
DEMOSPRUDENCE AND THE INDIAN SUPREME COURT: SHAPING THE CONTOURS OF THE TRANSFORMATIVE CONSTITUTION

Isha Rai & Janhvi Tripathi***

Abstract

Demosprudence, which is a term of fairly recent origin, can be summed up as democratically-oriented judicial creativity. It uses the prudence of the demos or the people to ensure that the fundamental wrongs which they were hitherto subject to are transformed into fundamental rights. In a vibrant democracy like that of India, the practice of demosprudence embodies the transformative spirit of the Indian Constitution and translates the hopes and aspirations of people into remedies for their maladies. In the recent times, there have been increasing instances of the Apex Court invoking its power to do “complete justice.” This has, in turn, paved the way for the Apex Court to ensure that the interests of the ‘people’, who are at the heart of the Constitution of India, are protected. As a result, the debate centred around demosprudence and its relationship with the Indian Constitution has intensified.

*Isha Rai is a fifth-year student at Faculty of Law, Banaras Hindu University. The author can be reached at isharai2030@gmail.com.

**Janhvi Tripathi is a third-year student at Faculty of Law, Banaras Hindu University.

This article seeks to analyse India's tryst with demosprudence in a comprehensive manner. The central theme of the article is to undertake an analysis of the contribution of the application of demosprudence by the Apex Court in shaping the ever-ephemeral contours of the Indian Constitution. For a well-rounded perspective, the problematic areas in this voyage of transformation have also been identified in this article and an attempt has been made to provide suggestions for realization of the demos-oriented prudence of the Apex Court in a better manner.

I. INTRODUCTION

In 2009, American citizenry witnessed the much-awaited Lilly Ledbetter Fair Pay Act. The legislation was a reaction to the US Supreme Court decision in *Ledbetter v. Goodyear Tyre & Rubber*,¹ denying equal work and equal pay for all sexes. The US Supreme Court nullified the verdict of the federal jury and decided on the basis of waiver of her right to sue. The decision contained a more than ordinary dissent of Justice Ginsburg. By analysing the situation of women in a male-dominated workplace, Justice Ginsburg engaged an external audience in a conversation about equal pay for equal work, which in essence amounted to *courting* the people to reverse the decision of the majority and limiting the effect thereof. Her oral dissent proved as an alarm for the social activists, legal advocacy groups, media translators and legislators. While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real

¹*Ledbetter v. Goodyear Tyre & Rubber*, 550 U.S. 618 (2007).

target was the legislature.² Justice Ginsburg's fervent plea thus paved the way for the Fair Pay Act. This instance was a fine expression of demosprudence, or, *democratically-oriented jurisprudence* in its germinal form. Demosprudence, a term coined by Guinier and Torres, is an idea of collaborative enterprise between institutional elites- whether judges, legislators and lawyers- and the ordinary people.³ In the aforementioned case, Justice Ginsburg did so by creating a space for the citizens to advance an alternative argument of law.⁴

The term, though of recent origin, is in practice in the Indian Supreme Court while it marches towards the quest of transforming the society using the tool of transformative constitutionalism. Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy.⁵ Transformative Constitutionalism is the ability of the Constitution to adapt and transform with the changing needs of times. It implies a departure from Victorian notions and affirms that the Constitution should be viewed as embodying hopes and aspirations of the society in which it was framed.

In this backdrop, this article presents a picture of the obvious relationship between the demosprudential exercise of power by the Apex Court and the transformative character of the Constitution. The article has been divided into VII parts. In Part II, having briefly sketched the outline of the idea, the Indian Constitution's tryst with demosprudence has been explored. Part III deals with the tools employed by the Apex Court to achieve the task of transformation through the Indian Constitution. These tools have of late played a major role in shaping the contours of current discourse in

²Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARVARD LAW REVIEW 437, 444 (2013).

³*Id.*

⁴*Id.*

⁵Navtej Singh Johar. v. Union of India, (2018) 10 S.C.C. 1 ¶ 97.

constitutional law by creative judicial intervention in the domain of the other two branches of the government. Drawing its life-breath from the preceding section, Part IV briefly enumerates the instances where the Apex Court has displayed demosprudential leadership and interpreted constitutional provisions in a new light to add the element of social significance to the task of transformation. Part V addresses the discordant notes in this demosprudential exercise of power. Part VI consists of the recommendations of the authors to minimize the friction in the aforementioned exercise of power. Ultimately, in Part VII the authors have offered concluding remarks.

II. TRANSFORMATIVE CONSTITUTION: INDIA'S TRYST WITH DEMOSPRUDENCE

The Indian Constitution is an organic document. Owing to this nature, it has now become a tool for the transformation of the social and legal structures which existed at the time when it was drafted. The notions of “*justice, liberty, and equality*” have become the touchstone on which the validity of laws is tested, and further course of action is arrived upon. In recent times, the core value of constitutionalism is in the driving seat of this wagon while demosprudence constitutes its wheels. While Guinier focuses on the rhetoric of judicial opinions and their pedagogical role while laying down the foundation for demosprudence in her writings,⁶ the concept has been taken by the Indian jurists⁷ to mean the creative judicial role which the Apex Court has been playing since the post-emergency era.

⁶*Supra* note 2.

⁷Upendra Baxi, *Demosprudence and Socially Responsible/Response-able Criticism: The NJAC Decision and Beyond*, 9 NUJS L. REV. 153 (2016).

Demosprudence, in contrast with legisprudence and jurisprudence, concerns courts' role of 'co-governing' the nation. Though not a super-legislator, the Court momentarily *legislates, administers and executes*.⁸ Demosprudence serves to make formal institutions more democratic by looking at law-making from the perspective of informal democratic mobilizations and disruptive social movements.⁹

The democracies make and interpret the law by expanding, informing, inspiring and interacting with the community of consent. This community of consent in constitutional terms is better known as 'we, the people'.¹⁰ The Apex Court practices demosprudence through the means of Constitutional provisions,¹¹ be it directing the executive to take action¹² or compelling Parliament to enact laws.¹³ This has led to the reposing of faith by the middle class into the judiciary to remedy their maladies and other social evils.¹⁴ The Apex Court, by shifting away from jurisprudence and towards demosprudence, is becoming more democracy-oriented.¹⁵ The dynamic relationship among courts, political branches, and the public¹⁶ is required to be maintained in order to realize the transformative spirit of the Constitution.

In the practice of courting the people, the court is guiding and is being guided by the *demos*. In the construction of *demos*, the Court prioritizes on doing justice or mitigating injustice. Shaping the

⁸*Id.*

⁹*Id.*

¹⁰Indian Const. Preamble.

¹¹Indian Const. art 32, 141, 142 and 144.

¹²Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 S.C.C. 1.

¹³Vishakha v State of Rajasthan, A.I.R. 1997 S.C. 3001.

¹⁴*I'll Be Judge, I'll Be Jury*, 42 ECONOMIC AND POLITICAL WEEKLY 1315, 1316 (Apr. 14-20, 2007).

¹⁵Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies* (Annual Tony Blackshield Lecture delivered at Macquarie Law School, Macquarie University, 21 October 2014).

¹⁶B Ray, *Demosprudence in comparative perspective*, 47 STANFORD JOURNAL OF INTERNATIONAL LAW 111 (2011).

contours of a transformative constitution becomes possible when judges move beyond the horizons of doctrines and principles.¹⁷ This is evident from the recent examples of favouring the long-denied rights of the weaker sections of the society¹⁸ or gender minorities,¹⁹ and the Ayodhya verdict²⁰ in which the court has tried to strike a balance between the entitlement of the majority and the feelings of the minority being wronged at the hands of the former.

The Constitution's vision is about achieving a social transformation that seeks to place the individual at the forefront of its endeavors, by transforming the content of the law.²¹ This conferment of rights against the State is transformative in both the senses as it brings about alteration in the content of the law and also achieves the goal of social transformation. These instances of adjudicative leadership demonstrate the manner in which the Apex Court has adopted a people-centric approach and works to realize the ideals of a transformative constitution.

Demosprudence, or 'jurisprudence of social movements',²² therefore, aims at bringing the voices of non-elites into the discourse about emancipation through the constitution. The tools for securing this emancipation have been discussed in Part III of this article.

¹⁷L Guinier, *The Supreme Court 2007 term: Foreword: Demosprudence through dissent*, 122 HARVARD LAW REVIEW 4 (2008).

¹⁸Indian Young Lawyers Association v. The State of Kerala, W.P (Civil) No. 373 of 2006; Joseph Shine v. Union of India, (2018) S.C.C. Online S.C. 1676.

¹⁹Navtej Johar v. Union of India, (2018) 10 S.C.C. 1.

²⁰M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.

²¹Kalpana Mehta v. Union of India, (2018) 7 S.C.C. 1.

²²*Supra* note 17.

III. TOOLS OF ADJUDICATIVE LEADERSHIP

A. *Demosprudential Dissent*

A ‘dissenting opinion’, as an expression for an intended audience, can be a powerful pedagogical tool. A democratic voice in the form of dissent re-examines the source of democratic authority of ‘legal elites.’ Elections, though a technique for legitimatizing law-making, are not the only way citizens should hold a relationship with the laws that they are being subjected to. An active participation in the form of deliberations is pre-requisite for a vibrant democracy. “*We, the people*” in the constitutional setup is a community of consent that should be expanded, informed and inspired to address the democratic intuition. When the backbone of social movement, i.e., non-elites and ordinary people, start flavouring interpretations of the Constitution and the statutes, democracy actually comes into life.²³

Prof Guinier indicated three levels of demosprudential dissent.²⁴ On the first level, it dives into substantive concerns about democratic legitimacy, accountability, and structure. On the next level, it departs from conventional scrutiny about the fouls of majority and offers an alternative interpretation of the set of facts. On the final level, it facilitates the non-judicial actors to revisit the conclusions formed by the majority. This unconventional style of dissent not only teaches but also scouts the community to carry forward the march.²⁵

What distinguishes demosprudential dissent from an ordinary one is its commitment to the ‘democratic process’ by attempting to disperse the governance in the hands of many than few. The aspiration to do so comes from the notion of the court’s legitimacy, based on the

²³Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 154 (2004).

²⁴*Supra* note 17.

²⁵*Dred Scott v Stanford*, 60 U.S. 393 (1857).

community's faith in the institution and its judgments. This further rests upon the ability of the same to engage the non-judicial actors in the active democratic process of making, interpreting and implementing the law. A dissenting judge, from a demosprudential perspective, is rather an activist for democracy.

A demosprudential dissent, obviously lacking the force of law, is more of a democratic than judicial activism. It provides breathing space for the citizens to allow alternative interpretations of the law. The aspired effect, however, depends upon the ability of the dissenter to engage the audience. In spite of that, it still is an effective tool to broaden and limit the authority of justices along with making the law-making more transparent and democratically accountable.

In the Indian scene, although dissent is termed as the safety valve of democracy,²⁶ the practice of demosprudence through dissent is at a nascent stage with one-off instances like *Shayara Bano v. Union of India* ("**Triple Talaq**")²⁷ and *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors.* ("**Sabarimala**").²⁸

B. Tool of Constitutional Morality

The notion of constitutional morality in the recent past has played the role of filling the gaps - which sometimes exist, and other times are deliberately created. Constitutional morality means to bow down to constitutional norms and not act in a manner which would become violative of the rule of law or reflective of action in an arbitrary manner.²⁹ It plays a crucial role in countries where written

²⁶Romila Thapar v. Union of India, (2018) 10 S.C.C. 753.

²⁷Shayara Bano v. Union of India, (2017) 9 S.C.C. 1.

²⁸Indian Young Lawyers Association & Ors. v. State of Kerala & Ors., (2019) 11 SCC 1.

²⁹Manoj Narula v. Union of India, 2014 (9) S.C.C. 1, ¶ 74-76.

constitutions are based on the consent of people.³⁰ It significantly influences the maintenance and advancement of the rule of law.³¹

No matter how wonderfully a Constitution is written, circumscribed interpretation is needed to fulfill the ambition of subscribing to the ideal of democracy. In the absence of constitutional morality, the operation of the Constitution, no matter how carefully written, tends to become arbitrary, erratic, and capricious.³²

Morality, generally based on the concept of popular morality, has been used as a premise of many Indian laws. Apart from subscribing to some kind of morality, this has acted as a tool to conveniently divorce itself with the other two types, whether popular or societal. For instance, in January 2019, the Apex Court rejected “*morality*” as a ground for restriction of dance by women in eating houses or permit rooms or beer bars.³³ The court emphasised that “*a practice which may be immoral by societal standards cannot be thrust upon the society as immoral by the state with its notion of morality and thereby exercise social control.*” Further, in the *Naz foundation* case,³⁴ the Delhi High Court had declared section 377 of the Indian Penal Code as unconstitutional and did not accept the contention regarding ‘popular morality.’ Justice Shah put it as, “if there is any type ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.”³⁵ However, this

³⁰Bruce P. Frohnen & George Carey, *Constitutional Morality and the Rule of Law*, 26 JL & POL 497, 498 (2010-11).

³¹Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case Note on The Naz Foundation Judgment*, 2 NUJS L Rev 445, 450 (2009).

³²André Bételle, *Democracy and its Institutions 1 of Constitutional Morality* (Oxford University Scholarship Online 2012).

³³Indian Hotel and Restaurant Association (AHAR) v. The State of Maharashtra, Writ Petition (Civil) No. 576 of 2016.

³⁴*Naz Foundation v. Govt. of NCT of Delhi*, (2009) S.C.C. Online Del 1762: (2009) 111 DRJ 1.

³⁵*Id.* at 36.

was overruled by the Apex Court.³⁶In 2018, the Apex Court explained the nature of constitutional morality *as a check on popular morality and as a principle promoting a pluralistic and inclusive society while clinging to different standards of constitutionalism*.³⁷ It can, therefore, be asserted that the protection of minority interests, an essence of democracy, is sailing in the lap of constitutional morality and demosprudence.

As a matter of fact, democracy rests on a delicate balance between the rule of law and rule of numbers. Populism invokes the principle of numbers; constitutionalism, of legality.³⁸ The Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to citizenry remains unperturbed.³⁹ A legal system, as a dynamic phenomenon, works only when a balanced approach has been adopted by the legal elites. The popular notion of morality is antithetical to individual dignity and human rights.⁴⁰ Only the Constitution protects a society of plural cultures as it does not preach any religious theocracy or dormant ideology.⁴¹

No matter how sacred the adjective is, it still cannot change the stigma of uncertainty attached to morality. The moot question of where a line has to be drawn must be answered only by the legislature. In a written constitution, there should be a minimum dependence on constitutional morality. Invoking this principle frequently would result in the nullity of laws like obscenity and sedition. To prevent disbalance between the legislature, executive and

³⁶Suresh Kumar Koushal v. Naz Foundation, (2014) 1 S.C.C. 1.

³⁷Navtej Johar v. Union of India, (2018) 10 S.C.C. 1, ¶ 603.

³⁸*Supra* note 32.

³⁹Government of NCT of Delhi v. Union of Indian & Another, (2018) 8 S.C.C. 501.

⁴⁰*Id.* at ¶188.

⁴¹*Id.*

judiciary, the prudence of demos should guard what the morality of ‘we, the people’ is.

C. *Basic Structure Doctrine*

‘We, the people’ while entrusting ourselves with the sacred document called the Constitution of India, vested in it the dreams, aspirations, and vision of the world’s largest democracy. Though with the passage of time, the Constitution has gone through many changes, the guardian of the Constitution has not let the soul of the Constitution be changed. An unalterable basic structure has rescued the democracy from sabotaging the spirit of the Constitution. In adverse times, the doctrine provides a breathing space for demos to constantly struggle for the recognition of new features as the basic structure and defend the old one. In a grim prospect of democracy, the Court’s push against the majoritarian excess was a break in *Kesavananda Bharati v. State of Kerala* (“**Kesavananda Bharti**”)⁴² and by introducing constitutional limits to the abuse of power by the state government in *S. R. Bommai v. Union of India* (“**Bommai**”)⁴³ has done the same. Though not frequently invoked, the doctrine even today is a potent shield for the aspirations of the constitutional community.

Originally devised for checking the validity of the constitutional amendments, the basic structure doctrine now influences all matters of public decision. This, in turn, shatters the limits of judicial actions, consequently shaping the role of the executive and legislature. It is no more unethical. Demosprudence establishes a democratic communication between the judiciary and the other two wings. It has been entrusted with the responsibility of maintaining the spirit of

⁴²*Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

⁴³*S. R. Bommai v. Union of India*, [1994] 2 S.C.R. 644.

society which will eventually perish if the society evades its responsibility by thrusting upon the courts the nurture of it.⁴⁴

IV. RULING THROUGH PRINCIPLES

Governance, being a rule-bound affair, is limited by the text and context of the Constitution.⁴⁵ After the *Kesavananda Bharati*⁴⁶ case, a political consensus was arrived at by the court to act as a co-equal branch of the State. The journey was carried forward by the *Maneka Gandhi v. Union of India* (“*Maneka Gandhi*”)⁴⁷ case by re-interpreting the right to life and liberty to include both procedural and substantive due process. Public Interest Litigation or Social Action Litigation in the late 1980s⁴⁸ emerged as a related development on the same lines.

What distinguishes political from juridical is that a judicial decision with proper cognizance and argumentation remains in public domain, open to reflection and review. In the past three decades, Demosprudence has found expression in the form of judicially invented human rights, such as the right to privacy⁴⁹ and the right to food,⁵⁰ creation of new jurisdictions like epistolary⁵¹ and curative petition,⁵² enforcement of remedies,⁵³ meeting exigencies of the situation by binding policies and principles until a similar law is

⁴⁴HAND, THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (Irving Dilard ed.), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York 1960).

⁴⁵*Supra* note 7.

⁴⁶*Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

⁴⁷*Maneka Gandhi v. Union of India*, (1978) S.C.R. (2) 621.

⁴⁸*S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

⁴⁹*K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1.

⁵⁰*PUCL v. Union of India*, (2007) 12 S.C.C. 135.

⁵¹*Sunil Batra v. Delhi Administration*, A.I.R. 1980 S.C. 1579; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 S.C. 802.

⁵²*Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 S.C.C. 388.

⁵³*Ujjam Bai vs State of U.P.*, (1963) 1 S.C.R. 778.

passed⁵⁴ and monitoring already adopted policies by Central and State government.⁵⁵ From 1950 to 1973, the Indian judiciary did not act as social entrepreneurs but only as legalists. However, after the era of substantive due process,⁵⁶ the court has rather acted as a legatee of constitutional democracy.⁵⁷

A. *Factors Contributing to the Rise of Judiciary*

The approach in earlier cases was a judicial review on limited grounds of *mala fides*.⁵⁸ The following factors can be said to have contributed to the rise of judicial co-governance:

- Parliamentary inability to meet the vision envisaged by framers of the Constitution.
- Relatively shorter sessions of Parliament to consider issues of prominence
- Frequent by-passing of the Constitutional safeguards by the legislature and executive
- Splintered composition of the Parliament
- Absence of any effective opposition
- Executive pre-occupied with security and policy matters, having little time to focus on finer aspects

⁵⁴Vishakha v State of Rajasthan, A.I.R. 1997 S.C. 3001; L.K. Pandey v. Union of India, A.I.R. 1986 S.C. 272.

⁵⁵Samaj Parivatana Samudaya v. State of Karnataka, (2013) 8 S.C.C. 154 (A committee was constituted by Supreme Court for monitoring sale of iron ore by e-auction); See also, Common Cause v. Union of India, (2017) 9 S.C.C. 857.

⁵⁶Maneka Gandhi v. Union of India, 1978 S.C.R. (2) 621.

⁵⁷*Supra* note 11.

⁵⁸Tata Cellular v. Union of India, A.I.R. 1996 S.C. 11.

- Absence of exogenous political forces in the rigorous judicial tests of relevance makes it more responsive than the other two branches.⁵⁹

B. Demosprudence as Co-Governance

By issuing guidelines to the other two branches, the Apex Court has become a ‘court of good governance’⁶⁰ that remedies the shortcomings of the representative institutions.

C. Demosprudence and Legislature

a) Filling the voids

In *Vishaka v. State of Rajasthan*⁶¹ and *Lakshmikant Pandey v. Union of India*,⁶² the Court issued guidelines in cases where no law existed for guiding the law enforcement agencies. Passive Euthanasia⁶³ met the same fate by the pronouncement regarding a *living will* and guidelines to prevent its misuse. After the genesis of Public Interest Litigation in *S.P. Gupta v. Union of India*⁶⁴ all matters are now within the protective umbrella of the Apex Court by virtue of the ‘complete justice’ provision.⁶⁵

b) Carrying batons of reform

⁵⁹Donald L. Horowitz, *The Courts and Social Policy* 22 (1977).

⁶⁰Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009), http://openscholarship.wustl.edu/law_globalstudies/vol8/iss1/2.

⁶¹*Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241.

⁶²*Lakshmikant Pandey v. Union of India*, A.I.R. 1984 S.C. 469.

⁶³*Common Cause v. Union of India*, Writ Petition (Civil) No. 215 of 2005.

⁶⁴*S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

⁶⁵Indian Const. art 142.

By striking down the age-old practice of *Triple Talaq*,⁶⁶ decriminalising consensual gay sex⁶⁷ and adultery,⁶⁸ the Court has been performing the task of imparting justice, and more importantly, gender justice. The issue of mob lynching was sought to be tackled in *Tehseen Poonawalla v. Union of India*,⁶⁹ by asking the parliament to enact a law, directing preventive and remedial measures.

c) Human rights enforcement

The Court has operationalized the principles of the Preamble, Directive Principles of State Policy⁷⁰ and the right to constitutional remedies⁷¹ in instances like directing the Municipal authorities to perform their functions,⁷² issuing directions for compulsory teaching of lessons in schools for protection of natural environment⁷³ or furthering “constitutional patriotism” by directing singing of national anthem in cinema halls.⁷⁴

As a result of numerous petitions and PILs on issues ranging from health hazards in an industry,⁷⁵ medical care for workmen⁷⁶ and prohibiting smoking in public places,⁷⁷ Right to Health was included in Article 21 as a necessary pre-condition for a dignified life. Reading together Articles 21, 39 (e), 47 and 48A, the substantive content of

⁶⁶*Supra* note 27.

⁶⁷*Navtej Johar v. Union of India*, (2018) 10 S.C.C. 1.

⁶⁸*Joseph Shine v. Union of India*, 2018 S.C.C. OnLine S.C. 1676.

⁶⁹*Poonawalla v. Union of India*, Writ Petition (Civil) 754 of 2016.

⁷⁰Indian Const. Part IV.

⁷¹Indian Const. art 32.

⁷²*L.K. Koolwal v. State of Rajasthan*, A.I.R. 1988 Raj 2.

⁷³*MC Mehta v. Union of India*, Writ Petition (Civil) 4677 of 1985.

⁷⁴*Shyam Narayan Chouksey v. Union of India*, A.I.R. 2018 S.C. 357.

⁷⁵*Consumer Education and Research Centre v. Union of India*, (1995) 3 S.C.C. 42.

⁷⁶*Paschim Banga Khet Mazdoor Samity v. A.I.R.* 1996 S.C. 2426.

⁷⁷*Murli Deora v Union of India*, (2001) 8 S.C.C. 765.

this right has been expanded and guidelines have been issued in various cases to guarantee this right.⁷⁸

D. Demosprudence and the Executive

a) Monitoring committees

In the construction of *demos*, the Court prioritizes doing justice or mitigating injustice rather than working on strict legal principles as professed by jurisprudence. Pragmatism and activism have been adopted to pave the way to justice.⁷⁹ Resultantly, access to the court⁸⁰ was granted as a basic human right providing epistolary jurisdiction to the Court. Fact-finding commissions⁸¹ can now be appointed to establish facts and make recommendations,⁸² so that the Court can proceed with issuing interim orders and directions in the form of continuing mandamus.⁸³

b) Delivering environmental justice

For the past two decades, the Court has taken several bold steps by passing directions to prevent and control the pollution of the Ganga River,⁸⁴ implementing forest conservation laws,⁸⁵ protecting the fragile coastal regulation zone,⁸⁶ bringing quarrying operations to a halt,⁸⁷ directing the closure of polluting industries,⁸⁸ directing the

⁷⁸Consumer Education and Research Centre v. Union of India, (1995) 3 S.C.C. 42; Noise Pollution (I), in re v. Union of India, (2005) 5 S.C.C. 727.

⁷⁹*Supra* note 15.

⁸⁰Indian Const. art 32.

⁸¹Manohar Lal Sharma vs The Principal Secretary, (2014) 9 S.C.C. 516.

⁸²Paramjit Kaur v. State of Punjab, (1999) 2 S.C.C. 131.

⁸³Vineet Narain v. Union of India, 1996 S.C.C. (2) 199.

⁸⁴MC Mehta v. Union of India, (1988) 1 S.C.C. 471.

⁸⁵T.N. Godavarman v. Union of India, (2001) 10 S.C.C. 645.

⁸⁶S Jagannath v. Union of India, (1997) 2 S.C.C. 87.

⁸⁷Rural Litigation Entitlement Kendra v. State of UP, (1985) 3 S.C.C. 614.

⁸⁸MC Mehta v. Union of India, (1987) 4 S.C.C. 463.

switching of commercial vehicles from fuel to CNG in order to improve the air quality,⁸⁹ issuing a writ of mandamus to Central and State governments for complying with its directions for speedy and effective execution of the Interlinking of Rivers project⁹⁰ and stopping deforestation⁹¹ across the country. The Court has evolved unconventional remedies, including the concepts of ‘Constitutional Tort’,⁹² ‘pollution fine’,⁹³ and imposing exemplary damages on the polluters. The Court has also evolved a number of principles and doctrines, including the polluter pays principle,⁹⁴ the principle of “*Absolute Liability*”,⁹⁵ the principle of sustainable development, and the Public Trust Doctrine,⁹⁶ to ensure the wholesomeness of the environment.

In the *M.C. Mehta v. Union of India* (“*Taj Trapezium*”)⁹⁷ case, a new ‘labour environmental jurisprudence’ was evolved for the protection of the ancient monument ordering closure and relocation of coal/diesel-using industries. Right from the *Municipal Council, Ratlam v. Shri Vardichand et al.* (“*Ratlam Municipality*”)⁹⁸ to the recent orders to control pollution caused by stubble burning,⁹⁹ the Supreme Court has been doing its bit to maintain the ecological balance, at times even pulling up the agencies¹⁰⁰ responsible for

⁸⁹M.C. Mehta vs Union of India, Writ Petition (Civil) 13029 of 1985.

⁹⁰In Re: Networking of Rivers, Writ Petition (Civil) NO. 512 OF 2002.

⁹¹MC Mehta v. Kamal Nath, (2000) 6 S.C.C. 213.

⁹²MC Mehta v. Union of India, A.I.R. 1987 SC 1086.

⁹³*Supra* note 92.

⁹⁴Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 S.C.C. 212.

⁹⁵*Supra* note 93.

⁹⁶*Supra* note 92.

⁹⁷M.C. Mehta v. Union of India, (1997) 2 S.C.C. 353.

⁹⁸Municipal Council, Ratlam v. Shri Vardichand et al., (1981) 1 S.C.R. 97, 100.

⁹⁹Krishnadas Rajgopal, *SC asks Punjab, Haryana, U.P. to end stubble burning immediately*, THE HINDU (Nov. 04, 2019, 11:14 AM), <https://www.thehindu.com/news/national/to-save-delhi-supreme-court-bans-stubble-burning-in-punjab-haryana-and-uttar-pradesh/article29880089.ece>.

¹⁰⁰Per J. Krishna Iyer, *Municipal Council, Ratlam v. Shri Vardichand et al.*, (1981) 1 S.C.R. 97, 100.

maintaining the balance. The latest additions in this list are the moves of the blanket ban on crackers,¹⁰¹ putting a stay on the cutting of trees in the Aarey colony in Maharashtra¹⁰² and the direction of holding entire State administration, police mechanism and even the gram panchayats responsible¹⁰³ in event of even a single instance of stubble burning in order to seek an immediate halt to stubble burning in the states around Delhi to improve the worsening air quality index.

c) Recent social reforms

Firstly, the Apex Court has played a crucial role in the culmination of exercise of preparation of a National Register of Citizens in Assam by monitoring the publishing as mandated by the Assam Accord of 1985.¹⁰⁴ To ensure fairness, a division bench in 2018 monitored the release of a new draft.¹⁰⁵

Secondly, in the recently concluded *Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors.* (“*Babri Masjid-Ram Janmabhoomi*”) title suit,¹⁰⁶ the Supreme Court made use of the ‘complete justice’ provision¹⁰⁷ to direct the Centre to allot a suitable plot of land measuring 5 acres to the Sunni Central Waqf Board to make good its loss of the structure of a mosque. This step goes a long way in preventing the feelings of

¹⁰¹Arjun Gopal v. Union of India, Writ Petition (Civil) No. 728 OF 2015.

¹⁰²PTI, *Don't cut anymore trees, says SC on Mumbai's Aarey*, THE ECONOMIC TIMES (Nov. 09, 2019, 10:16 AM), economictimes.indiatimes.com/articleshow/71473965.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

¹⁰³*Supra* note 101.

¹⁰⁴Assam Sanmilita Mahasangha v. Union of India, (2015) 3 S.C.C. 1.

¹⁰⁵Assam Public Works v. Union of India and others, Writ Petition (Civil) No .274 OF 2009.

¹⁰⁶M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.

¹⁰⁷Indian Const. art 142.

minority being wronged and maintaining the ‘composite culture’¹⁰⁸ of India.

V. RECENT TRENDS AND PROBLEMATIC AREAS

The path of demosprudence in India has run into troubled waters in recent times. A number of problematic areas which deserve the attention of the Apex Court have been brought to light.

A. *Contradictory Stances*

The same court often takes contradictory stances on a similar set of facts before it. An apt example of this can be that of the ambiguity shrouding the ‘Essential Religious Practices’ test. The consistent application of this principle in an inconsistent manner has led to the creation of more problems than solutions. The seven-bench decision in *The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar* (“*Shirur Mutt*”)¹⁰⁹ case, holding that “*what are essential religious practices should be left to be determined by religious denomination itself*”¹¹⁰ is in conflict with the five-judge bench in *Durgah Committee, Ajmer vs. Syed Hussain Ali*.¹¹¹ In the latter instance, the court accorded to itself the role of distinguishing between ‘religious practices’ and extraneous ‘superstitious beliefs.’ The apparent conflict between the two decisions has prompted the suggestive reference¹¹² of the *Sabarimala* women entry case¹¹³ to a larger bench for

¹⁰⁸Indian Const. art 51 A (f).

¹⁰⁹*The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar*, (1954) S.C.R. 1005.

¹¹⁰*Id.*

¹¹¹*Durgah Committee, Ajmer vs. Syed Hussain Ali*, A.I.R. 1961 S.C. 1402.

¹¹²*Kantaru Rajeevaru v. Indian Young Lawyers Association*, 2019 S.C.C. OnLine S.C. 1461.

¹¹³*Indian Young Lawyers’ Association v. State of Kerala*, Writ Petition (Civil) No. 373 of 2006.

reconsideration, which would also shape discourse regarding the entry of Muslim women in a durgah¹¹⁴ and essentiality of female genital mutilation in Dawoodi Bohra community of Gujarat.¹¹⁵

B. The Gap between Theory and Practice in the Area of Co-Governance

Although *bona-fide* criticism of a judgment is permissible, but the Constitution still places a non-negotiable obligation on all the authorities to enforce the judgments of the Apex Court.¹¹⁶ In the *Sabarimala* review-petition case,¹¹⁷ Justice Nariman voiced his concern over this non-compliance and directed the State of Kerala to give wide publicity to the judgment and devise modalities for compliance while striking a balance between lasting peace and human dignity.

In 2014, a study was conducted in the Udaipur town of Tripura, which revealed gross violations of the Noise Pollution (Regulation and Control) Rules, 2000.¹¹⁸ The Tripura High Court¹¹⁹ treated a letter by some students to be a writ petition and hauled up the police and state administration for this blatant violation and non-implementation. Recently, in July 2019, the Apex Court issued notices to the Centre, National Human Rights Commission and state governments on a

¹¹⁴Kantaru Rajeevaru vs Indian Young Lawyers Association, Writ Petition (Civil) No. 472 of 2019.

¹¹⁵Sunita Tiwari vs Union of India, Writ Petition (Civil) No.286 of 2017.

¹¹⁶Justice Nariman, Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.

¹¹⁷Kantaru Rajeevaru v. Indian Young Lawyers Association, 2019 S.C.C. OnLine S.C. 1461.

¹¹⁸Viki Das et al., *Evaluation of Noise Pollution: A Case Study of Udaipur, Tripura, India*, 03 INTERNATIONAL JOURNAL OF ENGINEERING RESEARCH & TECHNOLOGY (2014).

¹¹⁹Court on its own motion v. State of Tripura & Ors, Writ Petition (C) (PIL) 03 of 2013.

plea¹²⁰ seeking implementation of the Apex Court's 2018 guidelines to prevent incidents of mob lynching.¹²¹

No matter how fascinating the concept of co-governance is, it will not be wrong to assert that there exists a substantial gap between theory and practice. However, the road of filing contempt petitions is not a viable solution as in many cases, the violation is not brought to the court's notice. The limitations of an overworked and understaffed executive in India should also not be overlooked by the judiciary.

C. Lack of Clear Norms in the Exercise of Demosprudence

The judges and their judgments are being influenced by the psychological and sociological stimulus of facts. The very essence of the creative is its novelty, and hence we have no standard by which to judge it.¹²² The recent manifestation of these contradictory stances can be cited as the contradiction between the court's stance in cases where the minorities have been ensured their long-denied rights in cases such as the triple talaq case,¹²³ Sabarimala women entry case,¹²⁴ and the decriminalisation of Sections 377¹²⁵ and 497¹²⁶ of the Indian Penal Code on one hand, and on the other hand, the Ayodhya title dispute suit¹²⁷ which is an obscured vindication of majoritarian faith and beliefs.

The difference in the stance is plainly visible when the court on one hand remarks that, "*title cannot be established on the basis of faith*

¹²⁰Express News Service, *Prevention of lynching: SC notice to Centre, 10 states on implementing guidelines*, INDIAN EXPRESS, (Nov. 09, 2019, 11:36 AM), <https://indianexpress.com/article/india/prevention-of-lynching-sc-notice-to-centre-10-states-on-implementing-guidelines-5855473/>.

¹²¹Tehseen Poonawalla v. Union of India, Writ Petition (Civil) 754 of 2016.

¹²²Everett Rogers, *Diffusion of Innovations*, 351 (4 ed. Free Press 1995).

¹²³Shayara Bano v. Union of India, (2017) 9 S.C.C. 1.

¹²⁴Indian Young Lawyers' Association v. State of Kerala, (2019) 11 S.C.C. 1.

¹²⁵Navtej Johar v. Union of India, (2018) 10 S.C.C. 1.

¹²⁶Joseph Shine v. Union of India, (2018) 2 S.C.C. 189.

¹²⁷M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das & Ors., (2020) 1 S.C.C. 1.

and belief above.”¹²⁸ Yet, it proceeds to say, “*Once the witnesses have deposed to the basis of the belief and there is nothing to doubt its genuineness, it is not open to the court to question the basis of the belief...Whether a belief is justified lies beyond ken of judicial inquiry.*”¹²⁹

*D. Reluctance towards Transparency and Resultant Lack of
Institutional Faith*

The Apex Court’s tryst with transparency has always been a troubled area. The outlook of the judiciary on the issue of transparency in its working can be gauged from the fact that an appeal from the Delhi High Court’s judgment¹³⁰ on the issue of whether all information on the appointment and assets of judges can be put out in the public domain and whether Chief Justice of India was a ‘public authority’ under the Right to Information Act, was kept pending for almost a decade. Even after all this time, when the Apex Court finally let the disinfectant of sunshine¹³¹ into its well-guarded premises in *CPIO v. Subhash Chandra Agarwal*,¹³² by holding the Chief Justice of India to be a ‘public authority’, it was done with certain riders. Concerns about the right to information being used as a tool of surveillance were expressed in the judgment and the test of proportionality and legitimate State interest¹³³ was directed to be applied in order to adjudge whether the information could be disclosed under the Act. Further, there is no pronouncement about the working of the collegium system in an open manner. Transparency will do well to

¹²⁸*Id.* ¶ 788.

¹²⁹*Id.* ¶ 555.

¹³⁰Supreme Court of India Vs. Subhash Chandra Agarwal (2009) 162 DLT 135.

¹³¹Swapnil Tripathi v. Supreme Court of India, (2018) 10 S.C.C. 639.

¹³²CPIO, Supreme Court of India v. Subhash Chandra Agarwal, 2019 S.C.C. OnLine S.C. 1459.

¹³³K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

enhance the faith of the public in the institution and will in turn lead to efficiency.¹³⁴

A chink in the armor of judicial independence appeared in the recent past through the lone dissent of Justice Chelameswar in *Supreme Court Advocates-on-Record – Association v. Union of India* (“*NJAC*”),¹³⁵ where he expressed his concern over the issue whether the judiciary had really outgrown the malady of dependence or merely transferred it from the political to judicial hierarchy.¹³⁶ Recent episodes of allegations against the Chief Justice of India, the opacity in the in-house investigation¹³⁷ and the refusal to re-open the exercise of preparation of National Register of Citizens in Assam despite the patent irregularities¹³⁸ have led to the erosion of trust of the public in the revered institution of the Apex Court.

The tremors of the ill-practices prevailing in the judicial system were felt even at the institutional level when the four senior-most justices organized an ‘extraordinary’ press conference in January, 2018 and listed a number of problems that ailed the institution and put democracy to peril, one of them being the allocation of sensitive matters to hand-picked benches.¹³⁹

¹³⁴CPIO, *Supreme Court of India v. Subhash Chandra Agarwal*, 2019 S.C.C. OnLine S.C. 1459 (J. Saniv Khanna).

¹³⁵*Supreme Court Advocates-on-Record – Association v. Union of India*, (2016) 5 S.C.C. 1.

¹³⁶*Id.*

¹³⁷Japnam Bindra, *In-house probe panel clears CJI Ranjan Gogoi in sexual harassment case*, LIVEMINT (Nov. 07, 2019, 05:14 PM), <https://www.livemint.com/news/india/sc-inquiry-panel-dismisses-complaint-of-sexual-harassment-against-cji-gogoi-1557144334119.html>.

¹³⁸*Assam Public Works vs Union of India*, Writ Petition (Civil) No. 274 of 2009.

¹³⁹Michael Safi, *India's top judges issue unprecedented warning over integrity of supreme court*, (Nov. 29, 2019, 10:16 PM), <https://www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra>.

E. Attempt to Define ‘Constitutional Morality’

The court has mounted on a wagon of transformation through adjudication and delivered a considerable number of verdicts¹⁴⁰ in which the discriminatory practices prevailing in the society were sought to be weeded out through the tool of constitutional morality. Constitutional morality is essentially the crux or the core principle which can, in an alternative vocabulary, be called the ‘grundnorm’ in Kelson’s Pure Theory of Law, which too defies any straitjacketed formula for its determination.

In *Kantaru Rajeevaru v. Indian Young Lawyers Association* (“*Kantaru Rajeevaru*”),¹⁴¹ one of the terms of reference is about the need to delineate the contours of the expression “*morality*”, lest it should become subjective.¹⁴² However, if a definition is given, it will circumscribe the working of the Apex Court in this direction. The decision on this reference will also decide the fate of marital rape, women’s entry in mosques¹⁴³ and the constitutionality of restitution of conjugal rights provision of the Hindu Marriage Act, 1955. These issues might take an even longer time to be decided as they will remain pending until the determination of questions referred to the larger bench. It is submitted that while there appears a need to weed out the subjectivity associated with these concepts; it is the spirit of the constitutional community that should pave the way for the Court in this endeavor.

¹⁴⁰*Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1; *Navtej Johar v. Union of India* (2018) 7 S.C.C. 192; *Joseph Shine v. Union of India*, (2018) 2 S.C.C. 189.

¹⁴¹*Kantaru Rajeevaru v. Indian Young Lawyers Association*, 2019 S.C.C. OnLine S.C. 1461.

¹⁴²*Id.*

¹⁴³*Kantaru Rajeevaru v. Indian Young Lawyers Association*, Writ Petition (Civil) No. 472 of 2019.

F. Pick-and-Choose Policy

Of late, the adjudicative leadership has drawn much flak from the academia on account of the over-zealousness shown by the Courts and their ‘pick and choose’ policy in the exercise of demsprudence. While long-forgotten rights are being ensured to the people on the one hand, the ambiguous status of personal laws¹⁴⁴ and their relationship with fundamental rights, the unnerving silence on the Uniform Civil Code despite the fervent pleas as to its enactment,¹⁴⁵ and the blurring distinction between the executive and judiciary on the other have become causes of concern. Aggravating these concerns is the judicial evasion towards deciding politically charged cases, be it declining to order probe into corruption allegations in *Manohar Lal Sharma v. Narendra Modi* (“**Rafale**”)¹⁴⁶ citing the limited scope of judicial review or the abdication in Kashmir habeas corpus petition¹⁴⁷ and refusing to take into account the human rights implications of the lockdown in the valley.

G. Substantial and Technical Justice

The Apex Court on one hand is zealous to do justice in substance by innovating remedies and on the other hand, invokes technical grounds to turn a blind eye to injustices that are being perpetrated. Two instances of this practice by the Apex Court have been described below:

¹⁴⁴Krishna Singh v. Mathura Ahir, A.I.R. 1980 S.C. 707 at 712; Maharishi Avadhesh vs. Union of India, 1994 S.C.C. Supl. (1) 713; Ahmedabad Women Action Group v. Union of India, (1997) 3 S.C.C. 573.

¹⁴⁵Sarla Mudgal v. Union of India, A.I.R. 1995 S.C. 1531; Lily Thomas v. Union of India, A.I.R. 2000 S.C. 1650.

¹⁴⁶Manohar Lal Sharma v. Narendra Modi, (2019) 3 S.C.C. 25.

¹⁴⁷ANI, *Supreme Court adjourns J&K Habeas Corpus petitions till December 6*, THE INDIAN EXPRESS (Nov. 29, 2019, 10:26 PM), [newindianexpress.com/nation/2019/nov/29/supreme-court-adjourns-jk-habeas-corpus-petitions-till-december-6-2068935.html](https://www.newindianexpress.com/nation/2019/nov/29/supreme-court-adjourns-jk-habeas-corpus-petitions-till-december-6-2068935.html).

a) *Pollution fine*

Attempting to impose ‘Pollution Fine’¹⁴⁸ instead of granting compensation or exemplary damages to the victims is a move to import a component of criminal jurisprudence into civil proceedings. The Apex Court here is trying to function as the highest criminal court it will left with little time to perform its primary function.

b) *National register of citizens conundrum*

The recent exercise of directing the preparation of an NRC in Assam and monitoring its preparation is an example of usurpation of executive power by the Apex Court. With its denial to re-open the exercise of preparation of National Register of Citizens in Assam despite the patent irregularities, the Apex Court has left the excluded citizens at the whims of Foreigners’ Tribunals which are shockingly bereft of judicially-trained members.¹⁴⁹ The Apex Court is the guardian of the Constitution, and in turn, the people. Without a guided exercise of power, if the perpetrator of these wrongs is the Apex Court itself, where will the remedy to the wronged lie?

VI. SHIFT TOWARDS DEMOSPRUDENCE FROM JURISTIC PRUDENCE: GUIDING LIGHT

In this article, the authors have traced the stance of the court which has undergone a sea change in the post – *Maneka Gandhi* era. There has been a marked departure from the seemingly static notion of

¹⁴⁸MC Mehta v. Kamal Nath, (2000) 6 S.C.C. 213.

¹⁴⁹Faizan Mustafa, *Kangaroo tribunals: Foreigners’ Tribunals almost another arm of BJP government in Assam*, THE INDIAN EXPRESS(Nov. 07, 2019, 01:46 PM), <https://indianexpress.com/article/opinion/columns/supreme-court-foreigners-tribunals-assam-nrc-6058158/>.

juristic prudence, which calls for adjudication through a set of concrete principles, towards a more flexible notion of demosprudence. However, this shift has revealed a few problematic areas which have been addressed in the foregoing part of the article. To address these problems, a few suggestions are being put forward by the authors.

- i) The desperate attempt to impart justice has left the court with no option but to delve into matters which were out of its realm for the sake of protecting democracy. However, in the absence of any fixed judicial policy, the court is caught up between substantiality and technicality of justice. These incongruities call for a judicial policy befitting the court's plenary power to do justice-both substantial and complete. This would minimize the potential abuse of judicial discretion.
- ii) Non-compliance with the orders of the court is yet another evil that plagues the judiciary. To do away with the lackadaisical attitude of the bodies entrusted with the authority to enforce these orders, courts must seek compliance reports on its own orders and penalties must be prescribed for non-filing of a compliance report or furnishing reasons for non-compliance within a stipulated timeframe. A special bench should be constituted for speedy disposal of contempt cases arising out of non-compliance.
- iii) Demosprudence has the potential of being abused to become a 'democracy by elites'. The judiciary must accept and appreciate the natural limitations of the institution and exercise some modicum of self-imposed restraint on the exercise of judicial power.
- iv) There is a need for structural division in the Apex Court benches for the proper division of judicial time to tackle the humongous backlog and delay in decisions. The revival of the

social justice bench of the court, which is currently defunct according to the new roster of the Apex Court, would be a welcome step.

- v) As argued by Stuart Mills, the foundation of democracy is not merely about the protection of individual rights in a negative sense but includes the promotion of active participation in public life. The best antidote to judicial supremacy is an active role of the constitutional community. This would legitimize the process of judicial activism by tempering ‘professional reason’ with ‘people-oriented prudence’. People’s participation can be ensured not only by the executive, but also by the institution of judiciary by delivering laconic but well-reasoned and easily comprehensible judgments. These judgments would be available in the public domain and this would, in turn, build up a base for ensuring the participation of demos in transforming the society in the real sense.

Although the above suggestions are not conclusive in nature, they can form the first step towards ensuring an all-accommodative and balanced exercise of demosprudential leadership of the court.

VII. CONCLUSION

The point of the discourse in the article is to illustrate the importance of the practice of demosprudence in the contemporary constitutional society that has pinned its hopes on the principle of transformative constitutionalism for realizing its long-desired goals. It must be remembered that courts alone are not the voice of change. They are only an institution for the ratification of social change, which comes from within the society. Demosprudence is the driving force behind the transformation of the constitutional community through the very document that is its *raison d’être*.

The practice of demosprudential dissent enhances its authority by shifting from silent acquiescence to speech. Talking in moral terms rather than a legal analysis, it reaches a larger audience to understand the implications of the majority view. The litmus test for an institution based on consent and popular majority is how gracefully it adopts the disagreements. The practice of demosprudence is warranted especially when the hyper-active Apex Court lacks a clear judicial policy. The wisdom of people should be the guiding force of the professional reason of the judges departing from their adjudicative task and chasing justice- which is an amorphous concept in itself.

Responsibility is better understood as “response-ability.” The court is responsible to the people because it has the ability to respond to their pleas. But the frequent invocation of the *parens patriae* jurisdiction of the court has bred chaos. The courts must be mindful of the fact that there is no “complete” definition of “complete justice”. The need of the hour is to realize where to call a halt to the wagon of “*transformation*” lest it should not become “*annihilation.*” Liberalism demands tolerance. Any approach, howsoever liberal it is, falls flat for the lack of tolerance in society. Societal change should follow the bottom-up trajectory of evolution and should not be brought about in a revolutionary top-down manner.

The possible arguments that can be contemplated against demosprudence are, in our opinion, fallacious. The exercise of adjudicative leadership circumscribed by well-defined principles, judicial accountability and the judges’ sense of self-restraint tempered with judicial propriety has the capacity to make the justice delivery system even better equipped to perform the transformative task that has been entrusted on the guardian of the constitution by the greatest law of the land itself.

A transformative Constitution is a document that ignites in our hearts the hope of a society where the mind is without fear and the head is held high. It should be remembered that the achievements we

celebrate today are only the opening of avenues of greater achievements that await us. The Apex Court will have to ensure that it withstands “*the great tides and currents which engulf the rest of men*”, both internally as well as externally.¹⁵⁰ India can ill-afford the government of judges¹⁵¹ lest the ideas of transformation through demosprudential leadership should become a Frankenstein’s monster that would devour the very reason for its existence- the *demos*.

¹⁵⁰Kevin James, *A Year After Four SC Judges' Press Conference, Is Democracy Still in Danger?* THE WIRE (Nov. 19, 2019, 09:46 AM), <https://thewire.in/law/supreme-court-judges-press-conference-one-year>.

¹⁵¹Anurag K Agarwal, *Judicial Legislation and Judicial Restraint*, 46 ECONOMIC AND POLITICAL WEEKLY 22, 24 (January 1-7, 2011).