

THE RUNAWAY JUDGMENT: LAW AS LITERATURE, COURTCRAFT AND CONSTITUTIONAL VISIONS

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Court judgments are a compelling genre to engage with – they puzzle and they punish; they enforce and they entertain. Using insights from scholarship on law-as-literature, an attempt is made to inquire into ways in which judgments may be read and how different readings might be relevant for legal practice. Examples of constitutional interpretation by the Supreme Court in India are used to demonstrate how judgments are instrumental in the shaping of public discourse, through speaking to multiple audiences. By looking at judgments perceived as “suffering” from literary excesses or judges whose writing was criticised for being revolutionary but “unnecessarily” verbose, it is argued that judgments are to be read taking judicial observations seriously – as expressions of constitutional visions that are built up over time. The rhetoric in a judgment may also create a legal legacy of its own, even if a suitable remedy is not obtained in a particular case where it is employed. This Article explores the idea that judgments are public documents and that they are read by multiple audiences and different readers might arrive at different readings, all of which are equally valuable. Finally, unlike a literary or a philosophical text, a judgment records the taking away of someone’s life and liberty. As we read judicial texts, it is important to note not only who constitutional language accommodates, but also its absences, omissions and silences.

I. INTRODUCTION

Judgments are a challenging genre of writing to engage with. They puzzle and they punish, they enforce and they entertain. A thousand lines of judicial text often states too little; ten lines, too much. Although

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written by legal experts in technical language, both the reason and consequence of judgments is for a general audience. Guidelines on judgment writing have, therefore, traditionally emphasized simplicity and clarity.¹ A judgment is berated when it slips up, inserting explicit judicial observations on society, economy and polity or commenting on the moral degradation of the citizens under its care. When reading a judgment, a first year law student is taught to distinguish between the *ratio decidendi* or the part of the judgment that has value as a legal precedent and the *obiter dicta*, which is everything else. We are taught to disregard the latter. Thus begins our instruction in the black letter law tradition; in our understanding of laws as merely rules. I will use “judicial observations” in the Article to refer to comments, remarks, citations and statements that the judges make in relation to the case at hand, but which appear irrelevant to the “legal” questions.² Very often, these observations are mistaken as courts indulging in policymaking. This

¹ There are several well known expositions on this topic. See generally Richard Posner, *Judges' Writing Styles (and do they matter?)*, 62 U. CHI. L. REV. 1421, (1995); see also Michael Kirby, *On the Writing of Judgments*, 64 AUSTL. L. J. 691 (1990); see also Justice Sunil Ambwani, *Writing Judgments: Comparative Models*, Presentation at the National Judicial Academy, Bhopal (2006), available at <http://districtcourtallahabad.up.nic.in/articles/writing%20judgment.pdf> (“It is no longer prudent to write a long and verbose judgment, with uncontrolled expressions and citations”); see also Justice T.S. Sivagnanam, *The Salient Features of the Art of Writing Orders and Judgments*, Tamil Nadu State Judicial Academy, Chennai (2010), available at <http://www.hcmadras.tn.nic.in/jacademy/articles/IA%20Particular%20ABJ%20Sec%2047%20CPC%20and%20EA%20under%20O21%20CPC.pdf> (“Judges should see that their pronouncements are judicial in nature and do not normally depart from sobriety, moderation and reserve. They should refrain from being sarcastic in their judgments. The language of the judgment should be entirely devoid of anything approaching factiousness. Be precise, make your sentences short and adopt simple language.”); see also Justice B.G. Harindranath, *Art of Writing Judgments*, Karnataka Judicial Academy (2004) (“What is the most important component of good judgment writing? To my mind, it is clarity. If your ideas are clear then you will be able to express them clearly. Unclear judgments are likely to be long-winded, indistinct, pretentious, and boring”).

² BLACK'S LAW DICTIONARY 1102 (8th ed. 2004) (defining “obiter dicta”); P. RAMANATHA AIYAR, ADVANCED LAW LEXICON 3272 (2005) (defining both “obiter dicta” and “obiter observation”)(I include both in the term “judicial observation” as opposed to a “ruling” or a “direction” in a judgment, which are considered part of binding precedent.

Article attempts to redeem such judicial observations in the text of a judgment, but also goes further in order to see the possibilities for a practice of law that arise from regarding judgments as literature. Although the idea that judicial *opinions* can be read as a form of social commentary is by now fairly well established, as students of law, we continue to read and comment upon judgments in the classroom only as interpreting a statutory or constitutional provision or settling the dispute between parties.³ This Article attempts to arrive at a formulation of how this might be done differently. The judgments of the Indian Supreme Court (“the Court”) are perhaps a more interesting case than most to explore this question. Not only does it deal with numerous and diverse cases, its judgments often are a testament to its involvement in the everyday public and private lives. I take up the example of constitutional interpretation, as it is instrumental in the shaping of public discourse and speaks to multiple audiences. These judgments may be read not merely as judicial orders directed at the parties in the case but as writing that inspires, creates and shapes textual and actual realities

³ A contemporary institutional history of Indian courts may well draw upon such judgments, as it has been in the case of colonial court cases.); see e.g. PARTHA CHATTERJEE, *A PRINCELY IMPOSTER? : THE STRANGE AND UNIVERSAL HISTORY OF KUMAR OF BHAWAL* (2002); see generally Mattison Mines, *Courts of Law and Styles of Self in Eighteenth-Century Madras*, 35 MOD. ASIAN STUD. 33 (2001); see generally Neil Brimnes, *Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor's Court in Late Eighteenth Century Madras*, 37 MOD. ASIAN STUD. 513 (2003); see generally Matthew Groves, *Law, Religion and Public Order in Colonial India: Contextualising the 1887 Allahabad High Court Case on 'Sacred' Cows*, 33 S. ASIA: J. S. ASIAN STUD. 87 (2010); Excellent accounts of the working of the Indian Constitution exist in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* (Rajeev Bhargava ed., 2008), *INDIA'S LIVING CONSTITUTION* (R. Sudarshan et al. eds., 2005) and *GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (1999) (although scholarship exclusively on the politics surrounding a Supreme Court judgment is rare.); A recent book-length attempt for a single judicial decision is T.R. ANDHYARUJINA, *THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF THE STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT* (2011). Judicial autobiographies have also often referred to the dynamics behind a particular decision. See e.g. FALI S. NARIMAN, *BEFORE MEMORY FADES* (2010); see generally LEILA SETH, *ON BALANCE* (2003) (discussing the politics behind *ADM Jabalpur v. Shivakant Shukla* A.I.R. 1976 S.C. 1207).

of governments and citizens.⁴ This Article takes up the July 2011 judgment in the case of *Nandini Sundar v. State of Chhattisgarh*⁵ (alternatively referred to as “the Salwa Judum judgment”) as its starting point, given the extraordinary attention paid to the judicial observations in this case. To further explore this idea, it also uses the text of various well-known judgments on Fundamental Rights by the Court and the observations made in those cases, some of which were considered “unnecessary”. This Article highlights two dimensions to these “runaway” judgments. First, I describe ways in which they can be read to articulate constitutional visions at a particular point in the Court’s history – its place and importance vis-à-vis its public. Second, I note that its reading by multiple audiences may create possibilities to formulate strategies by which laws and courts can be a site for resistance and empowerment. The cases selected in this Article are merely illustrative, and meant only to serve as a template for a similar analysis with other judgment texts.

In pointing to the use of judicial observations, this Article benefits greatly from the insights provided by the law and literature movement. One of its aspects – law *as* literature – considers law to be capable of being subject to the kind of critique that literature is, by identifying the use of rhetoric, the construction of narratives (in a trial, by lawyers, and by the judge) and so on.⁶ Part II of this Article draws from the fact that judicial opinions indulge in a particular kind of

⁴ In an Indian context, see Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIA L. INST. 1, 5 (1993).

⁵ (2011) 7 S.C.C. 547.

⁶ See e.g. GUYORA BINDER, LAW AND LITERATURE, JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM (Michael Groden et al eds., 2006) (For a good historical survey of the history of the law and literature movement in the United States); Kenji Yoshino, *What’s Past is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471, 472 – 477 (1994); Some of the prominent texts of the law and literature movement in the United States includes JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973); Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J. L. & HUMAN. 1 (1988); RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); Jane Barron, *The Rhetoric of law and literature*, 26 CARDOZO L. REV. 2273 (2005). Scholars that have engaged with law-as-literature in the Indian context include Lawrence Liang, *In the Field of Pain and Death: Law, Literature and Violence*

storytelling about “the” constitutional matter at hand— the cast, the motives and the moral of the story being discernable from the kinds of facts presented in the beginning of the judgment, the framing of the legal issues pointing towards the heroes and villains and the final ruling determining who would “pay” for the violation of established rules of societal conduct. At the Court, the chain novel is attempted to be written, very often based on the judicial observations made in a case.⁷ Part III discusses how the rhetoric in judicial observations creates a legacy all its own, even when the remedies offered by the Court are unsatisfactory. They provide an opportunity to hone legal strategies for those attempting to secure remedies through courts, or look for opportunities outside of the law. This Article explores the idea that judgments are public documents read by multiple audiences. The focus is on the value of these readings for a practice of law. By “practice”, I imply lawyering in and around courtrooms, classrooms and social movements i.e. similar to what Baxi refers to as cultural software around constitutions.⁸ I want to emphasize that what is at issue is neither literary form nor aesthetics of judgment writing or individual judges’ styles, which may quite possibly form the potential subject matter of another Article. This question is only briefly considered in the final Part.

II. NANDINI SUNDAR AND CONSTITUTIONAL VISIONS

Filed as a public interest litigation (PIL) petition in 2007 by Nandini Sundar, Ramachandra Guha and EAS Sharma, all eminent

(NLSIU Seminar Course Materials *available at* <http://www.altlawforum.org/education/law-literature-and-violence/in-a-field-of-pain-and-death-syllabus>); Maya Dodd, (*See Archives of Democracy* (Ph.D. Dissertation, Stanford University, 2006); Jaya Nandita Kasibatla, *Constituting the Exception: Law, Literature and the State of Emergency in Postcolonial India* (Ph.D. Dissertation, Duke University, 2005); Rajeswari Sunderrajan, *Secularism and Citizenship in India: A View from Literature*, Paper presented at the first LASSnet Conference (2009); Shrimoyee Nandini Ghosh, *The Erotics of Helplessness: Reading the Case of the Bombay Bar Girls*, Paper presented at the first LASSnet Conference (2009).

⁷ The chain novel idea is discussed in RONALD DWORKIN, *LAW’S EMPIRE* 228 - 238 (1986).

⁸ Uppendra Baxi, *Outline of a Theory of Practice of Indian Constitutionalism* in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 100, 101 (Rajeev Bhargava ed., 2008).

scholars and publicly engaged citizens, *Nandini Sundar* expressed concerns with the state-sponsored terror campaign known as the Salwa Judum against Naxalites in Dantewada in Chhattisgarh, India.⁹ The petition directed the Court's attention to the legislative framework, under the cover of which these activities were being carried out. The provisions of the Chhattisgarh Police Act, 2007 (enacted two years after the campaign ostensibly began) were more broad-ranging than that of the central Indian Police Act, 1861. Under both laws, provisions existed for the appointment of locals as special police officers (SPO). Unlike the Indian Police Act, where SPOs are only to be appointed in case of temporary disturbances (such as a riot or an unlawful assembly), and only for the pendency of the emergency, the Chhattisgarh Act did not specify any such circumstances, nor did it specify what qualifications one must possess before one could be appointed as an SPO.¹⁰ The petition argued, *inter alia*, that the Salwa Judum campaign comprised a large number of SPOs appointed in this fashion, and that the appointments had to be quashed.

The initial petition, in challenging the appointment of SPOs, also recorded the violence carried out by the Salwa Judum, the police and the paramilitary forces posted in the region, and the large scale internal displacement of villagers that had occurred as a result. The

⁹ For a historical anthropology of the region where the Salwa Judum campaign has been conducted, see generally NANDINI SUNDAR, *SUBALTERNES AND SOVEREIGNS: LEGAL GROUNDS AND NATURAL RESOURCES, IDENTITY AND THE LAW IN JHARKHAND* (2009) and Nandini Sundar, *Bastar, Maoism and Salwa Judum*, 41 ECO. & POL. WKLY. 3187 - 3191 (2006); see also K. Balagopal, *People's War and the Government: Did the Police Have the Last Laugh?*, 38 ECO. & POL. WKLY. 513, 519 (2003). For a popular, (and controversial) recounting of the Chhattisgarh situation, see Arundhati Roy, *Walking with the Comrades*, OUTLOOK, (Mar. 23, 2010), <http://www.outlookindia.com/article.aspx?264738>; and its rejoinder in Anirban Gupta Nigam, *Moonwalking with the Comrades*, <http://kafila.org/2010/03/23/moonwalking-with-the-comrades>. For a comprehensive overview of the petitions themselves, see Nandini Sundar, *Pleading for Justice*, http://www.india-seminar.com/2010/607/607_nandini_sundar.htm (The petitions and many of the documents submitted to the Court are available at <http://sanhati.com/>).

¹⁰ § 17, Police Act, 1861 and § 9, Chhattisgarh Special Police Act, 2007.

foremost remedy sought by petitioners from the Supreme Court was that the security of the villagers in Dantewada be protected, and that the appointment of unemployed tribal youth as SPOs be stopped, as both were violations of constitutional provisions. Commencing in April 2008 and until May 2011, benches of the Supreme Court had received sworn written testimony and heard arguments from both parties, addressed a number of fact-finding reports, and received extracts from police diaries and government documents as documentary evidence. In April 2008, the Court ordered an inquiry by the National Human Rights Commission. The report was submitted in August 2008 and supported the petitioners' allegations, although the findings were scattered and unsatisfactorily explained. Even after repeated orders by the Court to the police to register first information reports in the event of any violence from either the Naxalites, or the security forces, and to evacuate schools and hospitals which were being used as "relief" camps, there was little or no indication that the situation in Dantewada had improved. Finally, in July 2011, Justices SS Nijjar and Justice Sudershan Reddy ruled that the appointment process was unconstitutional, and that the Salwa Judum be disbanded immediately.¹¹

While the decision was widely acclaimed, much ink was spilt on condemning the judicial observations on the ill-effects of globalization and of the state's alleged hypocrisy in issuing "tax break after tax break" to multinational companies, while not guaranteeing basic human security to the villagers in Dantewada.¹² Chastising the

¹¹ *SC judgment on Salwa Judum will impact anti-Naxal operations*, INDIA TODAY, (July 27, 2011), <http://indiatoday.intoday.in/story/sc-verdict-on-salwa-judum-to-affect-anti-naxal-operations/1/146255.html>; Aman Sethi, *Face of Salwa Judum killed in Maoist Ambush in Chhattisgarh*, THE HINDU, (Feb. 11, 2012), <http://www.thehindu.com/news/national/article2879769.ece?homepage=true> (However, since a review petition has been filed by the Central Government, there have been disquieting reports about the state of affairs in Chhattisgarh).

¹² *Joseph Conrad in Chhattisgarh*, MINT, (July 6, 2011), <http://www.livemint.com/2011/07/06221040/Joseph-Conrad-in-Chhattisgarh.html>; Arun Jaitley, *Can courts enforce ideology?*, OUTLOOK, (July 14, 2011), <http://www.outlookindia.com/article.aspx?277663>; Tarunabh Khaitan, *A Six Pack Judiciary*, THE TIMES OF INDIA, (July 10, 2011), http://articles.timesofindia.indiatimes.com/2011-07-10/special-report/29757860_1_supreme-court-judges-cases-naxal; see also Kalpana

government for its “muscular and violent statecraft”, the judgment indicts the “wielder of power” for the Salwa Judum campaign which violated the notions of “innate human dignity”. Citing Joseph Conrad’s *Heart of Darkness*, it places the blame for the Chhattisgarh conflict squarely on the violence of neoliberal economics. While the Court admittedly does prefer a particular notion of what development should entail, (“a culture of unrestrained selfishness and greed spawned by the neoliberal paradigm”), the judgment sought to frame the situation in Chhattisgarh not merely as an individual civil liberties problem, but as one of collective human security. In its own words, armed rebellion or violent politics is rooted in “socio-economic circumstances, endemic inequalities, and a corrupt social and state order that preys on such inequalities”.

These observations become useful and important as the judgment links them up to the values underlying the Constitution. Pointing to the Directive Principles, the judges note the importance of sustainable development and equitable distribution of natural resources, both “principles fundamental in the governance of the state”. *Nandini Sundar* is hardly the first case to carry out this exercise. The Directive Principles of State Policy in the Constitution, which were considered unenforceable in courts at the time of drafting, have been used, particularly post *Minerva Mills v. Union of India*,¹³ by constitutional courts in India to determine the scope and content of Fundamental Rights. Some of the more important judgments in this case were delivered by the Court in the 1980s, addressing the question of socio-economic rights – the non-implementation of poverty alleviation measures, labour rights violations and environmental degradation. Early prominent examples include *Bandhua Mukti Morcha v. Union of India*¹⁴

Kannabiran, *Development, Justice and the Constitution*, THE HINDU, (July 27, 2011), <http://www.thehindu.com/opinion/op-ed/article2296451.ece>.

¹³ A.I.R. 1980 S.C. 1789 (stating that the Fundamental Rights and the Directive Principles both together demonstrate the Constitution’s commitment to a social revolution and as such, forms part of the basic structure).

¹⁴ A.I.R. 1984 S.C. 802.

and the *MC Mehta* cases.¹⁵ The judges in this case were following a well-established method of interpreting constitutional provisions.

The phrase that the judges use in this context is “cannon fodder”, emphasizing the condition of many SPOs who were also victims of violence. A lack of equitable distribution of public goods such as human security was evident to the Court in this case. Taking recourse to an oft-cited line from *Kharak Singh v. State of Uttar Pradesh*¹⁶ (and later *Francis Coralie v. Administrator Union Territory of Delhi*¹⁷) that the right to life did not entail a “mere animal existence”, the judges also stated that the SPOs faced risks incommensurate with their training, the appointment itself violated the right to life. Although the original petition had demanded the appointments be invalidated because many of the SPOs were below the age of eighteen, the judges ruled that the entire process was unconstitutional. Arming tribal youth without their “informed consent” is to violate their dignity as individual citizens as well as an erosion of dignity of human life in general. Thus, judicial observations on the state of social inequality were central to understanding why the Court considered Articles 14 and 21 violated in this case.

In the *Nandini Sundar* case, the Court frames the sustainable use of natural resources as an integral aspect of human security. A transgression of these norms in the Chhattisgarh situation, according to the Court, constituted violations of the state’s obligation to ensure human security. The petition alleged the violation of Articles 14 and 21 not just in reference to the appointment of SPOs, but to the situation in Dantewada as a whole.¹⁸ Thus, the discussion on the

¹⁵ *M.C. Mehta v. Union of India* A.I.R. 1988 S.C. 1037 (ordering the closing of tanneries discharging their effluents into the river Ganga); *M.C. Mehta v. Union of India* A.I.R. 1997 S.C. 734 (issuing directives for the protection of the Taj Mahal from environmental degradation); *M.C. Mehta v. Union of India* (2002) 5 SCALE 538 (directing public transport buses in Delhi to be environment-friendly).

¹⁶ A.I.R. 1963 S.C. 1295.

¹⁷ A.I.R. 1981 S.C. 746.

¹⁸ Scholars agree that the broader reading of Article 21, vis-à-vis the other Fundamental Rights, may be traced back to the decision of the Court in *Maneka Gandhi v. Union of India* A.I.R. 1978 S.C. 597.

disproportionate impact of government policies on peoples is relevant because it makes the collective impact of conflict clear. In ruling that the appointments were unconstitutional, the Court used this background to make a number of interesting arguments about constitutional visions – and citizens, as individuals and as a collective. The judgment records how the dignity of individuals and the human security of the collective are at the heart of constitutionally guaranteed rights. As far as Chhattisgarh is concerned, these statements are based on estimations of the situation in Chhattisgarh and upon the various submissions made along the same lines by the Planning Commission (2008), the National Commission on Women (2005) and the National Commission for the Protection of Child Rights (2007), among others.¹⁹ Hence, while the economics or philosophy behind particular theories of development in this judgment may be less than satisfactorily discussed, these judicial observations reveal a commendable effort by a court to flag the structural causes of political violence.

The Court also had to rule on the question of whether Chhattisgarh was a state of exception, as the Central and State governments claimed, where extra-constitutional measures would have to be adopted. Should human security be subject to military exigencies in such times? Stating that the Constitution was not a pact for “national suicide”, at many points, the Court recognizes that extremist violence would have to be countered through enhanced law enforcement. However, a situation like the one in Chhattisgarh was not to be addressed through hiring SPOs, which was meant to be only

¹⁹ Reports by non-governmental organizations on the situation in Dantewada provide details of these atrocities. See generally HUMAN RIGHTS WATCH, BEING NEUTRAL IS OUR BIGGEST CRIME: GOVERNMENT, VIGILANTE AND NAXALITE ABUSES IN INDIA'S CHHATTISGARH STATE (2008); ASIAN COMMISSION FOR HUMAN RIGHTS, THE ADIVASIS OF CHHATTISGARH: VICTIMS OF THE NAXALITE MOVEMENT AND THE SALWA JUDUM CAMPAIGN 1 (2006); Independent Citizens Initiative, *War in the Heart of India: An Enquiry into the Ground Situation in Dantewara District, Chhattisgarh*, (July 20, 2006), available at http://sanhati.com/wp-content/uploads/2010/10/independent-citizensinitiative_dantewara_2006.pdf; see also PUDR letter to Prime Minister on breakdown of constitutional order in Chhattisgarh, <http://sanhati.com/articles/2171/>.

a temporary measure. Outlining the socio-economic causes of the Chhattisgarh conflict enabled the Court to counter the state of exception arguments. The judgment restricted the scope of activity for SPOs to immediate relief activities or traffic regulation, but not in any event to occupy combatant positions against the Naxalites. This judgment is a reiteration of notions of equity, dignity and human security that run through the key provisions in the Constitution. The question is whether the judgment can be read as providing a time and situation-specific constitutional vision.

By itself, this is a fairly obvious statement. Within the law and literature movement, any number of literary texts have been subjected to analysis to understand the infusion of law into social lives – from classic texts such as Kafka’s *The Trial* and Shakespeare’s *The Merchant of Venice* or *Measure for Measure*. In an Indian context, Sadat Hasan Manto’s *Toba Tek Singh* or Rohinton Mistry’s *A Fine Balance* have been used as pedagogic tools to speak about the violence of constitution-making or the suspension of civil liberties during the national emergency proclaimed by Indira Gandhi.²⁰ In doing so, we see social realities but simultaneously also social ideals. If one were to look to *Nandini Sundar* as one trained in conventional modes of reading judgments, one would fall into the same conundrum of distinguishing between the *ratio* and the *obiter*, and treating the latter as irrelevant. However, reading the judgment as literature, one might learn to read it not merely as precedent, but as a means of reiterating constitutional ideals, of engaging the relationship of the citizen to the state, of responding to a perceived socio-economic condition. Some of these may lie in the *narration* of facts by the judge (not the facts themselves), the *framing* of the constitutional issues (not the

²⁰ See Lawrence Liang, *In the Field of Pain and Death: Law, Literature and Violence*, October 2007 – January 2008 (NLSIU Seminar Course Materials) available at <http://www.altlawforum.org/education/law-literature-and-violence/in-a-field-of-pain-and-death-syllabus>; Faiz Tajuddin, *On the Connections between Law and Literature*, March 2012 – May 2012 (NLSIU Seminar Course Materials on file with the author); Amita Dhanda, *Law and Literature* (NALSAR University of Law Course Materials, personal communication).

issues themselves) or in the *nature* of the orders that are issued (not the orders *themselves*). The foregoing discussion of *Nandini Sundar* has tried to demonstrate the same. This is of course, only a first step, the identification of where we might start to look for constitutional visions articulated in a judgment. Judicial observations also point to the historical context to the case, which is integral to understanding *why* a particular version of the constitutional vision was articulated at that point. In some cases, there might be tantalizing leads within the judgment, as is the case with *Nandini Sundar*. But very often, when the judgment “speaks” to its historical or social context, it is often dismissed as “bad” judicial writing - a runaway judgment. And similarly, if a judgment is silent on context, it is barely, if ever, considered an omission.

III. ROMESH THAPAR AND JUDICIAL SILENCES

The *Nandini Sundar* judgment is perhaps an easy case, because the judgment itself points to its context. However, in other cases, this would have to be discerned from the fact that the text itself is *silent* as to the political and social context. Take for instance, one of the earliest Fundamental Rights cases in the Court. *Romesh Thapar* exists directly in contrast to *Nandini Sundar*’s much berated excesses. Where *Nandini Sundar* speaks, *Romesh Thapar* is silent. And yet, both were well positioned for the Court to make a statement about constitutional visions. After the rhetorical flourishes of the Constituent Assembly Debates and the euphoric pronouncements of a new Indian republic, why had so little of it affected the new Indian Supreme Court?

Romesh Thapar, the founder of the popular *Seminar* magazine, was the petitioner in Petition 16 of 1950 before the Court. ‘Crossroads’, a biweekly magazine of which he was the editor, had aroused suspicion as being a mouthpiece for the Communist Party of India since it was started in April 1949. It was banned entry and circulation into Madras under the Madras Maintenance of Public Order Act, 1949 (“the Madras Act”) one of the many “public safety” legislations enacted by Provincial Legislatures in the wake of the communal riots following the partition of British India in 1947. The Madras Act stated that for

the purpose of securing public safety or maintenance of public order, the government could prohibit or regulate entry of circulation, sale and distribution of any documents or class of documents. Romesh Thapar approached the Court and challenged the Madras Act as a violation of his right to freedom of speech and expression under Article 19(1)(a) of the Constitution. In her autobiography, Raj Thapar, Romesh Thapar's wife, was to describe the litigation at the Supreme Court as the "greatest experience of our lives".²¹ However, little of this is apparent from the six page judgment.

The bench, comprising six judges of the new Supreme Court, upheld Romesh Thapar's argument. The Madras Act, stated the majority judgment written by Justice Patanjali Sastri, purported to maintain public order, but public order was not a ground under Article 19(2) on which speech could be restricted. Justice Fazl Ali, in his dissent, argued that the expression 'public safety' in the context of legislation such as the Madras Maintenance of Public Order Act and the East Punjab Public Safety Act, 1949 would be equated with the safety and security of the state. Cases of public disorder may escalate to situations that present a threat to 'public safety'. Since the Constitution expressly refers to the greater violence, it would not be logical to leave out any kind of lesser violence either. As one of the first Fundamental Rights cases to come up before the Supreme Court, the text of the *Romesh Thapar* judgment may be read as a representation of a constitutional court trying to generate its own jurisprudence, staying true to the values articulated in the new Constitution. To justify their stance, the Supreme Court had to demonstrate that there was no replay of the sedition trials of Tilak and Gandhi in post 1950 India. Using these precedents, Justice Sastri noted that the "freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation."

These judicial observations provide a starting point in reconstructing the historical context of the judgment. The judges in the *Romesh Thapar* and *Brij Bhushan* cases were looking at writings

²¹ RAJ THAPAR, *ALL THESE YEARS* 86 – 87 (1991).

which they felt would be detrimental to public order, the former for encouraging the radical left and the latter for inciting the radical right.²² The Communist Party of India had declared the beginning of a “revolution” in February 1948, accusing the Nehruvian government of being an agent of imperialist and semi-feudal forces. An all-India railway strike was declared on 9 March 1949, a month before *Crossroads* was banned, but it met with little success.²³ Nehru finally permitted the banning of the party only in West Bengal and Madras where the Party was most active.²⁴ *Crossroads* was being published from Bombay, long recognized to be a nerve centre of communist activity, but the ban under the Madras Act related only to the Madras Presidency.²⁵ In the Madras Presidency, the Communist Party had been gaining in strength since its inception in the early 1920s. Thanjavur became a focal point and the first communist-leaning newspaper, *Janasakthi* was started there in 1937. At this time in Bombay, a Report on the Police Conference recommended that police resources be pooled to counter the communist uprisings as they constituted a threat to internal peace and security. One of the countermeasures would involve locating their printing presses, which were being used to spread their propaganda.²⁶ Under Defence of India Rules 38 and 39, which was emergency / war time legislation, editors and publishers could be prosecuted. This was considered preferable to the charges under the Press Act, 1910 or under ‘ordinary law’ because of more severe penalties. Communist literature circulated by railway packages was subject to strict scrutiny and resulted in the interception in Madras and Calcutta. The Criminal Law Amendment Act, 1932 had been stringently used in the Madras Presidency during the Congress ministry reign in 1937. The *Romesh Thapar* judgment does not record any of

²² *Romesh Thapar v. State of Madras* A.I. R. 1950 S.C. 124; *Brij Bhushan v. State of Delhi* A.I.R. 1950 S.C. 129.

²³ BIPAN CHANDRA, *INDIA’S STRUGGLE FOR INDEPENDENCE* 257 (2008).

²⁴ *Id.* at 104.

²⁵ Letter to J.M. Sladen, D.O.No. 7/1/40-Political(I) Government of India, Home Department (July 31, 1940).

²⁶ Report of the Police Conference on Anti-Communist Measures, Maharashtra Gazetteer, vol. 12, part 6.

these facts, but if read in its historical context, it is also an opportunity to view the Court as involved in its first constitutional balancing act between everyday government and constitutional values.

Just as *Nandini Sundar's* discussion of human security in the context of Article 21 is traced back to interpretations in *Francis Coralie*²⁷ and *Olga Tellis*²⁸, the silences on the question of social context in cases such as *Romesh Thapar* also prompt us to read them as judgments using a different strategy. The text of judgments dealing with “dangerous” political ideologies in the 1950s demonstrates interesting continuities. C.R. Pattabhiraman, Thapar’s lawyer, also represented VG Row, a prominent labour law practitioner in Madras, in his case against the State of Madras two years later.²⁹ The Madras People’s Education Society, formed to “educate” the people in political engagement, was banned under the Indian Criminal Law Amendment (Madras) Act, 1950 for allegedly being a smokescreen for the recruitment of supporters for the Communist Party of India (which had previously been banned in August 1949 in Madras). The Court ruled that the provisions of the Amendment Act that did not make it mandatory to notify the members of the association of a ban, was unconstitutional for violation of Article 19(1)(c), guaranteeing freedom of association. Justice Sastri wrote the majority judgment in this case too, but unlike the sparse text of *Romesh Thapar*, he made a very important observation. “...If then, the courts in this country face up to such an important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit but in discharge of a duty plainly laid upon them by the Constitution.”³⁰ – a clear reference to the First Amendment to the Constitution in 1951, overturning the decisions in *Romesh Thapar* and *Brij Bhushan*.³¹ Justice Sastri also acknowledges the role of the ideology

²⁷ *Francis Coralie*, *supra* note 17.

²⁸ A.I.R. 1986 S.C. 180.

²⁹ A.I.R. 1952 S.C. 196.

³⁰ *State of Madras v. V.G. Row* A.I.R. 1952 S.C. 192.

³¹ AUSTIN, *supra* note 3, at 41. See also Arudra Burra, *The Cobwebs of Imperial Rule*, SEMINAR (2010), http://www.india-seminar.com/2010/615/615_arudra_burra.htm (last visited July 6, 2012).

of the judge in deciding a particular “legal” question – “It is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for the people of their way of thinking, but for all, and that the majority of elected representatives of the people have, in authorizing the imposition of the restrictions, considered them reasonable”.³² In noting how narrative theory can illuminate the reading of a judgment, scholars often point to the fact that it shows how only one out of many viewpoints presented as legal arguments is adopted in the final ruling. They also note that it is only through constructing a particular narrative that a judgment can be justified.³³ It is the latter that I considered in this Part, noting the importance of the historical moment.³⁴ In reconstructing the political moment from judicial observations using the histories of the litigation (as in the *Nandini Sundar* case) and/or reading judicial observations in the light of the historical moment (as in the *Romesh Thapar* case), we note how constitutional visions take form *over time*. We also note, through judicial observations in *V.G. Row*, how some remain dominant while others are subverted. Read as a narrative begun by the Court in the earlier cases, *V.G. Row* provides an opportunity not merely to see the legal historical evolution of the free speech doctrine, but also the ways in which the nature of the elaboration changes, as it responds to the political and historical context.³⁵ We also see, reading the judgment closely, the emerging role of courts and judges vis-à-vis other public institutions, and the tensions therein. Reading *Romesh Thapar* and *V.G. Row* in this light reveals their value as a historically contingent public statement of constitutional visions, beyond their role as legal precedent.

³² *V.G. Row*, *supra* note 30 at 608.

³³ For a useful summary, see ANTHONY AMSTERDAM AND JEROME BRUNER, *MINDING THE LAW* 141 (2000).

³⁴ See e.g., Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) for a discussion of the same in the U.S. context.

³⁵ See RONALD DWORKIN, *LAW'S EMPIRE* 228-238 (1986).

Hence, constitutional visions are revealed not just through speech, but also through silences. The reader has to be empathetic to both.

IV. THE RHETORIC AND LEGACY OF OLGA TELLIS

So far, the reader of the runaway judgment has been the legal practitioner - in the courtroom and the classroom. However, the interpretive communities for judgments include many more, including those who may have no professional legal education but still read judgments to gain an understanding of the law (what Baxi might refer to as non-authoritative interpretive communities).³⁶ This insight is especially important for the Court in India – as an institution that enjoys a great deal of public credibility and as one that has made significant moves towards the “de-professionalization of justice” – The Court’s many audiences read its judgments differently. However, even within the authoritative interpretive community for a judgment, the rhetoric in the judgment texts outlives the judicial orders issued in the case.

*Olga Tellis v. Bombay Municipal Corporation*³⁷ involved a case where pavement dwellers were ordered off their temporary hutments by the Bombay Municipal Corporation. The Supreme Court stated that the right to life, under Article 21, was a life with dignity and not of “mere animal existence”, drawing from its earlier rulings in *Kharak Singh* and *Francis Coralie*. The right to life was to include a right to livelihood. In depicting the plight of the soon-to-be-evicted pavement dweller, Justice YV Chandrachud embarked on a lengthy description of the plight of the migrant worker in the great metropolis of Bombay. In doing so, interestingly, he noted that these observations were based on “commonsense” which was “often more dependable than the rival facts presented by warring litigants”. In its final ruling, the Court however ordered that since adequate opportunity for both parties to be heard had been provided, the pavement dwellers were required to move. Arguably, it is disappointing to find a final ruling such as this

³⁶ Baxi, *supra* note 8, at 100 – 101.

³⁷ A.I.R. 1986 S.C. 180.

at the end of a rousing discussion on human dignity. However, it is not the final order but rather the discussion on the right to livelihood as an integral aspect of the right to life with dignity that seems to have become more of a popular precedent, and in courtrooms, more of a persuasive legal argument, than the final ruling. Since then, *Olga Tellis* and its predecessors have created a legacy all their own, as it is cited in more than four hundred judgments –they have helped concerned citizens *question* the creation of a “city beautiful” in courts.³⁸ When used as an appropriate frame for legal issues, the reiteration of key observations made by the judges make for a more compelling case – in the process of arguing in the courtroom as well as in the text of the judgment. All too often, these kinds of judicial observations form material for popular consumption in the media and by legal practitioners eager to secure the attentions of drowsy judges in a hot, overcrowded courtroom (or a hot, overcrowded classroom). It is hard to dispute the importance of either.

Admittedly, the number of times that *Olga Tellis* has been cited with approval or otherwise, in courtrooms, has little or nothing to do with its “success” in securing remedies for those who invoke it. One might see contrary arguments being advanced by courtroom lawyers and accepted by judges. For instance, in the case of *Almitra Patel*,³⁹ slum dwellers were compared to pickpockets. Justice B.N. Kirpal, who delivered the judgment in this case, does not look to *Olga Tellis* when speaking of urban displacement, but instead to the case of *BL Wadhera*⁴⁰ where the Court was actively involved in cleaning up the city of Delhi. Even if *Olga Tellis* does not “help” the slum-dweller in a particular case taking rhetoric in judgments seriously allows for particular kinds of constitutional claims to be made, which were hitherto unavailable in the legal imagination. Indeed, the possibility that

³⁸ See generally, Usha Ramanathan, *Demolition Drive*, 40 ECO. & POL. WKLY. 3607 (2005); see also Gautam Bahn, *This is no longer the city I once knew: Evictions, the urban poor and the right to the city in millennial Delhi*, 21 ENV'T AND URBANISATION 127 (2009).

³⁹ *Almitra Patel v. Union of India* AIR 2000 SC 1256.

⁴⁰ *B. L. Wadhera v. Union of India* (1996) 2 SCC 594.

courtroom lawyers might risk the use of such precedent is higher in the Court rather than other courts in India.⁴¹

In a similar vein, the judgments of the 1980s and 1990s by the Supreme Court, especially by Justices PN Bhagwati and Krishna Iyer, have been lauded for their fearlessness, but at the same time derided for their literary “excesses”. There has been a great deal of discussion around the social action litigation cases of the 1970s and the 1980s by the Court, but particularly around its merits and shortcomings.⁴² Justice Krishna Iyer’s observations on the court’s power to compel municipal corporations to carry out public works in *Ratlam Municipality v. Vardichand*⁴³ set the tone for greater court intervention in environmental matters.⁴⁴ Especially when socio-economic rights or the implementation of welfare measures were concerned, governments argued that such schemes were financially unviable. In Justice Krishna Iyer’s characteristic prose, he stated: “The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice.” Justices Bhagwati and Krishna Iyer have authored many more judgments

⁴¹ See generally, JAYANTH K. KRISHNAN, TRANSGRESSIVE CAUSE LAWYERING IN THE DEVELOPING WORLD: THE CASE OF INDIA, THE WORLD CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat et al. ed., 2005).

⁴² The material on PIL / SAL is far too vast to mention here, but for broad surveys of the PIL phenomenon, see generally, UPENDRA BAXI, TAKING SUFFERING SERIOUSLY: SOCIAL ACTION LITIGATION IN THE SUPREME COURT OF INDIA in *Judges and Judicial Power* (Rajeev Dhavan et al eds., 1985); UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE MID EIGHTIES (1985); Rajeev Dhavan, *Public Interest Litigation in India*, 36 J. INDIAN L. INST. 302 (1994); ASHOK DESAI AND S. MURLIDHAR, PUBLIC INTEREST LITIGATION: POTENTIAL AND PROBLEMS in *Supreme but not Infallible – Essays in Honour of the Supreme Court of India* (B.N. Kirpal et al. eds., 2000). Particularly in the case of socio-economic rights, see SHYLASHRI SHANKAR AND PRATAP BHANU MEHTA, COURTS AND SOCIO-ECONOMIC RIGHTS IN INDIA in *Courting Social Justice* (Varun Gauri and Daniel Brinks eds., 2008).

⁴³ A.I.R. 1980 S.C. 1622.

⁴⁴ See Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability*, 19 J. ENV. L. 293 (2007); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009).

that speak fearlessly to the social context, and to constitutional ideals. In many cases, including *Bandhua Mukti Morcha*,⁴⁵ the 1980s Court reiterated the Constitution's socialist commitment. If these directions were not complied with, the petitioners could file a contempt petition to ask that the Court follow through with its rulings. This was the case in *Bandhua Mukti Morcha*, notwithstanding the fact that the contempt petitions regarding *Bandhua Mukti Morcha* lay pending with the Supreme Court for many years.⁴⁶ The Court's orientation to SAL has changed. The Constitution is no longer unequivocally considered a socialist text. But these judgments have formed the basis of the critiques of the changes in the Court's character.⁴⁷

Judicial observations, especially those that create a stereotype of the parties before the Court, provide a different kind of opportunity for a legal practitioner. In *Air India v. Nergesh Meerza*,⁴⁸ different service conditions for male and female cabin crew with India's official airline were challenged. Female cabin crew members were allowed to marry, but they would be grounded if they were discovered to be pregnant. Justice Murtaza Fazal Ali struck down the rule as unconstitutional, observing amongst other things, that it violated the value of Indian motherhood. The "larger interests of the airhostesses" and the "good upbringing of children" were ostensibly at stake. Of course, *Nergeesh Meerza* is only one of the numerous judgments where judicial observations on the role of women vis-à-vis the Constitution have been discussed with varying levels of gender sensitivity.⁴⁹ The nurturing mother and the long suffering wife also appear in the case of *Javed v.*

⁴⁵ M.C. Mehta, *supra* note 15.

⁴⁶ Baxi, *supra* note 4, at 11.

⁴⁷ See *supra* notes 43 and 46.

⁴⁸ A.I.R. 1981 S.C. 1829.

⁴⁹ For a broader discussion of women as portrayed in judicial opinions, see generally KALYANI RAMNATH, THE WOMAN CITIZEN AND HER RELIGIOUS UN-FREEDOMS: GENDERED READINGS OF INDIAN COURT JUDGMENTS ON ARTICLE 25 in *Inside and Outside of the Law* (Jonathan Hall and Shubhankar Dam eds., forthcoming) available at <http://www.inter-disciplinary.net/wp-content/uploads/2009/02/ramnath-paper.pdf> (last visited July 6, 2012).

State of Haryana.⁵⁰ In upholding the constitutionality of the provisions of the Haryana Panchayati Raj Act which mandated that if a sitting member of a local self-governing body had more than two children during the term of office, he or she would be disqualified, the Court made a number of observations that could only be matched by those in the Uniform Civil Code debates. The petitioner was a Muslim man, who stated that the Act violated his right to marry more than once and have children with all of his wives. Stating that this was not mandatory for Muslim men, the Court observes that women in Indian society would have to helplessly bear a third child if their husbands asked them to. This law would save them from this predicament. At the same time, it also notes that “[w]ith the awareness which is arising in Indian women folk, they are not so helpless (sic) as to be compelled to bear a third child even though they do not wish to do so.” Family planning was deemed a ‘secular’ activity for the purposes of Article 25 which guarantees the right to religious freedom, and hence a constitutionally valid restriction. The judgment clubs women empowerment along with health and child development as a ‘goal’ of social reform, in a manner reminiscent of colonial legal debates on *sati* or widow remarriage. These observations highlight a very important aspect: Both *Nergeesh Meerza* and *Javed* continue to be cited in gender discrimination cases that have followed. For the purposes of our argument here, it also raises old, unanswered questions once again – is it only in the form of nurturing mother or dutiful wife that an Indian woman could secure her Fundamental Rights to equality?⁵¹ Should legal practitioners advise their female clients to conform to judicially created stereotypes in order to secure what they are entitled to?⁵²

⁵⁰ A.I.R. 2003 S.C. 3057.

⁵¹ *Harvinder Kaur v. Harminder Singh* A.I.R. 1984 Del. 66 (The Delhi High court observed that in the privacy of the home and married life, neither Article 21 nor Article 14 have any place. However note that Section 10 of the Indian Divorce Act was struck down in *Ammini E.J. v Union of India & Ors* A.I.R. 1995 Ker. 252 on the grounds that it violated Articles 14 and 21).

⁵² See e.g. Flavia Agnes, *Women's Movement within a secular framework: Rethinking the Agenda*, 29 ECO. & POL. WKLY. 1123 (1994) (discussing the impact of the Uniform Civil Code debate).

Of course, based on the Court's articulation of an issue, we might choose to leave courtrooms out of our strategies altogether. The Court's observations might not find favour with particular communities, groups or institutions – we might seek to challenge it or ignore it altogether. We might choose to formulate other kinds of strategies. Owing to the perceived “success” of the SAL phenomenon, activists and social movements have generally desisted from adopting this line.⁵³ And perhaps with good reason. It is useful to remember that at the very beginning of the SAL movement, one could write letters to the Chief Justice of India which would be taken up as petitions. The emphasis here is not on style or sources, but on the expression of concern on an issue of people's importance. As Professor Baxi has argued, a “socially responsible critique” of the SAL phenomenon recognizes the people-judiciary partnership for the positive impact that it has had.⁵⁴ In spite of the more recent controversies surrounding SAL cases where the *bona fides* or public-spiritedness of people before the Court was questioned,⁵⁵ the Court has conveyed the impression that the appellate courts are accessible to the ordinary petitioner.

⁵³ As early as 1985 at the height of the SAL movement, Rajeev Dhavan noted the lack of legitimacy for the judiciary on many issues but also its significance on the question of a democratic conversation: “Hedged in from all sides, the modern judiciary is a very limited creature. It does not create much of the law it deliberates on. Nor does it have the extensive freedom to manufacture the equity with which the applicative use of the law is moderated. Its quest for self-definition rests on very exaggerated claims of what it is able to do. Unlike the other organs of the state, it cannot legitimate itself on the basis of democracy. Nor can it wholly create an illusion of affairs by appealing to ‘justice’. It remains, however, a powerful arena in which many things can be renegotiated and its litigative and lawyering processes lend themselves to much manipulation”. See generally RAJEEV DHAVAN, JUDGING THE JUDGES, JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER (Rajeev Dhavan et al. eds., 1985).

⁵⁴ Upendra Baxi, *On Judicial Activism, Legal Education and Research in a Globalising India*, Annual Capital Foundation Lecture, 1996.

⁵⁵ See Shankar and Mehta *supra* note 51 (One of the most vocal critics from within the judiciary was former Justice Markandey Katju); see generally, State of U.P. v. Jeet S. Bisht (2007) 6 S.C.C. 586; Divisional Manager, Aravalli Golf Club v. Chander Hass (2007) 14 SCALE 1 (Former Justice Arijit Pasayat has also stressed upon the need to look at the more ‘genuine’ cases in PIL). See B. Singh v. Union of India (2004) 3 S.C.C. 363; see Kusum Lata v. Union of India (2006) 6 S.C.C. 180.

Finally, I want to draw attention to those members of interpretive communities for judgments for whom the courtroom is not the primary arena for engagement with the law. It is for them that reading judgments as a literary text provides the greatest number of opportunities. For instance, some judicial observations could lead to an unanticipated (but certainly not unnecessary) dialogue if read out of context. For instance, in its zeal to give effect to the Directive Principles, the Court has made observations on their non-implementation in many differing, varying contexts. Some have been relatively “successful”, as in the case of the case of the right to education.⁵⁶ But the more important, perhaps unsuccessful ones have resulted in compelling dialogues between the Court and social movements / activists which incorporate judicial engagement into their strategies. A notable example in this regard is the call for a Uniform Civil Code in India – articulated in cases involving differential treatment accorded to the law governing succession for Christians in India and in cases where maintenance for Muslim women were challenged on constitutional grounds. *Mohammed Iqbal v. Shah Bano Begum*,⁵⁷ *Mary Roy v. State of Kerala*⁵⁸ and *John Vallamatom v. Union of India*⁵⁹ referred to the need to legislate upon a Uniform Civil Code, as mentioned in Article 44 of the Constitution. In *Sarla Mudgal v. Union of India*,⁶⁰ a case where observations about the UCC are made and where the petitioner is a Hindu woman, Justice Kuldip Singh exhorts the legislature to enact the UCC, for surely the “enlightened” Muslim community would not want people converting to Islam merely for the purposes of marriage. Notwithstanding the expectations of the Court, Flavia Agnes notes how the observations on a Uniform Civil Code

⁵⁶ See J.P. Unnikrishnan v. State of Andhra Pradesh A.I.R. 1993 S.C. 2178 and the possibly the first round of litigation surrounding the Right to Education Act in Society for Unaided Private Schools in *Rajasthan v. Union of India* W.P. No. 95 / 2010 available at <http://courtnic.nic.in/supremecourt/temp/95201031242012p.txt>.

⁵⁷ A.I.R. 1985 S.C. 945.

⁵⁸ A.I.R. 1986 S.C. 1011.

⁵⁹ A.I.R. 2003 S.C. 2902.

⁶⁰ (1995) 3 S.C.C. 635.

(UCC) paint Hindu laws as being gender just and the UCC as a means by which the same gender equality could be extended to women of minority communities.⁶¹ These judgments have resulted in a debate between women's rights and minority rights groups each time such observations are made. The *John Vallamatom* judgment for instance, generated a furious debate among Muslim minority rights and women's rights groups, although the case itself was about the validity of a provision in the Indian Succession Act, 1925 regulating bequests by Christians.⁶² The same analysis could be extended to judicial observations made by the Court in a number of cases – from the cow slaughter cases to those on affirmative action. One might even venture to see the Court not merely as a counter-majoritarian institution, but one that has functioned as an initiator of conversations. To sum up, apart from providing a context for the ruling in the case and serving as public statement of constitutional visions at the time, judicial observations are important in that they have an important rhetorical value. Rhetoric is integral to any form of argumentation, and involves not just the particular verbal expression but also the process of reasoning.⁶³ Too often, however, 'rhetorical' is used as a synonym for unnecessary. If law were to be treated as literature employing rhetoric, we might be able to see the multiple perspectives that were presented in the courtroom and the voices of parties to the case, perhaps even recover the voices of those who were silent.⁶⁴ Viewing judicial observations and judgments as a culmination of a particular strategy allows us to evaluate their potential in legal argument. Thus, a close reading of judicial observations provides an opportunity to go beyond impressive textual gymnastics to reimagining a socially relevant judicial process, one that transcends the courtroom.

⁶¹ Flavia Agnes, *Constitutional Challenges, communal hues and reforms within personal laws*, 3&4 COMBAT LAW 4 – 10 (2004).

⁶² *Id.*

⁶³ Posner, *supra* note 1, at 1422.

⁶⁴ See e.g. Kim Scheppele, *Telling Stories: A Foreword* 87 MICH L. REV. 2073 (1989); MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* (2005); SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS OF THE TWENTIETH CENTURY* 134 (2002).

V. EXPERT AUTHORS, EVERYDAY AUDIENCES

To elaborate on interpretive communities for judgments, if we were to look beyond the understanding of judgments by constitutional courts as settling matters between the parties contesting the case, perhaps we would see matters differently. While a majority of the consumers of the Supreme Court's constitutional jurisprudence might be legal practitioners, judgments are also meant to speak to larger audiences. Perhaps our understanding of judges and courts as ruling on narrow, technical points of law ought to be revised in the light of their role as authors of public documents. If judgments are *also* considered thus, these observations are likely to play a key role in initiating democratic conversations. Further, constitutional courts, even a Supreme Court such as India's, which seems to enjoy great public legitimacy, rarely "settles" or "solves" matters. Most are often settled through political negotiations. If one were to accept this role of constitutional courts, then their contributions would be to set the terms of debate within constitutional values. While relevant constitutional precedent or scope of administrative discretion is an attractive enough topic for discussion in lawyerly circles; for its public, what is important is an articulation of how – and importantly, why – the country's highest courts interpret the commitments made in the constitutional text. Runaway judgments are as important as any other in this regard.

It goes without saying that observations made by judges may be blatantly partisan or under-researched. Judges do make observations in judgments that may not just betray, but specifically push their social or political prejudices. The reader should obviously treat such observations with care. In India, this task is further complicated by the lack of material to determine a sitting judge's political leanings, whether through elections or through extrajudicial observations. For surveyors of the Court's jurisprudence – diligent court-watchers and ruminating academics included – the judgment is often the easiest available insight into the case. Other documents filed before the courts might take some time and effort to unearth, and one is almost always subject to bureaucratic hassles. The text of the judgment – its discussion of the facts and its framing of the "legal" issues – therefore becomes

determinative of analysis. Even a restricted narrative, the circumstances that led to the filing of the case, the actual litigation and the legal strategies employed are not often discussed. Hence, reading judgments in context ought not to end with judicial observations; they are however an excellent place to begin an enquiry. Apart from the narrative value, reading the judgment in context provides us with insights into substantive laws, legal procedure and, especially, just how deeply implicated politics is within the workings of the law and legal institutions. In all of the above cases, the observations of the judges are crucial. For instance, the “rhetorical” style of the Salwa Judum orders points to, and provides an estimate, however fragmented, of the context in which this case was litigated, and prompts one to look for the bigger story. The story behind *Romesh Thapar* and *VG Row* is but one example of how this might be carried out. Similarly, the inclusion of more general observations on social justice issues, as in the SAL cases of the 1970s and the 1980s, point to how the language of judgments reflected the inclination of many judges on the bench to make the Court more accessible. Reading judicial observations in context is a means of taking this enterprise forward.

If judgments are indeed public documents, then would it possibly place a greater impetus on their authors, rather than their readers, to write straightforward, “plain” language? For unlike a novel that one can put away because one does not find it palatable or the ending does not suit, a judgment has the power to alter material realities.⁶⁵ As far as the authors i.e. the judges (or more recently in the Indian context, the law clerks!) are concerned, there will always exist institutional reasons why the product of judgment writing is a veritable *bricolage* - the submissions by the parties to the case, the materials placed before it by *amici* or intervenors, the time constraints for judgment writing and not least, media reporting on the case at hand. Individual writing styles differ, a matter of concern in constitutional court of thirty one judges that decides matters in benches of two.⁶⁶ In

⁶⁵ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

⁶⁶ Baxi explains how this became a practice after the Justice Y. V. Chandrachud became Chief Justice of India, leading to the Court losing what he calls it “corporate

some instance, all of these factors may play in; in others, none may exist at all. Judges have a responsibility to provide “public reasons”, to use a Habermasian phrase, i.e. that which counts as a reason within the political arrangement that is agreed upon and not just a reason that we understand. This Article hopefully makes this a matter of genuine debate as to what kinds of styles and sources could be used to provide these reasons. In the context of many of the judgments of the 1980s Supreme Court and indeed in *Nandini Sundar*, the judges were arguably trying to reconfigure this political arrangement. If so, the language might not be what one might expect or what already exists in the legal imaginary. “Plain” language might not always meet this need.

VI. CONCLUSION

Courts, supreme or otherwise, still begin and engage in their enterprise largely with the aid of the textual. That they are less aware of what happens in the ‘real’ world, that they create their own realities even, is often at the heart of concerns about activist judges and overenthusiastic courts in India. This is a claim that ought to be taken seriously, but perhaps we ought to consider judgments in context before framing our responses. Unlocking the “rhetoric” in judgments is merely one of many devices that will enable these conversations. The “runaway” judgment is therefore not necessarily to be critiqued to death or deconstructed out of shape for its flamboyance. This Article by no means aspires to be a comprehensive survey of the Court’s judgments or an exhaustive understanding of how they ought to be read. It explores how judicial observations might be perceived, and more importantly, employed by its multiple audiences.

character?”. Vijay K. Gupta, *Decision making in the Supreme Court of India* (New Delhi: Kaveri Books, 1995) as cited in Upendra Baxi, *The Fair Name of Justice: The Memorable Voyage of Chief Justice Chandrachud in V.S. Deshpande*, THE CHANDRACHUD READER 79 (1985). See Nick Robinson et. al., *Interpreting the Constitution: Supreme Court Constitution Benches since Independence*, 36 ECO. & POL. WKLY. 27 – 32 (2011) (For an account of how constitution benches are fewer today than ever before and arguably therefore, an absence of anything resembling a collective voice for the Supreme Court).

Unlike literary or philosophical interpretation, judicial interpretation necessarily requires a result, a final ruling that has sanctions attached to its nonconformity.⁶⁷ Judicial interpretations by judges are different from literary or philosophical interpretations, as Cover argued, because their consequence is that people lose their life, liberty or property. ‘Jurispathic’, Cover called it, when competing interpretations of the law are “killed” by the interpretation of the judge.⁶⁸ And so, legal interpretation transcends from the textual to the real in the space of the courtroom, and is documented in the judgment. I have explored how judicial observations made in the course of this transition may be read, critiqued or commented upon. In the text of the *Romesh Thapar* judgment, one sees the writing in *Crossroads* representing the reality that certain political ideologies were ‘dangerous’; similarly, in the *Nandini Sundar* judgment, one sees the Court’s understanding of what is ‘real’ in Dantewada, Chhattisgarh, integral to the way in which the final orders were fashioned. If judgments are read as public documents, there are useful ways in which we might read such realities. As we read judicial texts, it is important to note who constitutional language accommodates, but also its absences, omissions and silences. Through reading judicial opinions as literature, as Goodrich has shown, the margins and periphery of legal practice are inverted, in a way that uncovers the law’s (im)possibilities.⁶⁹ Most importantly, it provides an opportunity to think deeply about the manner in which we read, and write about judgments; to the violence that constitutional values may confront, and to the language in which we ought to respond.

⁶⁷ Susan Bandes, *Searching for Worlds beyond the Canon: Narrative Rhetoric and Legal Change*, 28 L. & SOC. INQUIRY 271 (2003).

⁶⁸ Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 39 (1983).

⁶⁹ Peter Goodrich, *Law by Other Means*, 10 CARDOZO STUD. L. & LITERATURE 111, 115 (1998).