession in India.[3] But if I may say so, Dr. Basu was not in any error in entertaining this viewpoint. His tall voice has gone unheard for the last six decades but the cause he championed still matters for a democratic future of India.

I still recall his warm reference to me during the dark times of the emergency: while I had enusisasitcally welcomed the progressive features of Sardar Swaran Singh Committee report (specially the recommendation that education and land reform be at least placed in the concurrent list), I vehemently critiqued the 42nd Amendment as it emerged at a public meeting Chaired by Swaran Singh. The *Statesman* recorded DD Basu's statement acquiescing with what I had said and Dr. Basu rang me, when I was the Provost at Gwyer Hall, University of Delhi applauding my courage in saying this. Till today, I cherish this conversation.

I remember meeting Dr Basu for first time, and indeed it turned out for the last time, at Delhi at his son's residence in Chitaranajan Park at Delhi. It was late in the evening and it was approaching almost his bed time. Yet, he received me with great enthusiasm and grace. He offered me some nice Sandesh and other fine Bengali sweets and the latest edition of his constitutional law books. He worked tirelessly on constitutionalism in India and was the first jurist to write on comparative constitutional law theory and practice. He urged me a Gurudakshina to keep writing legal and public matters and I hope I have not

[3] In my VD Mahajan Memorial Lectures (delivered in 1980s but sill sadly unpublished), I maintain that we ought to speak about legal professions in plural, rather than singular. Still in formation, we have Indian legal professions but no single 'the' profession. It remains crucial, in my view, to appreciate this plurality and diversity, often laced with kinship, religion, and afflicted with different social health and pathologies of power.

failed him. The other offering (where Delhi University will honour itself with the award of an honorary doctorate to Dr. Basu and Dr. Duncan M Derrett), to my regret, could not materialize during my term of office. A truly a great modern rishi that he was, Dr. Basu was much above these modern day honours and afflictions.

Limited Government

Dr. Basu believed in rule of law, whose values can be secured by what he called 'limited government'. One of the enduing merits of Dr. Basu's works is the insistence on comparative constitutionalism, tracing the 'history and development of constitutionalism' in the world. He insisted that '... no greater blunder' may be committed than 'taking out' the Indian Constitution from 'the galaxy its predecessors and contemporaries, segregated from the wisdom of generations of political phisophers who have made research on constitutionalism as shield against abosutism'.[4] He regarded as 'reasonable and realistic' the demise of an 'early apathy to foreign decisions' a return to the bad old' Government of India act days '[5] Thus, DD Basu may be rightfully regarded as an Indian father of (what I call) COCOS, comparative constitutional studies.[6]

Of great importance is the notion of the Constitution as a 'shield' against political absolutism. DD Basu felt that constitutional arrangement made the best sense in a liberal democracy and the duties of judges and jurists lay in a *will to democracy articulated by the Constitution, not in will to power by any centre of constituted power.*

All powers were constituted, none was constituent, and there was no sovereign power vested in any branch of the government. If governance is a rule-bound affair, the powers of government are always limited by the text and context of the Constitution, which also ought to discipline the executive, the legislature, and the courts. courts and justices. Constitutional discipline for him was respect

[4] Durga Das Basu, *Limited Government and Judicial Review,* University of Calcutta Tagore Law Lectures, 56 (New Delhi, LexisNexis, 2016; Professor P Ishwara Bhatt ed.) The book will be referred hereafter simply as 'LG'. See also, P. Ishwara Bhatt, "Reflections on the Life and Works of Dr. Justice Durga Das Basu' in *Constitutionalism and Constitutional Pluralism: One Supreme Law Many Communities, Contemporary Issues in India, South-East Asia, China, and Europe* 1-33(Delhi. LexisNexis, 2013: P. Ishwara Bhatt ed.).

[5] LG, at 57.

[6] See, Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism'. BISA (Brazil, India, South Africa) Conference, Courting Justice-11, 27–29 April. Delhi; now in Oscar Vilhena, Upendra Baxi, Francois Viljon,(Eds), *Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria, Pretoria University Press,2013).

for the Constitution in word and deed. People, the rulers and the ruled alike, must respect the constitution because it 'reflects the collective will of the people'.[7]

However, the 'sanctity' of the Constitution does not mean imperviousness to change: it is not, nor ought to be 'as permanent and immutable as the Ten Commandments'[8].In this context, it needs to be emphasised that Dr. Basu recommended the 'need for a permanent Commission for constitutional revision'[9].

Dr. Basu certainly did not favour judicial amendments not provided in the Amending Article 368; he went as far as to say that *Golak Nath* diluted constitutional limited government by its 'total uncertainty' and 'uncharted judicial autocracy'.[10] At the same time, he did not counsel the 'continuation of government of India Act mentality', and definitely maintained that 'if there was any justification for making a new constitution for independent India, that was not for reproduction of Government of India Act in a bolder font'.[11] He was of the view that if the 'skeleton' was borrowed from the 1935 Act, the 'soul' was derived from the American Constitution[12] and in the unfolding of the latter justices use the power to invalidate legislations sparingly, lest they many begin to exercise super-legislative powers or substitute their 'particular economic theory' overlooking that the constitution was made (quoting Justice Oliver Wendell Holmes Jr.,) 'for people of fundamentally differing views'. [13]

It may come as a surprise that Basu was not averse to a modicum of substantive due process or judicial invention of wholly unanticipated human and basic rights and constitutional discipline. Dr. Basu was of the firm view that a 'judiciary that

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[7] LG, at 46.

[8] LG, at 65,71-73.

[9] LG, at 68-72. See also, for the Commission set up to review the Constitution, Upendra Baxi, 'The *Kar Seva* of the Indian Constitution: Reflections on Proposals for Review of the Constitution" *EPW* XXXV: 891- 95 (March 11,2000.)

[10] LG, at 613. Dr. Basu uses these expressions in relation to the doctrine of prospective overruling but his general point is also well captured by generalizing this observation to *Golak Nath* decision as a whole.

[11] LG, at 473.

[12] LG, at 471.

[13] LG, at 363; quoting from Justice Holmes in *Lochner v. NY* (1905)198 U.S. 45 (dissenting).

overlooks' the 'flavour of independence and democracy'--- these twin flowers of 'Bill of Rights and Judicial Review'-- 'would not be "upholding" the Constitution, according to the judicial oath, but "undermining "it'.[14] And yet this undermining did not occur when the Supreme Court espied some unenumerated rights.[15] Dr. Basu strove all his life to maintain a firm distinction between juridical/juristic reasoning and political resonating and his oeuvre needs to be most carefully studied, if we are to maintain his legacy.

NJAC Decision

I shall not say much, through that is a promise that the title suggests, about the NJAC decision which I would urge you to read word by word for there is no easy substitute. Professor Bhatt has summed up its broad features well in his learned annotations to DD Basu's *Limited Government and Judicial Review*.[16]

Durga Das Basu would have approved Justice RS Pathak's observation that while '*the administration of justice draws its legal sanction from the Constitution, its credibility rests on the faith of the people'* and Justice Bhagwati's remarks in the independence of the judiciary as '*vital to real participatory democracy, maintenance of the rule of law as a dynamic concept, and delivery of social justice to venerable sections of the community'*. [17]

There has been heavy propaganda against the Supreme Court decision invalidating the amendment and the law. But it is wrong to say that the Supreme Court denied the plenary powers to amend the constitution; these survive intact since *Kesavananda*. The NJAC decision merely said that the 99th amendment and the accompanying Act were invalid (indeed Justice Chelameswar, in his sole dissent, did not examine the validity of the Act). What the Court ruled as unconstitutional was the ousting of judicial primacy, and the presence and the voice of the Union Law Minister: any future amendment and law giving effect to

[14] LG, at 473.

[15] See LG, 254-268. See generally, also, Lecture 11 at 130-222 and lecture 1V Fundamental Rights as a limitation' provide an excellent analysis of the 'written constitution as a limitation. These valuable Chapters talk paradoxically both about judicial limitations as well as adjudicative opportunities are still relevant today.

[16] LG at the opening yet unnumbered page just before the list of abbreviations, and the previous Judges Cases, as well as the NJA Constitutional Amendment and the Act, at 48-59. See also his footnote 41 citing a 1999 Orrisa High Court decision applauding indendepence of judiciary, as a democratic virtue. Justice Bhagwati's observations were rendered extravagantly by the nominative overkill in *Subsah Sharma.*
Their Bretheren

[17] Citing the germinal discourse in *SP Gupta's Case*: wisely and well quoted by P. Ishwara Bhatt LG at 54 (emphasis added).

a national judicial commission, or a similar body, may well be held valid if it respects these constitutional conditions and conventions.

The propaganda also says that 'judges appointing judges' is flawed and deeply so. A moment's COCOS type reflection will show that Judges have a preponderant say in appointing their Brethren in most Commonwealth jurisdictions. Moreover, the Union Law Secretary affidavit before the Court, in advisory opinion 1998, itself stated that only seven out of some 348 recommendations were negatived by the Central government. If the system of executive nomination has worked so well, why the change that will allow now a possible veto by the Union Executive? It is too late in the day to maintain any unconstitutional prerogative in the executive or the legislature to appoint or transfer the High Court or the Supreme Court justices to the detriment of judicial independence and review.

Neither method—contrary to propaganda-- can be said to have failed or succeeded, because the citizen has no way of knowing who the candidates are, how they are selected and why. No empirical study of judicial appointments is possible because the records are not available, and like the electoral nomination of candidates, the right to information does not exist so far as judicial elevations or transfers of high court justices are concerned. Stories in which judges, lawyers, law ministers and journalists tell us about the "system" are abundant, but such anecdotal evidence is hearsay and not ordinarily admissible in a court of law.

The most important aspect of the NJAC decision is the most ignored but it is impossible to read the judgment without studying the threshold decision on recusal. Such is the gravitational pull of the issue of the constitutional validity of the NJAC decision, replete with surprise, that the issue of judicial recusal in certain situations is not discussed at all. But we should recall that NJAC decision is made possible only by a primary ruling concerning when and indeed whether individual Justices should recuse themselves.

By a long standing convention, recusal whether by the concerned Justice or at the instance of the Bar, is an individual affair; the Court as an institution is not involved. The institutional interest becomes of course engaged when there is allegation of pecuniary bias or any other possibility of conflict of interest. Lawyers may exonerate, however, the possibility of even pecuniary bias by stipulating that they have complete faith in a Judge, as happened when Justice J.C. Shah disclosed the puny shareholding he had in the affected banks in the

1970 *Bank Nationalization Case*. Does this stand for a wider proposition of law/convention: when parties unanimously so stipulate, there is no pecuniary bias or conflict of interest?

But it was never a matter of lis or constitutionality, till the advent of the 2014 decision in *Subrato Roy Sahara*; there Justice Khehar (in which Justice Radhakrishnan agreed) took the lead to confront the convention with the judicial oath of office under the Third Schedule of the Indian Constitution. His Lordship) strongly deprecated the recusal convention as the essence of "[C]alculated psychological offensives and mind games" which needs "to be strongly repulsed" and recommended a "similar approach to other Courts, when they experience such behaviour". They further held that: "… not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favour, affection or ill will".

Justice Khehar followed his own logic in the NJAC Case: "A Judge may recuse at his own, from a case entrusted to him, by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before she assumes his office, takes an oath to discharge his duties without fear or favour. She would breach his oath of office, if she accepts a prayer for recusal, unless justified". The irony is lost in the NJAC decision whose strength lies in a robust defence of the judicial collegium reinforced by a rigorous approach towards respecting conventions (following judicial precedents is held to be a convention) in constitutional interpretation and change!

There a three judge bench referred the matter to a five judge Bench, which was constituted by the CJI (on 7.4.2015) comprising Anil R. Dave, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ; Justice Anil Dave recused himself and the CJI substituted Justice Khehar as presiding judge (on 15.4.2015). Apparently, Justice Dave recused himself because he became an ex officio Member of the National Judicial Appointments Commission, on account of being the second senior most Judge after the Chief Justice of India. Thus arose a piquant situation: as Justice Khehar demonstrates, Justice Dave was a member of the Judicial Collegium when he was on a three judge Bench and became a member also of the NJAC; and so was the constitutional destiny of Justice Khehar and indeed all seniormost justices of the SCI! In fact, all Justices whether

or not potential members either of the Collegium or the NJAC, could be said to be officially interested in the outcome that retained the power of elevations (and transfer of High Court Justices) unto themselves!

To reiterate: recusal was denied by Justice Khehar in *Subrata Roy Sahara* where (speaking for Justice Radhakrishnan and himself); he ruled that it is an appropriate remedy when pecuniary bias is demonstrated but aside from this exception the Third Schedule does enjoin a constitutional duty to adjudge all cases and controversies coming before the SCI without 'fear and favour'. Was a constitutional convention thus made subject to judicial review process and power?

In the *NJAC decision*, Justice Chelameswar and Goyal were further somewhat baffled by the petitioner's submission: was it the "implication of Shri Nariman's submission" that Justice Khehar "would be pre-determined to hold the impugned legislation to be invalid"? But if so, "the beneficiaries would be the petitioners only" as the respondent government of India had no objection to the continuance of the Justice.

On the wider question of institutional or official bias, enshrined by the Supreme Court itself on the Indian administrative law, Justices Chelameswar and Goyal ruled that "Judges of this Court are required to exercise such "significant power", at least with respect to the appointments to or from the High Court" with which they are associated. If accepted, the argument of Shri Nariman, they said, "would render all the Judges of this Court disqualified from hearing the present controversy". This was not a "result" legally permitted by the "doctrine of necessity".

Agreeing with 1852(*Dime*) and 1999 (*Pinochet*) House of Lord Opinions, Their Lordships drew a distinction between 'automatic', considered (non- automatic), and conscientious recusal. Justice Kurian, however, specifically urges that "a Judge is required to indicate reasons for his recusal" to promote transparency and accountability which stem from the "constitutional duty, as reflected in one's oath". This would also help to "curb the tendency for forum shopping', more so because (as Justice Lokur observed) judicial recusal applications are "gaining frequency". However, Justice Lokur disagreed; finding recusal far from a "simple" affair he questioned the requirement of reasoned opinion; and urged that the issue being "quite significant" warrants fresh rules. His Lordship ruled that "it is time that some procedural and substantive rules are framed in this

regard. If appropriate rules are framed, then, in a given case, it would avoid embarrassment to other judges on the Bench".

Five categories of recusal emerge from this discourse. The first is when the concerned Judge declines to sit on the Bench for reasons conveyed to the CJI. Since the litigating or general public never knows what information is thus exchanged, we will never know why such recusal occurs.

Automatic recusal, second, occurs when it is demonstrated that the Judge has a pecuniary bias; but when a judge denies these, 'real danger' evidence to the integrity of the judicial system as a whole has to be provided. The third category of considered recusal, though the Supreme Court does not so name it this way, occurs when there is 'real likelihood' of non-pecuniary bias or conflicts of interest. In both these situations, if necessary, the Brethren sit on judgment concerning the consequences of individual judicial recusal (or non-recusal) conduct.

The fourth ground of recusal is that of official or institutional bias. The NJAC decision can be said to hold either that there is no such thing as institutional bias, or the doctrine of necessity (i.e. the Court has to decide) operates; and both can be justified by the judicial oath. This is a fine point because the Court both follows (as in this case) the collective wisdom of past judicial precedents and also departs from it massively!

The fifth category is problematic in that 'conscience' here conflicts with express provisions of judicial oath. If the Constitution creates a duty to adjudge, may a Justice recuse himself or herself without violating that obligation? Conversely, should 'conscience' be considered so supreme that any Justice may on that ground escape the constitutional judicial obligation to hear and decide a matter? Should Justices resign their offices to serve the judicial conscience or should they be permitted, upon hearing the full arguments on the substance, to recuse themselves in individual cases? Should the Brethren or the Bar be allowed to override individual judicial conscience? What are the ethical obligations of the Bar in regard to recusal and do they extend to individual lawyers, in case the Justice pleads a constitutional duty to adjudicate the matter? And finally (without here being exhaustive) would a rule made by the Court and/or the legislature ever solve the issue of conscientious recusal?

The NJAC decision presents us with a bouquet of concerns, going at the heart of the so-called public virtues of 'transparency' and 'accountability. What, if

anything, may one learn from other jurisdictions and the UN-Bangalore Principles of Judicial Conduct and allied regional jurisprudences? Or, all said and done, should we say with Eugene Ehrlich: 'The best guarantee of justice lies in the personality of the Judge?'

Between Fiat Justice and Salus Populi

In their daily work, Justices do not engage the vast literature on many philosophic approaches and notions of justice that implicitly inform the tasks of administration of justice by the courts and judges. Does any absolutist notion of justice inform judicial approaches to tasks at hand? Rather, they fall back upon the accumulated wisdom of the past, often upon the principles of common law and those emerging from COCOS. The Justices often recourse to maxims as precepts of the law, which they hold as knowable and known—as a matter of statutory interpretation-- also to the executive and the legislature respectively in applying and making law.

Although it was Roman jurists who said: *Fiat justitia ruat caelum* ('Let justice be done though the heavens fall') should judges not also temper this by a limiting maxim '*Salus populi suprema lex esto* ('The health of the people should be the supreme law' or 'Let the good (or safety) of the people be the supreme (or highest) law'? How are the notions of *fiat justitia* and *salus populi* to be determined and which one to be followed when the two maxims are seen or said to be in conflict?

One answer is legalism, not in its pejorative sense of 'hyper-legality' but in in the basic meaning as following the rules because obedience to the law is integral to any system of rules. Mohandas Gandhi's remarkable speech, before an English judge (1922, Ahmedabad) reveals legalism as an ethical approach to the law.[18] Rules and their interpretation must be followed even as one contests these. While pleading guilty as charged, he accepted the highest punishment for treason; in this (if he read Immanuel Kant) Gandhi insisted on the moral right to be punished, although he also said he would challenge imperial legality again and again (as he did) while following legal/penal law as long as it existed.[19]

[18]Mohandas K Gandhi, www.gandhi- manibhavan.org/gandhicomesalive/speech3.htm (visited 15 February 2016).

[19] Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964); see also Mortimer R. Kadish and Sanford M Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford University Press, 1973).

Liberal legalism becomes incoherent when confronted by that form of civil disobedience that takes legalism seriously.

The other response is: 'context', where judicial understanding of contexts determines the mode of interpretation. The contexts, however, vary and waver: obviously, the contexts are political, social, cultural, and social or human rights movements (broadly subaltern). Contexts may also be episodic or structural. Contexts may be contemporary or historical. One may also speak about the different levels of contexts (meta, meso, and macro). And one may generally divide (following Michel Foucault) two types: governance contexts and resistance contexts. In this way, one speaks of the hegemonic and subaltern context.Changing contexts also raise questions about the meanings of judicial independence and review and equally importantly about the impact of judicial decisions.

The problem always is to establish some kind of relationship between the *text* and the *context*, or the relation between *context* and *judgment*. Further, what distinguishes the distinctly juristic from the political is the context of contestation (judges can usually decide upon what is brought before them); normally, both the lawyers argumentation is in the public domain and so is the judicial reasoning and outcome.

SAL and Its Itineraries

Context-sensitive justicing begins its distinctive itinerary in India through the device of social action litigation (SAL).[20] The smashing of the context (to borrow

[20] The literature here is immense. But consult least: Granville Austin, Working a Democratic Constitution—The Indian Experience (Delhi, Oxford University Press,1999); P. Ishwara Bhatt, *Law & Social Transformation in India* (Lucknow, Eastern Book Co., 2009); Upendra Baxi, The Indian Supreme Court and Politics (Lucknow, Eastern Book Co,1980); Id., ' "The Little Done, The Vast Undone": Reflections on Reading Granville Austin's The Indian Constitution', *Journal of the Indian Law Institute* 9:323-430 (1967); Id., 'The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice', in S.K. Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* 156-209 (Oxford University Press and Indian Law Institute, Delhi, 2001); Id., 'Writing About Impunity and Environment: the "Silver Jubilee" of the Bhopal Catastrophe', *Journal of Human Rights and the Environment* 1:1, pp. 23-44 2010); Id., 'The Justice of Human Rights in Indian Constitutionalism', in Akash Singh and Silika Mohapatra (eds.), *Indian Political Thought: A Reader* (Routledge, London & New York, Chapter 17, 2010);Sandra Freedman, *Human Rights Transformed: Human Rights and Duties* (Oxford, Oxford University Press, 2008); Gary Jacobsohn, The Wheel of Law: Indian Secularism in a Comparative Context (Delhi, Oxford University Press, 2003; Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Mass, Harvard University Press. 2013);Madhav Khosla, The Indian Constitution(Oxford India ShortEditions,2012) Sudhir Krishnaswamy, *Democracy and Constitutionalism* Delhi, Oxford University Press, Delhi, 2009); Anupama Rao, *The Caste Question: Dalits and the Politics of Modern Asia* (University of California Press, Berkeley, 2009); S. P. Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits*(Delhi, Oxford University Press, 2002); Ronojoy Sen *, Legalizing Religion* (with commentary by Upendra Baxi), Policy Studies 30, (Washington DC, East West Centre, 2007); Ujjwal Kumar Singh, *The State, Democracy, and Anti-Terror Laws in India*, New Delhi. Sage,2007); Aniurdh Prasad and Chandrasen Pratap Singh, *Judicial Power and Judicial Review*, (Lucknow, Eastern

here Roberto M. Unger's battle cry for critical legal studies movement in the USA)[21] is another beginning for (what I call) *demosprudence* in contemporary India. The contexts of 'smashing' and modes of 'smashing' need a greater analysis than now available; so do the ways in which these provide scope for future legitimate adjudicative leadership or judicial social action. At base remains legal interpretation, or more generally legal and political hermeneutics. The tasks of interpretation, as earlier in 1837-38 Francis Liber, and more recently as Stanley Fish reminds us, are 'never done' and interpretation is ceaseless'.[22] And legal cum constitutional interpretation, we should never forget, occurs on the 'plane of pain and death'.[23]

There is no doubt that SAL, and its demosprudential adjudicative leadership is made possible in India simultaneously both by adjudication that is independent of social action and movement and dependent on it and the commenteriat (the media campus based and pubic intellectuals, and human rights social action groups)—now substituting the old vanguard proletariat. Relative autonomy from the state and the market, the polity and economy, is made possible primarily through social action litigation (SAL), still miscalled as public interest litigation(PIL). Since we lack a theory of *adjudicative time*[24], it might be worthwhile to points out that what we call time is a *contradictory unity of many*

Book Co..2012); Parmanand Singh,' Enforcing Socio-Economic Rights through Public Interest Litigation: An Overview of the Indian Experience' n Surya Deva (ed.), *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China,* NY, Routledge,101-122 (2015); Arun Thiruvengadam 'Swallowing a Bitter PIL'?: Brief reflections on Public Interest Litigation in India' in *The Sliding Scales of Justice: The Supreme Court in Neo-Liberal India* 121- 40 (Mayur Suresh and Siddharth Narrain, eds.; Delhi Orient Blackswan, 2014);Udai Raj Rai, *Fundamental Rights And Their Enforcement* (Delhi, PHI learning Pvt Ltd, 2011); Anupama Roy, *Gendered Citizenship: Historical and Conceptual Explorations* (Delhi, Orient Blackswan , 2013).

[21] Roberto M Unger, *The Critical Legal Studies Movement* (Cambridge, Mass: Harvard University Press, 1983). See also,Roberto M Unger, *What Should Legal Analysis Become?* (London, Verso, 1996). But see, Emilios A. Christodoulidis. 'The Inertia of Institutional imagination: A Reply to Roberto Unger', *Modern Law Review*, 59: 3, 377-397 (1996).

[22] Stanley Fish, *Doing What Comes Naturally, Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press,1996). Fish also draws valuably to our attention the fact that interpretation relies on 'foundations' but these have to be rhetorically negotiated rather than forever postulated.

[23] Robert Cover, 'Robert M. Cover, 'The Supreme Court, 1982 Term -- Foreword. Nomos and Narrative', *Harv. L. Rev*. 97:4 (1983).

[24] I have briefly developed this theme in my Introduction to Mayur Suresh & Siddharth Narrain (ed.), *The Shifting Scales of Justice: The Supreme Court in Neoliberal India* (Delhi, Orient Blackswan, 2014).

times.[25] There is the difference between *constituent* and *constituted time* (that is the time of constitutional founding and the time of putting constitution to work, or to sleep).

A distinct theory of constituted time is adjudicative time. The Indian constitutional experience and development presents singular difficulties in understanding adjudicative time. In the main so, because the Supreme Court of India presents itself as a sole residuary legatee of the originary constituent moment; thus it ordains a doctrine of basic structure and essential features of the Indian constitution. Originally strictly confined to adjudging the validity of constitutional amendments, the basic structure doctrine now extends widely and vastly to all manner of public decisions. Further, the horizons of adjudicative time constantly expand with the invention of SAL jurisdictional and jurisprudential practices and the adjudicative demosprudential leadership is fusion of constitutional and adjudicative time demand some typical (even paradigmatic) ways of Indian adjudicatory leadership.

The routinisation of the exceptional moment of the enunciation of the basic structure doctrine now confers almost limitless scope for judicial action. Indeed, I have always suggested that *Kesavananda Bharati* and its normative progeny begin a process of judicial rewriting of the already heavily written Indian constitution. SAL processes further develop these scripts in versatile, yet complex, and even contradictory ways.

Leaving aside the rather crucial question concerning how the *Kesavananda Bharathi* fusion of two orders of time may have gestated forms of inaugural SAL time in the Judicial Eighties, it is clear enough that in some remarkable ways, the SAL adjudicative time disrupts conventional understanding of this as an 'eternal yesterday' (borrowing here a phrase from Max Weber[26] Put starkly, SAL writes, as it were, on a clean adjudicative slate, generating in turn its very own distinctive normative/doctrinal past times.[27]

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[25] See Alfred Gell, *The Anthropology of Time: Cultural Constructions of Temporal Maps and Images* (Oxford, Berg, 2001).

[26] Max Weber, 'Politics as a Vocation'. In *Essays in Sociology*, 26–45. (New York: Macmillan, 1946: H. H. Garth and C. Wright Mills eds).

[27] Delivering the 6th DD Basu Memorial Lecture, the former CJI Justice S. Rajendra Babu said that not merely has the basic structure 'theory has stood the test of time'(134)but that 'Supreme Court has been instrumental in reinforcing democracy''(194), an 'unparalled contribution to the growth and sustenance of democracy' (1950. His Lordship then said that the Court

In so doing, SAL also re-democratises investments of adjudicative time. In this way, and here extending Roland Barthes[28] , SAL converts 'authorly' text of the Indian Constitution almost fully into a 'readerly' text. This means, here very simply put, that the task of production of constitutional social meaning belongs to us all, even when some 'imagined communities' may continue to insist that the production of legal/juridical meanings of constitutional texts may/must still remain a dominant function of the privileged community of citizen justices and lawyers.

As I have said elsewhere we live under three prudences: legisprudence, jurisprudence, and demosprudence[29]; the latter is characterized by an era where Justices rediscover/remake people. In other words, the Supreme Court of India has now decided on a new role and function for itself: it decides disputes but also *co-governs the nation*.[30] 17 Even when it does not act as a 'super-legislator', it does occasionally legislate, execute. And administer proving all over again that there is no such things a strict separation of powers—otherwise a well cultivated myth about the rule of law in India and elsewhere.

> always sought to be the major centre of political power in the interest of the society. It is after all a political institution; with the executive being its real rival. If the Court found that a liberal and enlightened executive irremovably occupied the Centre, it tried to share power with the executive. If the executive was aggressive and bellicose, the Court demonstrated deference. If the willing xecutive moved away from the Centre, it sought to occupy the seat of power itself. If it could not do any of these, it created its own field of operation. Vicissitudes in the fortune of the successive executives perpetually made the Court readjust its position.

This precisely has been my view since the 1980s and so it is now, Justice Rajendra Babu makes one further observation (with which I respectfully agree):'

> perspective which moulds the vision of such requirements, depends upon the philosophies of individual judges who at any point of time constitute the Court. After all a judge's personality is the funnel through which value norms enter judgment. It is out of such a welter during different periods, that perceptible trends and major policies of the Court emerge (195-196).

See his 'Contribution of the Supreme Court to the Growth of Democracy in India', *NUJS Law Rev*.6:193-211 (2013): the page number in the text of this note refer to this article.

[28] Roland Barthes, *An Essay* (New York: Hill and Wang, Richard Miller, trans., 1975).

[29] Upendra Baxi, 'Demosprudence v Jurisprudence? The Indian Judicial Experience in the Context of Comparative Constitutional Studies' *Macquarie L. J*. 14:1-13 (2015).

[30] I have briefly developed this theme in my Introduction to Mayur Suresh & Siddharth Narrain (ed.), *The Shifting Scales of Justice: The Supreme Court in Neoliberal India* (Delhi, Orient Blackswan, 2014).

New Ways of Socially Responsible Criticism

In what does SRC consists is indeed a vexed question. The bases of SRC are often un-articulated. I prefer Jacques Derrida's substitution of 'responsibility' by '*response- ability'*.[31] The ability to respond is more than responsibility. And response- ability is forever more than a *criticism* of this or that decision but a *critique* of an adjudicative trend or tendency. How does develop a critique of judicial and juridical context-worship, context-smashing, context-forgetting, and context- transcending?

Nor is any distinction made between episodic and structural criticism and even critique. I do not insist on binary, if only because we are all postmodernists in our dislike of binaries! But I do suggest that the ways in which we proceed to deconstruct these do matter. If structural change is a long term affair, for example we may not be led to criticizing courts for not changing the structures of power or domination by a single or even line of decisions; indeed, then the question is not so much what judicial power does (or does not do) but is the way in which the courts are mobilized by insurgent actors and the ways in which the outcomes are incrementally used. Talking about outcomes is also to take seriously the problematic of 'symbolic' and 'instrumental' outcomes and impact studies. What 'structural' critique may learn from the 'episodic' —the triumphal narratives of the successful and the disappointments of the losing party—is also as yet an open question, not yet foreclosed by any science of naaratology.

In a form of adjudication governed by the principle of parliamentary 'sovereignty' the basic structure doctrine seems out of place. The winner -takes-it-all principle stands now replaced by the postulate-- the judicial innovation of SAL-- of 'hope-and –trust' jurisdiction (notably by Justice P. N. Bhagwati). This displaces the view that justices ought not to direct executive policy or as shaping a legislature; rather than 'overreach' or trespass 'separation of powers', a new jurisprudence entails a democratic dialogue between the judiciary and the legislature/executive combine. Some adjudge the rising judicial sovereignty as undemocratic in principle as it lowers the bar of representative intuitions. The wider point, of course, is that adjudicative leadership should not ignore state differentiation; the Court is best seen as working through such institutions rather than singularly or alone.

[31] See, the discussion in John Llewelyn 'Responsibility with Indecidability in Derrida: Critical Reader David Wood (Oxford: Blackwell,1992); David Campbell, 'The Deterritorialization of Responsibility: Levinas, Derrida, and Ethics After the End of Philosophy' *Alternatives: Global, Local, Political,* 19: 4, 455-484 (1994).

The problematic merits further discussion; yet indeed the suggestion that scholarly critics of courts state their own ideology in broad daylight and articulate the general principles animating their critique seems a legitimate one. SRC is a species, if you will, of careful critique of the judicial performances and ways in which judges, lawyers, and jurists think.

The response of the Parliamentary/Executive combine to adjudicatory leadership has varied over time. The initial outcries of judicial usurpation still continue though in an increasingly feeble voice. This is partly due the fact that, ever since its inception, leading political actors have gone to the Court for judicial and constitutional protection of their basic rights against their incumbent adversaries. Even a bare reading of the parties in the leading decisions of the Court reads like a 'Whose Who' of Indian politics. No matter how justices may proceed to decide constitutional contentions, the outcome becomes a politically appropriable resource. *Bush v Gore* [32]may provide a rare moment of adjudicative politics in the United States Supreme Court; in contrast, the Indian Supreme Court would be simply unimaginable this way! Do the questions then confronting the Court provide a different context, marking the distinction between judicial role and function in developing' constitutional democracies and some bicentennial forms of constitutional adjudication? This in turn frames contestation between ahistorical (and therefore abstractly universalizing) view of what may be said after all to be the province and function of apex courts and the historically new formations of postcolonial (and now of course postsocialist) constitutional justicing.

We need a new basis for judging our justices, the old ways of jurisprudence will no longer suffice.

The accusation that the Courts 'overreach' presupposes that we have theory of judicial role and if so we must lay it out clearly and well. If the theory is that Judges merely declare, and not make, the law, we need to think through that normative premise. Is the distinction between 'finding' and 'making' viable

[32] 531 US 98 (2000); see Jack M. Balkin, 'Bush v. Gore and the Boundary Between Law and Politics', *The Yale Law Journal* 110:101- 152 (2001). Balkin right finds the decision 'troubling' because it suggested that the Court was motivated by a particular kind of partisanship, one much more narrow than the promotion of broad political principles through the development of constitutional doctrine'. But he also maintains that the boundary is not impregnable. See also Pratap Bhanu Mehta,'The Rise of Judicial Sovereignty' *Journal of Democracy* 18; 2, 70-83(2007).

theoretically? Must the judicial decision maker not make the law as a first step in order to declare it? Ought one to make a distinction in Roscoe Pound sense, between judicial law-finding and law-saying?[33] Ought Justices, as Ronald Dworkin said, not ever be even deputy legislators but must remain deputies to legislature?[34]

The problem of judges listening to their critics is an old one but appears in new guises now in this era of demosprudence. An assumption is here made that Justices and arguing counsel read what legal scholars write, even when the extent and impact of such reading remains yet to be verified empirically. All that one can say (based on individual anecdotes) that justices do not any longer believe that they can do justice in a 'soundproof room'; how far and wide they have opened their doors of perception remains a debatable matter[35].

Demosprudence and SRC

There is a new beginning for demosprudence in contemporary India. As I have said elsewhere we live under three prudences: legisprudence, jurisprudence, and demosprudence. Demosprudence as practiced by the Supreme Court over the past three decades (and by the High Courts as well) the latter is characterized by an era where Justices rediscover/remake people: in their name, stand invented and elaborated new:

(a) judicially invented human rights;

(b) jurisdictions (such as epistolary and curative petitions);

(c) enforcement and remedies structures;

(d) policies which will bind until Parliament passes a similar law;

(e) ways of monitoring Union and State policies already adopted;

(f) policing asymmetric federalism

(g) combating systematic governance corruption

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[33] Roscoe Pound, *Law Finding Through Experience and Reason: Three Lectures* (Uni. Of GA Press; First Edition,1960).

[34] Ronald Dworkin*, Law's Empire* (London, Hart Publishing; New Ed edition,1998).

[35] For the judicial tendency till 1970 concerning constituent assembly debates, see H. C. L. Merrillat, 'The Soundproof Room: A Matter of Interpretation', *JILI* (Journal of The Indian Law Institute) 9:521-546 (1967). Things have changed with scholarly literature as well since the digital advent and the availability of a pool of talented interns, research assistant, and academic associates since the 80s.

(h) ways of enunciating basic structure doctrine;

(i) forms of judicial co-governance of the nation.

How then shall we evaluate the democratic enhancement thus brought about? And what about backslidings also recently evident (as in Bhopal Catastrophe[36], the state of relief and rehabilitation in massive irrigation projects, the *Kaushal* (the reversal of a well-considered and imaginative decision by the Delhi High Court in a matter originally filed before the Supreme Court and farmed out for 'comprehensives consideration' to it) and *Lily Thomas* decisions (the upholding of convicted politicians at the district court level notwithstanding the cornerstone of the Indian and common law criminal justice system- the presumption of innocence)?

There are several related 'how to' questions, all of which provoke a reconsideration of our old ways of judging the judges. The tasks of social critique of demosprudence is ever harder than the task of evaluation suggested by jurisprudence. If we want our judges to listen to us, we should surely move beyond staid jurisprudential prejudices and think about some apt ways of grasping how judges and lawyers do think through the problems of maturation of a democratic order with human rights assurances and reorder our own intellectual apparatuses in some uncharted directions.

[36] I think, and rethink, the Bhopal Catastrophe but examples of mass disasters, toxic torts, and industry-sponsored toxic capitalism abound. See Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' Journal of Business and Human Rights (2015, forthcoming inaugural issue); 'Writing about Impunity and Environment: The "Silver Jubilee" of the Bhopal Catastrophe' (2010) *Journal of Human Rights and the Environment* 1: 23; 'The "Just War" for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect' in Ledne Bomann-Larsen and Oddny Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004) 175; Upendra Baxi, 'The Geographies of Injustice: Human Rights at the Altar of Convenience' in C Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* 197 (London, Hart, 2001) It is a measure of time and discipline that the admirable work of K Fortun, *Environmentalism, Disaster, New Global Orders* (University of Chicago Press, 2001) does take little notice of my scholarly and activist work on Bhopal; Kim Fortun gives a fascinating narrative of 'advocacy' in, and after Bhopal and her elucidations of the notion of 'enunciatory communities' is extremely important in exploring mass disasters. I have recently discussed her work, along with the work of early Veena Das in my seminar talk at the Department of Sociology,Delhi University, entitled: 'The Bhopal Catastrophe Narratives: Where Law and Anthropology Meet, but Not Quite?[4 September,2015].

I may suggest in summary conclusion the following standards of judging the demosprudential adjudicative leadership, in the fullest confidence that Dr. Basu will at least have agreed with most of these.

First, we should judge demosprudence in its structural (not episodic) socio-political setting. Although we have nominally the self-same constitution, there have at least been seven de facto constitutions/constitutionalisms[37]. The seven Indian Constitutions only provide the skeleton of Indian constitutionalism; the search for its soul (to use the phrase -regime of DD Basu) has yet to begin! This is a very rough periodization—and all periodization is perilous-[38] some sense of the changing socio-political profile is essential for the task.

Second, in this pursuit somehow we have to render distinct exceptional adjudicative leadership from quotidian one (the structural from the episodic).

Third, SRC has to draw some boundaries between *judicial activism* and *judicial despotism*: the latter merely singify the exercise of a brute will to judicial power, the former an appeal to judicial reason and popular conscience.

Fourth, since discretion is ineluctable to all human action, SRC needs to render distinct two forms of arbitrariness: one that may be called creative and the other facially arbitrary and therefore uncreative. Creative arbitrariness is at the heart of demosprudence Can justices be both: be creative and arbitrary? The answer seems to be clear: Basic structure is creative judicial arbitrariness, when we look at the judicial internal struggle in *Kesavananda* and its normative progeny. It was

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[37] These are : (i) the text adopted in 1950; (ii) the Nehruvian constitution, demanding a compelling respect by the Supreme Court of India for parliamentary sovereignty; (iii) the 1973 *Kesavananda Bharati* constitution which confers constituent power on the SCI, including the power to annul a constitutional amendment otherwise duly made by parliament; (iv) the state ' finance capitalist constitution presaged by the Indira Gandhi constitution, via the nationalisation of banks and insurance industries and the abolition of the privy purses; (v) the Emergency constitution of 1975–77; (vi)the post-Emergency constitution which marks both judicial populism as well as the emergence of expansive judicial activism; and (vii) the neo-liberal constitution which reduces India to a vast global market fully at odds with the first, second, third, fourth and the sixth constitutions.

[38] See, for a historical perspective, Lucian Hölscher, 'Time Gardens: Historical Concepts in Modern Historiography' *History and Theory* 53, 577-591 (2014). He concludes his essay (at p.591) by the following:

> 'Time has to be taken as a potential bond of life, history as a garden with a common concept of life, real life. This is the only way to provide a common ground for historical narratives, for keeping history as a universal reality together. We may produce all kinds of historical concepts and historical temporality, but we do not escape the necessity to hold fast to the concept of empty time as the open field on which histories may arise, keeping in touch with one another'.

See also, See Helge Jordheim, 'Against Periodization: Koselleck's Theory of Multiple Temporalities' *History and Theory* 51: 2 ,151-171 (2012).

creative judicial arbitrariness to give basic human rights to transgender and uncreative arbitrariness to deny these to those who have a different sexual orientation.

Fourth, creative judicial arbitrariness is creativity combined with discipline. When we are studying demosprudence, the reference to 'discipline' involves not so much in the past doctrines such as *stare decisis* (in fact demosprudence, or demosprudential constitutional leadership, is impossible when we strictly follow precedents). But with demosprudential constitutional adjudicative leadership n we need to reinvent the notion of judicial discipline itself in new directions (as for example entailing a reference to 'constitutional culture' or basic values of a constitutional order).

The tasks of giving *social* meaning (as distinct from imparting a *jural* import) to demosprudential leadership and of devising a new social singficance to adjudicative leadership are new and daunting but is high time that these are now essayed. With the great poet Schiller, we must say

> "What is left undone one minute
>
> is restored by no eternity".

Table of Cases Referred to in the Text

Golak Nath v. State of Punjab, AIR 1967 SC 1643.

Maneka Gandhi v. *Union of India*, 1978 SCR (2) 621

Lily Thomas v Union of India, (2000) 6 SCC 224.

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

In Re: Presidential Reference on the Principles and Procedures regarding the Appointment of the Supreme Court and High Court Judges (1998) 7 SCC 739

Subrato Roy Sahra v. *Union of India*, Writ Petition(Criminal) No 54 (2014)

Subhash Sharma v Union of India 1991 AIR SC 631; 1990 SCR Supl. (2) 433

Supreme Court Advocates- on-Record v Union of India (16 October, 2015: The NJAC decision).

Suresh Kumar Kaushal v. *Naz Foundation*, AIR 2014 SC 563

Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?

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Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?

Upendra BAXI*

Abstract

This article addresses human rights responsibilities of multinational corporations (MNCs) in the light of what I describe as the four Bhopal catastrophes. More than thirty years of struggle by the valiant violated people to seek justice is situated in the contemporary efforts of the United Nations to develop a new discursivity for human rights and business—from the Global Compact to the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the Guiding Principles on Business and Human Rights, and the more recent process to elaborate a legally-binding international instrument.

Keywords: Bhopal, Guiding Principles on Business and Human Rights, justice, mass torts, UN Draft Norms

I. The State of the 'Art'

If we are to believe that the United States of America (US) is the new globalizing Empire, much talk about the linkages between human rights and multinational corporations (MNCs) remains altogether misplaced. In *Kiobel*, the Second Circuit Court of the US held that corporations are not liable to human rights law and jurisprudence,[1] and reconsidering that decision the US Supreme Court in 2013 ruled that the presumption against extraterritorial jurisdiction extends to the Alien Torts Statute 1789 (ATS), because of the 'danger of unwarranted judicial interference in the conduct of foreign policy'.[2] There is much discussion concerning questions such as the dramatic litigation under the ATS, what *Kiobel* actually decided, the impact of this decision on human rights law and jurisprudence, and possible alternatives as ways out of it.[3]

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[1] *Kiobel v Royal Dutch Petroleum Co*. 642 F 3d 111(2nd Cir. 2010).

[2] *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013), at 1672 (per Justice Beyer in a concurring judgment). Ingrid Wuerth discusses this decision in beautiful detail: Ingrid Wuerth, 'The Supreme Court and the Alien Tort Statute: Kiobel v Royal Dutch Petroleum Co.,' Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 13–26, http://ssrn.com/abstract_id=2264323 (accessed 2 August 2015).

[3] Much scholarly literature has been well surveyed in Wuerth, note 2 and by Anna Grear and Burns H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel

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In June 2011, the UN Human Rights Council unanimously endorsed[4] the Guiding Principles on Business and Human Rights.[5] However, on 26 June 2014, the Human Rights Council—at the initiative of Ecuador and South Africa, which was endorsed subsequently by Cuba, Venezuela, Bolivia, Algeria, El Salvador, Nicaragua, and Senegal—resolved to establish an open-ended intergovernmental working group to elaborate 'an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[6] Since state practice is an important indicator in determining *opinio juris* in the formation of international customary law, paradoxically both *Kiobel* and the work of, and the voting pattern at the Human Rights Council, remain important. Inaugural shifts are infrequent in international law and affairs but the Council's predecessor Human Rights Commission makes this shift decisively by the un-adopted 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms).[7] Whether the treaty yet to be made adopts elements of either, or both, of these documents remains too early to foretell.

The question of whether corporations are subject to international law and human rights obligations is a deeply-contested one. The dominant view exists and thrives, urging that only states are proper subjects of international law, that the human rights law and jurisprudence do not apply to non-state entities and actors like MNCs, and that any submission to human rights responsibilities and obligations is at best a matter of negotiated responsibility of MNCs, international civil society, and the community of states. This submission occurs, if at all, through 'soft' law instruments (in the nature of codes of conduct imposing no legal obligations) and talk about corporate social responsibility (CSR).[8]

(F'note continued)
Lawscape' (2015) 15 *Human Rights Law Review* 21. To this, I add Jordan J Paust, 'Human Rights through the ATS After *Kiobel*: Partial Extraterritoriality, Misconceptions, and Elusive and Problematic Judicially-Created Criteria' (2014) 6 *Duke Forum for Law and Social Change* 31; Ross J Corbett, '*Kiobel, Bauman*, and the Presumption Against the Extra Territorial Application of the Alien Tort Statute' (2014) 13 *Northwestern Journal of International Human Rights* 50; Gregory H Fox and Yunjoo Goze, 'International Human Rights Litigation after *Kiobel*' (2013) *Michigan Bar Review* 44; Roger P Alford, 'The Future of Human Rights Litigation after *Kiobel*' (2014) *Notre Dame Law Review* 1749. Already, a fervent plea has been made as to why the EU should accept the principle of extraterritoriality: 'The [*Kiobel*] retrenchment has provided the EU with an opportunity to step forward' because this would 'enable the EU to project a moral example around the world' and 'also help it to demonstrate a commitment to human rights leadership'. Jodie A Kirshner, 'A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses' (2015) 13 *Northwestern Journal of Law and Human Rights* 1, 3.

[4] Human Rights Council, 'New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council' (16 June 2011), www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E (accessed 2 August 2015).

[5] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) ('Guiding Principles').

[6] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC/RES/26/9 (26 June 2014), para 1. For a balanced and hopeful analysis, see Grear and Weston, note 3, 21–44, especially 40–44. See also, for a different genealogy of human rights, '"Framing the Project" of International Human Rights Law: Reflections on a Dysfunctional "Family" of the Universal Declaration' in Adam Gearty and Costas Douzinas (eds.), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 17.

[7] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[8] On CSR, see Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2013), Chs 8 and 9 ('Baxi, *Future*').

On the other hand, it is plain global fact that large MNCs exist and command more influence and power than most states in the Global South; they constitute *state-like* and also *state-transcendent* collectivities, and they remain integral to the 'nomadic' war machine that is the state.[9] In her provocative and wide-ranging work, *Problems and Process: International Law and How We Use It*,[10] Rosalyn Higgins describes as mythical the entire distinction between 'subjects' and 'objects' of international law and instead urges that we adopt the perspective of participants in the process of making and applying that law. MNCs are clearly such participants and they at times decisively influence the making and the unmaking of international law norms, standards, and values. As such, they may not be regarded as immune from the discipline of human rights law and jurisprudence.

This view is now progressively shared but there are many difficulties still in the way; even Higgins acknowledges that international law is '*for the time being*' and '*at this moment*' state-centric, a mode that dwells 'at the heart of international law'.[11] While from a subaltern standpoint that 'time being' and momentary seem to trespass on infinity, the glacial pace of international law reform seems all that is required of international relations and organizations.

There are here at least four difficulties. The first concerns the very nature of human rights; the second relates to punishment (legal liability) versus responsibility; the third is about mandatory versus voluntarist approaches to human rights responsibilities of corporations; and the last but not the least is the sway of the conflicted ideology of neo-liberalism.

First, while I previously attempted to distinguish the nature, number, limits, and justifications of human rights,[12] I later became more fully aware that a huge divide exists between philosophers of human rights who try to pursue the moral idea of human rights and the human rights law and jurisprudence.[13] Philosophies of human rights can justify human rights on the ethical grounds of dignity, autonomy, subsistence, difference, and responsibility only when they consider core human rights and standards.[14]

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[9] I here use the favourite expression of Geroge Deleuze and Felix Guttari in *A Thousand Plateaus: Capitalism and Schizophrenia* (Indianapolis: University of Minnesota Press, 1987). For a critical exposition, see Guillaume Sibertin-Blanc and Daniel Richter, 'The War Machine, the Formula and the Hypothesis: Deleuze and Guattari as Readers of Clausewitz' (2010) 13:3 *Theory & Event*, https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/theory_and_event/v013/13.3.sibertin-blanc.html (accessed 30 July 2015); James C McDougall, 'Deleuze and Guattari's Nomadology: The War Machine and Critical Resistance in Cyberspace' (2014–2015) 6:1 *Asia Journal of Global Studies* 48.

[10] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) 39, 49.

[11] Ibid, 39 (emphasis added). See also Anna Grear, 'Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights' (2007) 7:3 *Human Rights Law Review* 511.

[12] 'By "nature", I mean here, primarily, distinctions made between "enforceable" and not directly "justiciable" rights. By "number", I refer to the distinction between "enumerated" and "unenumerated" rights, the latter often articulated by practices of judicial activism. By "limits", I indicate here the scope of rights thus enshrined, given that no constitutional guarantee of human rights may confer "absolute" protection. The "negotiation" process is indeed complex; it refers to at least three distinct, though related, aspects: (1) judicially upheld definitions of grounds of restriction or regulation of the scope of rights; (2) legislatively and executively unmolested judicial interpretation of the meaning, content, and scope of rights; and (3) the ways in which the defined bearers of human rights chose or chose not to exercise their rights—this, in turn, presupposing that they have the information concerning the rights they have and the capability to deploy them in various acts of living.' Baxi, *Future*, note 8, xxxiv, footnote 12.

[13] Upendra Baxi, 'Reinventing Human Rights in an Era of Hyperglobalization: A Few Wayside Remarks' in Gearty and Douzinas, note 6, 150.

[14] Baxi, *Future*, note 8, especially Chs 5, 6, 8, and 9. For a hard-nosed account of MNC realities as well as how far human rights responsibilities are justified by some extant theories of justice, see Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005).

In contrast, the UN production of human rights is indeed inclusively carnivalist. Opinions differ on whether there are and ought to be such rights and if so how *many*, *what*, and *how non-negotiable* these ought to be and are. Assuming that human rights discursivity extends to corporations and other non-state actors, the question always is whether they are morally and ethically responsible for violation of core norms or from the very idea of what it means to be and to remain human.[15]

Second, while legal lability is one aspect, the ethical or moral MNC responsibility howsoever related remains a discrete domain. Legal liability depends on the type of juristic personality, as also on the nature of law characterizing the conduct as civil or criminal wrong, and the classification of private and public law. Adjudication normally follows as choice of law the place where contract or tort took place and not on the law of foreign forum, even when in a rare case the court rules that it is an appropriate forum and even believes in extraterritorial jurisdiction for gross violation of such rights. Whether a MNC owes any moral or ethical responsibility for violation of human rights is a question decided by international law or the 'soft' law concerning human rights responsibilities of business. The question is made more complicated if stating moral responsibility is attributed with the potential of having legal effects in a pending litigation or thereafter. There is also the matter of confidentiality and privacy, obligations to subsidiaries and business affiliates, and generally to fellow MNCs. These issues have not been adequately addressed, or impliedly attended to, by soft law standards of CSR or existing instruments of 'soft' law.

The third domain belongs to the general area of progressive codification of international law under Article 12 of the United Nations Charter.[16] Under this mandate, the Human Rights Commission, the Human Rights Council, and the UN Secretary General are taking notable initiatives concerning business and human rights. Broadly, there is a developing consensus among UN member states that complete impunity to MNCs for transgressions of core human rights is not justified. The disagreement, which is massive, centres on voluntarism versus obligatory enforcement. The difficulties here are multiple. Should the entire body of human rights responsibilities or only some core rights be annexed to a legally-binding instrument? How far in either case ought we to be cognizant of MNCs' organizational and operational complexities? How do we approach the problematic of 'complicity' between the host and home governments?

Fourth, the road ahead is marked also by the dominant neo-liberal ideology which subscribes to a secular theology of market fundamentalism.[17] Most simply put, 'free market'

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[15] Upendra Baxi, 'From Human Rights to the Right to Become Human: Some Heresies' (1986) 13 *India International Centre Quarterly* 185.

[16] See the landmark analysis by Shabati Rosenne, 'Codification Revisited after 50 Years' in Jochen A Frowein and Rudiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (London: Kluwer, 1998) 1–22. See also Alan Boyle and Christine Chinkin, *The Making of International Law. Foundations of Public International Law* (Oxford: Oxford University Press, 2007); Ramaa Prasad Dhokalia, *The Codification of Public International Law* (Manchester: Manchester University Press, 1970); Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972); Mark Villiger, 'The Factual Framework: Codification in Past and Present' in Mark Villager (ed.), *Customary International Law and Treaties* (Dordrecht: Martinus Nijhoff, 1985) 63.

[17] Upendra Baxi, 'Writing about Impunity and Environment: The "Silver Jubilee" of the Bhopal Catastrophe' (2010) 1 *Journal of Human Rights and the Environment* 23. See also David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

(the principles of free association, contract, and property)—despite its social pathologies, especially the exploitation of labour—is the only agent of social and human development. The market, it is said, may through its institutions and associations assist the state to develop materiality for social welfare and inclusion; as a force for globalization it also tends to gently 'civilize' state power and apparatuses, providing in fact the rise and spread of market civilization;[18] the state must act in favour of the market rather than against it, its regulation must be orientated towards the creation of success stories of free competition; the human rights paradigm should be trade-related and market-friendly, and not the paradigm of universal human rights;[19] and the state should incentivize MNCs and the community of direct foreign investors.[20]

In turn, MNCs are said neither to be morally obligated nor legally bound by human rights law and jurisprudence: not being usually resident in all jurisdictions and operating through a network of regional and local subsidiary companies, they comply with the local law through their subsidiaries and seek to escape direct liability for their acts and omissions. When against all odds, the violated (either by way of mass disasters or toxic torts) reach the *siege social* where the MNC can be said to be usually resident, the canons of the colonial conflict of laws kicks in. The doctrine of *forum non conveniens* results in the dismissal of the suit; thus stand produced inconvenient fora and convenient catastrophes or when the foreign corporation is sued in foreign courts the applicable law is only *lex loci delicti*, the place where harm is said to have actually occurred. The final judgment of the local court is subject to recognition and enforcement by the foreign court (and as stipulated by the conditional forum dismissal in the Bhopal case subject to American due process standards).[21] Very often this creates unfavourable (to the violated) incentives, whether judicial or political, to settle the case. And in special cases like the ATS in the US, it has now been ruled that the presumption against extraterritorial application of statutes holds.[22]

The plain global social fact is that MNCs do not regard themselves as either under a moral obligation or legal responsibility for preventing mass disasters they cause. They are above any obligations to people and environs they hurt and harm; operating in a 'morals free zone',[23] they remain beyond the sanctions and cultures of guilt and shame and continue to live in a world of 'corporate Neanderthalism'[24] claiming an immunity

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[18] Stephen Gill, 'Globalization, Market Civilization, and Disciplinary Neoliberalism' (1995) 24 *Millennium -Journal of International Studies* 399.

[19] Baxi, *Future*, note 8, especially Chapter 8 and the distinction between transactional and regulatory globalization.

[20] See Baxi, 'Writing about Impunity and Environment', note 17. See also the materials cited in note 21.

[21] For claims made in this paragraph, see Upendra Baxi (ed.), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986); Upendra Baxi and Thomas Paul (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986); Upendra Baxi and Amita Dhanda (eds.), *Valiant Victims and the Lethal Litigation: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1990); Upendra Baxi, 'Human Rights: Between Suffering and Market' in Robin Cohen and Shirin Rai (eds.), *Global Social Movements* (London: Athlone, 1999) 32; Upendra Baxi, 'Mass Torts, Multinational Enterprise Liability, and Private International Law' (2000) 276 *Recueil des Cours* 301; Upendra Baxi, 'The "Just War" for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect' in Lene Bomann-Larsen and Oddny Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004) 175.

[22] *Kiobel*, note 2.

[23] David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986).

[24] See Thomas Donaldson and Thomas W Dunfee, *Ties that Bind: A Social Contract Approach to Business Ethics* (Cambridge, MA: Harvard University Press, 1999). For notable attempts to relate human rights to MNCs, see Henry

and impunity from all socially responsive human rights law and jurisprudence. Thus arises the production and perpetuation of geographies of human rightlessness.[25] The task for the middle and late twenty-first century is to make reasonable advances towards a mandatory regime of multinational liability for human rights violations.

Against this backdrop, this article navigates through different narratives of Bhopal and elaborates on what I call the 'four Bhopal catastrophes' spread over more than thirty years. It then explores—in the light of the Draft Norms, the non-mandatory Guiding Principles, and current calls for a legally-binding treaty—ways and tasks ahead in ending corporate impunity for human rights abuses in the twenty-first century.

II. Different Narratives of Bhopal

There are different and conflicting ways of telling stories about Bhopal. Not only there are different ways of juridification[26] but there are other different ways of narration—from the state, MNC, the UN, and intentional organization, and movement-centred narratives. In this section, I explore the state, MNC, and violated-centric languages. Privileging a mode of narrative is made impossible if we only tell the stories of the violated and miss other actors. How to make these languages somewhat concordant is a principal issue facing any attempt at a treaty regime of human rights responsibilities of MNCs.

In these three languages, the first problem is the naming of the rightless peoples. The MNC discourse speaks of 'side effects',[27] 'accidents', and occasionally of 'victims'. The state discourse freely uses the term 'victims' and out of deference to common linguistic convention, I have at times used the language of victimhood but always thought that the conventional term 'victims' is too un-reflexive. It does not foreground the human rights dimensions, or the states of rightlessness and human and social suffering. The terminology of 'victims' denies the violated of any agency or capacity to act as 'militant subject'; it denies them a history and future of their own; it obscures the fact that, as in Bhopal, the 'victims' are re-victimized by the corporate state. On the other

(F'note continued)
Shue, *Basic Rights* (Princeton: Princeton University Press, 1980); Henry Shue, 'Exporting Hazards' (1981) 91 *Ethics* 579; James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987); Thomas Donaldson, *The Ethics of International Business* (Oxford: Oxford University Press, 1989). See also Allan Gewirth, *The Community of Rights* (Chicago: Chicago University Press, 1996). This creatively revisionist narration suggests that 'legitimate' business operations are those which are consistent with human rights norms, standards, and values, that duties of avoidance/minimization of 'negative' (read human rights-violative) side effects ought to inform corporate conduct, governance, and culture, and that business operations may only stand justified only and in so far as 'proportionate' and 'necessary' to achieve the legitimate (business) 'objective'. The actual practice still suggests that the 'objective' and what remains 'proportional' and 'reasonable' remain matters of power politics and not ethics as recently shown, among others, by the exclusion of companies from the Rome State of International Criminal Court and the extreme voluntarism of the UN Global Compact.

[25] Upendra Baxi, 'The Geographies of Injustice: Human Rights at the Altar of Convenience' in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (London, Hart, 2001) 197.

[26] Lars Chr Blichner and Anders Molander, 'Mapping Juridification' (2008) 14:1 *European Law Journal* 36. The five types of juridification they offer may well help us further grasp translation and transgression.

[27] Ulrich Beck, Anthony Giddens, and Scott Lash, 'Preface' in Ulrich Beck, Anthony Giddens, and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford: Stanford University Press, 1994).

hand, the violated speak differently to us, with distinct authorial voice, and crowd the agenda of governance and development with the voice for human rights.

I speak of a mass disaster (catastrophe) violated because the term 'violated' gives to very state law a sense of the future of human rights. I have unlearnt a lot of law and jurisprudence in struggle waged by the violated relentlessly against a powerful business/governance combination. The scandalous judicial settlement by the Supreme Court of India and the labyrinthine proceedings in the US courts, and their utter human rightlessness have affected the struggle, voice, and authorship of the violated—that is one reason why I call this a saga of 'valiant' violated and 'lethal litigation'.[28]

The three-decade Bhopal-violated have been subject to several catastrophes: the massive exposure to methyl isocyanate (MIC) on 2 and 3 December 1984, the forum denial by Judge Kennan and subsequent denials of air and water contamination by him and the Appeals Court, the scandalous settlement orders of the Supreme Court of India, the uphill struggles to attain meagre compensation amidst growing genetic mutations and health crises, and the battle to extradite Warren Anderson and to punish the perpetrators in the relevant jurisdictions. More than three decades later, the valiant violated continue to act as a community of suffering and human rightlessness; they continue to act as 'indignation' and 'norm' entrepreneurs resolutely addressing the 'regulatory void' of transnational governance.

In contrast, the MNC-centred narratives seek to absolve the parent corporation of any legal liability or moral responsibility for the act and omission of its subsidiary. While acknowledging the liability of the subsidiary company within national jurisdiction, the MNC discursivity denies that it is a resident foreign corporation within national jurisdiction subject to the competence of any court of law despite controlling a majority or near-majority share and commanding heights of worldwide chain of decision making. The MNC repudiates both any universal jurisdiction of human rights and international criminal jurisdiction and successfully combats any extradition. Knowing full well that certain decisions (the switching off of a refrigeration plant, the decaying and inapposite safety systems, the storage of large quantities of a poisonous chemical gas, as in the Bhopal case) will contribute, and even cause, mass disasters, the MNC insists for a strict legal proof of the agent of harm and that it had the means or capacity to prevent this. Ethically, this means that the relevant legal orders may be ignored with impunity, a claim to immunity from any moral responsibility, and a claim to a *moral right to do a human rights wrong*.[29]

The discourse of the state and law, where at least there is a pretence to formal democracy, freely deploys the language of victims. The Indian policy discourses usually justify victimage and revictimage; the state-centric narratives in terms of 'development' and 'social change' ultimately rest on the talismanic mantra of economic growth, without

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[28] See Baxi and Dhanda (eds.), note 21.

[29] I am currently working on this important subject and struck by the paucity of research on the subject. I indicated in 1987 that human rights in class-divided societies are ultimately bourgeois rights, based on the freedom of property and transaction, and entail a right to harm others. In a capitalist and market society and economy, where exploitation is the rule and emancipation a utopia, the human right to a free competition signifies a right to cause harm to innocent and vulnerable others. See Baxi, *Future*, note 8. See, for a sustained liberal philosophy discussion, Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21; Ori J Herstein, 'Defending the Right to Do Wrong' (2012) 31 *Law and Philosophy* 343.

which just distribution is just a chimera. Where a constitutional democracy exists, contentious politics[30] engages the multiple meanings of 'development'. The question, in such politics, always is how far any espoused model of 'development' may justify sacrificial politics, where costs of 'development' fall heavily on the present generation of the constitutional have-nots; those violated by 'development' ask questions about how long, at whose cost, and for whom 'development' occurs.[31] The state discourse on these matters is shaped by international affairs and the Bretton Woods institutions as well as by MNCs. The state emerges but rarely (as in Bhopal) as a sovereign plaintiff in mass disaster situations before a foreign court. And most Global South states are only nominally *host* states but in reality *hostage* states—states held captive by foreign capital and direct foreign investment.

III. The Four Bhopal Catastrophes

I have analysed in my writings and public action, the Bhopal catastrophe for the past three decades in different narrative modes.[32] For the sake of brevity, I refer here to four catastrophic moments.

The First Bhopal Catastrophe occurred on 3 December 1984, with the explosive escape of 47 tons of MIC from the Union Carbide Corporation (UCC) and Union Carbide India Ltd (UCIL) factory/plant located in a densely populated area in Bhopal. UCC was a majority shareholder and for all purposes made key operational decisions concerning the ultra-hazardous manufacture, storage, and safety, in blithe disregard of the best industry standards and standards of good corporate governance.

The pre-trial discovery proceedings before US District Judge John F Keenan, where for the first time a sovereign post-colonial state dared to sue a mighty MNC for causing an unprecedented mass disaster, fully established the fact that UCC preferred systematically to ignore early-warning signals of the potential for massive toxic release. Among these was the alert specially demonstrated by the 1982 gas 'leak' that killed two workers and its own subsequent in-house safety audit report that stressed the urgency of the need for adequate safety systems at the Bhopal plant replicating the

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[30] I borrow this phrase-regime from Carless Tilly; this sort of politics also engages organized labour against multinationals. Charles Tilly, 'Globalization Threatens Labor Rights' (1995) 47 *International Labor and Working Class History* 1.

[31] See Upendra Baxi, '"What Happens Next is Up to You": Human Rights at Risk in Dams and Development' (2001) 16 *American University International Law Journal* 1507; Upendra Baxi, 'Rehabilitation and Resettlement: Some Human Rights Perspectives' in Hari Mohan Mathur (ed.), *Social Development Report: Development and Displacement* (Delhi: Oxford University Press, 2008).

[32] See the materials cited in notes 15, 17, 21, 25, and 32. See further David Weir, *The Bhopal Syndrome: Pesticides, Environment, and Health* (San Francisco: Sierra Club Books, 1984); Dan Kurzman, *A Killing Wind: Inside Union Carbide* (New York: McGraw Hill, 1987); Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Cambridge, MA: Ballinger, 1987); Sonjoy Hazarika, *Bhopal: The Lessons of a Tragedy* (New York: Penguin, 1987); David Dembo, Ward Morehouse, and L Wykle, *Abuse of Power: Social Performance of Multinational Corporations: The Case of Union Carbide* (New York: New Horizons Press, 1990); James Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993); Dominic Lapierre and Javier Moro, *It Was Five Minutes Past Midnight in Bhopal* (New Delhi: Full Circle, 2001); Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (London: Amnesty International Publications, 2004); Ingrid Eckerman, *The Bhopal Saga: Causes and Consequences of the World's Largest Industrial Disaster* (Hyderabad: Universities Press India Private Ltd., 2004).

state-of-the-art digitalized safety systems of UCC's West Virginia plant, which produced and stored minuscule amounts of MIC compared with the Bhopal plant.[33]

It is also worth recalling that the plant was declared 'safe' by the then Chief Minister of Madhya Pradesh, Arjun Singh, whose culpability now begins at last to be as seriously discussed as that of the UCC Chief Executive Officer, Warren Anderson. Incidentally, the Bhopal-violated heard from Jairam Ramesh, the former Union Environment Minister, on the eve of the 'Silver Jubilee' of the first catastrophe that neither the subsoil nor the water was contaminated by the residual toxicity of the MIC explosion.[34] Eminent political leaders (who criticize Bhopal activists for dramatizing the environmental risk still aggravating the plight of the Bhopal-violated) see no harm in minimizing the long-term lethal potential of Bhopal 1984. A silver lining in the toxic cloud over the Bhopal-violated flickered bright but only briefly. Via the Bhopal Ordinance (and later the Act),[35] some of us were able to persuade the Indian government to assume responsibility for prosecuting UCC in a US court since UCC claimed that it was no longer under Indian jurisdiction. Judge Keenan described the first catastrophe as the largest peacetime industrial disaster, less colourfully than Justice Krishna Iyer who was to name it 'Bhoposhima'.[36]

The end result of this endeavour was to bring UCC back under Indian jurisdiction. Ironically, while the government of India argued that its own legal system was not geared to deliver justice to the Bhopal-violated, Judge Keenan insisted that it would constitute legal 'imperialism' were he not to recognize that the Indian judicial system had the capacity to stand 'tall' before the entire world.[37] Thus Judge Keenan, while constraining the UCC submission to Indian courts, was careful to subject any future UCC liability to a later determination by the New York 'small causes' or garnishee courts, leaving it to decide whether due process was accorded to UCC in the Indian trial process.

I believe it was this factor that the Indian UCC attorneys cleverly deployed: in order to serve among the top echelons of adjudicatory leadership and secure the Supreme Court of India settlement order,[38] the ultimate end of immunity and impunity of UCC and UCIL and their CEOs.

The Second Bhopal Catastrophe occurred when the Supreme Court passed brief settlement orders in 1989. Not only did the Supreme Court settle the UCC liability for USD 470 million against the Union of India's damage claims of over USD 3 billion, but it also sought to justify this amount and the grant of complete immunity from any criminal liability for UCC and its global affiliates. Later, of course, given the exertions of the Bhopal-violated, the Court, on review, cancelled this immunity,[39] although it left cruelly intact the meagre-sanctioned amount for hundreds of thousands of survivors whose real-life needs for health care and livelihood were thus rendered of little serious regard.

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[33] See the materials cited in notes 21 and 32. See also Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London/New York: Routledge, 2012) Ch 2.

[34] See N D Sharma, 'Jairam Makes Light of Bhopal Gas Tragedy', *Current News*, http://currentnews.in/jairam-makes-light-of-bhopal-gas-tragedy/ (accessed 30 July 2015).

[35] Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (Act 21 of 1985) (India), replacing the Bhopal Gas Leak Disaster (Processing of Claims) Ordinance 1985 (India).

[36] V R Krishna Iyer, 'Bhoposhima: Crime without Punishment' (1991) 26:47 *Economic and Political Weekly* 2705.

[37] *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 634 F Supp 842 (1986).

[38] *Union Carbide Corporation v Union of India* AIR 1990 SC 273.

[39] *Union Carbide Corporation v Union of India* AIR 1992 SC 248.

Further, the Court fully legitimized the denial of the presence and voice of the Bhopal-violated as a constitutional necessity. The settlement orders denied even the opportunity for a hearing to the Bhopal-violated parties to the case. The trend continues to grow. For example, on 14 February 1994, when Justice A M Ahmadi allowed the sale of UCC shares to the UCIL, he declined to hear the Bhopal-violated petitioner-parties before him.[40] Even as late as 7 June 2010, some Bhopal-violated parties were denied entry into the precincts of the Bhopal district court, as the 'integrity' of the judicial process had to be enforced by the imposition of prohibitory orders, denying even a modicum of their presence on a judgment day.[41]

The Third Bhopal Catastrophe occurred in the disbursement of some relief upon settlement. The tribunals which were charged with this constitutional responsibility seemed either hunted by the spectre of fake claimants or insisted on proofs which required the next of kin to show death certificates and the number of people who were present at the funeral or cremation. The multifarious, even nefarious, 'bureaucratization of justice' practised by the tribunals established for the disbursement of compensation re-victimized the already traumatized victims, who had to seek recourse to the Supreme Court for the eventual superintendence of relief operations.

The Bhopal-violated people are subjected to staggering burdens of proof concerning their severe multiple injuries, thus reducing their eventual compensation, when not altogether denied, to the lowest possible amount. As if this were not enough, the violated people were required to demonstrate the nature and extent of the injury beyond a shadow of reasonable doubt. No wonder, then, that a large number of the violated people either still await compensation or are denied their rightful share of it. There was not even a semblance of rehabilitation by the state. Further, even as late as mid-2010, the Bhopal-violated were denied the dignity of any full Supreme Court invigilation of the arbitrariness, callousness, and injustice of the administration of compensation disbursement, aggravating the Third Catastrophe.

Things would have been different indeed if the media and popular outrage had been articulated on 14–15 February 1989, when the Supreme Court passed the judicial settlement orders, or when the Court declined to admit that the settlement amount was grossly inadequate. That would probably have ameliorated the suffering of the Bhopal-violated.

Public opinion should have come down heavily on the Supreme Court decision of 13 September 1996, in which the Court diluted the charges against UCIL officials on the grounds that the principal responsibility lay with UCC rather than UCIL officials.[42] Public outrage was also called for on 13 July 2004, when the US government rejected the entirely justified pleas for the extradition of Warren Anderson on the grounds that no charges had yet been framed against him.[43] The Bhopal court's decisions declaring him

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[40] See 'Former CJI Defends Verdict in Bhopal Gas Case', *Times of India*, 8 June 2010, http://timesofindia.indiatimes.com/india/Former-CJI-defends-verdict-in-Bhopal-gas-case/articleshow/6024676.cms (accessed 30 July 2015); S Muralidhar, *Unsettling Truths, Untold Tales: Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice* (IELRC Paper, 2004) 50, http://www.ielrc.org/content/w0405.pdf (accessed 30 July 2015).

[41] 'Prohibitory Orders Ahead of Bhopal Gas Verdict Monday', *Hindustan Times*, 7 June 2010, http://www.hindustantimes.com/bhopal/prohibitory-orders-ahead-of-bhopal-gas-verdict-monday/article1-554170.aspx (accessed 30 July 2015).

[42] *Keshub Mahindra v State of Madhya Pradesh* (1996) 6 SCC 129.

[43] 'Prosecution of UCC, UCE and Warren Anderson', http://www.bhopal.net/old_studentsforbhopal_org/Assets/23UCCAndersonProsecution.pdf (accessed 30 July 2015).

and an official of UCC Eastern as proclaimed absconders and the failure of successive central governments to bring them to book did not shock the 'nation' much. Perhaps, all over again, political parties and their leaderships continue to fall over each other as the best defenders of the 'victims'.

The first and now the second generation of Bhopal-violated know well, in their blood and bones, that the Indian ruling classes are the great descendants of Professor William Dicey who practise to a point of perfection his advice that one must never weigh 'the butcher's meat in diamond scales'.[44] The question is how and why the mass media, trade unions, and activist communities, barring valiant exceptions that prove the rule, remained so indifferent for three decades. As against the political and public outcries, Chief Judicial Magistrate Tiwari proceeded with great care in deciding the only issue before him: whether the accused were guilty under Section 304-A of the Indian Penal Code (IPC).[45] He had no jurisdiction to go beyond what the Supreme Court mandated by way of criminal proceedings. There was little that the judge could have done other than to proceed within the confines of the indictment.

He held that 'in determining negligence' under Section 304-A, *mens rea* has no place and that 'knowledge [of likely harm] is enough to constitute the offence'.[46] He rejected the pleas that expert evidence, even when verified by examination and cross-examination, may not be the basis of conviction.[47] Further, the learned judge maintained that his decision to convict the key officials of UCIL did not involve any extension of vicarious liability for the acts of other persons—rather these officials were culpable for acts of gross negligence, as they failed to do what they should have done concerning the parlous condition of the plant and safety systems.[48]

Judge Tiwari further dismissed the plea of leniency in sentencing the seven UCIL officials to a two-year imprisonment under Section 304-A of the IPC, and a one-year sentence under Section 338 of the IPC, with varied associated fines.[49] The concluding paragraph of the judgment preserves intact every part of the case and archives it until the absconders, Warren Anderson and UCC, as well as its subsidiary UCC Eastern, appear before the court.[50]

A Fourth Bhopal Catastrophe is in the making, as the UCIL seven are extremely likely to prolong further reconsideration, review, and reversal of this verdict, all the way to the Supreme Court. They are also likely to press their plea that their conviction is based on some version of vicarious liability for either the acts of UCC or the defaults of their employees. Justice Ahmadi reportedly stated the day after the decision that, aside from in situations of conspiracy or abetment, Indian law does not provide for vicarious liability for the gross criminal negligent acts of others.[51] Given the fact that successive

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[44] Albert Venn Dicey, *Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1914) 141.

[45] *State of Madhya Pradesh v Anderson and Others*, Cr. Case No. 8460/1996, http://www.countercurrents.org/UCIL.pdf (accessed 30 July 2015).

[46] Ibid, para 154.

[47] Ibid, paras 156–8.

[48] Ibid, paras 181, 184, and 190–4

[49] Ibid, paras 199–218.

[50] Ibid, para 226.

[51] 'Ahmadi Rejects Criticism of Dilution of Charges', *The Hindu*, 9 June 2010, http://www.thehindu.com/todays-paper/tp-national/ahmadi-rejects-criticism-of-dilution-of-charges/article465389.ece (accessed 30 July 2015).

regimes in the state of Madhya Pradesh have been UCC-friendly rather than solicitous of the Bhopal-violated, their desire to seek enhanced sentence must be received with an Everest of salt. Further, some hasty appeals and revisions by activist lawyers and Bhopal-violated communities may unwittingly reinforce the case for the 'UCIL seven'.

In the process, the suffering of the Bhopal-violated communities will again become *sub judice*. Even worse, the authors of their tragic fate may eventually resume a life of immunity and impunity. If so, the most important question is how to prevent the Fourth Catastrophe from fully unfolding.

Indeed, a first step would be to 'name and shame' each and every elected official and civil servant complicit with the UCC assault on the Bhopal-violated. The elected officials must be debarred by a change in the Representation of People's Act from holding any public or constitutional office and civil servants thus named must be denied all forms of superannuated service in public or private sector, and their pensions should be reduced at least by half. We must demand that the Union of India make good its claim of more than USD 3 billion (minus the settlement amount, if so required, but with compound interest) to the Bhopal-violated community, to be disbursed by a citizens' trust by way of relief and rehabilitation of at least the first- and second-generation Bhopal-violated. Given the proud boast of the high annual GDP growth, this remains far from an insensible public demand. Additionally, an annual corporate Bhopal tax/levy may be imposed to assist the present as well as the future needs of the Bhopal-violated.

Replacing the current standard 'Bhopal clause' now included in every agreement of foreign investment limiting or eliminating liability for mass disasters, we should think of an alternative provision that requires all investors and MNCs to contribute annually a certain percentage of their net profits to a superfund that would respond to at least the minimum needs of those adversely affected.

In the interim, the 24/7 mass media should dedicate a percentage of their advertisement revenues to a public trust that will further engage the tasks of healthcare and livelihood rights of the Bhopal-violated. The media, chastizing now, and rightly so, politicians who thrive parasitically on the windfall of toxic capitalism, would carry greater credibility with suffering Indian humanity were they to do this. After all, massive profits are made by making a commodity of human and social suffering.

More fundamentally, we need to think of the Bhopal catastrophes in terms of cross-border nomadic practices of MNCs' 'terror'. The UN now has begun to describe 'terrorism' as a political project in which non-state, yet state-like, actors deploy asymmetrical and indiscriminate violence against innocent civilians with the aim to overawe lawfully-elected governments or to transform state policies.[52] Even as we condemn insurgent violence everywhere on the planet, we should begin to think of ways in which 'terrorist' forms of corporate governance may at least be held answerable to indictments of crimes against humanity.[53] Warren Anderson was in no way a counterpart

[52] See UN General Assembly, 'Measures to Eliminate International Terrorism', A/Res/49/60 (17 February 1995).

[53] An anecdote relevant here is worth a passing reference. Within four days of 9/11, I identified Bhopal also as an act of terror, on a leading national TV channel live interview. I have not been invited by the commercial TV channels since that day until now, whether or not formally blacklisted; the print media has been more hospitable. See Upendra Baxi, 'Terror of Performance', *Frontline* (3 April 2015) http://www.frontline.in/books/terror-of-performance/article6998742.ece (accessed 2 August 2015).

of Osama bin Laden, until you listen to the voices of suffering humanity affected by their comparable predatory ventures. The Bhopal-violated are indeed close cousins of the victims of 9/11 and 26/11 (the Mumbai attacks).[54]

How we may name and think through the commonalities and differences amongst these critical events is all that matters for the suffering humanity and the rightless peoples of the hyper-globalizing world. As Marx wrote in 1843, profound social transformation occurs only when thinking humanity remains capable of suffering and the suffering humanity begins to think.[55]

IV. The Draft Norms and the Guiding Principles

The evolution of human rights normativity for MNCs has paradigmatically taken the form of 'soft law'.[56] Obviously, the normative standards in various codes of conduct for MNCs or the canons of CSR did not result in any legal liability or human rights responsibility for UCC nor did its successor (Dow Chemicals) acknowledge any real responsibility for the Bhopal-violated. The situation is the same for world's other mass-disaster situations.[57]

The Draft Norms did fasten on MNCs some human rights responsibilities. Despite my specific criticism of the Norms' tendencies towards 'dense intertextuality' and 'one-size-fits all' type rationality,[58] they charged transnational corporations and other business enterprises to 'promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law'.[59] The human rights responsibility of business entities may be summated in terms of duties of non-benefit from human rights violations; duties of influence; and duties of implementation. While the state responsibility is unqualified, transnational corporations and other business enterprises bear these responsibilities only 'within their respective spheres of activity

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[54] See Surya Deva, 'From 3/12 to 9/11: Future of Human Rights?' (2004) 39 *Economic and Political Weekly* 5198.

[55] The precise sentence ending Marx's letter to Arnold Ruge in May 1843 is as follows: 'The longer the time that events allow to thinking humanity for taking stock of its position, and to suffering mankind for mobilising its forces, the more perfect on entering the world will be the product that the present time bears in its womb.' Marxist Internet Archive, 'Letters from the Deutsch-Französische Jahrbücher: M. to R. – Marx to Ruge, Cologne, May 1843', https://www.marxists.org/archive/marx/works/1843/letters/43_05.htm (accessed 2 August 2015).

[56] As a practitioner of feminism I have always caveated the expressions 'hard' and 'soft' law. If we were to insist on the terminology, we must at least identify contexts when 'hard' law is made 'soft' and vice versa. With this general caveat, see the valuable discussion in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013). See in particular David Bilchitz and Surya Deva, 'Human Rights Obligations of Business: A Critical Framework for the Future' 1–27 and Parts III and IV of the book. Ibid. See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (29 February 2012); Manoj Kumar Sinha (ed.), *Business and Human Rights* (New Delhi: Sage, 2013); Jernej Letnar Černič, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 71.

[57] For instance, even if BP and Shell paid compensation for environmental disasters caused by their business operations, they did not admit any legal liability for such wrongs.

[58] Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 1 *Human Rights Law Review* 1; Baxi, *Future*, note 8, Ch 9. See also David Weissbrodt and Muria Kruger, 'Norms on Responsibility of Transnational Corporations and Other Business Entities' (2003) 97 *Americal Journal of International Law* 901; Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) 10 *ILSA Journal of International & Comparative Law* 493.

[59] Draft Norms, note 7, para. 1.

and influence'. There is no question that the Bhopal-violated would have a judicially-mandated just compensation and restitution under these Norms.[60]

Professor John Ruggie, the UN Secretary General's Special Representative on business and human rights (SRSG) clearly did not believe in these Draft Norms. A staunch believer in human rights self-regulation and corporate voluntarism, he had earlier proposed the Global Compact, which had 'little impact'.[61] Indeed, Professor Ruggie did not offer the Draft Norms even the 'dignity of a third class funeral'![62] The Guiding Principles thus produced were not designed to streamline the perceived overreach or deficiency of standards and rules set by the Draft Norms, much less geared to produce a binding code or a set of mandatory MNC obligations. The mass-disaster-violated people were denied all opportunities to be heard, although MNCs and some human rights groups were allowed audience.

The mood and the approach of SR were of self-confessed 'principled pragmatism'.[63] This approach, while recognizing the complexity of corporate and business 'governance systems' as 'polycentric',[64] insists on viewing 'international law as a tool for collective problem-solving, not an end in itself' and 'recognizes that the development of any international legal instrument requires a certain degree of consensus among states'.[65] Holding that,

> before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly

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[60] Whether private international law orthodoxies would have been dispelled by the Draft Norms-based adjudication by foreign plaintiffs or whether a universal human rights jurisdiction was so established would have perhaps remained open and vexed questions. It also remains uncertain how far these obligations extend to 'other entities'. For example, it is worth noting that a study regards it as reasonable to ask, following the Principle of Double Effect, MNCs (and other business entities) to minimize the negative side effects of a corporate decision or decision-making generally. See the study cited in United Nations Industrial Development Organization, *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries* (Vienna: UNIDO, 2002). Of course, the United Nations Industrial Development Organization, while presenting it, does not entirely endorse this position.

[61] Pete Engardio, 'Global Compact, Little Impact', 11 July 2004, http://www.bloomberg.com/bw/stories/2004-07-11/commentary-global-compact-little-impact (accessed 2 August 2015). See also Justine Nolan, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24:2 *University of Queensland Law Journal* 445.

[62] See John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises,' UN Doc E/CN.4/2006/97 (22 February 2006). But see Karsten Nowrot, 'The 2006 Interim Report of the UN Special Representative on Human Rights and Transnational Corporations: Breakthrough or Further Polarization?', Policy Papers on Transnational Economic Law, No. 20, Faculty of Law, Martin Luther University, Halle-Wittenberg (March 2006).

[63] John Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization', Regulatory Policy Program Working Paper RPP-2015-04, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, Harvard University (2015), http://www.hks.harvard.edu/index.php/content/download/74032/1678739/version/1/file/RPP_2015_04_Ruggie.pdf (accessed 2 August 2015). This important paper is hereafter cited as Ruggie, 'Regulating Multinationals'.

[64] Ruggie preciously identifies three governance systems: 'The first is the system of public law and governance, domestic and international. The second is a civil governance system involving stakeholders affected by business enterprises and employing various social compliance mechanisms such as advocacy campaigns and other forms of pressure. The third is corporate governance, which internalizes elements of the other two (unevenly, to be sure). Lacking was an authoritative basis whereby these governance systems become better aligned in relation to business and human rights, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which cumulative change can evolve over time'. Ruggie, 'Regulating Multinationals', note 63, 2.

[65] Ibid, 12.

> crafted international legal instruments for business and human rights—"precision tools" I called them—focused on specific governance gaps that other means are not reaching.[66]

In other words, principled pragmatism does not pursue 'international legalization as such' but rather 'it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results, all the while building on the GPs' foundation'.[67]

Professor Ruggie illustrates well the notion of 'principled pragmatism' but does not philosophically analyse it nor consider alternatives to it. He is entirely justified in calling our attention to the fact that the same Human Rights Council passed another resolution (sponsored by Argentina, Ghana, Norway, and Russia) that urged the UN system to elaborate on the implementation of guidelines and the tasks ahead in any interregnum to a treaty-based regime of business and human rights.[68]

Obviously, Professor Ruggie is not interested in grounding the Guiding Principles in deontological ethical and justice theory; his is typically a sub-ideal theory but still different from a deontological theory like the one offered by John Rawls, although for that reason no less crucial. Pragmatists differ widely and we are already supposed to live in a neo-pragmatist era, away from the classical American pragmatism. And less obviously the 'principled pragmatism' differs from crass as well as refined utilitarianism.[69]

There is great merit in doing philosophy in a way that human beings matter, and not just philosophers. Obviously it simply would not do to name 'principled pragmatism' an as an oxymoron, if only because it draws too sharp an analytical distinction between 'principle' and 'pragmatism' as if the latter is devoid of any principles. But if the pragmatic test is the benefit of masses of worst-off people, the question does arise whether the Guiding Principles are pragmatically superior to the mandatory Draft Norms. Do the former end, or at least begin to end, the regime of MNC impunity from human rights responsibilities? On this question even pragmatists, while practising 'principled pragmatism', may differ. When they do, is theirs a principled disagreement?

This is not a place to compressively survey the complexity and contradiction in the Guiding Principles' commendation of a 'tripod framework':[70] the three pllars of the Guiding Principles aim to 'protect, respect, and remedy' human rights violations. States have 'existing obligations to respect, protect, and fulfil human rights and fundamental freedoms', the 'business enterprises as specialized organs of society performing specialized functions' stand summoned 'to comply with all applicable laws and to

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66 Ibid.

67 Ibid, 13.

68 Ibid.

69 See as to varieties of pragmatist theories, Brian Z Tamnah, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law* (Oxford: Clarendon University Press, 1997); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: NYU Press, 1996); Morris Dickstein (ed.), *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Durham: Duke University Press, 1998); John D Arras, 'Freestanding Pragmatism in Law and Bioethics' (2001) 22 *Theoretic Medicine* 69.

70 See Deva and Bilchitz (eds.), note 56; Surya Deva, 'Multinationals, Human Rights and International Law: Time to Move beyond the "State-Centric" Conception?' in Jernej Letnar Černič and Tara Van Ho (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (The Hague: Wolf Legal Publishers, 2015) 27.

respect human rights'; and there is a 'need for rights and obligations to be matched to appropriate and effective remedies when breached'.

The Guiding Principles consist of thirty-one principles, with commentary elaborating on the juristic as well as social meanings and implications for law, policy, governance, and business conduct as well as practice. The values, goals, and norms of the Guiding Principles extend to all states and all business enterprises. The various Foundational and Operating Principles make an impressive reading until we begin to realize that MNCs are not bound by any legal obligation. Foundational Princple 11 says that: 'Business enterprises should respect human rights' which 'means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. Laudable though the clarification that 'human rights' include 'the International Bill of Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work', the commentary to Foundational Principle 12 merely says that '[d]epending on circumstances, business enterprises may need to consider additional standards'.[71] The 'human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them' such as the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families reeive amibivalent normative protection.[72] And the injunction that 'in situations of armed conflict, enterprises should respect the standards of international humanitarian law' sounds majestic but remains assured of honour in breach.

Perhaps the most important principle in the Guiding Principle is that of 'due dilgence'. Principle 17 adumbrates:

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

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[71] There is no doubt that 'the more corporate counsel integrates a robust understanding of existing international human rights into corporate decision-making, the greater the likelihood will be of consistently and predictably minimizing or eliminating conduct likely to trigger deleterious human rights consequences now and into the future. This, coupled with the spillover benefits outlined above, should weigh heavily in favor of adopting an approach that uses the Guiding Principles as a starting point, but moves quickly to enlarge and enhance its reach.' Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 *Texas International Law Journal* 33, 46. How a corporate counsel learns a 'robust' human rights approach is an important question. But if experience is any guide such insurrectionary knowledge is not permitted by the craft of legal practice and courtroom advocacy. The question must remain open where legal systems permit lay participation (typically the jury) in the administration of justice. But Blitt is surely right to say that while the ILO Charter of Philadelphia is important, 'its non-binding status necessarily render[s] it a less authoritative source of law than the core treaties. Indeed, ... the declaration within the text of the Guiding Principle ultimately come[s] at the expense of forgoing explicit reference to the core international treaties that establish a broader range of compulsory norms beyond the declaration's narrow focus. Citing the declaration as a source of minimum-recognized human rights norms is also curious insofar as the declaration has fewer parties than some of the core international human rights treaties, including the CRC and CEDAW, and offers fewer formalized tools for meaningful review, engagement, and enforcement.' Ibid, 46. See also, for a searching discussion, Alan Supiot, *The Spirit of Philadelphia: Social Justice vs the Total Market* (London: Verso, 2012).

[72] See Anne Trebilcock, 'Due Diligence and Rights at Work: Bright Light on the Horizon or Mirage?' (2013), http://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Trebilcock.pdf (accessed 2 August 2015).

In non-mandatory codes, internalization of the relevant cluster of human rights norms is indeed important. In an optimistic vein, one may say that 'the most important lesson for corporate counsel [is] to internalize when contemplating the evolving relationship between business and human rights'.[73] But the success stories of 'how aspirational non-binding principles', or "soft law", can evolve continually over time into more durable and enforceable "hard law"—either in the form of a written treaty or in the consolidation of customary international practice'[74] need to be told again and again. Perhaps, roseate optimism would have us believe that the Guiding Principles 'aspirational today … can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders'.[75] And certainly, 'should this framework influence future practices … or bring about renewed attention of the rights of victims' access to justice before the domestic courts', the Guiding Principles shall 'become one of the cornerstones for the protection of victims of business-related abuse'. [76]

V. Towards a Concusion

The Bhopal-violated or violated of many a business industry catastrophe-causing decisions by MNCs may well be justified in looking askance at such prognostications. No doubt, some success stories of state-industry collaboration exist and the SRSG is justified in telling these. But compared with mass disasters and toxic torts that abound, these success stories do not fully support the framework merely of the state 'protect' and businesses 'respect' human rights. Nor is howsoever hard-nosed focus on the state, especially from the Global South, likely to provide a viable approach in situations such as Bhopal: India did everything that lay within its sovereign power—including personify under the *parens patriae* Bhopal Act[77]—to sue as a sovereign plaintiff but its Supreme Court was led to a settlement of just under one-third of the amount it had claimed, perhaps under the apprehension that a garnishee court in the US may term any award as violative of the American judicial doctrine of 'due process'.

Considerations of integrity of adjudicatory process and power are important but these must be held within notions of justice and human rights and it is surely time now for India's articulation of the 'absolute liability' of hazardous MNCs to be accepted as a core principle of justice and human rights[78] so that no MNC may create future Bhopals with an assurance of impunity. For this to happen at all, MNCs should be made to accept at

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[73] Blitt, note 71, 41.

[74] Ibid.

[75] Ibid. But see Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9:2 *European Company Law* 101.

[76] Angelica Bonfanti, 'Access to Ready for Victims of Business-Related Abuse' in Sinha (ed.), note 56, 130, 141.

[77] Bhopal Act, note 35, sec 3.

[78] The Indian principle, since then an aspect of Indian jurisprudence reiterated by the Supreme Court of India, was enunciated as follows in the sovereign plaintiff brief before Judge Keenan:

> A multinational corporation has a primary, absolute and non-delegable duty to the persons and country in which it has in any manner caused to be undertaken any ultrahazardous or inherently dangerous activity. This includes a duty to provide that all ultrahazardous or inherently dangerous activities are conducted with the highest standards of safety and to provide all necessary information and warnings regarding the activity involved.

least one human right: the right to be immune from, and the human right to hold the parent MNCs absolutely liable for, catastrophe-creating decisions, which they consciously and intentionally take. Not too much 'epistemic insubordination',[79] however, is required to decolonize multinational corporate multilevel governance as the Bhopal-violated teach us.

On a wider plane, the idea of 'international legalization' (as Professor Ruggie would call this) has come to stay. The future battles lie, in my view, not especially in the debate, or confrontation, between those who favour a fuller discipline of human rights law and jurisprudence on MNCs (and their affiliates including related business entities) and those who would continue to favour the refinement of the soft law of the voluntary notion of corporate social and human rights responsibility. Rather, we need to tame our approach in a way that harnesses both the mandatory and the voulantaristic perspectives. A collaborative approach, and a growing learning curve, among states, international organizations, MNCs (as well as other business entities), and social movements for justice for the violated should be welcome in principle.

However, a future treaty extending to all trade and business not to violate a minimum of well-established international human rights norms and standards is not antithetical to encouraging constantly a better (that is higher and more nuanced) notion of CSR. Following the two-track approach is a necessary global public good, in a world where

(F'note continued)

> Defendant multinational Union Carbide breached this primary, absolute, and nondelegable duty through its undertaking of an ultrahazardous and inherently dangerous activity posing unacceptable risks at its plant in Bhopal, and the resultant escape of lethal MIC from that plant. Defendant Union Carbide further failed to provide that its Bhopal plant met the highest standards of safety and failed to inform the Union of India and its peoples of the dangers therein. Defendant Union Carbide is primarily and absolutely liable for any and all damages caused or contributed to by the escape of lethal MIC from its Bhopal plant.

Elaborating further, India argued that:

> Multinational corporations by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultrahazardous or inherently dangerous. Key management personnel of multinationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law.
>
> The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. In this manner, the multinational carries out its global purpose through thousands of daily actions, by a multitude of employees and agents. Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.

Baxi and Paul, note 21, v; 'Amended Consolidated Complaint and the Jury Demand filed by plaintiffs on 8 July 1985' in Baxi and Paul, note 21, 148–60.

[79] Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000); Walter Mignolo, 'Globalization and the Geopolitics of Knowledge: The Role of the Humanities in the Corporate University' (2003) 4:1 *Nepantla: Views from the South* 97. See also Eduarado Ibarra-Coldao, 'Organization Studies and Epistemic Coloniality in Latin America: Thinking Otherness from the Margins' (2007) 2 *Worlds and Knowledges Otherwise* 1.

politics has increasingly become business and business has another name for doing high politics. State-like and state-transcendent entities continue to grow and prosper in the name of necessary economic development. In fact, under the same rubric, there has been allowed to develop what I have called a trade-related, market-friendly paradigm of the universal human rights of all corporations de-privileging the paradigm of the universal human rights of all human beings.[80]

There is every danger that the debate of what should go into and what should stay out of a sparse treaty, reversing the juristic impunity of MNCs, may be 'politicized and polarized' thus fraught with the 'potentially harmful consequences for impacted individuals and communities, particularly in the intentional contexts of the global South'.[81] While reflexive academics and social movements ought to continue to combat this deformation, the idea of a treaty laying down some human rights obligations on MNCs ought not to be fully deterred by full-throated performance of corporate voluntarism. The danger of mass disasters and toxic torts, the perils of trade-related, market-friendly human rights arose long before the idea of human rights treaty defining MNCs' human rights obligations, as the archetypal Bhopal and other mass disasters, especially in Global South, fully indicate. And it is the world real future probability that such human and social distress will continue to grow in a regime of MNC impunity, especially in an Anthropocene era now upon us all.[82]

What should interest us is how the proposed work on such a treaty would describe 'core' human rights: what does 'principled pragmatism' teach us about the meanings (juristic as well as social) of the notion of core human rights? If any part of the message of principled pragmatism is that following human rights norms and standards is not practical or pragmatic for MNCs and their affiliates, we are also led logically to conclude that such norms and standards themselves are not pragmatic. We must reject such a message if only because the known history of the conduct of international negotiations, treaty-making, and customary law formation, and of international organizations, offers enough evidence to the contrary.

While Rawls-like deontological positions are clearly prescribing a moral idea of human rights as consisting of only a few articulations of core human rights that makes just global and domestic societies (and their laws and constitutions), any UN-based treaty is bound to include the crimes against human rights such as genocide, the outlawry of race- and religion-based discrimination, human rights to effect 'empowered civic participation',[83] and rights of social protections against all forms of vulnerability.

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[80] For a detailed analysis, see Baxi, *Future,* note 8, Chs 8 and 9.

[81] Ruggie, 'Regulating Multinationals', note 63, 14.

[82] See the highly popular, and assiduously accurate, work of Naomi Klein, especially *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007). See also Naomi Klein, *This Changes Everything: Capitalism v Climate* (New York: Simon & Schuster, 2014). This admirable work, designed to foster activist knowledge, legality, justice, and solidarity among suffering and struggling peoples of the earth, is especially important as conveying a vivid description of tactics pursued by neo-liberal markets and governments, especially job blackmail, 'desperation' as means to predation, and 'total control'. See Chapters 12 and 13 for some sage counsel.

[83] A fully developed version of this notion was proposed by Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff, 2012). Melish and Meidinger propose a fourth 'Participate' pillar to the Ruggie framework, which he seems to conceptually welcome but practically denounces. Ruggie, 'Regulating Multinationals', note 63, 4–7.

The Draft Norms embraced all UN-enunciated human rights norms and standards as applicable to MNCs; their future lies in a treaty proposal that is far more parsimonious.

The best bet for a resurrection of the impulse and direction animating the spirt of the Draft Norms, I believe, lies in what Nancy Fraser once called 'perspectival dualism',[84] negating the reduction of many into the same and resisting the tyranny of the singular. States and markets are relatively autonomous realms and may not be reduced to one thing but that should not preclude the recognition that that government-market conduct stands historically, and heavily, permeated by complex and interlocking intersectionality. There is surely not any *a priori* reason why that intersectionality must mark the end or silencing of enforceable human rights norms, standards, and discipline at the shores of corporate governance.

The problem with human rights is not their interpretive plurality, that they mean different things to different peoples: in fact, the right to interpretive plurality is in itself a human right. The real problem is elsewhere: it dwells in the domain of conduct that insists that non-state actors are not subject to any human rights norms or standards. This regime of human rights MNC-developed nihilism ought to come to an end in the twenty-first century, even when the new beginning is liable to be labelled partial, fractured, and tentative. The direction of human agency, I believe, lies in favour of a choice for ontological robustness of human rights norms and standards rather than their ontological fragility.

[84] Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (translated by Joel Golb et al) (London: Verso, 2003) 7, 34–37

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Demosprudence and Difference: Towards Reasonable Pluralism?

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[Parts of these random reflections were initially shared at a JNU seminar on 'Democracy and Difference' and at a National Law University, Delhi Discussion Programme; these notes are here substantially revised; and they furnish a background to my presentation concerning the costs of legal pluralism. The provocations here offered are rather wide-ranging but those more specifically interested in theoretical approaches of legal pluralism may consult/engage para 41 onwards, although in the preceding paras we revisit the concerns about state legal pluralism. Apologies for the lack of references, which will be developed later!]

1. In this presentation, I raise several assorted questions concerning identity and difference and plurality and pluralism. I leave aside several related questions: for example, the distinction (and the distinction is important) among *human rights law /jurisprudence* and human rights as a *moral idea* on the one had hand and the philosophical construction of alterity, or of the self and the other, (which to some extent are discussed in my *The Future of Human Rights* and more recent writings).
2. To start with, perhaps it may be true to say that the law as a shaper of identity within difference. Constitutional interpretation is a marker of vertical (group differentiated, as Will Kymlicka calls it) and horizontal rights (that apply to all). The law celebrates difference in identity: the difficult problem lies when constitution or laws deny, or can be said to deny (and the two are not identical) difference as a way of achieving a common, though not a uniform, identity.
3. Constitutional hegemony'-- the justified true belief that constitutional interpretation has a social effect and is politically important, if not also decisive-- is an essentially contested concept often conflated with interpretational judicial hegemony. However, the supermajorities in the legislature and the relatively autonomous executive also interpret the constitutional text and the intent. Constitutional interpretation is undertaken by the civil society, market, media, armed opposition insurgent groups, and other non-state actors.

Hegemony is the name that we give to the salient contemporaneous viewpoint. Concentrating on varieties of interpretation—agents and narratives—I have elsewhere argued that we cannot grasp Indian constitutional interpretation (law) outside the perspective of all these actors, especially citizen interpretation which often become the governing law. Constitutional hegemony in action, at least in liberal societies, may not be grasped outside the variety of citizen interpretation.

4. An abiding message of Antonio Gramsci, who invented the term 'hegemony' for social theory (standing for coercion-consent-coercion) has been that any account of hegemony has to be tentative and partial; the hegemonic is an attempt to describe the appearance of, not the actual, production of political consent or consensus. How that appearance is constructed and achieved is a real problem in studying hegemony. Liberal constitutional theory that insists on a strict 'separation of powers' and counsels that the 'rule of law' is best attained by distributing powers among the legislature, executive, and the judiciary is just one important mythical device for securing constitutional hegemony.
5. Three forms of prudence, or bodies of thought, determine the province of constitutional hegemony: these are *legisprudence* (the principles or theory of legislation that take it beyond the contingency of politics, though not the vicissitudes of the constructions of the 'political'), *jurisprudence* (that determine the principles, precepts, standards, doctrines, maxims of law and the concept of law) and *demosprudence* (judicial review process and power that enhance life under a constitutional democracy). How have the three bodies of wisdom, these 'different multiplicities' (as James Tully called constitutional pluralism) played out in the making and working of the Indian Constitution, especially through the dynamics of the Supreme Court of India is the question worth pursuing but we mainly explore here demosprudence of the Indian Supreme Court (the Court, hereafter).
6. The task is limited but historical contexts are large as well as shifting and the social meanings of the original 1950 Constitution are indeed all but legible. In particular, I revisit the notion of adjudicatory leadership and rework the notion of demosprudence in the context of the Supreme Court of India and offer a changeful relation between jurisprudence and demosprudence.
7. My argument is simple: The Court now is inclined towards demosprudence, though its early jurisprudence was also tinged with it. Demosprudence is a novel conception and it was introduced in American literature by Lani Guinier and Gerald

Torres, though namelessly practiced by the Court since its inception.

8. Guinier is concerned with the phenomena, rare in US judicial history, of the oral dissent: the argument is that 'oral dissents, like the orality of spoken word poetry or the rhetoric of feminism, have a distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil'. Ultimately, 'they may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process' as oral dissents 'can become a crucial tool in the ongoing dialogue between constitutional law and constitutional culture'. Professor Guinier moves to the more general argument about 'demosprudence' as 'a democracy-enhancing jurisprudence'.
9. Unlike traditional jurisprudence, demosprudence is not concerned 'primarily with the logical reasoning or legal principles that animate and justify a judicial opinion'; rather it is 'focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites. Demosprudence through dissent attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents,' It 'describes lawmaking or legal practices that inform and are informed a democracy-enhancing jurisprudence', practices that that inform and are informed by the wisdom of the people'.
10. We are here not concerned with some instructive criticisms of the US judicial history, the possible extensions of the term in the comparative constitutional type studies, or its rich potential for the UN agencies and the question how far Guinier embraces both legisprudence and demosprudence. Rather when we focus on the Supreme Court of India, we are struck with the fact that it discovered demosprudence much before the term was invented by American constitutional scholars!
11. As innovated by the Indian Supreme Court, demosprudence speaks to us severally. It serves as a marker of the emergence of a dialogic adjudicative leadership between/amidst the voices of human and social suffering. The Court not merely relaxes the concept of standing but radically democratizes it; no longer has one to show that one's fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient that one argues for the violations of the worst-off Indian citizens and persons within India's jurisdiction. *Other-regarding concern* for human rights has now become the order of the day and this concern has prompted a creative partnership between active citizens and activist justices. New human rights norms and standards not explicitly envisaged by the original constitutional text stand judicially invented.

12. Organizational leadership begins when the Court assumes self-directing powers. In a remarkable feat, the Court seized the power to appoint Justices and transfer (high Court) justices since 1993 by holding in the 'Judges Case' that the constitutional requirement of 'consultation' meant the same thing as 'concurrence' of the CJI; it then proceeded to subject the primacy of the CJI by inventing a collegium of five seniormost (including the CJI) deciding with unanimity, whose say on judicial appointments will be final. The Union Executive agreed with the principle and procedure of the judicial collegium. After nearly two decades, the 99th amendment, and an Act reinforcing it, created National Judicial Appointment Commission but the Court invalidated the amendment and the Act on the ground that these violated the independence of judiciary, an essential feature of the basic structure. This recent invalidation of the NJAC is rich in its re-visitation of demosprudence; so are the current public hearings on how to render the judicial collegium more transparent, if not by the same token equally accountable. The discourse provides an abundant testimony of *state legal pluralism, or the dialectic of differentiation within the centralized unity of state functions and power.*
13. This adjudicative feat stands notably 'justified' in *Sushas Sharma* a three judge Bench decision, speaking of the virtue of a '*non- political judiciary'* as 'crucial to our chosen political system', 'the *vitality of democratic process*', the '*ideals of social and economic egalitarianism*', the '*imperatives of a socio-economic transformation* envisioned by the Constitution as well as *the rule of law and the great values of liberty and equality*' (emphasis added). The justifications offered for this adjudicative *coup de etat* are indeed a normative overkill and do not fully withstand analytical scrutiny, as even the first decade produced an independent Court.
14. The opacity of judicial elevations is not eliminated, even progressively, by the NJAC or a plethora of Bills on judicial standards and accountability. Even some distinguished incumbent CJI and some superannuated justices, the active grapevine constituted by some incumbent justices as well as by the leaders of highly politicized and fractal leadership of the Indian Bar, who criticize the functioning of the judicial collegium do not want a return of the days when a Union Law Minister may repeat his story of having 'judges in his pockets'.
15. Parliament is at liberty to propose constitutional amendment and laws for judicial elevations which do not violate the basic structure or essential features of the IC. How it may seek to serve the values of integrity and independence of the judicial review process within the constitutional discipline thus imposed

is a teasing provocation but still within bounds of constitutional probability and planning.

16. Further, a constitutional custom that elevates the senior-most judge of the Court as the CJI, thus removing the vice of political patronage, stands judicially endorsed. Indira Nehru Gandhi explicitly breached the custom during the Emergency Rule (1975-76) by superseding the seniority rule and this raised considerable public discussion concerning her justification of an inchoate doctrine of 'committed judiciary'. However, the custom also means some spectacular short tenures of CJI (at times from 18 days to a few months! Concerns about social diversity and plurality in composition of the Court have insistently emerged, and subtler forms of court-packing have ensured that women justices on the Court remain as few as possible and woman justice may be available as CJI, though a constitutional custom as regards the elevation of Muslim and Dalit justices seems to have evolved.
17. There is no doubt, however, that HAL (hermeneutical adjudicative leadership) is centrally involved in resolving the tangle of the self-organization of the Court. Should we for that reason alone collapse the two is a question worth considering; the organizational leadership addresses much wider constituencies than judicial elevations (for example, the Court has acted as a pay commission for 'subordinate' judiciary). Organizational leadership involves HAL and yet is distinct, because HAL directs interpretive energies beyond the institution of judiciary itself or its self-directed collective composition to governance itself.
18. The Court has now assumed the power to co-governance of the nation and enshrined it in the Basic Structure doctrine. Socially responsible criticism (SRC) may no longer pose the concern jurisprudentially—that is by recourse to some pre-existing conceptions about the judicial role and function. Rather, SRC (the commenteriat and the proletariat) ought to address the quality of demosprudence, the issue of how justices talk about and listen to the worst-off peoples and strive to realize (in Hannah Arendt's difficult terms) 'the right to have rights'. Who do the Justices listen to when they refer to 'people' or the 'demos'? Are they better listening posts in a plebiscitary democracy than the legislators?
19. Clearly, the earlier rules of jurisprudence do no longer apply to Court. Stare decisis, for all its indeterminacies, was an engine for the growth of common law jurisprudence; the Indian demosprudence bids an 'Adieu' to it even in terms of daily jurisprudence of the Court, let alone the realm of Social Action Litigation (SAL).The 'gravitational force' (to deploy Ronald Dworkin's term) of precedent no longer governs the

demosprudence of the Court; the construction of demos is not precedent-minded but regards doing of justice or mitigation of injustice as its prime task.

20. Is this aversion to precedent by Court both (and here to use Robert Cover's distinction) jurispathic and jurisgenerative? How far may it refuse to follow any institutional rule or discipline laid down by other institutions of co-governance and how far it may reshape these? And if the Court is thought of in the immortal image Justice Goswami as the 'last recourse for the bewildered and oppressed' for the wounded Indian humanity, may it find liberation or conformity to judicial self-discipline (jurisprudence) as a way of attaining the best for the worst off (demosprudence)? And how far may its successful demosprudence erase the public memory of the fact even when the Court presents itself as an aspect/visage of new social movement, it must also remain at the end of the day an assemblage of state sovereignty/suzerainty? In order to retain the promise of constitutionalism in all its senses, we need to answer some hard questions both of constitutional demosprudence and jurisprudence.
21. To a long list of anxieties about demosprudence, we must also ask if demosprudence is difference-friendly or difference–in-identity hospitable. Where, for example, shall we place the catastrophic judicial Bhopal settlement orders?
22. No bright–lines between legal and constitutional interpretation seem to exist now. Nor do the complex genealogies of constitutional and legal cultures: if 'civil' law cultures classify private and public law, its common law counterpart often articulates the traditions of constitutional common law. Whereas the continental cultures celebrate a strict discipline of the 'proportionality' test, common law constitutionalism leans towards 'balancing' competing and conflicting interests. Does the Indian experience offer a more complex and ambivalent instance?
23. As a state ideological and coercive apparatus, the Court has sustained overall not just the colonial laws (such as the Official Secrets Act and the offence of sedition entailing forms of official love for duly elected governments) but has upheld against human rights-based challenges some dragnet and Draconian post-independence, frankly 'neo-colonial laws.
24. The Court now downgrades *'legalism'* (an ethical virtue of following rules even when they produce undesirable results); and '*restaintivism*' (even when they have the power they should not enter the 'political thicket' as tools for judging. Instead, it frankly resorts to '*pragmatism*' (even as they expand the scope of their power, justices ought to respect some institutional limits and act always with regard to the overall

acceptability and effectiveness of their decisions) and '*activism*' (justices ought to so act as to protect and promote human rights and constitutional conceptions of justice).

25. Confronted with a mélange of socially and culturally grounded expectations, the Court has not as fully as it may have engaged especially women's, children, and First Nations people's rights seriously without taking seriously as human rights the rights of sexual minorities. Even so and increasingly since the 60s, the Court has tended to assume a visage of a new social movement, especially via SAL; further, it has also emerged as discursive platform for governance transparency, bordering in the verge of an enunciation of constitutional right against corruption in high places. Thus the Court today assumes full judicial powers of directing and monitoring State investigative and enforcement agencies such as the CBI (Central Bureau of Investigation) and the constitutionally established CVC (the Central Vigilance Commission). More recently, the Court has begun, at least symbolically, to tackle the 'black money' about which the executive issued a 'white paper' (2011) in turn deliberated upon by Parliament.
26. SAL has survived legislative supermajorities in the past and has grown because of coalitional forms of national governance; even now with the l6th Parliament this trend continues uninterrupted.
27. The Court goes beyond these, for example straddling the conventional distinctions of judicial activism/restraint, it invents a contrast between juristic activism/restraint, relatively unknown to the received wisdom of Anglo-American prescriptions of judicial role and function. Styles of 'juristic activism' comprise a genre in which justices elaborate future decisional pathways without applying the judicial reasoning in an instant case to its own specific outcome. For example, *Olga Tellis* enunciates the future of a new constitutional right to shelter for Mumbai pavement-dwellers though in the instant result condemning them to acts of executive discretion to uproot them from their necessitous habitats! This disrupts a 'universal' notion of the very idea of judgment as marking the unity of judicial reasoning and result; yet, at the same moment, it also births the practices of 'suggestive jurisprudence'.
28. To offer a momentous example, the anxious murmur articulated by Justice Hidayatullah in *Sajjan Singh*, while sustaining the 17th Amendment, leads to a radical transformation of Indian constitutionalism. He there said that the IC did not intend Part 111 rights to be mere 'playthings' of 'majorities', paving the ways for the momentous decision in *Golak Nath* (immunizing these rights from the runaway viral powers of constitutional amendment) and the 1973 *Kesavananda Bharathi* decision that

judicially re-writes Article 368 powers of constitutional amendments, subjecting it fully either to the practices of eventual judicial endorsement or even the power to declare amendments as 'unconstitutional.'

29. *Kesavananda* in some wafer-thin 'majority' outcomes via a thousand-page decision, riven with some indecipherable putative concurring and dissenting plurality of opinions, still enunciates the doctrine of the IC personality subject to constitutional judicial power. The reach of amendatory power may now not any longer offend the 'basic structure' of constitutional governance nor its 'essential features'—severally described as 'democracy', 'equality', 'federalism', 'rule of law', 'secularism' and 'socialism'. The decisional core of course remains the notion of judicial power as an essential feature—a core that results in a co-sharing with Parliament of constituent power by the apex justices. Initially politically opposed, today this articulation of adjudicatory leadership no longer remains an affair of contentious polities) even fully echoed in many a South Asian adjudicature, notably Bangla Desh, Nepal, and Pakistan.
30. The *Kesavananda* constitutional 'bootstrapping' interestingly accomplishes further its constitutional and political legitimation; its basic structure doctrine now further extends beyond the implied limits on the amendatory powers; thus in *Bommai* (1994) the Court outlaws the Presidential powers to suspend or dissolve duly elected state legislatures under Article 352. Further still, as noted already, it now even transforms the basic structure doctrine into organizational leadership.
31. In and via SAL, the Court has democratized access to constitutional remedies as a basic human right. SAL began as an epistolary jurisdiction (where rightless people or the next of their kin the human rights and social activists write letters to the Court, which are regarded as writ petitions) and may appear before the Court as petitioners- in-person. Since the Court it itself not a fact-finding authority, it has devised the method of 'socio-legal enquiry commissions' go establish facts and make recommendations on which it proceeds to issue interim orders and directions (a kind of continuing mandamus). It has further developed a new partnership of learned professions with social and human rights movements and investigative print and electronic journalism.

32. Overall, all this has inaugurated a new form of constitutional litigation but also developed judicial powers of superintendence over governance institutions and constrained them for the most part to observe their statutory obligations and respect towards

constitutional/human rights, thus also expanding its power and prowess over national policy agenda.

33. In so doing the Court has shifted the bases of legitimation of adjudicative power by invoking a notion that high judicial power is not just merely an affair of 'governance' comity among the leading state-formative apparatuses but rather insisted that all forms of public power should be read as constituting a code of 'public trust'. In turn, this fiduciary notion of judicial power has deeply questioned that the elected public officials may not justify their everyday acts of power and policy-making on the grounds of electoral mandate; rather these remain liable to adjudicative deliberation. Some major decisions of the Court have directly appealed to the people of India from whose acquiesce the Court itself derives some extraordinary quotient of judicial power – forms of 'judicial populism' question some core notions of representative democratic governance, without entirely devaluing these. In the process, not merely all this has enhanced the role of the Indian State High Courts but also the relative autonomy of constitutional agencies such as the Election Commission of India, and the associated human rights institutional networks.
34. In the spheres of normative leadership, the Court has devised ways of monitoring and disciplining the runaway exercises of constitution-amending powers, initially solely entrusted to the Parliament and the Executive, via the invention of the doctrine of the basic structure and essential features of the IC. Soon enough the originary limits of this doctrine confining the Court's jurisdiction only to constitutional amendments proliferates variously as a canon of constitutional construction thus further disciplining the sway of executive and legislative powers. No longer, then, the conventional theoretical/ideological narratives of 'separation of powers' crib and confine the performatives of the Court.
35. Thus, in a few decisions, the Court has engaged in tasks of explicit legislation for example, it has laid down a fully-fledged judicial legislation concerning sexual harassment in workplace, and the unconscionable practices of campus violence 'ragging' in turn entailing variously national- norm setting in the conduct of student elections. These explicitly detailed judicial legislative acts are nominally subject to any eventual national legislation whose conformity with such acts also remains a matter for judicial power. Further the creping jurisdiction of the Court now stands directed to some acts of national policy-making --such as the protection of the environmental commons; national rivers water-sharing arrangements; disaster management; rehabilitation and recompense for developmental project-affected worst of Indian citizens.

36. This daring of adjudicatory leadership is further at work: not merely has the Court has restored rights deliberately excluded by the constituent assembly of India (such as right to speedy trial, bail, and adequate legal representation) but more crucially created a right to substantive 'due process' ; in this way, it has further read into the right to life and liberty (Article21, IC) an unending regime of enunciation of human rights to livelihood, shelter and housing, food and nutrition, education, heath, and the environmental well-being; in sum, the Court has been last quarter century been steadily converting human needs into human rights. In the process, it has also mutated the discourse of judicially unenforceable (as originally enacted) Directive Principles mostly by incorporating these in Article 21 now interpreted (importing substantive due process).
37. In the area of affirmative action for socially disadvantaged groups, the Court has insisted that the identification of beneficiaries be based on scientific studies, the overall reservation/quota (mostly for educational and state employment) should not exceed 50%, and provided for the exclusion of 'creamy layers' among the disadvantaged peoples. More recently, the Court in a further pursuit of SAL power and process has welcomed mass media sting exposés to render corruption in high public places as violation of constitutional morality, human rights, and the fiduciary obligations of decent democratic administration. How the Court shapes and reshapes the demos is an all-important question. Perhaps, the earlier Justices, during 1950-1973, did not regard themselves as social entrepreneurs and constitutional activists preoccupied as they were with laying the foundations of judicial review, a model of rule of law, and of adjudication, and guided the colonial Bar into a constitutional profession. They were not unmindful, in so doing, of the wider question of social legitimation of the Constitution; however, they thought and acted primarily as *legalists* rather than as *legatees* of constitutional democracy. The scene and scenario since 1973 is very different: in the main it is an era of substantive due process.
38. The distinctive political role carries with it the loss of constitutional legal certainty. This is, for example, shown dramatically in the decisions in *Lily Thomas* and *Kaushal (Naz 2): Lilly Thomas* cancelled a 60 plus tradition of doing politics in India by reversing the settled principle of innocence till proven guilty and the LGBT decision denied substantive due process to sexual minorities by the failure to reverse a legislative precedent of even longer standing. On the administrative side, the Court's own ambivalence in sexual harassment situations by retired judges has given the

impression that even then substantive due process is hard and male in nature!

Plurality and Pluralism

41. I now turn to the distinction between plurality and pluralism. The distinction is important; *while plurality is an ineliminable and elementary social fact, pluralism is a matter of belief and construction*. We shall shortly see how the fact yields to construction, or the 'normative force of the factual' as Eugene Ehrlich called this (pace David Hume).

42. Although there is a lot of talk in policy circles concerning 'diversity', I take it to refer to the fact of plurality; a 14th century word in English, it stands for the state or quality of being different, for heterogeneity, and difference; the much older Sanskrit words for diversity are *vicitratva,* a state of being variegated and *bahuvidhatvaa,* meaning many-typed-ness. Diversité in French usage foregrounds more directly either biological or cultural diversity. The first question is to find appropriate words for plurality across many regions and cultures; the second is to describe and justify pluralism.

43. The second question pertains to legal pluralism- is this distinct from societal or cultural pluralism, or is it another way of talking about it? Assuming that it is, is respect for plurality always a virtue? Or, is it one among many virtues? If so, how is the conflict to be handled or settled - a question perhaps not of great practical importance in theocratic constitutionalism and relatively monocultural societies? Or is legal pluralism an ineluctable aspect of legal dogma, as Alian Supiot would put it? Is it also a part of legal dogma of the non-liberal societies? (The division of world into 'liberal' and 'non-liberal societies is also problematic; a 'liberal' society may develop some illiberal features and vice versa.)

44. Assuming that legal pluralism is a subject of relatively autonomous discourse, how shall we define global legal pluralism? Is it liberal or postliberal, or something else altogether? This question goes to the heart of defining globalization. If regard, as does Alain Badiou in his famous article on mondalization in La Monde, as 'war on plurality', then conversation on global legal pluralism ends because plurality cannot be an ineliminable and elementary social fact. Given the thesis of multiple modernities, or different globalizations, global legal pluralities emerge and with it the question of multipolar global constructions of legal pluralisms.

45. The question then is: how do we understand global legal pluralism? And what do we do with it? International human rights thought and movement suggest that national sovereignties (differences) must end when core human rights

begin. But, what are core human rights? Are they social, economic, and cultural human rights or are these primarily civil and political rights? Or bits of both? Here our responses vary and much of this owes to the failure to maintain a distinction between the moral/ethical Idea of human rights on the one hand and human rights law on the other; the two rarely correspond. Does the moral idea of human rights always converge on the history of the West (USA and Northern Europe)? If not, what do we do with interpretive or hermeneutic pluralism thus arising?

46. It is to solve this difficult problem that we may turn to the notion of 'reasonable pluralism' (RP) as developed by John Rawls. One may not be too careful in detailing the thought of Rawls: here are at least three Rawls: the 1971 Rawls of *A Theory of Justice* (TJ), 1993 Rawls of *Political Liberalism* (PL), and the 1999 Rawls of *The Law of Peoples* (LP); the three are related but also different. Here I focus primarily on the second Rawls, though the original position notion, as developed by John Rawls of PL is important in itself but also for the associated notions of 'overlapping consensus', 'basic [social] structure', 'constitutional essentials', and the duties of civility. For Rawls, the pluralism of comprehensive doctrines must be considered as a 'permanent feature of the public culture of democracy' and should not be taken as a 'mere historical condition that may soon pass away'.

47. In a major move from TJ where justice is a metaphysical virtue, for the Second Rawls it is preeminently a political virtue. As latter, it thrives, and matures, on civil public discussion, oriented in the first place to choosing principles of justice, the principles of consensus, basic structure, and constitutional essentials; after the choice of first principles of justice in 'the original position' (OP)—under a thin veil of ignorance in which the parties do not know the concrete conditions of their birth and life –begins the question of interpretation of the values agreed upon or chosen. What agreement on principles of justice would justify social cooperation among its members?

48.Even so, what remains distinctive – to adapt Rawls – is the fact that there is no social world without some loss; that is, no social world exists that does not exclude some ways of life that realize in special ways certain fundamental values. The inevitability of the loss of social worlds – 'some ways of life' – is justifiable only where this loss is accepted as justified by those who actually experience it (as Charles Larmore says it), Note that justification does not mean just providing 'good reasons' for the action of the dominant, nor does it consist in what Martha Nussbaum characterizes as 'adaptive preferences' by which the subalterns cope variously with the real-life

experience of their subordination, even subjugation. *The sovereign question then surely is: What may ever constitute good reasons for people to accept the loss of their social worlds?*

49. Although Rawls's thought has been constantly evolving, it is clear that the idea of public reason constitutes a value in itself as fostering the quest for the elements of a theory of a shared concept of justice. The Rawls of *Political Liberalism* is explicit concerning justice as a political virtue both as crystallizing 'the principles of justice for the basic structure' of society and as providing 'principles of reasoning and rules of evidence' enabling 'citizens to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them'. If the basic structure of a well-ordered society is to arrive at shared understanding of the principles of justice as fairness (equal liberty of all and equality of opportunity, further supplemented by the 'difference principle', solicitude for the worst-off people in society) the principles and procedures of public reason ought to be more securely in place. As Charles Larmore suggests, the aim of 'a common point of view' concerning what justice may mean 'is to adjudicate disagreements by argument … public life founded on what mutually acknowledged principles … of what fairness entails'. Public reason allows scope for 'reasonable pluralisms' and 'overlapping consensus' based on the important distinction between the 'rational' and the 'reasonable.' Public reason is the stuff out of which reasonable legal pluralism is constructed.

50. However, a rarely noted aspect of Rawls's notion of public reason is its other – the 'non-public' reason of social groups and collectivities. Rawls instances thus churches, universities, and scientific associations and professional social groups; these hold non-public power 'with respect to political society and citizens generally'. Their acts of reasoning remain 'public with respect to their members' as forming ways of 'reasoning as to what is to be done'. Further, Rawls draws attention to the fact that voluntary exit from such associational forms of life remains possible with being members of a part of political community; in contrast, exiting from the state remains far more onerous. How then may one relate the various gradations of exit to the very idea of folk law and legal pluralism?

51. The distinction between public and non-public reason surely remains important, if indeed not decisive, for Rawls's imagery of a well-ordered society. For one thing, autonomous forms of associational life are both an aspect of liberty and further ought to be regarded as integral to performances of 'reasonable pluralism.' For another, associational forms shape a 'background culture'. But what may we say constitutes the

relation between 'background culture' and 'public reason'? Rawls is particularly sensitive to the importance of religion as providing comprehensive conceptions of good life whose forms of non-public reason that public political institutions ought, as far as possible, to fully strive to respect.

52. This poses several dilemmas of toleration for political institutions that ought to function as custodians of public reason. Without a sincere respect for plurality of worldviews reflected in non-public religious power and reason, these custodians or guardians – be they legislators or justices – may not achieve the virtue of toleration as an aspect of the basic structure of political institutions or the burdens of judgment borne by adjudicatory leadership communities.

53. Although the Rawls of TJ here differs from the Rawls of PL how far the two may assist adjudicatory leadership tasks in state regulation of hijab and of building minarets in public spaces remains an open question. If one were at all to extend this framework to 'severely divided societies' across the global South (as Donald Horowitz names them) the tasks of adjudicatory leadership become even more formidable than those framed with the expedient and often hollow Euro-American prose of 'multiculturalisms'.

54. Equally at stake remain cross-border flows of the networked traffic in ideas, arrangements, and institutions now represented by all our talk of globalization or 'neo-liberalism'. Rawls refrained from addressing these forms of non-public reason – especially forms of corporate power: nevertheless the first pages of *The Law of Peoples* forcefully draws our attention to the fact that even laws may be bought and sold for a price in the US Congress (the reference being here to electoral campaign funding as an aspect of the First Amendment sacrosanct rights). Yet overall Rawls did not address the global networks of power and influence, especially of the multinational enterprises, which even adjudicatory leadership may not fully escape.

55. Yet, it remains not too far off the mark to say that performances of deliberative public reason especially in the global South, remain fully confronted by the 'reason' of the non-public powers, increasingly constituted by the communities/networks of direct foreign investment, 'sovereign' funds, international and regional financial institutions, global corporations and multilateral treaty based trade agreements that stridently claim immunity and impunity from local 'constitutional essentials.' Various forms of adjudicatory leadership, however, wrestle with the crisis of global public reason thus made manifest before them by such contemporary forms of 'neo-liberalism'. Thus the Philippines Supreme Court

and the Bombay High Court confronted with the need to adjudicate the constitutional legitimacy of their state's accession to the Dunkel Draft WTO agreements while granting locus standi (respecting the demands of procedural fairness) deferred adjudication to a future point of time when adverse impacts on constitutional/human rights may be more fully demonstrated.

56. By contrast 'neo-liberal' adjudicatory leadership constitutes the time of [human rights and constitutionalism] that never will be. It is this constitution of *null political time* (as Giorgio Agamben puts it) that constitutes the structures of engagement and of postponement with forces of globalization. The emergent global economic constitutionalism illustrates the structures of engagement rather poignantly. Courts and justices increasingly accelerate the promotion and protection of trade-related market-friendly human rights of multinational enterprises and related entities while at the same time disengage themselves from the tasks of promoting and protecting the human rights of human beings, especially the worst off. The 'sacrifices' of 'an economic-corporate kind' that Gramsci thought will need, or ought, to be made by the hegemonic blocs are not writ large on the formations of neo-liberal global economic law.

57. There have been many critiques Rawls's liberal pluralism. Political philosopher Chantal Mouffe maintains that the notion ignores the dimension of agonistic politics: 'the conclusion that we can draw from scrutinizing the nature of the overlapping consensus is that Rawls's ideal society is a society from which politics has been eliminated'. It is true that a 'set of liberal conceptions of justice are mutually recognized by reasonable and rational citizens who act according to its injunctions'… 'probably have very different and even conflicting conceptions of the good, but those are strictly private matters and they do not interfere with their public life'. However, does this point to elimination of politics? Professor Mouffe may be right that there is a tendency in liberal politics to use force with some justification by 'invoking the principles of justice that are endorsed by everybody' that all rational and reasonable beings. Does reasonable pluralism always mean rational pluralism? Or does it subscribe to a Ralwsian view that distinguishes *coercion* from *oppression*? Does (and ought it to) embedded liberalism (and its close cousin neoliberalism) allow liberals to coerce people and yet remain, as Rawls puts it, 'beyond reproach'? Mouffe has done overall well to alert us concerning what she calls the 'limits of reasonable pluralism'-- Ralwsian or post-Ralwsian.

58. The other question raised in critical literature on reasonable pluralism relates to region; in relegating religion to the private

sphere, Rawls does not diminish the importance of religious life; however, he does not give founding comprehensive religious visions a political pride of place. In other words, he does not wish the state to have a comprehensive vision of its own; rather it is for Rawls a site of overlapping consensus among competing religious visions. Debate rages over the question whether excluding religion from the state formation is of any help; in this respect the identity- forming role of religion stands rightly highlighted by Jürgen Habermas.

59. Is religious pluralism an aspect of pluralism generally and global legal pluralism specifically? It is worth noting in respect of the latter, some Islamic movements that seem explicitly to impose a violent (anti-women and LGBT) version of the Koran) also preach and practice 'non-violent' pluralism' (as documented by Amitai Etzioni in 2011). How may one describe non-violent religious pluralism? Does it amount to (what I think Professor Michael Perry describes as) pluralism arising out of 'epistemic abstinence'? In any event what sense do we make of Mohandas Gandhi in understanding non-violence as a strategy and tactic of anti-colonial struggle? Is reasonable pluralism, in its best avatar, to be understood as non-violent secular and religious pluralism?

60. What is to be done when reasonable pluralism disagrees with feminist and sexual minority perspectives? Speaking for the former, Susan Moller Okin has recently argued that 'Rawls' theory fails to declare a sexist comprehensive doctrine unreasonable', and it tolerates oppression of women to some extent'. Since 'oppression of women (indeed oppression of any group) should not be allowed by any theory of justice, Rawls' theory, due to its failure to deal with such important theoretical implications, is unfair to women and thus implausible. Further, as Okin has shown, one has to work very hard on the Ralwsian conception of family as a 'school of morals'; the flip side of that institution is full borne out 'when girl children and women are treated unequally within the family compared to their male kin, this inevitably results in boys and girls internalizing an unjust sense of family relations.' How does reasonable pluralism work, then excepting as (and to borrow Giorgio Agamben phrase from a different context) '*inclusive exclusion*'?

61. *How do we return more fully to the question of the other of reasonable pluralism? Are there plural ways of being reasonably pluralistic? If so, how may we relate these to the ways of being just?*

The Problem of Order

62. Finally (without being exhaustive) there is the question of order. Here the much ignored Luce Irigaray's feminist critique of order is deeply relevant. She posits 'the logic of sacrifice and the logic of order as laying the foundations 'of liberal political theories 'including deconstruction, psychoanalysis, and feminist critiques influenced by those theories'. Irigary claims that: 'All assume that difference must be sacrificed for order and identity to function'. If so, all any efforts, including the feminist, towards difference and diversity are confronted with a radical difficulty.

63. Anne Caldwell (a sympathetic critic) puts it thus: 'If a community is to acknowledge difference rather than identity as the fabric of its social tie, such an acknowledgment requires the possibility of concepts capable of expressing, rather than repressing, difference. *It also requires the possibility of a form of subjectivity not anchored in the repression of difference'.*

64.How do we arrive at this new political and moral subjectivity in order to respect difference is a question of questions for the construction of political obligation and for the determination of what should count as a political. To ignore the problem of order is to render a disservice to the thematic of difference and justice. On the hand, there is risk in making the problem of order the only game there is in the town and of the gown! How may the postcolonial Indian legal system (such as it is) foster a truly (if there is such a thing) difference-based conception of order?

‘Five Star Activists’?

Upendra Baxi

At the very recent Chief Justices Conference while Chief Justice of India made some conciliatory remarks calling the Supreme Court a constitutional ‘sibling’ of Parliament, Prime Minister Modi made some adversarial observations. The three words – five star activists—he chose to use are wounding words, and frightening too if construed as a war against social activism generally. True, these are not words that bind, but as conveying premonitions of a future these are disturbing. The event was already mired in controversy—Justices Joseph and Sen publically protested the scheduling of the event on a Good Friday by CJI Dattu and his justifications.

Already, some prominent public interest lawyers, including Prashant Bhusan, have objected to these remarks and speculation is rife about what Mr. Modi had in mind. Politically, the speech-writers had in mind clearly Ms. Teesta Setalvad in view; and also the case of Ms. Priya Pillai, a Greenpeace activist whose freedom to dissent and to travel was valiantly restored by the Delhi High Court. Already, some public interest lawyers seem to be contemplating a contempt of court petition: Mr. Modi’s remark about the ‘issue of bail of (sic) five star activists’ is especially unfortunate as referring to a particular case pending before the Court. It will be doubly unfortunate if Justices were to find any criminal intention to offend by way of contempt; more likely, they will be more generous in their response, dismissing any eventual contempt petition.

The point is not what the Supreme Court will do but rather any Prime Minister should or should not say. While entitled to speak to the nation, no Prime Minister or legislator should be seen to comment on a matter live in courts because that may jeopardize the doing of justice. It should always be borne in view that the government continues to be the largest litigant and that it now again claims the power to appoint justices, a power that is contested before the Court. Prime Ministers and legislators may pass any comments they like as citizens in exercise of their freedom of speech but they should also be first among citizens not to risk interference with the administration of justice.

Nor should they assert as a social fact something which is in the realm of conjecture. Are all social activists’ only five star activists or advocates? If some indeed are, the State should bring this information in public realm; mere officially leaked documents and intelligence report will not do; in any such disclosure, the State must also reveal the business, industry, and Party NGOs and their doings. The social activists I have met in more than thirty years of teaching, research, and activist lawyering are in no sense of that word ‘five star activists’ but rather fighters for just and lost causes. Appearing as petitioner in person (I have recently discontinued this practice because of inclement health), I have never seen a ‘five star activist’. One may have honest differences with some social activists but never should question their bona fides.

The Supreme Court (and the High Courts) has decisionally frowned on ‘five star’ activism that converts public interest litigation into private or political litigation; they have asked for names of members of a group acting in public interest, severely disciplined lawyers and social action groups for abuse or misuse of the judicial process; and dismissed many a petition for want of prima facie case. Moreover, Justices have openly dissented on the constitutional vires of SAL (social action litigation as I call the so-called PIL) since the 80s. Justice Venkataramiah expressed the same anxiety early enough that the Prime Minister

now expresses when he said judicially, as well as judiciously, that when the executive fails to act according to law people will go to Parliament and when it fails to courts; what will they do if courts were too to fail them? CJI Dattu is, however, entirely right to suggest that the Supreme Court has means of self-correction and it will continue to innovate these.

Prime Ministers and Parliaments have taken every public occasion to remind learned justices to stay within the law and Justices like elected representatives take an oath, or solemnly affirm, to uphold the 'constitution as by law established'. What the political class means is the constitution as established by law made by them. The Justices, on the other hand, mean by law the constitution, which they interpret; they justify it by saying that the constitution is a higher law which all should follow - including those who make the law and amend the constitution.

The conflict between the Supreme Executive and the Supreme Judiciary is not new; both seek to co-govern the Nation. And it is not peculiar to India; rather it is now the condition in which all mature democracies grow, whether in the old or the new British Commonwealth, the EU or in America. What is peculiar to India is the double speak: the executive claims respect for the Constitution and the Judiciary on the one hand and the assertion of untrammelled supremacy of the executive, especially when it commands a legislative supermajority.

Pandit Jawaharlal Nehru claimed absolute parliamentary sovereignty and the then Supreme Court Justices accommodated him, even holding constitutional amendments valid which were later declared unconstitutional. The germ of doubt was planted in 1967 when Justice Hidyatullah wondered aloud in *Sajjan Singh* case whether the constitution should be a 'plaything' of a majority. There was no judicial looking back thereafter: in *Golak Nath,* their Lordships said in 1969, that fundamental rights may not be amended; in *Kesavananda Bharathi*, the Court held that all amendments to the Constitution should pass the test of the basic structure of the constitution and its fundamental features. And now the Supreme Court uses this new found power not just to invalidate amendments but also extend its powers to Presidential and executive decisions and acts, subordinate legislation, and generally puts the basic structure doctrine as means of statutory construction.

The Court through SAL has done many a constitutional wonder. It has made many directive principles into fundamental rights (like the right to education which has now christened as Article 21-A); it has judicially invented new rights that either constitution-makers declined (the right to speedy trial and the right to substantive due process) or basic human rights (such as the right to privacy and dignity, shelter, livelihood, environment) they added. The Court has enacted laws against sexual harassment in workplaces, Holi hooliganism, ragging etc and Parliament has adopted these. It has protected, as best as it can, the rights to free speech and expression; Media, and the right to debate and dissent and it has initiated new policies in diverse fields (such as 2G spectrum, and other resources, black money, cleaning of rivers and their interlinking, capital punishment and police reforms).

Many decisions of the Court have simply not been obeyed. The executive of the Union and States delay matters by not filing, despite reminders, responses to constitutional and judicial concerns. The rights and policy adjudicatory leadership is begrudged by the executive. The executive acts in a myriad ways to curb the independence of judiciary. Instead of cooperation, there is confrontation with the judiciary. The old view of separation of powers prevails in the face of a different constitutional interpretation by the highest court. Judges are held (to use Professor Dworkin's words) not even as 'deputy legislators' or even as 'deputies to legislators'. Theirs, it said, is the task to decide the cases and controversies brought before

them by specific litigants, not to lay down the law or policy. The executive complaints of 'judicial overreach' are reaching a new crescendo. Even so, the Prime Minister can make a new beginning by giving greater financial autonomy to courts as the CJI has urged

Judicial decisions are not flawless, nor is the judiciary a perfect institution. In the company of distinguished jurists, I have been a critic of judicial performance and called for greater judicial democratic accountability. Justices should always be receptive to socially responsible criticism forever crafted by citizens, especially by the media, and law academics and lawyers. I appreciate the Prime Minister's call for understanding newly emerging forms of litigation (like cybercrimes); his lament on tribunals that fail to work, though often these remain under-staffed and without minimal facilities; arrears in courts and his call to make legislations 'future proof'. These and related concerns are to be taken seriously and in a timely fashion

But it also should be appreciated that the Court has moved us from mere jurisprudence to a new demosprudence, a truly democracy-reinforcing judicial review policy. From the Krishna Iyer and Bhagwati era till today, the Court has sought cooperation of the executives of States as well as the Union. The progress has been slow; in the single-minded pursuit of the management of political power, the executive has very often postponed the constitutional tryst with destiny of the worst-off Indian citizens. It is good for the nation that there are Justices who know how to nudge an indifferent executive.

INTERNATIONAL CONFERENCE ON "THE SUPREME COURT OF INDIA AND PROGRESSIVE SOCIAL CHANGE" [December 11-12,2015]

School of Policy and Governance, Azim Premji University

Symbolic and Instrumental Dimensions of Impact Analysis

[First Draft: To be more fully proofed and referenced]

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Prefatory

It is good to be in the company of Professor Gerald Rosenberg, Professor Sudhir Krishnaswamy, and a host of friends and scholars at this deliberative event on the 'impact' of the Supreme Court decisions. I am particularly glad that this debate now takes place as I tried to encourage an Indian debate as early as 1982; even its provocative title failed to spark any debate![1] 'Better late than never' is a good motto for legal impact studies, if we are not relapse into mere 'before and after studies' and are able to maintain some control over plausible rival hypothesis.

Professor Rosenberg has created a near perfect moral storm by his *Hollow Hopes*[2] and critique of Lani Guinier's work on demosprudence. I am particularly fond of his critique 'Romancing the Court'[3].His finding that not many Americans know about the concurring or dissenting opinions of the Supreme Court of the United States, and nothing at all the oral dissents, is borne out by a large number of empirical social studies. I also agree that oral dissents are least cognized, even by law academics. As general observation, it may even be said that most legal academicians are too 'court-centric'; and do not study the legislatures, the political executive, and the bureaucracy, although studying *not what the judges say but what judges do with what they say* (as Karl Llewelyn was fond of advising first year law students at Chicago) offers a plateful!

But I doubt if anyone else than law academics would systemically study courts and judges; and the changing history and geography and cultures as shaping factors of constitutional and legal interpretation. In India most law academics even today study judicial decisions as solitary texts and they teach these aconetextually. Although this is neither the time or place to review the recent trends in Indian legal scholarship, a few observations of trends need to be made in the present context. Doctrinal treatises (mostly written by lawyers and justices, though there are many a welcome trend when leading law publishers invite academics to edit editions of such treatises and even write these on their own). Most scholarly work has been qualitative, and some of high comparative worth, and some distinctively socio-legal

[1] Upendra Baxi, "Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions" *Journal of the Indian Law Institute*. 24:4, 842(1982).

[2] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago. Ill.; University of Chicago Press,1991). See for some notable earlier explorations, Stephen L. Wasby, "The Supreme Court's Impact: Some Problems of Conceptualization and Measurement", Law & Soc. Rev. 5:41(1970-71); 5. Michael J. Petrick, "The Supreme Court Authority Acceptance", *Western Political Quarterly* 21: 5 (1968).

[3] "Romancing the Court", *B.U. L. Rev*.89: 563 (2009).

(empirical) in character. Although calls have been made for jurimetrics type analyses of courts in India, this type of work has not been systemically pursued by Indian scholars. There has been some effort towards quantitative study of the Supreme Court (notably by Indian law scholars like Abhinav Chadrachud, Madhav Kholsa, Shyashri Shanakar and political scientists like Ujjwal Kumar Singh and sociologists like Nandini Sundar and Anupama Roy). In this context, the work on impact of Supreme Court decisions now undertaken promises a fresh start. And it is also in this context that I insist that at least in the wake of social action litigation (SAL) in India, one ought to study the intersectionality[4] between social movements and courts.

I will shortly come to this aspect but I must at the outset say that: (a) impact studies, In their methods of measurement and ideological aims, are notoriously ambivalent; (2) different conceptions of 'politics' animate qualitative versus quantitative studies[5]; and (c) while we ought to be wary of placing ''uncritically' , as Professor Rosenberg states, courts at the 'centre of social movements', we also ought to be equally cautious about any extreme conclusion that there is no social science, or indeed any evidence, of judicial impact on social change or movement desired social change.

May I also restate the obvious facts about social movements? First, even when one thinks that there is possible to construct a metatheory or narrative about social movements, these remain (certainly at meso and micro levels) a deeply culture-bound phenomenon, riven by race/caste, gender, faith and community divide, often accentuated by practices of liberal and illiberal politics, national, geo-political, and international. Second, there is a difference between broadly violent and non-violent social movements, rendered even more complex by issues of ethics of self-determination and legitimacy or otherwise of violent means. Third, there is stated a difference of kind between OSM (old social movements) and NSM (new social movements) and the linkages/interfaces between the old and the new. Fourth, while some social movements crystallize into NGOs, many do not and remain below and often beyond the national politics and social science gaze.[6] Fifth, there is the vexed question about the anti-political character political NSM, recently illustrated from Czech to Arab Springs.[7] Sixth, not all social movements go to courts and not all courts happen to them; there is a certain

[4] See, Dorthe Staunæs "Where have all the subjects gone? Bringing together the Concepts of Intersectionality and Subjectification, *NORA - Nordic Journal of Feminist and Gender Research*, 11:2, 101-110 (2003); Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color," *Stanford Law Review* 43:6, 1241–99 (1991); Mary John, "Intersectionality: Rejection or Critical Dialogue?" l: 72 33 *EPW: Economic & Political Weekly*(2015);Bronmen Morgan (Ed.) *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Aldershot, Ashgate, 2007).

[5] See Lani Guinier," The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent", Harv. L. Rev.122:4, 15-16 (2008) and Robert Post, "Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate", *Boston University Law Review,* 89:581 (2009).

[6] Upendra Baxi, *The Future of Human Rights*, Ch.3 ,7,8 (Oxford University Press, Delhi, 2013; Perennial Edition).

[7] As seen recently in the Arab Spring and Occupy movements. See, e.g., *Beyond the Arab Spring: the Evolving Ruling Bargain in the Middle East* (Mehran Kamrava ed., 2014*)* Vijay Prashad*, Arab Spring, Libyan Winter* (Delhi, Leftword,2012)); Boaventura de souse Santos, available at http://alice.ces.uc.pt/en/index.php/transformative-constitutionalism/boaventura-de-sousa-santos-occupy-the-law-can-law-be-emancipatory/#sthash.mA5r543K.dpuf/.

distance between juridicalization, or juridification[8] of social movements and their politicization. Seventh, there is question of relative autonomy of social movements from the state and the market.

What Shall 'We" Say Constitutes the 'Impact' of Judicial Decisions?

This is a difficult probelmatique. There is no general answer to this question possible because 'we-ness' itself stands differently constituted and challenged. There exist distinct disciplinary boundaries borders, and burdens. This trichotomy, allocating or dividing the space, is much debated by geographers (and to some extent even by historians, at least in terms of periodization) but not fully denied. Impact studies may from a transboundary and multidisciplinary research tradition; thus various social sciences by a conventional (agreed protocols) common method study may constitute as it were a temporary 'we-ness' and thus even constitute new borders; but disciplinary boundaries are otherwise maintained and burdens within these are shared by all the disciplinary specialists. For example, a political scientist studying constitutional courts does not thereby become a legal academic and vice versa). In other words, while transdisciplinary exists to reconfigure the borders, eradicating boundaries (if this was desirable) is a difficult and different enterprise altogether. Provisionally, one must acknowledge certain geographically constituted fact of what Immanuel Kant so long ago described as ' conflict of the faculties'[9] and the temporariness or contingencies of impact studies.

That said, when we probe the notion of impact itself, we find that it has been given many a meaning. The first is a narrow meaning of 'compliance'; the second is 'effectiveness' over a period of time --this relates to the immediate, median, and long term *impact constituencies* as I have generally described these (in my 1982 article); the third relates to impact on the general public or social impact; the fourth concerns symbolic versus instrumental impact analysis; and finally, yet without being exhaustive, the *impact of impact analysis*.

Taking this last first, not too much literary energy has been invested on this issue but obviously it is of some academic and political import, at least from a social epistemology and political economy perspective. Those who write about write about the impact of judicial decisions have many transdisciplinary concerns about demonstrating extremes that these have great causal impact, or no impact; those showing that these have substantial and moderate impact are stand in between. Scientifically, their basic problem is to avoid naïve 'before-after' type studies and to specify an acceptable test for control of rival casual variables or hypothesis, establishing judicial decision(s) as independent variables. It is also clear that the scholars working in the field of impact aim, epistemologically at least, to establish the borders of their discipline, if not basically alter its boundaries, and act against those tending to police those who protect the existing borders and boundaries of a particular disciplinary tradition.

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[8] Lars Chr. Blichner, and Andres Molander, "Mapping Juridification" *European Law Journal*, 14: 36–54. (2008). See also, Mark Bevir, "Juridification and Democracy", *Parliamentary Affairs* 62: 3, 493–498(2009); Roger Masterman, "Juridification, Sovereignty and Separation of Powers ", *Parliamentary Affairs* 62:3, 499-502(2007).

[9] Immanuel Kant, The Conflict of the Faculties/Der Streit der Fakultäten, (trans. Mary J. Gregor; New York: Abaris Books, 1979).

Difficulties arise when we attempt the underlying political concerns or ideologies (on some or other version of what Fredrick Jameson so majestically described as the 'political unconscious' of modernity)[10]; he postulated a trans-individual historical/structural underlying an individual narrative [11] If so, what animates the impact theories and what, if any, is *their impact* offers a worthwhile field of study. What for example are the social costs and benefits of de-mystifying impacts, or certain narratives about 'modern' law?

The questions of compliance and effectiveness may not be understood outside a general theory of judicial impact. If compliance is too narrow (smacking of before and after type comparison), effectiveness is too wide a notion as at least encompassing both actual behaviour, general conduct, and changes in belief systems of the targeted individuals or groups and law enforcers and officials. Empirical studies do have to find some measures and protocols of knowing minds or consciousness of persons affected (for weal or woe) by judicial decisions. In a total absence of information about judicial outcome, or reasoning, one may not speak of judicial impact.

It is perhaps for this reason that the Supreme Court of India has developed a jurisprudence of information and legal literacy before Parliament made national laws regarding these measures. The Court's continuing SAL insistence that its orders may be made known by the district judiciary and the executive seem to underscore the importance of legal literacy among the beneficiaries. High courts are not lagging behind: as early as 1982, the Gujarat High Court mandated legal literacy programmes by the South Gujarat University, when an MPhil thesis about the conditions of work and living was filed by me (while in office) as probably the first letter (here a thesis) petition; we continued this work for well over two years. NHRIs (national human rights institutions, as well as state institutions) have also been assigned an important pivotal role in this regard by the Supreme Court and acts of legislatures. What impact did judicial initiatives have in thus promoting legal awareness and literacy is a matter yet not empirically studied. Further, in studying the effectiveness of judicial decisions, as I had urged in 1982, the *intended* as well *unintended* impacts must also be studied: as a SAL Petitioner myself I have had to deal with the situation of unintended consequences, including some socially violent ones.[12]

Impact Communities

There are also the differential impacts judicial decisions depending on the many different communication constituencies.[13] A SAL decision appeals and is judicially intended to reach diverse impact communities-IC). The social activist groups, the new commenteriat replacing almost the old (media and opinion –writers and I now add the instant public opinion formed in the social media, the new wave and realistic films and television serials, the Blog, Facebook

[10] Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act*, (London and New York: Routledge, 1981).
[11] Id., at 116
[12] I have partially narrated these in my reminiscences about the Mathura Open Letter, Agra Home Case and the Bhopal catastrophe, and the UP chamar case.
[13] See, for this notion, Upendra Baxi, Introduction to KK Mathew, *Democracy, Equality, and Freedom* (Lucknow, Eastern Book Co.,1975).

and Twitter folks being foremost, form a growing part of the IC now. Their activities legitimate structural as well social adjudicatory leadership, though occasionally they also contribute to social criticism this or that judicial trend.

The second IC is the more traditional; since Article 141 empowers the Supreme Court to declare law that is binding on all courts throughout the territory of India, all Courts (and judicial bodies) are bound to follow the law so made, subject to judicial powers to discover the 'ratio' of what the Supreme Court may have held and to follow an alternate line of decision embedded in the Supreme Court decisional law as binding. How this is accomplished particularly by the High Courts opens up a fascinating direction into impact analysis within the juristic hierarchy.

The third IC s the executive-legislature combine. Certainly, this combine has accepted the invention, since 1973, of the basic structure and the essential features of the Constitution; it has also accepted the invention of a judicial collegium for about two decades; and accepted the annulment of a constitutional amendment (99th) and the Parliamentary Law enacting the National Judicial Commission. This means, regardless of comparative constitutional law, studies and perspectives, that the Supreme Court has summed power of co-governance of the nation (demosprudence, the Indian way).[14] The Court has recognized the plenary powers of Parliament to amend the Constitution and it has rarely invalidated constitutional amendment; yet it has insisted on policing these on the touchstone of basic structure, which really equals judicial review powers and processes. On the whole, Parliament has also very infrequently reversed Supreme Court decisions. As far as 'accommodation' between the two high governance institutions is concerned, so far it has been staggeringly attained. How far this has contributed to the salience of justices and courts and how far it may have de-politicized central rights and justice issues poses some formidable challenges to impact analysis in general.

The situation is the reverse as far as the executive is concerned; if one looks at the growth of administrative law India it is clear that there is a great deal of resistance by civil service to judicial decisions and directions; one is rather surprised at the failure to adhere to a modicum fairness discipline evolved by the courts; the simple rules enunciated by the Supreme Court since the first decades of the Constitution, as the case law reveals, have not even now been internalized by the executive. Systemic governance corruption, and police highhandedness, continue also to flourish, although judicial normative pronouncements abound. The more recent trend to arrest such political evils by the device of court-monitored investigation shows judicial leadership, both hermetical and organizational, at its zenith; only impact studies may empirically show what this alliance between the Court and social movements holds for the constitutional 'idea of India'.

Finally, the impact seems negative as far as corporations and multinational corporations are involved; here the Court has rendered decisions that incline towards unfair globalization and

[14] See, Upendra Baxi, "Demosprudence v. Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies', Macquarie *University Journal* 14:3-23(2014); T*he Indian Supreme Court and Politics* (Lucknow, Eastern Book Co.,1979)

development (as in the archetypical Bhopal catastrophe judicial settlement) and the systemic reversal of labour jurisprudence. The latter is indeed striking when we consider the fact that the Court since Independence has created itself the magnificent edifice of labour rights and justice. How impact analysis may study judicial self-reversal and its general effect on the cornerstone of independence of judiciary (which it so celebrated recently) remains to be seen.

Symbolic and Instrumental Dimensions of Impact Analyses

Borrowing from Robert Gusfeld's sociology in early part of last century, and the work of political scientist Maurice Edelman, who drew our attention to the distinction between the symbolic and instrumental political/ policy action, I said in my 1982 paper that Indian students of judicial impact would do well to study it. India has a great cultural tradition of symbolism and it has served well the postcolonial constitution of ours. The Preamble, the Directive Principles, and Fundamental Duties are constitutional texts but are largely significant as symbols of India's commitment to a just, caring, and humane development. Constitutional legitimacy of political action is judged by these egalitarian and dignitarian considerations.

A preliminary or threshold aspect is just this: the symbolic addresses the values and altitudinal disposition, whereas the instrumental addresses overt conduct made subject to legal controls and their meanings (interpretation). If a symbolic legislation is a gesture of values to which an organized polity subscribes and it has a long term educational function, instrumental legal decisions (including judicial decisions) are intended to control behaviour. As has often been acknowledged, the symbolic gesturing is apt for eradicating societal *prejudice* against some people or a group over a period of time; instrumental action, on the contrary, is directed to control and regulate *discrimination*. This is a distinction of great import for impact analysts for they may not judge by standards apt for the symbolic action by standards beloning to the realm of instrumental action.

Since no political action (justices, too, command a significant degree of legally authorized violence) wears its credentials as being symbolic or instrumental, the impact analyst must make some initial choices. The first decision that an impact analysis student should make is whether the law or judicial action is exhortative or instrumental. But how does one do it? The Sarda Act and the first Dowry Prevention Act were, for example, clearly symbolic; they did not affix liabilities and punishments, such offences as contained therein are declared non-cognizable, the definitions of disapproved conduct are amorphous. The amendments to the dowry act subsequently changed the situation and made the law enforceable.

The second task is to examine the distinction with great care. Not all unforced laws are therefore symbolic, though juristic and sociological reasons for these happening need to be always discreetly analysed if we are to take, legisprudence seriously. By the same token creeping enforceability, or even a gradually full enforceability, may not be overlooked. Analysing impact across the symbolic/ instrumental divide is not an easy task which may not be advanced by ignoring the law/jurisprudence and legisprudence/ jurisprudence/ demosprudence divide.

Finally, how do we determine the legislative and judicial intention? These are vast questions but this much is clear the intention is difficult to determine from the that matters, and is for

the time being decisive.[15] And the province of interpretation matters as much as that of the impact.

[15] It is common knowledge (or should it be?) that *Kesavananda* was originally an advisory opinion as it directed the lesser Bench of the Court to dispose of a batch of petitions in accordance with the law declared in the decision (what the law declared was nutritiously difficult to determine as the decision was 6:6:1 justices of the Full Court; how the soft law became hardened eventually is a question different from the one which concerns the original moment of the decision. Was it initially symbolic and then became instrumental? Similarly, what may we think of advisory opinions which are judicially stipulated as binding? What of the original *Olga Tellis* decision? I have always thought of the case as awaiting a judgment; that is, if we were to raise a fundamental question concerning reasoning pus outcome as a judgment. The trend continues: we had as late as 2014 a judgment of the Supreme Court of India where a two judge Bench decided that it was neither constitutionally or legally valid to pronounce a fatwa l but the Court is itself known not to be averse to issue constitutional fatwas from time to time, that is not reasoned decisions, where the reasoning matches the result.

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-00873

IN THE MATTER OF THE INTEGRITY IN PUBLIC LIFE ACT, 2000 AS AMENDED BY THE INTEGRITY IN PUBLIC LIFE (AMENDMENT) ACT 2000

BETWEEN

GLADYS GAFOOR

Claimant

AND

THE INTEGRITY COMMISSSION

Defendant

Before the Honourable Mr. Justice V. Kokaram
Appearances:
Mr. Clive Phelps and Mr. Seepersad instructed by Ms. Nicole De Verteuil-Milne for the Claimant
Ms. Deborah Peake S.C. leads Mr. Ravindra Nanga instructed by Ms. Marcelle Alison Ferdinand for the Integrity Commission
Mr. Avery Sinanan S.C. leads Mr. Jagdeo Singh instructed by Ms. Kamala Mohammed-Carter for the Attorney General

JUDGMENT

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1. Recusal from hearing a matter is not a decision lightly taken by a Judge. But it is not uncommon. Such a decision for a Judge to "stand down" from deliberating on a matter can be made for a variety of reasons such as where the judge may have some direct interest to the case that makes it too difficult to be, or seem to be, an impartial arbiter. The purpose of recusal is to preserve the impartiality of the judicial process, bolster the confidence of society in the integrity of the administration of justice and in the Courts as the bastions of the rule of

law. There is no shame in either entertaining the question to recuse or in actually stepping down. As Judges despite what we may perceive to be an inconvenience to another Judge to fill the breach so to speak we must step down in the interests of preserving that public trust and confidence in the judicial process. In doing so we give true meaning to the right to be tried by an independent and impartial tribunal an integral part of the principles of fundamental justice guaranteed by the Constitution of Trinidad and Tobago. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. For this reason there are a number of decisions in the Commonwealth which suggest that in matters of recusal "if in doubt- out"[1]. No less than Lord Devlin commented:

> *"The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven but on earth he is no use at all."*[2]

2. Lord Hope reminded us when he cited a paragraph from **Sellar v Highland Railway Co** 1919 S.C. HL 19 at pp 20-21 that "*The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias of interest in the judge*

[1] Judicial Recusal: Principle, Process and Problems, Grant Hammond

[2] See also **R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte** *(No. 2)* [2000] 1 A.C. 119 per Lord Nolan "in any case where the impartiality of a judge is in order the appearance of the matter is just as important as the reality" per Lord Hope "One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered". Lord Bingham of Cornhill in **Davidson v Scottish Ministers** [2004] UKHL 34:"It has … been accepted for many years that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so." Chief Justice A. Barak, "The Role of the Supreme Court in a Democracy" (1998) 3 *Israel Studies* 6 noted that for a Judge "judicial independence and lack of bias are the backbone of his existence."

upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."

3. Judicial Codes of Conduct such as The Bangalore Principles of Judicial Conduct 2001 and our own draft Code of Conduct underscores that j*udges must be and should appear to be impartial with respect to their decisions and in the process of their decision-making.* A judge shall not only perform his or her judicial duties without favour, bias or prejudice but shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

4. In recusals, the Judge is engaged therefore in a sensitive exercise to preserve the dignity of the judicial office, the requirements of due process and the fundamental principle of the rule of law. However equally enjoined in that sensitive exercise is the Constitutional duty of the judge to administer justice impartially "to all manner of people without fear or favour affection or ill will"[3] a fundamental pillar of the judicial process. Justice Nelson of the Caribbean Court of Justice referred to it in his insightful treatise[4] as "the duty to sit". In the recent decision of **Muir v Commissioner of Inland Revenue** [2007] 3 NZLR 495 the New Zealand Court of Appeal stated:

   "the requirement of independence and impartiality of a judge is counterbalanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law the duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceedings. As Mason J emphasised in JRL ex p CJL (1986) 161 CLR 342. "it is equally important the judicial officers discharge their duty to sit and do not by acceding too readily to suggestion of appearance of bias encourage parties to believe that by seeking

[3] Section 107 and First schedule of the Constitution

[4] Justice Rolston F. Nelson, Judicial Continuing Education Workshop: Recusal, Contempt of Court & Judicial Ethics, May 4, 2012

the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

5. Justice Nelson observed:

A judge who has to decide an issue of self recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason. In ***Simonson v General Motors Corporation*** *U.S.D.C. P.425 R. Supp. 574, 578 (1978):*

> *"Recusal and reassignment is not a matter to be lightly undertaken by a district judge. While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reason for recusal, there remains what has sometimes been termed a "duty to sit." See,* ***U.S. v Moore, supra at 772; Sperry Rand Corp. V Pentronix, Inc., supra, at 373****."*

6. Recusal applications are fact specific. However interestingly, some recent cases in the Commonwealth and in the United States have thrown up fact scenarios in recusal applications on the grounds of apparent bias of the sitting judge (with facts that are much more extreme than the challenge being made in this case) where the courts have consistently underscored the judge's right to sit. Lord Justice Sedly who disclosed that he was the President of the British Tinnitus Association and did not step down from an appeal in test cases about noise induced deafness in the textile industry[5]. Lady Crosgrove a member of the International Association of Jewish Lawyers and Jurists with a vocal pro Israel Association President, sitting on a petition of a Palestinian claiming asylum in the United Kingdom[6]. Justice Scalia attending a duck hunting trip together with Vice President Dick Cheney and the Judge robustly defending his decision not to recuse himself from hearing a case against

[5] **Baker v Quantum Clothing Group**[2009] C.P. Rep. 38

[6] **Helow v Advocate General for Scotland**,[2008] 1 W.L.R. 2416, [2008] UKHL 62

the Vice President[7]. At home, Magistrate Espinet, a member of the Morris Marshall Development Foundation alleged to be aligned to the political party the People's National Movement (PNM) sitting on committal proceedings involving former Prime Minister Basdeo Panday[8]. The duty to sit in those cases was not trumped by any real possibility of bias.

7. This tension between the duty to sit and the duty to preserve judicial independence and impartiality sets the stage for a recusal process which is open, transparent and fair: where decisions on recusal are made after careful thought and reflection; where the applications themselves are made bona fide, properly formulated, coherent and well grounded on established principles of law. The fact that it is a challenge going to the fundamental and solemn duty of a judge of the Supreme Court, the occasion should not be scandalised by improper, spurious and baseless requests for recusal which will do nothing to inspire confidence in the administration of justice. Such applications must not in itself be seen as an attempt to excite suspicion and mischief nor an attempt to ferret out information from the judge to make out a case for recusal.

8. Indeed to lightly treat the duty to sit is the very temptation which must be resisted and which highlights the condemnation of unfounded applications for recusal which will have the unintended consequence of embarrassing a judge rather than genuinely questioning his impartiality and integrity in the interest of the administration of justice. The Court of Appeal in **Locabail**[9] reminds us that it *"would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance"*.

[7] The test of bias in the United States is not the same as in the UK but see the treatment of the duty to sit in the controversial 22 page ruling of Justice Scalia **Cheney v US District Court** (2004) 124 S.Ct. 1391; 158 L.Ed.2d. 225 (March 18, 2004). It was made even more controversial by some extra judicial statement made by Scalia J at Amherst College on February 15, 2004 preceding his ruling: "This was a government issue. It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."("Old MacDonald Had a Judge", *LA Times,* February 17, 2004).

[8] It was argued that Mr. Panday, the leader of the United National Congress (UNC) and the PNM were political enemies. **Basdeo Panday, Oma Panday v Her Worship Ejenny Espinet**; **The Director of Public Prosecutions** C.A.CIV.250/2009 and H.C.2265/2008

[9] **Locabail (U.K.) Ltd v Bayfield Properties Ltd** [2000] Q.B. 451, CA

9. Ultimately therefore there is a presumption of impartiality on the part of the sitting judge and any application for recusal is not to be lightly made. It is a fundamental challenge and must be supported by evidence. The application must not be spurious to fanciful, lest the very making of the challenge will in itself do damage to the administration of justice which the very essence of a proper recusal is meant to prevent. Care must be exercised to prevent recusal hearings from being reduced, "into a side show". Archie JA (as he then was) observed in **Panday v Virgil**[10]:

> *"The proper point of departure is the presumption that judicial officers and other holders of high public office will be faithful to their oath to discharge their duties with impartiality and in accordance with the constitution.*[11] *The onus of rebutting that presumption and demonstrating bias lies with the person alleging it. Mere suspicion of bias is not enough; a real possibility must be demonstrated on the available evidence."*[12]

10. Recusal is a course which a Judge will only take on the basis of established principles and practices. Justice Nelson in his treatise "Judicial Recusal"[13] has neatly summarised some of those principles in play established in our common law system:

> *"1) A judge should recuse himself whenever a fair-minded and informed observer would conclude that there was a real possibility or a real danger of bias on the part of the judge: see* ***Porter v Magill*** *[2002] 2 AC 357, 494 where the House of Lords approved*

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[10] Civil Appeal Nos. 49, 50, 52 and 53 of 2007

[11] **Jones v Das Legal Expenses Insurance Co. Ltd.** [2003] EWCA Civ. 1071 and see also **Public Service Commission and the Attorney General v Wayne Hayde** Civ. App. No. 12 of 1999

[12] Warner JA also stated the general principles of the duty to sit:

- *(i) Ill-founded challenges to the bench are not to be entertained.*
- *(ii) Courts must be assiduous in upholding the impartiality of judges; the onus of establishing bias lies with the appellant.*
- *(iii) The impartiality of the decision maker [the Chief Magistrate] is to be presumed, but this presumption can be dislodged by cogent evidence.*

[13] *Rolston F. Nelson, Judicial Continuing Education Workshop: Recusal, Contempt of Court & Judicial Ethics, May 4, 2012*

dicta of Lord Phillips of Worth Matravers ***in In re Medicatments and Related Classes of Goods*** *(No. 2) [2001] 1WLR 800.*

2) *A second principle is that although it is important that justice must be done, it is equally important that judicial officers discharge their duty to sit and do not accede too readily to suggestions of appearance of bias. In* ***United States v Robert Cooley*** *1 F. 3d 985 [58] the U.S. Court of Appeals, Tenth Circuit put the principle this way:" ... we have emphasized that "there is as much obligation for a judge not to recuse when there is no occasion to do so as there is for him to do so when there is""*
3) *The third principle is that the rules as to recusal were not intended to give litigants a veto power over sitting judges, or to provide a means of obtaining a judge of their choice: see* ***U.S. v Robert Cooley*** *(supra) at [49].*
4) *A fourth principle is that, if a judge recuses himself from a case, no judicial authority can lawfully order him to hear the case: see* ***Consiglio v Consiglio*** *48 Conn. App. 654 (1998).*
5) *A fifth principle was expressed by the Constitutional Court of South Africa in* ***President of the Republic of South Africa v South African Rugby Football Union*** *1999 (4) S.A. 147, 177 thus:*

> *"... the reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions." [1]*

Yet this presumption which underpins the judicial superstructure is very easily displaced when a challenge of recusal is made.

6) *Sixthly the reasonable person envisaged by the test for bias is an informed, right-minded member of the community with knowledge of the history and philosophy of the community."*

11. Archie JA endorsed a three step approach when considering applications for recusal[14]:

- First, one must identify what it is said might lead a judicial officer to decide a case otherwise than strictly on its merits;
- Second, a logical connection between the matter/s and the feared deviation from impartiality has to be articulated;
- Third, an assessment must be made whether a fair-minded observer would conclude that there was a real possibility that the case would not be decided impartially.

"The test is one of possibility (capable of existing; real and not remote) and not probability (more likely than not)[15]. The words *"fair-minded"* and *"informed"* summarize the characteristics that are to be imputed to the hypothetical observer."

The Claimant's application for recusal:

12. I turn to the instant application of the Claimant seeking to have me step down from further hearing this matter made by letter dated 27th September 2012, which came to my attention.

13. The reasons for the recusal were read into the record by Counsel for the Claimant as follows:

"1) In the Constitutional Motion parallel to the subject proceedings your Lordship accused our client of impropriety: '*Indeed it was quite improper to make such a request having regard to the independent functions discharged by the Commission'* (paragraph 37 (g) of your judgment). This criticism of our client was and is irrelevant to any of the issues as set out at paragraph 48 of your judgment which arose for determination of her constitutional right to protection of the law. It is our client's view as well as that of her Attorneys-at-Law that by this unwarranted criticism you have prejudiced yourself from further hearing the subject matter.

2) On a separate but related issue, your Lordship did not draw to Counsel's attention at the commencement of the Trial that you are a Presidential appointee to the Mediation Board. This means that the President has implicit power to remove your Lordship

[14] **Panday v Virgil** (ibid) see also Per Gleeson C.J.; Mc Hugh, Gummow and Hayne JJ @ para 8 **Bender v The Official Trustee in Bankruptcy** (2000) 205 CLR 337

[15] op. cit. @ para 7

from membership and Chairmanship of the Board and to this extent it may appear that you are beholden to His Excellency.

3) Further, the Board comes under the purview of the Attorney General who is also a Defendant in the parallel Constitutional Motion. He is in a position to facilitate the Board in certain matters concerning the Board's affairs. An example is the request made by the Board in or about December, 2011 for payment of financial benefits to Board Members.

4) Additionally, the recipients of such financial benefits should be required to make declarations to the Integrity Commission and so it may also appear that the Board would need to consult and be advised by the Integrity Commission on such declarations. It must be borne in mind that the Integrity Commission is the Defendant in the subject matter.

In our view the facts and surrounding circumstances of this case do nothing to bolster public confidence in the judicial system, the office of the Attorney General, the office of the President and the Integrity Commission (which already does not seem to have the public confidence) and may give the unpleasant impression that justice may not be done in the Judicial Review proceedings."

14. I cannot lightly pass off my responsibility to a fellow judge unless there is a proper basis in law to do so. The fact that the Judge is the Chairman of a Mediation Board which is charged with the function of regulating the profession of mediation and generally the promotion of peaceful dispute resolution should cause no stir. Indeed I made the disclosure of my Chairmanship on the first day of hearing in March 2012 as well as the membership on the Board of the Claimant's son. The Claimant consented to my hearing this matter.

15. I am not aware when the Claimant obtained the information and some of the matters raised in her letter, I would have thought would have easily been referenced by examining the appropriate legislation since I made my disclosure. For clarification and for the record:

(a) The Mediation Board is a body enacted by the Mediation Act 2004 ("the Act"). It is charged with the functions of, among other things, regulating the mediation profession. These functions are set out in section 5 of the Act.

(b) I have already disclosed that I am Chairman of the Board. If the Claimant took the time to read the Act one sees that I have been nominated to sit in that capacity by the Chief Justice who is the person responsible for my appointment. I sit as an ex officio member of the board. Other members are appointed by various entities and cover a wide cross section of society. See section 4 of the Act.

(c) I do not know the basis on which the Claimant alleges that the Mediation Board falls under the purview of the Attorney General. Indeed no instrument nor Gazette was produced to demonstrate this and Counsel was unable to direct me to any authority for saying this.

(d) No request for any stipend or any form of remuneration has been made for me or members of the Judiciary on the Board. My service on the Board is purely on a voluntary basis without reward. Indeed Counsel for the Claimant withdrew any allegation inferred or otherwise in the grounds of the letter that the Chairman was in receipt of or negotiating for a stipend as Chairman.

(e) A request was made for other members of the Board to receive an allowance which will assist them in the performance of their Board functions and in recognition of their dedicated time, service and commitment and the work of the Board in the development of mediation in this country. No board member to date is in receipt of any stipend, remuneration or honorarium for their service on the Board.

16. The first misstep of the Claimant is that the application for a recusal was made by way of a private and confidential letter addressed directly to the sitting judge. This is wholly inappropriate. One must be careful with direct correspondence as it may be interpreted as an attempt to intimidate a judge. That was not what was intended in this case having understood counsel's explanation who repeatedly repeated his respect for the Court. The second misstep is that it was copied not to the parties in the case but to the Chief Justice who has absolutely no interest in this application or this matter. It is trite law and it was conceded by attorney for the Claimant that decisions on recusal are to be made by the sitting judge "to the best of his ability". There was no basis in law or fact to copy the Chief Justice not even as a matter of courtesy. Counsel must tread very careful in handling matters such as these.

17. Procedurally unless there is some sensitive matter which both Counsel wish to seek an audience with the Judge in chambers, applications such as these, because of the nature of the challenge and the solemnity of the occasion should be formally made in the presence of all the parties preferably by way of an inter partes application supported by an affidavit setting out the clear grounds for the challenge and the evidence being used to support it.

18. Quite apart from the procedure, the letter in this case does not make it clear on what ground the challenge for recusal was being made. It was only in oral submissions that counsel made it clear that the challenge was on apparent bias. If I understand the objection in a nutshell it is that although counsel has confidence in the court in its ability to deliver a just and impartial verdict it is the suspicious man in the street who may question the decision of the court based on the matters set out in the letter. In addition to the matters set out in the letter counsel has "put into the pot" so to speak a "gag order" which I had imposed earlier in the proceedings and which I subsequently lifted, overruling the Defendant's objections. He contends that "This society is unduly suspicious and no matter if everything is above board and is black and white our society will question it." The test of apparent bias is therefore that of the fictitious suspicious bystander looking on at these proceedings.

19. This simply is not the test endorsed by the Court of Appeal to determine whether there is apparent bias of the presiding Judge. Archie JA was he then was in **Panday v Virgil**[16] identified the attributes of the fair minded observer.

> "The fair-minded observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at[17]. That is a critical caveat in a society such as ours that is deeply polarized and where conspiracy theories abound. …..The fair-minded observer is not an insider (i.e. another member of the same tribunal system). Otherwise he would run the risk of having the insider's blindness to the faults that outsiders can so easily see[18]. Although he will have a general appreciation of the legal professional culture and behavioural norms, he may not so readily take

[16] ibid

[17] **Johnson v Johnson** (2000) 201 CLR 488, 509 (para. 53)

[18] **Gillies v Secretary of State for Works and Pensions** [2006] UKHL 2 per Baroness Hale of Richmond @ para 39.

for granted, as judicial officers might, a judicial officer's ability to compartmentalize his mind and ignore extraneous information or circumstances. …..The informed observer is a member of the community in which the case arose and will possess an awareness of local issues gained from the experience of having lived in that society. He will be aware of the social (and political) reality that forms the backdrop to the case[19]….It follows that the informed observer, if he is also fair-minded, will choose his sources of information with care…*It is to be assumed too that he is able when exercising his judgment to decide what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."*[20] He will also make use of all the available and relevant information"

20. In the recent Court of Appeal judgment of **Panday v Espinet[21],** Mendonca JA addressed the argument of a suspicious society in this way which deserves repeating:

> "Counsel for the Appellants submitted that prevailing conditions in the country take precedence in determining the test. The test will therefore apply differently if local considerations are different. In other words, in this jurisdiction, it is appropriate to regard the observer as suspicious so that he is to be treated as being suspicious and not as not unduly suspicious.
>
> 42. I however do not agree. Among the characteristics attributed to the fair-minded observer, as I have already mentioned, is that he is not unduly sensitive or suspicious. To accept the submission that he should be treated otherwise would go against well established authority. In **Panday v Virgil**, a decision which is binding on this Court, Archie, J.A. (as he then was) saw the attribute that the observer is not unduly suspicious as a "critical caveat in a society such as ours that is deeply polarized and where conspiracy theories are abound". I too think it is a critical caveat, not because it serves to give the observer immunity against a

[19] R v S (R.D.) 151 DLR (4th) 193 per Cory J.

[20] **Gillies v Secretary of State** (supra) per Lord Hope of Craighead @ para. 17

[21] ibid

symptom that is rampant in this jurisdiction, but because it is a natural corollary of the other characteristics of the observer.

43. I do not think that we as a people have any greater tendency to be more suspicious than anyone else. If we tend to be so on occasion it often goes hand in hand with the lack of knowledge of relevant information. The fair-minded observer is however informed. As I have mentioned, he can distinguished what is relevant and what is not. He will take the time to inform himself of all matters that are relevant and are able to determine the weight to be given to those matters that is relevant. So informed, I do not think that the average person in this jurisdiction would tend to be suspicious or overly so. Consistent with the hypothetical person he would not be unduly suspicious. Suspicion also does not sit well with someone who is fair-minded. There are obvious Difficulties in accepting that someone who is fair-minded should be treated as someone who is not unduly suspicious.

45. The question therefore is whether the fair-minded and informed observer having considered the facts would conclude that there is/was a real possibility the Magistrate was or would be biased."

21. Applying the principles enunciated above I must then ask whether the circumstances as advanced would lead a fair-minded and informed observer to conclude that there is a real possibility that I would be biased in hearing this matter.

- Firstly there is nothing in the statement made by me in the judgment in the parallel constitutional law proceedings which remotely suggests that I have prejudged the issues which are alive in the judicial review application now before me. Counsel failed to identify any issue in the judicial review application which I would have prejudged based on that statement. In any event, the alleged criticism of the Claimant was blown wholly out of proportion from the context of the statement made. In **Locabail**[22] the Court of Appeal said "*The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found*

[22] ibid

the evidence of a party or witness to be unreliable, would not without more found a sustainable objection." I will not rehearse what I said or what I meant to say in the parallel constitutional proceedings as it is the subject of an appeal and any issue with that statement should be taken up there in the proper forum.

- Second the allegation that I am somehow "beholden to the President", whatever that may mean, as a result of my appointment to the Mediation Board and so cannot impartially try this case simply makes no sense. I cannot see how any fair minded observer can come to the conclusion that I am "beholden to His Excellency" after being seized of the facts of my appointment at the behest of the Chief Justice and that in any event all Judges are appointed by the President. In any event the President is not a party to these proceedings and if there was any merit in that submission it should have found its way in the appeal before the Court of Appeal in those proceedings.

- Third the allegation that the Mediation Board falls under the purview of the Attorney General. I do not know if I should seriously deal with this as counsel when asked could produce neither evidence nor basis in fact or in law to make such a statement. If this was a ground for disqualification then is it to be suggested that I cannot sit on any case in which the Attorney General is named as a party? Or what of the numerous matters that I have dealt with routinely against the State in assault and battery cases, false imprisonment, judicial review where the legality of state action is under review? The Attorney General's action is not under review in these proceedings. Even the official bystander will ask himself "what is the point?"

- The Claimant alleges that the recipient of financial benefits by members of the Mediation Board, excluding the secretary and Judicial officers of the Supreme Court, if ever they receive anything at all, shall be required to make declarations to the Integrity Commission. This is not a fact but a surmise or speculation. It is perhaps gratuitous advice being given to the Board. But again the fact that the sitting Judge is not in receipt of a stipend, nor allowance, his sitting on the Board is purely voluntary without reward, no other member is in receipt of a stipend or reward, they have been

sitting there for the promotion of mediation in this country without benefit, the officious bystander will ask what does that have to do with this case?

Case management and Delay:

22. Applications for recusal must be made promptly as soon as the reason for it is known. I am unaware of when this information came to the Claimant's attention. It simply is not good enough to explain away the delay of such a significant challenge by saying that Counsel needed time to carefully consider the point. In **Locabail** the Court of Appeal commented:

> *"In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve of the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection."*[23]

23. The fact is, these matters arose for consideration since the very first day of this case. Since then this case has been case managed to a trial. Further after the letter was written the Claimant filed an affidavit in compliance with my directions in the further management of this case. I have already ruled on several procedural applications one of which, an application to re amend the claim form to include a claim for bias which will go to the heart of one of the main issues in this case. To date I have been managing the extent to which evidence and submissions will be made on that point as a result of my decision made on that application. To now make this challenge days away from the trial is too late.

24. Counsel suggested that if I recuse then the entire matter must be heard de novo. Two days will be vacated. It will deprive other litigants of two days trial or an audience with this judge to manage cases or settle cases by active management or judicial settlement conference. To

[23] Justice Jamadar as he then was observed in **McNicholls v JLSC** that: "An application to ask a judge or recuse him or herself is a serious matter. It ought to be raised at the first opportunity. Failure to do so or in this case have resulted in the continuing involvement of the judge in the manner and the commitment of time and effort to the case."

accede to this challenge would certainly lead to a waste of judicial and parties' resources which is inimical to the overriding objective.

Conclusion:

25. The fact that a litigant may not want a particular judge to hear his or her case is no ground for a recusal. There is no basis to have the judge step down unless there are good grounds to demonstrate apparent bias. Challenges such as the one made here is premised on speculation and surmise and do not cross the bar. If I harboured any doubts, in accord with standard practice and proposition of law my doubt would have resolved itself in favour of recusal. But there is no basis for any reasonable doubt. I cannot burden my brothers or sisters with this case needlessly nor do the administration of justice more harm than good by recusing thereby setting back the clock on the law of recusals and proper case management principles.

26. The application is dismissed and I will hear counsel on the question of costs.

Dated this 11th day of October 2012

Vasheist Kokaram

Judge

WALTER SINNOTT-ARMSTRONG

RECUSAL AND *BUSH V. GORE*

In any case as controversial and complex as *Bush v. Gore*,[1] the personnel on the Court make all the difference to the outcome. Consequently, judges in such cases need to be impartial for the trial to be fair, and they also must appear impartial. If the citizens believe that their President got into office through a biased procedure, they will lose respect for the President, for the Supreme Court, and for the whole legal system. These dangers make it critical for judges to recuse themselves where their impartiality could reasonably be questioned.

But when is it reasonable to suspect a judge's impartiality? Before *Bush v. Gore* came to trial, it was widely reported that two of Justice Scalia's sons were lawyers in firms representing Bush and that Justice Thomas' wife was collecting applications from candidates who wanted to be recommended by the Heritage Foundation for positions in a Bush Administration. These connections with Bush led to several calls for recusal, the most prominent of which was by Judge Gilbert S. Merritt of the United States Court of Appeals for the Sixth Circuit. Republicans dismissed Merritt's call as partisan, since he was an old friend of the Gores and a contender for the Supreme Court. They also denied that such calls were reasonable. Justices Scalia and Thomas apparently agreed, because they did not recuse themselves or even disclose their conflicts of interest.

The public part of this debate lapsed into superficial rhetoric, but the issues are critical, so I want to determine the real force of these charges. To do so, we need to look at both the law of recusal and its purpose. In the end, I will argue that Justices Scalia and Thomas were and should have been required by federal law to recuse themselves in the case of *Bush v. Gore*.

[1] 531 U.S. 1048 (2000).

Law and Philosophy **21:** 221–248, 2002.

I. RULES OF RECUSAL

The governing law is Section 455 of Title 28 of the United States Code. Many grounds for disqualification are listed, but the crucial passages read,

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself [when] . . . (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

The word "shall" makes this law mandatory. Recusal in the specified circumstances is not just nice. It is required.

There is no reference to either party in the case raising the issue of recusal, so no official challenge is needed. Even if neither party mentions recusal or any conflict of interest in court, and even if both parties openly waive any objections, the judge still has a duty to "disqualify himself" all by himself.[2]

The circumstances when recusal is required are quite broad. Subsection (b)(5)(iii) is more specific, but it covers a lot. This subsection refers to "an interest" without any limit on the kinds of interests that might require recusal, except that the interest must be substantial enough to be "substantially affected". The "third degree of relationship" is defined to include great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.[3] Subsection (b)(5)(iii), thus, applies to interests of a judge's spouse's niece's husband. This breadth must have been intentional, because it is explicit.

Subsection (a) is even more general. It was added in the 1974 revisions of the Code, presumably to cover further cases. Subsection (a) is not restricted to interests or to particular relationships. It applies to any grounds that might lead any reasonable person

[2] In addition, judges are required to disclose any facts that might be grounds for recusal, as Justice Scalia himself recognizes in *Liteky v. United States*, 510 U.S. 540, at 548 (1994). Justices Scalia and Thomas did not officially disclose their conflicts of interest in *Bush v. Gore*.

[3] Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, *Judicial Conduct and Ethics*, Third Edition (Charlottesville, Virginia; Lexis Law Publishing, 2000), p. 128.

to question the judge's impartiality. To question a judge's impartiality is not to believe that the judge is partial but is only to doubt or suspect the judge's impartiality. Moreover, because of the term "might", there is no need for anyone actually to question the judge's impartiality. There is also no need for all reasonable people to agree. What is required is only that someone could suspect the judge's impartiality without being unreasonable.

Subsection (b)(5)(iii) applies only when the circumstance "is known by the judge", but no such restriction appears in subsection (a). A judge is, therefore, required to recuse himself when his impartiality might reasonably be questioned even if he does not know that his impartiality might reasonably be questioned.[4] If the judge had no way of knowing that his impartiality might reasonably be questioned, then he would presumably not be subject to personal sanctions; but the judge's decision could still be vacated as a violation of subsection (a).

Another striking feature of subsection (a) in contrast with (b) is, as Justice Scalia says, that "what matters is not the reality of bias or prejudice but its appearance."[5] The relevant appearance is not subjective. It does not matter whether any observer, reasonable or not, actually doubts the judge's impartiality. It also does not matter whether the judge actually has any bias. As Justice Scalia says, "Since subsection (a) deals with the *objective appearance* of partiality ... the judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so."[6] Thus, nobody's actual subjective states matter.

Why don't all suspicions count? Because, if every suspicion mattered, then parties could disqualify any unwanted judge by spreading baseless rumors. This would be easier for those with connections to the media. To prevent such differential ability to shop for the most favorable judge, the law must count only reasonable doubts.

When is a suspicion "reasonable"? Here's one common test from a 1988 federal case: "In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person,

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[4] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

[5] *Liteky v. United States*, 510 U.S. 540, at 548 (1994).

[6] *Liteky v. United States*, 510 U.S. 540, at 553 note 2 (1994).

knowing and understanding all the facts and circumstances, would believe."[7] The point is that a doubt is unreasonable if it would disappear after the doubter became better informed.

But when would fully informed people have suspicions? Some examples are clear. It is not reasonable to question the impartiality of a judge for no reason at all. Since most judges usually are impartial in the required ways, an informed person needs at least some positive reason for suspicion. Moreover, the reason for suspicion must be strong enough. Everyone should admit that distant connections to minor interests are not enough to disqualify judges. At the other extreme, it seems clear that judges should be disqualified when their decisions could double their net worth or send their spouse or child to prison.

Such simple examples cannot answer the general question: When is a reason for suspicion strong enough? One answer is given by Justice Kennedy: "For present purposes, it should suffice to say that ..., under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute."[8] This standard would make recusal very rare, since a factor that inclines a judge towards one side in a case is almost never so strong that "a fair-minded person" literally "could not" set it aside. One might want recusal to be rare, but it should not be this rare. If the judge "could" set aside an aversion but is unlikely to do so, a trial under that judge would hardly be fair. Thus, Justice Kennedy's standard is too permissive.

A better standard is hard to formulate. Any precise standard will be controversial, for the law on this issue is not clear or settled. Nonetheless, we can list some factors that are relevant. The reasonableness of a suspicion is bound to depend somehow on the likelihood that the suspicion is correct. This makes it reasonable to question a judge's impartiality when circumstances create a significant risk that the judge will not set aside prejudices or disregard interests.

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[7] Judge Cardamone in *Drexel Burnham Lambert*, 861 F.2d 1307, at 1309 (1988).

[8] *Liteky v. United States*, 510 U.S. 540, at 558 (1994). Justice Blackmun joined this dissenting opinion.

Some relations and interests create more risk than others. The closer the relationship, the more minor the interest that suffices to raise reasonable doubts. An interest of the wife of the nephew of a spouse might not be sufficient, whereas the same interest would be enough if it were the interest of a spouse or child. Why? Presumably because love of children and spouses is normally stronger than love of spouses' nephews' wives, so interests of closer relatives would be more likely to affect judges' decisions.

The kind of interest matters, too. Most recusal laws focus on finances, because the interest in money is widespread and strong. However, other interests can be just as strong, especially for some people. Professional interests are dear to the hearts of judges, who could often make more money in private practice. This suggests that financial and professional interests of spouses and children create more risk of bad decisions by judges than do other interests of other people. That explains why the most common recusals are when a case could affect the personal finances or professional career of the judge or a spouse or child.

The next question asks when such risks become significant enough to require recusal. The law is not clear here, but we can compare other areas where risks are assessed. In medicine, traffic control, and bungee jumping, which risks are significant depends on what is at stake. A very low probability of death can be a significant risk even when a much larger probability of a bruise is not. Similar considerations affect the need for recusal. Reasonable people will weigh what might be gained by recusal against what might be lost. Even a minor appearance of partiality could be grounds for recusal in important cases, such as felony trials, whereas the same factors might not be significant enough to warrant recusal in relatively trivial civil suits.

On the other hand, we might have to put up with more risk of unfairness when recusal would create practical problems, such as when no other judge is available to try the case. This sometimes happens in rural districts where alternative judges are hard to find and in cases involving utility rate hikes or tax increases that would affect every judge.[9] However, this rule of necessity has no force when enough other judges are ready to try the case.

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[9] Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, p. 112.

None of this provides a complete test of when recusal is required, but it should be enough for the case at hand. The reasons to question the impartiality of Justices Scalia and Thomas in *Bush v. Gore* are financial and professional interests of their sons and spouse. These relations are clearly covered under 28 U.S.C. §455 (b)(5). These kinds of interests are adequate for recusal in many other cases. Moreover, the implications of *Bush v. Gore* could not have been greater. Public scrutiny could not have been more intense. If the Justices failed to recuse themselves when necessary, there was much to lose, including the reputation of the Supreme Court, the sovereignty of Florida, and so on. These dangers make even the slightest risk of impropriety significant. In comparison, much less would be lost if Justices Scalia and Thomas had recused themselves when it was not absolutely necessary. The election would still have been resolved, state sovereignty and the appearance of impartiality in our highest court would have been saved, and so on. The Supreme Court had an opportunity to display their devotion to impartiality, principle, and federal law in a way that could have gained them tremendous respect. Given such potential gains and losses, even a minor ground for suspicion was enough to require recusal in *Bush v. Gore*.

II. RECUSAL IN THE SUPREME COURT

Since 28 U.S.C. §455 applies to "Any justice, judge, or magistrate of the United States", Supreme Court Justices are also bound by these rules. They recognize this, as is shown by cases where they have recused themselves. Recently, Justice Thomas recused himself from hearing a 1996 appeal challenging the refusal of Virginia Military Institute to admit women, apparently because his son was a student there.[10] Justice Thomas seems to have thought that his son had "an interest that could be substantially affected" by whether women went to Virginia Military Institute. It is not clear what that interest was supposed to be, but it cannot have been very great. Thus, Justice Thomas seems committed to the position that minor interests of one's children are adequate to raise reasonable questions about

[10] *U.S. v. Virginia*, 518 U.S. 515 (1996).

the partiality of a Supreme Court Justice even in cases much less important than *Bush v. Gore*.

The Supreme Court has not always held itself to such high standards, especially when relatives of Justices are partners of attorneys before the Court. This ground for recusal has received more written comment by the Supreme Court than any other. It is worth looking at what they say in order to determine whether there is any good reason to exempt Supreme Court Justices from the usual rules of recusal.

Justice Rehnquist's Statement

In 2000, the Supreme Court had to decide whether to accept an expedited review of a district judge's ruling against Microsoft. Chief Justice Rehnquist's son James is a Boston lawyer who was helping to defend Microsoft in a separate, private antitrust case. Nonetheless, Justice Rehnquist refused to recuse himself and took the unusual step of issuing a statement of his reasons for his refusal.[11] The fact that Justice Rehnquist felt the need to issue this statement is evidence that he knew that there was an appearance of impropriety. Otherwise, why say anything? But Justice Rehnquist argued that any suspicions were unreasonable: "there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court." Why not? Justice Rehnquist gave three arguments.

First, "Microsoft has retained [his son's firm] on an hourly basis at the firm's usual rates." This argument is inadequate, since there are obviously other less direct ways for his son's firm to benefit financially. Moreover, financial interests are not the only ones that count under 28 U.S.C. §455.

Rehnquist seems to have been aware of these problems, since he went on to add a second argument that "it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he [James Rehnquist] nor his firm would have done any work on the matters here." This argument is no better than the

[11] *Microsoft Corporation v. U.S.*, 530 U.S. 1301, at 1301–1303 (2000). All quotations in this subsection are from this statement by Justice Rehnquist.

first. The absence of "any work on the matters here" hardly shows that the Supreme Court decision would not affect the case that James Rehnquist was working on and, thereby, affect James Rehnquist's reputation and welfare.

Justice Rehnquist responds, "I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court." That's not the point. Nobody claims that the problem is that simple. The bare fact that Microsoft is a client in both cases is not enough to create a reasonable appearance of impropriety. However, both cases here are antitrust cases. The problem is not just that the client is the same but also that the cases fall in the same area of law and raise similar issues. This complex of connections could make a well-informed and reasonable individual suspect that the Supreme Court decision in the government's case might be used as a precedent in the private antitrust case argued by James Rehnquist.

Justice Rehnquist adds, "the impact of many of our decisions is often quite broad", so the "fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides." However, the present situation involves more than speculation about a possible future case. James Rehnquist was currently working on an actual related case. That is what distinguishes this conflict from other cases whose impact is "quite broad" in the abstract.

Justice Rehnquist's third argument concerns how often Supreme Court Justices would have to recuse themselves if 28 U.S.C. §455 were interpreted broadly enough to apply to him in this case. Justice Rehnquist refers to "the negative impact that the unnecessary disqualification of even one Justice may have upon our Court." Recusal creates inconvenience even in lower courts, but the "negative impact" is said to be much greater in the Supreme Court. Why? "Here – unlike the situation in a District Court or Court of Appeals – there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance

of a lower court decision by an equally divided court." However, if a Justice ought to recuse himself, then it is not clear why it is a "negative impact" for the Court to be "deprived of the participation of" that particular Justice. Maybe that Justice would have much to add to the Court's deliberations or even has special expertise in that area of law, but that usefulness cannot prevent the appearance of partiality.

The argument then comes down to Justice Rehnquist's claim that it is bad not to have all nine Justices. Why? Nine is not a magic number. Seven would be considered enough, if not for tradition.[12] Justice Rehnquist does insist that the Court should not have an even number of members. However, the number would not be even if two Justices stepped down, so this argument cannot justify Justices Scalia and Thomas' decisions not to recuse themselves. More generally, it is not clear what would be so bad about an even number of Justices. This would make it less likely that lower courts, including state courts, would be overruled; but it is not clear why that would be bad. Anyway, this argument hardly seems available to Justices such as Rehnquist, Scalia, and Thomas, who usually speak strongly in favor of states' rights.

Consequently, Justice Rehnquist does not present any good reason not to have recused himself in the Microsoft case. But that was only one case. The more general and important lesson is that he has given no good reason why Supreme Court Justices should not be subject to the same rules of recusal as other judges and justices.

The 1993 Policy

The kind of conflict that Justice Rehnquist faced in 2000 is not unusual these days, since several Justices now have spouses or children who practice law. This recurrent problem led seven of the Justices, including Justices Scalia and Thomas, to sign a general policy on November 1, 1993, regarding recusal when relatives are

[12] The number of Supreme Court Justices is set by Congress and has been as low as five (in 1801), although it has remained nine since 1869. The number has also been even: six in 1789–1801, six in 1802–1837, and ten in 1863–1866. The Court had seven Justices in 1866–1869.

partners of attorneys before the Court.[13] This policy tries to carve out exceptions for the Justices that federal law doesn't allow.

In their 1993 policy, the Justices say, "We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger these provisions" of 28 U.S. §455. The Justices conclude, "Absent some special factor, therefore, we will not recuse ourselves by reasons of a relative's participation as a lawyer in earlier stages of the case." This strangely shifts the burden to anyone who would ask for recusal, whereas the burden lies elsewhere for other judges and justices.

What kinds of special factors would trigger recusal? "One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect 'his' or 'her' case and its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation." This admits that professional reputation is a very significant interest. "Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here." The Justices agree that they must recuse themselves in these circumstances.

The Justices admitted that "in virtually every case before us" there is "a genuine possibility that the outcome will have a substantial effect upon each partner's compensation." However, they considered it an adequate safeguard that "we shall recuse ourselves from all cases in which appearances are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares."

That is the policy, but it is also worth considering the procedure by which it was made. Courts set many of their own institutional rules, but it still seems strange for a court to make its own rules of judicial conduct, since the judges' own interests are clearly at stake.

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[13] "Statement of Recusal Policy", Supreme Court of the United States (November 1, 1993), signed by Justices Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Stevens, and Thomas. Justices Blackmun and Souter did not sign. All quotations in this subsection are from this statement unless otherwise noted.

By their own standards, the Supreme Court Justices should all have recused themselves from this decision about how to interpret 28 U.S. §455. A policy could still have been formulated, since they could have set up a Special Master or asked some other person or group to make a policy for them, possibly with input and subject to approval. Their actual procedure makes it hard to see how the Supreme Court statement could change the rules in force.

In addition to the procedure in making this policy, the content of the Supreme Court policy is also questionable. Their policy is, admittedly, in line with many precedents, although there are some precedents on the other side.[14] Also, Judicial Conference advisory opinions and at least one *en banc* appeals court decision[15] suggest that judges should recuse themselves even if a relative's involvement in a case is substantially less significant than the Court's policy covers. Under the Court's 1993 policy, for example, a justice's close relative could have been the second chair who argued the case below, and the Justice would still sit.

The Court might seem to anticipate that problem in requiring "written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares." However, it is not that easy to sequester fees related to Supreme Court cases. If the firm gets a big fee from a Supreme Court case, that frees up funds in other parts of the firm's budget. Funds are fungible and movable here as in other budgets. Moreover, partners can be compensated in many ways. Relatives can benefit in indirect and intangible ways from the reflected glory of a Supreme Court win.

The Justices do offer some justifications for treating themselves differently in recusals: "In this court, where the absence of one justice cannot be made up by another, needless recusal deprives litigants of the nine justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the *certiorari* process, requiring the petitioner to obtain ... four votes out of eight instead of four out of nine." The first two arguments have already been criticized, except for the

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[14] See Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 132–133, citing *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984).

[15] *In Re: The Aetna Casualty and Surety Co.*, 919 F.2d 1136 (6th Cir. 1990).

suggestion that litigants are "entitled" to nine justices. That cannot be right, since it would rule out all recusals (and illnesses). The problems for the *certiorari* process are serious.[16] However, this argument does not apply to the situation of Justices Scalia and Thomas in *Bush v. Gore*, so I will not discuss *certiorari* here.

The Justices also expressed concern about the possibility of parties "strategizing" recusals by picking particular law firms with an eye toward forcing the recusal of an unwanted justice. This is a problem, but again it does not apply to the situation of Justices Scalia and Thomas in *Bush v. Gore*. Bush clearly did not pick his lawyers in order to force Justices Scalia and Thomas to recuse themselves. Bush wanted those two on the Court.

The Justices conclude, "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage." Of course, the Supreme Court need not use "excess" caution. However, as I argued in the previous section, much caution is required at least in prominent cases where judges have close relations to affected parties, the interests at stake concern money or reputation, the case has grave consequences, and it is subject to intense public scrutiny. These factors together make it reasonable to doubt the impartiality of Justices when "a relative is a partner in the firm before us." A failure to recuse in such cases thus violates the mandate in 28 U.S.C. §455(a). In addition, interests of such relatives "could be substantially affected", so failure to recuse would violate 28 U.S.C. §455(b)(5)(iii) regardless of appearances. The Supreme Court cannot change these rules by issuing any policy statement. To apply 28 U.S.C. §455 to such cases is not "to go beyond the requirements of the statute". It is just to enforce existing law.

III. RATIONALES OF RECUSAL

To understand 28 U.S.C. §455 and its application to the Supreme Court, it is useful to consider the reasons for requiring recusal. There

[16] See Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 *Minn. L. Rev.* 657 (1996).

are two main rationales: a consequentialist one and a deontological one.

The Appearance of Impartiality

The House Report on 28 U.S.C. §455(a) says that this statute was "designed to promote public confidence in the impartiality of the judicial process."[17] The Supreme Court ascribes a similar goal: "People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."[18] On this understanding, the point of the statute is to have good consequences on public attitudes towards the courts.

This consequentialist rationale explains the focus on appearance.[19] What affects people's attitudes is what they believe about judicial impartiality, not whether judges really are impartial. The consequentialist rationale also suggests that recusal is more important in high-profile cases like *Bush v. Gore*. Such cases have greater consequences on public attitudes.

Why is public confidence so important? The answer is that the Supreme Court relies on public confidence for its authority. As Justices O'Connor, Kennedy, and Souter say in another context,

> the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[20]

If the Supreme Court loses the confidence of the public, it will not be able to function effectively.

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[17] House Report at 6354–55.

[18] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, at 864–865 (1988) (note omitted). See also *Drexel Burnham Lambert*, 861 F.2d 1307, at 1312 (1988).

[19] Appearances are also important to consequentialists in other contexts. For a wonderful discussion, see Julia Driver, "Caesar's Wife: On the Moral Significance of Appearing Good," *The Journal of Philosophy*, vol. 89 (July 1992), pp. 331–343.

[20] Joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 865 (1992).

Impartiality

Nonetheless, the appearance without the reality of impartiality would not be sufficient. One reason is that the rules of recusal also have another rationale, which raises deontological concerns about due process. Even if the system would not break down or suffer any bad effects from a judge failing to recuse, the process still seems unfair unless the judge is impartial. Legislators, in contrast, are not expected to be impartial. They are allowed to vote for a bill just because it favors their own district. Some citizens see their Congressional representatives as no more than advocates for their state or district. In contrast, it has long been held that judicial processes cannot be fair unless judges remain impartial between the parties in a case before them (and possibly also among others who are affected by the case).

Unfortunately, most people misunderstand impartiality. Impartiality among people does not require neutrality among values. To see this, compare basketball referees. Some referees restrict their calls to the most egregious fouls because the game is more exciting when the play continues without as many interruptions. Other referees put less emphasis on the value of excitement and more emphasis on the value of safety, so they call more fouls in order to prevent injury (and maybe also to teach respect for the rules). Most referees recognize the value of both excitement and safety, but they balance these values in different ways and sometimes adjust their weights to specific contexts, such as whether the game is between professionals or fifth graders. None of these methods of calling fouls reveals any partiality towards either of the teams playing in a particular game. Even if one team is more likely to win with a referee who calls fewer fouls, the referee can call the game that way for the sake of excitement without being partial to either team. This shows that one can reach decisions on the basis of values that favor one side over the other without failing to be impartial in any sense that is required of basketball referees.

Analogously, moral convictions do not make a judge partial in any sense that would disqualify him or her as a fair arbiter. A judge who is committed to freedom and equality is not partial. This point has often been recognized: "A judge's own moral convictions or atti-

tudes about societal matters are generally insufficient to disqualify a judge."[21] Similarly, a commitment to a certain method of interpreting the law, such as strict construction or original intent, does not make a judge partial in the way that requires recusal. If such methods are not unfair, then prior commitment to such a method cannot introduce unfairness into a procedure. Besides, if neutrality with regard to moral values or legal methods were required of judges, almost every judge would have to recuse himself or herself in almost every case. So the rules of recusal should not require that kind of neutrality.

The kind of impartiality that is and should be required is more practical because it is more limited. To understand the required kind of impartiality, it is useful to start with a general analysis of impartiality. The most illuminating analysis is presented by Bernard Gert, who says, "A is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced by which member(s) of G benefit or are harmed by these actions."[22] On this analysis, all talk about impartiality is elliptical. There is no such thing as simply being impartial. Impartiality must be specified both with respect to the kind of action and with regard to the group toward whom one is impartial in this respect. For example, basketball referees are required to be neutral with respect to rule violations and with regard to the competing players. They can favor excitement for spectators over safety for players (on either side) without being partial in this respect. Again, legislators should be impartial among their various constituents, but they need not be impartial between their own district and other districts. They can argue strongly for public projects in their own districts, as long as they do not go too far. Senators may also favor United States interests over other nations when they consider treaties. They are not required to be impartial among various countries.

The same relativity applies to judges. Judges are allowed to favor the interests of their own country over other nations. They may favor the rights of parties in the case over the interests of spectators when

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[21] Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, p. 113.

[22] Bernard Gert, *Morality* (New York; Oxford University Press, 1998), p. 132. Much of what I say about impartiality in this section is indebted to Gert.

they exclude reporters and others from the courtroom. What are forbidden are only personal biases and prejudices with respect to the parties in the case.

Not all personal biases are forbidden. Some intra-courtroom biases are allowed, such as when a judge finds a party or lawyer in contempt.[23] Contempt can create animosity in the judge, but the judge may still carry on with the case. Otherwise lawyers could get rid of unwanted judges by showing contempt. Nothing like this is at issue in the case of *Bush v. Gore*, so I will usually ignore this qualification and say simply that judges must be impartial between the parties in the case.

A crucial term in Gert's analysis that needs to be clarified is "influenced". This term can be interpreted in two main ways. One could say that a factor influences a judge only when it makes a difference to what the judge decides. Alternatively, one could say that a judge is influenced by any factor that pushes the judge towards one side, even if that factor does not make a difference to what the judge decides in the particular case. The second interpretation makes influences like forces. If I push hard on my parked car, I do exert a force even though it makes no difference to the motion of the car. Similarly, an influence can incline a judge towards a certain decision without making any actual difference to what the judge decides in the particular case.

The same contrast comes out when a basketball referee's son is on one of the teams that are playing. When the referee calls a foul against the other team, the referee still might have called the same foul even if his son had not been on the team that benefited. The referee did have more motivation to call fouls against that opposing team, but that additional motivation might not have made any difference in the specific call. In describing situations like this, it is natural to say that the decision-maker (such as the referee) is not impartial even though the decision (such as the particular call) is impartial.

What we require from judges is not just that their decisions are impartial but also that they are impartial as decision-makers. One reason is that, if they are not impartial as decision-makers, there is a danger that their decisions will not be impartial. Risks must

[23] See Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 115–116.

be distributed fairly. In addition, if the judge is not impartial as a decision-maker, then most people in the public will not be able to determine whether the judge's decision is impartial, that is, whether the judge's motivations really did make a difference to the decision. Since we want a procedure in which the public can have confidence, appearances are crucial. For such reasons, 28 U.S.C. §455 should be interpreted so that a prejudice in favor of one party over the other makes a judge partial even when that prejudice does not change the judge's decision in a particular case.

IV. APPLICATION TO JUSTICE SCALIA

These general standards apply to Justices Scalia and Thomas in the particular case of *Bush v. Gore*.[24] Let's start with Justice Scalia.

At the time when *Bush v. Gore* came before the Supreme Court, Justice Scalia's son Eugene, age 37, was a partner in the Washington office of Gibson, Dunn, and Crutcher. Another partner in the same firm was Theodore B. Olson, the attorney who twice had argued before the Supreme Court on behalf of Bush.

Another of Justice Scalia's sons, John, age 35, had accepted a job offer in the Washington office of Greenberg Traurig. A partner in that firm's Tallahassee office is Barry S. Richard, who represented Bush in Florida.

Neither son was directly involved in the case of *Bush v. Gore*. John Scalia was not going to join the involved firm until 2002. Eugene Scalia specialized in labor law in a firm with 242 partners, and his firm had submitted assurance that Eugene would not benefit financially from any case before the Supreme Court, as required by the Supreme Court's 1993 policy statement.

Nonetheless, Justice Scalia's sons could substantially benefit from a ruling for Bush in several indirect ways. First, any firm that wins such a prominent case is bound to build its reputation and thereby attract more and better clients who can be charged more. That is one reason why firms take on such cases, often for less than their usual fees. Thus, Eugene Scalia, as a partner in Olson's

[24] The following information about Justices Scalia and Thomas is drawn from a variety of media reports.

firm, is very likely to benefit from a victory by Olson on behalf of Bush. (Some recent evidence of non-financial benefit is that Bush appointed Theodore Olson to be solicitor general.) John Scalia would probably also benefit less directly, since anyone in a law firm knows that their welfare is tied to the welfare of the firm. When the firm does better, it has more funds available for raises and bonuses and better offices, as well as more slots for promotion. Admittedly, nobody could say that either of Justice Scalia's sons would get a raise as a direct result of the Supreme Court deciding for Bush. However, nothing like that is required for recusal. Any interests are covered by 28 U.S.C. §455, not just direct financial ones. There were many ways for Justice Scalia's sons to benefit from a decision in favor of Bush. Together these benefits could be substantial. Hence, subsection (b)(5)(iii) required recusal.

Subsection (a) focuses on reasonable appearance rather than actual benefits. Even if Eugene and John Scalia did not actually benefit from the Supreme Court's decision in *Bush v. Gore*, many observers did suspect that Eugene and John were likely to benefit somehow. The reasonableness of this suspicion is shown by the fact that so many smart people who knew the facts were suspicious. Unless all of those who doubted Justice Scalia's impartiality were being unreasonable, the appearance of impartiality was reasonable enough to violate the legal requirements of 28 U.S.C. §455(a).

The same arguments would apply in any important, high-profile case where a Justice's child or spouse is a lawyer in a firm that is representing either party before the Court. Recusal might be required in other cases as well, but it is at least required in such prominent cases.

V. APPLICATION TO JUSTICE THOMAS

Justice Thomas' conflict of interest was similar, but some differences matter. At the time of *Bush v. Gore*, the Justice's wife, Virginia (Ginni) Thomas, was employed by the Heritage Foundation. Her job was to collect applications from people seeking employment in a possible Bush Administration.

Unlike Justice Scalia, Justice Thomas would not be covered by the Supreme Court's 1993 policy statement. Moreover, Justice Thomas' wife was in daily contact with the Justice. Justice Thomas' own welfare was also more closely tied to that of his wife than Justice Scalia's welfare was tied to that of his sons. If Mrs. Thomas' recommendations for the new government were followed, not only would her organization be better off, but she would probably have a more prominent position in that organization, in addition to many friends inside the new government. The benefits to her and, hence, indirectly to Justice Thomas are not limited to finances, and they could be substantial.

In response to such charges, "Mrs. Thomas said ... that her recruitment efforts were bipartisan and not on behalf of the Bush campaign." However, Mrs. Thomas herself acknowledged that "her search was likely to generate more interest among Republicans, because of the Foundation's conservative orientation."[25] So what makes it bipartisan?

A spokesperson for the Heritage Foundation, Khristine Bershers, pointed out that Virginia Thomas asked some Democrats to submit resumés.[26] That is irrelevant. Every informed person knows that the Heritage Foundation has strong ties to the Republican Party. Even if Mrs. Thomas and the Heritage Foundation did solicit resumés from a few Democrats, and even if Bush does include some token Democrats in his administration for public relations purposes, that does not change the fact that many more resumés were submitted by Republicans, many more Republicans were recommended, and many more of the Heritage Foundation's recommendations have been followed by Republican administrations than by Democratic administrations. After an administration takes over, those who were recommended and entered the government are then more likely to listen to the Heritage Foundation when they suggest policies. This was true in the past, and we and Justice Thomas had no reason to doubt that it would continue to be true in a Bush Administration.

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[25] "Contesting the Vote: Challenging a Justice", by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

[26] http://www.cnn.com/2000/LAW/12/12/supreme.court. conflict/#2

Bershers also said, "Mrs. Thomas' pay at the Heritage [Foundation] won't be affected by whether Bush wins or loses his Supreme Court case."[27] That's not the point. Mrs. Thomas can have important interests in the outcome of the case even if her salary would not be directly affected.

Mrs. Thomas is reported to have responded, "There is no conflict here." because she "rarely discussed court matters with her husband."[28] However, "rarely" is not good enough, since *Bush v. Gore* is just the kind of case that most people discussed even if they never talked about any other legal case. Besides, it does not matter whether the Thomases ever discussed the particular case. They surely discussed the election at some time, so Justice Thomas knew very well which candidate was favored by his wife and by her employer. He also knew how her interests would be served by a Bush victory. She didn't need to tell him.

Ari Fleischer, a spokesperson for the Bush transition team, responded to the charges by saying, "Like many professional women, Mrs. Thomas should not be judged by her spouse."[29] Of course not, but that is not the issue. Nobody is judging Mrs. Thomas or saying that she did anything wrong. It is her husband who should have recused himself, and the reasons for recusal cannot be separated from his spouse's professional interests, since this is just the kind of case that 28 U.S.C. §455 (b)(5)(iii) was meant to cover.

Instead of actual interests, 28 U.S.C. §455(a) focuses on the appearance of partiality. Even if Mrs. Thomas did not actually benefit from the Supreme Court's decision in *Bush v. Gore*, many smart and informed members of the public did suspect that she was likely to benefit in some indirect way. This makes their suspicions seem at least reasonable. That requires recusal according to 28 U.S.C. §455(a).

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[27] http://www.cnn.com/2000/LAW/12/12/supreme.court. conflict/#2

[28] "Contesting the Vote: Challenging a Justice", by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

[29] "Contesting the Vote: Challenging a Justice", by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

It is worth recalling that Justice Thomas did recuse himself in the Virginia Military Institute case, because his son was a student there. If that was enough to create a reasonable suspicion of partiality, then surely Virginia Thomas' ties to Bush through the Heritage Foundation must be more than enough to create reasonable doubts about his impartiality.

Consequently, to protect public confidence and to ensure a fair procedure, Justices Scalia and Thomas should have recused themselves in *Bush v. Gore*. Their failures to do so lend new force and meaning to the words in Justice Stevens' dissent: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[30]

VI. OBJECTIONS

Not everyone will agree. Even those who accept my interpretation of the rules of recusal, and their rationales might raise several questions about how those general standards apply to the particular case of *Bush v. Gore*.

No Effect

Some critics have responded that the interests of Justice Scalia's sons and of Justice Thomas' wife were not significant enough to affect how they decided a case as important as *Bush v. Gore*. Besides, they continue, Justices Scalia and Thomas were already disposed to favor Bush on ideological grounds, so the personal interests of their relatives made no difference to what they decided in that case.

I admit that Justices Scalia and Thomas probably would have decided for Bush even if their relatives were not associated with Bush. They had plenty of other incentives to want Bush to win.

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[30] *Bush v. Gore*, 531 U.S. 1048, slip op. at 7 (2000). Justice Stevens was talking about a different issue regarding lower courts, but his fears also apply to recusal in the Supreme Court.

However, my claim is not that the Justices' conflicts of interest changed how they decided *Bush v. Gore*. Even if their decision was not affected, that would show at most that their decision was impartial. Federal law also requires the decision-maker to be impartial, for reasons discussed above. Twenty-eight U.S.C. §455 demands that Justices Scalia and Thomas recuse themselves if substantial interests of their close relatives inclined them towards one party or the other, even if their decisions were not affected by those motives. This stronger standard of impartiality is not met by Justices Scalia and Thomas, so they were required to recuse themselves.

Necessity

Partiality that would otherwise require recusal might be allowed if it is necessary for the legal system to work. If we need some judge to try a case, and a certain judge is no more partial than anyone else, then this judge will be allowed, despite partiality. Some defenders claim that such a rule of necessity applies to Justices Scalia and Thomas.

It does not. It would apply if my argument were that Justices Scalia and Thomas have moral, political, or legal views that affected their decision. If such views were grounds for disqualification, those grounds would rule out all judges in this case and in too many other cases. Similarly, the rule of necessity would undermine my argument if I claimed that Justices Scalia and Thomas had to recuse themselves just because they had a stake in the outcome of the election. Every Supreme Court Justice had a stake in the 2000 election. It is no secret that the President makes policies that affect Supreme Court Justices. Also, everyone wants colleagues with whom he or she can work easily. The Republican Justices would probably gain such colleagues if Bush won, and the Democratic Justices would probably gain such colleagues if Gore won. Thus, if we required recusal on those grounds, we would have no Justices left to try the case. Such grounds are too general.

My argument is different. We will have plenty of Justices left if judges are required to recuse themselves only when they have special connections through family members to parties in the case. Some other Justices might have had close relatives whose interests

were substantially affected. If so, those other Justices also should have recused themselves. However, no such connections have come to light, even when Republicans were trying to defend Justices Scalia and Thomas. Thus, there is no reason to believe that the normal rules of recusal would make the Supreme Court unable to try this case, so the rule of necessity cannot justify an exception to the normal rules of recusal in this case.

No Complaint

Another common response is that Gore's lawyers could have raised formal objections during the trial, but they did not, even though they probably knew of these connections through the media. This made it reasonable for Justices Scalia and Thomas to assume that Gore's lawyers did not want them to recuse themselves.

However, the lack of formal complaint could have been due to other factors. Gore's lawyers might have believed that it was too risky to raise the issue if the Justices were going to refuse anyway and then might hold their request against their client. Public opinion also might turn against them for citing such a technical legal ground in a national election.

In any case, even if the parties do explicitly or implicitly waive any objections, the judge still must recuse himself in many cases. The process will still be unfair if the judge is partial. The public will still lose confidence without recusal. That is why 28 U.S.C. §455 does not require any formal complaint in order for judges to be required to recuse themselves.

Et Tu

Popular discussions often include one more objection: The Florida Supreme Court abused its power, so it should have been overturned. Some critics add that Gore (and Clinton) created even more appearance of impropriety in many past acts, so they are in no position to raise such objections against Justices Scalia and Thomas.

All of this is irrelevant. I need not defend the Florida Supreme Court or the arguments by the dissenters in *Bush v. Gore*. The issue here is procedure. Regardless of how the case should have been decided, federal law requires that it be decided by Justices with

both impartiality and the appearance of impartiality. My point is that Justices Scalia and Thomas lacked those features, so they should not have tried the case, even if other impartial Justices would or should have overturned the Florida Supreme Court without their help.

The vices of Gore and Clinton are also irrelevant to this argument. Cases like *Bush v. Gore* are often hard to separate from political preferences. However, my argument does not depend on any political preferences. Whether they supported Gore or Bush, any Justices with family connections to either party should have recused themselves, no matter how that might have affected the outcome of the case. The issues here concern due process, so they cannot be settled by anyone's preference for a certain outcome or dislike for prior acts that were not before the Court.

Too Late

A final response is that my argument is too little too late. Who cares whether Bush gained power legally after he has been acting as President for so long? The answer is that many American citizens care about whether their President is legitimate and whether their Supreme Court Justices follow federal law. Legal scholars also care about whether Justices who espouse strict constructionism practice what they preach. There has been a grave cost to public confidence in the Supreme Court, as reflected in the above quotation from Justice Stevens. The point of recusal and fair procedures generally is to protect this public confidence, which is crucial to the Court's authority. Justices cannot violate these rules of recusal without doing damage to the Rule of Law.

VII. WHAT SHOULD BE DONE?

Suppose that you agree with me that Justices Scalia and Thomas were required by federal law to recuse themselves in *Bush v. Gore*. They did not do so. Thus, they violated federal law. What can we do about it? Twenty-eight U.S.C. §455 does not specify any particular penalty or remedy for violations, so several alternatives are available.

Impeach the Justices

The only remedies mentioned in the United States Constitution are impeachment and removal from office. However, the Constitution limits the grounds for impeachment of federal officers to "Treason, Bribery, or other high Crimes and Misdemeanors" (U.S. Const. Art. II, §4).

This phrase is unclear about whether it covers failures to recuse when required by federal law. Such failures are akin to bribery in their rationale, but they are still not bribery. Such failures can cause great harm, but they are not crimes or misdemeanors in the usual sense. Still, some commentators suggest that "high Crimes or Misdemeanors" are whatever Congress wants them to be. If so, this phrase might include failures to recuse when required by federal law, since such failures are serious misconduct.

Nonetheless, precedents suggest that such failures are not adequate grounds for impeachment and removal. No Supreme Court Justice has ever been removed from office through the process of impeachment. Federal judges have only been removed for serious misconduct, such as felonies.[31] In addition, some opponents of impeachment argue that impeaching any Supreme Court Justice would make all Justices less likely to follow the law and protect unpopular rights against preferences of a majority that might impeach them.

These dangers are real, although they might be reduced in this case because an impeachment of Justices Scalia and Thomas would be for specific violations of federal law rather than for politically unpopular legal decisions. Still, impeachment could have dire consequences for the whole legal system. That is why I think that impeachment would be going too far, even if it is consistent with the law.

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[31] Edward J. Schoenbaum, "A Historical Look at Judicial Discipline", 54 *Chi.-Kent L. Rev.* 1, 1–10 (1977). It is reported that one New Hampshire judge was removed for drunkenness, but such exceptions are very rare.

Find Misconduct

Lesser penalties still might be appropriate. As in some state cases,[32] official findings of misconduct could be made publicly about Justices Scalia and Thomas. If such findings are not enough by themselves, they might be accompanied by some form of explicit criticism or censure.

Judges should be subject to such censure for failure to recuse only if the failure was willful. However, Justices Scalia and Thomas knew about their conflicts of interest and chose neither to recuse nor to disclose. So they cannot use this excuse.

Such public findings and censure would send the message that others will not stand by silently when Justices knowingly violate federal law. This might help to make judges act more responsibly and to restore some public confidence in the legal system.

Consequently, I believe that official, public findings and censure would be useful and appropriate. But who would do it? The other Justices on the Supreme Court? Congress? A special commission? In my view, any or all of these bodies could announce findings and censure Justices Scalia and Thomas. The point is to show that these Justices cannot get away with violating federal law. All of these official bodies are in a position to make that point.

Vacate the Decision

Instead of focusing on the Justices, some remedies focus on the case. Cases are often retried when a judge did not inform the parties about a conflict of interest and when the judge was required to recuse but failed to do so. This is and should be standard practice to ensure that a fair trial occurs at some time.

Unfortunately, there are serious practical problems with vacating the decision in *Bush v. Gore*. First, normally a failure to recuse is evaluated by an appellate court, but no court is higher than the Supreme Court. Future Supreme Courts could raise this issue. The four dissenters in *Bush v. Gore* are enough to put the case on the docket. Justices Scalia and Thomas would certainly have to recuse themselves from this new case. The four dissenters would then make

[32] Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 28–29.

up a majority that could reverse the previous decision and fashion a remedy. However, such moves could lead to a dangerous Constitutional crisis. Moreover, vacating the judgment in *Bush v. Gore* would leave it unclear who is President in 2000–2004. A new election could be held, but the risks would be immense. Besides, the losing party (Gore) has not asked for a retrial.

For these reasons, I do not favor vacating the judgment in *Bush v. Gore*. This remedy is consistent with the laws and precedents, but it would be too disruptive.

Recognize the Rules

Still, something must change, namely, the policy and practices of the Supreme Court. Why? To avoid repetition. Many people are calling for the government to clean up the ballots and the election system. There is more to clean up than that. The 1993 Supreme Court statement needs to be publicly revoked as a misinterpretation of the rules. It should be made clear that 28 U.S.C. §455 will henceforth be interpreted more strictly in accordance with its actual meaning. The Supreme Court needs to restore public confidence and set an example for other courts by announcing that Justices will recuse themselves when they face conflicts of interest like those of Justices Scalia and Thomas in *Bush v. Gore*. Federal rules require as much, and Supreme Court policy and practice must be brought back in line with those rules.

Nothing

Critics will likely respond that official findings of misconduct would tear our country apart. Policy changes could not be implemented without Supreme Court approval. So, they say, we should do nothing (other than maybe write academic articles).

This response is compatible with the illegitimacy of the Supreme Court decision and of Bush's presidency. Maybe it is too costly to do anything now, but that does not make it right in the first place. It is also dangerous to do nothing, because of the loss of confidence in the judicial system. Moreover, there is much to gain in the future from official findings now. Judges would abuse their power less often if they thought that they might be made to pay for abuses

by losing respect and legitimacy in the eyes of the public. Public opinion does have force with Justices, so it is worthwhile to inform the public about what these Justices did. Still, public opinion is not enough by itself. That is why I favor official findings of misconduct and revocation of the 1993 Supreme Court policy.

VIII. WHAT WILL BE DONE?

I am not so deluded as to believe that any steps like these will actually be taken. I would be as surprised as anyone if *Bush v. Gore* were retried or if Justices Scalia or Thomas were impeached or if any findings of misconduct were issued or if the Supreme Court renounced its 1993 policy. That is not how America works, unfortunately. My only claims are that official, public findings of misconduct are appropriate responses to this egregious violation of federal law and that the Supreme Court's 1993 policy needs to be revised. At the very least, these issues need to be considered seriously before anyone can know whether Bush gained power legally or whether the strict constructionists on our Supreme Court are hypocrites.[33]

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[33] Thanks to Nancy Crowe, Colin Macleod, Lynn Mather, Hal Rabner, and Tony Roisman for helpful comments on earlier drafts.

In memory of T.V. Satyamurthy, political scientist and iconoclast, who embodied much that is 'wild in human nature and warm in the human heart'.

India's Living Constitution

IDEAS, PRACTICES, CONTROVERSIES

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Contents

his country today has an idea or two about what his country's constitution ought to have, Granville Austin saw that as a dangerous situation!

18. We may note in passing that Pakistan, arising in roughly comparable circumstances, has had, and continues to have, difficulties in the matter of working a constitution grounded in Western law. Why Pakistan and India have taken such divergent courses in this domain is a question that cannot be addressed here.
19. When this argument was first presented publicly (29 Dec. 2000 at Indian Sociological Conference, Thiruvananthapuram, Kerala), Professor Surendra Munshi asked: 'If Gandhi was an "accident" in India, where else would he have been "normal"?' In one way, of course, Gandhi would have been normal anywhere, insofar as he did no more than realize something of what are universal human potentials, however extraordinary the manner and the magnitude of his effort. In another way, however, he has to be seen as a once-off quantum leap which did not get routinized: it was in a class by itself, non-replicable, and therefore it could not be seen as 'normal' anywhere. It is my conflation of these two angles on Gandhi that had Munshi baffled.
20. Rajni Bakshi, *Bapu Kuti: Journeys in Rediscovery of Gandhi*, Penguin, New Delhi, 1998, has a recent report on the wide, if thin, but vitalizing spread of Gandhi's influence.
21. On 21 Sept. 2001, the Constitution Bench of the Supreme Court unseated Ms Jayalalitha as Chief Minister of Tamil Nadu on grounds of conviction in criminal cases of corruption, despite strong endorsement at the polls. 'The "will" of the people prevails', the Bench said, 'if it is in accordance with the Constitution.' *The Hindu*, 22 Sept. 2001.
22. In the seminar preparatory to this volume, Imtiaz Ahmad, 'The Constitution and Minorities,' focused on these issues too.
23. Ulf Hannerz, *Transnational Connections: Culture, People, Places*, Routledge, London, 1996, discusses a 'global ecumene' where all cultures have to learn to cope with powerful influences of diverse provenance.

2

THE (IM)POSSIBILITY OF CONSTITUTIONAL JUSTICE
Seismographic Notes on Indian Constitutionalism

UPENDRA BAXI

1. Constitutions: The Will to Stateness

This contribution to a volume marking fifty years of the Indian republic addresses the triumphs and tragedies of Indian constitutionalism. The central problem I wish to explore is one of the 'justness' of the Indian constitution. Much here depends on how the very notion of 'constitution' is constructed and from whose point of view and for whose benefit. The imagery of constitution/constitutionalism[1] varies from the perspectives of those who rule and those who are ruled and of the epistemic communities which develop empirical and normative theories/images of constitutions. However, as we all know, the 'ruled' and the 'rulers' do not constitute homogeneous classes of beings, with a singular essence (that is, the property or attribute of ruling and being ruled, or people with and without power). We also know that constitutional theorists also constitute a heterogeneous range of reflexive beings, marked by their distinctive class, race, gender, social origins, experience, and imagination (that is, the capacity to negotiate/transcend these.) At the outset, then, we ought to acknowledge that the conceptions of constitutions, and their relation to tasks of justice, far from being settled, vary enormously. That acknowledgement is however in short supply in the dominant discourse for a variety of reasons.

Juridical conceptions, for example, assign to constitutions the prime, even sole, function of providing criteria of validity for all legal norms. The tradition of analytical jurisprudence, from John Austin and Hans Kelsen onwards, highlights, in all its complexity, the basic notion that constitutions constitute a 'higher law' governing all forms of authoritative legal enunciations and performances. However, the high ground thus occupied has no relation to 'justice' values; Kelsen exemplified this by his famous assertion that the Basic Norm may have any content whatsoever, so long as it performs the core analytical function enabling us to draw bright lines between realms of 'law' and 'non-law'. Understanding constitutions entails legalization of notions about legitimacy: that which is legal is legitimate and that which is legitimate is legal. 'Legitimacy' is here conceived in terms of the production of belief systems that makes the life of state law both *analytically* legible and possible.

Another mode conceives constitutions as a will to stateness. Constitutions, typically, are thought of as collective volitional performances through which the collective political life of a territorially enclosed totality of individuals and groups become possible.[2] The will to stateness is a complex historical formation. It is also a totalizing formation, in that it seeks to personify/embody in a single entity diverse peoples and generations into a 'imagined community' of a nation-state[3] from whom some real obligations of loyalty are expected. It is a will that catalyses both the notion of sovereignty and of constitutionalism. That is, the will to stateness manifests a state as a sovereign entity in an external sense (that is, within communities of states) and as a constitution in an internal sense (that is, the framework for legitimacy of apparatuses and performances of governance). As concerns other states, a sovereign state is defined by conditions of autonomy and self-determination: namely, in the articulation of power to construct its own imaginative forms of constitutional life. As concerns its peoples, sovereignty assumes forms of orderings that determine the boundaries of collective political life/living, outside which one is condemned to a Hobbesian state of nature in which human life is 'poor, nasty, solitary, brutish and short'.

Both in the external and internal dimensions, then, the will to stateness consists of *the right of autonomous, self-determining peoples to have a constitution*, unburdened by the exercise of a similar right by other

states. These latter may not impose any universal, cross-cultural prerequisites upon the making of a nation's constitution. Nor may peoples once constituted into a state, founded on a constitution, raise questions regarding the 'justice' of a constitution *as such*. These questions remain appropriate, even justified, to the workings of a constitution; they remain inappropriate, even unjustified, in relation to the constitution as promulgated. 'Treason' is sensible only within the boundaries of (to borrow a phrase from Habermas) 'constitutional patriotism'. Sovereignty then is the place of inscription for bright lines between 'dissent' and 'treason'. The question of the justice of constitutions addresses, in vital ways, the task of how, with what labours of justification, these bright lines may be drawn. In an ideal–typical sense (the sense that Max Weber gave to it), Gulag constitutionalism necessarily manifests a will to stateness that represents dissent as treason; the 'open society' constitutionalism incarnates this will by a dispersal of the distinction into various domains of criminal law and administration of justice.

The post-metaphysical/post-foundational discourse, however, raises the possibility of the emergence of justness *of* constitutions as such. It conceives contingent universals of justice variously, whether in terms of 'constitutional essentials',[4] wrapped into regimes of 'overlapping consensus',[5] or the production of 'legitimate law',[6] or of human capability. This genre of discourse subjects constitutions to tasks of negotiated normativity of human rights norms and standards, as ordaining meaningful forms of individual, associational, and collective life. Of necessity, then, this form of theoretical discourse rejects the notion that the will to stateness may extend to an external (based on international law) positivist right to have *any* form of constitution.[7] The Kelsenite thesis that the Basic Norm may have any content is thus repudiated at the very threshold by the discourse of contemporary normative constitutional theory. It is also now possible to articulate the notion of a 'just' constitution without the trappings of 'old iusnaturalist' metaphysical baggage.

In an era of global digital capitalism one may, further, conceptualize constitutions in terms of hardware and software programming of codes of justice and of injustice. On this view, notions of justice are programmed into the constitutional hardware as well as software, which determine the (im)possibility of justice under constitutions. The 'hard-

ware' is the stuff that constitutes the materiality of state power, the institutions and apparatuses of governance, the 'webs of coercion',[8] and the state as a 'war machine'.[9] The constitutional hardware then is designed to combat challenges to the life of the sovereign state, discursively described, in earlier languages, as the doctrine of the Reason of State. No normative constitutional theory, as far as I know, addresses the hardware issues: the architecture of the armed forces, security and police establishments, methods and means of organizing levels of delivery of violence when the life of state is stated or seen to be threatened. Normative constitutional theorizing occurs under discursive conditions that concede the will to stateness (the hardware). It concedes the practices of writing and reading constitutions that entail many forms of epistemological and collective political violence. The founding act (the act of making a constitution) is usually preceded, even accompanied, by collective political violence and the foundational violence this inaugurated is reiterated in constitutional unfolding/development.[10] Programming constitutional software is meaningful only within this boundary.

Within this, constitutions also programme 'cultural software'[11] which provide relatively free access to divergent experiences and enunciations of 'justice' in ways that do not permit interrogation of the validity of the constitution as such. It is this 'software' that opens up dialogue boxes of rights, justice, and development.

Most constitutions design their distinctive interactive software. Constitutions contain programmes designing both rights and governance encoded in the texts of the Preamble, and related aspirational enunciations (such as the Directive Principles of State Policy or Fundamental Duties of Citizens) and constitutional rights. These programmes allow for meaningful 'surfing' that almost always expands the life of the constitution beyond the 'original intention'. The possibility of surfing depends on how a constitutional corpus is constructed and how open it is to revision. As to the first, almost all constitutional designs structure asymmetry between governance and rights and justice; the unwieldy corpus of the Indian constitution[12] illustrates this hiatus quite distinctively. The corpus of the constitution is crowded with governance texts. Rights and justice texts remain slender in comparison to the governance texts. As to the second, amending articles are software

programmes that facilitate 'live updates', as it were, by providing for changes *in*, though never *of*, the text of the constitution. Constitutional engineering devises 'rigid' or 'flexible' types of constitutional design; the Indian programming is unusual, even unique, in the ways in which it provides for its 'live updates'. A prime task of normative constitutional theory is to evaluate these programmes and to design ideal ones.

Constitutional software does not always relate to high tasks of justice. Forms of constitutional engineering often produce software which, prima facie, remains indifferent to normative considerations, including those of 'justice'. These typically address the difficult design of institutions of governance, raising issues concerning efficiency (programming outcomes that produce the belief: 'Whatever is efficient is always just') rather than those of justice (that is, concerns about the justness of ordering regimes of public policy efficiency). Constitutional software that designs governance formats (for example unitary rather than federal, constitutional–monarchical rather than republican, presidential rather than cabinet, rigid rather than flexible constitutional arrangements) do not readily invite consideration on the grounds of justice, at least in terms of extant justice theorizing. In contrast, constitutional software that programmes rights remains eminently suitable to the discourse on justice. Much contemporary normative constitutional theorizing remains preoccupied with the nature and scope of rights, justified modes of resolving conflicts of rights, and the place of rights in polity, economy, and society. It furnishes forms of narrative risk-taking. Its message, expressed in a sentence, is: Constitutional orderings, structures, and processes are just when they affirm the equal human worth of all human beings, advance 'human capabilities', ensure 'human rights', promote 'authentic public participation in governance', and 'diversity' and 'pluralism' by acts of articulate abstention from promulgation of a state-sponsored vision of the good life. The heaviness of this shorthand camouflages many a conceptual minefield!

2. Governance and Justice in the Design of the Indian Constitution

I proceed, within this context, to imagine the ways in which the theory and practice, the origins and development, of Indian constitutionalism

may be said to relate to tasks of justice. These tasks have been defined distinctively in the corpus of the Indian constitution, through the articulate divide between the governance and rights/justice texts.[13] This divide can be summarized, roughly, by saying that the governance institutions have almost exclusive constitutional power to define meanings and paths of development, while the judiciary (especially the Supreme Court of India) retains almost exclusive power to interpret and implement constitutional rights. This broad divide continues even in these halcyon days of Indian judicial activism (indeed, the tenth wonder of the world!), which recognizes the imperative of adjudicatory deference to the executive supremacy in the realm of instituting macroeconomic policies of 'development', even when it may properly review and rectify microeconomic practices that may be construed to impinge on fundamental rights.

From its inception, then, the Indian parliament, and the union executive (really the prime minister of India till the 1980s) bore the singular burdens of identifying the tasks of development as justice. I cannot pursue here in any significant detail the history of executive-sponsored notions of justice. It remains necessary though, for the present purpose, to highlight three overarching contexts within which this discourse has been framed. Tasks of justice have been presented as integral to peace and security, development, and 'globalization'.

(a) National Integrity and Unity as 'Justice'

The tasks of constitutional (in)justice have always been conceived within the discourse of state security. The integrity of India defined minimally as the security of its post-colonial borders has always been privileged and valued by the constitutional classes. The argument here is, and has always been, that failure to preserve the sovereign integrity and unity of the Indian nation is a form of collective injustice to Indian people. 'India' must exist and survive if tasks of justice for Indians are to be fully addressed. This existence may be threatened by other sovereign states through war or warlike actions as well as by internal subversion. Citizens have little role to play in the formulation of foreign and national defence policies; policies that often distort developmental priorities.[14] Nor does contemporary normative constitutional theory go so far as to provide for dialogical rights or participatory democracy in such matters; even Jürgen Habermas[15] is of no assistance on this count.

The constitution, as initially framed, and in its subsequent development, elaborates precise ways that uphold the belief that almost all practices of power directed to maintaining the unity and integrity of the nation are inherently justice enhancing. Both external aggression and internal subversion are portrayed as inimical to Indian development, and constructions of what forms the latter forever succumb to definitions by constitutionally insincere classes. Any form of popular (mass) action/movement that expose illegality and illegitimacy of the ruling 'development' paradigms invite legal, even constitutionally justified, repression. As threats, both internal and external, to India's 'integrity' remain perennial, the dominant discourse maintains, so must Draconian security legislation. Not merely must the colonial security legislation continue to operate with full vigour in independent India,[16] but preventive detention based on jurisdiction of suspicion, is authorized by Article 22 as a just order of exception to the precious fundamental rights to life and liberty. The Fifty-ninth Amendment to the constitution provided, for a while, that situations of armed insurrection or rebellion might justly trigger a declaration of 'partial emergency' during which even the right to life might be suspended.

Security forces (the army, paramilitary forces, and police) acting under these and allied conditions (like those provided under the regime of Disturbed Areas Act) remain, in almost all respects, beyond the pale of constitutional and legal accountability.[17] Indicative of the identification of national 'unity' and 'integrity' with development as justice is the recent, and altogether outrageous, proposal of the Indian Law Commission commending the enshrinement of preventive detention powers in the Criminal Procedure Code.

This identification of the 'unity' and 'integrity' of the nation with justice complicates, in many ways, the discourse concerning the possibility of the (in)justice of Indian constitutionalism. At the same time, as we see later, it has been a constant source for reflexive critiques as well as for people's struggles for democratic rights.

(b) Development as Justice

At first sight, the rights and justice texts provide authoritative starting points for the articulation of notions of development as justice. The Directive Principles of State Policy, read as a whole, define and prescribe minimal indices for development. Some Directives even mandate time

periods for their realization. Thus, for example, provision of free and compulsory education for children less than fourteen years of age had to be accomplished within ten years of the adoption of the constitution. Fundamental rights provisions creating a right against exploitation (Articles 23, 24, and 35) specifically required expeditious and effective constitutional and legal action ensuring immunity from forced and bonded labour, trafficking in human beings, agrestic serfdom, and child labour. Overall, the constitution defines development as a series of governance obligations: the progressive implementation of policies, programmes, and measures that disproportionately benefit and empower the impoverished masses of India.[18]

The executive-sponsored regimes of development have not always been consistent with the constitutional vision. These programmes articulate development policies through various acts of deferral, dispersal, and even denial of rights/justice texts. I do not propose to revisit the admirable narratives of the histories of hegemonic constructions of 'development',[19] but it remains necessary for the present purpose to offer a capsule account of how 'justice' and rights have been negotiated through various enunciations of development. I highlight, very summarily, certain trends.

First, development planning has since its inception been heavily concerned with a sustained rate of economic *growth*. While the Five Year Plan documents remain suffused with the rhetoric of equitable social development, there has been very little actual progress towards the fulfilment of the minimal obligations of the directive principles, and the fundamental rights enshrined in Articles 17, 23 and 24.

Second, development design moves back and forth between the model of *land* reforms and *agrarian* reforms. Land reforms aim at enhancing expansion of agricultural productivity, necessary both for self-reliance in the production of foodgrains and for global markets for agricultural produce. Development here is conceived of in terms of efficient management of agricultural production. The agrarian reform model, by contrast, is primarily directed at state-sponsored equitable land distribution, debt relief, protection of the rights of agricultural workers, and elimination of practices of agrestic serfdom.

Third, the planned economy casts the state in the role of inventor of forms of state regulated capitalism. This implicates the state and law heavily in tasks of quite comprehensively monitoring economic

enterprise. Markets for political power are increasingly determined by claims to ability to produce forms of compliant market activity. The management of development processes and programmes was cast in the mode of command and control,[20] leading to extraordinary formations of bureaucratic and political power, with resulting corruption, waste, and an ethos of unaccountable executive power.[21]

Fourth, development planning unfolds the role of the state, requiring it not just to function as an allocator and regulator but also as the producer of economically valued resources. The commanding heights of the economy thus remained captured by state industrial monopolies. The constitution is invoked (especially Article 39) to justify nationalization of key sectors of production. A network public enterprises (statutory corporations, government companies, holding companies) putting people before profits is represented as signifying the enhancement of state capacity to perform tasks of justice.

Fifth, the 1970s simultaneously mark the discovery/reinvention of mass impoverishment; it is indeed an awkward fact that Dadabhai Naoroji's classic *Poverty and Un-British Rule in India* should find, at very long last, a resonance in the Indira Gandhi led 'Garibi Hatao' programmes of the early 1970s. Whatever may be said to be the impact of this revival on the Indian impoverished, it certainly led to the 'greening' of Indian economic theory. Anti-poverty programmes begin to fashion the vocabulary of development economics. This latter then exposed the multifarious human, and human rights, violative impacts of the unleashing of the Green Revolution, and also led to a renewal of social science concern with insurgent violence (especially the Naxalite movements).

Sixth, this period also witnesses the growth of state finance capitalism with the nationalization of banks and insurance industries,[22] marking a very significant transformation of rural economy, at least in terms of access to credit.

Seventh, with disparities in regional development, economic federalism begins to emerge, in terms of demands for greater regulatory autonomy for states and equitable allocation of federal revenues through the renovation of normative approaches by the Indian Finance Commission. The governance formats for development begin to undergo significant transformations. New conceptions of economic federalism emerge, where the states (Assam, Gujarat) now contest before the courts

the arrangement of royalty-sharing for natural-resource exploitation, and the discourse of the constitutionally ordained Finance Commission undergoes dramatic shifts in approaches to federal revenue sharing.

Eighth, 'New social movements begin to contest hegemonic notions of development. The Total Revolution of the 1970s seeks to redefine development in terms of greater peoples' participation in governance and a peoples' war against corruption in high places. The authoritarian 'politics' of the Emergency Rule (1975–6) marks a crucial response: for the first time, the fundamental right against exploitation and related Directive Principles guide the reformation of notions of development and renovation by a constitutional amendment of the Directive Principles (the Forty-second Amendment tainted by the Emergency also enunciates a concern for environment in development planning; so do the Fundamental Duties of Citizens). Movements for social empowerment of the educational and social backward classes redirected development, in the early 1990s, towards more explicit commitment to egalitarianism. Feminization of development definitions and paradigms begins to occur with the rise of women's movements. Environmental movements begin to orient (even if in terms of 'sustainable development') the logic of practices of planned development.

Ninth, the 1990s also mark a much-deferred decentralization and devolution of power to panchayati raj processes and structures in ways that eventually foster the flow of redefinitions of development as justice from the grassroots to national levels.

These processes mark the history of consolidation of the hegemonic practices of planned development. However, constitutional losers (the 'weaker sections of society') begin to contest reigning notions of development; their 'million mutinies' seek to supplant these by more people-oriented, participatory development. Insurgent social violence seeks to direct the benefits of development to the constitutional have-nots. Even as violent protest de-legitimates the ruling paradigms of development as justice, its 'management' by constitutionally insincere and insecure classes leads to militarization of the Indian state.

(c) Globalization

The onset of the contemporary politics of economic 'globalization', however, introduces a just order of anxiety concerning the future of constitutional justice. The software of rights and justice texts is steadily

being overlaid with programmes of globalization in ways that generate insoluble hardware conflicts. The global economic situation and diplomacy have always affected the course of Indian constitutional development. What is new, however, about contemporary economic globalization is that it encases the Indian constitution within the emergent paradigm of global economic constitutionalism.[23] This paradigm creates many-sided impacts, principal among which is the transformation of notions of accountability/responsibility. The Indian state (like many other South states) is placed in a situation where internationally assumed (or imposed) obligations to facilitate the flows of global capital, trade, and investment command a degree of priority over the order of constitutional obligations owed to Indian citizens and peoples. The three Ds of economic rationalism (deregulation, disinvestment, and denationalization), for example, favour many development policies that threaten, and at times nullify, achievements of rights and justice discourse.[24] On the other hand, there is room for the argument that the politics of economic globalization remains human rights friendly, especially in terms of empowering networks of global civil society solidarity. Indian NGO communities deploy these in various deeply conflicted ways.[25] The future of normative Indian constitutional theory at least, then, lies in those dialectic progressive and regressive discursive profiles of contemporary global economic constitutionalism. I do not essay this task here.

In what follows, I trace the itineraries of illocution to the theory and practice of Indian constitutionalism, and the moves that shape the contingent careers of many conceptions of rights and justice. Constitutional discourse has been subject not merely to people's illocution; those who thrive under it also count as constitutional 'malcontents'. The multitudinous constitution-talk in India combines celebration as well as mourning: the *shehnai* (the celebratory note) as well as the *matam* (the voice of lamentation), true to the classical Hindi film song refrain: *Jahan bajti hey shahnai, wahan matam bhi hoti haye* (where the trumpets blow, the voice of lamentation also finds its power).

3. The Shehnai

The celebratory discourse remains integral to the nationalist project. From the debris of colonialism, India, that is at the same time also named Bharat, is born as a union of states. The quest for identity of a

post-colonial nation is a performative act of political imagery: the invention of 'India', with the dangerous supplement of 'Bharat'; a register of continuity with a colonial past laced with the revivalist potential for the foundational bases for a 'Hindu' notion of an imperial India, reinventing its mythic pasts. Even so, the constitution facilitates forms of enduring nationhood, in the midst of astonishing civilizational and cultural multinational diversity. It is, in this vital sense, inaugural of the creativity of the postcolonial. The shehnai seeks to overcome the matam.

Much before the times of post-liberal churnings, the Indian constitution dares to innovate notions of governance, rights, justice, and development. Summarily expressed, the triumphal register celebrates institutionalization of an order of constitutional facts that:

- Establishes and implements universal adult suffrage, without a trace of gender-based discrimination, in ways that reproduces astonishingly vibrant forms of constitutional élites. This amidst electoral practices violative of fair and free elections, not at all redeemed by the comparable, recent developments in the United States: 'perforated chads' discourse sacrificing the integrity of right to vote.[26]
- Recognizes rights of political participation by her First Nations peoples and millennially deprived Dalit populations (those beyond the pale of the caste system) on the basis of a system of affirmative action through legislative reservations.
- Provides for constitutional platforms/anchorages for affirmative action for social, educational, and 'other' backward classes.
- Structures relatively autonomous adjudication, with all its complex and contradictory entailments, endowing it with the potential for activist adjudication.
- Establishes a free press and creates contradictory spaces for vigorous political and social dissensus.
- Puts to work the dynamic of growth for a progressively authentic federal polity that provides spaces for the realization of autonomy movements charting changing forms of cartography of the Indian federation.
- Enables deepening of grass-roots democracy.

Notably, the Indian constitution innovates the liberal model of rights.

Rights are not just conceived of as a corpus of restrictions on the power of the state. Civil society is also identified as a source of human rights violation. The constitution thus ushers in the notion of a progressive constitutional state.

Also, well ahead of the International Bill of Rights, the constitution-makers enact a distinction between civil and political rights, on the one hand, and, on the other, social/economic rights. The Directive Principles of State Policy define the constitutional essentials of good governance; they provide constitutional criteria or bases, even languages, for evaluating political practices and performance. The fundamental rights (basically civil and political) enable, by processes of judicial enforcement, changing forms of authoritative discourse on governmental arbitrariness or abuse of power.[27]

What is more, the Indian constitutional experience is unique for its reflexive character. Not merely did the Constituent Assembly consider a whole variety of divergent approaches to the constructions of 'constitutional essentials'[28] but also a half-century functioning of the constitution has been characterized by an ongoing critique emanating from constitutional winners as well as losers. Political actors, including India's apex adjudicators, have always put the legitimacy of the Indian constitution to test;[29] and so have people within the dominant classes who feel aggrieved by its workings.

In what follows, I briefly outline the modes of the ongoing 'critique' of the Indian constitution, both in its foundational and reiterative moments. I recognize that the summary presentation does not as fully attend to major analytic distinctions[30] or the complexity of the practises of politics that are entailed in each genre of 'critique'. Even when the hybridity of the narrative may prove irritating for the dominant practitioners of Indian constitutional movement and theory, I persevere in the hope that it may prove constitution-reinforcing/regenerative in its present and profound moment of crisis.

4. The Left 'Critique'

This extremely fluid and heterogeneous discourse permits no easy summation. At a meta-level, we find articulations of parliamentary com-

munism as well of Naxalite, and neo-Naxalite, formations. At the micro-levels, we encounter many situated, cadre-based critiques of both the regimes of Left governance and insurrection.

Both parliamentary and extra-parliamentary theory and practice characterize the foundational constitutional choices of rights and justice as embodying bourgeois conceptions.[31] E.M.S. Namboodripad, on pain of contempt, characterized the Indian judiciary as an agency of class domination and rule, rendered somewhat ahistorical by Justice Hidayatullah's judicial gloss on Marxist texts.[32] The gist of this denunciation is that the making and the working of the Indian constitution celebrate the rights of the propertied classes over the proletariat. The rights and justice discourse thus generated by the dominant institutions of the Indian state and law, with all its apparently complex differentiation, is distinctly neo-colonial. While promoting regimes of civil and political rights of citizens, this discourse denies most or all democratic rights of the Indian peoples. The unfolding of the Indian constitution, on this view, occurs in predictable ways of reproduction of dominant legality, which remains complicit, overall, with continuing immiserization of the working classes, the rural impoverished, and is marked by accentuation of the anti-people consolidation of the class character of Indian state agents and managers.

Beyond this, the Left critique suffers a loss of ideological coherence. Of necessity, the very possibility of the emergence and growth of the radical (Maoist/post-Maoist) critique entails critical moments of constitutional collaboration. At the same time, it is confronted with the need for the *invention of politics* that does not altogether undermine the logic of revolutionary cadre-based movements that vigorously challenge the bourgeois character of Indian constitutionalism. Parliamentary communism is thus deeply conflicted. It can accommodate its Other—modes of extra-parliamentary communist critique of Indian state and law—only up to a point. That point it provides is a shifting horizon of unstable constitutional compromises: the cadres may reign but also the governments must rule in ways that return them at the polls. The West Bengal communist regime vivifies an institutionalized critique of the Indian constitution, and of the dominant regime styles of the non-socialist ways of the Indian state. It harnesses the constitutional space for enactment of the Left programme, especially agrarian reform

and literacy. Howsoever bourgeois the federal principle and detail may appear in theory, the Left governments in India have actually revitalized Indian federalism.[33]

In contrast, the forms of extra-parliamentary communism (whether Maoist or post-Maoist) offer more sustained Left critiques of Indian constitutionalism. In this genre, the bourgeois–landlord comprador capitalist state is prefigured as an order of violence, even permanent war, against the Indian masses. The constitutional practices of the rule of law emerge variously as masks for the reign of terror. Forms of constitutional practices of liberal democracy signify, at the end of the day, what the Ghanian thinker C. Ake[34] terms 'the democratization of disempowerment'. The Naxalite, neo-Naxalite, and post-Naxalite movements remain committed to the destruction of the enemies of the Indian people; in particular, people's war groups position themselves in a state of permanent armed hostility to constitutional norms, standards, apparatuses, and functionaries.[35] Extra-parliamentary communist critique directs attention to the anti-people subversive ways of parliamentary communism. Occasional harvesting of available civil rights spaces by these formations is regarded as non-threatening to militant ideological 'purity'.

These militant forms of critique reproduce self-fulfilling prophecies concerning the violence of the Indian state, constitution, and legality. Organized armed insurrection reinforces unconstitutional, and profoundly, human rights violative, even catastrophic, practices of power; these, in turn, signal the plenitude of a lawless 'dual' state which protects and rewards ideologically compliant (and complicit) citizenry and penalizes, even terrorizes, the practitioners of alternative constitutive visions of a radical democratic India that is not Bharat. The governance prose of Indian states regards some of its dissentient active citizens as vermin (the prose of 'Naxalite-infested' areas) destined to face acts of extermination. In Mahasweta Devi's *Draupadi* metaphor, the constitutional rule of law itself is (en)countered. The reiteration of state illegality, and terror, reproduces, dialectically, violent popular illegalities. In all this, the death of Indian constitutionalism is born. The beginning of the end of Indian constitutionalism is heralded when practices of violence in the pursuit of politics of equality are considered as a threat to the underlying values of Indian constitutionalism, as defined

by schizoid–paranoid élite constitutional formations. 'Constitutional' violence that consigns citizens to a permanent state of rightlessness extravagantly, and often with fierce practices of cruelty, surrenders the strength of the original intent as well as the power, and potential, of future imaginings for juster Indian democratic ordering.

5. The Gandhian Critique

The Indian constitution, in the act of its making and in many subsequent developments, appears Westoxifying in Gandhian and Neo-Gandhian thought. Readers of Mohandas Gandhi's *Hind Swaraj* (1911)[36] will recall the continuity of his critique of Western parliamentary institutions and industrial society with his proposals concerning the new constitution of India, based on a network of self-determining people's institutions of village republics. For Mohandas[37] Gandhi, the very notion of democracy conceived solely as a system of management of distribution of power was in itself undemocratic. For him, competitive democratic politics carried with it the manifold potency of denial of a true Swaraj. Viewed in relation to colonial rule as a signifier of political self-determination for India, Swaraj, once freed from colonial yoke, becomes an arena for individual and collective moral, even spiritual, self-determination. Mohandas Gandhi did not regard institutionalized party politics as having the potential for the achievement of true Swaraj, which emerged only with communities and individuals learning to practice their freedoms as an order of responsibility to the Other. In a sense, Mohandas Gandhi was a more committed republican than all the members of the Constituent Assembly put together.

An unusual combination of colonial (Nehruvian) legal liberalism[38] and the creatively modified subaltern legal liberalism of Dr B.R. Ambedkar defeated, for better or worse, Mohandasian aspiration. For the former, Mohandasian notions had outlived their utility once Independence had been achieved;[39] for the latter communitarian self-determination appeared only to revive the spectre of the millennially entrenched forms of casteism.[40] As a result, Mohandas's conception normatively survives only in enfeebled forms in the constitutional text: principally through the Directive Principles of State Policy urging the state to move towards prohibition of intoxicant drinks and a ban on cow slaughter.[41]

6. The Neo-Gandhian Critique

Acharya Vinoba Bhave and Jayaprakash Narayan revitalized the Gandhian tradition. Each sought in distinctive ways to approximate Mohandas Gandhi's Swaraj within the contexts of Indian parliamentary democracy. Each deployed the notion of fundamental rights to create forms of mass politics to attract Indian democratic development to the Gandhian vision. Each had a moment of constitutional triumph and tragedy.

Vinoba Bhave translated Gandhian notions of Swaraj into a series of ideas rolled up in the coinage of conceptions of Sarvodaya, signifying equitable and equal empowerment of all. Against the unedifying backdrop of constitutional wrangles on the right to private property, Bhave revived the Gandhian notion of dialogical amity through which landowners were persuaded to relinquish 'surplus land' in favour of the landless. The Bhoodan and Gramdan (*lit.* gift of land and of villages) movements urged the super-rich to educate themselves to be compassionate to the super-impoverished, in frameworks that transcended the terms of the constitutional discourse.[42] In this way, Bhave (and later Narayan) struggled to reintroduce the Gandhian notion of 'trusteeship' against the constitutional canon of *the right to property*, with results that have been variously evaluated.[43]

Bhave, and then Narayan, Indianized the liberal notion of the right to free movement throughout the territory of India into a right to *padyatra*, walking through 'Bharat' in ways that repudiated 'India', Through a decade or more of padyatra, Bhave sought to achieve a transformation of agrarian relations in India by the production/cultivation of social trust and cooperation. The Bhoodan and Gramdan movements provided alternatives to violent and coercive state/insurrectionary modes of land redistribution; the movement sought to provide the constitutional state with a communitarian base. For Acharya Vinoba Bhave, the constitutional state can become related to tasks of justice; only a tradition of community/social trust are reinvented or reinforced, rendering citizenship into an ethical, not merely, legal notion. A constitutional order that placed citizens and the state in adversarial roles, or which made classes of citizens complicit with or indifferent to the regimes of state/insurgent terrorism, did not provide the prospect of authentic civic cooperation necessary for a just social transformation.

In contrast, the later Jayaprakash Narayan, somewhat ambivalently, sought to transform constitutional politics through forms of mass politics that frontally challenged the decadent bourgeois politics of parliamentary democracy and its notions of 'development' as justice. Accentuating the legitimation crises of the early 1970s, his 'Total Revolution' movement was directed against the increasing corruption in governance and visions of participatory democracy.[44] The 'Total Revolution' movement, in so many senses bigger and bolder than the events of May 1968 in Paris, revitalized Indian democracy in ways yet to be adequately recounted, let alone adequately theorized. The Emergency Rule of Indira Gandhi has almost permanently erased it in constitutional and public memory. Indeed the 'Total Revolution' proved to have a short constitutional shelf-life, unless we attribute the panchayati raj amendments to that democracy-deepening stream of neo-Gandhian thought.

The poverty of Indian liberal social/constitutional theory is manifest in its near-total lack of narrative interest in neo-Gandhian development of regimes of trusteeship and people's power pitted against the logic of 'possessive individualism' through the languages and logics of the right to property and élitist conceptions of development as justice. The golden jubilee of the republic came and the Indian had no word of remembrance for the great neo-Gandhian moments.

Nonetheless, as and when the history of Indian constitutionalism is adequately written, the Total Revolution movement will be perceived as laying the true foundations of a new Indian constitutionalism, reverberating now in the adjudicatory crusade against corruption in high public places. Each and every Indian judge who today inveighs against corruption in public life is an unacknowledged lineal descendent of Mohandas Gandhi, Vinoba Bhave and Jayaprakash Narayan. It is another matter altogether that judicial beings remain wholly narcissistic, wallowing in unacknowledged histories of social movements that serve as midwives to judicial activism.

7. The Hindutva Critique

The 'Hindutva' critique inverts the Gandhian vision and means. It transforms the notion of multi-religious Indian society and polity into

the prose of a politically reconstructed 'Hinduism.'[45] An ideology long in the making, Hindutva begins to explicitly address the failings of the Indian constitution only in the 1980s.[46] The 'Hindutva' critique grounds itself on the notion that the constitution, as originally enacted and in its subsequent development, remains hostile to the majority of its citizens, who are born as, and choose to remain, 'Hindus'. It thrives on empirical instances of discrimination against 'Hindus', which it insists are generated by the working and interpretations of the text and context of the Indian constitution.[47] It insists that constitutional secularism is deeply flawed for the following principal reasons.

First, while the Constitution mandates reform of Hindu religious beliefs and practices that manifestly violate human rights (practices of 'untouchability'), non-Hindu religious traditions are allowed constitutional impunity principally through the perpetuation of the 'personal law' rights-violative formations. Second, the near-absolute protection, under Article 30, of the rights of minority communities to establish and administer educational institutions of their own choice is said to favour non-Hindu religious traditions. Third, affirmative action programmes disadvantage 'Hindu' citizens by favouring quotas that blight the future of the non-complicit present generation, despite demonstration of manifest 'merit' for righting past millennial wrongs. Fourth, the interpretive ways in which the Representation of People's Act rendered appeals to religion as 'corrupt practices', at least till the so-called Supreme Court Hindutva judgment,[48] denied construction of 'Hinduism' as a political ideology articulating legitimate visions of a future polity, readily available to secular, even godless, political parties. Fifth, constitutional protection of religious practice and belief is said to foster practices of conversion which are said to disadvantage non-missionary religious traditions (like Hinduism) and favour 'minority' religions.[49] Sixth, provisions for special constitutional status for the state of Jammu & Kashmir enabled hostile discrimination against the Hindu minority, resulting in the enforced diaspora of Kashmiri Pandits, rendered altogether rightless. Hindutva critics decry Indian constitutionalism, for all these and related reasons, as 'pseudo-secular'.

The future of Indian constitutionalism then, on this perspective, lies in redirection of constitutional secularism. Secularism that affirms the religious tradition of a dominant community is presented as the

very best hope there is for a multi-religious society and nation. The Hindutva platform advocates that the future of the 'children of the lesser Gods' will be more secure with an affirmation of the dominant religious tradition. An insecure majority religious-cultural tradition scripts a death warrant for 'minority' rights; it points to the exemplary flourishing of these rights where the secularist constitutional balance is struck in ways that do not reduce the dominant tradition to a minority syndrome.[50] As of the time of writing, calls are frequently made for Indianization of Islam or Christianity, presumably a process through which these traditions will be relocated within the 'Hindu nationalist', rather than 'pan-Indian', religious traditions.

The politics of Hindutva systematically seeks to *enforce* the notion of a Hindu Rashtra, in which 'Hinduism' shall be the de facto state religion. It deploys a variety of strategies and tactics designed to prepare the ground for what may eventually be presented as a compelling national consensus for constitutional change.[51] It transforms forms of padyatra into those of *rathyatras.* If the former were oriented to new forms of production of communitarian trust, the latter remain directed to the destruction of all forms of social trust and cooperation. The rathyatras (lit. 'national' leaders leading a procession in a van decked out as a chariot) constitute, at one level of understanding, legitimate exercises in the fundamental right to movement throughout the territory of India and the right to free speech and expression. At the same time, they innovate forms of hate speech against minorities, especially Indian Muslims.

Freedom of speech in the Hindutva understanding is a near-absolute right to be, and remain, articulately intolerant of minority religious communities. Bal Thackeray is a virtuoso exponent of hate speech. Open advocacy of mass violence against targeted minority groups is presented as constitutionally justifiable. Practices of collective political violence are presented as a constitutional mode of righting past wrongs done to the majority community. Thus, history is reinvented in relation to places of religious worship; a large number of mosques are discovered to have been built by Muslim rulers, centuries ago, on the sites of Hindu temples or sacred shrines, and their removal by the Hindutva forces is presented as an act of constitutional redemption. Popular action to 'reconvert' the lower castes to 'Hinduism', as well as the movement of

legislative restriction on conversion by 'force' and 'fraud', is presented as a necessary reworking of conceptions of constitutional secularism. Equally so are the militant practices of Hindutva hooligans who arrogate to themselves the right to enforce some version of 'Hindu' critique of taste and beauty, and to act as violent surrogate state censors.[52] It is also urged that all performers of such sacred, historic deeds—demolishers of the Babri Masjid, fomenters of hate speech, church-burners, commanders-in-chief and all subalterns engaged in acts of sponsored 'communal' violence, supporters of sati, and the self-styled enforcers of pseudo-Hindu aesthetics (Bajrang Dal activists)—should be spared even a semblance of rigorous law enforcement. At the time of writing, they possess sovereign immunity, as befits plenipotentiaries of a resurgent Hindu India, currently constituting a state within a state.[53]

8. The 'Matam' of First Nations

The making of 'modern' constitutions always constitutes a narrative of violent appropriation of the peoples of the First Nations, which the dominant discourse on constitutionalism can scarcely privilege. The theme, however, was prominent in the making of the Indian constitution. Even as Nehru complained, in tabling the First Amendment, about the theft of the Indian constitution (this magnificent edifice, he said, is already being purloined by lawyers and judges), Jaipal Singh said, memorably, on the very first day of the Constituent Assembly that the making of the Indian constitution was itself an act of theft, taking away the forms of nationhood from the indigenous peoples of India. The Nehruvian lamentation is, after all, a triumphal narration of the grieving charismatic constitutional élites at judicial incursions on their sovereignty. Jaipal Singh's matam represents, in contrast, the epic of sorrow of the millennially deprived peoples. I have elsewhere described (in an article in the *Delhi Law Review, circa* 1987, and an unpublished theme paper presented at the international conference on the rights of subordinated peoples at the University of La Trobe), the significance of the contrast between self-serving and historically irredeemable forms of constitutional grief.

Unsurprisingly, the constitutional response is to deny any and all claims for continuing to exercise the right to self-determination. Not

unexpectedly, the result has been a long state of civil war, though not thus described, in the north-east. The impact of this civil war upon the formative practices of Indian constitutionalism has yet to be written, but this much is clear: radical claims to self-determination (secession) have been delgitimated. All that remains permissible is the translation of residual autonomy aspirations into federal adjustment (that is, the creation of new states status within the Indian Union). This, too, has been achieved at great human rights cost—as the history of the transformation of the north-east into so many states, and the recent creation of three new states, from the belly of the Indian beast (Uttar Pradesh, Madhya Pradesh, and Bihar) records. Proliferation of cultural and political identities remains sensible only within the parameters of federal cartography.

The fact that redrawing the federal map rarely signals the beginning of the end of internal colonialism within the nation has left very little impress on Indian constitutional theory and practice. Nor has, as far as one can tell, the highly innovative device of legislative reservations in the Indian parliament for the 'scheduled tribes' achieved any significant reversal of an extractive, neo-colonialist pattern of devolution of power. The most natural resource-rich areas of federal India are also the areas in which, for the past half century, the highest rate of mass impoverishment is sustained and it is no coincidence that these are also the areas where indigenous peoples live.[54] Unfortunately, leading constitutional law, and even political theory, treatises have little space for this subject. The inaugural constitutional sigh of Jaipal Singh hovers across many a vaunted constitutional development during the past fifty years.

9. Subaltern Critiques: Cornerstones as Tombstones

One overarching way of describing this genre, this conglomeration of critiques, is to say that it articulates the voices of constitutionally dispossessed and disenfranchised peoples. Their voices emerge with poignant authenticity outside the dominant narratology of Indian constitutionalism. The extent of alienation may be measured when we juxtapose dominant discourse concerning constitutional development with the realistic fiction of a Sadat Hasan Manto, Mahasweta Devi, Rohinton Mistry, and Shivaram Karanth. These bring to us lived collective histories of hurt in ways that even the most rights-imbued prose of constitutional discourse rarely achieves. Indian constitutional theory and practice needs to ground itself, if it is ever to maintain a modicum of conversation with the constitutional underclasses, in the narratives of *Draupadi*, *A Fine Balance*, or *Chomu's Drum: One Day in the Life of a Bonded Labourer*.

The interiority of orders of constitutional violence is also mirrored in the gifted, and anguished, social theory scholarship. I have here in mind the corpus of Veena Das, and the agonizing labours of feminist historiography[55] relating the histories of the partition of India as sites upon which the practices of building the Indian nation stood, and are still heavily inscribed. These marked the birth, and growth of the constitution as providing inaugural, and still fecund sites, for the production and reproduction of citizen-monsters. Thus, writes Veena Das, 'if men emerged from colonial subjugation as autonomous citizens of an independent nation, they emerged simultaneously as monsters'.[56] From a suffering feminist perspective, the foundational violence against women enacted during the moment of constitution-making, iterates itself, over and over again, through fifty long years of unfoldment of its vicious patriarchal logic.

In a different vein, ecological historians (like Ramachandra Guha), de-globalizing reflexive environmental activists (like Vandana Shiva), and the pre-Arundhati Roy-overlaid history of Narmada struggles, embodied by Medha Patkar and Baba Amte, offer many insights into the 'heart of darkness' of the Indian practices of development as justice, proselytised as 'development' by the peddlers of Indian constitutionalism. Equally so is the germinal discourse in *Twenty-Eight Report of the Commissioner of Scheduled Castes and Tribes*, which I regard as historically as important as the Constituent Assembly Debates.

In comparison to all these genres, the dominant discourse does recognize the constitution as a site for struggle of Indian *atisudras* (social and economic proletariat, as Babasaheb Ambedkar designates the disenfranchised); a site where numerous battles, symbolic and real, are waged against the myriad forms of violent social exclusion leading to the development of the 'pre-Mandal' and 'post-Mandal' constitutionalism. In the process, new practices of social violence and hate speech become constitutionally legitimate, marking an end to the residue of

civility in public life. In the process, too, C2 (adjudicatory hermeneutic) emerges, more or less, as a therapeutic form of state power, seeking to restore constitutional justice to a beleaguered, though not entirely fragile, place of its own amidst the practices of violence *for* 'equality' and violence *of* equality.

For the dominant raconteurs, the constitution is the 'cornerstone' of the nation, a site for welding several 'nations' into a 'modern' state ('unity in diversity') and for progressive state formation, oriented to visions of Indian prowess and development ('India's place in the world'). For the subaltern critics, the cornerstone is also a tombstone for justice. The 'strong' state makes itself possible by lawless and unconstitutional exertions and endeavours. It fosters practices of national integration that remain deeply and pervasively human rights violative; it emerges for the minorities as an 'institutionalized riot system';[57] it remains a 'state in search of a nation'[58] and embodies a resilient rape culture.

It is on this register that cultural postmodern critics complicate subaltern critiques, in that they denounce the constitution, including its notions of secularism, as exemplifying the 'demonology' of the spirit of modernity. For Ashis Nandy, for example, constitutional secularism is as detestable an aspect of 'modernization' as the techno-scientific model of Indian development (1985.) However, this form of constitutional nihilism, responsible as well as irresponsible, portraying the constitution as a liability, renders it liable to dire labours of *kar seva*; the missionary social work aimed at its swift and thoroughgoing demolition. The new form of kar seva was inaugurated on 26 January 2000 when the present national, globalizing regime dedicated itself to the celebration of its golden jubilee, ironically, by announcing a committee for its rewriting.[59]

10. The 'Inconcludable'

This essay provides a *suffering* exploration of what Jean François Lyotard describes as the differend, clashes of phrase regimes that must forever remain incommensurable.[60] The fairy tales and the horror stories pose numerous challenges to any 'master' narrative of Indian constitutionalism. None may be wholly privileged. Each destroys hegemonic narrative

monopolies. Both profile a distinctive dynamic of the (im)possibility of constitutional justice.

True, in a comparative perspective, the Indian constitution marks a historic break with 'modern' constitutionalism, of the colonial and Cold War genres, and its impact on the constitutionalism of the South is indeed striking, even pervasive. The normative discontinuities are, indeed, astonishingly inaugural.[61] Whatever be the point of arrival, the point of departure is, indeed, startling. No previous constitutional model envisaged such an explicit and comprehensive transformation of a 'traditional' society and installed a description of a constitutionally desired social order and good life, and ways of deep contention regarding these. Even fifty years down the road, this vibrancy of vision survives.

This having been said, each of the critiques here explored raise sufficient ground for anxiety concerning the potential for justice in Indian constitutionalism. The work of celebration must then remain perforce the work of matam, a work of mourning. Should that labour of sorrowing necessarily be a clone of the postmodern matam?[62] To say in response that I do not know would perhaps be politically correct but also to say so would also be a form of 'cop out'; a form that renders epistemic communities complicit with the constitutional order of 'things'; which assimilates the suffering masses of humans to the order of nonhuman.

What needs *saying* matters because of the audacity of enunciation that complicates, at each beginning of the Indian constitutionalism day, that well-touted 'progressive Eurocentrism' which, shorn of its claims to empathetic trappings, remains a wolf in sheep's clothing. Even when the shehnai remains globally orchestrated, shouldn't our matam at least be irreducibly our own?

Notes and References

1. To understand this variation, I enunciate three categories: C1 (the text), C2 (interpretation), and C3 (ideology/theory). C1 stands for the word as the world, a site of initially formulated, or the founding historic, texts. C2 signifies the site of constitutional hermeneutic, the site of formative practices of constitutional interpretation, normally called 'constitutional law'. C3 represents discursive sites for justification (or mystification/demystification/re-mystification) of practices and performances of

governance. (See U. Baxi, 'Constitutionalism as a Site of State Formative Practices', *21 Cardozo L, Rev.* 1183, 2000a.) These three forming practices (cf. G. Simmel, 25 *The Sociology of Georg Simmel*, ed. Kurt. H. Wolff Free Press, New York, 1950) constitute the complex and contradictory practices of formations of power and reflection that we in a shorthand way call the 'constitution'. Ever present in this formation is the issue of the production of 'legitimate law' (Jürgen Habermas, *Between Facts and Norms: Contributions Towards a Theory of Discourse Ethics,* trans. W. Rehg, MIT Press, Cambridge, 1995) or the question of authority (J.M. Bernstein, *The Philosophy of the Novel: Lukacs, Marxism and the Dialectics of Form,* Harvester Press, Sussex, 1984).

2. Ulrich K. Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress,* trans. D.L. Schneider, Humanities Press, N.J., 1995, pp. 18–22.
3. B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism,* Verso, London, 1983.
4. John Rawls, *Political Liberalism,* Columbia University Press, New York, 1993.
5. See Jürgen Habermas, *Between Facts and Norms.* See Note 1.
6. A. Sen, *Development as Freedom,* Oxford University Press, Oxford, 1999.
7. John Rawls, *The Law of the Peoples,* Harvard University Press, Cambridge, Mass., 1999.
8. J. Braithwaite and P. Drahos, *Global Business Regulation,* Cambridge University Press, Cambridge, 2000.
9. G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia,* University of Minnesota Press, Minneapolis, 1987, pp. 351–423.
10. 'The Force of Law: The Mystical Foundations of Authority', in *Deconstruction and the Possibility of Justice,* ed. D. Cornell, *et al.*, New York, Routledge, pp. 3–67.
11. J.M. Balkin, *Cultural Software,* Yale University Press, New Haven, 1998.
12. Probably, the most over-written constitution in human history, the text of the original constitution contained close to 400 articles (with a whole variety of sub-articles) and Eleven Schedules. The constitution has undergone over eighty amendments.
13. For the distinction between these two kinds of texts, see U. Baxi, 'Constitutionalism as a Site of State Formative Practices', *21 Cardozo L, Rev.* 1183, 2000a.
14. A national budget that since Independence inflates defence expenditure to about 40 per cent of national resources and remains impervious to questioning on the grounds of rights and justice.
15. Jürgen Habermas, *Between Facts and Norms.* His notions of 'public sphere' and deliberative justice take no account of the state as a war machine.
16. Like the Official Secrets Act, which converts acts of free movement within a territory designated as prohibited places, into treasonous activity, liable to military trial of citizens as spies. The initial site of protest in South Gujarat against the Sardar Sarovar (Narmada Dam) project was thus notified, empowering the local state to arrest innocent tribal peoples moving across these notified places who had no access to legal understanding of the state law!
17. Of course, the Supreme Court, and now the National Human Rights Commission, has moved towards providing compensation for excesses committed by the army and paramilitary forces (see, for the jurisprudence of constitutional compensation for violation of human rights; S.P. Sathe, *Judicial Activism in India,* OUP, Delhi, 2001. S.P. Sathe, 'Judicial Activism', *Journal of Indian School of Political Economy,* 10, pp. 400–41, 604–39; 11, pp. 1–37, 219–58, 1998–9). The present chair of the national Human Rights Commission has recently bemoaned indifference of the union executive to the suggestion that such operations be brought within the purview of the Human Rights Act.
18. U. Baxi, 'Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India', in U. Baxi (ed.), *Law & Poverty: Critical Essays,* N.M. Tripathi, Bombay, 1989, pp. 387–415.
19. L. and S. Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State,* Chicago University Press, Chicago, 1987; F. Frankel, *India's Political Economy 1947–1977:The Gradual Revolution,* Princeton University Press, Princeton, N.J., 1978.
20. L. and S. Rudolph, *In Pursuit of Lakshmi.*
21. The fantastic growth of administrative law in India [U. Baxi, 'Postcolonial Constitutionalism', in H. Schwartz & S. Ray (eds), *Blackwell Companion to Postcolonial Studies,* Blackwell, Oxford, 2000b, and the materials there cited] attests the various forms of pathologies of state power.
22. U. Baxi, 'Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India'.
23. D. Schneiderman, 'Investment Rules and the New Constitutionalism', *Law and Social Enquiry,* 25, 2000, pp. 757–86; E. Sridharan, 'Economic Liberalization and India's Political Economy: Towards a Paradigm

Synthesis', *The Journal of Commonwealth & Comparative Politics*, XXXI, 1993, pp. 1–31.

24. The principal casualties remain—
    - The shrinking horizons for affirmative action programmes for employment, as the state ceases to be a principal constitution-bound employer
    - The constitutional obligation to protect unorganized labour and the 'weaker sections of society'
    - The state capability to fulfil the right to health, arising out of recognition of the intellectual property rights of a transnational pharmaceutical industry
    - The state regulatory capacity to combat hazardous transnational corporate power to create environmental and industrial catastrophes, of which the suffering of Bhopal remains the archetypal symbol
    - Systemic development policies aimed at elimination of slave, and slave-like, labouring conditions under which masses of rural and urban impoverished eke out their 'livelihood'

    The list can be further enlarged in terms of description of the emergence of a trade-related, market-friendly human rights paradigm threatening, and at times supplanting, the paradigm of universal human rights. See Baxi, *The Future of Human Rights*, Oxford University Press, Delhi, 2001.
25. Swami Agnivesh is thus constrained to internationalize, through the United Nations, the issues of bonded and attached labour; Gail Omvedt is moved to resort to the World Bank and IMF as agencies that may redress the Indian state's failure to do justice to landless labourers; and in relation to the Narmada movement, the World Bank finds momentary solace in the withdrawal of resourcing for the dam. None of these, and related initiatives, surrender people's power to critique the agendum of global capitalism embodied in the international financial institutions. Even when 'driven' to use these fora, these forms of strategic recourse also recognize the varied potential of judicial activism through social action litigation.
26. One hopes that the Indian judiciary will never go so far as the American Supreme Court's recent assertion that people have *no* constitutional right to elect their president and vice president outside legislative bounty—that determines how the electoral college votes may be constituted but it remains important to note that the right to adult suffrage in India is not a fundamental but merely a constitutional right, subject to parliament's plenary power of the amendment of the Indian constitution. One hopes that any misguided amendments will be restrained by the fecund doctrine of the un-amendability of the Basic Structure of the constitution.

27. These two inaugural features realize their full potency for extraordinary forms of activist adjudication in the working of the constitution, especially since 1973.
28. See, for this notion, Rawls, Note 4 above.
29. U. Baxi, 'The Little Done, the Vast Undone: Reflections on Reading Granville Austin's *The Indian Constitution*', *Journal of the Indian Law Institute*, 9, 1967, p. 323.
30. Distinctions, for example, between:
    - *Criticism* and *critique*.
    - *Constitutional patriotism* (that is, fidelity to forms of constitutionalism to legitimate power) and *commitment* (that is the will to achieve the ideals of liberty, equality, dignity, of all Indian citizens)
    - Constitutional and extra-constitutional forms of politics
    - Hierarchies of citizenship: *super-citizens* (beyond the law), *negotiating citizens* (typically upper middle class, who, through their capabilities to negotiate the law, often remain immune from the law, but have the power to represent law enforcement as regime persecution); *subject-citizens* (the vast majority of the Indian impoverished to whom the law applies relentlessly, and for whom the presumption of innocence stands inverted); *insurgent citizens*, often *encountered* or exposed to vicious torture, whose bodies construct the expedient truths of the security of the state; *gendered citizens* (women, lesbi-gay, and transgender people, recipients, and often receptacles, of inhuman societal and state violence and discrimination) and finally (without being exhaustive) the *PAPs—citizens*, the project affected peoples who remain subjects of state practices of lawless development
31. Sobhanlal Datta Gupta, *Justice and Political Order in India*, Firma K.L. Mukhopadhyaya, Calcutta, 1979.
32. U. Baxi, *Marx, Law and Justice: Indian Perspectives*, N. M. Tripathi, Bombay, 1993.
33. Especially by leading the opposition to the device of imposition of President's Rule on states, and effectively critiquing arbitrary interference with autonomous governance, well archived by the Sarkaria Commission: *Report of the Commission on Centre–State Relations* (2 vols.), Govt. of India Press, Nasik, 1988.
34. C. Ake, 'The Democratization of Disempowerment', in Jochen Hippler (ed.), *Democratization of Disempowerment*, Pluto Press, London, 1995, pp. 70–89.
35. But see the extraordinary churning reflected in the documentation prepared by the Committee of Concerned Citizens, *In Search of Democratic Space: Documentation of the Efforts by the Committee of Concerned Citizens*

(CCC) to bring peoples aspirations and right to live with dignity on the agenda of Naxalite movements and Governments, Hyderabad, August 1998, especially pp. 18–28, 45–55, 84, 96.

36. A.J. Parel, *Gandhi: Hind Swaraj and Other Writings*, Cambridge, Cambridge University Press, 1997.
37. The insistence of the first name is essential, given that his last name is more familiar to contemporary generations through many leaders of the Indian National Congress. I do not use the word 'Mahatma' to distinguish him from other Gandhis (and not just in the light of Ananda Coomarasawamy's critique of that notion).
38. Ganesh Prasad, *Nehru: A Study in Colonial Liberalism*, Sterling Publishers, New Delhi, 1976.
39. P. Chatterjee, *Nationalist Thought in the Colonial World: A Derivative Discourse?*, Zed, London, 1986.
40. U. Baxi, 'Justice as Emancipation: Babasaheb Ambedkar's Legacy and Vision', in U. Baxi & B. Parekh (eds), *Crisis and Change in Contemporary India*, Sage, Delhi, 1995, pp. 122–49.
41. U. Baxi, 'The Little Done, the Vast Undone', p.323.
42. T.K. Oommen, *Charisma, Stability, and Change: An Analysis of Bhoodan–Gramdan Movement in India*, Thompson Press, New Delhi, 1972.
43. J.D. Sethi, *Trusteeship: The Gandhian Alternative*, Gandhi Peace Foundation, New Delhi, 1986.
44. U. Baxi, *The Crisis of the Indian Legal System*, Vikas, New Delhi, 1982.
45. See T. Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India*, OUP, Delhi, 1999; C. Bhatt and P. Mukta, 'Hindutva in the West: Mapping the Antinomies of Diaspora Nationalism', *Ethnic and Racial Studies*, 23, 2000, pp. 407–41.
46. P. Mukta, 'The Public Face of Hindu Nationalism', *Ethnic and Racial Studies*, 23, 2000, pp. 407–41.
47. The triggers being provided by a whole series of critical events: the legislative reversal of the Shah Bano judgment, the opening of locks at the Ram Mandir in Ayodhya, the Deorala discourse concerning the right to perform sati, and the implementation of the Mandal Report. See Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh?: Hindutva and the Rule of Law*, Oxford University Press, New Delhi, 1999.
48. S.P. Sathe, *Judicial Activism In India*, Oxford Univesity Press, New Delhi, 2001. I say the so-called 'Hindutva' judgment because the issue of constitutionality of Hindutva was never before the Supreme Court, which had to deal with the rather more specific question of whether freedom of speech and expression during election campaigns appealing to utopian alternatives to present policy (whether of the Left or the Right

genre) amounted to a 'corrupt practice.' Quite rightly, the Supreme Court decline to so rule. Unfortunately, Brother J.S. Verma unduly extolled 'Hindutva' as a way of life in a couple of paragraphs, which grew larger than life in the public outcry that followed.

49. This type of propaganda overlooks the fact that the Supreme Court of India has upheld the constitutionality of Orissa and Madhya Pradesh legislations as prohibiting the use of 'force' and 'fraud' in such practices.
50. U. Baxi, 'The Constitutional Discourse on Secularism', in U. Baxi, A. Jacob and T. Singh (eds.), *Reconstructing the Republic*, Indian Association of Social Science Institutions and Har-Anand Publications, Delhi, 1999, pp. 211–33.
51. U. Baxi, 'The Kar Seva of the Indian Constitution? Reflections on Proposals for Review of the Constitution', *Economic and Political Weekly*, XXXV (11 March 2000), pp. 891–5, 2000c.
52. As the incidents concerning the making of *Water*, a film on Indian widows at Varanasi, or the film *Fire*, or systematic defacement of F.M. Hussain's paintings, demonstrate.
53. The most recent example of sovereign immunity enjoyed by Thackeray occurred when he was indicted on rather minor charges of hate speech last year. When a warrant for his arrest was issued , he and his supporters issued dire threats of retaliatory violence. Hindutva ideologues do not of course critique such open defiance of the law. Rather, they provide fuel to the fire by foregrounding the claim that all other religions, and cultural politics associated with them, have been repressive and retrograde and the best, even only, reassurance for a 'democratic' Indian future lies in the hegemony of reconstructed Hinduism. See Arun Shourie, *World of Fatwas, or Shariah in Action*, ASA Publications, New Delhi, 1995; and *Harvesting Our Souls: Missionaries, their Design, their Claim*, ASA Publications, New Delhi, 2000.
54. 28th Report of the Commissioner of the Scheduled Castes and Tribes, Government of India, New Delhi, n.d.
55. Urvashi Butalia, 'Community, State and Gender: On Women's Agency During Partition', *Economic and Political Weekly*, 28, 24 April 1993, WS 12–14; R. Menon and K. Bhasin, 'Recovery, Rupture and Resistance: Indian State and the Abduction of Women during Partition', *Economic and Political Weekly*, 28, 24 April 1993, pp. WS 2–11.
56. Veena Das, 'Language and Body: Transactions in the Construction of Pain', in Arthur Kleinman, Veena Das, and Margaret Lock (eds), *Social Suffering*, California University Press, Berkeley, 1997, p. 67.
57. Paul R. Brass, *The Theft of an Idol: Text and Context in the Representation of Collective Violence*, Princeton University Press, NJ, 1997.

58. G. Aloysius, *Nationalism Without a Nation,* Oxford University Press, New Delhi, 1999.
59. U. Baxi, 'The Kar Seva of the Indian Constitution?'
60. Jean-François Lyotard, *The Different: Phrases in Dispute*, 1992, New Haven, Yale University Press: Georges van den Abbeele, trans.
61. Indeed, from that point of view, the imaginative features of the Indian constitution are constituted by its salient departures from the paradigm of 'modern' constitutionalism. It constructs, first, the ordering principles of legitimation of state power, such that make legitimation wholly problematic, creating practices of public opinion and 'democratic will formative practices' (*cf.* Jürgen Habermas, *Between Facts and Norms*) that enable contestation concerning political practices of cruelty as well as imposition of the law and the constitution as *political fate*. Second, it marks the practice (and the continuing possibility) of naming orders of radical evil in the Indian state and civil society. In a creative departure from the classical liberal–modern notions of human rights, the Indian constitution addresses not just the state as a violator of human rights but also formations of power in civil society as millennially originary sites. Articles 17 (constitutional abolition of untouchability) and 23 (providing forced labour, trafficking in human beings, *begar*) are monumentally addressed to civil society. Third (thanks to Ambedkar) the constitution also innovates participatory rights: rights of the underclasses (the Dalits, the *atisudras*, the millennially dispossessed, disadvantaged, and deprived masses of India—U. Baxi, 'Justice as Emancipation: Babasaheb Ambedkar's Legacy and Vision', pp. 122–49; Marc Galanter, *Competing Equalities: Law and the Backward Classes in India,* Oxford University Press, New Delhi, 1984—to representation in the civil services of the states and legislatures. Fourth, the constitution, through its distinction between fundamental rights and directive principles of state policy, also innovates the international regime of human rights. It presages the distinction between the Covenant on Civil and Political Rights (rights entitled, as it were, to here-and-now judicial enforcement) and the Covenant on Social, Economic and Cultural Rights (subject to a regime of 'progressive realization'). Assurances of 'minority' rights are spectacularly enshrined. Fifth, the constitution, defines *development* as those governance policies which accomplish a *disproportionate* flow of rights and beneficence to the *atisudras* or the Dalits. The regime of representation in the Indian constitution is thus inherently, and innovatively, people-friendly. Sixth, contrary to the 'original intent' (if such phrase-regimes are meaningful!), the Supreme Court of India becomes the Supreme Court

for Indians. This happens initially, through the logics and paralogics of *Kesavananda Bharati*, by an unprecedented assertion of judicial power to review and annul, on the grounds of basic structure, amendments duly made by parliament, and then by the explosive invention of social action litigation, democratizing judicial access and redefining the mission of activist adjudicatory power and policy.
62. See Jacques Derrida, *The Spectres of Marx: The State of Debt, the Work of Mourning and the New International,* Routledge, London, 1994.

Judicial Review of Quasi-Judicial Decisions in Tax Matters

- Arshad Hidyatullah

Judicial Review is the most powerful weapon in the armoury of a Judge to shoot down a decision and grant relief to an oppressed assessee. This power is conferred by the Constitution under Article 226. It is a plenary power which has no Constitutional limitations but is an exercise of power only within the self-imposed restraints of a particular judge applying its principles of review which have evolved over the ages.

This often raises a dilemma in the mind of a Judge whether to exercise the powers conferred by Article 226 or not. This speech seeks to highlight when that power has to be used to control excessive or arbitrary action by a statutory functionary under a taxing statute which makes the decision in excess of jurisdiction and / or without jurisdiction.

In the armoury of the Judge the quiver has many arrows. They are:

- The writ of Certiorari
- The Writ of Mandamus
- The Writ of Habeas Corpus
- The Writ of Prohibition

Let me remove the first hurdle. Are the Orders passed under the Excise Act and Customs Act quasi-judicial or mere administrative Orders? In Sewpujanrai (AIR 1958 SC 845 (849)) it was held that Customs Authorities have the duty to act judicially in deciding the questions under the Act. So their decisions are subject to judicial review by the Court in exercise of powers under Article 226.

I have chosen to speak on the Writ of Certiorari as it is the most effective redress.

But, in the context of examining a quasi-judicial decision made by a functionary under powers under the excise Act, Customs Act or the Sales Tax Act, two arrows are used frequently.

The easiest way to describe the nature of writ of certiorari is from the pleading and the prayers in a writ petition. For invoking the writ of certiorari the Petitioner, ideally and separately sets out the facts leading to the passing of the decision called the impugned order and thereafter gives the grounds for the relief which he seeks. The prayer normally and should read:

> “for a writ of certiorari or a writ in the nature of certiorari to call for records of the Petitioners case to go into legality and propriety thereof and the quash and set aside the impugned Order”

It is therefore a command by the Court to the concerned functionary or his subordinate Officers to produce the record before the Court for it to examine the legality and propriety and if satisfied that the impugned Order is in excess of jurisdiction or without jurisdiction or arbitrary or in breach of principles of natural justice to quash and set aside the Order.

In the Courts of Karnataka and Kerala the Original of the impugned Order used to be produced in the Court and if it was to be quashed, it was physically cancelled by the Court and a red seal of the Court hanging from a ribbon would show that the Order was nullified!

A Wonderful practice to show the power of the Court.

The Writ of certiorari is an age old writ issued by the Court of Chancery in England. Its manifestation and scope in India is best described in the celebrated Judgment delivered by S. R. Das CJ in State of U. P. V. Mohmmad Nooh (AIR 1958 SC 86). It was a case of bias in that a person recorded his testimony and nevertheless proceeded to adjudicate the case against the Petitioner. Though it was not a tax case, the principles which were laid down in the context of the writ of certiorari are applicable in all tax cases where an Order is passed by a Statutory functionary contrary to the principles laid down in following two paragraphs:

> “10. … If, therefore, the existence of other adequate legal remedies is not per se a bar to the issue of a writ of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicial or quasi-judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior court can in a proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal e.g. by furnishing security required by the statute, should it then be laid down as an inflexible rule of law that the superior court must deny the writ when an inferior court or tribunal by discarding all principles of natural justice and

> all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior court or tribunal on appeal or revision?...
>
> 11. …If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. …"

This was the starting point of Judicial Review by invoking writ of certiorari. In yet another landmark judgment arising under the Customs Act in UOI V. Tarachand Gupta (1983 (13) ELT 1456 (SC)) (after reviewing the authorities) the concept of an Order being "without jurisdiction" was elaborated. Quoting from Lord Reid in the case of Anisminic Ltd. V. The Foreign Compensation Commission the Court held that the decision or order passed by an Officer of Customs under the Act must be a real and not a purported determination. To my mind, the passage from Anisminic summarises (and it has never been better said given the felicitous language of Lord Reid) the scope of judicial review and for issue of the Writ of Certiorari:

> "22. … In *Anisminic Ltd.* v. *The Foreign Compensation Commission*, (1969) 1 All ER 208, Lord Reid at pages 213 and 214 of the Report stated as follows :
>
> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where,

> although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly". …"

The audience may keep this passage in mind in the light of the latter part of this speech.

In yet another great judgment of the Bombay High Court Justice Madan and Justice kaniya as they then were in Binod Rao V. Minocher Rustom Masani (1976 SCC OnLine Bom 100 = (1976) 78 Bom LR 125) after referring to a host of Judgments summarised principles for judicial review as follows: - This was a judgment delivered during the 1975 emergency

> (1) The Court's scrutiny and review are not totally barred in a case where in the exercise of statutory powers an authority is empowered to make an order in its discretion on its subjective satisfaction.
>
> (2) An order made by an authority on its subjective satisfaction can be set aside by the Court on the following grounds:
>
> (a) where the authority has not applied its mind;
>
> (b) where the power is exercised dishonestly;
>
> (c)where the power is excercised mala fide;
>
> (d) where the power is excercised for a purpose not contemplated by the statute, that is to say, where it is excercised for collateral purpose;
>
> (e) where the authority has acted under the dictate of another body or authority;

(f) where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner;
(g) Where the satisfaction of the authority is based on the application of a wrong test;
(h) Where the satisfaction of the authority is based on the misconstruction of the statute;
(i) Where the grounds on which the satisfaction is based are irrelevant to the subject matter of the enquiry and extraneous to the scope and purpose of the statute;
(j) Where the authority has failed to have regard to the matters which the statute expressly or by implication requires it to take into consideration; and
(k) Where the decision based on subjective satisfaction is such that no reasonable person could possibly arrive at it, that is to say, the satisfaction of the authority is not real and rational.

(3) If one of the several grounds relied upon by the authority to support an order passed on subjective satisfaction is vague or irrelevant or bad the whole order must fail because it would not be possible for the court to say whether the impugned order would have been passed in the absence of such ground, though if it were the case of an order passed on objective satisfaction the court might endeavour to uphold the order on surviving grounds.

(4) The authority cannot avoid the scrutiny of the Court by failing to give reasons. In such a case the Court can compel the authority to state its reasons.

(5) Where the reasons given are bad and the authority has not taken in to consideration the relevant matters or real grounds on which the order could have been passed, the Court can direct the authority to reconsider the matter in the light of such relevant matters.

(6) Where, however, all the reasons which can be given for upholding the validity of the order have been found by the Court to be bad and unsustainable, the Court will not direct the authority to reconsider the matter, for then there is nothing for the authority to reconsider, but the Court will direct the authority to carry out what it has by the impugned Order refused to do.

These principles are of universal application for the issue of a writ of certiorari. This is the scope of judicial review under Article 226.

In the context of the interpretation of taxing / fiscal statute Justice S B Sinha in Commissioner V. ACER (2004 (172) ELT 289 (SC)) summarised the same between paragraph 28 to paragraph 49:

> ***Principles of Interpretation of a Taxing/Fiscal Statute :***
>
> **28.** A duty of excise primarily is levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods and not upon sales or the proceeds of sale of goods. In terms of Entry 84, List I of the Seventh Schedule of Constitution of India, the taxable event in respect of the duty of excise is the manufacture or production. No tax in terms of Article 265 of the Constitution of India can be imposed, levied or collected except by the authority of law.
>
> **29.** In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners,* [(1921) 1 KB 64 at p. 71], it is stated :
>
> "…In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."
>
> [See also *State of West Bengal* v. *Kesoram Industries Ltd. and Ors.*, 2004 (1) SCALE 425].
>
> **30.** It is also well-known that the one and the only proper test in interpreting a section in a taxing statute would be that the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. [See *St. Aubyn (LM) and Others* v. *Attorney General (No. 2)*, (1951) 2 All ER 473, p. 485].
>
> **31.** Imposition of tax is a constitutional function.
>
> **32.** A taxing or a fiscal statute demands strict construction. It must never be stretched against a tax payer. So long natural meaning for the charging section is adhered to and when the law is certain, then a strange

meaning thereto should not be given. [See *W.M. Cory & Sons Ltd.* v. *Inland Revenue Commissioners*, (1965) 1 All ER 917].

33. It is also well settled rule of construction of a charging section that before taxing a person it must be shown that he falls within the ambit thereof by clear words used as no one can be taxed by implication.

34. It is further well settled that a transaction in a fiscal legislation cannot be taxed only on any doctrine of "the substance of the matter" as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or "by inference or by analogy".

35. The taxing authorities cannot ignore the legal character of the transaction and tax it on the basis of what may be called 'substance of the matter'. One must find the true nature of the transaction. [See *Union of India and Others* v. *Play World Electronics Pvt. Ltd. and Another,* (1989) 3 SCC 181].

36. While interpreting valuation or classification contained in the Tariff Act, one cannot lose sight of the legal text contained in the Chapter Note explaining the meaning of the entry and in absence of its applicability thereto the general rules of interpretation.

37. The entries in the instant case are covered by the Chapter Note 6 vis-a-vis Rule 1 of the general rules of interpretation and Rule 3 thereof.

38. While construing a taxing statute, the existing market practice may also be taken into consideration.

39. The statute, however, should not be interpreted in such a manner which may lead to wide scale evasion of duty. The Court should adopt an interpretation which would be user friendly. If any other interpretation is made, the same would encourage the manufacturers to sell the operational computer separately as a result of which the buyers may have to incur extra charges. The customers, thus, may not be able to get the benefit of the information contained in the operational computer loaded in the factory. Furthermore, it may encourage in loading of pirated softwares in the computer.

40. In *Mathuram Agrawal* v. *State of Madhya Pradesh* [(1999) 8 SCC 667], the law is stated in the following terms :

"...The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. <u>If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.</u>" (Emphasis Supplied)

[See also *Indian Banks' Association, Bombay and Ors.* v. *M/s. Devkala Consultancy Services and Ors.*, JT 2004 (4) SC 587].

41. In *Hansraj and Sons* v. *State of Jammu and Kashmir and Others* [AIR 2002 SC 2692 : (2002) 6 SCC 227] rule of strict construction of a taxing statute was recommended.

42. We are also not oblivious of the fact that when the statutory provision is reasonably akin to only one meaning, the principle of strict constructions may not be adhered to.

43. Artificial rules to give the tax payer the 'breaks' are not out of place for taxation is now not an 'impertinent intrusion into sacred rights of private property'. [See *Oxford University Press* v. *Commissioner of Income-tax*, (2001) 3 SCC 359].

44. Furthermore, for the purpose of interpretation of a taxing statute, the fiscal philosophy, a feel of which is necessary to gather the intent and effect of its different clauses should be applied. [See *K.P. Verghese* v. *Income Tax Officer, Ernakulam and Another*, (1981) 4 SCC 173].

45. A consideration of public policy may also be relevant in interpreting and applying a taxing Act. [See *Maddi*

Venkatraman & Co. (P) Ltd. v. *Commissioner of Income Tax*, (1998) 2 SCC 95].

46. A provision enacted for the benefit of an assessee should be so construed which enables the assessee to get its benefit. [See *Mysore Minerals Ltd., M.G. Road, Bangalore* v. *The Commissioner of Income Tax, Karnataka, Bangalore* (1999) 7 SCC 106].

47. However, principle of purposive construction will be adhered to when a literal meaning may result in absurdity.

48. In Francis Bennion's Statutory Interpretation, Fourth Edition, page 828, it is stated :

"Section 310. Purposive construction not excluded for taxing etc. Acts: Particular types of Acts (for example taxing Acts) are not excluded from strained and purposive construction. The presumption as to purposive construction applies to them as to other Acts."

49. We may also notice that in Francis Bennion's Statutory Interpretation, Fourth edition at pages 879-880, the maxim *'quando aliquid prohibetur fieri, prohibitur ex directo et per obliquum'* has been quoted which means "Whenever a thing is prohibited, it is prohibited whether done directly or indirectly."

Sometime an issue arises as to whether the Order impugned is based on subjective satisfaction or on objective satisfaction (i.e. in the latter case on material criteria). In such a case, of subjective satisfaction the quasi-judicial decision was sought to be attacked by invoking the principle laid down in Wednesburry where Lord Greene M. R. held as follows:

10. … "If", to use the words of Lord Greene, M.R., in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [(1948) 1 KB 223 : (1947) 2 All ER 680] words which have found approval of the House of Lords in*Smith* v. *West Ellor Rural District Council* [1956 AC 736 : (1956) 1 All ER 855] and *Fawceit Properties Ltd.* v. *Buckingham County Council* [1961 AC 636 : (1960) 3 All ER 503] — "the authority has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere". In such a case, a legitimate inference may fairly be drawn either that the authority "did not honestly form that view or

that in forming it, he could not have applied his mind to the relevant facts". …

The aforesaid Judgment in Wednesburry resulted in the application of its principle in the recent judgment of Heinz India V. State of U. P. ((2012) 5 SCC 443) the Bench of T S Thakur as he then was and Deepak Mishra summarised the principles in paragraph 49 after referring to the Wednesburry principle of unreasonableness as follows:

"49. The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. …When one talks of 'judicial review' one is instantly reminded of the classic and oft quoted passage from Council of Civil Service Unions (CCSU) v. Minister for the Civil Service [1984] 3 All ER 935, where Lord Diplock summed up the permissible grounds of judicial review thus:

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

*By 'irrationality' I mean what can by now be succinctly referred to as '**Wednesbury** unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong*

with our judicial system. I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

50. The above principles have been accepted even by this Court in a long line of decisions handed down from time to time. We may, however, refer only to some of those decisions where the development of law on the subject has been extensively examined and the principles applicable clearly enunciated. In Tata Cellular v. Union of India (1994) 6 SCC 651 1994 Indlaw SC 17, this Court identified the grounds of judicial review of administrative action in the following words :

"The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) *Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*

(ii) *Irrationality, namely, Wednesbury unreasonableness.*

(iii) *Procedural impropriety.""*

In paragraph 56 after referring to the passage from Reid V. Secretary of State their Lordships quoted from the said Judgment as follows:

> 56. We may while parting with the discussion on the legal dimensions of judicial review refer to the following passage from Reid v. Secretary of State for Scotland [1999] 1 All ER 481, which succinctly sums up the legal proposition that judicial review does not allow the Court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case.
>
> *"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse or irrational or grossly disproportionate to what was required. …"*

Earlier I had said that the audience should keep in mind the principles laid down by Lord Reid in Anisminic. The wheel has come full circle and the same principles have been reiterated in Reid V. Secretary of State and like in Tarachand Gupta have been concurred in Heinz India.

Rider A

Let me remove the first hurdle. Are the Orders passed under the Excise Act and Customs Act quasi-judicial or mere administrative Orders? In Sewpujanrai (AIR 1958 SC 845 (849)) it was held that Customs Authorities have the duty to act judicially in deciding the questions under the Act. So their decisions are subject to judicial review by the Court in exercise of powers under Article 226.

JUDICIAL REVIEW OF NATURAL RESOURCES & INFRASTRUCTURAL PROJECTS

National Judicial Academy, Bhopal – 9.12.2012

By Mr. K.K. VENUGOPAL, Senior Advocate

I have no doubt whatsoever in my mind that among all common law countries, India, has been home to the most rapid development in the field of judicial review. While in England or in the United States a step forward need the gradual and harmonious development of a single aspect of administrative law, in India, with a large number of High Courts and a large number of Benches of the Apex Court of the country, the progress in this field of administrative law has been by leaps, rapid and swift. Whether this augurs well for the development of administrative law or not is a matter which one may have to analyze very carefully as the years progress. But it is clear that notwithstanding the avowed constitutional goal of separation of powers under the Constitution, the Supreme Court has been perhaps not very mindful of any limitation on its powers of judicial review, especially where it felt that the Government was guilty of wrong doing or that the statutes transgressed constitutional limitations.

I am restricting this presentation to an issue of great concern to the country, being the Government's distribution of leases, licenses, permits and grants in regard to infrastructural projects and those involving natural resources, which are the wealth of the country.

As all of us are aware, in the last few years, India has been developing economically at a fast rate and projects in the nature of airports, power plants and ports have been granted in large numbers. Leases of valuable minerals have been a source of enormous wealth to the beneficiaries. Privatization of industries controlled by the Government has been a source of vast revenues to the State. Licenses, especially in the area of telecommunications, have not only fetched great revenues to the State but also to those whom these licenses were granted. Massive infrastructure projects in the nature of townships and highways have been awarded by the Government, in a rapidly expanding economy.

All these raise questions about the policy issues involved in the distribution of such benefits, the processes to be followed by a Government and the requirements that constitutional limitations of Government's rights in these areas would demand.

I remember a long time ago, every Chief Minister had a certain percentage of seats in institutions of higher learning and especially medical colleges, which he could allot at his free will under the head 'discretionary quota'. There were housing projects where the houses built by Government could be allotted through such discretionary grants by the Minister in charge or by the Chief Minister. We had the unedifying spectacle of Chief Ministers being hauled before the Court because the beneficiaries of such grants were the drivers or the personal secretaries of the

Minister or Chief Ministers, perhaps holding these properties as *benamis*. The public at large accepted all such grants as the established rights which a Government or a minister was entitled to as part of his prerogatives. It took a number of years through development of administrative law that the realization slowly dawned that all this was not permissible under a Constitution which guaranteed equality before the law.

This branch of the law developed with the seminal judgment of the Supreme Court of India in the ***RamanaDayaram Shetty's Case (RamanaDayararam Shetty v. International Airport Authority, 1979 3 SCC 489).*** It was recognized by that judgment that there was a new type of wealth or a 'new property' which was in the nature of licenses, permits, leases and so on, which gave immense economic benefits to the grantee. Could the state part with such wealth at its whim and fancy, was the big issue which was posed in *RamanaDayaram Shetty's case (supra).* If through judicial review, limitations were to be imposed on the arbitrary distribution of such largesse, was it the Government alone which could be prohibited or regulated in its action or could it also extend to agencies of the Government in the nature of Corporations, companies controlled by the Government or even societies controlled by the Government. All these were issues of great importance to the progress of the nation.

It was Justice Bhagwati who later became Chief Justice of the Supreme Court of India, who decided and held in regard to what he described as "a new property" as follows:

> **11.** Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our

> wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so.

This would mean that in the future, the Government had to follow norms and principles which would satisfy the rule of non-arbitrariness. What would this entail?

The judgments of the Supreme Court held that it was not open to the Government or its agencies, which would also be considered as 'State' under Article 12 in Part III of the Constitution of India, to make any grant of the new property without following the procedure of inviting tenders or without holding a public auction. Such procedure had to be transparent, fair and reasonable. A proper advertisement would have to be issued so that all persons qualified would be entitled to apply. If yardsticks are laid down or a marking system is set out, they should be strictly adhered to. Any violation by the State of any of the conditions of the auction or invitation to bid being violated would result in invalidating the process.

Once judicial review of this dimension was evolved, the floodgates were opened as it were, because no single grant of leases, licenses, permits or award of contracts for infrastructural projects escaped attack by unsuccessful competitors, who approached the courts by way of judicial review. A total new jurisprudence developed, therefore, around the grant of such benefits. The seekers of judicial review were not restricted to those who fail in the competition. A new branch of jurisprudence known as Public Interest Litigation came into existence, which did away with the issue of *locus standi,* thereby permitting an NGO or a lawyer to espouse the cause of an individual or group which was unable to approach the Court to seek relief for itself.[1] The formalities of adversarial litigation were dispensed with and as a result, in the context of administrative law and distribution of resources, numerous petitions were filed by unsuccessful bidders, NGO's and public spirited individuals often alleging the violation of the norms governing the grant of such resources.

The one big aspect which the courts had to struggle with were challenges to such grants which involved issues of policy where the courts would substitute their own perception on what should be the policy in the state case for that of the Government. Would not policy issues be purely within the domain of governance and would not the separation of powers required by the Constitution be violated, if the Courts were to embark upon judicial review of policy issues.

[1] S.P. Gupta v. Union of India, AIR 1982 SC 149

In a leading case dealing with the disinvestment policy of Government, the Supreme Court in ***BALCO Employees' Union (Regd.) v. Union of India (2002) 2 SCC 333*, held as follows:**

> **46.** …… it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

A separate branch of law which developed on parallel lines dealt with the concept of State in relation to the agencies of the Government. If a public corporation wholly owned by the Central Government, in which it held all the shares and which was subject to the total control under the statute which set it up or under its articles of association by the Central Government, was it immune from its actions being challenged on the ground of violation of Fundamental Rights, if it fulfilled the indicia of being a 'State'? In such a case it would be bound by Article 14 of the Constitution and what is more, by Article 16 which required equality in respect of employment under the State. This was, therefore, an important issue which affected the lives of the employees of State corporations or statutory authorities as well the discharge of any of its functions, which could also be tested against the touchstone of the equality clause in the Constitution. Here, an independent branch of law developed as to the circumstances in which an authority or a corporation would be subject to judicial review for violation of fundamental rights.

The Supreme Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111***formulated a test so as to determine whether the authority is a State or not in the following terms:

> **40**…… The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

In fact, at a certain stage even the Board of Control for Cricket in India (BCCI) which controls cricket in India was alleged to be State and, therefore, could act in regard to the award of broadcasting rights only if it followed the same principles that the Central Government would have to follow if it were to be treated as a State. (***Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649)***

Here three of the judges of a Constitution bench held that the BCCI was not 'State' and it was not liable to the writ jurisdiction of the Supreme Court under Article 32 of the Constitution. But even the majority was prepared to hold that it could in certain circumstances be subjected to the jurisdiction of the High Court under Article 226.

One has to realize that the challenges to the award of valuable contracts in the nature of power projects or telecom licenses or establishing airports etc. are bitterly contested cases. The stakes involved are very high. Highly paid counsel are arraigned on either side and consequently, the arguments also proceed interminably. In the words of a former Supreme Court Judge (Justice Katju) the arguments continue '*ad nauseum'.*

We now come to a judgment recently delivered by the Supreme Court in what is known as 2-G Scam case (***Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.***As many as 122 valuable telecom licenses were cancelled in a single stroke by the Supreme Court of India. All of us are aware of the fact that many of the persons involved are facing trial before a Special Judge under the Prevention of Corruption Act. In regard to the distribution of natural resources of the State, the principle that emerges from the judgment is that every single infrastructural contract/project shall be granted only through public auction. The Supreme Court in this judgment held:

> **78 [Ed.: Paras 78 and 80 corrected vide Official Corrigendum No. F.3/Ed.B.J./9/2012 dated 6-2-2012.] .** In India, the courts have given an expansive interpretation to the concept of natural resources and have from time to time issued directions, by relying upon the provisions contained in Articles 38, 39, 48, 48-A and 51-A(*g*) for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance with the constitutional principles in the process of distribution, transfer and alienation to private persons.
>
> **96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.**

This certainly was unacceptable to the Government. It desired to have the freedom to decide the nature of cases where auction should take place or where it need not resort to auction or inviting bids through tender process. **The Presidential Reference (No.1 of 2012)** was made and in this Reference what is held is as follows:

> **146.** To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavor of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources.

I may mention that even though during the period after *RamanaDayaram Shetty,* where it was held that all such distribution of the 'new property' had to be through auction or by the tender process, in fact there have been exceptions which have been upheld by the Supreme Court of India. The circumstances when such departures are permitted are seen clearly in the *Torrent case* (***G.D. Zalani v. Union of India 1995 Supp 2 SCC 512***) **where Hindustan Antibiotics,** which was a wholly controlled government company, and therefore, a 'State', had the complete infrastructure for producing numerous antibiotics including Penicillin-G. Hindustan Antibiotics desired to have a joint venture partner for the purpose of improving the quality and yield of Penn-G and to achieve the full installed capacity. This partner had to have extensive expertise in the area of producing Penicillin. The Dutch company, ***Gist Brocades,***was a premier manufacturer of Penicillin which controlled 20% of the Penicillin produced in the world. The Dutch Company was selected by Hindustan Antibiotics not by auction or by tender process, but by being nominated as the joint venture partner. The other antibiotic manufacturers who were not even considered by Hindustan Antibiotics took the matter to Court. The Court upheld the tand of Hindustan Antibiotics and held in the following terms:

> **34.** We must reiterate that this was not a simple case of granting of lease of a government company, in which case the court would have been justified in insisting upon the authorities following a fair method consistent with Article 14, i.e., by calling for tenders. We agree that while selling public property or granting its lease, the normal method is auction or calling for tenders so that all intending purchasers/lessees should have an equal opportunity of submitting their bids/tenders. Even there, there may be exceptional situations where adopting such a course may not be insisted upon. Be that as it may, the case here is altogether different. HAL was trying to improve not only the quantum of production but also

> its quality and for that purpose looking for an appropriate partner. They went in for the best. It must be remembered that this technology is not there for the mere asking of it. All the leading drug companies keep their processes and technology a guarded secret. Being businessmen, they like to derive maximum profit for themselves. It is ultimately a matter of bargain. In such cases, all that need be ensured is that the Government or the authority, as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances.

Thus, fortunately, the area of arbitrary discretion vested in regard to the distribution of valuable State property has now gradually seen its end. All this is due to the judicial activism of the courts.

But nothing seems to have changed very much as evidenced by the recent allocation of 2-G licenses and also the allotment of coal blocks. Vigilance, therefore, has to be the cornerstone of judicial review. Human beings can be venal, justice cannot and judicial review will not. Hence, let us hope that with a strong judiciary and with the flaming sword of justice coming down harshly on wrongdoers, we can hope that the promises held out by the Constitution will stand fulfilled.

Acting Out of Turn
Supreme Court and Postponement Orders

ARGHYA SENGUPTA

The recent judgment of the Supreme Court of India, creating a new remedy of postponement orders to balance the freedom of press and the right to a fair trial, has once again raised grave concerns about overreach by the judiciary. This article argues that the creation of such a remedy in this case was beyond the legitimacy and competence of the Court. Further, the conceptualisation of the postponement order as a means to balance the two rights is flawed. Despite certain safeguards, it marks the beginning of a dangerous discourse to stifle free speech and will prove inefficacious in securing the fair administration of justice.

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The principled relationship between a free press and the administration of justice is a complementary one. Lord Hewart's dictum that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"[1] accepted widely as the cornerstone of any judicial system requires the press to freely report court proceedings. Not only does this ensure that the judiciary remains accountable for its functioning, but it is also necessary to secure public confidence in a fair and transparently functioning judicial system. Despite paying lip service to this fundamental complementarity, the judgment of the Constitution Bench of the Supreme Court of India in *Sahara India Real Estate Corporation and Others vs Securities & Exchange Board of India and Another*,[2] focuses disproportionately on those exceptional situations when there is a conflict between the freedom of the press and the requirement of fair administration of justice.

While indeed such conflicts may arise and require judicial resolution, this essay argues that neither was the Court directly confronted with such a situation in the present case nor was its resolution of this purported conflict prudent and workable. The argument will be developed specifically through two claims: first, the decision of the Court to lay down the constitutionally acceptable balance between free speech and administration of justice in this case is an illegitimate exercise of judicial power beyond the competence of the Court; second, the remedy of a postponement order while a laudable effort to balance the said rights is flawed in principle, problematic in practice and fashioned from an incomplete appreciation of the operation of such orders in the United Kingdom (UK). As a result, the Court's decision to hold the media[3] accountable for its purported excesses results in an unfortunate own goal, scarcely protecting the administration of justice as proclaimed, pointing instead to its own position as a supremely powerful yet inadequately accountable institution.

Judicial Legitimacy, Competence

Throughout the judgment, Chief Justice Kapadia, speaking on behalf of a unanimous Court reiterates that the Court is exercising its power to declare law under Article 141 of the Constitution. The fact that such power exists is a truism and beyond question. The key objection, as pointed out by several leading lawyers in the oral arguments, is that in the instant case there was no lis or dispute which is a fundamental precondition that has to be satisfied prior to the exercise of such power. To understand the basis of this objection and the Court's reasons for rejecting it, a brief survey of the facts leading up to the dispute is necessary.

Following an order of the Supreme Court in a pending litigation between the petitioners (hereinafter "Sahara") and the respondent (hereinafter "SEBI") asking the parties to come to a settlement in a matter involving security for liability incurred by Sahara to certain bondholders, Sahara's counsel sent a confidential proposal to his SEBI counterpart explaining how such liabilities would be secured. Subsequently, a television channel broadcast the contents of the said proposal, despite its confidential nature. In the hearing in Court on this issue, Sahara claimed a breach of confidentiality on SEBI's part which the latter denied. The Court then passed an order, distressed by the goings-on, requesting counsel to make written applications that would allow it to pass appropriate orders regarding "reporting of matters which are sub-judice". In the interlocutory applications (IAs) filed pursuant to the request of the Court, Sahara requested the Court that it frame appropriate guidelines regarding reporting of sub judice matters and issue directions regarding the extent of publicity that ought to be given in the media of documents and pleadings in pending court proceedings. SEBI too requested, in the

Court's words, "(that) this Court should give appropriate directions or frame such guidelines as may be deemed appropriate" (para 14).

From this survey, two relevant facts can be gleaned. First, the only lis between Sahara and SEBI, flowing from the television report, related to whether there was a breach of confidentiality on the part of SEBI or not. While this is an issue that certainly required judicial resolution, neither is this a constitutional issue and nor is this the lis that can justify the Court's intervention in passing the current order regulating media reporting of court proceedings.

Second, insofar as the applications filed by Sahara and SEBI are concerned (IAs 4, 5 and 10), contrary to the Court's claim that they evidence a dispute between the parties for which they have sought adjudication (para 45), they demonstrate substantial concurrence in requesting the Court to frame appropriate guidelines or directions as may be necessary regarding media reporting of pending proceedings. No lis justifying the Court's actions is demonstrated. In any event, deriving the legitimacy of its exercise of power of laying down general guidelines from the requests made by parties likens the Court to an alternative dispute resolution mechanism whose basis for functioning is party consent.

The Court's justification that parties were free to withdraw their applications but chose not to do so furthers this impression that the Court was acting not as the final arbiter of disputes in a sovereign state but rather akin to an alternative dispute resolution tribunal whose jurisdiction could be given or taken away by parties at their will. Such an argument to justify the order is flawed at worst given that its consequences will affect non-parties to the dispute, and a ruse at best, to allow the Court to pronounce on an issue of societal concern in the guise of resolving a dispute.

Alternatively, if the Court derives its legitimacy from a distinct lis, i e, the breach of Sahara and SEBI's rights to negotiate and settle in confidence, by the media report of a privileged document, the said dispute is not between the parties inter se as the Court suggests, but rather between the parties on the one hand and the television channel on the other. Even insofar as this dispute is concerned, creating a new general remedy of a postponement order without using the order so created to resolve the dispute at hand raises two distinct problems.

It is in breach of a well established canon of constitutional adjudication that the Court must decide constitutional cases on the narrowest ground necessary to resolve the dispute at hand and will not adjudicate on larger claims which may be raised. A long line of cases has established this principle, including the case of *Naresh Shridhar Mirajkar vs State of Maharashtra*,[4] cited by the Supreme Court in this case as binding precedent. Following *Mirajkar,* in the present case, to determine whether the report of the television channel disclosing a confidential document related to proceedings pending in Court, affected the right of parties to negotiate and settle in confidence, did not require creation of the new remedy of a postponement order to be issued against publication of any materials that may affect the administration of justice. The case could most certainly have been decided on the narrower ground of whether disclosure of *this* confidential communication in the course of *this* litigation affected impartial administration of justice. Neither should other parties have been invited to present their point of view in Court, nor should a wide-ranging general remedy have been framed. To suggest that the resolution of a civil constitutional matter of this nature would require a remedy that would apply to criminal cases as well and a much wider set of publications than documents between parties inter se (as was the issue in the present case) is in blatant disregard of this well-established canon of constitutional adjudication.

Beyond Court's Competence

In any event, to lay down a general remedy of this nature is a legislative task, beyond the competence of the Court. While the Court would certainly be competent to order postponement of the offending publication in this case as a way of resolving the tension between the freedom of speech of the television channel and the parties' right to a fair trial, it is crucial to note that the Court did not pass any such order to this effect. Instead, it created a new general remedy and enumerated the circumstances when its use could be ordered in the future. While the Court did hear several parties representing diverse interests, in a case such as this one involving the creation of a new remedy, where a diverse (and often unknown) range of factors are at play, the Court is simply not competent to ascertain the implications of its actions, no matter how representative it purports to be.[5]

While this criticism can be levelled against a number of decisions of the Supreme Court, it is especially valid in this case, since the contours of a postponement order have been poorly defined and leave ample scope for abuse. For example, can a publication that reports on the fact of a postponement order being issued by the Court, in the process describing the offending publication, itself be postponed? After all such a publication can itself arguably cause a substantial risk of prejudice. Will postponement be ordered for publications which support an accused's presumption of innocence rather than attack it as is the current trend that the Court finds dangerous? Though rare today such publications may become commonplace in the future and also affect the fair administration of justice.

These illustrative unanswered questions (and there are many more) will accompany the law laid down by the Supreme Court in this case, for the foreseeable future – an unfortunate but inevitable consequence of a legislative exercise beyond the competence of the Court. Before embarking on such an exercise, the Court would have been well-advised to be cognisant of its own limitations and reflect on the enormity of the task, aware that after all "it is a Constitution…(they) are expounding".[6]

Principle and Policy Criticisms

In terms of the law laid down by the Supreme Court in this case, the remedy of a postponement order, which can be sought by an accused or an aggrieved

person who apprehends a violation of her fundamental right under Article 21 of the Constitution from the Supreme Court or a high court, against the offending publication, warrants critical scrutiny. Two specific aspects are critically reflected upon in this essay: First, the operation of postponement orders and the practical difficulties that seem imminent in such operation; second, the principle that the Court posits as the rationale for a postponement order, i e, a device to prevent possible contempt of Court, and its validity. Both these concerns emanate from an unsatisfactory appreciation of the operation of postponement orders in statutory law in the UK by the Supreme Court and its consequently flawed transplantation into Indian constitutional law.

The idea of a postponement order is not novel, being enshrined in British statutory law for over three decades. Section 4(2) of the Contempt of Court Act, 1981 provides for an order postponing publication of any report of court proceedings if such postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in pending proceedings or any other connected proceedings. Its scope and effect were explained in the recent Court of Appeal judgment in *In the Matter of B*.[7] In this case, the Court clarified that the ambit of postponement orders under Section 4(2) was limited to contemporaneous, fair and accurate reports of court proceedings only. This is because, though such reports, would not attract the strict liability rule of contempt, which any unfair, inaccurate or other publications regarding court proceedings or any incidental matter would, being protected by an exception in this regard in Section 4(1), their publication could nonetheless tend to prejudice the administration of justice.[8] For example, in a sequential trial involving multiple defendants, a fair and accurate report of the proceedings in the first trial, including descriptions of what was introduced as evidence and what answers were given, has a real chance of affecting the fair administration of justice in the later, connected trials, as the jury might get swayed by such reports. These reports however cannot constitute contempt of court and consequently there is no deterrent available to thwart their publication despite the occasional necessity of doing so. It is only in such circumscribed situations for fair, accurate and contemporaneous reports that postponement orders can be issued. As counter-intuitive as this may sound, the Court expressly disallowed the postponement of unfair and inaccurate reports, with the wise words,

> Broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice…The risk of being in contempt of court for damaging the interests of justice is not one which any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked simply because there are occasions when there is widespread and ill-judged publicity in some parts of the media (para 25).

Three Key Points

Three key points emerge from this analysis. First, the ambit of a postponement order is limited to fair and accurate reports of court proceedings which can cause a substantial risk or prejudice to the administration of justice. The position of law is thus clear and the circumscribed nature of a postponement order provides maximum scope for the operation of a free press and the principle of open justice. While the Supreme Court of India is careful in closely circumscribing the remedy and the conditions which have to be fulfilled when such a remedy is ordered, it has failed to limit the ambit of the offending publication. Such prescription would have been appropriate in the interests of certainty, especially as the UK law which the Court has chosen to follow has a much narrower remit than what the Court itself intends for an analogous order in India.

Second, in the UK, postponement is permitted only for planned publications and not against publications that are already in the public domain. The latter is subject to ordinary contempt law and the media bear full responsibility for exercising their own judgment in such cases. Limiting postponement to planned publications, facilitates such orders to be passed generally and not against any specific publication that is found offensive, thereby ensuring that administration of justice is protected comprehensively.

In India, this judgment has expressly altered this position, with postponement orders possible only in case of actual and not planned publications (para 42), i e, those publications already in the public domain. While this criticism does not advocate a replication of the UK position, the reasons for such a change are not outlined in the judgment and raises concerns of efficacy and floodgate litigation. In a digital age when a publication is circulated globally minutes after its publication, the efficacy of a postponement order against an actual publication reducing the risk of prejudice is severely questionable. It is likely that prejudice, if any, will already have been caused by the time a postponement order is issued, which, given the constraints of the judicial process, cannot be ordered instantly. Thus in all likelihood the remedy of postponement orders will be too little, too late in securing the fair administration of justice.

At the same time, given that postponement can only be ordered against actual publications and not planned publications, such an order will operate only against the impugned publication, i e, the publication that has been challenged. This means, nothing in the order will bind a media publication on the same topic in the future. For the petitioner to seek relief against such a publication, an application for a postponement order subsequent to each such publication will presumably have to be resorted to. It is likely that the fact of a postponement order being granted will raise, rather than quell popular curiosity about a particular case, thereby leading to more publicity in the media, further interfering with the proper administration of justice. It is to precisely quell this reactive curiosity that super-injunctions were developed in the UK, preventing reporting of the grant of the injunction in the first place, severely affecting the freedom of the press and the principle of open justice.[9] Ominously, it seems that the Supreme Court has unwittingly thrown

open such a door, and has put itself between a rock and a hard place, either severely restricting the freedom of the press through a barrage of postponement orders or failing to protect the administration of justice comprehensively, the key virtue its order sets out to fortify.

Third, it is fallacious for the Supreme Court to point out that the principle underlying a postponement order in the UK is to minimise possible contempt of Court (para 19). As has been pointed out above, postponement orders apply to fair and accurate reports of court proceedings. Such reports cannot be contempt of court under the Act, despite its strict liability provision, since Section 4(1) specifically provides such an exemption. Even otherwise, while the Supreme Court is correct in stating that contempt is an offence sui generis flowing from the inherent power of the Court, under common law in the UK, the test for contempt is well-established. Contempt is only occasioned when the appellant knowingly did an act which he intended and which was calculated to interfere with the course of justice and was capable of having that effect.[10] Thus a fair and accurate report of court proceedings can rarely constitute common law contempt – it can only cause substantial, albeit unintended risk of prejudice to the administration of justice, to avoid which a postponement order can be issued.

This is not to suggest that the Indian law relating to postponement orders cannot rest on a distinct principled proposition of preventing possible contempt by the press. However even when this claim is examined, the Court's reasoning is found wanting. The Court assumes, in asserting this proposition, that a publication which causes a substantial risk of prejudice to the administration of justice would qualify for contempt. This is not the position in law. A fair and accurate report of court proceedings would not qualify as contempt under Section 4 of the Contempt of Courts Act, 1971 or in all likelihood under the common law of contempt in India.[11] As far as other publications are concerned, which tend to affect the administration of justice, without any intention of doing so, the position of law is uncertain with the Supreme Court having in the past adopted both an intention-based test, as well as an effects-based test in determining contempt.[12] This uncertainty should be clarified by the Court forthwith instead of being used as a justification for creating a new remedy of a postponement order. While in such cases, a postponement order may still be necessary to ensure the fair administration of justice, such an order does not prevent possible contempt or at any rate should not be seen as doing so.

Finally, if there is any publication that is calculated to affect the administration of justice, it deserves to be contempt of court and no preventive mechanism is necessary. The Court is thus disingenuous, overly concerned with its image of being a guardian of press freedoms, and plainly in error in attempting to portray the rationale for a postponement order as preventing possible contempt by the media, a rationale that suggests a protective attitude. If anything, such an order proceeds on the unstated assumption that a free press in India is increasingly inimical to the fair administration of justice and requires subordination to the latter in a range of situations. This is a radically distinct principle, one that the Court ought to have expressly articulated.

Conclusions

It is unlikely that postponement orders will be the last word on the subject of balancing the freedom of the press and the right to a fair trial. Despite such orders being laid down in law instead of guidelines on media reporting as was initially being considered, there is a very real possibility that postponement orders can be used to stifle the press, especially by the rich and powerful, those who possess the wherewithal to access the courts repeatedly. How the courts deal with such applications will be the key question in the future. If they show the same missionary zeal as that which led the Supreme Court to pass this order in the first place, the foundation of press freedom in India will be on shaky terrain. Reading this judgment, the inference that the judges were responding to a popularly perceived notion of the media having become exceedingly powerful without the requisite accountability is inescapable. While such a notion may indeed be true, to act on such a general sentiment is not the prerogative of the courts of law. This is especially so since vigorous public debate on this issue has led to some healthy introspection within the media itself.

If self-regulation is found ineffective, light-touch governmental regulation of the media in consonance with constitutional restrictions is always possible. By acting out of turn, the Supreme Court has only furthered the impression of its well-intentioned albeit misplaced zeal to become the ultimate go-to institution for the country's myriad political, social and governance problems. This is a path that is dangerous, especially for an institution whose own lack of accountability is an issue of concern, rivalling if not surpassing that of the media, on whom it sat in judgment.

NOTES

1 *The King vs Sussex Justices,* [1924], 1 K B 256.
2 MANU/SC/0735/2012.
3 The terms "media" and "press" are used interchangeably in this article.
4 AIR 1967 SC 1.
5 The idea of polycentric issues, i e, issues which have several dynamic and different dimensions each affected by changes in the other thereby leading to a complex set of repercussions to any change, being unsuitable for judicial determination was an argument originally made by Lon Fuller. See Lon L Fuller, "The Forms and Limits of Adjudication" 92 *Harvard Law Review,* 353(1978-79).
6 The original quotation is by Marshall C J in *M'Culloch vs Maryland*, 17 US 316, and reads, "…we must never forget that it is a *constitution* we are expounding" (emphasis as in original).
7 [2006] EWCA Crim 2692.
8 This view is supported by an official publication of the Judicial Studies Board. See "Reporting Restrictions in the Criminal Courts" (A Joint Publication by the JSB, the Newspaper Society, the Society of Editors and Times Newspapers Ltd, October 2009) at p 20, available at http://www.judiciary.gov.uk/NR/rdonlyres/5AC4E743-55FE-4E31-9FAB-7BBEC3 DF1B89/0/crown_court_reporting_restrictions_021009.pdf (last visited 27 September 2012).
9 For a history of super-injunctions, see Adrian Zuckerman, "Super Injunctions: Curiosity-Suppressant Orders Undermine the Rule of Law" 29(2) *Civil Justice Quarterly,* 131 (2010).
10 *R vs Michael Geroge Giscombe,* (1984), 79 Cr App, R 79.
11 *In Re: Mulgaonkar,* (1978), 3 SCC, 339.
12 Contrast the divergent tests formulated by Mukherjea J in *Brahma Prakash Sharma vs State of Uttar Pradesh,* AIR 1954 SC 10 and Beg C J in *In Re: Mulgaonkar,* (1978), 3 SCC 339 (based on effects of publication) on the one hand with those of Grover J in *Perspective Publications Ltd vs State of Maharashtra,* [1971] 2 S C R 779 and Krishna Iyer J in *In Re: Mulgaonkar* (1978), 3 SCC, 339 (based on intention) on the other.

CHAPTER 23 SWALLOWING A BITTER PIL? REFLECTIONS ON PROGRESSIVE STRATEGIES FOR PUBLIC INTEREST LITIGATION IN INDIA

Arun K Thiruvengadam[1]

1 Introduction

Against the background of an alleged shift in the nature and role of the judiciary in India between the 1980s and the 1990s, this essay focuses on the following two questions: (i) What exactly is the nature of the shift that has taken place within the Supreme Court of India on issues of social rights and distributive justice?; and (ii) Should this shift lead progressives to abandon the site of legal intervention?

In formulating responses to these two questions, this essay in turn advances two arguments. The first – descriptive – argument seeks to assess the shift in the approach of the Indian Supreme Court to issues of human rights and Public Interest Litigation (PIL) between the 1980s and the 1990s. The second – normative – argument urges progressives to increase – rather than abandon – engagement with the law and the courts.

2 The changing character of Public Interest Litigation: The debate over assessing this claim

Several scholars have asserted that PIL in India has been transformed from the time of its inception in the late 1970s to the causes it embraced in the period since the 1990. The seeming consensus amongst progressives is that the Supreme Court's stance has changed from being progressive in the 1970s to one that became actively hostile to progressive causes in the 1990s. This has been termed the 'conservative turn' of the Indian judiciary. Some other

1 This is a modified version of an essay that was written in 2009 for a workshop that sought to analyse the Indian Supreme Court's conservative turn since the advent of neoliberalisation in the early 1990s. The full essay appears in M Suresh & S Narrain (eds) *The shifting scales of justice: The Supreme Court in a neo-liberal era* (2014). I am grateful to Professors Viljoen, Baxi and Vilhena for including my work here.

scholars have questioned whether such a turn has occurred in the way that is asserted.

My view is that those asserting the existence of a conservative turn can rely on various forms of evidence to back their claims. My first argument, therefore, seeks to bolster the claim of a 'conservative turn' by describing the terrain while relying upon scholarly assessments and actual court decisions.

In its early stages, the Court's focus in PIL cases was on very specific causes, almost all of which affected constituencies that were particularly disempowered. Very often the Court cited the fact that most of these constituencies would not have ready access to justice, to justify its admittedly adventurous steps to improve their situation. Thus, for instance, a number of these early cases (especially those involving Justice VR Krishna Iyer, who had a particular interest in ameliorating prison conditions having undergone incarceration himself) focused on the rights of prisoners. Clearly, prisoners were a category of citizens who were severely handicapped in being able to pursue the rights that were due to them. The Supreme Court held, for instance, that those charged with criminal offences had positive rights to legal aid[2] and a speedy trial.[3] On the negative side, prisoners were held to have constitutional rights against the following: solitary confinement;[4] bar fetters;[5] handcuffing;[6] delayed execution;[7] custodial violence;[8] and public hanging.[9] Other groups whose causes were addressed in early PIL cases were the following: migrant labourers;[10] pavement dwellers;[11] children;[12] and mentally-ill persons.[13] All of these groups fit the general category of cases that were the focus of the early phase of PIL cases, as each of these groups faced special difficulties in being able to espouse its grievances through the regular channels of democratic politics and access to justice.

Things began to change in the 1990s. To illustrate briefly what these changes entailed, I rely on a comprehensive survey of PIL cases that were decided in the 1997-1998 period. In the conclusion of the survey, Muralidhar presciently observed: 'The cases that were taken up for detailed consideration by the courts reflected a perceptible shift to issues concerning governance.'[14] This was the period during which the Supreme Court became proactive in its efforts towards (i) cleaning up the political process by focusing

2 *MH Hoskot v State of Maharashtra* MANU/SC/0119/1978.
3 *Hussainara Khatoon v Home Secretary, State of Bihar* MANU/SC/0084/1980.
4 *Sunil Batra v Delhi Administration* MANU/SC/0184/1978.
5 *Charles Sobhraj v Supt Central Jail* MANU/SC/0070/1978.
6 *Prem Shankar Shukla v Delhi Administration* MANU/SC/0084/1980.
7 *TV Vatheeswaran v State of TN* MANU/SC/0383/1983.
8 *Sheela Barse v State of Maharashtra* MANU/SC/0382/1983.
9 *AG of India v Lachma Devi* MANU/SC/0059/1985.
10 *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.
11 *Olga Tellis v Bombay v Municipality* AIR 1985 SC 180.
12 *Lakshmikant Pandey v Union of India* AIR 1984 SC 469.
13 *Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308.
14 S Muralidhar 'Public Interest Litigation' (1997-1998) 33-34 *Annual Survey of Indian Law* 525.

on corruption at the highest levels of the political set-up in the *Hawala* case[15] and the *Fodder Scam* case;[16] (ii) solving the chaotic traffic and pollution in Delhi;[17] (iii) cleaning up the Taj and its surrounding area;[18] (iv) regulating the disposal of hazardous waste;[19] (v) regulating the manufacture and sale of pesticides;[20] (vi) addressing the issues of sexual harassment[21] and female foeticide;[22] and (vii) regulating the collection and distribution of blood by blood banks.[23]

Usha Ramanathan documents the changing nature of PIL in the mid-1990s, describing the original constituency of PIL as being that portion of the Indian population which was 'caught in the throes of severe disenfranchisement, dispossession and rightlessness', and includes within this category 'the bonded labourer, the incarcerated undertrial, the labouring child, migrant labour, and women in custodial institutions'.[24] In her telling, PIL cases across the 1980s and into the 1990s began to focus on a vast range of issues, most of which centred on issues affecting the middle classes in India, as opposed to the marginalised sections. Ramanathan states that in this new phase, which emerged more clearly in the 1990s, the Supreme Court had to balance competing interests, and it gradually began to turn away from protecting the interests of the original constituencies of PIL. Ramanathan describes these competing interests in vivid terms: [25]

> The right of over 30 per cent of the residents of Delhi to their shelter in the slum settlements was pitted against the need to 'clean up' the city. The right to a relatively unpolluted environment by means of the relocation of industries was pitted against the right of the working classes to their livelihood. The right to life, livelihood and protection from immiseration and exploitation of communities displaced along the Narmada was pitted against the right to water that the dam was expected to reach to the people in parts of Gujarat; it was also pitted against the enormous amounts of money that had already been expended on the dam. Even the right of the victims of the Bhopal gas disaster to receive compensation was pitted against the bureaucratic imperative of winding up the processing of claims.

Ramanathan therefore argues that 'the constituency on whose behalf the enhancement of judicial power' had been justified in the first phase of PIL, 'began to emerge as the casualty of that exercise of power' in the new phases

15 *Vineet Narain v Union of India* (1998) 1 SCC 226.
16 *Union of India v Sushil Kumar Modi* (1997) 4 SCC 770.
17 *Suo Moto Proceedings in Re: Delhi Transport Department* (1998) 9 SCC 250.
18 *MC Mehta v Union of India* (1998) 9 SCC 381; (1998) 9 SCC 711; (1998) 8 SCC 711.
19 *Research Foundation for Science and Technology v Union of India* 1997 (5) SCALE 495.
20 *Dr Ashok v Union of India* (1997) 5 SCC 10.
21 *Vishaka v Union of India* (1997) 6 SCC 241.
22 *Chetna v Union of India* (1998) 2 SCC 158.
23 *Common Cause v Union of India* (1998) 2 SCC 367.
24 U Ramanathan 'Of judicial power' 19(6) *Frontline* 16-29 March 2002, available online at http://www.flonnet.com/fl1906/19060300.htm (accessed 13 September 2012).
25 As above.

of PIL that appeared in the 1990s.[26] More recently, Shukla has reached a similar conclusion after examining a body of case law relating to civil liberties, slum clearance and labour rights, all of which directly affect the conditions of the poor in India: 'From the beginnings of PIL as pro-poor and trying to effectuate the rights of the exploited, it is increasingly taking *a diametrically opposite direction*'.[27]

Evidence that the Supreme Court in the 1990s and in the current decade is refusing to enforce rights which the Court of the 1980s would have, is supported by quantitative analysis. In support of their arguments, the critics of PIL cite several significant decisions to make good their claim, which can be classified under three categories. One category of cases includes the following three cases: *Narmada Bachao Andolan v Union of India* (2000);[28] *ND Dayal v Union of India* (2003);[29] *Tata Housing Development Company v Goa Foundation* (2003)[30] – all of which involved the displacement of thousands of people as a result of large dam projects that were ultimately endorsed by the Supreme Court. A second set of cases which have been consistently attacked for their neglect of the concerns of migrant workers is the series of orders passed in the long-running *MC Mehta v Union of India* (1986) case[31] that oversaw the relocation of thousands of polluting industries outside of the limits of the city of Delhi. The third category of cases which attracts the ire of the critics is cases such as *Almitra Patel v Union of India* (2000),[32] where the Supreme Court ordered the demolition of slums and unauthorised structures set up by migrant workers and the poor. Even if these cases are few in number, one has to recall that the effect of each of these cases was typically felt by a large section of the population and, in that sense, each case had a potentially huge impact.

Shankar has undertaken a statistical survey,[33] asserting that the success rate in socio-economic rights cases (specifically in the health and education

26 U Ramanathan 'Displacement and the law' (1996) 31 *Economic and Political Weekly* 1486; U Ramanathan 'Demolition drive' (2005) 40 *Economic and Political Weekly* 2908.

27 R Shukla 'Rights of the poor: An overview of the Supreme Court' (2006) 41 *Economic and Political Weekly* 3755.

28 2000 10 SCC 664. Here the Supreme Court allowed the Sardar Sarovar project that created one of the world's largest dams to proceed even though a comprehensive environment appraisal had not been conducted. In addition, this affected thousands of tribes and other disempowered groups of people who were forcibly relocated without adequate rehabilitation efforts or compensation.

29 2003 7 SCALE 54. Again, the Court approved of a large dam project by dispensing with the requirement of an environmental impact assessment programme, and by ignoring an expert committee report which pointed to serious environmental problems.

30 2003 7 SCALE 589. In this case, the Supreme Court approved a housing project that was to come up on forest land. Its order, according to Bhushan, effectively deprived hundreds of poor fishermen of their livelihood.

31 AIR 1996 SC 2231. The original case was initiated in 1985, but has had several off-shoots over the years. Several of the orders issued by the Supreme Court over the last two decades have been helpfully catalogued and reproduced at http://www.elaw.org/resources/regional.asp?region=Asia (See the cases listed as *MC Mehta v Union of India*) (accessed 21 December 2013).

32 (2000) 2 SCC 166.

33 S Shankar *Scaling justice: India's Supreme Court, anti-terror laws, and social rights* (2009).

sectors) had declined from the 1980s to the 1990s. The fact that Shankar's study was primarily focused upon cases relating to health and education seems like a reasonable objection. Shankar's study relied upon reported cases, which form a small subset of the actual cases decided by the Supreme Court. Epp, in conducting a similar quantitative study of the Supreme Court's record on rights cases, has called this the difference between the Court's 'public agenda' (consisting of decisions on major issues that are published in law reports) and its 'routine agenda' (consisting of tens of thousands of routine decisions, forming the bulk of the case load of the Court, which remain unpublished and are known only to the lawyers and the parties to the case).[34]

A more comprehensive study that is relevant for our purposes is that conducted by Gauri, who has attempted to empirically test the claims of the critics of PIL in a systematic way.[35] Gauri's study covers a wider spectrum. Like Epp, Gauri appears to have worked in tandem with the Supreme Court Registry as is indicated by the description of his dataset: (i) cases that, according to the Supreme Court registrar's office, the Court has itself classified as PIL from 1988-2007 (some 2800 'cases' overall); (ii) all Supreme Court cases in the Manupatra database that involved fundamental rights and that addressed concerns regarding women and children rights, whether or not explicitly admitted as PILs (86 cases); (iii) all Supreme Court cases in the Manupatra database that involved fundamental rights and were related to issues regarding SC/ST/OBCs, whether or not explicitly admitted as PILs (180 cases); and (iv) all Supreme Court cases in the Manupatra database that the Supreme Court explicitly called a PIL (44 cases).[36]

Gauri concludes that his findings are 'consistent with the claim that judicial receptivity in the Supreme Court to fundamental rights claims made on behalf of the poor and excluded individuals has declined in recent years'. His data shows 'not only a decline in the win rate for marginalised individuals, but a simultaneous increase in the win rate for advantaged individuals'. Gauri concludes that his findings

> constitute a *prima facie* validation of the concern that judicial attitudes are less favorably inclined to the claims of the poor than they used to be, either as the exclusive result of new judicial interpretations or, more likely, in conjunction with changes in the political and legislative climate. [37]

As Gauri concedes, the ambiguous manner in which the Supreme Court Registry classifies PIL cases creates difficulties in making definitive

34 CR Epp *The rights revolution: Lawyers, activists and Supreme Courts in comparative perspective* (1998) University of chicago press 90.

35 V Gauri 'Public interest litigation in India: Overreaching or underachieving?' World Bank Policy Research Working Paper 5109 (November 2009) available online at http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-5109 (accessed 13 September 2012).

36 Gauri (n 35 above) 9.

37 Gauri (n 35 above) 13.

determinations about trends in PIL cases. Also, the specific methodological choices made by Gauri in seeking to conduct his study may also be open to debate, especially the factors he uses to assess success rates of the categories that he terms as 'marginalised', 'disadvantaged' and 'advantaged.' It cannot be doubted, however, that Gauri's study is an important step towards making quantitative assessments of the PIL jurisprudence of the Supreme Court.

It would appear that a number of public interest organisations and non-governmental organisations (NGOs) have, for some time now, acted in a way which shows an appreciation of the conclusions reached by Gauri. This is what is suggested by Krishnan who argues, based on an extensive survey of 73 prominent social advocacy groups, that the changed reality is leading to a situation where the most prominent social advocacy groups tend to avoid litigation as a deliberate strategy.[38] Krishnan explains that groups like the People's Union for Democratic Reforms (PUDR) have become disenchanted with the slow pace and inconsistent progress of PILs, and prefer to focus on alternative strategies, such as grassroots political mobilisation. For several other groups (Krishnan specifically identifies the Centre for Law and the Environment, Conservazone, Lokayan, the National Federation of Women, Saheli, and the National Alliance of Women), the costs and institutional focus required for mounting and sustaining long-drawn PIL campaigns has caused them to avoid using them altogether. Overall, Krishnan emphasises that social groups are beginning to shy away from using PILs in their strategies.

For these reasons, I support the view advanced by a number of progressive scholars that the Indian Supreme Court has, in a process which began in the 1990s and has continued over the current decade, transformed the nature of PIL and in some cases turned away from concerns it embraced in its original phase. I take the methodological objections raised by some commentators on board, while reiterating their call for more comprehensive and empirically rigorous research to be undertaken to facilitate a firmer grasp on the actual practice of contemporary PIL.

3 The way forward

I now turn to the second question set out earlier: What should progressives do, when faced with an increasingly bleak situation where judges on the Indian Supreme Court have turned their back on at least some of the central progressive causes and concerns?

In my view, abandoning the site of legal intervention is an alarming trend, and needs to be reversed. What is the alternative? Some progressives have implicitly suggested that what is required is a return to the original phase of PIL. In essence, they could be seen as demanding that a new generation of

38 JK Krishnan 'Social policy advocacy and the role of the courts in India' (2003) 21 *American Asian Review* 91.

judges in the mould of Justices Iyer, Bhagwati, Chinappa Reddy and Desai be appointed to redeem the potential of PIL for progressive causes. I believe that such a view is both unrealistic and problematic.

The contemporary situation, which is characterised by excessive and overweening judicial power, where judges adopt 'command-and-control' strategies in PIL cases, may well be a direct result of the exhortations offered by the generation of progressive scholars who sought to influence and shape the discourse of PIL in its founding era. Looking at some of the landmark scholarly literature from the 1980s, one finds an astonishingly instrumental vision advanced for the judiciary. I focus here on the writings of Baxi, whose role and influence in that founding era has been widely acknowledged. In an article that was widely cited and came to symbolise the dominant thinking amongst progressives at the time, Baxi exhorts judges to become 'activist'. For Baxi, an activist judge is a judge who is aware that she wields enormous executive and legislative power in her role as a judge and this power and discretion have to be used *militantly* for the promotion of constitutional values.[39]

I find this statement problematic on two counts. First, the presumption here appears to be that only 'activist' judges can provide deliverance from the many social ills that afflicted India by promoting constitutional values. Noticeably, no other social actor is relevant in this scenario: Grassroots movements, social organisations, lawyers, and even clients are completely missing from this picture. The only people who seem to be important for bringing about the necessary social change are 'activist' judges. Second, the task of interpreting and promoting constitutional values is also presumed to be straightforward, and entirely free from either complexity or problems. Baxi appears to suggest that the text of the Indian Constitution inexorably points to progressive ends, ignoring the reality that there can be several conflicting interpretations of what exactly the constitutional values are and, more importantly, how they are to be achieved. Justice Bhagwati, one of the pioneers of the PIL movement, offers very similar advice in a much cited article.[40]

In another article written around the same time, Baxi offers a more nuanced perspective, acknowledging that PIL was not without problems. Here, Baxi specifically notes that, despite encouraging signs, the crucial phase of PIL between 1980 and 1982 had shown that the use of PIL had continued apace with the judiciary making 'constitutional compromises' which 'create

39 U Baxi 'On the shame of not being an activist: Thoughts on judicial activism' in N Tiruchelvam & R Coomaraswamy (eds) *The role of the judiciary in plural societies* (1987) 172. The same article appeared in the *Indian Bar Review* in 1984, and was probably written in the early 1980s (my emphasis).

40 PN Bhagwati 'Judicial activism and Public Interest Litigation' (1985) 23 *Columbia Journal of Transnational Law* 561.

new sources of anxiety'.[41] Baxi also concedes that the movement in its early years could be viewed as 'relatively minor exercises in class-transcendence.' Yet, this nuance gets drowned out in the overall message of the article, which celebrates early successes in PIL cases, and exhorts other judges on the Indian Supreme Court to convert to the cause.

Many judges of the Indian Supreme Court, having taken these messages to heart, began to flex their muscles particularly in the 1990s when the weakened political executive had no choice but to tolerate such judicial adventurism. Part of the problem was also the fact that the judges favoured by progressives (referred to more recently by Baxi as the Four Musketeers)[42] had retired, and were replaced by other judges who did not always share the same judicial philosophy or values. Baxi once referred to the evolution of PIL in India as 'at best an "establishment revolution"'.[43] The story of PIL in the 1990s seems to be consistent with the historical storyline of the weak records of other establishment-led revolutions.

When progressive scholars writing in the 21st century ask how Supreme Court judges came to believe that they wield untrammelled authority when deciding PIL cases, at least part of the answer can be traced to progressive scholarship in the 1980s, which prompted judges to believe that they were all-powerful and fully justified in incorporating their own understanding of the values of the constitution into their decisions. So, when Justice Kirpal writes in a judgment about encroachers being akin to pickpockets,[44] he was merely incorporating his own value judgments into the task of adjudication – and was thus directly acting on the questionable advice offered by progressive writings in the 1980s. The deification of activist judges by progressives seems, albeit with the benefit of hindsight, a mistake.[45]

Progressive scholars and judges do not seem, while offering this advice, to exhibit a genuine belief in the values of constitutionalism and the rule of law. In adopting such an instrumental view of the task of judging, they seem to be unconcerned with maintaining the institutional credibility and neutrality of judges, to enable them to speak authoritatively while deploying the language of constitutionalism and the rule of law. Much of the initial criticism by some judges of the Supreme Court was indeed directed at the potential harm such nakedly ideological actions would cause to the credibility

41 U Baxi 'Taking suffering seriously' in Tiruchelvam & Coomaraswamy (n 39 above) 32. This piece has appeared in print in several different versions, the earliest of which was in the *Delhi Law Review* in 1979.

42 U Baxi 'The promise and peril of transcendental jurisprudence' in C Raj Kumar *et al* (eds) *Human rights, justice and constitutional empowerment* (2007) 5. The reference is to Justices Krishna Iyer, Bhagwati O Chinappa Reddy and DA Desai.

43 Baxi (n 42 above) 49.

44 *Almitra Patel v Union of India* MANU/SC/2767/2000 para 14.

45 For a different critique of such advocacy of judicial activism, see M Khosla 'Addressing judicial activism in the Indian Supreme Court: Towards an evolved debate' (2009) 32 *Hastings International and Comparative Law Review* 60.

of the Supreme Court.[46] Progressive scholars like Baxi were quick to dismiss these valid criticisms as being outdated and regressive, but in doing so, ignored the sensible pleas made to focus on a credible conception of the judicial role for handling PIL.

In charting strategies for the future, I believe progressives should avoid making the same mistake, and must instead advocate a role for judges where they can justifiably lend support to PILs without appearing to act in partisan or ideologically motivated ways. The first move in this regard is a negative one, where I seek to rely on what progressive judges should *not* do in PIL cases. In many PIL cases, judges seek to dominate the agenda of the proceedings, and adopt 'command-and control' measures,[47] where they mimic bureaucracies by laying down fixed and specific rules, which prescribe the inputs and operating procedures of the institutions they seek to regulate.

By way of illustration, I focus on two examples drawn from different eras of PIL cases. One can see symptoms of this tendency in the early 1980s PIL that sought to regulate inter-country adoption of children, where detailed orders were issued to the authorities to solve the problem.[48] Although the Court did seek to solicit participation from NGOs and government agencies dealing with the issue of inter-country adoption, its final order reads like a legislative enactment, complete with the setting of age limits and precise procedures for conducting specified tasks. It was unclear exactly how the Court obtained the background information which it based its definitive conclusions upon. The inflexibility of the rule-like 'guidelines' laid down by the Court later led to problems of implementation and confusion, after the case was finally disposed of by the order. A more recent example of a PIL where the Court exercised an extraordinary degree of overweening control over the proceedings is the *Hawala* case (*Vineet Narain v Union of India* (1998).[49] To recall, the PIL was brought by two journalists and two lawyers, seeking investigation by the Central Bureau of Investigation (CBI) on details of illegal payments made by way of *hawala* transactions to several politicians for favours in the award of government contracts. Over a period of two years, the Court (especially after the case began to be heard by a bench headed by Justice JS Verma) adopted a posture that has been described by a sympathetic observer as 'dynamic, fearless and dominating'.[50] As Muralidhar describes it, the Court's actions achieved many things, including infusing investigatory authorities like the CBI with autonomy and insulating them from executive interference. Yet, in the process of doing so, the Court

46 See, eg, the criticisms voiced by Justices Tulazpurkar and Hidayatullah during the initial stage of the development of PIL, pointing to several troubling aspects of the phenomenon. VD Tulzapurkar 'Judiciary: Attacks and survival' AIR 1983 (Journal) 9; and M Hidayatullah 'Highways and bye-lanes of justice' (1984) 2 SCC 1.

47 CF Sabel & WH Simon 'Destablisization rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1015 1019.

48 *Lakshmikant Pandey* (n 12 above).

49 n 15 above.

50 Muralidhar (n 14 above).

displaced the actual petitioners, and appointed a senior advocate as *amicus curiae* to assist the Court. At the same time, intervention in the proceedings by everyone else was shut out, while some of the hearings were held *in camera*, by shutting out the public. Muralidhar, whose credentials as a PIL litigant and astute and insightful chronicler of its development are impeccable, is critical of these aspects of the case, which 'defeat the very purpose of the jurisdiction', 'deprive public-spirited petitioners of their right to espouse a public cause' and render the participation of other organs of the state redundant. These criticisms echo those made by others about the overweening attitude of court-appointed *amici curiae,* committees and the judges themselves.

I argue that progressives should critique such modes of adjudication, and urge judges to abandon the 'command-and-control' strategies that are currently on display. Judges should instead be encouraged to adopt a far more modest, *facilitative* role, where the focus is on the citizens who suffer, the social movements who organise their interests, and the lawyers who represent them. This will enable an avoidance of some of the problems of domineering judges, individual lawyer dominated agendas, and idiosyncratic judicial preferences that have plagued PIL in more recent times.

Elsewhere,[51] I have set out more details about what such a facilitative role would entail in its details. Due to constraints of space, I can only outline the broad details of that conception here. Judges in India gain legitimacy for their extravagant actions in PIL cases from the fact that they are seen as making up for the deficiencies of the elected branches. Indeed, in several PILs, the Court has consciously sought to act as a deliberative forum for policy making, and has used the judicial process to solicit – even mandate – responses from all wings of government. In doing so, the Court has reached beyond the central government to seek responses from state governments on issues that affect them, required all ministries potentially affected by its decisions to provide their considered inputs, and so forth. My assertion is that judges should continue to be sensitive to the need to focus upon filling the deliberative gap, rather than seeking to impose their own subjective choices upon the judicial process. They must remember that their primary role should be to *facilitate* the reaching of sound policy decisions in cases that come up before them.

This *facilitative* role can be enhanced by a focused change in mindset which eschews the domineering methods noted in the two examples above. What is required, instead, is a much more decentralised form of intervention, where the emphasis is on enabling all possible stakeholders to contribute

51 A Thiruvengadam 'Revisiting "*The Role of the Judiciary in Plural Societies (1987*)": A progressive conception of the role of the Indian judge'(draft presented at the LASSNET conference 2009); A Thiruvengadam 'Revisiting "The role of the judiciary in plural societies (1987)": A quarter-century in S Khilnani *et al* (eds) *Comparative constitutionalism in South Asia* (2013) 363-69.

meaningful inputs. Such inputs should be used to design flexible rules that are capable of responding to changing – and sometimes unpredictable or hostile – circumstances on the ground. Throughout this process, the emphasis should be on making every stage of the judicial process transparent.[52]

Progressives also need to attend to other worrying features of contemporary PIL. We have already noted Krishnan's disturbing findings that public interest organisations and social organisations have begun to abandon the route of PIL. This trend makes sense if we take account of the contemporary PIL scene, which is dominated by individual lawyers who file PILs quite often with no direct connection to the clients or causes they seek to represent. This is followed by a 'top-down' process employed by the judges who subsequently hear the case and decide on its future development with inputs from 'experts' and 'court-appointed *amici*' who, once again, have very little direct contact with affected interests.

In his provocative study of PIL in India, Epp concludes that the Indian case offers a paradox: Despite having one of the most activist courts in the world, which is also the most supportive of egalitarian and procedural rights, India has been 'unable to develop a sustained agenda' on rights. Epp argues that this is primarily because 'the Indian support structure for legal mobilization – the complex of financial, legal and organizational resources necessary for appellate litigation – remains weak and fragmented'.[53]

If PIL is to truly become a vehicle for addressing concerns of the marginalised in Indian society, its future will have to be crafted for it to be able to do so effectively and meaningfully. It is imperative that progressives focus on strengthening the network of social organisations that can build grounded and bottom-up litigation strategies, which seek to genuinely represent the concerns of the actual clients in PIL cases. Arguably, the recent '*Right to Food PIL'* represents one example of such a trend.[54] Another example – albeit drawn from comparative law – is the *Treatment Action Campaign* case[55] decided by the South African Constitutional Court, where an AIDS NGO was able to use the courts to thwart the South African government's opposition to plans to distribute a free drug that would significantly reduce mother-to-child transmission of AIDS.[56]

52 My normative views are influenced by the experimentalist modes of intervention that have been reconstructed by Sabel and Simon after studying successful recent examples of public law litigation in the US. Sabel & Simon (n 47 above).

53 Epp (n 34 above).

54 http://www.righttofoodindia.org/links/updates/update14.html (accessed 21 December 2013).

55 *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721 (CC).

56 A Belani 'The South African Constitutional Court's decision in *TAC*: A "reasonable" choice?' CHR&GJ Working Paper: Economic, Social and Cultural Rights Series, Number 7 (2004) 24-31; W Forbath *et al* 'Cultural transformation, deep institutional reform, and ESR practice: South Africa's Treatment Action Campaign' in LE White & J Perelman *Stones of hope: How African activists reclaim human rights to challenge global poverty* (2011).

These examples provide hope that once such a 'support structure' is in place, judges will feel obliged to adopt more modest roles by deferring to the greater credibility and representational capacity enjoyed by a strengthened support structure.

4 Conclusion

In this short essay, I have sought to highlight specific questions about the changing character of PIL through the 1980s to the 1990s, while acknowledging the need for more detailed and rigorous empirical studies of the issue. While agreeing with other contributors about several worrying aspects of contemporary PIL, I find myself disagreeing with the general cynicism exhibited towards a continued engagement with the law. I believe that PIL has achieved many successes, and what is required is not abandonment, but renewed engagement with its foundational ideas. I have sought to show how progressives of the 1980s made mistakes in charting strategies for the future of PIL, and how these will need to be corrected and remedied as we conceive of its future in the current moment.

I am fully conscious of the seductive power of the law, and how it has historically frustrated and belied progressive hopes. Yet, like the British historian EP Thomson, I believe that the law *matters*, and is of deep consequence for progressive causes. I conclude with these words from his revealing study of the tradition of the rule of the law in eighteenth century England:[57]

> In a context of gross class inequities, the equity of the law must always be in part sham. Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. But even here the rules and rhetoric have imposed some inhibitions upon the imperial power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters.
>
> I am not starry-eyed about [the law] … I am insisting only upon the obvious point, *which some modern Marxists have overlooked*, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.

57 EP Thompson *Of whigs and hunters: The origins of the Black Act* (1975) 266.

Much as we may have reason to be disappointed with the achievements of Indian constitutionalism, we must broaden our vision to see how we have fared comparatively. When one looks across South Asia, and the post-colonial nations in Asia and Africa more generally, one begins to appreciate the value of the struggles of Gandhi and Nehru to establish the foundations of constitutional government in India. If they held fast to a belief in the power of the rule of law while struggling against the dark forces of imperialism, surely we can do so when faced with the challenges of the contemporary?

To 'abandon the site of legal intervention', as has been suggested by some, would, in my view, be a mistake of monumental proportions and would also amount to 'throw[ing] away a whole inheritance of struggle about law'. What is required of progressive communities, instead, is a fulsome re-engagement with the enterprise of PIL with a view to correcting strategic errors of the past, and reclaiming ownership over its future.

Proposing Continuing Mandamus to move towards Gender equality by Prita Jha[1]

Introduction

In this article we discuss the power of judicial review to uphold the fundamental rights of women to live without various kinds of gender based violence and discrimination. We argue that robust judicial reviews, continuous monitoring and oversight are required given the persistent failure of gender just legislation targeting social evils such as sex selective abortion, sexual violence and harassment and the most common form of violence that women in India and world over face, domestic violence in intimate relationships.

India is exceptional in that the whole concept and introduction/innovation of PIL was a "Judge led"/judge dominated movement"[2] by Supreme court Judges who envisioned the PIL as a tool to plug in the huge gaping holes in the delivery of legal aid services such that the vast majority of Indians were not able to access and sadly still are not able to access competent and timely legal representation. The relaxation of the rules in the late 1970's and early 1980's, essentially by doing away with formal rules and requirements so that even a post card or a letter from concerned persons or affected individuals could be treated as a writ petition. These developments coupled with the commitment to issues of socio-economic justice towards those socially and economically exploited, marginalized led to a boom in Public Interest litigation covering rights of bonded laborer, prisoners, rickshaw pullers, sex workers and many others[3]. The Supreme Courts took a leap in the ground-breaking case of Vishaka vs Union of India and others, when it drew on the provisions of CEDAW to redress the grievance of sexual harassment faced by women at workplace, when there was no statute to draw upon or enforce, but of course article 14 and 15 and 21 of the constitution were also relied upon by the belated Justice Verma in the Vishaka Judgment, which predictably was poorly implemented. The Prevention of Sexual harassment (prohibition and

[1] I would like to acknowledge my gratitude to senior Advocate Megha Jani not just for taking time to read and give me feedback on this article, but her calm commitment to the issue of gender justice. I would like to thank Dr Upendra Baxi and Justice Murlidhar for their writings and interventions on this important issue –I would really have struggled to understand and write this without having the foundational understanding based on Justice Murlidhar's work.

[22]See pages 102-124 ,Muralidhar, S.(2008) in Social Rights Jurisprudence : Emerging Trends in International and Comparative Law / ed. by Malcolm Langford, Publisher Cambridge University Press

[3 3] Ibid, footnote 1 and - For a detailed, in-depth and cogent analysis of PIL cases spanning almost half century, see Murlidar.

redressal) Act means that it is easier for the High courts to make mandatory orders regarding compliance. It is telling that despite the Vishaka Judgment, the clock only started ticking for the executive after the rules of this Act were published in December 2013. To uphold the constitutional ideal of gender equality and right to security guaranteed by the Indian constitution and its continuous de facto violation requires sustained and continuous action, monitoring and supervision by the Judiciary .We propose the vehicle of continuing mandamus as already enunciated by the Supreme Court in Vineet vs Narain[4] and used to protect fundamental rights in many important cases such as : Bandhua Mukti Morcha Vs union of India[5], Upendra Baxi vs state of Utter Pradesh[6], Prakash Singh and others vs Union of India PIL spanning more than a decade and still ongoing case , Bachpan Bachao Andolan PIL litigation spanning many years on issue of child rights. In each of these cases, the courts have made a mandatory order, ordering the state to act in order to implement a piece of social welfare legislation such as Minimum Wages Act 1948, Bonded Labour (Abolition) Act 1968 to prevent violation of the right to live with dignity under article 21. In many of these cases, the Supreme Court, did not stop with just making the mandatory order, but it also ordered a timeframe under which the order was to be complied and essentially monitored the progress by requiring the state to report at regular intervals to the court.

In addition if we examine the nature of legislations passed over the last 20 years or so we see that compared to the social welfare legislation in the period 1950's-1990, there were various key pieces of legislation either giving citizens key rights such as Right to information or legislations such as PCNDT act 2004, Protection of women from Domestic violence Act 2005, the protection of Children from Sexual Offences Act 2012 and the Criminal Amendment Act 2013, Prevention, (Prohibition and Redressal) of Sexual Harassment act 2013, which create a comprehensive infrastructure and key agents(Public Information officers, Information Commissioners, dowry prohibition officers, protection officers, support persons) necessary for implementation of the legislation. Repeatedly, and persistently, states have not provided the adequate infrastructure for implementation of these legislation thus reducing them in some cases to nothing more than paper tigers. There have been PILs on poor implementation of gender just legislations on Dowry prohibition and sex selective abortions before the Supreme Court, in both instances the PILs were

[4] 1996 SCC (2) 199
[5] 1984 AIR 802
[6] 1983, 2 SCC, 308

directed at the executive failure to create the necessary infrastructure on the ground, without which the Act is meaningless. Despite the interventions by the SC, both these pieces of legislation are still extremely poorly implemented and there are very few prosecutions and rare convictions under the Dowry Prohibition Act 1961 and the PCNDT act 2004.

In this article, for want of space, we cannot address the multiple dimensions of gender discrimination that women experience from birth to death-discrimination which actually starts before birth in the clear preference shown by parents and society for boys as oppose to girls, and continues in the levels of care and attention given to girl children's basic needs for food, education, physical, intellectual, emotional and physical development during childhood years. Of course, the struggle continues into adulthood and beyond as women enter the workplace or do unpaid work in the domestic arena. We are very far from any level of gender equality in all the following arenas; in the workplace; in terms of health services; in terms of political participation and protection from various forms of economic and sexual exploitation. Here we confine our discussion to the most basic and fundamental rights of women to live without the unacceptably high levels of violence they face in their private and public lives. We hope to set out the broad contours of the significant failures of legislation targeting not just prevention of gender violence but also statutory provisions targeting an effective justice response to prevent trauma occasioned by insensitive, delayed and discriminatory response of the Justice system itself.

"Rape, sexual assault, eve-teasing and stalking are serious matters of concern-not only because of physical, emotional and psychological trauma which they engender in the victim, but also because they are practices which are being tolerated by a society ostensibly wedded to the rule of law"(Justice Verma Committee report)[7]

To the above list of gender based human rights violations, we should add domestic violence, dowry-related cruelty, abetting suicides and deaths, "dishonor" based violence [8] and sex selective abortion which has led to around 50 million girls literally missing from the population and is reflected in the alarming decrease in child sex ratios. We should add that these practices are not

[7] Para 1, page 1, JS Verma Committee Report.

[8] Legacies of Common Law: 'crimes of dishonour' in India and Pakistan, Legacies of Common Law: 'crimes of dishonour' in India and Pakistan, Baxi, P,Rai, S.R,Ali, S.S where significantly they write about " dishonour" based violence as opposed to the usual "honour based killings"

just being tolerated by the society but also by the state and the judiciary, who are duty bound to uphold and enforce the basic safety of half of India's population. But, I hear you say, we have laws, strong laws to address all of these and there are many strong Supreme Court judgments pronouncing such violence to be unlawful. Indeed there are but that has failed to check the reality of the levels of violence on the ground-the day to day implementations of all the legislation has left a lot to be desired and the resulting impunity has buttressed the confidence of the perpetrators, who continue to violate women and girls dignity knowing that their crimes will never be reported to formal agencies, let alone duly investigated and prosecuted.

Whilst there is no doubt that the Indian constitution guarantees gender equality to women and their right to live, to live with security and dignity free of any gender based violence and harassment. These are undoubtedly enforceable fundamental rights, reality is that day in and day out such fundamental rights are being breached with impunity and the existence of this impunity suggests failure of standards of "due diligence" in enforcing the national and prescribed customary international law which are applicable to India.

The Indian state will need to ensure the following functioning good quality infrastructure support to survivors to not only meet the due-diligence standard we have agreed to by signing CEDAW and Declaration on rights of Victims but also to prevent the persistent and continuing violation of article 21 , article 14 and 15 whose combined reading requires that the state must comply with its duties " ***to provide a safe environment at all times, for women who constitute half the nation's population; and failure in discharging this public duty renders it accountable for the lapse***."[9]

A necessary prerequisite for this is that the state must provide the following infrastructure support to survivors of gender based violence:

1. Hygenic, clean, healthy safe spaces or shelters for women and girls whose fundamental rights have been violated on basis of gender based violence or for girls and women who have nowhere to go on account of violating the social, family, religious and community norms that do not see them as autonomous human beings with right to exercise control over their body and make choices which are not the same as their parents.

[9]Ibid, Para 7, page ,

2. Counselling and access to emergency, short-term and long-term medical health facilities to ensure that their physical, psychological and mental health needs are met.
3. Access to empathetic, sensitive and competent legal aid, advice, assistance and legal representation to ensure that they are aware of their legal options and can decide the best legal options and strategies to pursue.
4. Compensation by the state for the harm and injury done as a result of the human right violations.
5. State must undertake the necessary publicity to raise awareness not just about the gender just laws that have been passed but also about their rights to shelter, legal aid, counselling and compensation.

GENDER BASED VIOLENCE

"It is unfortunate that such a horrific gang rape (and subsequent death of the victim was required to trigger the response for the preservation of the rule of law-the bedrock of a republic democracy. Let us hope that this tragedy would occasion better governance, with the state taking all necessary measures to ensure a safe environment for the women in this country"..

The opening paragraph of Verma committee report (Para 1, page1) reminds us the stark failure of the Indian state to provide a safe and dignified environment for women and girls in India. There is no evidence that things are getting any better, though in our view, the startling increase in recorded levels of crimes against women[10], be that sexual violence or dowry related violence does not show that things have got much worse-it is a well-known fact that we do not know, have not known and perhaps for some time to come will not know accurately about the actual levels of violence that exist against women and girls, due to the chronic levels of underreporting of domestic and sexual violence globally[11]. For us the alarming and shocking statistics is in fact the tip of the iceberg, it is showing the very slow melting of the ice-like culture of silence around gender based violence

[10] see NCRB data for 2014, which shows an increase of 58 % from 2010-2014 in respect of rape, largest annual increase of 35% was recorded in 2013 over 2012, clearly showing the impact on public consciousness regarding rape , the % increased again in 2014, but only by 9.2 % over 2013.

[11] See, "Tip of the iceberg: Reporting and Gender-Based Violence in Developing Countries ,Tia Palermo, Jennifer Bleck, and Amber Peterman, American Journal Of Epidemiology (2014) 179 (5):602-612.

prevalent in our families, communities and society as whole. Recent international[12] and national level research study[13] confirm gender based violence in India as a hidden epidemic that programmers, policymakers, practitioners, lawmakers and adjudicators need to consider. The research published in December 2013 based on data from cross-sectional, nationally representative Demographic and Health Surveys since 2000 in 24 countries found that on average, globally only 7 % of women who suffered gender based violence actually reported it to official sources such as doctors, justice system or social service providers. In India and East Africa, this figure dipped much lower to around 2%. This is supported by a research study in 2013, based on comparing data from two waves of the National Family Health Survey (NFHS – 2 conducted in 1998- 99 and NFHS – 3 conducted in 2005-06) with the reported crime data available from the National Crime Records Bureau (NCRB).

"The analysis reveals that most cases of sexual and physical violence against women, whether by their husbands or other men, went unreported. For the year 2005, only about 5.8% of the incidents of sexual violence against women which were committed by men other than the survivors' husbands ("others") were reported to the police. Reporting of incidents of sexual violence by husbands is even lower: 1% of the incidents were reported to the police. Similarly, around 1% of the incidents of physical violence by "others" and 2% of the incidents of physical violence by husbands are estimated to be reported to the police. Consequently, violence against women is estimated to be more widespread than what reported crime statistics depict. Violence by husbands, particularly sexual violence, is found to be much more prevalent than violence by "others". Most incidents of sexual violence were committed by husbands of the survivors. The number of women who experienced sexual violence by husbands was forty times the number of women who experienced sexual violence by non-intimate perpetrators"[14]

So, what is the recourse for women suffering sexual violence by husbands-the definition of domestic violence in the Protection of women from Domestic violence act 2005 covers sexual abuse and women are becoming aware and starting to use the Act but still the primary recourse to Domestic violence legislation continues to be for dowry related violence, followed by violence

[12] Ibid.
[13] See Gupta, Ashish (2014), final working paper, "Reporting and Incidence of violence against women in India" last accessed at http://riceinstitute.org/wordpress/wp-content/uploads/downloads/2014/10/Reporting-and-incidence-of-violence-against-women-in-India-working-paper-final.pdf
[14] Ibid reference note 11.

triggered by unfaithful and drunken husbands[15]. Given this situation where a large number of women, we know are suffering multiple forms of violence without seeking any legal remedies or court intervention, it is very important that the state provides safe spaces for women, not just a roof over their heads, but an environment that is emotionally and psychologically safe that gives them breathing space and break from the violence and abuse and an opportunity to build their shattered self-confidence and reflect on their future options. It requires that women can gain voluntary access to such shelters on basis of their needs, access to shelters should not be dependent on court intervention, medical intervention or police intervention or social services involvement because we know that this is only catering at best for a tiny minutiae of women who have sought formal help, the vast majority of women, we know are suffering silently. Yet, there is little concern for this silent and hidden epidemic in our institutions, this despite clear evidence[16] that the executive have been aware of the problems and solution for many years. Despite the Verma Committee emphasizing and decrying the lack of shelters[17] and safe spaces for poor destitute women and that this constitutes failures to enforce the fundamental right to protection against violence, discrimination and injustice[18], the state continues to falter in providing functioning shelters. In fact often such shelters constitutes spaces where women's human rights are being violated on a routine basis[19]. In a later section, we consider the attempts to rectify this with reference the Agra Protection Home and shelters in Gujarat.

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[15] See, "staying alive: Evaluating court orders, the 6th monitoring and evaluation report 2013 on PWDVA 2005 published by Lawyers Collective and available on their website.

[16] See pp 15-17 Justice Verma Committee report which notes on basis of various internal reports, commissions and committee recommendations notes that: "This clearly shows that the Executive of this country is fully aware of the bare minimum steps that are required to ensure the safety of women, and has been aware of the same, as will be seen elsewhere in this Report, for several years. Yet, despite numerous recommendations, deliberations, consultations, studies, directions from the judiciary and, most importantly, the protests of civil society, the State continues to fall woefully short of ensuring the safety of women in this country."

[17] See para 14, pp 17, Verma Committee report- "We further express our distress that the State has turned a blind eye to poor and destitute women, and women who are victims of domestic violence and who are unable to provide shelter for themselves. This fundamental lack of empathy, understanding and engagement reflects poorly on the State, which has the constitutional responsibility to provide for those who lack access to justice."

[18] ibid, See para 15 : "The Constitution grants every citizen a fundamental right to protection against perpetration of injustice. We would like to remind the State that it is duty-bound to provide safe spaces or safe residences for not only destitute, disabled and abused women, but also for working women who are unable to find suitable accommodation, especially in metropolitan area".

[19] See discussion and analysis by Murlidar, S piece on the Agra Protection Home, where not only was there widespread violation of the "rescued" women's right to clean and safe environment, but allegations of corruption and exploitation by public servants entrusted to make important decisions regarding their future.

Non-implementation of the domestic violence legislation.

Protection of Women from Domestic Violence (PWDVA) 2005 is an extremely important piece of legislation for Indian Women. It is a mixture of civil and criminal law aiming to secure a range of remedies quickly for women suffering domestic violence from one court, as opposed to having to run to various different courts. It was also required as part of India signing CEDAW (convention to end discrimination against women-CEDAW links violence against women with the prevalent social discrimination-it is the lesser value and social inequality that leads to acceptance and impunity for violence against women.

Unlike other gender just targeting discrimination and VAW, thanks to lawyer collective, there was an attempt to evaluate the implementation of the legislation from 2008 onwards, with a national level effort to collect data, judicial orders and the infrastructure provided by this act. The 5th report, based on data of three states, Maharshtra, Rajasthan and Delhi, speaks about the absence of three key stakeholders who surprisingly were not involved in the evaluation and implementation effort-Shelters, Medical facilities and most importantly legal services:

"*Who is absent? MFs(medical facilities) and SHs(shelters), which under the PDWVA, are to help victims of domestic violence to access medical help and shelter services are absent. Medical professionals are the first port of call for many women – who receive injuries due to violence faced at home. However, over the years, health professionals and medical institutions have been absent in the implementation of the PWDVA, and in trainings organized by LCWRI government agencies. The Legal Services Authority are also absent in the implementation of the PWDVA and no stakeholders have been able to use their services effectively. This has been a consistent observation since the Act has been enforced and is shocking, since women are entitled to free legal aid under the Legal Services Authorities Act, 1987*."[20]

Without the active cooperation and functioning of these three key agencies in implementation of any legislation targeting VAW, the system will simply only work for those who are either wealthy

[20] See executive summary, page 19 of the fifth monitoring and evaluation report of the Lawyers Collective Women's Rights Initiative (LCWRI) which sought to evaluate the status of implementation of the PWDVA in India, through an analysis of infrastructure provided by different states, budgetary allocations, orders passed by the Magistrates and judgments of the higher judiciary, and interviews conducted with key stakeholders under the Act, accessed from website of lawyers Collective.

enough to not need legal aid and can afford to have alternative accommodation and private medical treatment-certainly not the situation for the vast majority of rural and poor urban women. In one important case brought to the CEDAW committee[21], the committee held the failure to provide a shelter to a woman and her disabled son who was suffering abuse was a breach of her fundamental freedom particularly her right to security of person-committee noted that this failure to provide adequate shelter was emblematic of the general attitude of the Hungarian state to domestic violence.

Other important gaps highlighted by this evaluation included lack of data collection from nodal departments responsible for collecting data:

The primary hurdle in assessing the status of implementation of the Act is lack of data. The nodal departments, which are responsible for getting the data from the notified health centers under the Act, have not done so. They are also responsible for issuing a circular to all stakeholders in a particular jurisdiction, specifying the role of each stakeholder within the Act, other information, and ensuring all stakeholders are linked to each other for better implementation. A uniform reporting system needs to be developed to collect data from all stakeholders under the Act.[22]

Another important lacunae noted was the absence of coordination between agencies to ensure effective implementation, the need for trainings and meetings with all stakeholders present so that there is a regular common platform where the different departments responsible for implementation of various aspects can share best practices, discuss issues and find solutions.[23]

To the best of my knowledge all of these important gaps considered by the Committee are equally applicable to the Indian Context. The only and important difference is that Hungary did not have a specific domestic Violence legislation as India does, so on paper it was in compliance of the requirement to have a specific legislation, but in practice, in all these important aspects, it is failing in its duties to comply. Another important issue linked to effective implementation is the lack of allocation for budget for training, capacity building and monitoring in many states and only 13

[21] See CEDAW decision on AT.Vs Hungary accessed at http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf
[22] Ibid reference 15 executive summary, page 19, 5th Monitoring and Evaluation report on PWDVA 2005.
[23] Ibid.

states had a “Plan Scheme” for implementation, 18 did not and the position in respect of Jammu Kashmir was not known.[24]

My attempts and experience of trying to get an overall picture of implementation of PWDVA 2005 in Gujarat was frustrating as no single agency was able to provide overall picture of implementation- one had to go to various different departments to get information about different aspects and it was clear that there was little coordination between the departments for them to understand the overall implementation issues combined with transfer of responsible executive officer in reality. In theory, it is the secretary of women and child department who should be concerned, but in reality the person in this post has a number of responsibilities that they are juggling and even when they are ordered by the High Court to do something very important like inspect the shelters where hundreds of vulnerable women are living, they do not find it easy to comply. I have to congratulate Gujarat High Court for its recent decision to refuse substitution of the principal secretary with her undersecretary in PIL alleging severe human right violations in shelters across Gujarat.

Role of Lower Judiciary in Implementation

Having laid out the infrastructure failures, we now consider the adjudication across 18 states on the basis of the sixth monitoring and evaluation report [25] which focused on the orders made under PWDVA 2005 by the magistrates and session courts.

Analysis of 9,526 orders from 22,255 orders collected from 27 states and union territories is an achievement that LWC must be congratulated for, because in absence of this time-consuming and no doubt mindboggling exercise, all of us working to assist survivors with effective use of the act could only site as evidence our own handful of cases, as opposed to a statistical trend that can be revealed by analysis of the results. As expected, many things are vastly different across different states, but this research helps us to address the particular problems state wise. The data collected shows that in most states judiciary are making interim orders in only around 15% of the cases-this is very significant, because the whole purpose of interim orders is to give women maintenance,

[24] Ibid.
[25] Ibid footnote 18, accessed from Lawyers collective website.

protection and possibly the security of housing to continue with the complaint till the final order is denied by this failure. The worst performing states on this front were Gujarat where interim orders were made only in around 4% of cases, , then came Maharashtra with 8%, Chandigarh with 9% and Himachal Pradesh with 10% . In the above-mentioned states survivors are least likely to avail the important remedy of interim orders. This needs to be addressed urgently as in my experience in the vast majority of cases there is a need for a maintenance and protection order by the survivor in the interim especially given the failure of the lower courts to completed proceedings within the 60 days stipulated by the Act. Another concern expressed was about the nullifying effect of interim orders, if they are converted to mini-trial like proceedings[26]. In Gujarat, the average time for domestic violence proceedings is anywhere around 1-2 years, but there are cases continuing beyond 2, and exceptionally 3 years, which defeats the intention of providing quick remedy to women.

But perhaps the most important and most difficult correction is regarding the biases of those responsible for adjudication and implementation of the gender sensitive machinery and legislation. Senior advocate, former ASG, Ms Jaising's remarks below are made after painstaking analysis of thousands of judgments and resonate with the experiences of many survivors and activists.

"Yet this Report is telling us that judges have not quite understood this message. The reasons for grant and denial of relief under the Act are telling. They paint the picture of the search for a perfect victim, one worthy of relief. Only married women, helpless women, deserted women, abandoned women, are entitled to relief on "moral" grounds. Only women who can show a connection to property have a Right to Reside in the Shared Household. Widows and daughters, sisters and live-in partners have no place in the shared space. They must await new laws addressed to them. Even married women who leave the Shared Household have crossed the lakshman rekha and must now

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[26] Ibid, footnote 10, See para 3.1 and 3.2 of the 6th Monitoring and Evaluation report.

3.1 "The procedures adopted by Courts are as significant as the Orders finally issued under the law in providing women the full protection of the law. With two High Courts requiring extensive proceedings to be undertaken at the stage of Interim Orders, the Supreme Court should settle this question once and for all recognizing that the purpose of getting Interim Orders would be defeated in trial-like proceedings.

3.2 While the judicial system is generally weighed down by the high pendency of cases, there is particular urgency in adhering to the deadlines in the PWDVA to ensure protection for women facing domestic violence. As required by the Act, proceedings must be completed by Courts within 60 days."

live in their natal home, never mind whether they are welcome there or not. It is the "moral" duty of the parents to look after a deserted daughter…."[27]

In our view, one of the most important recommendation emanating from this evaluation in relation to the lower judiciary is the requirement of eliminating the judicial bias:

"Judicial "sensitization based on the recognition of the biases and prejudices that may undermine the application and implementation of the PWDVA should be considered on a regular and recurring basis. The Higher Judiciary should consider the adoption of an M&E process to oversee the application of the Act by the Courts. Exceptionally biased decisions should invite censure from the higher judiciary good Practices in decision making should be widely disseminated across the States and districts and Judges should be encouraged to adopt these good practices in their own decision-making."[28]

Having set out some of the most important failures afflicting the implementation of the most important legislation being used by increasing number of women, though mainly married women, we turn our attention to the most important person (apart from the Judge) under the DV legislation, that is the protection officer. Unfortunately, there is not any recent national level data available on this aspect, but we shall briefly go through the situation in Gujarat, a relatively prosperous state over the last few years and we note that appointment of 142 protection officers following a PIL in Bombay High Court, describing the ground reality that even 10 years after the act there was not a full time protection officer in each Tehsil. The court ordered that there should be 142 more full time posts and the state asked for 6 months for compliance.[29]

Protection officers are significant because in most cases in Gujarat, it is they who file the Domestic Incident Report in practice and they have the duty to assist the court in every case and most significantly they are the persons who have face to face contact with the survivor and interpret the narrative of the woman in to the legally required information for the court. An important lacunae in the actual standard forms being used in Gujarat is that it has a page with all the possible orders available under the act, and the protection officer puts a tick in the square box next to the orders

[27] See opening remarks in executive summary of 6th Evaluation report on PWDVA.
[28] See pp, ibid .
[29] See DNA and various newspaper reports dated 16th January 2015.

sought by the complainant. However, the form does not have a box for interim orders as it should so that women can request this remedy from the court at the earliest point possible.

Gujarat PIL re appointment of sufficient, non-contractual protection officers with adequate facilities

The Gujarat High Court took suo moto cognizance[30] after receiving a letter from a Judge enclosing news items published on 5.7.2012 in the Times of India, Ahmedabad Edition which reported that women wanting to file complaints under the domestic violence Act were asked to wait for three months on account of pendency of complaints ; this was due to shortage of protection officers and the working conditions of protection officers left a lot to be desired-their contracts were temporary, insecure and they were not being provided with the basic amenities and facilities to be able to fulfill their obligations under the act. The substantive order after filing of affidavits by the state notes that the state conceded that a large number of domestic violence complaints were pending and were attended during a special drive and the requisition for appointment of protection officers were submitted to Gujarat State Public service commission before 22nd February 2013. The High court in its analysis examined the objects and reasons behind the act and concluded that the object of the act was to provide effective protection to women suffering any kind of violence in context of family and this would be nullified if the act was not implemented properly and effectively on account of insufficient protection officers and protection officers lacking the facilities and environment to fulfill their mandate under the act[31]. In para 16, it noted that the

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30 See WPPIL 153 OF 2012

31 See Para 20, 21, 22, 23 and 24 of the PIL dated 22nd Feb 2012(reproduced here).

20.In our opinion, the problem in this country is the effective execution and implemntation of the laws. It is not that we do not have the laws. It is not that we do not have te laws to combat with the menace of violence against women but unfortunately, there is no proper and effective implemntation of the same so as to ensure the object with which the piece of legislation has been enacted, is subserved.

Para 21: This petition is a fine example of poor implemntation of the Domestic Violence Law.

Para 22 : we have noticed having gone through the provisions of the Act that the protection officers plays an important role in proper implemntation of the Act. Neither the protection of women from Domestic Violence Act, 2005, nor the Protection of women from domestic Violence rules, 2006 permit the state government to make any contractual appointments of protection officers for 11 months. In fact rule 3(3) says that the tenure of the protection officer shall be for minimum period of three years. In our opinion the contractual appointment of 11 months and less could be termed as contrary to the provisions of the Act. It is therefore, imperative that the state government completes the process to regular selection of protection officers of all districts in the State as early as possible. A protection officer has to be of a particlar level and calibre. Having regard to the duties and functions of the Protection officers, as provided in the provision of the Act as well as the Rules, preference as provided in Rule 3 of 2006 should be given to women and such person appointed as protection officer is expected to have atleast three years expereince in the social sector. In out opinon , it is only when a person is appointed as a Protection officer on regular basis with regular salary that he would work with sincerity and dedication.

mischief of violence against women had not as yet received the required priority to bring about sufficient change ,the political will backed up by action and resources was missing.

The court expressed very clear opinion that state needed to set up systems, policies and procedures to monitor the functioning of the PWDV Act[32] so that it could take corrective steps as soon as required and it should ensure that women have effective access to justice to secure the remedies available under the act and goes on with various steps that should be taken by the state to address the problem of poor implementation. However, the court did not eventually in its final order require the state to produce its monitoring plan or systems, or ask actually who was responsible for implementation of the Act as it was perfectly entitled to do to ensure enforcement of women's fundamental rights to security and justice. Thus an important opportunity was missed to fix responsibility for overall systems, planning and implementation. However, the order that was made was extremely clear and focused on the Protection officer's post, their employment tenure and facilities required for protection officers to do their duties.

The state had claimed that its process of regular selection of protection officers was already underway and the court ordered the state govt to complete the the process of regular selection of protection officers for all districts in the state as early as possible and in any case, within eight weeks from the date of the order, i.e 22nd February 2013. It stated that appointments shall be in

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[32] Para 23 : we are of the opinion that the state government should have in place a proper system of manpower planning to assess the needs of each district. For example, the materials on record indicate that districts like Ahmedabad, Jamnagar, Vadodara , Sabarkatha, Surat, Rajkot, Bhavnagar and Junagadh are the ones where more than 100 applications in seven months have been received starting from Janauary 2011 till mid-July 2012.Conversely, districts Navsari,Patan, Narmada,Surendranagar, Porbander have received less than 25 applications in the period referred to above. Thus in busy districts, one protection officers is simply not enough. To have one protection officer in a district like Ahmedabad, where more than 800 applications have been received in the last seven months is nothing but mockery of the ACT. Therefore, the need of the hour is that the government assess the needs of each district and accordingly, appoint adequate number of protection officers in each district to receive and attend the complaints in time.
24.We are also of the opinion that the state government must make sure that office of the District social Defence officer is provided necessary staff and infrastructure facilities like furniture, computers etc. This would only be in consonance with rule 3(4) which provides a necessary office assistance to the protection officer for the efficient discharge of his or her functions and duties under the rules and the Act.
25. The office of the Protection Officer is a statutory post. The Protection officers under section 30 of the Act are deemed to be Public servants. Therefore, like any other Government servants, they should be entitled to pay-scale of appropriate rank with other allownace and service benefits as admissable to Governmet servants. The Act of 2005 being a benovolent piece of legislation and the rules reqiuring preference to be given to women for appointments as protection officers, the state government should ensure that labour turnover is not high in this area. One of the ways to ensure this is to pay adequately to the protection officer.

consonance with the Rule 3(1), (2) and (3) of the rules 2006 and the state and the state was directed to ensure that the office of the District Social Defence Officer was provided with necessary staff and infrastrcture facilities, like furniture, computers, cabinets, etc and as provided in rule 3(4) of the Rules , 2006[33].

So, you may, if you may imagine that this judgment would solve an important issue, the order also required the registry to notify the matter in 2 months' time to report compliance of the courts directions. BUT NOT SO. The matter then went in to hibernation on assumption of implementation by the state-there is nothing to indicate why it was not brought to courts notice after two months as stipulated in the February order. My conversations with amicus office indicated that the matter was listed but the case never came on board- It was eventually brought back up in the later months of 2013 for non-compliance - a Special Miscellaneous application was filed –the state dragged the issue for many months .Eventually the Application was dismissed on 12th December 2014, more than 18 months after the initial order demanding compliance within 2 months and even in December 2014, the Application was dismissed on assumption of compliance within 2 months rather than proof of compliance. It has taken the state 18 months to put on record the provisional results of the preliminary test conducted by GPSC (Gujarat Public State Commission) for the post of protection officer-further tests were still going on and the GPSC estimated another 2 months to complete the entire process!

So, even more than three years after lawful and clear direction by the High court, there is no public record regarding full compliance on this-in fact, field realities in Ahmedabad vary from month to month, recently, again I was told by an activist that the a survivor was asked to come back after two months. Would it have made a difference if the court had attached a penalty and mandated presence of the responsible secretary with the report and should the court continue to monitor implementation of such key statutes are question that we need to reflect upon. Findings of a recent comprehensive quantitative study about relationship between levels of Judicial review litigation and quality of local government services found that judicial review made a positive contribution to public administration "partly because it promotes values which are central to the ethos of Public

[33] See para 26 of the wppil 153 of 2012, order dated 22nd February 2013.

Administration"[34]. This research found that whilst there was different levels of engagement and responses by different local authorities to judicial review, officials expressed a desire to do the "right thing" by abiding by the order made by Court. Also, at times, there is not an uniform response by all within an institution under review, there are differing responses given the differing impacts. So, whilst an order may suit frontline staff in a service, if they get more resources, it may cause headaches to those responsible to find the resources, allocate the budget etc if they have already committed those funds elsewhere.

We now shift our attention two PILs on the issue of shelters, though they are separated by time-span of more than 30 years, the similarity regarding the physical infrastructure, absence of adequate medical facilities, alleged human right violations of residents of shelter and lack of plans for rehabilitation are common themes.

From Agra protection Home PIL[35] (1981) to Odhav Nari Gruh PIL (2014)

The Agra Protection home was subject to a PIL[36] for sixteen years from 1981-1997, which has been written about by the amicus curae in the case, Murlidhar, S (senior advocate at the time, now High court Judge of Delhi). The Agra home PIL was started by a letter written to SC by eminent scholars Upendra Baxi and Lotika Sarkar, two law professors, dated April 8, 1981, and founder members of Association for social action and legal thought, read a letter written by Dr. R.S Sodhi, written to the Indian Express dated 6th April 1981, entitled, "Home for girls or Jail", a member of the board of visitors of the Agra Protection home wrote about the inhuman living conditions in the home which included lack of ventilation and drainage facilities, one toilet for 100 to 125 inmates. He disclosed that a report setting out the deplorable conditions in the home had been sent to the District Judge by the chief judicial magistrate but had been suppressed by the UP govt. The petitioners asked for directions for the UP govt to constitute a panel of doctors to examine the

[34] See ,Platt, L,Sunkin, M and Calvo, K, " Judicial Review litigation as an incentive to Change in Local Authority services in England and wales" in Journal of Public Administartion Research and Theory: vol 20, supplement 2 :Incentives with Public Service Performance : A special Issue (July 2010)pp i243-i260.

[35] We have relied almost exclusively on the detailed and critical evaluation of the complex set of issues arising from institutionalization of women living in Protection homes such as Agra as discussed by Muralidar, S , " The Case of The Agra Protective Home" in Engendering law eds Dhanda, A and Parashar, A. The facts and details of court proceedings have been reproduced from the account of the author and amicus curae in the case, Muralidhar, S.

[36] See Upendra Baxi vs State of Utter Pradesh,(1983), 2 SCC 308.

physical and mental health of the inmates and to publish the suppressed report of the chief Judicial Magistrate and for directions to devise a suitable rehabilitation programme and schemes to compensate the inmates who are victims of "governmental Lawlessness".

The Odhav Nari Gruh PIL was filed in the High Court of Gujarat by two NGOs working on issue of gender Justice following newspaper articles in Indian express regarding the escape from Odhav of residents, an issue that was reported widely, but the Indian express had gained entry in to the Narigruh. It was therefore able to actually show the inhuman living conditions of residents and narrate their stories cataloguing a plethora of serious human right violations . The PIL was also supported by affidavits of activists working for gender justice who had been to Odhav and most importantly a former resident survivor of domestic violence, herself.

Both PILs were filed to draw the courts attention to the reported inhuman living conditions inside the homes, lack of medical facilities, hygiene and exploitation of residents and absence of rehabilitation plans for them. Both shelters were established to protect women rescued under the Immoral Traffic prevention act 1956 and in both sets of court proceedings though separated by time span of more than 30 years, important and surprisingly similar questions were raised about the human rights of the residents, their living conditions, access to health facilities, their right to privacy and autonomy and participation in decisions to enter and exit the shelters and most crucially the total absence of any plans and activities for rehabilitation and reintegration of residents after their "time inside".In both cases there were serious allegations of misconduct and misuse of residents by the government servants running the institutions. There were issues of secrecy, lack of openness in running of the institutions and serious issues about the choice, control, autonomy and rights of the residents in the way the institutions were being run. In Odhav women complained about literally being " locked-up" in -there did not appear to be any clarity about what rights/representations, access to legal advice the women and girls had in either the decision to be admitted to the institution or the decision to leave the institution. In case of Agra, which was primarily dealing with women rescued from sex work, there was the continuous danger and in fact those appointed by the court found that girls once released slipped back in to sex work. In both cases, the planning around long-term needs and rehabilitation of the women was missing and in case of Agra, it proved very difficult even for the Supreme Court to hold the errant authorities accountable. Whilst action was taken against corruption and extortion alleged by residents in

complaints to the inspecting district judge appointed by the court-the women complained that if the rescue officer's greed for money was not satiated he would have them picked-up and sent to protection home even without producing them before the magistrate as required by the legislation. The Supreme Court kept hold of the PIL for 16 long years, making many important orders and interventions, whilst being more active in some years than others.

However, holding the institutions accountable and securing compliance of its orders was a tough task even for SC. In its penultimate order dated 22nd September 1997, the court said: "the facts beyond controversy indicate a total apathy on behalf of state govt. and the concerned authorities towards the continuing serious problems at the Agra Protective Home. Repeated directions from this court have also not received the consideration necessary from the concerned authorities. This situation is continuing ever since the commencement of these proceedings in the year 1981. It has, therefore become necessary for this court to consider the kind of action which is required to be taken by this court now for obtaining desired results and to make concerned authorities perform their duties under the law"[37]

Murlidhar recounts this the order of SC was a complete surprise to all, including him, present that day.[38] He notes however, that despite the unexpected, surprise ending, the impact of the PIL over the 16 years had a decisive impact on various aspects of running the protection home, on ensuring that there was a board of visitors, a chief inspector etc and an agreed set of far-reaching in terms of the changes proposed to the existing framework which included requiring the " rescued" or " removed" person under ITPA to not just be produced before magistrate, but to be heard in person or by a lawyer appointed by legal aid at every stage of the proceeding including admission, intermediate custody and discharge and a number of other useful guidelines which took account of the dignity of the woman removed and tried to work with her in removing her from sex work and tried to prevent her into falling back in hands of people likely to put her back in the prostitution racket.[39]

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[37] Ibid footnote 31, reproduced from article of Murlidhar, S.

[38] Ibid footnote 31, Murlidhar recalled, "At the next hearing the SC passed the monitoring responsibility to the NHRC in its final order dated November 11th 1997 to the surprise of all, as the suggestion had come from the court itself. The supreme court, it seemed had had enough-whilst it was made aware that powers of NHRC, a statutory body were nowhere near comparable or coextensive with the powers of the SC, it dismissed it simply observing that all authorities will comply with NHRC directions and NHRC could approach the court in future for clarification."

[39] Ibid footnote 31.

In case of Gujarat PIL, the High Court after a slow start eventually constituted a committee of credible citizens including a judicial officer to visit 8 homes and report to court. The process is underway and there are positive reports of the difference at least in the physical living conditions of shelters as a result of the High Court taking the PIL seriously. Whilst we look forward to the committee report and recommendations, we know that that as far as effective implementation is concerned, it will be a long journey, but one worth making given what is at stake and one that actually needs to be taken up in the vast majority of states and one which cannot have a real life without the High courts' going beyond rhetoric to issue appropriate orders to enforce fundamental rights of women under the Indian Constitution and under CEDAW by following examples of the remarkable persistence shown by the SC in its lengthy engagements with the states in cases like Agra Protection Home, Prakash Singh Judgment and Bachpan Bachao Andolan to ensure some ground level changes which no matter how small really make a difference in the daily lives of the most marginalized, poor, vulnerable people and if the actual experience of Gujarat is anything to go by, such legal moves are actually welcomed by many within the state machinery who want to do the right thing by the law but are often blocked by various bureaucratic and political hurdles that they do not have the power to remove.

JUDICIAL OVERSIGHT OR OVERREACH: THE ROLE OF THE JUDICIARY IN CONTEMPORARY INDIA

- **Justice Ruma Pal**

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The Background

On 6th December 2007, two judges of the Supreme Court of India said that the Indian Judiciary today is rightly criticized for 'over-reach' and encroachment into the domain of the other two organs of Government. [1].More recently, the Prime Minister also cautioned the judiciary against overreach. All this has given rise to furious debates both on the electronic and in the print media[2]. Are the judges guilty of overreach or aren't they? Even among judges we have the spectacle of wildly swinging judicial scales while weighing the issue[3].

The charge of overreach proceeds on the assumption that there is a constitutionally defined limit to judicial authority, which limit has been crossed by the judiciary in India, the principal offender being the Indian Supreme Court. That constitutionally defined limit when used in conjunction with oversight, according to the critics, is the separation of powers between the executive, legislature and the judiciary. For example, the present Speaker of the Lok Sabha is admittedly making indefatigable efforts "staunchly seeking citizen support for upholding the separation of powers enshrined in our Constitution and which constitutes its basic structure"[4]. He has cited two recent cases disposed of by the

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[1] *per Katju, J. :Divisional Manager, Aravali Golf Club and Anr. Vs.: Chander Hass and Anr 2007 (14) SCALE 1*

[2] *Judges v. Judges: The Tribune*

[3] *State of UP v. Jeet s. Bisht (2007) 6 SCC 586*

[4] *Somnath Chatterjee: Speaker, Lok Sabha on "Empowerment through education—impact on strengthening of democracy": IVth Dr. Shyama Prasad Mookerjee Special Lecture (2007); See also Somnath Chatterjee: The Second Annual Convocation Address at the West Bengal National University of Juridical Sciences, Kolkata (23/6/07)*

Supreme Court[5] as "glaring examples of deviation from the clearly provided constitutional scheme of separation of powers". An aspect of this criticism, according to the Speaker, is that the Constitution gives the Indian Legislature "a distinctly superior position" amongst the other organs of Government as the elected representatives of the sovereign will of the people[6].

At the outset I may indicate that I disagree with the Speaker's view and it will be my endeavour to justify the dissent with reference to the provisions of the Indian Constitution.

Re: Parliamentary Supremacy

With Independence, India has been able to cut the umbilical cord to Britain politically but not from two political concepts which are no longer apposite in India at least not in the sense that they are understood in Britain. The supremacy of Parliament is one such concept. The rigid or vertical separation of powers, propounded by Montesquieu more than 300 years ago is the other.

However the Speaker can be forgiven for reading Parliamentary supremacy into the provisions of the Constitution. After all, the Supreme Court, in the early days had said:

"Our Constitution has accepted the supremacy of Parliament and that being so, we must be prepared to face occasional vagaries of that body and to put up with enactments of the nature of the atrocious English statute…that the Bishop of Rochester's cook be boiled to death…A procedure laid down by the legislature may offend against the Court's sense of justice and fair play...but that is a wholly irrelevant consideration"[7].

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[5] *Jagadambika Pal v. Union of India : (1999) 9 SCC 95; Anil Kumar v Union of India : (2005) 3 SCC 150; (2005) 3 SCC 399*

[6] *Somnath Chatterjee: Separation of Powers under the Constitution and Judicial Activism : Dr. Kailash Nath Katju Memorial Lecture: 26/4/2007*

[7] *per S.R.Das, J. :A.K.Gopalan v. State of Madras :AIR 1950 SC 27 : 1950 SCR 88*

Fortunately, the decision has since been overruled since there is no supreme or sovereign power under the Indian Constitution. As in most countries with a written constitution, with the adoption of the constitution the legislature or Parliament, the executive and the judiciary are all equally obliged to discharge their functions not only in keeping with its provisions but with the sole object of upholding its provisions. In that sense, in India, only the Constitution is supreme.

Re: Separation of Powers

The separation of powers under the Indian Constitution is not rigid but flexible allowing as it does in many ways, for a functional overlap of powers in the three limbs of government.

For example, apart from legislating during a National emergency or when Presidential Rule is declared in respect of a State, the executive has the power when Parliament is not in session, to promulgate Ordinances, which have the same force and effect as an Act of Parliament and are, theoretically, to be in force for 6 months[8]. It is empowered to make administrative rules relating to the functioning not only of the executive but also relating to the legislative bodies[9] and because its field is coterminous with that of the legislature, if there are no statutory rules in force, it is competent to make appropriate Rules and to formulate policies on any matter in respect of which the legislature is competent to enact laws[10].

The executive also exercises quasi- judicial powers under several provisions. For instance, it has the ability (in the name of the President) to decide whether a Member of a

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[8] *Articles 123 and 213. An Ordinance does not require any involvement of other Legislative members. It is "drafted secretly in government chambers and is promulgated without an open discussion" . The Governor of Bihar promulgated 256 ordinances between 1967 and 1981 and all these ordinances were kept alive for periods ranging between one to 14 years by repromulgation from time to time on the prorogation of the session of the State Legislature. It was held in Wadhwa v. State of Bihar (1987) 1 SCC 378 that "the Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in Session, take over the law-making function of the Legislature"*

[9] *Article 118 (3)*

[10] *Articles 73 and 162; Ram Jawaya v. State of Punjab: AIR (1955) SC 549*

House of Parliament has become disqualified to continue as such[11]. It has the right to advise the President, advice the President is bound to accept, to grant pardon to or modify the punishment of a convicted person. Article 311 allows the executive to hold an enquiry into charges against any person holding a civil post under the Union or the State and to award punishment. Besides several statutes e.g. Acts dealing with licensing, levy of taxes or imposition of duties give the administrative authority the power to decide rights affecting a claimant or competing claims[12].

Similarly, Legislatures (which in the Centre is the Parliament), exercise quasi-judicial powers under the Constitution for example in the case of impeachment of judges[13] and contempt of legislatures[14].

The Constitutional framework is supported by various national institutions e.g. the defence forces and the civil services, primary amongst which is the judiciary and the judicial system. Unlike the US where the "vacuum created by the U.S. Constitution's silence on the courts' powers over unconstitutional legislation' had to be filled by judicial inference from the supremacy clause and Article III section 2 of its Constitution[15], the Indian Constitution expressly confers the power of judicial review on the Supreme Court and the High Courts under Articles 32 and 226. Referring to fundamental rights, the Constitution says that "*the State shall not make any law which takes away or abridges the rights conferred…and any law made in contravention of this clause shall, to the extent of the contravention, be void."*[16]. All legislative powers whether of Parliament or State Legislatures are also expressly made subject to other provisions of the Constitution[17]. Whether there is a contravention is decided by the Supreme Court under Article 32 under which the Supreme Court is not limited to merely declaring that a law is unconstitutional

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[11] *Article 103*

[12] *Ms. East India Commercial Co. vs. Collector of Customs: AIR 1962 SC 1893.*
Given the wide powers of the executive, according to one author, Parliamentary supremacy in the context of the practical working of the parliamentary system is "only a 'myth' or 'fiction'" which "actually boils down to supremacy of the executive government of the day" and "[w]hen a government shouts from the housetop to uphold "sovereignty of Parliament", what, in effect, it is seeking is to have complete, uncontrolled, freedom of action itself to do what it likes as it knows the majority in Parliament would always support it"(M.P.Jain: Indian Constitutional Law(5th edn. Rep) p 1635)

[13] *Article 124(5), Article 217;*

[14] *Article 194 (3)*

[15] *Marbury v. Madison. (1803) 1 Cr. 137*

[16] *Article 13*

[17] *Article 245; State of Bihar v. Balmukund Sah (2000) 4 SCC 640*

but is also empowered to actively enforce fundamental rights by issuing directions or orders or writs of or in the *nature of* mandamus, certiorari, habeas corpus, prohibition and quo warranto for this purpose. Fundamental rights are not merely "aspirational rhetoric", but "enforceable legal principle". It is therefore a constitutional requirement that the Courts oversee not only that laws have been competently enacted but that such laws are compatible with other constitutional provisions including Part III. The phrase "directions or orders or writs in the nature of" in Articles 32 and 226 gives wide latitude to the remedies which may be granted freed from the technicalities traditionally associated in England with the five prerogative writs[18]. The power under Articles 32 and 226 to issue directions and orders to enforce a constitutional obligation or to confer a constitutional benefit, therefore envisages a measure of legislative exercise and the power to evolve rules in the absence of any statutory provision[19].

Significantly, Article 32 was not placed with the articles of the Constitution which define the general jurisdiction of the Supreme Court, but is contained in Part III of the Constitution which enumerates the Fundamental Rights. Being a fundamental right itself, the Article provides a "guaranteed" remedy to have direct access to the Supreme Court for the enforcement of all the fundamental rights if necessary by issuing directions or orders. The High Courts powers of judicial review are in a way, wider, as they are authorized under Article 226, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and "for any other purpose".

Coupled with these powers is the power of the Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it"[20]. It has been said that Chief Justice Marshall's view in *Marbury v. Madison* did not mean that judicial interpretation of constitutional provisions, of its own force, would bind political branches of government *"[b]ut the judicial interpretation of the Constitution would only have such force as logic and persuasiveness might give it"*[21]. In India, on the other hand, all authorities are specifically mandated by Article 144 "to act

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[18] *T.C.Basappa v. T. Nagappa AIR 1954 SC 440.Dwarka Nath v. ITO AIR 1966 SC 81, 84*
[19] *Bandhua Mukti Morcha v. Union of India : (1984) 3 SCC 161 per Pathak,J*
[20] *Article 142*
[21] *The American Constitution: Its Origins and Development: Kelly, Harbison and Belz. (6th edn) P. 177*

in aid of the orders passed by the Supreme Court" and every decree or order passed for doing "complete justice" is enforceable throughout the country under Article 142.[22]

The powers of judicial review have been held to be part of the basic structure of the Constitution and cannot be abridged or excluded by amending the Constitution[23]. What judicial power could be more widely and expressly constitutionally conferred? It is therefore acknowledged even by the die-hard critics of judicial activism that "the power of judicial review is an exception to the principle of separation of powers"[24].

In fact, with so much Constitutional overlap in the functioning of the three organs of Government, the Indian Constitution itself does not indicate a separation of powers as is commonly understood. As I see it, there is, to a large extent, a parallelism of power, with hierarchies between the three organs in particular fields. It is this balance of hierarchies which must be maintained by each organ subject to checks by the other two. To illustrate this is the requirement for the executive to fill the legislative vacuum by executive orders[25]. Where there is inaction even by the executive for whatever reason, the judiciary can step in and in exercise of its obligations to implement the Constitution provide a solution till such time as the legislature or the executive act to perform their roles either by enacting appropriate legislation or issuing executive orders to cover the field[26]. Similarly while the legislature and executive may reject a judicial decision by amending the law, the judiciary may in turn test that law against the touchstone of the Constitution.

The only curb on the exercise of powers by the three limbs of government is the Constitution, and because the judiciary protects, interprets and enforces the Constitution,

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[22] *The comment "The courts possess neither the power of the sword, nor the purse; they only have to rely upon the goodwill and respect of the two co-ordinate branches as that of the general public, for the enforcement of their orders" (B.N. Srikrishna, J: Skinning a cat: (2005) 8 SCC (J) 3, 17) may be appropriate in the context of the US but incorrect in the Indian.*

[23] *L.Chandra Kumar v. Union of India: (1997) 3 SCC 261*

[24] *B.N. Srikrishna: Skinning a Cat (2005) 8 SCC (J) 3.*

[25] *Articles 73 and 162*

[26] *Articles 32 and 226: Vineet Narain and Ors. v. Union of India :(1998)1SCC226, "to fill the void in the absence of suitable legislation to cover the field..[i]t is the duty of the executive to fill the vacuum by executive orders…and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations…to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field".*

the judiciary. That does not make the judiciary supreme although that is probably what the strongest and most vocal critic of judicial activism, the Executive, fears. This fear had led to an amendment of the Constitution in 1976 to drastically curb the powers of judicial review, amendments which were subsequently undone partly by another Constitutional amendment and partly by the judiciary itself by holding the first amendment to be unconstitutional[27].

Re: Overreach through Interpretation

The critics say that judges not only second guess Parliament in the guise of interpretation of the ordinary laws enacted by it, but while interpreting the Constitution judges have often re-written it. For example they cite the fact that judges have interpreted the right to equality as including reasonability or an absence of arbitrariness[28] and thus introduced a standard of judicial review, which was according to them was "neither contemplated by the framers of the Constitution nor by the plain text of Article 14"[29]. The further complaint is that judges have introduced the concept of substantive due process into the phrase "procedure established by law" in Article 21 which had been consciously rejected by the framers of the Constitution[30]. By construing the negative right not to be deprived of life under Article 21 as a positive right to life and by redefining the word "life" to include to the right to live with dignity, the charge is that judges have created new fundamental rights like rights to livelihood and shelter[31], education[32], privacy[33], legal

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[27] *The Constitution (Forty-Second Amendment) Act, 1976 amended by The Constitution (Forty-third Amendment) Act, 1977. Although said in the context of the U.S. the observations " [E]lected officials appear to have attacked the Court without justification, perhaps out of a hysterical overreaction to earlier grievances. Court-curbing measures appear to be an emotional relaease, not a rational strategy to advance policy objectives—a psychological phenomenon, not a political one" [Keith E. Whittington: Political Foundations of Judicial Supremacy p. 12] are apposite to the Indian context.*

[28] *[E.P.Royappa v. State of Tamilnadu: (1974) 4 SCC 3; Maneka Gandhi v. Union of India: (1978) 1 SCC 248]*

[29] *B.N.Srikrishna,J: Skinning a Cat : (2005) 8 SCC (J) 3, 10*

[30] *[ibid]*

[31] *Olga Tellis v. Bombay Municipal Corporation : (1985) 3 SCC 545*

[32] *Unni Krishnan v State of Andhra Pradesh: (1993) 1 SCC 645*

[33] *R. Rajagopal alias R.R. Gopal and Another Vs.State of Tamil Nadu and Others: (1994)6SCC632, [1994] Supp 4 SCR 353*

aid[34], a clean and pollution free environment[35] and the right of women to freedom from sexual harassment at work[36] to name a few. It has limited the powers of Parliament by holding in what has been described by one author as representing "the high point of judicial innovation"[37] and by another as a constituent or constitution making role[38], that Article 368 of the Constitution which empowers Parliament to amend the Constitution could not be exercised to alter the basic structure of the Constitution[39]. At the same time, the complaint is, the Supreme Court has arrogated to itself greater powers by interpreting the provisions of the Constitution relating to the appointment and transfer of judges[40] so as to take the power away from the Executive and give it to the Chief Justice of India and a collegium of senior judges of the Supreme Court[41]. In other words Judges have been charged with having a tendency to replace the Rule of law with the rule of judges by displacing choices already made by the framers[42].

The charge proceeds on the assumption that the Rule of law is distinctly and definitively identifiable and that its interpretation was immutably fixed when the Constitution was drafted by the framers.

Assuming that the Rule of Law is exhaustively defined in the Constitution, where the Constitutional Rights are "great generalizations", to require judges to limit their role "to examine whether the legislature had the authority to promulgate the Statute and examine whether the statute violated one of the Constitution's textually enumerated fundamental rights" is to beg the question. The fact is that the framers did not define such concepts like "equality", "liberty" or "freedom". They did not lay down the standards of "reasonableness" of the restrictions which the Constitution allows on the freedom of

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[34] *Sunil Batra v. Delhi Administration AIR 1978 SC 1675. 1724; Hussainara Khatoon AIR 1979 SC 1369; Sheela Barse v. State of Maharashtra AIR 1983 SC 378*
[35] *T.N.Godavarman Thirumalpad v. Ashok Khot: .(2006) 5 SCC 1*
[36] *Visakha v. State of Rajasthan : AIR 1997 SC 3011*
[37] *M.P Jain: Indian Constitutional Law: 5th ed(rep) p.1572*
[38] *Raju Ramachandran: The Supreme Court and the Basic Structure Doctrine (Supreme But Not Infallible: Oxford)*
[39] *Kesavananda Bharati v. State of Kerala : AIR 1973 SC 1461*
[40] *Articles 124 and 217] Supreme Court Advocates on Record Association v. Union of India (1993) Supp. 2 SCR 659*
[41] *In re Presidential Reference : AIR 1999 SC 1*
[42] *R.Berger : Government by Judiciary 412 (1977)*

speech, the rights of peaceable assembly, to form associations, to move freely or to reside and settle anywhere in the country[43], nor what constitutes "public order, morality and health" subject to which a person is entitled to freedom of conscience and the right to profess, practice and propagate any religion[44]. None of the rights have a fixed content. Most of them are "empty vessels" as Justice Learned Hand said, into which each generation pours its content by judicial interpretation in the light of its experience[45]. Judges have looked at the context, textual and empirical, resorted to other sources of law and looked for persuasive credible opinions of comparative jurisdictions for the "filling in" of the content.

As early as 1952, Vivian Bose, J recognised that the words "equality before the law" in Article 14 could not be precisely defined. It could not mean being governed by the same law as this would infringe on the right of every person to be governed by their personal laws in the practice of their different religions. Equality could not also be confined to "reasonable classification" because classification can be broad based or it can be broken down and down until finally just one solitary unit is divided from the rest. Besides how would reasonableness be determined? The test of "hostile discrimination" would not take the matter any further as it would be impossible to assess the minds of those enacting the law. Besides there could be cases where there is utmost good faith and scientific precision in making the classification and yet the law would offend the concept of equality. *"Let us take an imaginary case"* he said "*in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are*

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[43] *Article 19*
[44] *Article 25*
[45] *per Matthew, J: Kesavananda Bharati v. State of Kerala : AIR 1973 SC 1461*

substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is ***inevitable*** *when a judge is called upon to crystallise a vague generality like article 14 into a concrete concept"*[46].

Apart from the judiciary, no other limb of government has been given the authority to finally determine constitutional questions.

In fact, the President may (acting on the advice of the Cabinet) refer questions of public importance, existing or anticipated, to the Supreme Court for its opinion. Presidential References have in the past included questions relating to the constitutionality of proposed legislation[47], the powers, privileges and immunities of State Legislatures[48] the validity of the election of the President[49] and the mode of appointment of judges[50]. It is up to the Supreme Court to choose to answer the reference and of the several occasions when such references have been made, it has decided not to oblige the President only once[51].

The contention that the judge merely states the law and cannot create it has been characterized as "a fictitious and even a childish approach" by Aharon Barak[52]. In the context of the Indian Constitution, particularly the express wording of Articles 32 and 226, the approach is inexcusable.

It is not my intention nor would time constraints allow for an examination of the empirical context of the many decisions in which the provisions of the Constitution have been construed except to say, that like other countries the constitutional jurisprudence of India has evolved in the context of its own political, social and economic conditions. One decision will serve as an illustration. I choose the case which gave an expansive meaning

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[46] *Anwar Ali v. State : AIR !(1952) SC 75, para 82.*
[47] *Article 143(1): e.g. In re Kerala Education Bill :AIR (1958) SC 996; In re Special Courts' Bill, 1978 : (1979) ! SCC 380*
[48] *Keshav Singh v. Speaker, Legislative Assembly: AIR 1965 SC 745*
[49] *In re Presidential Poll : AIR 1974 SC 1682*
[50] *In re: Presidential Reference: AIR 1999 SC 1*
[51] *In re special Reference No. 1 of 1993 ("Ram Janmabhumi case") : (1994) 1 SCC 680*
[52] *Aharon Barak Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy116 Harv L.Rev. 16*

to the phrase “procedure established by law” in Article 21 and introduced what has been termed “substantive due process” a phrase that the framers of the Constitution consciously avoided.

It was triggered by an unprecedented attempt by the executive to firmly entrench itself as the sovereign power under the Constitution suppressing any form of dissent, followed by one of the worst decisions rendered by the Supreme Court in its entire career. This extraordinary combination of circumstances came about when the then Prime Minister’s election was set aside in 1975 on the grounds of corrupt electoral practices by the Allahabad High Court. The Supreme Court granted a stay of the operation of the decision, but injuncted her from voting in Parliament till the appeal was heard. The next day a state of internal emergency was declared. Two days later in exercise of powers conferred by Clause (1) of Article 359 the President suspended the right of any person including a foreigner to move any Court for the enforcement of fundamental rights including those conferred by Articles 14 (equality), 19 (1) (a) (freedom of speech and expression), 21(life and liberty) and 22(protection against arrest and detention). All proceedings pending in any Court for the enforcement of those rights were also suspended for as long as the emergency was in force. To stifle protest, gatherings of more than 5 persons were forbidden. More than 100,000 persons, a great many of whom belonged to the opposition parties, were arrested and jailed under the Maintenance of Internal Security Act (MISA) throughout the country.

Despite the embargo on the right to approach court for enforcement of fundamental rights, several petitions for writs of habeas corpus were filed in the High Courts. Nine High Courts held that notwithstanding the continuance of emergency and the Presidential Order suspending the enforcement of fundamental rights, the Courts could examine whether an order of detention was in accordance with the provisions of MISA or whether the order was made in bad faith or was made on the basis of irrelevant material. The government preferred appeals from the decisions of the High Courts before the Supreme Court. It also directed the transfer the 16 High Court Judges who had decided against the Government out of their home States.

The judgment of the majority of the Supreme Court allowing the Governments appeals must have gladdened the hearts of many originalists. The Chief Justice leading the majority view said that "Liberty is itself the gift of the law and may by the law be forfeited or abridged". He rejected the relevance of "[s]ome instances from different countries … referred to by some counsel for the respondents as to what happened there when people were murdered in gas chambers or people were otherwise murdered" saying "People who have faith in themselves and in their country will not paint pictures of diabolic distortion and mendacious malignment of the governance of the country"[53] Another judge similarly praised the executive and said "Courts can safely act on the presumption that powers of preventive detention are not being abused" and "that the care and concern bestowed by the State authorities ' upon the welfare of detenus who are well housed ,well fed and well treated, is almost maternal"[54]. "An impassioned appeal … to save personal liberty against illegal encroachments by the executive" and "to listen to the voice of judicial conscience" was rejected by another judge saying that judicial conscience was not " a blithe spirit like Shelley's Skylark free to sing and soar without any compulsions" and could not deflect the judge by such considerations from arriving at what he considered to be the correct construction of the constitutional provision[55].

Strictly construing the letter of the law, the majority held that Courts were not competent to question the authority of the detaining officer, nor the relevance of the grounds for detention nor whether the detention was actuated by malice during the operation of the Presidential Order. But it was said that the person would have his remedy for any false imprisonment after the expiry of the Presidential Order.

This shameful instance of judicial deference to and abdication of its powers of judicial review in favour of the executive has remained a blot on the reputation of the Supreme Court as a protector of the citizen from executive excesses. Incidentally, the sole notable

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[53] *per A.N.Ray, C.J. Additional District Magistrate, Jabalpur Vs. Shivakant Shukla (1976) 2 SCC 521, 572; [1976] Supp SCR 1726.)*
[54] *per Beg, J. ibid. p. 643*
[55] *per P.N.Bhagwati, J. ibid at p. 722*

dissenter[56] was suitably "punished" by the executive by being superseded for the post of Chief Justice.

This was followed by two drastic amendments to the Constitution. In 1975 the 39th Amendment excluded the election of the Prime Minister and some other public officials from judicial review. The 42nd Amendment Act passed the next year, curtailed fundamental rights including free speech. The jurisdiction of higher courts was substantially denuded by setting up tribunals to be manned basically by executive appointees, and the power of judicial review under Articles 32 and 226 seriously curbed. Emergency was ultimately withdrawn in 1977 immediately before elections were held when the ruling political party was defeated. Public condemnation (which was as severe as it was widespread) of the Supreme Court's role in supporting the executive during the period of the emergency, was the empirical context in which the construction of Articles 14 and 21 was revisited in two seminal decisions of the Supreme Court[57].

The first occasion to construe the two articles arose when a passport officer impounded the passport of Maneka Gandhi and refused to divulge the reason why. Reading Article 14 and Article 21 together, it was held that the requirement for rationality in Article 14 meant that the procedure by which a person could be deprived of life or liberty under Article 21 had to be "right, just and fair" and not arbitrary, fanciful or oppressive otherwise it would be no procedure at all'[58].

The second was one of several cases which signalled the growth of Public Interest Litigation. This was primarily relatable to the executive excesses during the period of the emergency between 1975 and 1977 and perhaps was also a reaction to the criticism of the failure of the Supreme Court to protect the citizen when the protection was most needed. The petitioner was a non-governmental organization which sought release of labourers

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[56] *Khanna, J.*

[57] *It is arguable that this case is an instance of the judiciary reacting to "public outrage": Cass R. Sunstein: If People would be outraged by their rulings, should judge's care: Stanford Law Review (October 2007)*

[58] *Maneka Gandhi v. Union of India (1978) 1 SCC 248 per Bhagwati, J. at p. 284*

forcibly made to work in stone-quarries while living in sub-human conditions. The State Government said that no fundamental right of the workers had been infringed. The Court negatived the submission by reading into the concept of "life" in Article 21, the Directive Principles which *inter alia* require the State as a matter of policy to ensure adequacy of livelihood and "just and humane conditions at work" and an earlier decision[59] which had held that "life" meant something more than mere animal existence[60]. By this reasoning Maneka Gandhi got back her passport and the labourers held in bondage released.

Was the Court legally justified in construing Articles 14 and 21 in this manner? No one can deny that the Court has the power to and must construe the language of the Constitution in a manner so as to do "complete justice'[61]. The interpretation is a possible one and does not run counter to any Constitutional provision. On the other hand, do the critics suggest that the laws according to which a person can be deprived of his or her liberty or even life may, in the context of the explicit provisions of the Constitution, be unreasonable, arbitrary and unjust? It may be that the framers of the Constitution wanted to exclude "substantive due process" because of the Lochner experience in the US. Apart from the fact that in the United States, with Brown v. Board of Education[62], the courts appear to have long since got over the fear of the 'Lochner spectre'[63], we cannot allow the intention of the framers determine the meaning of a word or concept today. As was said by a great enlightened soul over a 100 years ago: *'Mughal coins have no currency under the (East India) Company's rule'* [79a].

Re: Overreach in matters of Policy

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[59] *Kharak Singh v. State of Uttar Pradesh [1964] 1 S.C.R. 232*
[60] *Bandhua Mukti Morcha v. Union of India : (1985) 3 SCC 161, 182.*
[61] *I was a little taken aback by the comment of a writer who said that "no constitutional text can be discovered for the proposition that the Supreme Court is the interpreter of the Constitution.(Andhyarujina: Judicial Activism & Constitutional Democracy[Tripathi] p.6).Apart from the fact that that in the legal context 'interpretation always means the process by which Courts seek to ascertain the meaning of the legislature' there are several Articles in the Constitution which refer to the court as the interpreter of the provisions of the Constitution e.g. Articles 133 (2), 143(3), 228*
[62] *347 U.S. 483 (1954)*
[63] *Sujit Choudhry The Lochner Era And Comparative Constitutionalism: 98 Colum. Law Rev. 531*
[63a] *Sri Ramakrishna Paramahamsa*

But, say the critics, Judges are really indulging in policy making, which is the sole prerogative of the other two branches of government. Without a definition of the word "policy" the charge lacks clarity. Does it mean the prioritization of social or economic goals, or does it mean the method by which the goals are to be achieved? Courts do not in fact interfere with the first but have subjected the second to judicial scrutiny under their powers of judicial review. In a sense with its monopoly of constitutional interpretation and its power of judicial review the Indian judiciary, like the judiciary in the U.S. inevitably has become a powerful instrument of policy[64]. But courts in India have also intervened in the absence of executive action or in a legislative vacuum. That the decisions have had social and economic impact is inevitable but unavoidable. The form in which this judicial intervention takes place is by way of public interest litigation.

The Indian model of public interest litigation is different from the public interest litigation model in vogue in the United States. Public Interest litigation in the US deals with issues like consumer protection, prevention of environmental pollution and ecological destruction. The Indian model deals with those issues but was initially mainly used for the protection and promotion of "numerically small and powerless minorities" and those who by reason of poverty and illiteracy are unable to represent their cause before the courts[65]. such as prisoners, bonded labourers, rickshaw operators, children, migrant labourers, pavement dwellers, inmates of workhouses, rape victims, inmates of mental institutions, small farmers, workers facing plant closures, and victims of environmental degradation[66]. Later the jurisdiction was extended to correct abuses of discretionary power by persons holding public positions including ministers and judges[67].

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[64] *The American Constitution: Its Origins and Development: Kelly, Harbison and Belz. (6th edn) P. 177: Speaking of the state of the law in the U.S. "[W]here we now take it for granted that Supreme Court decision making is political, in the early nineteenth century defenders of judicial review drew a distinction between law and politics, reserving the former sphere to the judiciary and the latter to the political branches".*

[65] *A.S.Anand (Protection and Promotion of Human Rights through Public Interest Litigation : Sir Asutosh Mookerjee Oration, (2004); S.P.Gupta v. Union of India : 1981 Supp. SCC 87 at 210; People's Union for Democratic Rights V. Union of India: (1982) 3 SCC 235;Sunil Batra(II) v. Delhi Administration (supra); Dr. Upendra Baxi v. State of UP (1983) 2 SCC 308*

[66] *Burt Neuborne: THE SUPREME COURT OF INDIA Constitutional Court Profile International Journal of Constitutional Law, July, 2003*

[67] *Common Cause v. Union of India (1996) 6 SCC 530 (Minister of State); Tarak Singh v. Jyoti Basu:.(2005) 1 SCC 201 (High Court judge)*

The rules of standing and other procedural norms have been relaxed in order to give easy access to the Courts[68]. Any public spirited individual or organization can represent the victims of either a denial of fundamental rights or of misapplication of the law. However once the petition is entertained as a public interest litigation in view of the public interest involved, the locus of the petitioner is confined only to assisting the court through amicus curiae appointed by the court and the petitioner has no independent or additional right in the conduct or hearing of the proceedings thereafter[69].Courts have "gathered facts" by the appointment of commissioners who may be District Judges, journalists, lawyers, bureaucrats, professionals and expert bodies[70].The hearings are not adversarial but a 'co-operative or collaborative effort on the part of the petitioner (or those who are represented), the State or public authority and the court' with the common objective of securing observance of constitutional or legal rights, benefits and privileges and to reach social justice to the socially and economically disadvantaged[71].

Given the fact that the Executive and the Legislative bodies have been and continue to be apathetic and inert on many occasions when the Constitution or law requires them to act, the grievances of the public were and continue to be manifold. Relief has been provided by the Courts on matters so diverse that if the subjects were classified alphabetically they would probably cover every alphabet several times over from adoption of children by foreigners[72] to filling vacancies in the Supreme Court and High Courts[73], and from air-pollution[74] to wild-life[75]. On occasions when the laws were in place but unimplemented by the executive, implementation was directed and monitored[76]. The Supreme Court has laid down a summary of principles evolved in public interest litigation, a sort of Code of

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[68] *Rural Litigation and Entitlement Kendra v. State of U.P. : (1985) 2 SCC 431*
[69] *Vineet Narain and Ors. v. Union of India and Anr. (1998)1SCC226, [1997]Supp6SCR595,*
[70] *Desai and Murlidhar: 'Public Interest Litigation: Potential and Problems': [Supreme but not infallible; Oxford] p.159, 165.*
[71] *Dr. Upendra Baxi v. State of UP (1986) 4 SCC 106 at 117*
[72] *Laxmi Kant Pandey v. Union of India, A.I.R. 1984 S.C. 469*
[73] *Supreme Court Advocates on Record Association v. Union of India (1993) Supp. 2 SCR 659*
[74] *M. C. Mehta v. Union of India, A.I.R. 1987 S.C. 965*
[75] *Pradeep Krishen v. Union of India (1996) 8 SCC 599; Animal & Environmental Legal Defence Fund v. Union of India (1997) 3 SCC 549*
[76] *People's Union for Civil Liberties v. Union of India (2004) 12 SCC 104; (2006) 13 SCALE 399: (2007) 9 SCALE 25:- non-implementation of the Integrated Child Development Services…directions given to implement scheme*

Judicial Activism[77].On occasions when there was a legislative vacuum directions were issued by the Supreme Court which were to be complied till law was framed by the relevant legislative body[78] Noteworthy among these has been the set of directions relating to sexual harassment of women at the work place[79]. More recently directions were issued relating to police reforms[80]. These instances far from indicating instances of unwarranted interference by the judiciary really highlight instances of legislative or executive inaction or indifference. Although it may be true that "judicial over-reach" is the direct result of legislative and executive "under-reach"[81], the inaction of the other organs is not the legal basis for the so-called "overreach". The Constitution is.

Re: Impracticality

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[77] *Appendix II*

[78] *People's Union of Civil Liberties (PUCL) Vs. Union of India (UOI) and Anr. (1997)1SCC301Section 5(2) of the Indian Telegraphs Act, 1885 allows phones to be tapped by the Central Government or the State Government. Although the power to make rules relating to the precautions to be taken for preventing the improper interception or disclosure of messages had been there for over a century, the Central Government had not framed the necessary rules The Court relied on the fact that India had ratified the International Covenant on Civil and Political Rights, 1966, Article 17 of which protects the individual against arbitrary or unlawful interference with his privacy, family, human or correspondence, considered the Report of The Second Press Commission which gave suggestions to the Government regarding procedural safeguards and in that context issued directions.*

[79] *The rationale behind this was the obligation cast on India by its ratification of the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] to take the necessary measures to give effect to the Convention and its subsequent official commitment at the Fourth World Conference on Women in Beijing. However no statute was enacted implementing the treaty in India.The relevant provisions of (CEDAW), were relied on by the Supreme Court of India first, to hold that sexual harassment at the place of work violates the fundamental right to gender equality guaranteed under the Constitution and second, to lay down, with the* ***consent of the Union of India****, guidelines and norms to provide for the effective enforcement of gender equality and guarantee against sexual harassment at work places. These guidelines are to operate until legislation is enacted for the purpose. (Visakha* ***v.*** *State of Rajasthan(AIR 1997 SC 3011)*

[80] *[The Indian Police Act 1861 intended to create a politically useful force which continues as an indispensable tool of governments to retain power(Feudal Forces : Democratic Nations: Police Accountability in South Asia: Report of the Commonwealth Human Rights Initiative 2007) To prevent misuse of powers by the police and to insulate the force from political or other pressures seven different Commissions recommended a drastic amendment of the Police Act. The last Commission drafted a new Act. No action was taken. A petition under Article 32 of the Constitution of India was filed before the Supreme Court by two retired police officers and a Non-Governmental Organization, inter alia, praying for issue of directions to the Government of India to frame a new Police Act on the lines of the model Act drafted by the Commission. The court in exercise of powers under Articles 32, 142 and 144 issued "appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations": Prakash Singh and Ors Vs. Union of India :(2006) 8 SCC1:]*

[81] *Fali S. Narriman; 3rd P.D.Desai Memorial Lecture: 9th February 2008: Ahmedabad*

Impracticality is another reason for criticism of "activism". This is a concern which is normally voiced only by the anti-activism judges. According to them the danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will be counter-productive and undermine the credibility of the institution. They also say that judicial activism diverts the time, talent and energy of judges into channels that they are neither required to navigate, nor equipped to, for lack of competence, skill or resources. An aspect of this criticism is the fact that the judicial system is already clogged with a huge back-log of cases, delayed decisions and a number of frivolous petitions[82]. The Executive's take on this is that the Courts are unable to cope with the volume of work they have and should concentrate their attention in cleaning up their own house[83].

The issue of executability of the orders passed should not really arise. To the extent that orders declare the law, like legislative enactments, it is for the concerned citizens to avail of the law. To the extent that the courts mandate a course of action, given the Constitutional provisions for the enforcement of the orders of the Supreme Court by the executive, it is for the executive to discharge the responsibility. Since it is sometimes difficult for the executive to shed the habit of inactivity, the Courts have had to resort to proceedings in contempt to enforce their orders[84].

However I concede that the pendency of cases is massive. As of February 2006, 33, 635 case were pending in the Supreme Court, 3,341,040 cases in the high courts and 25,306,458 cases in the subordinate courts[85].This means an overwhelming work load for the judges and an intolerable delay for the litigants. The reasons for this are manifold and merit a separate speech. I will indicate only one reason.

We have a population of 1.2 billion and a total number of 26 judges in the Supreme Court, 670 in the High Court and 13,204 in the subordinate courts. The ratio of judges

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[82] *B.N.Srikrishna, J: Skinning a cat: (2005) 8 SCC J-3*
[83] *Somnath Chatterjee Separation of Powers under the Constitution and Judicial Activism : Dr. Kailash Nath Katju Memorial Lecture: 26/4/2007*
[84] *E.T. Sunup v. C.A.N.S.S. Employees Association : (2004) 8 SCC 683*
[85] *Hindustan Times (India), 19 March 2006*

works out to 12-13 per one million persons, compared to 107 in the United States, 75 in Canada and 51 in the United Kingdom[86]. Suffice it to say that the power to increase the number of judicial posts lies with the legislative wing of the government.

In any event, criticism based on the number of pending cases is really a red herring and the answer was aptly given by the Supreme Court within the year that the Constitution was enacted, to declare that it is "*constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights"*[87]. Krishna Iyer, J. put the matter more picturesquely. He said that courts are not hotels that they can turn away an applicant on the plea that they were overbooked. Nevertheless the judges themselves have from time to time laid down guidelines and shown a remarkable restraint in the exercise of this otherwise untrammelled power[88]. In fact the Indian Supreme Court treads very carefully not to "overreach" itself even in areas in which the British and the US Courts have entered[89].

Strangely no one objects to the beneficial impact of the orders passed by the Supreme Court on the public. The critic's grouse is that immediate public benefit is outweighed by long term damage to the constitutional frame work and that the national edifice is threatened. If my reading of the Constitution is correct, the judiciary has acted well within the Constitutional framework. In fact, the other organs have not circumvented or rejected decisions in public interest litigation by enacting legislation to the contrary on the ground that they contradict their political and social preferences.

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[86] *Committee on Reforms of the Criminal Justice System ('Malimath Committee Report') (Bangalore : Ministry of Home Affairs, March 2003)*

[87] *Romesh Thappar v. State of Madras : AIR (1950) SC 124.*

[88] *See for example: State of U.P. v. Jeet S. Bisht; 2007 (4) Supreme 359 ;*
Ambika Prasad Mishra v. State of U.P: (1980) 3 SCC 719- (iv) Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664; Balco Employees' Union (Regd) v. Union of India : (2002) 2 SCC 333; State of UP v. Johri Mal (2004) 4 SCC 714;Rajiv Ranjan Singh "Lalan" (VIII) v. Union of India: (2006) 6 SCC 613;Secy of State for Karnataka v. Uma Devi: (2006) 4 SCC 1All India Judges Assocn & Ors v. Union of India (1993) 4 SCC 988

[89] *Compare United States v. Daniel B. Brewster, 33 L. Ed. 2d 507 with P.V. Narsimha Rao vs.State (CBI/SPE): [1998]2 SCR 870*

As Margit Cohn has said "*Some ground-breaking judicial decisions may even be applauded behind the scenes by government officials and members of the administration. Similar dynamics can occur vis-à-vis the legislature. Courts may be led to decision-making due to reluctance of political institutions to take the burden and responsibility involved in changing the law. Political constraints may prevent the government from following public opinion, especially when governments are based on volatile coalitions. In some of these cases, the courts may find themselves "activist by default" acting in the face of parliamentary inaction, their action could in fact reflect the consensus, rather than be the primary agent of its change"*[90].

The two cases of aberration which the Speaker found to be "anathema to democracy" related to proceedings in the legislative assemblies in two states[91]. In both cases there were two parties which claimed to form the government on the basis of having secured the majority. In each case one of the contenders approached the Supreme Court complaining of the bias or incompetence of the Speaker in their respective states. Undoubtedly, Article 212 restrains courts from inquiring into proceedings of the Legislature and it is true that on both occasions the court merely issued directions after hearing the parties for resolving the deadlock. No reasons were given in support of the directions. I was not a party to the judgment but it appears from the judgments that the issue of non-justiciability was not raised. It also seems that the orders were passed at the invitation of both parties, to resolve the impasse. In one case the directions were complied with and the dead-lock resolved in favour of the respondent. In the second, the matter was resolved between the parties out of court. In other words the Court was acting more as a mediator rather than as an adjudicator in an adversarial proceeding. In these circumstances, the cases cannot be cited as instances of "judicial" activism or overreach.

While defending judicial activism as a legitimate exercise of judicial power, it is not my object to defend the abuses of that power. At the same time criticism of judges' predilection for rhetoric, display of erudition or a wrong decision cannot be a reason for

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[90] *Margit Cohn.: Judicial Activism In The House Of Lords: A Composite Constitutionalist Approach*
[91] *Jagadambika Pal v. Union of India : (1999) 9 SCC 95; Anil Kumar v Union of India : (2005) 3 SCC 150; (2005) 3 SCC 399*

denying or curtailing the power. Also given the nature of the power that judges are empowered to wield, there can be no doubt that it is imperative that persons of the highest calibre are appointed by a process that is transparent. A single unhappy appointment can have serious repercussions since judges in the higher courts do not sit *en banc* so that an aberrant view might, till it is corrected by a larger Bench, represent the law of the land.

It may be that the framers of the Constitution had not anticipated that the power of judicial review would be used quite in this fashion, but they also could not have anticipated a non-functional legislature or a malfunctional executive to the extent that the country has witnessed in the last few decades[92]. No country can continue nor can the operation of the Constitution be maintained in such a legal vacuum. When the judiciary can, by a legitimate process fill that vacuum, at least temporarily, it not only can but must do so. In other words, the extent of judicial intervention will vary in direct proportion to the standards, both in terms of quantity and constitutionality, maintained by the other limbs of government.

Re: Democracy and Judicial Accountability

Finally, the critics have characterized the "activist" role of the judiciary as counter-majoritarian and destructive of democracy. A facet of the argument is the absence of judicial accountability to the electorate, -- that judges, not being elected, are not accountable to anyone for the discharge of functions of an executive or legislative nature and that there is no redress against aberrations "both of which are anathema in a democracy"[93].

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[92] *State level coalitions started since 1967. At the Centre the first coalition was in 1977 and except for a brief period (1996-1998) coalition governments continues till today*

[93] *Somnath Chatterjee: Separation of Powers under the Constitution and Judicial Activism : Dr. Kailash Nath Katju Memorial Lecture: 26/4/2007*

The fallacy lies first in limiting the notion of accountability to the sense in which politicians are accountable and second in treating "democracy" and "majoritarian" as synonymous. In the context of governance or politics, democracy is the process and government by the majority, the outcome. In the context of human or fundamental rights, democracy means the rights of individuals where the majority has little if any place. When the Constitution says "We, the people of India" it does not mean the majority. It means that every individual Indian is entitled to its protection. By this token how democratic are the legislators or the executive, both of which protect and speak for the majority? By this token they are not accountable to the minority or the individual and in the absence of political accountability what possible redress can the minorities or the individual get politically against the "tyranny of the majority"? If any limb of Government is capable of destroying democracy in this sense, it is the Executive and transient majorities in the legislatures as the events during the last emergency amply illustrate[94].

Judicial accountability in a rights-democracy context does not mean political accountability to effectuate majority will or answerability to the majority. It means the assurance to each individual that the process of determining his or her individual right is transparent, impartial and objective. To this end, judges are required to be independent and untouched by partisan politics[95]. The fact that judges are unelected ensures this in some measure. A relatively short tenure of a judge without the possibility of re-appointment also has the advantage of disallowing entrenched personal philosophies to develop[96]. In the interests of transparency, reasons in support of decisions have to be

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[94] *While introducing the Bill which was subsequently The Constitution (Forty-Fourth) Amendment Act, 1978, it was said "Recent experience has shown that the fundamental rights, including those of life and liberty, granted to the citizens by the Constitution are capable of being taken away by a transient majority" and that the further amendment was necessary was introduced "for removing or correcting the distortions which came into the Constitution by reason of amendments during the period of the Internal Emergency"*

[95] *"Unfettered by political interests or popular prejudices, the judiciary can penetrate to the true meaning of the Constitution and the subtle requirements of its principled commitments. Some questions—questions of justice and rights are too important to be left in the hands of legislative majorities or 'the people themselves'": Keith E. Whittington: Political Foundations of Judicial Supremacy, p.9*

[96] *Although the Constitution allows any person who has held judicial office for 19 years or practised in a High Court for 10 years to be appointed as a judge of a High Court (Article 217), in practise judges from the districts serve well over 25 years before they are considered for appointment and lawyers are very rarely appointed before they are 45. With the age of retirement at 62, a normal tenure in the High Court is*

given, proceedings in court are open to the public including the press, (unless it is necessary to protect an individual e.g. in cases of rape or child abuse) and all decisions are published. It may be that judges cannot be removed because of a bad decision. But bad decisions are rectifiable by judicial processes like appeal if the decision is not of the Supreme Court. Decisions are also open to review, overruling by a larger Bench or what is now known as the curative petition[97] and of course by enactment. An aberrant judge can be removed by impeachment. The only case when a Supreme Court judge was sought to be impeached on the ground of proven dishonesty, was defeated by a political party. Most importantly, all judges are also public servants within the meaning of The Prevention of Corruption Act, 1988 and can, like other public servants, be prosecuted for corruption[98].

In a coalition Government, which India has had for the last few decades, the country has and is being run by a number of parties which not only do not represent the majority in the country but may not even represent the majority in their own state. The political parties which join a coalition to form the government at the centre, have different political agendas (none of which may represent the view of the majority of the citizens of India) and often hold the government to ransom with threats of withdrawal of support unless their particular political agenda is met. Legislation is therefore is fitful and the outcome of compromise. There is in addition the problem of legislators changing their allegiance from one party to another after being elected[99].

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of about 14 years for appointees from the bar and about 5-6 years for appointees from the judicial service. . "Since Supreme Court justices have always been chosen from the ranks of the senior judges of the high courts (who must retire at age sixty-two), Supreme Court justices tend to be mature individuals by the time they are appointed".

[97] *Rupa Hurra v. Ashok Hurra : (2002) 4 SCC 388: "to prevent abuse of its process and to cure a gross miscarriage of justice,(the Supreme Court) may re-consider its judgments in exercise of its inherent power".*

[98] *When the Chief Justice of the Madras High Court was sought to be charge sheeted under the Act and he contended before the Supreme Court that judges of the High Courts and the Supreme Court were not public servants, the issue was decided against the judiciary: K. Veeraswami v. Union of India: (1991) 3 SCC 217*

[99]*. Compared to roughly 545 cases in the entire period between the First and Fourth General Elections, at least 438 defections occurred in a short period between March 1967 and February, 1968. Out of 210 detecting legislators of the States of Bihar, Haryana, M.P., Punjab, Rajasthan, U.P. and West Bengal, 116 were included in the Council of Ministers which they helped to bring into being by defections. (See "Committee on Defections" Repot dated 7th January, 1969 ; Kihoto Hollohan v. Zachillhu and Ors. 1992 (Supp) 2 SCC 651 paras 5 and 6). The Tenth Schedule was added to the Constitution with effect from*

In this unsettled political climate, it has been the judiciary which has provided continuity and protected democracy by protecting the Constitution. By giving the politically voiceless an opportunity of being heard, by acting as a buffer to protect the citizens and residents of India against State action or inaction, be it legislative or executive, it has in fact kept democratic principles alive. It has acted as a safety valve to the burgeoning discontent of the economically or socially disadvantaged irrespective of creed or ethnicity. To destroy activism is to kill democracy and the first indication of a totalitarian regime is the suppression or subversion of an active judiciary. It may be that other branches of government are better equipped to discharge certain functions, but the judiciary must continue to fill in lacunae till other branches function in the manner they are required and expected to under the Constitution.

Conclusion

All this has led to the strange paradox that the judiciary is powerful because of public confidence in the institution, and the confidence is based on the apolitical nature of the institution. "*But"* as has been said *"the judiciary's calling into account politicians represents, not so much a triumph of constitutionalism, but an acknowledgment of its break down….we have now put ourselves in a position where we want to say that no branch of government, other than the judiciary, can be trusted to discharge their constitutional functions….the real test of the judiciary's success will be…. Whether it can help us move to a position where all branches of government can once again become trustees of the people* [100]

I would like to conclude with emphasizing that powers which may be characterized as extraordinary in other jurisdictions, have been exercised by the Indian courts because the country is in some ways extraordinary. It is a unique aggregate of different distinct ethnic, linguistic, cultural and religious groups with not even a common script to bind them. The differences are relatable to distinct geographic areas within the country, and

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1.3.1985 because 'The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it". [The Statement of Objects and Reasons appended to the Bill].

[100] *Bhanu Pratap Mehta, President, Centre for Policy Research: Indian Express: 11/12/06*

were it not for historical circumstance, each of these geographical areas would probably have evolved into different countries much like Europe. Prior to independence in 1947, the groups did not represent separate political units which, to a large extent, they do now. There are consequently 28 states, 6 Union Territories, 1 capital territory and 24 officially recognised languages including Hindi and English. There are occasional upsurges of regionalism with cries like “Tamilnadu for Tamils” or “Maharashtra for Maharashtrians” or religious fundamentalism both of which are fostered and fed on by politicians.

And yet the feeling of “Indian-ness” persists. The reason for this is difficult to pin down. Perhaps nationalism is based on the events of the past particularly the fight for independence, but nationhood is preserved by and operates within the framework of the Constitution. In upholding the Constitution, as it has done, I would like to think that the judiciary has helped and is helping the nation survive.

PROPORTIONALITY, JUDICIAL REASONING AND THE INDIAN SUPREME COURT

Chintan Chandrachud*

Introduction

On the 11th of December 2013, a bench of two judges of the Indian Supreme Court passed judgment in amongst its most awaited decisions in recent history.[1] Following over a decade of litigation, the Court was called upon to decide the constitutionality of section 377 of the Indian Penal Code (IPC) - a colonial-era law criminalizing 'carnal intercourse against the order of nature'. After the Delhi High Court's decision to read down the law, [2] expectations ran high for the Supreme Court to establish its *Lawrence v Texas* [3] moment. Instead, the Court marked its *Bowers v Hardwick* [4] moment: reversing the Delhi High Court and upholding the constitutionality of section 377 on the basis that it was facially gender-neutral.

The Court's judgment was heavily critiqued based on liberal conceptions of gender, identity and sexuality. Commentators, however, were not just unsettled by the ultimate decision of the Court, but also by the absence of logical reasons in support of the Court's decision. Ironically, the Court relied upon the 'reasonableness test' – well established in Indian constitutional law – in deciding the case. This judgment offers an opportunity to reflect upon whether it remains reasonable to employ the reasonableness test in an age in which the proportionality test is 'dominating the dockets'[5] of supreme courts around the world.

Many commentators claim that the Indian Supreme Court is already applying the test of proportionality in constitutional adjudication. The first objective of this paper is to debunk these claims. Although proportionality-type considerations are sometimes

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[1] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

[2] Naz Foundation v. Govt of NCT of Delhi, (2010) Cri LJ 94 (reading down section 377 to exclude its application to consensual sexual activities between adults in private).

[3] Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas statute forbidding persons of the same sex to engage in intimate sexual conduct).

[4] Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing sodomy between consenting adults).

[5] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANS'L. L. 72, 74 (2008).

taken into account in the reasonableness test, there is a difference between adopting the proportionality test comprehensively and relying, *ad hoc*, on one or more of its components. Even in cases in which the Court has explicitly claimed to be applying the proportionality test, it has done so only in name.

From this analytical argument, the paper then moves to a normative argument. Proportionality promotes a culture of justification and reason giving that is lacking under the reasonableness test. To establish this claim, the paper distinguishes between three categories of errors – and explains that proportionality review mitigates the possibility of errors that represent a failure of the duty to give reasons for judgment. The Indian Supreme Court's (anti-) LGBT rights judgment provides a paradigm case of how reasonableness, in contrast with the proportionality test, can obscure reason giving in a most remarkable way.

I Koushal v. Naz Foundation and Reasonableness Review

Let us begin by briefly considering the circumstances that led to the Supreme Court's judgment in *Suresh Kumar Koushal v Naz Foundation*.[6] Section 377 formed part of the IPC, which was enacted in the year 1860 by an all-British Legislative Council[7] during colonial rule. It reads as follows:

> 'Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'

Section 377 represented the erstwhile law proscribing 'buggery' in the UK,[8] and was increasingly relied upon by public authorities, especially the police, to persecute members of the LGBT community. In 2001, the Naz Foundation - an NGO dedicated to offering care and support to HIV/AIDS patients in India - filed a writ petition in the Delhi High Court challenging the constitutionality of section 377, to the extent that it criminalized activities between consenting adults. The High Court initially refused to

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[6] (2014) 1 SCC 1.

[7] Robert Wintemute, *Same-Sex Love and Indian Penal Code § 377 : An Important Human Rights Issue for India*, 4 NUJS L. REV. 31, 43 (2011).

[8] For details on the development of the law on buggery in the UK, see Nicola Lacey, Celia Wells, Oliver Quick, RECONSTRUCTING CRIMINAL LAW 519-531 (3rd ed. 2003).

hear the case on the basis that no cause of action had accrued and that the challenge was purely hypothetical. However, in an appeal, the Supreme Court remitted the writ petition to the High Court requiring it to examine the case on its merits.

Following a consideration on the merits, the Delhi High Court held that section 377 violated articles 14,[9] 15[10] and 21[11] of the Constitution. The Court held that the statutory provision discriminated on the ground of sexual orientation, targeted homosexuals as a class, and was contrary to constitutional morality. Section 377 was therefore read down to exclude consensual sexual activities between adults in private. It was this judgment that was appealed to the Supreme Court - and presented the Court with an opportunity to sound the death knell for a relic of the British Raj that Britain itself had repealed many decades previously.[12]

It was an opportunity that the Supreme Court did not take. The Court reversed the judgment of the Delhi High Court, holding that section 377 did not criminalize a particular identity or orientation, but uniformly regulated sexual conduct. In what will go down as one of the most regrettable sentences in its history, it observed that LGBT people constituted only a 'miniscule fraction of the country's population'.[13] The implications of the Court's judgment were clear - the LGBT community was too insignificant a minority to deserve the Court's time and protection.

The judgment prompted a wave of critical commentary in journals,[14] newspaper op-eds[15] and blogs,[16] highlighting the Court's failure to protect the rights of sexual minorities that have remained at the margins of political discourse for decades.

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[9] The right to equality before the law and equal protection of the laws.
[10] Prohibition of discrimination on the basis of religion, race, caste, sex or place of birth.
[11] The right to life and personal liberty.
[12] Legislation criminalizing private consensual sodomy was deleted from the statute books of England and Wales by the Sexual Offences Act 1967: *see* Marian Duggan, QUEERING CONFLICT: EXAMINING LESBIAN AND GAY EXPERIENCES OF HOMOPHOBIA IN NORTHERN IRELAND 49 (2012).
[13] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 [43].
[14] See, for eg, Siddharth Narrain, *Lost in Appeal: The Downward Spiral from Naz to Koushal*, 6 N.U.J.S. L. Rev. 575 (2013); Danish Sheikh, *The Quality of Mercy, Strained: Compassion, Empathy and other Irrelevant Considerations in Koushal v. Naz*, 6 N.U.J.S. L. Rev. 585 (2013); V Venkatesan and T K Rajalakshmisagnik Dutta, *Rights and Wrongs*, FRONTLINE, Jan. 10, 2014.
[15] See, for eg, Pratap Bhanu Mehta, *Justice Denied*, THE INDIAN EXPRESS, Dec. 12, 2013; Gardiner Harris, *India's Supreme Court Restores an 1861 Law Banning Gay Sex*, N.Y. TIMES, Dec. 12, 2013.
[16] See, for eg, Aparna Chandra, *Recriminalizing Homsexuality: The Many Sins of Koushal*, LAW AND OTHER THINGS (Dec. 12, 2013); Pratixa Baxi, *Suresh Koushal v Naz Foundation*, KAFILA (Dec. 16, 2013).

Somewhat more unexpectedly, however, the Court was also criticised for its failure to give reasons for its decision. As Tarunabh Khaitan observed:

> 'The Supreme Court in *Koushal* fails to respect this fundamental judicial duty [to give reasons] at so many levels that it is difficult to escape the conclusion that the Court seems to be voting, not adjudicating.'[17]

Other scholars noted that the decision was 'startling for eschewing all attempts at reasoning'[18] and was based on 'wholly insufficient and unreasoned justification'[19].

It is worth briefly pausing here to consider whether there is any meaningful difference between a judgment whose outcome we disagree with but which is based on plausible reasoning, and a judgment whose outcome we disagree with but which is based on insufficient or implausible reasoning (or indeed, no reasoning at all). Consider this simple equation. In a sufficiently reasoned judgment, $R_1+R_2 =D$ (where R_1 and R_2 are the reasons offered by the court, and D is the court's decision). Imagine the ways in which we may disagree with the decision as three categories of errors. First, we could accept that $R_1 + R_2=D$, but that the court was wrong to consider R_1 or R_2, or that it should also have taken other reasons into account (R_3, R_4, R_5, etc). I will refer to these as 'Category 1' errors. It would be somewhat awkward to describe this situation as an abdication of the duty to give reasons, since the court has merely failed to provide some or all of the *right* reasons. Second, we could contend that R_1+R_2 is not equal to D. This involves the claim that the reasons provided by the court, even if accepted as legitimate, are not sufficient to compel conclusion D ('Category 2' errors). Third, we could argue that, in a form of judicial fiat, no reasons at all were offered for a decision – which would look something like (D=D) or (?=D). These are 'Category 3' errors.

The *Koushal* judgment suffers not from Category 1 errors, but from Category 2 and Category 3 errors. Let us begin by considering the Category 2 errors – where the reasons offered by the Court do not impel its decision. This was evident in the Court's treatment of the challenge to section 377 under article 14, the general equality clause. Under established doctrine, a law that classifies amongst groups will only be upheld if it is based on 'intelligible differentia', and if there is a rational or reasonable nexus

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[17] Tarunabh Khaitan, '*Koushal v Naz*: Judges Vote to Recriminalise Homosexuality' 78(4) M.L.R. 672, 677 (2015).
[18] Madhav Khosla, *The Courtly Way*, THE TELEGRAPH, Dec. 17, 2013.
[19] Arghya Sengupta, *The Wrongness of Deference*, THE HINDU, Dec. 16, 2013.

between the differentia and the objective of the law.[20] The Court articulated neither intelligible differentia, nor a rational nexus between the differentia and the objective of the law. Instead, the Court made the casual observation that '[t]hose who indulge in carnal intercourse in the ordinary course' and 'those who indulge in carnal intercourse against the order of nature' constitute different classes, and therefore section 377 is not based on irrational classification.[21] On its own, this statement does little to establish that the classification under section 377 is valid.

Other aspects of the judgment suffer from the same deficiency in reasoning. The Supreme Court, for instance, noted that section 377 is facially neutral and regulates sexual conduct regardless of gender identity, and is therefore valid. Again, the reasoning (that the law is facially neutral) does not compel the conclusion (that the law is valid), since the Supreme Court's precedent includes cases in which the Court has struck down facially neutral legislation whose rights-implications have changed over time.[22] Another reason that the Court provides in defense of the statutory provision is that only a 'miniscule fraction' of the country's population consists of LGBT people. This is a tenuous factual claim.[23] But even if it were to be accepted, it hardly justifies the conclusion that the law is valid. Imposing a *de minimus* threshold for access to fundamental rights would jeopardize the Court's role as a countermajoritarian institution that especially protects minorities lacking representation in the political process.

Let us consider the Court's Category 3 errors (where it offered no reasons at all for its decision). Section 377 was challenged on the basis that it violated articles 14, 15, 19 and 21 of the Constitution. The Delhi High Court left the article 19 question open, but held that section 377 violated the other three fundamental rights. In appeal, the Supreme Court upheld section 377 under article 15 without providing any reason at

[20] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75; R. K Dalmia. V. Justice Tendolkar, AIR 1958 SC 538; In re Special Courts Bill, (1979) 1 SCC 380.
[21] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 [42].
[22] John Vallamatom v. Union of India, AIR 2003 SC 2902 [33-36].
[23] Reports suggest that the Central Government informed the Supreme Court in 2012 that there were 2.5 million gay people in India: see *India has 2.5m gays, Government Tells Supreme Court*, BBC NEWS, March 14, 2012. This figure is almost certainly a gross underestimate, given the fears of coming out as openly gay in India: see Nish Gera, *Where Are the Gay Indians? Being Gay in the World's Largest Democracy*, HUFFINGTON POST (Jan. 30, 2013).

all, and upheld the provision under article 21 after reproducing extracts from case law, without explaining the relationship between the extracts and the case at hand.[24]

In *Koushal*, the Supreme Court applied its longstanding test of 'reasonableness review' to determine the constitutionality of section 377. It bears mentioning that the fundamental rights chapter of the Indian Constitution contains no general limitations clause. Instead, limitations are specifically set out in separate fundamental rights guarantees. Reasonableness review derives from the text of the limitation or the interpretation of the fundamental right.

Three constitutional provisions (articles 14, 19, 21), described by the Supreme Court as the 'golden triangle' of fundamental rights,[25] sufficiently demonstrate this. Article 19 guarantees six freedoms, each of which are subject to 'reasonable restrictions' made by law for specified purposes. A violation of article 14 – the general equality provision – can be established in two ways. The first is through the classification test, set out above, whose second ingredient requires the state to establish a rational or reasonable nexus between the 'intelligible differentia' (on which the classification is based) and the objective that the law seeks to achieve. The second is by establishing that the law is unreasonable or arbitrary in its own terms.[26] Article 21, the right to life and personal liberty, can be limited only under procedure established by law that is fair, just and reasonable. Indian courts have held that wide discretion exists in determining whether a limitation on rights is reasonable, and that the direct and inevitable effect of the law restricting fundamental rights must be considered in determining if it is valid.[27]

II Proportionality and its (Mis)use in India

As the Indian Supreme Court has continued to apply reasonableness review, a different test for judging limitations on constitutional rights - proportionality - has grown in influence across the world. The genesis of proportionality in contemporary constitutionalism is usually traced to German public law, after which it swiftly migrated to other parts of the European continent, Canada, Ireland, the UK, New

[24] Khaitan, *supra* note 17, 677-8.
[25] Minerva Mills v. Union of India, AIR 1980 SC 1789 [79].
[26] E. P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555.
[27] M P JAIN, INDIAN CONSTITUTIONAL LAW 982-3 (5th ed, 2008).

Zealand, Australia, and South Africa.[28] It has also been endorsed by Justice Stephen Breyer of the US Supreme Court, in the face of strong opposition from some of his colleagues.[29]

To say that there is a universal test for proportionality review obscures subtle (and sometimes, significant) differences in the way in which it is applied in different jurisdictions. Nevertheless, the most commonly applied version of the proportionality test has a four-part structure. It requires courts to ask the following questions when determining whether a law comprises a valid restriction on the enjoyment of fundamental rights. First, does the law seek to achieve a proper purpose? This step recognizes that there are some purposes that are, in themselves, illegitimate. Legislatures may enact laws for more than one purpose, and where this is the case, courts tend to focus on the 'dominant' purpose of the legislation.[30] Second, is there a rational connection between the purpose of the law and the means used to achieve that purpose? This is followed by the 'necessity' step - are there any less restrictive, but equally effective, means available to achieve the purpose of the law? The final step in proportionality review is proportionality *stricto sensu* or balancing - where the court considers whether the law adequately balances the social benefits and harms caused by the law. At first glance, the balancing test looks remarkably deferential. It is easy, for instance, to imagine cases in which a court holds that the national security interests of the community justify imposing draconian restrictions on the fundamental rights of a few. However, properly applied, the test requires balancing the *marginal* social benefit against the *marginal* social harms caused by the change in status quo that the law brings about.[31]

Amongst the most significant aspects of the proportionality test is the fact that each step of the test constitutes a separate veto point for the law. The mere fact that the law satisfies the third or fourth steps of the proportionality analysis is insufficient, if it pursues a purpose that the court considers inappropriate - for example, the regulation

[28] For details, see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 175-210 (2012).
[29] See District of Columbia v. Heller, 554 U.S. 570 (2008) (Breyer J dissent); STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 254 (2015).
[30] See HCJ 4769/95 Menahem v. Minister of Transport [2003] IsrSC 58(3) 503 [11]; HCJ 7052/03 Adalah v. Minister of Interior [60].
[31] BARAK, *supra* note 28, 350.

of private morals. Some courts combine the third and fourth steps of the proportionality analysis by applying the necessity step, but not restricting it to whether the alternatives available are equally effective.[32] The critical point for the purposes of this paper is that proportionality review consists of the four steps collectively, rather than any of them individually.

Some aspects of what has been argued thus far may come across as surprising. After all, the taxonomy of proportionality review is familiar to the Indian Supreme Court,[33] and many scholars argue that proportionality is already being applied in India. M P Jain suggests that in deciding constitutional challenges to legislation, Indian courts are essentially applying the proportionality test by considering whether alternatives that restrict rights to a lesser extent are available.[34] David Beatty argues that the reasonableness test in India is proportionality by a different name.[35] The relationship between the reasonableness test and the proportionality test really depends on how both of these terms are defined.[36] However, if proportionality is defined as a collective label for the four steps just described, the Indian Supreme Court is not applying proportionality review.

Several points are now worth making. To start with, there are many proportionality-type considerations that are taken into account in reasonableness review. This is clear from a bare reading of the text of the constitution together with established doctrine. The classification test under article 14 includes components of proportionality review. By asking whether the classification is based on intelligible differentia and whether there is a rational nexus between the differentia and the objective of the law, the court runs the means-ends analysis under the second component of the proportionality test. Depending on how the intelligible differentia for the classification is defined, the classification test may also include the first component of the proportionality test.[37]

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[32] Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 HARV. L. REV. 3094, 3118 (2015).
[33] A search on the legal search engine Manupatra reflected that the Supreme Court has used the term 'proportionality' in 49 constitutional law cases.
[34] JAIN, *supra* note 27, 983.
[35] DAVID BEATTY, THE ULTIMATE RULE OF LAW 163 (2004).
[36] BARAK, *supra note* 28, 375.
[37] Logically, the intelligible differentia component of the classification test under article 14 seems plausible only if that differentia is based on the purpose that the law seeks to achieve. The intelligibility

The text of the six freedoms set out in article 19[38] specifies the purposes based on which the freedoms can be restricted, and thus includes the first step of proportionality review. For example, the freedom of speech can be restricted by law in the interests of 'sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'.[39] A reviewing court, in other words, is required to determine whether the law restricting freedom of speech was enacted for one of the 'proper' purposes set out in the constitutional provision. The Supreme Court has also effectively incorporated the second step of the proportionality test into article 19 analysis by requiring that the connection between the law and the purpose be 'proximate', rather than remote or 'unreal'.[40]

The Supreme Court also applies the third and fourth steps of proportionality review from time to time. In State of Madras v. V G Row,[41] the Court was deciding the constitutionality of a law that empowered the state government to notify as unlawful, associations that: constituted a danger to public peace, interfered with the maintenance of public order, or interfered with the administration of law.[42] The law permitted associations to make representations to the government, which would be reviewed by an advisory board. The board would review the representation, and if it found that there was no sufficient reason for declaring the association unlawful, could require the state government to cancel its notification.

The state government passed an order declaring the People's Education Society unlawful under this law, on the basis that it was aiding communist propaganda. The Society claimed that the law violated the fundamental right to form associations or unions under article 19(1)(c) of the Constitution. The Supreme Court struck down the

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of the differentia, in other words, is judged with reference to the purpose of the law rather than in the abstract.

[38] The rights: (i) to freedom of speech and expression (ii) to assemble peaceably and without arms (iii) to form associations or unions (iv) to move freely throughout the territory of India (v) to reside and settle in any part of the territory of India (vi) to practise any profession, or to carry on any occupation, trade or business.

[39] INDIA CONST., art. 19(2).

[40] Ghosh v. Joseph, AIR 1963 SC 812 [9].

[41] State of Madras v. V G Row AIR 1952 SC 196.

[42] Indian Criminal Law Amendment (Madras) Act 1950.

law on the basis that it imposed unreasonable restrictions on the exercise of the right to form associations. The Court adopted a necessity test, arguing that a less restrictive means of curtailing rights – setting up a judicial inquiry instead of an advisory board – was available to the state:

> "The right to form association or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restriction on such right without allowing the grounds of such imposition both in their factual and legal aspect to be duly tested in a judicial inquiry, is strong element which, in our opinion, must be taken into account in judging the reasonableness of the restriction… what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government… [cannot] be a substitute for a judicial enquiry."[43]

The Court also adopted the balancing component of proportionality review, taking the following factors into account in its decision: (a) the only form of conveying the notification to the society was through publication in the Official Gazette, which would probably be overlooked by its members and result in forfeiture of the right to make representations (b) the consequences of the notification would be serious for the members of the society who, by their very membership, would be committing offences under the law.[44]

The Maharashtra dance bars case[45] offers another example of the adoption of necessity and balancing within reasonableness review. In 2005, the legislature of the state of Maharashtra enacted a law imposing a ban on dance performances in bars, except in certain establishments such as hotels rated 'three stars' and above.[46] The state's rationale for the ban was that many such dance performances were obscene, promoted prostitution and the exploitation of women, undermined the dignity of the dancers, and corrupted public morals. The ban resulted in the closing down of dozens

[43] State of Madras v. V G Row AIR 1952 SC 196 [17].
[44] State of Madras v. V G Row AIR 1952 SC 196 [18].
[45] State of Maharashtra v. Indian Hotel and Restaurants Association, AIR 2013 SC 2582.
[46] Bombay Police Act 1951, ss 33A, 33B.

of bars across the state and widespread unemployment. It was challenged on the basis that it violated the right to equality and the freedom of trade.

The Supreme Court struck down the law and ordered that the dance bars be allowed to reopen. Two aspects of the Court's judgment are of particular interest. First, the court reasoned that if the primary purpose of the law was to ensure the safety and security of women, many less restrictive options were available to achieve the same objective.[47] A committee appointed by the state government had suggested some alternatives, such as mandatory railings and minimum distances between the stage and the seats, which the government refused to adopt. Second, the Court explicitly balanced the social benefits of the law against its social costs. It held that the social costs of the law were alarming – it prompted the closing down of dance bars and unemployment of over 75,000 women.[48] The law proved counterproductive, as many of the women who were employed in dance bars were forced into prostitution out of necessity.[49]

Another well known discrimination law case from the Indian Supreme Court demonstrates the court's reliance on the necessity and balancing components of the proportionality test. In Anuj Garg,[50] the Court dealt with a challenge to the constitutional validity of a Punjab statute prohibiting women, as well as men under the age of twenty-five, from working in premises where liquor or intoxicating drugs were served.[51] By asking whether there was a 'relationship of proportionality between the means used and the aim pursued,'[52] the Court applied the necessity test. It held that the objective of the law - protecting the safety and security of specific social groups – could have been achieved through less onerous measures. Instead of enforcing an 'oppressive' law,[53] the state should have focused on establishing

[47] State of Maharashtra v. Indian Hotel and Restaurants Association, AIR 2013 SC 2582 [124] ("In our opinion, in the present case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance.").
[48] State of Maharashtra v. Indian Hotel and Restaurants Association, AIR 2013 SC 2582 [120]
[49] State of Maharashtra v. Indian Hotel and Restaurants Association, AIR 2013 SC 2582 [120].
[50] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.
[51] Punjab Excise Act 1930, s 30.
[52] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663 [49].
[53] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663 [41].

conditions that would inspire confidence amongst women to pursue occupations of their choice.

The danger of overlooking the balancing component of the proportionality test is that it risks legitimating arguments that all alternative measures are not as effective in achieving the objective as the measure chosen by the state. In the context of women's safety, this could legitimate paternalistic arguments about how the most effective way of protecting women is by keeping them within the confines of the home. The Court thus applied the balancing test, stating that the law – which was remarkably broad in scope - prevented large numbers of graduates from hotel management schools from securing employment and deprived women of the autonomy to choose their profession. The law was therefore struck down.

Reasonableness review in the Indian Supreme Court thus clearly accommodates proportionality-type considerations. Of course, the question that then arises is as follows. If proportionality review consists of all four components (proper purpose, rational connection, necessity, and balancing) of the test, the reasonableness test (as applied in India) can only be described as instance of proportionality review if it not only *accommodates*, but also *requires*, the application of all of those components. In other words: in order for legislation to survive the proportionality test, it always needs to satisfy the requirements of all four components. Does reasonableness review require the application of all four components of proportionality review in all cases?

Amongst the most authoritative opinions on reasonableness review comes from the V G Row case, cited earlier. In that case, the Supreme Court referred to several factors to be taken into account by courts applying reasonableness review, many of which correspond with components of proportionality review. It held:

> "It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the

> imposition, the prevailing conditions at the time, should all enter into the judicial verdict."[54]

At first glance, the last part of the extract – 'should all enter into the judicial verdict' – suggest that these are mandatory relevant considerations that must be considered by courts applying reasonableness review in all cases. However, read in context, a better interpretation is that the court laid down a number of factors that *may* be considered in determining whether or not a law is reasonable.

The Court's precedent suggests that it often omits one or more components of proportionality review in reasonableness analysis. In Hariharan v. Reserve Bank of India,[55] the petitioners challenged the validity of legislation that placed them in an inferior position to their husbands with regard to guardianship of their children. Ordinarily interpreted, the law – which laid down that a minor's natural guardian is 'the father, and after him, the mother'[56] – suggested that the mother could become the natural guardian of the child only after the father's death. The Supreme Court favoured an interpretive solution, reading the word 'after' as 'in the absence of'. This reading allowed the mother to be the natural legal guardian only when the father was not in 'actual charge' of the affairs of a minor, due to indifference, mental incapacity, etc. The Court made no serious attempt to identify whether the law was based on a proper purpose.[57] The concurring opinion did, however, allude that the law was intended to protect the welfare of the children.[58] Even if this were taken to be true, the Court did not make any attempt to establish a rational connection between the gender-based distinction and the achievement of the purpose.

Similarly, the Supreme Court's decision in Air India v. Nargesh Mirza[59] applied the rational connection and necessity tests, but failed to apply the proper purpose test. The case involved a constitutional challenge to the service regulations for air hostesses,

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[54] State of Madras v. V G Row AIR 1952 SC 196 [16]. This passage has been frequently cited. See, for eg, State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92; Kochuni v. State of Madras, AIR 1960 SC 1080; Municipal Corporation of Ahmedabad v. Usmanbhai, AIR 1986 SC 1205; Ramlila Maidan v. Home Secretary, Union of India, (2012) 5 SCC 1.
[55] Hariharan v. Reserve Bank of India, AIR 1999 SC 1149.
[56] Hindu Minority and Guardianship Act 1956, s 6(a).
[57] Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement*, 50 J. INDIAN L. INSTITUTE 177, 193-4 (2008).
[58] Hariharan v. Reserve Bank of India, AIR 1999 SC 1149 [40] (Banerjee J).
[59] AIR 1981 SC 1829.

which provided for the termination of services upon attaining 35 years of age, or on marriage (if it took place within 4 years of service), or on first pregnancy, whichever occurred earlier. The airline defended the pregnancy limb of the regulations based on the fact that pregnancies would give rise to medical complications and obstruct the performance of air hostess' in-flight duties before and after conception. Applying the rational connection test, the Court held that there was no medical authority for the proposition that women became weak and would not be able to perform air hostess' duties after conception.[60] The Court also applied the necessity test, highlighting less restrictive alternatives that were available to the airline – for instance, employing additional air hostesses on a temporary basis to cover for those on maternity leave.[61]

It is worth briefly noting here that the rational connection, necessity and balancing components require the identification of a purpose – the purpose provides the factual yardstick against which the other components are tested. However, in Air India, the Supreme Court failed to conduct the preliminary segment of the proportionality test – which requires the court to articulate precisely what the purpose of the law is, and whether that purpose is considered proper. The failure to identify a proper purpose becomes discernible from the Court's discussion on remedies. Remarkably, the Court observed that the regulations could be amended to provide for the termination of service on a third pregnancy, provided that the other two children were alive. In the Court's opinion, an amended regulation to this effect would satisfy the requirements of reasonableness, because it would be in the 'larger interest' of the air hostess and would also aid the family planning program.[62] Of course, had the Court specifically articulated the purpose of the regulations – which seemed to rest on the efficiency of the airline – it would have been more likely to recognize that its proposed solution would not withstand constitutional scrutiny. From this perspective, expressly articulating a purpose makes it more difficult for the Court to 'shift' purposes as its analysis proceeds.

In all of the cases discussed thus far, the Indian Supreme Court applied – and claimed to be applying – reasonableness review. There are also cases in which the Indian

[60] Air India v. Nargesh Mirza, AIR 1981 SC 1829 [84].
[61] Air India v. Nargesh Mirza, AIR 1981 SC 1829 [84].
[62] Air India v. Nargesh Mirza, AIR 1981 SC 1829 [104].

Supreme Court has self-consciously claimed to be applying proportionality, but in fact has relied on only one or more of its components – usually necessity or balancing. In Om Kumar v. Union of India, the Court engaged in a lengthy discussion on proportionality review, concluding that it is applied to legislation as well administrative action.[63] However, it is interesting to note the Court's restrictive understanding of proportionality:

> 'By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve".'[64]

This passage expounds upon the Court's restrictive understanding of proportionality review – which in this case, has been delimited to necessity and balancing. If we were to accept this restrictive definition of proportionality, the cases discussed earlier demonstrate that the Court in Om Kumar was not entirely incorrect in saying that proportionality review had been applied in the past. In fact, the conflation of proportionality review with one of its components is not a mistake that is unique to the Indian Supreme Court.[65] The confusion, to some extent, stems from the fact that the fourth component of proportionality review is also referred to as proportionality, although it is distinguished from the former by being described as proportionality *stricto sensu* or 'in the narrow sense'.[66]

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[63] Om Kumar v. Union of India, AIR 2000 SC 3689 [27-72].
[64] Om Kumar v. Union of India, AIR 2000 SC 3689 [28].
[65] See Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, 8 INT. J. CON L. 298, 305 (2010) (explaining how some scholars limit proportionality to balancing). See also Jackson, *supra* note 32, 3157 ("'proportionality as such' is the last in a sequence of inquiries and therefore is part of a more structured decisional process than "all things considered" balancing").
[66] Although this paper focuses on proportionality in constitutional law, it is also worth noting that in several administrative law cases, the Court has applied 'Wednesbury unreasonableness' review under the guise of proportionality review: see Abhinav Chandrachud, *Wednesbury Reformulated: Proportionality and the Supreme Court of India*, 13 OXFORD UNI. COMMONWEALTH L. J. 191 (2013).

Before advancing to the next section, it is worth recollecting the argument made thus far. To be sure, the paper has not advanced the claim that the Indian Supreme Court *never* applies all of the components of proportionality review in a single case. Instead, it makes the more limited claim that the doctrine of reasonableness review *is not understood to require* the Court to apply all of proportionality's components in every case. Therefore, if proportionality is defined in terms of proper purpose, rational connection, necessity, and balancing, the Indian Supreme Court does not consistently apply proportionality review in constitutional adjudication. The arguments in the next section will demonstrate that even if reasonableness review were understood to require applying all of proportionality's components, it is the sequential structure of the proportionality test, in contrast to reasonableness review, that promotes reason-giving in adjudication.

III Proportionality and reason-giving

Reason is the 'modern language of law in a liberal state',[67] and judges are duty-bound to give reasons for their decisions. As Rawls argues, the judiciary is the only branch of government that, on its face, is a 'creature' of public reason and 'that reason alone'.[68] In fact, judgments such as *Koushal* that defer to the legislative branch without providing public reasons, paradoxically threaten the court's democratic credibility.[69] The structure of proportionality review promotes a 'culture of justification'[70] and reason giving. By deconstructing the steps that need to be undertaken in order to determine whether a rights violation has taken place, it requires the judge to work through each step of the test with an account of reasons for which that step is satisfied. The structure of test thus mitigates the possibility of Category 2 and Category 3 errors.

Let us examine this claim with reference to the *Koushal* decision. The Category 2 errors committed by the Court could well have been avoided by imposing the four-part proportionality test. The Court would have found it more challenging to escape consideration of the most difficult aspects of the case, including whether section 377

[67] Jerry L Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 18 (2001).
[68] JOHN RAWLS, POLITICAL LIBERALISM 235 (2005).
[69] Ibid 233.
[70] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011).

was based on a proper purpose, and even if so, whether less restrictive alternatives were available to achieve that purpose. Applying proportionality, if the Court were to find that the law was enacted for the regulation of private morals, it would need to justify why this was a legitimate basis for limiting fundamental rights. On the other hand, if the Court chose to adopt the petitioners' argument that section 377 had the public health rationale of preventing HIV/AIDS, it would also need to establish why less restrictive measures (such as educational initiatives) could not be deployed to achieve the same objective.

The Supreme Court in *Koushal* also committed Category 3 errors, by failing to provide any reasons for upholding the law under articles 15 and 21 of the Constitution. Theses errors were facilitated by the 'black box' reasonableness test, which lacks explicit check posts to guide the Court's analysis. As one scholar notes, '[t]o describe a decision as unreasonable tells us nothing of *why* the decision is unreasonable'.[71] Category 3 errors are much harder to envisage in circumstances in which proportionality review is applied, without exception, to all claims of rights-violations. As Barak argues, it enables the judge 'not to skip over things which should be considered'.[72] Theoretically, Category 3 errors would still have been possible by applying the four components of the proportionality test tautologically – for example, that section 377 was enacted for a proper purpose *since its purpose was proper* (without anything further), or that section 377 employed the least restrictive means of limiting the right *since it was the least restrictive alternative*. However, as these statements suggest, it is much harder to commit Category 3 errors - or, if you will, escape genuine reasoning through Category 3 errors - within the structure of proportionality review.

To be sure, proportionality does not protect against Category 1 errors. A Category 1 error in the course of the proportionality test would not involve a claim that the test itself has been methodologically misapplied. Instead, it would involve the separate argument that the court has misconstrued the evidence, or not come out the right way on one of the steps of proportionality review. A good example of a Category 1 error

[71] PAUL DALY, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE 141 (2012).
[72] BARAK, *supra* note 28, 461.

would be where the court misapprehends the purpose for which a law has been enacted. So, for instance, if it decides that the purpose of a law is to protect the safety of women, whereas the real purpose of the law is to preserve gendered stereotypes, the court would have committed a Category 1 error. In this scenario, if we were to presume that the Court was correct about the purpose and if the other steps of the proportionality test were satisfied, the reasons given by the court would justify its conclusion (in other words $R_1 + R_2=D$). Therefore, as I argued earlier, it would be somewhat odd to characterize this as a failure to give reasons, in contrast with Category 2 and Category 3 errors.

Wojciech Sadurski provides an interesting, although 'admittedly imperfect',[73] analogy explaining proportionality's ability to explicate judicial reasoning:

> 'It is… as if a cook in an elegant restaurant first revealed to the customers all the ingredients, and then showed the guests, step by step all the stages of the preparation of the dish before it lands on their tables. By showing all the "ingredients" of his/her reasoning, a judge conducting the proportionality analysis indicates that the final conclusion is not a result of a mechanical calculus…'.[74]

Of course, this analogy holds true only if we were to accept that the legitimacy of a restaurant stems not just from the flavor of the dishes it serves (the judgment), but also from the quality and freshness of the ingredients used to prepare those dishes (the reasoning). A better analogy might involve the purchase of a diamond. The diamond's legitimacy unmistakably stems not only from how it looks, but also from the certificate accompanying it that sets out the attributes which make it valuable (colour, cut, clarity, carat). This analogy also better captures the fact that proportionality does not demand the presence of a live audience watching the analysis unfold step-by-step. Instead, proportionality demands full disclosure – in the form of a certificate, or the court's judgment.

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[73] Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini, REASONABLENESS AND LAW 139 (2009).
[74] Ibid.

The benefit of proportionality is sometimes conceived of as enabling judicial decisions to become more intelligible not just to lawyers, but also to the general public.[75] This claim is hard to justify – it is easy, for instance, to imagine a reasonableness case written in an uncomplicated style being simpler to understand for the non-lawyer than a proportionality case that relies on complex legal jargon. The argument can perhaps be made in a more limited form – that the structure of proportionality review makes it easier for the non-lawyer to cull out the court's reasoning. Even in these situations, one would expect a lawyer trained to a certain standard to be able to cull out the court's reasoning when it applies the reasonableness test. This paper makes a more limited claim. The real danger with Category 2 and Category 3 errors that appear in reasonableness review is that no one, not even a lawyer, knows the full set of reasons behind the decision. The Court's reasoning when it commits these errors is not just unintelligible or difficult to find, but is genuinely 'unknowable' from the judgment itself. In other words, in circumstances in which the judge is inclined to arrive at the 'incorrect' outcome under proportionality review, proportionality decreases the likelihood of Category 2 and Category 3 errors, and correspondingly increases the likelihood of Category 1 errors.

The analysis undertaken thus far suggests that it is not only the reliance on proportionality review, but also how proportionality is structured and applied, that counts. When proportionality is applied as a monolithic,[76] one-step test like reasonableness, many of the dangers of Category 2 and Category 3 errors re-enter the analysis. In fact, this seems to resemble the state of the Indian law, in which judges apply proportionality-type considerations in an ad hoc, unstructured way. It is the four-part structure of the proportionality test that ensures that steps cannot be skipped (accidentally or otherwise) and that the duty to give reasons at every stage cannot be easily evaded.

It is now worth addressing another possible line of objection. Is it unfair to judge the reasonableness test based on a bad application of the test in *Koushal*? It might well be argued that proportionality and reasonableness should be tested by comparing cases involving their best, rather than their worst, applications. In order to rebut this

[75] Sadurski, *supra* note 73, 139.
[76] Paul Craig, *Proportionality, Rationality and Review*, [2010] N.Z. L. REV. 265, 272.

argument, we need to distinguish between two kinds of 'bad application' of reasonableness/proportionality review. The first occurs when the court fails to apply the formal methodological steps that the test for review requires. This is not the argument that is made against *Koushal*, simply because reasonableness does not prescribe any formal methodology, except for asking whether the law restricting fundamental rights is reasonable. The second – which is the claim made against *Koushal* - occurs when the court fails to apply the test rigorously enough or in the right way. From this perspective, *Koushal* is not an outlier case, but a paradigm case, for reasonableness review. The difference between proportionality and reasonableness is that merely complying with the first type of application infuses a culture of reason giving into the decision-making process that is absent under the reasonableness test. A court that complies with the formal methodology, regardless of how rigorously it is applied, is less likely to commit Category 2 and Category 3 errors in proportionality review than under reasonableness review.

Finally, we arrive at the million-dollar question – would applying the proportionality test have affected the outcome of the *Koushal* case? As Vicki Jackson warns, we need to be 'proportional about proportionality'[77] and should be skeptical about claims that it would affect outcomes. A careful reading of the judgment indicates that ideological considerations may have been at play. For instance, the Court refused to accept that there was any factual basis to the claim that LGBT people were discriminated against. Its unsympathetic attitude towards the LGBT community - describing it as a 'miniscule' minority[78] with 'so-called rights'[79] also provides strong evidence of this. The Court also (mistakenly) believed that section 377 was being relied upon to prosecute sexual assault of children as well as sexual assault of women falling short of 'rape'.[80] To expect 'personal sympathies of the judges' to 'never come into play'[81]

[77] Vicki C Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004)
[78] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 [43].
[79] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 [52].
[80] For a discussion, see Chintan Chandrachud, *Rights-Based Constitutional Review in India and the United Kingdom*, PhD Thesis submitted to the Faculty of Law, University of Cambridge (Aug. 10, 2015).

merely because of changes in doctrine is fairly ambitious. From this perspective, proportionality may have eliminated the Court's Category 2 and Category 3 errors, in favour of Category 1 errors.

Nevertheless, there is another perspective from which proportionality may have influenced the outcome in the case. If we were to accept that proportionality involves the articulation of matters that often remain unstated under reasonableness review, the process of articulation may itself prompt a change of mind. This can take two forms. First, there may be a genuine change of mind brought about by the process of articulating the unstated issues – where the judge sees the difficulties with line of argumentation that he initially favoured. Judges have a right to, and sometimes do, change their mind in the course of drafting or finalizing a judgment.[82] Second, there may be a less-than-genuine change of mind, because articulation of the unstated matters may expose hypocrisy that the judge finds it cognitively difficult to sustain. In other words, even though the judge wanted to reach a specific outcome in a particular case, applying the proportionality test would expose cognitive dissonance which the judge is unwilling to assume.[83]

In *Koushal*, applying the proportionality test to uphold section 377 would require an analysis resembling the following: (i) the purpose of the law was to protect public health or prevent HIV/AIDS (ii) there was a rational connection between section 377 and preventing HIV/AIDS, because criminalizing consensual sodomy would be a deterrent against it (iii) all available less restrictive alternatives (educational initiatives, etc) were not equally effective at achieving the purpose of the law (iv) the law adequately balanced social benefits and social harms. A comparable analysis may have been undertaken if the Court conceived of the purpose of the law as protecting private morals. Would articulating these factors prompt a genuine (or non-genuine) change of outcome in the manner that I just described, even in the face of ideological

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[81] BEATTY, *supra* note 35, 166.
[82] Surendra Singh v. State of Uttar Pradesh, (1954) 24 AWR 360 ('Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of locus penitentix, and indeed last minute alterations often do occur.')
[83] See ELLIOTT ARONSON, THE SOCIAL ANIMAL 178 (1995).

and remedial considerations? It is difficult to speculate any further, let alone be certain about what the Court may have done in the circumstances.

Conclusion

This article has set up two broad claims in the backdrop of the Indian Supreme Court's judgment upholding colonial sodomy legislation in *Koushal*. Although some scholars (and on occasion, even the Supreme Court) have argued that the Court applies proportionality review in constitutional adjudication, it actually only takes some proportionality-type considerations into account in its process of reasonableness review. There is a difference between applying each of the four components of the proportionality test in all cases, and applying some components of the test in some cases. Further, proportionality review is not a solution to all of the Indian Supreme Court's adjudicative problems. Instead, the structure of proportionality review promotes reason giving in the adjudicative process by mitigating the possibility of Category 2 and Category 3 errors. It thus provides an important method of avoiding unreasoned decisions like *Koushal* – which I explained was a paradigm, rather than an outlier, exposition of reasonableness review.[84]

While proportionality review has many supporters, it has also been widely criticized. Although this article has not engaged with proportionality's critics, their arguments relate predominantly to its antidemocratic character [85] and the inability or incompetence of judges in applying it.[86] The normative weight of these critiques is significantly diminished when considered in context of the fact that the Court frequently relies upon components of proportionality review in reasonableness review. To have any traction in India, these critiques would have to challenge the status quo of proportionality-type considerations being applied in reasonableness review in the first place, or explain why their criticism applies to adopting the four-

[84] Of course, proportionality is not the only method of promoting reason-giving in adjudication. As I explain elsewhere, another method of doing so is by increasing panel sizes: see Chintan Chandrachud, *Interpretation* in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (forthcoming 2016).

[85] See Mark Tushnet, *Making Easy Cases Harder* (draft on file with author); Jeff King, *Proportionality: A Halfway House*, [2010] N.Z.L.REV. 327; Grant Huscroft, *Proportionality and Pretense*, 29 CONST. COMMENT. 229 (2014).

[86] See GREGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS ch. 3 (2009); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT. J. CONST. L. 468 (2009).

part proportionality test in all rights cases, but not to applying one or more components of the proportionality test in some rights cases.

Proportionality review may or may not have changed the outcome of *Koushal*. But it would have lessened the likelihood of Category 2 and Category 3 errors - a valuable achievement in and of itself.