

**DEMOSPRUDENCE VERSUS JURISPRUDENCE:
THE INDIAN JUDICIAL EXPERIENCE IN THE CONTEXT OF
COMPARATIVE CONSTITUTIONAL STUDIES**

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I

It is a great honour to be asked to deliver this Tony Blackshield Lecture. Succeeding the inaugural address delivered by Justice Michael Kirby and the lecture by Professor George Williams is a tall order, indeed. I adopt every warm word that they have said in his honour and add a few reminiscences of my own. But of course what Tony has achieved in classrooms, writings, and administrative chambers goes beyond words and reminiscences. His contributions to law and jurisprudence have been stunning (there is no other befitting expression for this) and he has proved a noteworthy successor to Julius Stone, even outdoing this tall presence in several respects.

The ever-active Macquarie Law School has gone out of its way in accommodating the visit of Ms Prema Baxi. I am aware of the imposed financial constraints on the universities and I have therefore borne the substantial additional expenses on my meagre pension account. I wish especially to thank Ms Eleanor McGhee for all her patient and dignified work. And I wish to thank Dr Shawkat Alam for his ‘hot pursuit’ of me; I know how difficult it is to maintain a live lecture series.

I am very glad to be back at Macquarie Law School. The last time I visited was decades ago but I still recall the urbane reception given to me at a seminar which I initiated on ‘Marx and Justice’. It feels good to be associated with the *Macquarie Law Journal*, although I am aware that I have contributed little to its fine growth.

II

It is just a coincidence that the current Australian Prime Minister shares the same first name. While selling uranium and coal-mining, Tony Abbott recently described India as a ‘model international citizen’. And here I am — speaking about a model Australian scholar of law and good life.

Tony likes coincidences, and often pedagogically explores these.¹ Part IV–A, Article 51–A, of the Indian Constitution stipulates the constitutional duty, inter alia, of all Indian citizens to

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develop ‘the scientific temper, critical enquiry, spirit of reform and excellence in all walks of life’. In teaching as well as writing, Tony imbibed these duties as virtues; he made mediocrity the enemy of excellence; he simply refused to be the second best. In the USA — the land of constitutionalism as well as ‘Constitutionalism and Comstockery’² — he, much to his chagrin, would be known as an ‘achiever’ or a ‘triple A’ man. Incidentally, he was referred to in whispered conversations as the ‘Black Sheep’ by their Lordships of the Supreme Court of India: this was their way of paying tribute to his contributions to Indian constitutional law at a time when they followed the common law tradition of not acknowledging any living jurists.³ My straightforward translation in Hindi as well as Sanskrit is *Kaladhah!*

I have a confession to make: I simply love Tony! And that is why I am here. Tony is, I know, a difficult person but he is also loveable. In fact the more difficult he is, the more loveable he is! He is prone to tantrums and even mighty rage: it is only when you realise how adorably calm he is beneath the surface that you begin to love this impossible man!

I spent my first lovely time with him as a colleague in the Department of Jurisprudence and International Law, where I began teaching and learning law. I discovered very many virtues which have made him what he is. He is nothing if not a perfectionist; any task that he takes up, he attends with loving care; the care he bestows on details is indeed remarkable; working with him you learn that no detail is trivial and that the difference between detail and design is perhaps overstated. A great thing about virtue is consistency in method, and this Tony achieved early in his LLM dissertation on judicial decision-making at Sydney University and continues all his life, including the great contribution to the treatise on Australian constitutional law and gifted stewardship of the *Oxford Companion to the High Court of Australia*.⁴

¹ Tony often began his Sydney jurisprudence class with a list of events that happened on a particular day one hundred years ago! He brought alive the continuity of life and law across three generations, the links between past, present, and future, though his views on social history of Australian law have still to be archived. But see, A R Blackshield, ‘Damadam to Infinities! The Tourneyold of the Wattarfalls’ in M Sornarajah (ed), *The South West Dam Dispute: The Legal and Political Issues* (University of Tasmania, 1983) 37; George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38 *Osgoode Hall Law Journal* 643. For a survey of Commonwealth law, see J N Matson, ‘The Common Law Abroad: English and Indigenous Laws in the British Commonwealth’ (1993) 42 *International and Comparative Law Quarterly* 753.

² See Anthony R Blackshield, ‘Constitutionalism and Comstockery’ (1966) 14 *Kansas Law Review* 403.

³ Among these most notable are his studies on the Supreme Court on amendatory powers and the death sentence, see: A R Blackshield, ‘Capital Punishment in India’ (1979) 21 *Journal of the Indian Law Institute* 137; A R Blackshield, ‘Fundamental Rights and the Economic Viability of the Indian Nation’ (1968) 10 *Journal of the Indian Law Institute: Pt I: Of Precedents and Progress at 1; Pt II: ‘The Balancing Wheel’ at 57; Pt III: ‘Prospective Overruling’ at 183; A R Blackshield ‘Fundamental Rights’ and the Institutional Viability of the Supreme Court’ (1966) 8 *Journal of the Indian Law Institute* 139, 140–7. Among his influential other articles are: A R Blackshield, ‘Secularism and Social Control in the West: The Material and the Ethereal’ in G S Sharma (ed), *Secularism: Its Implications for Law and Life in India* (N M Tripathi, 1966) 9; A R Blackshield, ‘Working The Metaphor: The Contrasting Use Of "Pith And Substance" In Indian And Australian Law’ (2008) 50 *Journal of the Indian Law Institute* 518.*

⁴ Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001). See also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006).

He is also a man of passionate intellectual attachments. These attachments vary. At one time he was very fond of jurimetrics (so much so that you had to struggle, both in his spacious old office at Phillip Street and his commodious car against empty egg shells and containers on which he did jurimetrics).⁵ At another time he was a votary of existentialism. Some other examples are his enthusiasm (with Gary Packer) to found a third Australian party and for its early vehicle called *Reform* (which he edited and stencilled); his interests in Aborigines and the law, the Indian Supreme Court's early wonders, and his abiding interest in the judges and law, epically with the High Court of Australia. But his attachments were impassioned: they seemed larger than life and seemed to consume him till, phoenix-like, he rose to attend to others.

Tony is a true jurist in every sense of that word. He has worked for the love of law but the soul of law is ever changing jurisprudence, which aims at *certainty where uncertainty prevails, order where chaos reigns, uniformity where diversity is on rampage and consistency where inconstancy is the rule*. Tony restlessly quested for a foundation-less jurisprudence, although too many legal theories seem to have all too solid (and by the same token soiled) foundations. It is difficult to name the best of his writing and even more difficult in this address to silhouette my reasons for fondness; but my favourites, even today, remain 'The Enclaves of Justice: The Meanings of a Jurisprudential Metaphor'⁶ and 'The Importance of Being: Some Reflections on Existentialism in Relation to Law'.⁷ If Tony had written nothing else (and that was simply impossible), these two articles would have sufficed as evidence of deep scholarship. The prolific Tony of the 70s beckons special attention. As the Onida TV ad has it, Tony is the 'neighbour's envy' and the 'owner's pride', though I must add that it will require a lot of courage to own him!

Since Tony is insufficiently vain, I do not think that he will ever write an autobiography. But he deserves to be written up. He should have several biographers and they should in particular deal with his contribution to the great Stone trilogy, his relationship to Julius Stone, his difficult deanship and stormy life at Macquarie Law School, and the varied jurisprudential themes he expounded at home and abroad.

Many memories crowd me on this occasion. But while I am a connoisseur of memory, I will be its assassin as well if I do not recall Pierre Nora's distinction between '*lieux de memoire*, sites of memory' and '*milieux de memoire*, real environments of memory'. Nora observes:

The remnants of experience still lived in the warmth of tradition, in the silence of custom, in the repetition of the ancestral, have been displaced under the pressure of a fundamentally historical sensibility. Self-consciousness emerges under the sign of that which has already happened, as the fulfillment of something always already begun. We speak so much of memory because there is so little of it left.⁸

⁵ This matured into some fine jurimetrics studies: see, A R Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964–1969' (1972) 3 *Lawasia* 1; A R Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972–1976' in Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (Law Foundation of New South Wales, 1978) 133.

⁶ Anthony R Blackshield, 'The Enclaves of Justice: The Meaning of a Jurisprudential Metaphor' (1967) 19 *Maine Law Review* 131.

⁷ Anthony R Blackshield, 'The Importance of Being: Some Reflections on Existentialism in Relation to Law' (1965) 10 *Natural Law Forum* 67.

⁸ Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' (1989) 26 *Revelations* 7, 7.

In case of Professor A R Blackshield, may I suggest that we speak to memory, while there is much of it left to us?

III

In general, I wish to deal with ‘constitutional hegemony’, the justified true belief that constitutional interpretation has a social effect and is politically important, if not also decisive. This is something that Tony critically adored. I dedicate this address to so many of its Avatars, and Tony’s too!

Constitutional hegemony is a logically essentially contested concept; among all its variations, interpretive or hermeneutical leadership is 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 also undertaken by the civil society, market, media, armed opposition insurgent groups and other non-state actors. Hegemony is the function of a hegemonic bloc and the name that we give to the salient contemporaneous viewpoint. A study of Indian constitutional interpretation from the perspective of all these actors alone, I believe, can give a full view of constitutional hegemony in action.

An abiding message of Antonio Gramsci, who invented this complex term for social theory, 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 ‘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.

Instead of looking at adjudicatory leadership this way, I propose to study three forms of prudence, or bodies of thought which determine the province of constitutional hegemony. These are: *legisprudence* (the principles or theory of legislation that take it beyond the contingency of politics)⁹, *jurisprudence* (that determines the principles, precepts, standards, doctrines, maxims of law and the concept of law)¹⁰ and *demosprudence* (judicial review process and power that enhances life under a constitutional democracy). While we think that law persons know best the second, we have to look at all three forms working together to achieve some grasp of law in late modern society. Doubts attach to, even assail, each of the three concepts. One may despair about

⁹ Luc J Wintgens, ‘Legitimacy and Legitimation in the Legisprudential Perspective’ in Luc J Wintgens (ed) *Legislation in Context: Essays in Legisprudence* (Ashgate, 2007) 3, 4. In Wintgens’ view, as expanded and critiqued by Vlad Perju, social theory, especially contractarian theory, makes stronger the ‘thereness’ of a legal system which then remains beyond the self-governing citizens whose freedom it constrains and conflates construction and representation — Wintgens regards this as central to modernity. ‘[P]rocedural theories of legitimation remain procedural in name only’. ‘One implication is that the requirement of justification applies to each and every law, rather than a set of [Rawlsian] “constitutionals essentials”’: Vlad Perju, ‘A Comment on “Legisprudence”’ (2009) 89 *Boston University Law Review* 427, 428.

¹⁰ Usually thought of as a body of knowledge that takes seriously the prudence of jurists — or the judge and the jurist.

legisprudence if one were to think (with Niklas Luhmann) that positive law entails nothing more than a ‘positivization’ of arbitrary will.¹¹ Or one may doubt that legislation as an affair of politics may ever aspire to rise to ‘theory’. All that we have, as Jeremy Bentham offered us a long while ago, is practical advice or a manual of instructions to legislators.¹² Similarly, one may revisit the notion ‘jurisprudence’ with a postmodern suspicion that it is nearly impossible to know whether the ‘law’ may be said to exist.¹³ Demosprudence may be held conceptually vulnerable if one were to think that, in an electoral and representative democracy, judges should strictly decide cases and controversies coming before them, maintain a distinction between *juristic* and political *reasoning*, and leave the task of re-constituting demos to the elected public officials, who are accountable to the ‘people’. However, taking these and related anxieties into account is not the same thing as repudiating in advance the possibility of a theory of legislation and jurisprudence.

How have the three bodies of wisdom, these ‘different multiplicities’ (as James Tully called constitutional pluralism)¹⁴ played out in the making and working of the Indian Constitution, especially through the dynamics of the Supreme Court of India (‘the Court’) is the question worth pursuing. But we mainly explore here the demosprudence of the Court. 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 Court and the changing relation between jurisprudence and demosprudence. I also raise briefly the problematic of judging the judges, and the problematic of socially responsible criticism of justices and courts.

My argument is simple: the Court now is markedly inclined towards demosprudence, though its early jurisprudence was also tinged with it. The Court has practised demosprudence since its inception, though it was a novel conception recently introduced in American literature by Lani Guinier. Guinier is initially concerned with the phenomenon, rare in US judicial history, which of course is rather pointless for comparative constitutional studies, which I briefly call COCOS, unless we overgeneralise the claim of John Rawls that the US Supreme Court is an exemplar of ‘public reason’.¹⁵

The more general argument of Guinier 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’.¹⁶ Disagreement in dialogue is the heart of democracy and judicial dissents ‘may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process’ as ‘[o]ral dissents can become a crucial tool in the ongoing dialogue between constitutional law and

¹¹ Niklas Luhmann, *A Sociological Theory of Law* (Martin Albrow ed, Martin Albrow and Elizabeth King trans, Routledge, 2nd ed 2014); Niklas Luhmann, *Law as a Social System* (Fatima Kastner et al eds, Klaus A Ziegert trans, Oxford University Press, 2004). This observation may also hold of divine natural law or divine positive law where the law is perceived to be based on God’s will, rather than reason.

¹² Upendra Baxi, ‘Introduction’, in Jeremy Bentham, *Bentham’s Theory of Legislation* (LexisNexis Butterworths 2008) ix.

¹³ I discussed this very question in Upendra Baxi, ‘How do We Know that the Law Exists?’ (Speech delivered at Seminar on Legal Reality, Nirma University, Ahmedabad, 26–27 September 2014).

¹⁴ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

¹⁵ John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press, 2013).

¹⁶ Lani Guinier, ‘Foreword: Demosprudence through Dissent’ (2008) 122 *Harvard Law Review* 4, 14.

constitutional culture'.¹⁷ Professor Guinier moves to the more general argument about 'demosprudence' as 'a democracy-enhancing jurisprudence' both for law and social movements.¹⁸

Unlike traditional jurisprudence, demosprudence is not concerned 'primarily with the logical reasoning or legal principles that animate and justify a judicial opinion'.¹⁹ Rather, it is 'focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites'.²⁰ Demosprudence 'attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents'.²¹ Put another way, it 'describes lawmaking or legal practices that inform', and are informed by 'democracy-enhancing jurisprudence' — practices that inform, and are informed by, the 'wisdom of the people'.²² All this raises several concerns. Does demosprudence explain the evolution of the American constitutional common law? If *Dred Scott*²³ was a denial of demosprudence, was *Brown v Board of Education*²⁴ its affirmation and acclaim? What are the possible extensions of the notion in the COCOS? Or is its rich potential for the UN and supranational regimes, in construction of demos?²⁵ Further afield lies the question: how far does Guinier embrace both legisprudence and demosprudence? These are important issues, but I focus on the Supreme Court of India, which *discovered* demosprudence much before American constitutional scholars *invented* the term!

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 does not merely relax the concept of standing but radically democratises 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.

IV

Before I turn to the Indian Supreme Court, let me say that the High Court of Australia also occasionally practises demosprudence, although it does not seem to explicitly engage any reconstruction of demos. The nearest to that happening are of course the decisions that pertain to

¹⁷

Ibid.

¹⁸

Lani Guinier. 'Courting the People: Demosprudence and the Law/Politics Divide' (2009) 89 *Boston University Law Review* 539; Lani Guinier and Gerald Torres, 'Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements' (2014) 123 *Yale Law Journal* 2740.

¹⁹

Guinier, above n 16, 16.

²⁰

Ibid.

²¹

Ibid.

²²

Ibid, 15–6.

²³

Scott v Sandford, 60 US (19 How) 393 (1857) ('*Dred Scott*').

²⁴

Brown v Board of Education of Topeka, 347 US 483 (1954) ('*Brown v Board of Education*').

²⁵

See, the remarkable analyses of the Constitutional Court of South Africa in Brian Ray, 'Demosprudence in Comparative Perspective' (2011) 47 *Stanford Journal of International Law* 111.

Aboriginal rights — *Mabo* and its normative progeny.²⁶ The problematic of ‘judicial ontology and constitutional hermeneutics’ has indeed surfaced in post-9/11 Australian jurisprudence.²⁷ “‘Islamic’ asylum seekers, ‘enemy combatants’ and ‘terrorism suspects’, and certain classes of criminal offenders in spaces beyond the doctrines, paradigms, and institutions of the criminal law’²⁸ now crowd the Australian High Court, as Penelope Pether demonstrates.²⁹ She brings alive the creative dissents of Justice Michael Kirby. Especially, with and since *Al Kateb*,³⁰ Justice Kirby declared the theory of ‘unenumerated rights’ and the supremacy of international law.³¹ A very recent unanimous decision of the High Court is said to have ended the executive practice of the federal government to grant other temporary visas which blocked asylum seekers from applying for permanent visas.³²

It is true that Justice Kirby’s ‘militant judicial intervention’ praxis, of post-9/11 constitutional judging, ‘marks a distinctive break with comparative constitutional law’s orthodoxy of proportionality, a break that is “capable of redressing the fundamental dislocation” of existing discourses and practices’ and ‘that his “enquiries” constitute a “generic procedure of fidelity.”’³³ I agree with Pether, (who quotes Oliver Feltham in the different setting of the worlds of Alain Badiou) that Justice Kirby’s ‘genuinely philosophical account of Chapter III duty “thinks local thoughts of justice”’.³⁴

But it is a common impression that adjudicative leadership in Australia generally leaves intact the paradigm of common law of constitutional justice and, like everything, the common view becomes dominant unless it is radically challenged. Even so, pending further specific studies, it remains arguable that what occurs is a ‘long slow process of supplementation’³⁵ — the development of ‘the jurisprudence of what is proper to courts’³⁶ — not ‘Romantic or avant-garde invention’.³⁷ This is not quite the same with the Supreme Court of India, with its frank and increasing recourse to ‘people’, a move away from *jurisprudence* and towards *demosprudence*.

²⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*Mabo*). Incidentally, that decision owes much to our critique of Justice Blackburn (of the Australian Federal Court) in *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, which our students and Tony and I initiated. See Upendra Baxi, ‘The Lost Dreamtime: Now Forever Lost — A Critique of the Gove Land Rights Decision’ (Paper presented at Australian Universities Law Schools Association Annual Conference, University of Tasmania, 1972)

<<https://www.academia.edu/8133265/>>, which Tony recently lovingly retyped. See for discussion from *Mabo* onwards: Blackshield, above n 4.

²⁷ Penelope Pether, ‘Militant Judgement?: Judicial Ontology, Constitutional Poetics, and “The Long War”’ (2008) 28 *Cardozo Law Review* 2279, 2279.

²⁸ Ibid 2279–80.

²⁹ See Ibid 2302–17.

³⁰ *Al Kateb v Godwin* (2004) 219 CLR 562, 614–30 (Kirby J) (*Al Kateb*).

³¹ Pether, above n 27, 2302.

³² *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847.

³³ Pether, above n 27, 2311, quoting Oliver Feltham, ‘Singularity Happening in Politics: The Aboriginal Tent Embassy, Canberra 1972’ (2004) 37 *Communication & Cognition* 225, 232, 241. Deploying Alain Badiou, *Being and Event* (Oliver Feltham trans, Continuum, 2005), Pether invokes Feltham at several places. She cites Feltham approvingly at 2283–4.

³⁴ Pether, above n 27, 2312.

³⁵ Badiou, above n 34, xxvi.

³⁶ Pether, above n 27, 2311.

³⁷ Ibid, 2312, citing Badiou, above n 34, xxvii.

Indeed, on this score at least, the conceptual distance between Canberra and New Delhi is vaster than the sheer geographical one.

V

Envisaged by the makers of the Indian Constitution (IC), the Supreme Court of India as an apex adjudicative bureaucracy, a final arbiter of the ‘doings’ of other courts in the hierarchy, has now fully emerged as an institutional *political actor*. This I suggest is the work of demosprudence. The IC makers conferred *vast* jurisdiction but *contemplated* a modest role for the Court: its task was to produce a stable pattern of a centralised production of *juristic* meaning of the Indian Constitution; whereas the production of its *social* meaning — the tasks of governance, development, and redistributive justice — lay entirely within legisprudence, the province and function of the elected public officials.

The world’s largest ever written constitution, providing a ‘flexible’ democratic constitution with liberal powers for its amendment, the 395 Articles of the IC (not mentioning various clauses and sub-clauses) stand divided in 23 Parts (each comprising several chapters and expanded further by subsequent constitutional amendments), and detailed further now in 12 Schedules, not to speak of over 100 amendments. It is a huge exercise in the elaboration of parliamentary (and even executive) supremacy. Indeed, the constitutional text scales some extraordinarily ludic heights in specifying that ‘unless context otherwise requires’, the terms ‘article’, ‘clause’, ‘part’, ‘schedule’ mean what the IC so designates (Article 366). Article 367 goes even further to say that a foreign state means a state other than India; that laws include ordinances; more importantly it subjects constitutional interpretation to the colonial *General Clauses Act 1868* (Imp) (as from time to time amended by Parliament)! Indian experience and development suggests the futility of overwriting the constitutional text; an elementary lesson in semiotics may have suggested that verbosity (or indeed brevity as the US constitutionalism suggests) may have little bearing on constitutional interoperation or adjudicatory leadership!

A most-over-worked and under-staffed apex Court, exercises overarching powers of power over (now 28) High Courts’ determinations in civil and criminal matters (Articles 132–4) further reinforced by Article 136 residual jurisdiction, liberally exercised, empowering the Court to grant at its discretion an appeal by way of special leave ‘from any judgment, decree, determination, sentence or order passed or made by any court or tribunal in the territory of India’. Understandably, then, even dated statistics tell their own story — it has as of July 2009, 53 000 pending cases (as compared with the overall pendency of 400 000 before High Courts and 20.7 million before district and local courts).

Many structural and procedural features contribute to the situation.³⁸ Thus there are unwarranted delays in judicial appointments and unprincipled Bench-size given its vast jurisdiction. The Court today comprises 31 justices (from an initial count of 8 Justices in 1950) servicing about

³⁸ See George H Gadbois, Jr, *Judges of the Supreme Court of India: 1950 – 1989* (Oxford University Press, 2011); Abhinav Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India* (Oxford University Press, 2014); Nick Robinson, *India’s Judicial Architecture* (4 October 2014) Social Science Research Network <<http://ssrn.com/abstract=2505523>>.

1.2 billion Indian citizens. The iron law of superannuation (age of 65 years) has further aggravated things because the average tenure of individual justices at the Court is about 2–3 years. Further, very few Chief Justices of India had the constitutional luck to serve the Court for long periods. Supreme Court Justices stand elevated from (now 28) State High Courts (with a retiring age limit of 62 years). The Court sits rarely as a ‘full Court’; most of the work is done by two–three judge Benches/Panels constituted by the Chief Justice of India (CJI). Often a Panel of five justices (named the ‘Constitution Bench’) is resorted to and at times larger Benches of 7 or 9 justices stand empanelled to resolve conflicts over prior precedents. Fragmented and fluctuating Bench/Panel structures accentuate the loss of institutional cohesion in myriad ways. Yet, some quantitative methods provide fresh starts in understanding the summit judicial conduct. Asymmetries in the Bench–Bar relationships further signify the fact that the Court remains relatively powerless in controlling its own proceedings. The practices of frequent adjournments and prolix argumentation (often lasting for weeks, even months) still remain the ‘dis-order’ of the day! The national adjudicative time thus remains at the sufferance of a politically fractionalised Supreme Court Bar, resting on an egregiously erroneous assumption that adjudicative reforms assault the independence of the Indian legal profession.

In the Indian context, jurisprudence, as placing some substantial demands of adjudicatory discipline, remains a casualty; the discipline of *stare decisis* suffers a tissue rejection; often, smaller Benches act without respect for larger Bench decisions.³⁹ Diversity of concurring opinions, even functioning as disguised partial dissents, and the practices of retroactive explanation⁴⁰ of what a particular justice meant in an earlier decision, make difficult the discovery of the law declared by the Court as binding on all courts (and other judicial authorities: Article 141). And yet the Court produces demosprudence and jurisprudence, making adjudicatory leadership (a better notion than judicial activism) an enormously complex task, directing attention to ‘organisational’ and ‘hermeneutic’ leadership and the ‘political’ (as sites of constitutional striving by the Court producing changing meanings of rights, development, governance, and justice) — in sum, ‘India’s living constitution’. At stake also remain the shifting bases of the legitimation of the Court as political institution, assuming fully the responsibility for the co-governance of the nation.

³⁹ See, eg, S P Sathé, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2nd ed, 2003); Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press, 1999); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008); Rajiv Dhavan *The Supreme Court of India: A Socio-Legal Analysis of Its Juristic Techniques* (N M Tripathi, 1977); Hormasji Maneckji Seervai, *Constitutional Law of India: A Critical Commentary* (N M Tripathi, 4th ed, 1993); Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Co, 1980); Blackshield, above n 2. See also on Seervai: M D Kirby, ‘Constitutional Law: Indian and Australian Analogues’ in V Iyer (ed) *Constitutional Perspectives — Essays in Honor and Memory of H M Seervai* (Universal Law Publishing Company, 2001) 166; Michael Kirby ‘To Midday’s Children in India — The Bright Tomorrow’ in Soli J Sorabjee (ed) *Law & Justice: An Anthology* (United Lawyers Assoc, vol 4, 1997); Michael Kirby, ‘A Neglected Transnational Legal Relationship: A Plan of Action for Australia’ [1997] *Australian International Law Journal* 17.

⁴⁰ See Upendra Baxi, ‘The Travails of Stare Decisis in India’ in A R Blackshield (ed), *Legal Change: Essays in Honor of Julius Stone* (Butterworths, 1983) 34.

VI

Organisational 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*'⁴¹ 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 senior most (including the CJI) deciding with unanimity, whose say on judicial appointments will be final.

This adjudicative feat stands notably 'justified' in *Subhas Sharma*,⁴² a three judge Bench decision, speaking of the virtue of a '*non-political judiciary*' as 'crucial to the sustenance of our chosen political system', 'the *vitality of the 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*'.⁴³ The justifications offered for this adjudicative coup d'état do not fully withstand analytical scrutiny, as even the first decade produced an independent Court.

The Bills on National Judicial Commission do not improve the opacity of judicial elevations. 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 politicised and fractal leadership of the Indian Bar, who criticize the functioning of the judicial collegium, do not want a return to the days when a Union Law Minister may repeat his story of having 'judges in his pockets'. The Constitution Amendment Bill (still to be ratified by half of the states) is about the *power* of Parliament to modify the Constitution (not so much about *transparency* and *accountability* of justices) and will eventually (already petitions are before the Court) be tested on the touchstone of the preservation of judicial preview power as an essential feature of the Basic Structure of the IC.

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. 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 the composition of the Court have insistently emerged, and more subtle forms of court-packing have ensured that women justices on the Court remain as few as possible, although a woman justice may be available as CJI.⁴⁴ However, a constitutional custom as regards the elevation of Muslim and Dalit justices seems to have evolved.

⁴¹ *Supreme Court Advocates-on-Record Association v Union of India* [1993] 4 SCC 441 ('*Judges Case*').

⁴² *Subhash Sharma v. Union of India* [1990] SCR Supp (2) 433 ('*Subhash Sharma*').

⁴³ *Ibid* 448 (emphasis added).

⁴⁴ See Upendra Baxi, 'Valedictory Speech: The Ways Ahead' (Speech delivered at the High Level Committee on Gender Justice, 15 December 2013).

VII

There is no doubt, however, that hermeneutic adjudicative leadership (HAL) is centrally involved in resolving the tangle of the self-organisation of the Court. Should we for that reason alone collapse the two is a question worth considering; the organisational leadership speaks to much wider contexts than judicial elevations (for example, the Court has acted as a pay commission for 'subordinate' judiciary). Organisational 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.

The Court has now assumed the power of 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, the commentariat and the proletariat that primarily constitute the 'social' ought to address the quality of demosprudence, the issue of how justices talk about and listen to the worst-off peoples and strive to realise (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?

Clearly, the earlier rules of jurisprudence no longer apply to the 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 terms) of precedent no longer governs the demosprudence of the Court; the construction of demos is not precedent-minded but regards the doing of justice or mitigation of injustice as its prime task.

Is this aversion to precedent by the 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 may it reshape these? And if the Court is thought of in the immortal image of Justice Goswami as the last recourse for the 'bewildered and oppressed' 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.

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. The Indian experience offers a more complex and ambivalent instance.

As a state ideological and coercive apparatus, the Court has sustained overall not just the colonial laws (such as the *Official Secrets Act 1923 (Imp)* 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. The Court now downgrades ‘legalism’ (an ethical virtue of following rules even when they produce undesirable results) and ‘restraintivism’ (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).

Confronted with a *mélange* of socially and culturally grounded expectations, the Court has not engaged as fully as it may with taking the rights of women, sexual minorities, children and First Nations as seriously as human rights. 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 a discursive platform for governance transparency, bordering on the verge of an enunciation of constitutional rights 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). SAL has survived legislative supermajorities in the past and has grown because of coalitional forms of national governance although now with the 16th Parliament this trend is interrupted.

The Court goes beyond these, for example, straddling the conventional distinctions of judicial activism/restraint, and 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*⁴⁵ 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’.

To offer a momentous example, the anxious murmur articulated by Justice Hidayatullah, in *Sajjan Singh*,⁴⁶ while sustaining the 17th Amendment, leads to a radical transformation of Indian constitutionalism. He there said that the IC did not intend Part III rights to be mere ‘play things of a special majority’,⁴⁷ paving the way for the momentous decision in *Golak Nath*⁴⁸ (immunising these rights from the runaway viral powers of constitutional amendment). The 1973 *Kesavananda*⁴⁹ decision proceeds farthest in judicially re-writing the constitution: Article 368

⁴⁵ *Olga Tellis v. Bombay Municipal Corporation* [1985] SCR Supp (2) 51 (‘*Olga Tellis*’).

⁴⁶ *Sajjan Singh v. State of Rajasthan* [1965] SCR (1) 933 (‘*Sajjan Singh*’).

⁴⁷ *Ibid* 962.

⁴⁸ *I C Golaknath v. State of Punjab* [1967] SCR (2) 762 (‘*Golak Nath*’).

⁴⁹ *Kesavananda Bharati v. State of Kerala* [1973] 4 SCC 225 (‘*Kesavananda*’).

powers of constitutional amendments are now fully subject either to the practices of eventual judicial endorsement or even the power to declare amendments ‘unconstitutional.’

Kesavananda,⁵⁰ in some wafer-thin ‘majority’ outcomes and 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’. What is not realised is the decisional core — the notion of judicial power — a core that results in a co-sharing with Parliament of constituent power by the apex justices. It is this power that would decide the essential features. If there is no power in the Court to adjudge the validity of an amendment, no judicial quest for essential features of the Constitution, or its personality, will be either ‘legal’ or ‘legitimate’.

Initially politically opposed, even in Parliament, this articulation of adjudicatory leadership no longer remains today an affair of contentious politics. The doctrine of Basic Structure has been judicially adapted and politically accepted in India and is even fully followed in most of the South Asian adjudicature, notably Bangladesh, Nepal and Pakistan.⁵¹

The *Kesavananda*⁵² 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*⁵³ the Court outlaws the Presidential powers to suspend or dissolve duly elected state legislatures under Article 352. Further still it now even transforms the Basic Structure doctrine into a canon of constitutional interpretation reaching out almost fully to judicial deliberation/invigilation of the quotidian exercises of state legislative and executive/administrative powers.

VIII

The Article 368 powers and procedures of constitutional amendment were all too frequently deployed in the Nehruvian era (1950–64), marked by ascendancy of parliamentary supremacy with a constitutionally unbecoming hostility towards adjudicatory leadership. Some early amendments led no doubt to a superior understanding of Indian constitutionalism; thus the very First Amendment expands the Part III equality rights as empowering the State to pursue percentile quota-based reservations (affirmative action policies) for the millennially disadvantaged Indian citizenry, especially in terms of admission to state-aided educational institutions and government employment. Thus, in turn, arises a new sphere for adjudicative

⁵⁰ Ibid.

⁵¹ See Upendra Baxi, ‘Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration’ in Mahendra P Singh (ed), *Comparative Constitutional Law: Festschrift in Honour of Professor P K Tripathi* (Eastern Book Company, 2nd ed, 2011) 201; Upendra Baxi, ‘Modelling “Optimal” Constitutional Design for Government Structure: Some Debutant Remarks’, in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (Oxford University Press, 2013) 23.

⁵² [1973] 4 SCC 225.

⁵³ *S R Bommai v. Union of India* [1994] 3 SCC 1 (‘*Bommai*’).

leadership in pursuit of the tasks of ‘complex equality’ or ‘competing equalities’. Parenthetically, all I may say here is the following: the Court: (a) legitimates demands of social justice (group-differentiated equality), yet remains anxious about horizontal equality of all eligible citizens; (b) limits the scope of differential treatment overall as not exceeding 50% of the Indian population; (c) seeks thus to exclude ‘creamy layers’ (the already constitutional haves) from capturing distributive monopolies to the disadvantage of the actually worst-off citizen-peoples, both in terms of ‘equality of opportunity’ and ‘equality of outcomes.’ Hermeneutic leadership of the Court offers a complex realm and in some notable ways differently from the US jurisprudence — a theme that this paper may scarcely pursue.

Unlike the US counterpart, the Indian First Amendment, far from enshrining the ontological robustness of the right to freedom of speech and expression, marks an era of ‘reasonable restrictions’ enacted on various grounds, including even the ‘friendly relations with foreign states’! Judicial acquiescence with these also marks various interpretive styles/patterns that question the ‘reasonableness’ of the power to prescribe ‘restrictions’ on fundamental rights. Summarily put, it evolves various standards of strict constitutional scrutiny to ‘balance’ competing constitutional policy considerations that may otherwise entirely ‘trump’ Part III rights.

Low-intensity constitutional warfare begins in relation to the Article 31 private property rights. Only a few justices took an ideological hard line on the notion of private property as the very foundation of freedom and human rights. Rather, as Justice Koka Subba Rao insisted,⁵⁴ the issue was ‘statism’, which may govern India as if rights did not matter. More consistently here emerges a form of constitutional legalism underscored with the conviction that the justices should have the final say in interpreting the Bill of Rights.

The collision over Article 31 property rights occurs variously (and Tony I have narrated this in different strokes). Presenting this in a few sentences, Parliament amends the Constitution by deleting the word ‘just’ from the phrase ‘just compensation’ hoping that the Court may not be able to further insist on market value plus solarium. In response, the Court maintains that the word ‘compensation’ may only signify ‘just compensation’. A yet further amendment replaces the term ‘compensation’ altogether by simply saying ‘any amount’ as ‘determined’ by appropriate legislation. The Court strikes back by saying that the word ‘determination’ carries with it the constitutional burden of principled compensation for takings!

Was the Court too far wrong in suggesting basic constitutional rights may not be taken away or abrogated under the title of distributive justice? If this puts the matter too widely, was it too far wrong in insisting that the State may not acquire castles for a bag of cashews, or palaces for a handful of peanuts? In a wise move, the Court did indeed relax its insistence on market value compensation by accepting instead that systematic under-compensation for takings must at least be based on some showing of principled determination. Moreover, the Court acquiesced for a long time with the ouster of its jurisdiction by the 9th Schedule. Furthermore the 4th amendment (1955) yields to the Court’s leadership via the principle of market value compensation for the

⁵⁴ See, Twarkavi Venkata Subba Rao, *Constitutional Development in India: Contribution of Justice K Subba Rao*, (Deep & Deep Publications, 1992).

state taking of land ‘under personal cultivation’.⁵⁵ Did all this achieve or accelerate any serious-minded pursuit of agrarian reforms? Empirical studies of the political economy of the reforms suggest otherwise. All this lays the groundwork for shaping a subsequent epic struggle over the scope and legitimacy of constitutional amendments.

Indira Nehru Gandhi, the third Prime Minister of India ascended to high political power, marking India’s major experimentation with state finance capitalism — in effect nationalising banks and insurance service industries. The constitutional rationale was articulated under her leadership via the 24th and 25th amendments. The latter in 1971 introduced Article 31C, a provision that sheltered fulfilment of Part IV rights if the takings law stood accompanied by a statement that it furthered the pursuit of these rights. The Court may not ever question the law ‘on the ground that it does not give effect to such policy’. The *Kesavananda* Court invalidates this amendment on the ground that it may shield ‘colourable’ exercise of such a power.⁵⁶

In moving the First Amendment, Nehru was quick to say that constitutional legalism was an act of theft of the Constitution and to justify the 9th Schedule — listing agrarian reform laws from judicial paper, even when manifestly violative of Part III rights — as a way of preventing this ‘magnificent edifice’ from being ‘purloined’ by lawyers and judges.⁵⁷ Justice M Hidayatullah (among India’s most gifted justices) said memorably that ‘ours is the only constitution that needs protection against itself!’ This Schedule was used in the Emergency days (1975–76) to protect other laws, including dragnet security legislation, from judicial paper. It is incidentally as late as 2009 in *Coelho* that the Court assumes the power to paper and invalidate the entries in the schedule.⁵⁸

This summary narrative at least suggests entailments of some Foucauldian labours as yet not in sight, whether in qualitative (doctrinal) or quantitative (institutional) Indian or expatriate studies of constitutional jurisprudence. The latter genre does in particular a great disservice to the ways of constitutional legalism, Indian-style, but may not be pursued here. There is a constitutional necessity prescribing that a constitutional ‘amendment’ may only proceed via a law made by Parliament rather than by referenda or the convening a new constituent assembly. As legislation, it may remain subject to the constitution-saying power of the Court. The ‘heroic’ 24th Amendment contests this perspective by insisting that constitutional amendments articulate

⁵⁵ See Upendra Baxi, ‘*State of Gujarat v Shantilal*: A Requiem for “Just Compensation”?’ (1969) 9 *Jaipur Law Journal* 29. This is the first, and as far as I know, only article to examine contemporary theories of distributive justice to Article 31 jurisprudence.

⁵⁶ [1973] 4 SCC 225 [1913].

⁵⁷ Upendra Baxi, ‘The Indian Constitution as an Act of Theft and the Theft of the Indian Constitution: A Retrospect on Indian Constitutionalism’ (Speech delivered at the Tenth Anniversary Talk, Centre for the Study of Culture and Society, Bangalore, 8 September 2008).. See also, Upendra Baxi, ‘Outline of a “Theory of Practice” of Indian Constitutionalism’ in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008) 92.

⁵⁸ *IR Coelho v. State of Tamil Nadu*, AIR 2007 SC 861 (‘*Coelho*’); Kamala Sankaran, ‘From Brooding Omnipresence to Concrete Textual Provisions: *IR Coelho* Judgment and Basic Structure Doctrine’ (2007) 49 *Journal of the Indian Legal Institute*, 240; Pathik Gandhi, ‘Basic Structure and Ordinary Laws (Analysis of the Election Case & the *Coelho* Case’ (2010) 4 *Journal of Indian Constitutional Law* 47. See generally Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2009); Rajeev, Dhavan, *The Supreme Court of India and Parliamentary Sovereignty: A Critique of its Approach to the Recent Constitutional Crisis* (Sterling Publishers, 1976).

‘constituent power’ — put differently, the expressions of legislative will, not amenable at all to acts of hermeneutic adjudicative leadership. In *Kesavananda* the Indian State even argued that the amendatory power may thus constitute an economy of excess in which it may reconstitute the constitutional idea of India from a ‘republic’ into a ‘monarchy’, from a ‘federal’ to a ‘unitary’ form of governance, and from a ‘secular’ form to a ‘theocratic’ one. The Court returns this ‘compliment’ by insisting upon an order of Basic Structure limitations on the amendatory power and in turn presenting itself as a co-equal regime of adjudicatory constituent power.

In any event, *Kesavananda*⁵⁹ inaugurates a new constitution of India, if only because it now marshals a new political consensus that the Court may act as a co-equal branch of State. I do not quite know how far, if at all, the Indian ways of plebiscitary competitive party politics/machines may have evolved differently outside the play of Indian adjudicatory leadership with and since *Kesavananda*.⁶⁰ Going far beyond some staple studies of ‘juristocracy’ (led eminently by Ran Hirschl),⁶¹ the question, shortly put, is whether this daring articulation of the Basic Structure doctrine merely marks an affair of judicial will to power or serves a whole lot better a profound difference for the futures of Indian constitutionalism and human rights. Whatever be the careful response, demsprudence has already arrived in the battle for judicial last say on all constitutional matters.

IX

Indira Nehru Gandhi, whose rise to supreme power was marked by India’s triumph in the creation of Bangladesh, and her socialist agendum that ushered in an era of state finance capitalism via the nationalisations of the banking and insurance industries, also ushered in the only explicit act of constitutional authoritarianism in the internal emergency. The trigger for this was provided by the Allahabad High Court decision ‘unseating’ her as a Member of Parliament and finding her ‘guilty’ of ‘corrupt’ electoral practice in only two of 67 counts. Her response was a 39th constitutional amendment that rendered this decision as void and all pending appeals against it as fully infructuous. At the height of constitutional dictatorship, the Court in *Raj Narain v Indira Nehru Gandhi* invalidated this amendment;⁶² yet in the infamous *Shiv Kant Shukla Case*⁶³ (and world-celebrated dissent by Justice H R Khanna) four leading justices of the Court proceeded to uphold a complete and total denial of the venerated right to habeas corpus, even against arrests based on mistaken identity.

This low point of hermeneutic leadership was soon to be reversed in the early post-Emergency period (1977–80). Thus begins the long itinerary of a normative judicial restoration, even a revolution, by way of cathartic and populist acts of revival of an autonomous apex court. This short period marks an extraordinary articulation of adjudicative leadership. Above all, via

⁵⁹ [1973] 4 SCC 225.

⁶⁰ Ibid.

⁶¹ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007).

⁶² [1972] SCR (3) 841.

⁶³ *Jabalpur v. Shivkant Shukla* [1976] SCR 172 (‘*Shiv Kant Shukla Case*’).

Maneka Gandhi,⁶⁴ the Court amends Article 21 rights to life and liberty as assurances of substantive due process specifically excluded by the IC authors. Since the late 80s, a different but related rights revolution unfolds that I insist on naming as the juridical invention of SAL as against PIL (public interest litigation) with a view to highlighting its distinctive Indian origins and characteristics.

In and via SAL, the Court has democratised access to constitutional remedies as a basic human right. SAL began as an epistolary jurisdiction in which rightless people or their next of kin, and human rights and social activists, write letters that are regarded as writ petitions to the Court and may appear before the Court as petitioners-in-person. Since the Court is itself not a fact-finding authority, it has devised the method of ‘socio-legal enquiry commissions’ to 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.

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 the national policy agenda.

In so doing, the Court has shifted the bases of legitimation of adjudicative power by invoking a notion that high judicial power is not merely an affair of ‘governance’ comity among the leading state-formative apparatuses but rather an insistence 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 the notion that elected public officials may 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 acquiescence the Court itself derives some extraordinary quotient of judicial power — forms of ‘judicial populism’ that question some core notions of representative democratic governance, without entirely devaluing these. In the process, all this has enhanced not merely 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.

In the spheres of normative leadership, the Court 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 originative 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, do the conventional theoretical/ideological narratives of ‘separation of powers’ crib and confine the performatives of the Court.

⁶⁴ *Maneka Gandhi v. Union of India* [1978] SCR (2) 621 (‘*Maneka Gandhi*’); see also Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* (Oxford University Press, 2012).

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 workplaces, and the unconscionable practices of campus violence and ‘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 creeping 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, and rehabilitation and recompense for developmental project-affected Indian citizens.

This daring of adjudicatory leadership is further at work: not merely has the Court 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 (Article 21, IC) an unending regime of enunciation of human rights to livelihood, shelter and housing, food and nutrition, education, health, and the environmental well-being.

In sum, the Court has in the 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 as importing substantive due process.

In the area of affirmative action for socially disadvantaged groups, the Court has insisted that the identification of beneficiaries be based on scientific studies, and that the overall reservation/quota (mostly for educational and state employment) should not exceed 50%. It has also 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 a violation of constitutional morality, human rights, and the fiduciary obligations of decent democratic administration.

X

These complex patterns of adjudicatory leadership have not gone unchallenged both within and outside the Court. Almost at every step of this development, dissident justices have contested the emergence of judicial supremacy in the governance of the nation, and the partially concurrent justices have issued stern caution on what is thought to be an extravagant assertion of judicial power. Yet, over time, and with some residues of internal dissensions, most such judicial actors have shed their initial ambivalence — an unsurprising phenomenon given the judicial will to power.

Some leading lawyers, and academics, who admirably condense the Court’s decisional law into treatises on constitutional law, have persistently questioned the expanding realms of adjudicative

leadership.⁶⁵ Many leading law and political theory scholars continue to address the ‘anti-majoritarian’ aspect of judicial power.

On the other hand, activist academics, while critical of this or that decisional trend/formation, overall embrace the fiduciary notion of the judicial role. So do specific agenda-driven human rights and social action movements, amidst many a profound moment of disappointment. For the 24/7 hyper-globalising news and views of mass media and the related commentariat (that now functionally displaces the proletariat), ad hoc criticism of the Indian judicial action remains a lucrative business. Overall, the problem of judging the judges emerges in the public, rather populist, deliberative sphere, as always inviting the question of socially responsible forms of criticism (SRC).

What SRC consists of is indeed a vexed question. The bases of SRC are often unarticulated. Nor is any distinction made between episodic and structural criticism and even critique. I do not insist on the 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 criticising courts for not changing the structures of power or domination by a single or even a 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 mobilised 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 narratology.

In a form of adjudication governed by the principle of parliamentary ‘sovereignty’ the Basic Structure doctrine seems out of place. The winner-takes-all principle stands now replaced by the postulate — the judicial innovation — of ‘hope-and-trust’ jurisdiction (notably by Justice P N Bhagwati). This displaces the view that justices ought not to be directing executive policy or shaping a legislative policy; rather than ‘overreach’ or trespass of ‘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.

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 criticism of the judicial performances and ways in which judges, lawyers, and jurists think.

⁶⁵ The contemporary foremost figure is Pratap Bhanu Mehta: see Pratap Bhanu Mehta, ‘Passion and Constraint: Courts and the Regulation of Religious Meaning’, in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008) 311; Pratap Bhanu Mehta ‘The Rise of Judicial Sovereignty’ (2007) 18(2) *Journal of Democracy* 70.

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 to 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*⁶⁶ 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 a historical (and therefore abstractly universalising) 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 post-socialist) constitutional justicing.

XI

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 guiding 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.

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*⁶⁷ and *Kaushal v Naz (2)*⁶⁸. *Lily Thomas* cancelled a 60-year plus tradition of doing politics in India by reversing the settled principle of innocence until 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!

That a substantive due process court may err and be inconstant is scarcely a novel finding. That such a court may fail the fundamental human rights of sexual minorities, be unmindful of the constitutional presumption of innocence, and tolerate sexual harassment by judges is a matter of

⁶⁶ 531 US 98 (2000).

⁶⁷ *Lily Thomas v. Union of India*, [2013] INSC 674 (10 July 2013) (*‘Lily Thomas’*).

⁶⁸ *Suresh Kumar Koushal v. Naz Foundation*, [2013] INSC 1096 (11 December 2013). (*‘Koushal v Naz (2)’*); See also Upendra Baxi, ‘Naz 2: A Critique’ *Economic & Political Weekly* (online) 8 February 2014 <www.epw.in/system/files/CM_XLIX_6_080214_Upendra_Baxi.pdf>.

deep concern. Yet any verdict on demosprudence is premature; is it true to say that in the absence of collective judicial self-discipline and in the full absence of a degree of judicial consistency, substantive due process may amount neither to jurisprudence nor to demosprudence?

Thank you all and Tony may you be amongst us forever.
