

DEMOSPRUDENCE AND SOCIALLY RESPONSIBLE/RESPONSE-ABLE CRITICISM: THE NJAC DECISION AND BEYOND

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I. PREFATORY OBSERVATIONS

It is a proud privilege and great pleasure to be invited to deliver this Dr. Durga Das Basu Endowment Lecture at the West Bengal National University of Juridical Sciences ('WBNUJS'). I deeply thank Professor (Dr.) Ishwara Bhat for inviting me so graciously. He has done an inestimable service by editing Durga Das Basu's *Limited Government and Judicial Review (Tagore Law Lectures)*¹ and also in bringing together many past memorial lectures, under the provocative book titled *Constitutionalism and Constitutional Pluralism*.² The WBNUJS is indeed fortunate to have his able, scholarly, and continuing leadership.

I had the privilege of knowing Dr. Basu for a long time, although we met in person infrequently. I have grown in understanding Indian constitutionalism by reading his works all my life. I read him, as young student of constitutional law in Bombay, 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, Dr. Basu believed that "infusion of academic jurists of the right order into the highest tribunal may lead to its enrichment."³ He quotes Justice Frankfurter as once saying: "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."⁴ In jurisdictions like France and Germany, academicians are elevated to the highest court

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¹ DURGA DAS BASU, LIMITED GOVERNMENT AND JUDICIAL REVIEW (Ishwara Bhat, 2016).

² P. ISHWARA BHAT, CONSTITUTIONALISM AND CONSTITUTIONAL PLURALISM: ONE SUPREME LAW MANY COMMUNITIES, CONTEMPORARY ISSUES IN INDIA, SOUTH-EAST ASIA, CHINA, AND EUROPE (1st ed., 2013). (For further details, see BASU *infra* note 5).

³ D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. 1 47 (1990).

⁴ *Id.*

even when they have no background as lawyers.⁵ Dr. Basu, commenting on the removal of Article 217(2) writes: “Logically the omission of sub-clause (c) from Article 217(2) after having once inserted it by an 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.”⁶ The High Courts along with the Supreme Court are the only courts 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.”⁷ A judge who has “no sure foundation of constitutional jurisprudence would fail to perform the primary function of a judge of a superior court”.⁸

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.⁹ However, 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 the democratic future of India.

I still recall his warm reference to me during the dark times of the Emergency: while I had enthusiastically welcomed the progressive features of Sardar Swaran Singh Committee Report (especially the recommendation that education and land reform be placed in the concurrent list), I vehemently critiqued the 42nd Constitutional Amendment as it emerged at a public meeting chaired by Swaran Singh. *The Statesman* recorded Dr. 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 his son’s residence in Chittaranjan Park, in Delhi. It was late in the evening and it was almost his bed time. Yet, he received me with great enthusiasm and grace. He offered me some nice *sandesh* and other fine

⁵ D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. 1 238 (1990); See also, for a detailed analysis, Rabindra Pathak, *Distinguished Jurist: A Tale of a Failed Constitutional Experiment*, 1 ROSTRUM’S LAW REVIEW 145 (2014).

⁶ BASU, *supra* note 5.

⁷ *Id.*, 239.

⁸ CONSTITUENT ASSEMBLY DEBATES, Book No. 8, June 7, 1949, *speech by Prof. Shibban Lal Saksena*, 662 (1999).

⁹ In the V.D. Mahajan Memorial Lectures (delivered in 1980s but still 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.

Bengali sweets as well as 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. As a *gurudakshina*, he urged me to keep writing on legal and public matters and I hope I have not failed him. The other offering (where the University of Delhi will honour itself with the award of an honorary doctorate to Dr. Basu and Dr. Duncan M. Derrett), to my regret, could not materialise during my term of office. True to the great modern *rishi* that he was, Dr. Basu was much above these modern-day honours and afflictions.

II. LIMITED GOVERNMENT

Dr. Basu believed in the rule of law, the values of which can be secured by what he called ‘limited government’. One of the enduring 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 Constitution from “the galaxy, its predecessors and contemporaries, segregated from the wisdom of generations of political philosophers who have made research on constitutionalism as shield against absolutism”.¹⁰ 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”.¹¹ Thus, Dr. Basu may be rightfully regarded as an Indian father of Comparative Constitutional Studies (‘COCOS’).¹²

Of great importance is the notion of the Constitution as a ‘shield’ against political absolutism. Dr. Basu believed that the 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 the government are always limited by the text and context of the Constitution, which also ought to discipline the executive, the legislature, and the courts and justices. Constitutional discipline for him was respect for the Constitution in word and deed. The rulers and the ruled

¹⁰ *Supra* note 1, 56. See also P. Ishwara Bhat, *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 (2013).

¹¹ *Id.*, 57.

¹² See Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism* in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 19,24 (Oscar Vilhena, Upendra Baxi et al, 2013) presented at BISA (Brazil, India, South Africa) Conference, Courting Justice 11, Delhi (April 27-29, 2008).

alike, must respect the Constitution because it “reflects the collective will of the people”.¹³

However, the sanctity of the Constitution does not mean imperviousness to change. It is not, nor ought to be regarded “as permanent and immutable as the Ten Commandments”.¹⁴ Here, it needs to be emphasised that Dr. Basu recommended the “need for a permanent Commission for constitutional revision”.¹⁵

Dr. Basu certainly did not favour judicial amendments not provided in the Amending Article 368. He went as far as to say that *C. Golak Nath v. State of Punjab*¹⁶ diluted the constitutionally limited government by its “total uncertainty” and “uncharted judicial autocracy”.¹⁷ At the same time, he did not counsel the “continuation of Government of India Act mentality”, and 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”.¹⁸ He was of the view that if the ‘skeleton’ was borrowed from the Government of India Act, the ‘soul’ was derived from the American Constitution.¹⁹ In the unfolding of the latter, Justices use the power to invalidate legislations sparingly, lest they may 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”.²⁰

It may come as a surprise that Dr. Basu was not averse to a modicum of substantive due process or judicial invention of wholly unanticipated human and basic rights and constitutional discipline. He was of the firm view that a judiciary that overlooks the “flavour of independence and democracy” - these twin flowers of “Bill of Rights and Judicial Review” - would not be “upholding” the Constitution, per the judicial oath, but “undermining it”.²¹ Yet, this did not occur when the Supreme Court elaborated upon some unenumerated

¹³ *Supra* note 1, 46.

¹⁴ *Id.*, 65, 71-73.

¹⁵ *Id.*, 68-72; See also Upendra Baxi, *The Kar Seva of the Indian Constitution: Reflections on Proposals for Review of the Constitution*, 35 ECONOMIC AND POLITICAL WEEKLY (March 11, 2000).

¹⁶ *C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762.

¹⁷ *Supra* note 1, 613. (Dr. Basu uses these expressions in relation to the doctrine of prospective overruling, but his general point is also well captured by generalising this observation to the *Golak Nath* decision as a whole).

¹⁸ *Supra* note 1, 473.

¹⁹ *Id.*, 471.

²⁰ *Id.*, 363, quoting from *Joseph Lochner v. People of the State of New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905) (*per* Holmes J., dissenting.).

²¹ *Id.*, 473.

rights.²² Dr. Basu strove all his life to maintain a firm distinction between juridical/juristic reasoning and political reasoning. If we are to maintain his legacy, his oeuvre needs to be most carefully studied.

III. THE NJAC CASE

I would urge you all to read the case of *Supreme Court Advocates-on-Record Assn. v. Union of India*²³ ('the NJAC case'). Professor Bhat has summed up its broad features well in his learned annotations to Dr. Basu's *Limited Government and Judicial Review*.²⁴

Dr. Basu would have approved of Justice R.S. 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 on the independence of the judiciary as being "vital to real participatory democracy, maintenance of the rule of law as a dynamic concept, and delivery of social justice to vulnerable sections of the community".²⁵

There has been heavy propaganda against the Supreme Court decision invalidating the amendment and the law. However, it is wrong to say that the Supreme Court denied the plenary powers to amend the Constitution; these survive intact since *Kesavananda Bharati v. State of Kerala* ('Kesavananda Bharati').²⁶ The NJAC case merely said that the 99th Constitutional Amendment and the accompanying Act (the National Judicial Appointments Commission Act, 2015) 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 a National Judicial Appointments Commission, or a similar body, may well be held valid if it respects these constitutional conditions and conventions.

²² See *id.*, 254-268; see generally Lecture II on *The Problem of Power and the Need for Limitation*, 98-130, and Lecture IV on *Fundamental Rights as a Limitation*, 222-300, 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 which are still relevant today.

²³ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808.

²⁴ *Supra* note 1, *Note on National Judicial Appointments Commission [NJAC] Judgment*, at the opening yet unnumbered page just before the list of abbreviations, and the previous Judges Cases, as well as The Constitution (One Hundred and Twenty First Amendment) Bill, Bill No. 97-C of 2014, and the National Judicial Appointments Commission Bill, Bill No. 96 of 2014, at 48-59. See also footnote 41 on page 54 citing a 1999 Supreme Court decision applauding independence of judiciary, as a democratic virtue.

²⁵ Citing the germinal discourse in *S.P. Gupta v. Union of India*, 1987 Supp SCC 87; See also *supra* note 1, 54.

²⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

The propaganda also asserts 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.²⁷ Moreover, the Union Law Secretary’s affidavit before the Court, in the Third Judges’ Case in 1998,²⁸ itself stated that only seven out of approximately 348 recommendations were negated by the Central Government. If the system of executive nomination has worked so well, why create a change that will allow 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 citizens have 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 strictly hearsay and not ordinarily admissible in a court of law.

The most important aspect of the NJAC case 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, replete with surprise, that the issue of constitutionality of judicial recusal in certain situations is not discussed at all. But we should recall that the NJAC case 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 considered to be involved.²⁹ The institutional interest becomes, of course, engaged when there is an allegation of pecuniary bias or any other possibility of conflict of interest.³⁰ 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

²⁷ Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice*, BINGHAM CENTRE FOR THE RULE OF LAW 31, 210 ¶1.6.2 (2015).

²⁸ Special Reference No.1 of 1998, In re, (1998) 7 SCC 739 : AIR 1999 SC 1.

²⁹ Upendra Baxi, *Who will save us from Judicial Recusal?* Law and Other Things, November 2, 2015, available at <https://lawandotherthings.blogspot.in/2015/11/who-will-save-us-from-judicial-recusal.html>.

³⁰ *Id*

he had in the affected banks in *Rustom Cavasjee Cooper v. Union of India*,³¹ popularly known as the Bank Nationalisation Case. Does this stand for a wider proposition of law/convention: when parties unanimously so stipulate or agree among themselves, there is no pecuniary bias or conflict of interest?

However, it was never a matter of *lis* or constitutionality, till the advent of the decision in *Subrata Roy Sahara v. Union of India*³² ('Subrata Roy Sahara'). There, Justice Khehar (with whom Justice Radhakrishnan agreed) took the lead to confront the convention with the judicial oath of office under the Third Schedule of the Indian Constitution.³³ 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".³⁴ 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".³⁵

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 that the Judge had been scared out of the case, just by the force of the objection. A Judge before she assumes her office, takes an oath to discharge her duties without fear or favour. She would breach her oath of office, if she accepts a prayer for recusal, unless justified".³⁶ The irony is lost in the NJAC case 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 comprising Justices Anil R. Dave, Jasti Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, which was constituted by the Chief Justice of India ('CJI'). Later, Justice Anil Dave recused himself and the CJI substituted Justice Khehar as presiding judge. Apparently, Justice Dave recused himself because he became an ex-officio Member of the National Judicial Appointments Commission ('NJAC'), being the second senior most Judge after the CJI. 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

³¹ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564.

³² *Subrata Roy Sahara v. Union of India*, (2014) 8 SCC 470.

³³ The Constitution of India, Schedule III, Part IV (Form of Oath or affirmation to be made by the Judges of the Supreme Court of India and the Comptroller and Auditor General of India).

³⁴ *Subrata Roy Sahara v. Union of India*, (2014) 8 SCC 470, ¶145.

³⁵ *Id.*, ¶10.

³⁶ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 808, ¶57 (per Khehar J.).

Bench and also became a member of the NJAC; and so was the constitutional destiny of Justice Khehar and indeed all senior most Justices of the Supreme Court! In fact, all Justices whether actual or 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 Supreme Court without “fear and favour”.³⁷ Was a constitutional convention thus made subject to judicial review process and power?

In the NJAC case, Justices Chelameswar and Goel 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”?³⁸ 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.³⁹

On the wider question of institutional or official bias, enshrined by the Supreme Court itself on Indian administrative law, Justices Chelameswar and Goel 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”⁴⁰ 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”.⁴¹ This was not a “result” legally permitted by the “doctrine of necessity”.⁴²

Agreeing with the House of Lord opinions in *Dimes v. Proprietors of Grand Junction Canal*,⁴³ and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte*⁴⁴ their Lordships drew a distinction between ‘automatic’, considered (non-automatic), and conscientious recusal.⁴⁵ Justice

³⁷ *Supra* note 33.

³⁸ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, ¶28 (per Chelameswar J.).

³⁹ *Id.*

⁴⁰ *Id.*, ¶31.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Dimes v. Proprietors of Grand Junction Canal*, (1852) 3 HL Cas 759 : 10 ER 301.

⁴⁴ *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte*, (2000) 1 AC 61 : (1999) 2 WLR 272 : (1999) 1 All ER 577 (HL).

⁴⁵ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 808, ¶25 (per Kurian J.).

Kurian, however, specifically urged 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”.⁴⁶ This would also help to “curb the tendency for forum shopping”,⁴⁷ more so because (as Justice Lokur observed) judicial recusal applications are “gaining frequency”.⁴⁸ 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.⁴⁹ 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”.⁵⁰

Five categories of recusal emerge from this discourse. The *first* occurs 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.

Second, automatic recusal, 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 should be provided.

The *third* category of considered recusal, though the Supreme Court does not 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 case can be said to hold either that there is no such thing as institutional bias, or the doctrine of necessity (*i.e.* the Court must 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 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

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*, ¶65 (*per* Lokur J.).

⁴⁹ *Id.*

⁵⁰ *Id.*

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 regarding recusal and do they extend to individual lawyers, in case the Justice pleads a constitutional duty to adjudicate the matter? Finally, would a rule made by the Court and/or the legislature ever solve the issue of conscientious recusal?

The NJAC case 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 the UN-Bangalore Principles of Judicial Conduct,⁵¹ and allied regional jurisprudences? Or, should we simply affirm with Eugene Ehrlich that: “The best guarantee of justice lies in the personality of the Judge”?⁵²

IV. BETWEEN FIAT JUSTITIA AND SALUS POPULI

In their daily work, Justices do not engage with the vast literature on many philosophical approaches and notions of justice that implicitly informs their tasks of administration of justice. 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 take recourse in maxims as precepts of the law, which they hold as knowable and known—as a matter of statutory interpretation. Do these maxims then also extend to the executive and the legislature when they chose to interpret what the constitution means or does not mean in the making and unmaking of 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 the basic meaning as following the rules because obedience to the

⁵¹ Round Table Meeting of Chief Justices held at the Peace Palace, The Hague November, 2002, *The Bangalore Principles of Judicial Conduct* adopted by the Judicial Group on Strengthening Judicial Integrity.

⁵² Eugene Ehrlich, *Freie Rechtsfindung und Freie Rechtswissenschaft*, (partly translated as ‘Judicial Freedom of Decision: Its Principles and Objects’) 9 SCIENCE OF LEGAL METHOD 47, 65 (1917).

law is integral to any system of rules. Mohandas Gandhi's remarkable speech, before an English judge in Ahmedabad in 1922 reveals legalism as an ethical approach to the law.⁵³ Rules and their interpretation must be followed even as one contests these rules. 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 to the extent it existed.⁵⁴ 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, cultural, and social or human rights movements (broadly subaltern). Contexts may also be episodic or structural, contemporary or historical. One may also speak about the different levels of contexts (meta, meso, and micro) and may generally divide them into 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 the 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); and normally, what is judicially cognized and decided upon lawyers' argumentation is in the public domain and thus, open to reflection and even review.

V. SOCIAL ACTION LITIGATION AND ITS ITINERARIES

Context-sensitive justicing begins its distinctive itinerary in India through the device of Social Action Litigation ('SAL').⁵⁵ The smashing of the

⁵³ Mohandas K Gandhi, Statement in the Great Trial of 1922, available at www.gandhi-manibhavan.org/gandhicomelive/speech3.htm (Last visited on February 15, 2016).

⁵⁴ JUDITH SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* (1964); *See also* MORTIMER R. KADISH & SANFORD M KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973).

⁵⁵ The literature here is immense. *See* GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION—A HISTORY OF THE INDIAN EXPERIENCE* (1999); P. ISHWARA BHAT, *LAW & SOCIAL TRANSFORMATION IN INDIA* (2009); UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980); Upendra Baxi, *The Little Done, The Vast Undone: Reflections on Reading Granville Austin's The Indian Constitution*, 9 *JOURNAL OF THE INDIAN LAW INSTITUTE* (1967); Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH* 156, 209 (2001); Upendra Baxi, *Writing About Impunity and Environment: the "Silver Jubilee" of the Bhopal Catastrophe*, 1 *JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT* 1 (2010); Upendra Baxi, *The Justice of Human Rights in Indian Constitutionalism* in *INDIAN POLITICAL THOUGHT: A READER* 200

context (to borrow here Roberto M. Unger's battle cry for the critical legal studies movement in the USA)⁵⁶ is another beginning for (what I call) *dem-osprudence* 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 the base remains legal interpretation, or more generally legal and political hermeneutics. The tasks of interpretation, as early as Francis Lieber in 1837,⁵⁷ and more recently as Stanley Fish reminds us, are "never done and interpretation is ceaseless".⁵⁸ Legal-cum-constitutional interpretation, we should never forget, occurs on the "plane of pain and death".⁵⁹

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 movement and dependent on it and the commentariat (the media campus based and public 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 SAL, still miscalled as Public Interest Litigation ('PIL'). Since we lack a theory of *adjudicative time*,⁶⁰ it might be worthwhile to

(2010); Sandra Freedman, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (2008); GARY JACOBSON, *THE WHEEL OF LAW: INDIAN SECULARISM IN A COMPARATIVE CONTEXT* (2003); NIRAJA GOPAL JAYAL, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY* (2013); MADHAV KHOSLA, *THE INDIAN CONSTITUTION* (2012); SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM* (2009); ANUPAMA RAO, *THE CASTE QUESTION: DALITS AND THE POLITICS OF MODERN ASIA* (2009); S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2002); RONOJOY SEN, *LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND RELIGION* (2007); UJJWAL KUMAR SINGH, *THE STATE, DEMOCRACY, AND ANTI-TERROR LAWS IN INDIA* (2007); ANIURDH PRASAD & CHANDRASEN PRATAP SINGH, *JUDICIAL POWER AND JUDICIAL REVIEW* (2012); Parmanand Singh, *Enforcing Socio-Economic Rights through Public Interest Litigation: An Overview of the Indian Experience* in *SOCIO-ECONOMIC RIGHTS IN EMERGING FREE MARKETS: COMPARATIVE INSIGHTS FROM INDIA AND CHINA* 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* 121,140 (2014); UDAI RAJ RAI, *FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT* (2011); ANUPAMA ROY, *GENDERED CITIZENSHIP: HISTORICAL AND CONCEPTUAL EXPLORATIONS* (2013).

⁵⁶ ROBERTO M UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983). See ROBERTO M UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996). But see Emiliós A. Christodoulidis, *The Inertia of Institutional Imagination: A Reply to Roberto Unger*, 59 *MODERN L. REV.* 3 (1996).

⁵⁷ See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (1837).

⁵⁸ See STANLEY FISH, *DOING WHAT COMES NATURALLY, CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (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).

⁵⁹ Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 *HARVARD L. REV.* 4 (1983).

⁶⁰ I have briefly developed this theme. (See Upendra Baxi, *introduction to* MAYUR SURESH & SIDDHARTH NARRAIN, *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEOLIBERAL INDIA* (2014).

point out that what we call time is a *contradictory unity of many times*.⁶¹ There is a difference between *constituent* and *constituted time* (that is the time of constitutional founding and the time of putting constitution to work, or to sleep).

Constituted time is of course the time of adjudicative action- adjudicative time- but it is also more than that. In what does that ‘more’ consist? Does it comprise in the distinction between adjudicating the constitution and adjudicating upon a statute or quasi- judicial’ or an administrative action? The traditional boundaries in interpreting these three as separate have long been judicially overrun and redrawn in the Indian jurisprudence, and not only there, but also as we see in what follows in demosprudence.

The Indian constitutional experience and development present singular difficulties in understanding adjudicative time. This is mainly because the Supreme Court presents itself as a sole residuary legatee of the original constituent moment; thus, it ordains a doctrine of basic structure and essential features of the 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. Adjudicative demosprudential leadership is a fusion of constitutional and adjudicative time; this demands some untypical 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 Constitution. SAL processes further to develop these scripts in versatile, yet complex, and even contradictory ways.

Leaving aside the rather crucial question concerning how the Kesavananda Bharati 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 the conventional understanding of this as an “eternal yesterday” (borrowing here a phrase from Max Weber).⁶² Put starkly, SAL writes, as it were, on a clean adjudicative slate, generating in turn its very own distinctive normative/doctrinal past times.⁶³

⁶¹ See ALFRED GELL, *THE ANTHROPOLOGY OF TIME: CULTURAL CONSTRUCTIONS OF TEMPORAL MAPS AND IMAGES* (2001).

⁶² MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY: POLITICS AS A VOCATION* 26, 45 (*translated by H.H. Gerth & C.Wright Mills*, 1946).

⁶³ Delivering the 6th D.D. Basu Memorial Lecture, the former CJI S. Rajendra Babu said that not merely has the basic structure theory has stood the test of time but that the “Supreme Court has been instrumental in reinforcing democracy”, an “unparalleled contribution to the growth and sustenance of democracy”. 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,⁶⁴ SAL converts the ‘authorly’ text of the Constitution almost fully into a ‘readerly’ text. This means, 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 on the production of legal/juridical meanings of constitutional texts. But the production of social meanings is a matter of a large variety of acts of interpretation, not just juridical and legal. In fact, SAL is made possible as a continuing social and juridical reality because it entails the pre-eminence of subaltern citizen interpretation of the Constitution whose social meaning also increasingly becomes juridical and legal.

As I have said earlier we live under three prudences: legisprudence, jurisprudence, and demosprudence;⁶⁵ the latter is characterised by an era where Justices rediscover/remake people. In other words, the Supreme Court has now decided on a new role and function for itself: it decides disputes but also *co-governs the nation*.⁶⁶ Even when it does not act as a ‘super-legislator’, it does occasionally legislate, execute, and administer, proving all over again that there are no such things as strict separation of powers—otherwise a well cultivated myth about the rule of law in India and elsewhere.

VI. NEW WAYS OF SOCIALLY RESPONSIBLE CRITICISM

What does Socially Responsible Criticism (‘SRC’) consist of is indeed a vexed question. The bases of SRC are often un-articulated. I prefer

“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 executive 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):

“[the] 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”.

See Rajendra Babu, *Contribution of the Supreme Court to the Growth of Democracy in India*, 6 NUJS L. REV. 193 (2013).

⁶⁴ ROLAND BARTHES, *S/Z AN ESSAY* (translated by Richard Miller, 1975).

⁶⁵ Upendra Baxi, *Demosprudence versus Jurisprudence? The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 MACQUARIE L. J. 3 (2014).

⁶⁶ SURESH & NARRAIN, *supra* note 60.

Jacques Derrida's substitution of 'responsibility' by '*response-ability*'.⁶⁷ 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 this 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 a 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 decision or even a line of decisions; indeed, then the question is not so much what judicial power does (or does not do) but it concerns the ways in which the courts are mobilised by ethically insurgent actors and the ways in which the socio-ethical outcomes are incrementally used in the actual practices of governance of India. Talking about outcomes is also to take seriously the problematic 'symbolic' and 'instrumental' outcomes and impact studies.⁶⁸ What 'structural' critique may one learn from the 'episodic' —the triumphal narratives of the successful and the disappointments of the losing party—also remains 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-it-all principle stands now replaced by the postulate — the judicial innovation of SAL — of 'hope-and-trust' jurisdiction (notably developed by Justice P. N. Bhagwati in its foundational and charismatic phase). This displaces the view that Justices ought not to direct executive policy or shape 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.

The problem merits further discussion; yet indeed the suggestion that scholarly critics of courts state their own ideology in broad daylight and

⁶⁷ See John Llewelyn, *Responsibility with Indecidability* in DERRIDA: A CRITICAL READER (1992); David Campbell, *The Deterritorialization of Responsibility: Levinas, Derrida, and Ethics After the End of Philosophy*, 19 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 455 (1994).

⁶⁸ See Upendra Baxi, *Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions*, 24(4) JOURNAL OF THE INDIAN LAW INSTITUTE 842 (1982); Upendra Baxi, *Symbolic and Instrumental Dimensions of Impact Analysis*, presented at the International Conference on The Supreme Court of India and Progressive Social Change held at Azim Premji University (December 11-12 2015).

articulate the general principles animating their critique seems a legitimate one. SRC is a species of careful critique of the judicial performances and ways in which judges, lawyers and jurists think.

The response of the Parliament/Executive combine to adjudicatory leadership has varied over time. The initial outcries of judicial usurpation continue, though in an increasingly feeble voice. This is partly because, 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 'Who's Who' of Indian politics. No matter how Justices may proceed to decide constitutional contentions, the outcome becomes a politically appropriable resource. *Bush v. Gore*⁶⁹ 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 on the one hand and on the other some bicentennial forms of constitutional adjudication? This in turn frames contestation between ahistorical (and therefore abstractly universalising) view of what may be said after all to be the province and function of Apex Court's and the historically new formations of postcolonial (and now of course postsocialist) constitutional justicing.

We need a new basis for judging our Justices since the old ways of jurisprudence will no longer suffice. The accusation that the Courts 'overreach' presupposes is that we have a theory of judicial role and, if so, we must lay it out clearly and well. If the theory is that Justices merely declare, and not make, the law, we need to think through that normative premise. Is the distinction between 'finding' and 'making' theoretically viable? Must the judicial decision maker not make the law as a first step in order to declare it? Ought one make a distinction in Roscoe Pound's sense, between judicial law-finding and law-saying?⁷⁰ Ought Justices, as Ronald Dworkin said, not ever be even deputy legislators but remain deputies to legislature?⁷¹

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

⁶⁹ *George Bush v. Albert Gore*, 2000 SCC OnLine US SC 83 : 148 L Ed 2d 388 : 531 US 98 (2000); See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 THE YALE LAW JOURNAL 1407 (2001). (Balkin rightly 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*, 2 JOURNAL OF DEMOCRACY 18 (2007).

⁷⁰ See ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON: THREE LECTURES* (1960).

⁷¹ See RONALD DWORKIN, *LAW'S EMPIRE* (3rd ed., 1998).

when the extent and impact of such reading remains yet to be verified empirically. All that one can say (based on individual anecdotes) is 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.⁷²

VII. DEMOSPRUDENCE AND SRC

There is a new beginning for demosprudence in contemporary India. As I have said earlier, 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), while the latter is characterised 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) modes of policing asymmetric federalism
- (g) juridical pathways of combating systematic governance corruption
- (h) articulations 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? Additionally, what about backslidings also recently evident -as

⁷² For the judicial tendency till 1970 concerning Constituent Assembly Debates: see H. C. L. Merrilal, *The Soundproof Room: A Matter of Interpretation*, 9 JOURNAL OF THE INDIAN LAW INSTITUTE 521 (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).

in the Bhopal Catastrophe,⁷³ the *Suresh Kumar Koushal v. Naz Foundation*,⁷⁴ (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 the *Lily Thomas v. Union of India*,⁷⁵ 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 even harder than the task of evaluation suggested by jurisprudence. If we want our judges to listen to us, we should surely move beyond the staid academic 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.

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.⁷⁶ The seven Constitutions only provide the skeleton of

⁷³ 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?* 1 JOURNAL OF BUSINESS AND HUMAN RIGHTS 1 (2015); Upendra Baxi, *The “Just War” for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect* in RESPONSIBILITY IN WORLD BUSINESS: MANAGING HARMFUL SIDE-EFFECTS OF CORPORATE ACTIVITY 175 (2004); Upendra Baxi, *The Geographies of Injustice: Human Rights at the Altar of Convenience* in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 197 (2001) (It is a measure of time and discipline that the admirable work of K. FORTUN, *ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, NEW GLOBAL ORDERS* (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 early work of Veena Das). See Upendra Baxi, Seminar presentation at the Department of Sociology, Delhi University: *The Bhopal Catastrophe Narratives: Where Law and Anthropology Meet, but Not Quiet?* (September 4, 2015).

⁷⁴ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 : AIR 2014 SC 563.

⁷⁵ *Lily Thomas v. Union of India*, (2000) 6 SCC 224.

⁷⁶ 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 Supreme Court, including the power to annul a constitutional amendment otherwise duly made by parliament; (iv) the states’ finance capitalist constitution presaged by the Indira Gandhi constitution, via

Indian constitutionalism; the search for its soul (to use the phrase - regime of Dr. Basu) has yet to begin! This is a very rough periodisation- and all periodisation is perilous⁷⁷ - some sense of the changing socio-political profile is essential for the task.

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

Third, SRC should draw some boundaries between *judicial activism* and *judicial despotism*: the latter merely signifies the exercise of a brute will to judicial power, the former an appeal to judicial reason, constitutional values, 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 lies at the heart of demosprudence. Can justices be both creative and arbitrary? The answer seems to be clear: the basic structure doctrine is creative judicial arbitrariness, especially when we look at the internal judicial struggle in Kesavananda Bharati and its normative progeny. It was creative judicial arbitrariness to give basic human rights to transgender and uncreative judicial arbitrariness to deny these to those who have a different sexual orientation.

Fifth, 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 we need to reinvent the notion of judicial discipline itself in new

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.

⁷⁷ See for a historical perspective, Lucian Hölscher, *Time Gardens: Historical Concepts in Modern Historiography*, 53 HISTORY AND THEORY 4 (2014). He concludes his essay 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 Helge Jordheim, *Against Periodization: Koselleck's Theory of Multiple Temporalities*, 51 HISTORY AND THEORY 2 (2012).

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 significance 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.”