I am very grateful for this gracious invitation by Professor (Dr.) Indira Hirway. I did not have the privilege of friendship with her husband but the fact that he loved the law and obtained his Ph.D. degree in law at the age of 75 years indicates his ceaseless passion for learning. It again demonstrates the truth of the maxim that the love of learning never ceases; it is lifelong and spans generations as befitting an ancient civilization. This lecture series, so affectionately rededicated to his vibrant memory, valiantly celebrates the achievement of excellence in all walks of life that the Indian Constitution enshrines in constitutional and fundamental duties of all citizens mandated by Article 51-A.

The Institute for Development Alternatives in continuing the fine work, embodying the virtues that Dr. Indira Hirway is known for across the world. If patient drilling of facts at the existential level is the virtue of microeconomics, she combines it with what has been called ‘social economics’¹ which stresses, in my view at least, a commitment to ameliorate the human rights of the labouring classes. This is abundantly evidenced by her writings and public advocacy of many a lost but a just cause -- the constitutional and legal entitlements of interstate migrant workers crystallized by central and state labour laws. This, indeed, will provide a ‘real solution… so that segmentation of the labour market becomes weak,

and workers (local and migrant) get a fair and equal deal in the labour market’, ‘weaken unfair competition between local and migrant labour and enable migrant workers either to settle down in the place of destination or to go back home and make a good living there’.\(^2\)

Instead of maximizing opportunities and conditions of what the International Labour Organization has called ‘decent work’,\(^3\) central to the national agenda now seems the creation of conditions which maximize human rightlessness of dis-organized workers in the name of ‘development... It seems overlooked that masses of Indian citizens thus get buried in the new ‘pyramids of sacrifice’\(^4\). Incidentally, I do not use the expression ‘unorganized workers’ which conceals the fact that they are systematically disorganized by the forces in the state and the market.\(^5\)

I here roughly trace three debates concerning ‘rational fools’ and ‘foolish excellence’. I maintain that the Directive Principles of State Policy, Fundamental Duties of Citizens, and Human Rights embody the latter. The debate has been waged in the arenas of economic theory, and ethics and constitutionalism. But unbeknown to the economists and ethicist exponents of the discourse, such a discussion was conducted in constitution assembly of India and has continued ever since in the development and interpretation of the Constitution, particularly through notions of the ‘spirit’ of the Constitution and the precepts of the constitutional morality.

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


\(^5\) See Upendra Baxi in Debi S. Saini, (ed),, Labour law, work, and development: Essays in honour of P.G. Krishnan (....).
dominant image of the rational fool. And a most gifted philosopher of the last century Emmanuel Levinas reminded us of the virtue of ‘foolish excellence’.

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

The question I wish to raise today is just this: How may we extend the notions of ‘rational fools’ and ‘foolish excellence’ in understanding constitutionalism, law and justice? A broader frame would include legal theory and social movement, social action for change and resistance to change, and much else besides. I shall here not pursue this broader frame but limit myself to a series of discrete issues; I may not wholly 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 marks an era of ‘foolish

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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 the new India envisage a constitutional idea of India enunciated by the Constituent Assembly of India resolve the many antinomies of constitutionalism, which I identify as a play and war among four key conflicting concepts: governance, development, rights, and justice. Indeed, the Constitution of India, in its origin and development, institutionalized and deepened this conflict of four concepts! How then we may understand the ways in which our confounding Fathers (since there were very few founding mothers) sculpted the variegated forms of antinomic governance structures?

By this I mean several things familiar to those taught constitutional law—for example, the antinomies of Parts 111 and IV, the wish-list of Indian federalism driven by a vision of 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. Or, were the constitution-makers ‘rational fools’ who perfected a complicated and contradictory discourse of legitimacy of power for themselves and their successors?

‘Constitutional economics implies its other—namely, an unconstitutional economics which extends public choice theory and rational choice models

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8 Krishan Mahajan has spent nearly a lifetime in demonstrating this, but his isa voice unheard. See, for his recent publication, Legally Victimized Monuments (Chennai, Notion Press, 2018); see also the review by Upendra Baxi entitled ‘When Monuments Become Documents’. India Legal. September 8. 2019.

to the understanding constitutionalism remains an alien figure, even for the holders of degrees in juristic sciences! This is of course a heavy theoretical terrain not merely concerned with rational decision-making procedures but also with optimizing governments. We remain now told by high priests of this genre that the design, detail, and development of constitution then must always remain exposed to an ‘efficiency’ test; the ‘efficiency’ matrix is not concerned with the aspirational and cultural dimensions constitutionalism itself becomes a series of transmission of incoming and outgoing intra-system messages or devices which then need to be processed by interpretation of information. 9

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! And now it is the basic structure doctrine, and its various avatars, are perceived by the constitutional elites as a received wisdom! 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 Kesavananda Bharathi for well over twenty times and still reading on further -- I think that that it ushered in a totally new Constitution of India. Already, the basic structure doctrine has travelled far and wide in the SARRC region and beyond and this learned

9 This field is now technically known as modelling optimal constitutional design. See, Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (ed) Comparative Constitutionalism in South Asia (New Delhi, Oxford University Press, 2012).
Institute may wish in its further work the socio-economic or developmental impact of the journey of the basic structure.\textsuperscript{10}

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). Rather what we have in India today are the avatars of ‘demosprudence’. \textsuperscript{11}

When I wrote ‘Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India’,\textsuperscript{12} 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 un-constitutional fates. The corporate Bar continues to foster similar fates of lethal violence of agribusiness and agrochemical MNCs. We all now further remain destined to witness of the destruction of the demise of the rights of the working classes, which the Supreme Court so painstakingly crafted earlier. The self-same Supreme Court now remains a chief architect of restoration of some horrendous managerial prerogatives. More may be said in this vein, but I must here desist. I do not know how to

\textsuperscript{10}Upendra Baxi. ‘How to Feminize the Basic Structure Doctrine? The Elusive Futures of Women’s Rights as Human Rights’, [25th Justice Sunanda Bhandare Memorial Lecture, 29 November 2019. IIC Multipurpose Hall, New Delhi; available at academia.edu].

\textsuperscript{11}Upendra Baxi, ‘Demosprudence and Socially Responsible/Response-Able Criticism: The NJAC Decision and Beyond’, \textit{NUJS L Rev}9:153-172 (2016),

decipher some judicially animated ways of structural adjustment of Indian judicial activism. I beg you to help me understand these Titanic reversals!

Even so, the ‘foolish excellence’ of our Justices remains the best prospect there is of re-democratizing Indian governance. 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 many not be done by some un-secular 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 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 Address? Please do not cause an epic loss resulting in a forfeiture of Indian demosprudence and may I also urge you to be and remain constitutionally sincere citizens as imagined in Part IV–A of our Constitution?

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