

# CONVOCATION ADDRESS

*Prof. Upendra Baxi\**

Justice Altamas Kabir, Vice Chancellor Professor Ishwara Bhat, Justice Chittatosh Mukerjee, the learned members of the General Council, distinguished guests, colleagues and above all dear students, I am honoured by your gracious invitation to be with you on this occasion for many reasons. This event is a happy one for me as well because it is presided over by His Lordship Justice Altamas Kabir whose contribution to the ways of constitutional justicing remains an enduring national asset indeed. To once again be in the presence of Justice Chittatosh Mookerjee enhances my joy, if only because without his sterling contribution to the life of NUJS, its many splendoured achievements would have had a more difficult passage.

This event also reunites me with my dear friend Vice Chancellor Ishwara Bhat. I have no doubt that NUJS will scale new heights under his wise leadership. I cannot help saying here that the University is fortunate to have an ‘Ishwara’ at the helm of affairs!

Convocations addresses can be – and for the most part are – long, tedious, and even stupid! I avoid the first virtue by a rather unusual device of footnotes! I shall try to resist the second virtue of tedium. The third virtue ‘stupidity’, however, is hard to negotiate! Certainly, this may not be done by fulfilling the fanciful hope of Sam Goldwin- “Let us have some new clichés!”

Perhaps, stupidity or folly is a virtue not to be entirely avoided!

In 1977 Professor Amartya Sen further developed the notion of a ‘rational fool’. “The economic man...” he said “(i)f he shines at all, shines... with the dominant image of the rational fool”.<sup>1</sup> And a most gifted philosopher of the last century Emmanuel Levinas reminded us of the virtue of ‘foolish excellence’.<sup>2</sup>

I will elaborate the difference between these two forms of foolishness in the remarks that soon follow. In the meantime, please try thinking about an academy of “juristic sciences” – is this naming an act of rational folly or of foolish excellence?

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<sup>1</sup> See A.K. Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, 8 PHILOSOPHY & PUBLIC AFFAIRS 317, 344 (1997).

<sup>2</sup> MARINOS DIAMANTIDES, LEVINAS, LAW, POLITICS (2007).

Let me share a secret. I always preferred to receive my degrees from Bombay to Berkeley *in absentia*! As life's little ironies would have it, I had no choice but to attend all the convocation events as Vice Chancellor of Veer Narmad University, Surat, and the University of Delhi! I did my duty as well as I could. Many colleagues, however, pointed out that when I recited the operative formula in awarding degrees – 'by the powers *vested* in me' – it sounded as if I was speaking of powers *wasted* in me!

I must start off by saluting some singular successes of the student body in general and graduating class in particular. Your many extraordinary achievements in mooted events and culture call for a celebration. Deeply auspicious for the future of Indian scholarship remains the student edited NUJS Law Review: a recent issue focussing on the Delhi High Court landmark *Naz* decision was indeed a substantial contribution, made all the more remarkable (if I may so in all humility) by my near total disagreement with your critique.<sup>3</sup>

I have had several delightful conversations even in the acoustically challenged NUJS classrooms and I have learnt a good deal from our exchanges. For the better part of yesterday, we discussed the nature of the Indian judicial process, so richly varied, complex and contradictory as to have startled even Justice Cardozo! All I may say here is that your teachers are very fortunate to have you as their students.

NUJS has a great future and I hope that the graduating class as it moves to levels of affluence especially at the corporate Bar would not forget to share a portion of it for the developmental needs of this University. I was going to use the expression *alma mater*; however I desist, if only because the sixteen varieties of Indian English that I know bring this expression phonetically close to *Alu Mater*!

For those who leave the portals of NUJS today, the convocation ought to be a happy, even festive, occasion of saying good-bye to your teachers, tests and exams, and to celebrate the release from the panoptic surveillance structure of the NUJS campus!

This event marks a safe passage for you to a brave new world of thought and action. I learn from reliable sources (again an Indian English expression raising the question about the very idea of 'source') that suggest to me that most of you already feel vibrant with excitement at your new niche in corporate legal professions. As you grow in the corporate Bar, you will surely begin to appreciate what Oscar Wilde once said—"Moderation is a fatal thing... Nothing succeeds like excess!"

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<sup>3</sup> UpendraBaxi, *Dignity in and with Naz* in OF LAW LIKE LOVE (Arvind Narain & Alok Gupta eds., 2011).

Of course, I wish you well enough never to encounter a corporate firm like the one narrated by John Grisham in the book *The Firm*! It is not always the case that a ‘firm’ is known by the mob it keeps! Grisham also wrote *The Street Lawyer*. The distance between the ‘firm’ and the ‘street’ is well worth some labours of deconstruction at least in terms of ‘Occupy’ Wall Street type movements. The ‘Occupy’ movements create a new politics of space resisting the lawlessness of finance capital; they also sustain images of just regulation and responsibility of the corporate Bar.

I may not speak further to this scheme save saying that the ‘firm’ often suggests that lawyers in the service of economic globalization also practice ‘cause’ lawyering. Surely, it may be said that corporate lawyers often think that in espousing the ‘free market’, they are pursuing far nobler causes – social wealth-maximization, economic development, sociotechnical inventions/innovations and much else besides. Who may deny the fact Indian administrative law and jurisprudence have been principally developed by business and industry lawyers challenging arbitrariness in administrative action?<sup>4</sup> How may we forget that it was a doyen of the corporate Bar – Nani Palkhivala – who urged in *Kesavananda Bharati*, the rudiments of the basic structure of the Constitution as furnishing an adjudicatory anvil for resolving contestations over the plenary power of constitutional amendment?

The histories of Indian ‘street lawyers’ however suggest otherwise – an aspect that I note a little further, even if briefly.

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Let me now revert to the notions of ‘rational fools’ and ‘foolish excellence’. And allow me to do this suggestively rather than rigorously.

If Amartya Sen was questioning the model of the ‘economic man’ as an egoistic being always intent on maximizing his or her preferences devoid entirely of sympathy or commitment to the plight of others, Emmanuel Levinas was concerned with development of an ethical philosophy that accorded non-negotiable responsibility towards the vulnerable other.

Levinas was concerned to develop a radical ethic of infinite responsibility, an ethic “despite-me, for another” in which “I am ordered toward the face of the other.” The call of responsibility remains “antecedent to my freedom” for “it is a sacrifice without reserve, without holding back, a form of an involuntary election not assumed by the elected one”.<sup>5</sup> Obviously, this is

<sup>4</sup> See UpendraBaxi, *Introduction* to I.P. MASSEY, *ADMINISTRATIVE LAW* (2008).

<sup>5</sup> See EMMANUEL LAVINAS, *OTHERWISE THAN BEING: OR BEYOND ESSENCE* 11, 15 (A. Lingis trans., 1998). See also Upendra Baxi, *Judging Emmanuel Levinas? Some Reflections on Reading Levinas, Law, Politics*, 72(1) *MODERN L. R.* 116-129 (2009).

not how far Professor Sen may travel though he offers ‘sympathy’ as a valued supplement to the rational choice theory. I keep hoping that that NUJS will encourage a close reading of the gifted corpus of Levinas.

The question I wish to leave with you today is just this- How may we extend the notions of ‘rational fools’ and ‘foolish excellence’ in understanding law and justice, theory and movement, social action for change and resistance to change? I know this large question needs to be broken into a series of discrete issues; I may not attempt this today but instead offer some rolled-up examples.

May I suggest to you that the acts of constitution-making, preceded at least by six decades of the Indian freedom struggle, mark an era of ‘foolish excellence?’ The canonical text and discourse of liberal, political and legal theory never anticipated that the colonized subject may claim any radical collective human right to self-determination! Nor did it envisage a constitutional idea of India enunciated by the Constituent Assembly and further since then.

How then may we understand the ways in which our confounding fathers (since there were very few founding mothers) sculpted forms of anti-nomic governance structures?

By this I mean several things familiar to you in terms of taught constitutional law – for example, the antinomies of Part III and IV of the Constitution, the wish-list of the Indian federation driven by the vision of a strong hegemonic Centre, many an excess of sentimental logic structuring complex equality leading to the politics of backwardness and the uncanny device of legislative reservation for the Scheduled Castes and Tribes, further aggravated by some distinctive features of Indian constitutional secularism? Were the constitution-makers ‘rational fools’ who perfected a complicated and contradictory discourse of legitimacy of power for themselves and their successors?

Constitutional economics that extends the public choice theory and rational choice models to understanding constitutionalism remains an alien figure, even for the folders of degrees in juristic sciences! Constitutional economics is of course a heavy theoretical terrain not merely concerned with rational decision-making procedures but also with optimizing governments.<sup>6</sup> We remain now told by high presets of this genre that the design, detail and development of the Constitution then must always remain exposed to an ‘efficiency’ test; the efficiency matrix is not concerned with the aspirational and

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<sup>6</sup> See J.M. BUCHANAN & GORDON M. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); J.M. BUCHANAN, *CONSTITUTIONAL ECONOMICS* (1991). See KEITH L. DOUGHERTY & JULIAN EDWARD, *THE CALCULUS OF CONSENT AND CONSTITUTIONAL DESIGN* (2011) (for a recent re-visitation).

cultural dimensions of constitutional design but with its instrumental efficacy; constitutionalism itself becomes a series of ‘economizing devices for receiving and interpreting information’.<sup>7</sup>

Switching narrative gears, how may we understand the tides and ebbs of judicial power or adjudicatory leadership of India? Even today I recall Justice Gajendragadkar firmly clasping my hand and telling me sternly that the *Golak Nath* decision was a ‘self-inflicted wound’ imposed by the Apex Court on itself! I was then a ‘rookie’ student of Indian constitutional law! Even so I had the gumption to tell him that I thought otherwise!

Subsequently, and please forgive me the sin of pride in saying that I remain a dinosaur amongst you having read the full text of the monumental *Kesvananda Bharati* for well over twenty times and still reading on further, I think that that it ushered in a totally new Constitution of India. Perhaps, this academy of juristic sciences may do no better than require its faculty and students to re-read this majestic text over and over again and further explore how the basic structure doctrine has travelled far and wide in the SAARC region and beyond.

The emergence of social action litigation (SAL, still miscalled as public interest litigation – PIL) in which courts and justices lead the ‘rights revolution’ does not mark for India any rise or fall of Indian ‘juristocracy’ (as my eminent friend Ran Herschel names this).<sup>8</sup> Rather what we have in India today are the avatars of ‘demosprudence’.<sup>9</sup>

When I wrote *Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India*, I was illiterate in the great legacy of Emmanuel Levinas. Even so, I maintained (and still so do) that the enterprise of taking human rights seriously entails taking social suffering equally seriously.

This is not an occasion for any stocktaking of the changing normative and existential fortunes of SAL jurisprudence.

Indeed, its demosprudence flickers to a vanishing horizon with the scandalous Bhopal judicial settlement orders, leaving large numbers of MIC infected humanity to their own estate of unconstitutional fates.<sup>10</sup> The corporate

<sup>7</sup> I rely here on my paper providing an overview of economic constitutionalism. See Upendra Baxi, *Modeling Constitutional Designs* in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (S. Khilnani, V. Raghavan & A. Thiruvengadam eds., forthcoming 2012).

<sup>8</sup> Ran Herschel, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Harvard University Press, 2004).

<sup>9</sup> LaniGuinier, *The Supreme Court 2007: Foreword: Demosprudence through Dissent*, 22 HARVARD L. R. 4 (2007).

<sup>10</sup> See Upendra Baxi, *Writing about Impunity and Environment: the ‘Silver Jubilee’ of the Bhopal Catastrophe*, 1:1 JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT 23 (2010).

Bar continues to foster similar fates for the lethal violence of agribusiness and agrochemical MNCs.<sup>11</sup> We all now remain destined to witness the demise of the rights of the working classes, which the Supreme Court so painstakingly crafted earlier. The selfsame Supreme Court now remains the chief architect of the restoration of some horrendous managerial prerogatives. More may be said in this vein, but I must here desist. I do not know how to decipher some judicially animated ways of structural adjustment of Indian judicial activism. I beg you to help me understand this titanic reversal!

Even so, the ‘foolish excellence’ of our Justices remains the best prospect there is in re-democratizing Indian governance. If any example is needed, I may only remind you of the 2G spectrum decisions. Fortunately for the nation, judicial activism Indian-style is, unlike 2G spectrum, not subject to norms of ‘first-come-first-served’ or available on ‘public auction’, although it does often appear as a form of constitutional lottery (random decisions of judicial chance)!

Our eminent Justices surely ought to extend the doctrine of public trust to their own acts of high-minded adjudicatory leadership of the nation. This may not be done by some unsecular references to Lakshman-Rekha, the bright-lines demarcating the zone of political power from the constitutionally ordained judicial review powers. Incidentally, this term also happens to be a trademark for poisoning cockroaches in kitchens! I may only hope that you may not regard judicial activism as a pestilence apt further for Monsanto-type lethal sprayers killing the idea of constitutional India and the rich heritage of new demosprudence, always a work in progress.

May I ask for a return fee from you for this Convocation Address? Please do not cause an epic loss resulting in a forfeiture of Indian demosprudence and in the same narrative vein may I also urge you to be and remain be constitutionally sincere citizens as imagined in Part IV-A of our Constitution?

In conclusion, may I recite to you a song composed by the greatest of all Bollywood composers – Naushad Sahib:

*Jeena Teri Gali Mein*  
*Marna Teri Gali Mein*  
*Marne Ke Baad Hogi*  
*Charcha Teri Gali Mein*

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<sup>11</sup> See REPORT OF PERMANENT PEOPLES TRIBUNAL CONCERNING VIOLATION OF HUMAN RIGHTS (prepared by the Agrochemicals and Agrobusiness Industry in Bangalore in early December 2011).

Love, life, joy and grief remain in the public realm from which there is simply no exit. We all remain destined to live and die in the same streets after we are gone, the *charcha*, what most postmodernists amongst us name artfully as ‘discourse’, will always follow.

No matter what kind of lawyering lives that you may wish to lead – whether the Wall Street or the streets of Athens, Damascus, Tunis or Cairo – the ‘firm’ remains insensible outside the imagination of ‘streets’.

And my constitutional aching and ageing heart allows me only to say this much to you today- in whatever you may do by way of future enterprises and experiments, please try to avoid the aspiration to preside over the liquidation of the constitutional idea of India!

This then is the import of my convocation blessings for each one of you.

Thank you for the dignity of your listening!

