9 Public and insurgent reason: adjudicatory leadership in a hyper-globalizing world

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Summary
Although it is well known that apex or supreme court justices wield impressive, and at times awesome, interpretive powers and capacities for leadership and political and moral influence, this chapter specifically introduces the wider concept of adjudicatory leadership as a contribution to extending theories of global leadership. Adjudicatory leadership consists in the management and organization of the usual hierarchy of jurisdictions and court systems, and it also entails interpretive/hermeneutic leadership. This process now operates on a world scale. Indeed, courts and justices, rather than representative institutions, governments or political parties, have become, in many parts of the contemporary world, the mentors and mediators of the crisis of hegemony, particularly if they are understood as providing ‘intellectual and moral leadership’, to use Gramsci’s phrase (Hoare and Nowell-Smith 1971: 57), as well as mediating and mentoring not just relationships between state and citizen but also social relations more generally. They are integral to the ‘general activity of the law’, which is ‘wider than purely the State and governmental activity’ and ‘includes the activity involved in directing civil society, in those zones which the technicians of law call legally neutral – i.e. in morality and in custom generally’, and thus to ‘the entire juridical problem’ (ibid.: 195). This ‘problem’ – as well as the crisis of hegemony – emerges in the contemporary moment as an aspect of the dialectic of constituted and insurgent power in the forging of public reason and progressive potentials of adjudicatory leadership.

Introduction: towards a theory of adjudicatory leadership
Adjudicatory leadership is as yet not a term of art, and its introduction into the discourse of constitutional, political and leadership theory may evoke contestation. Although pre-eminently an affair of national
societies, it now extends considerably across national boundaries. The proliferation of international courts, tribunals and related forums remains truly unprecedented. Supranational forums, such as the European Union and judicial systems in Africa and Latin America, have produced novel adjudicatory leadership; so has the multicultural composition and functioning of the International Court of Justice (ICJ). Although liable to critique as ‘victor’s justice’, the Nuremberg and Tokyo trials provide justifications for ad hoc tribunals in former Yugoslavia, Rwanda, Sierra Leone, questioning international leadership patterns and forms of impunity that were able to thrive previously. The International Criminal Court (ICC) may finally now, besides having the jurisdiction to try war crimes and crimes against humanity, also tackle crimes of aggression, and may even address, in the remote future, the conduct of non-state actors, especially multinational corporations and allied entities for flagrant violations of human rights, human abuse, environmental degradation and ecological destruction. One may also add to this list the ongoing interpretive adjudicatory leadership, such as the United Nations human rights treaty bodies, the Office of the High Commissioner for Human Rights and the Human Rights Council, which have often, though not always, provided the space for counter-hegemonic contestation over the practices of politics of cruelty, and much else as well, in terms of the amelioration of the lot of the worst off and rightless peoples.

In sum, the ‘rights revolution’ provides almost everywhere a remarkable potential for adjudicatory leadership to operate. This does not mean that it is always considered as ‘legitimate’ by governments, which are the bodies that usually appoint justices, or by scholars, who believe that justices ought to remain an inferior species compared with elected public officials, or by human rights and social movement activists, who are occasionally discomfited by adverse adjudicatory outcomes. Indeed, questions concerning the legitimacy of adjudicatory leadership may not gainsay its existence, nor may we reiterate old wisdoms distinguishing the tasks of the appellate/apex courts from those designated as trial or district courts. The latter have also begun to display some notable leadership traits, as, for example, outstandingly illustrated by Spanish investigative judge Baltasar Garzón, who triggered the initiation of the reversal of the logics of immunity and impunity of heads of state in the case of Augusto Pinochet, the Chilean general who seized power and ruled as that country’s dictator from 1973 to 1990 (see Sugarman 2002). In the quarter-century-old Bhopal litigation, the district judiciary has done better in protecting the residuary human rights of the more than 200,000 people who were afflicted by the 1984
toxic gas disaster than has the Supreme Court of India (Baxi 2010). Increasingly, trial courts, otherwise tasked to find the facts and apply the law as it stands, have begun to assume the custodianship of the rule of law and human rights values, norms and standards. Indeed, the trial courts, in providing *injunctive relief* (the power of injunction) against developmental public projects such as large-scale irrigation or other infrastructure development projects contingent on a full hearing of those adversely affected, have created and sustained social and political space in which movements of resistance can more fully articulate themselves and marshal new sources of critical solidarities. Adjudicatory leadership theory errs egregiously if it confines its attention almost exclusively to the appellate/apex courts; other courts matter a great deal.

Moreover, apex or supreme court justices remain divided concerning the best possible points of arrival and departure for deliberative and reflexive judicial action and intervention in matters in which agencies of state and of public opinion remain sharply divided (e.g. in the use of their interpretive authority or judicial review powers). Some approaches urge restraint, relegating the formidable issues thus posed to the representative political institutions, no matter how great the human rights and the rule of law costs thus entailed for suffering and vulnerable people. Some other approaches remain imbued with conceptions of adjudicative power as forms of social trust and responsibility (i.e. fiduciary notions). Some justices eschew theories of adjudicative power altogether, privileging arguments from consequences (Posner 2010).

Moreover, many apex justices actually believe in and practise the virtue of judicial self-restraint, on the basis of notions of respect for other coordinate braches of governance. They believe in institutional deference and harmony. They do not believe that their oaths of office and constitutional obligation to protect basic rights should be interpreted so far as to lead to an enunciation of constitutional policies; for example, for a long time a majority of US Supreme Court justices declined, via the doctrine of ‘political questions’, to intervene in cases of slavery, race-based discrimination and electoral gerrymandering. ‘Restraintivism’ everywhere is associated with hands-off stances concerning excesses of domination – excesses co-produced by state and civil society, which then ‘justify’ forms of human and social suffering and rightlessness. Nonetheless, humans exposed to this awesome fate in the post-colonial, post-socialist or post-conflict global South insist that apex justices may no longer afford to entrust the custodianship of human rights and legality exclusively to political
leadership.\(^1\) This at least suggests that the virtue of judicial self-restraint may not go so far as to constitute judicial abdication.

‘Judicial activism’ marks a near-complete reversal of doctrines of judicial restraint. Activist justices everywhere do not merely elaborate political power as a form of social trust but also present high judicial power in fiduciary terms, and in the following respects.

(1) Judicial discretion concerning who, other than extravagantly paid private lawyers, may move and appear before the apex courts (the democratization of *locus standi*, or access to courts).

(2) What cases/controversies may be admitted to the adjudicative roster/docket (readdressing the problem of *justiciability*).

(3) How these may be argued (e.g. time limits, or more importantly, judicial compliance with internationally accepted human rights and humanitarian law in customary and treaty regimes).

(4) The contrast between writing judicial opinions as collegiate acts/performances of adjudicatory leadership and ways that allow for a plurality, even a multiplicity, of judicial decisions.

(5) Approaches leading to requests for advisory opinions (or for post-socialist apex courts for ‘abstract’ judicial review) on the future validity of legislation, and even proposed constitutional amendments.

In India, apex justices have explicitly subjected the power to amend the constitution to imply limitations based on the grounds of infringement of the basic structure and essential features of the constitution. This invention means that constitutional amendments duly passed by parliament may be held to be invalid; this doctrine has travelled well in south Asian jurisprudence as well. The idea of apex courts as ‘constituent assemblies’ in perpetuity, exercising adjudicative power as a form of conjoint constituent power, has also been put to use by the Indian Supreme Court, (1) to restore fundamental rights that the constitution makers had after due deliberation left out from the constitutional text; (2) to proclaim new (invented) human rights; (3) to treat socio-economic rights declared as judicially unenforceable under the rubric of the Directive Principles of State Policy as worthy of incorporation as additional fundamental rights; and (4) to enlarge the spheres of...

\(^1\) In saying this, one needs to acknowledge fully that, in traditions that valorize, for example, the principles of theocratic state formation, or neo-charismatic authority, hereditary forms of monarchical rule and forms of militarized and related dictatorships, the very idea of adjudicatory leadership may remain liable to the indictment of treason or sedition. *The question in almost all contexts is not the capacity of justices to lead but their legitimacy in so doing (editor’s emphasis added).*
jurisdiction by the invention of epistolary jurisdiction (Baxi 1989, 2008a; Jacobshon 2003; Sathe 2001; Vandenhole 2002).2

A crucial question remains: how far can adjudicatory leadership ‘theory’ in non-theocratic constitutionalism engage with the fact that millions of humans, especially women, live under non-state law formations, either on the basis of charismatic law formations (the law as revealed by prophets) or under the patrimonial domination of customary law? A merely state-centric understanding of such leadership does not bring into view some crucial concerns about identity, difference, violence and justice as perceived and handled by forms of community- and religion-based adjudication. Further, how may adjudicatory leadership proceed to enable the communities of faith to develop respect for ‘contemporary’ and inclusive human rights values, standards, and norms? Put another way, how may faith/cultural communities be enabled to perceive the difference between their ‘law’ and the ‘law’ of the state? For example, how far state-centric adjudicatory leadership may repudiate the distinction between fatwa-based cultures (or decretal legal cultures – i.e. those that involve the making of law by decree or fiat) and the law of the state? The globalization of fatwa cultures fostered by ongoing wars of and on ‘terror’ encourages the view that the fatwa cultures valorize non-public (secret) decision-making by decree, which is inherently non-participative, unaccountable and ethically irresponsible. Indeed, the ‘wars’ of and on terror both deploy, and proceed to justify, indiscriminate violence and the unreasonable and disproportionate use of force (Baxi 2009). How far may adjudicatory leadership address or redress the shrinking of the public sphere by such violent means, ‘causing communities of fear and danger’ and enormous hurt and harm that is unredressed? How may anyone urge before the courts the uncanny verisimilitude between the fatwas in the name of Osama bin Laden and those issued in the run-up to the 2003 invasion of Iraq, under the signature of the Bush and Blair regimes? How may national adjudicatory leadership best respond to this particular moment of crisis?

Put another way, the question is this: how may we today, engulfed by the crisis of global leadership, grasp what Gramsci understood as the ‘general activity of law’ within, and across, territorially organized nation states? The principal theoretical contestation concerns contrasts between a historical materialist understanding of late capitalism with a cultural pluralist understanding of ‘inter-state relations’ or global politics. Human-rights-oriented adjudicatory leadership has thus partly gone

2 See Glossary for terms such as ‘epistolary jurisdiction’ and, later, ‘fatwa’ and ‘lex mercatoria’.

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global, while sustaining tendencies towards pedagogies of ‘civilizing’ governance, in the sense Gramsci conferred on progressive leadership at all levels and all sites.

On the other hand, we should also note the new forms of global lex mercatoria that are now placed at the service of capital, though not with felicitous ease, as certain decisions of the WTO and other related bodies suggest (Eliason 2009; Schaffer 2008). The ‘neoliberal penchant’ for the privatization of dispute settlement transfers the potential for adjudicatory leadership as a public good to the maximization of the welfare of the cross-border trade and investment communities (Muchlinski, Ortino and Schreuer 2008; Schneiderman 2008). In the conjuncture of globalization, millions remain affected by the privatization of the form of modern law, allowing important investment and trade disputes to be decided by private commercial arbitration. This tends to minimize the role of the state as a political community as a seat and source of authority to define basic moral goods. As Michel Foucault (Davidson 2010: 121; emphasis added) puts it: ‘One must govern for the market, rather than because of the market.’ If this description of neoliberal forms of law under conditions of hyper-globalization holds, we may ask: why is adjudicatory leadership so insufficiently recognized in either the conventional (e.g. much of the business literature) or critical approaches to ‘global’ leadership? May it also be the case that the dominant paradigm of international economic law now supervenes over elements of human rights law, and thus over more transformative forms of adjudicatory leadership?

In what follows I further outline aspects of the adjudicatory leadership concept as designating at least three sites of action or agency: (1) in repairing and innovating ‘systems’ of administration of justice; (2) as administrative or managerial leadership; and (3) as hermeneutic leadership.

**Extra-curiel adjudicatory leadership forms**

It is clear (for most regions of the world) that justices are accorded the status of organic intellectuals with regard to reforms of systems of administration of civil and criminal justice. When incumbent or superannuated justices lead such reforms, what emerges is an important extra-curial dimension of adjudicatory leadership (i.e. forms of leadership, as it were, exercised outside the courts).

On the one hand, such leadership by justices raises important concerns, such as the danger of an appropriation by the political leadership of the symbols of judicial authority for its own, expedient, ends. On the other hand, the relation between high judicial power and extra-curial
Adjudicatory leadership becomes immensely complex when incumbent justices in an activist mode deploy their power to enunciate law reform. The Indian Supreme Court provides a leading example. It has interpreted constitutional provisions regarding appellate judicial appointments in a manner that has divested the supreme executive of its prerogative by investing such powers in a Collegium of Justices presided over by the Chief Justice of India; moreover, the Pakistan Supreme Court has recently followed this initiative. The Indian Supreme Court has also made binding judicial orders ameliorating the service conditions and salaries of the district judiciary. Furthermore, it has enacted mandatory legislative policies concerning, for example, sexual harassment in workplaces, campus violence (practices of bullying or ragging) and rights to dignity, shelter and livelihood. After some initial outcries, the executive and legislature have complied, thus establishing as unproblematic the explicit legislative role of the apex court in India.

Such developments raise some fundamental questions. Should law reform seek to maximize efficiency as a non-moral virtue, or as a virtue associated with the quest for justice in society? If the latter, how can Kafkaesque procedures and powers of state law be avoided? How far may it even seek to expand its potential to assist the silenced and disarticulated subjects of law? How can dominant models respond to human and social suffering and states of rightlessness, which are often produced by the very practices of judicial interpretation? All these, and related, concerns accentuate the need for comparative and cross-cultural research.

Adjudicatory leadership as a site of management practices

Law reform also raises issues regarding the organization and management of the legal system. The efficient management of courts as state institutions is a legitimate concern of all citizens, yet court reform has not been a high priority, even for ‘transformative’ and ‘visionary’ political leadership. Nor, as far as I know, have human rights and social movement activists in most parts of the Third World pursued court reform with any zeal. As a result, those who go to courts or are taken there often become ‘victims’ rather than ‘beneficiaries’ of the judicial system – at least, at the grass-roots-level courts. Here, in terms of court management, is an instance of ‘leadership by default’.

However, the scenario for the Third World is changing rapidly, given the emergence of court reform as an aspect of conditionality for development assistance, and with it the unguarded solicitude towards the increased flow of direct foreign investment, and growing presence of multinational enterprises. Management gurus and digital experts who
suggest various ways of e-judicial governance, ‘paperless courts’ or video conferencing, for the purposes of garnering witnesses and evidence, understandably remain concerned with maximizing the efficiency of court procedures and outputs. Presented as major breakthroughs in doing and achieving ‘justice’, such measures deepen the divide between the constitutional ‘haves’ and ‘have-nots’. This rule by ‘experts’ regards organizational complexity as posing problems that require techno-fixes. Adjudicatory leadership thus becomes an appendage to neoliberal development. The very notion of justices as chief executive officers (CEOs) and managers of public sector corporations is an integral part of the new agenda of ‘judicial globalization’. However, judicial globalization means many things to different people. Technically, it means ways of maximizing judicial comity and cooperation so as to promote the handling of disputes or prosecutions that entail multi-state elements and reciprocal respect for other jurisdictions. Further, it signifies pooling knowledges (in the plural) concerning the management of complex relationships between many actors, be they justices, lawyers, administrative staff or, increasingly, the 24/7 media.

Such forms of judicial globalization often exceed their original intent by fostering tendencies towards homogenization via judicial training and related programmes to improve the skills and competences of adjudicative administrators. Even so, a global framework remains important for special situations of dependence, such as juvenile justice, or the residual rights of migrant workers, stateless persons, refugees and asylum seekers, and ‘undocumented aliens’. A further implication lies in the persistent demands for court reforms so that courts become service-providers, as public sector corporations that must follow models of business management leadership theory. However, any consideration of social and cultural variables and power relations complicates understandings; juridically constituted publics thus always remain confronted by counter-publics. Revisiting Franz Kafka remains the best antidote for ‘judicial-globalization’-led models for court reform.

Transformative/visionary conceptions of adjudicatory leadership

Here I make five points.

First, most post-colonial/post-socialist conceptions offer some new ways of imagining ideas of constitutionalism, signified by the dialectical relationships of four key conceptions: governance, rights, development and justice.

Second, many forms and styles of adjudicatory leadership in the global South (begun in India in the middle of the twentieth century,
and further developed later in that century in South African constitutionalism) anticipate and privilege contemporary markers of the development of international human rights values, standards and norms (Baxi 2008b). The Indian constitution, coeval with the Universal Declaration of Human Rights, marked a radical departure from the liberal conceptions of rights and justice and inaugurated two kinds of human rights: those labelled as civil and political rights and made judicially enforceable and those named as the Directive Principles of State Policy (in sum, social and economic rights), proclaimed as constituting ‘paramount’ constitutional state obligations in the making of laws and policies. In a welcome contrast, the South African form seeks to promote a community of rights, specifically privileging the Constitutional Court with some burdens of judicial implementation, even when this is interpreted as inviting collaboration with parliament and the court. These forms remain transformative in different ways in India, Brazil and South Africa (Baxi 2008a; Feldman 2008; Schneiderman 2008).

Third, the ‘transformative’ moment varies: post-colonial constitutional forms were results of the subjugated people’s ethical invention of their right to self-determination (Prashad 2007; Young 2001). The theory and practice of Latin American constitutionalisms remains overlaid with long and cruel histories of imperial predations (see Galeano 1997). Post-socialist constitutionalisms remain different, perhaps, since they occur mostly in an era of contemporary economic globalization, often labelled, curiously, as ‘transitional’ forms. The story is also different for ‘post-conflict’ societies emerging out of a politics of violence (e.g. the trauma of genocidal or ethnic cleansing, or after having been subject to the ‘global’ war on ‘terror’).

Fourth, new global South developments reconfigure the very idea of constitutionalism in what I term the ‘four “Cs”’. The first ‘C’ refers to the constitutional text; the second ‘C’ refers to the executive and adjudicatory authoritative enunciation of constitutional law. The third ‘C’ is the power of citizen interpretation, which often iconically disrupts the second; examples include Martin Luther King, Nelson Mandela and Aung San Suu Kyi. I may further mention the various revolutions of colour in post-socialist/transitional societies. The fourth ‘C’ names the very idea of constitutionalism as the normative/ideological site that disrupts the unity of the liberal/libertarian narratives. This is where activist adjudicatory leadership and citizen practices often trump the dominant first and second ‘Cs’. The power of social movement and human rights activism, for example marching under the banner ‘Women’s rights are human rights’, or the movements of indigenous peoples, the rights of religious and cultural minorities or the movement
for liberation from ‘despised sexualities’, furnish crucial markers of new adjudicatory leadership formations, within and across nations.

Fifth, all these constitutional forms remain transformative, if only because they enunciate constitutionally desired conceptions of social order. Such conceptions are transformative because they offer a comprehensive view not only of how legitimate authority may be constituted and sustained but also of how it may be constrained and challenged by those governed. The tasks of adjudicatory and political leadership thus entail a principled aspiration and respect for pluri-religious, -ethnic, -linguistic communities, even when they are located in theocratic constitutional forms (I scrupulously avoid here the conventional qualifier ‘multi-’). As global-South-oriented comparative constitutional studies show, adjudicatory leadership emerges most significantly as a form of deliberative leadership often reinforcing political leadership but also pitted against the pathologies of some governance powers.

Public reason and insurgent reason

Interpretive adjudicatory leadership modes remain justified on the platforms of deliberative public reason. These vary immensely (Larmore 2003; Rawls 1996: 321–40; 2001). However, public reason as exemplified by adjudicatory leadership remains possible when (1) courts and justices are public forums, (2) deliberation is conducted by recourse to complex logics of legal and rhetorical argumentation, (3) relatively independent legal professions prevail, (4) courts and justices control their arbitrariness by giving reasons for their decisions/opinions subject to deliberative public scrutiny and (5) the reversibility of prior acts/performances of reasoned elaboration remains open.

Even so, what remains distinctive – to adapt John Rawls – is the fact that there is no social world without some loss; that is, no social world exists that does not exclude some ways of life that realize in special ways certain fundamental values. The inevitability of the loss of social worlds, or, put differently, ‘some ways of life’, is justifiable only when this loss is accepted as justified by those who actually experience it (Larmore 2003, 374–5). Note that justification does not mean simply providing ‘good reasons’ for the action of the dominant, nor does it consist in what Martha Nussbaum (2000) characterises as ‘adaptive preferences’, by which the subalterns cope variously with the real-life experience of their subordination, even subjugation. Gramscians would recognize the latter

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3 See Baxi 1967 for a development of this notion with regard to India, and Baxi 2000 describing constitutionalisms as sites of state formative practices.
as the practices of hegemony, or even as dominance without hegemony (Guha 2007). The sovereign question then surely is: what may ever constitute good reasons for people to accept the loss of their social worlds?

Although Rawls’ thought has been constantly evolving, it is clear that the idea of public reason constitutes a value in itself fostering the quest for the elements of a theory of a shared concept of justice. The Rawls of Political Liberalism (Rawls 2005) is explicit concerning justice as a political virtue, both as crystallizing ‘the principles of justice for the basic structure’ of society and as providing ‘principles of reasoning and rules of evidence’ enabling ‘citizens to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them’ (Rawls 1996: 223–7). If the basic structure of a well-ordered society is to arrive at a shared understanding of the principles of justice as fairness (equal liberty for all and equality of opportunity, further supplemented by the ‘difference principle’ – solicitude for the worst-off people in society) the principles and procedures of public reason ought to be more securely in place. As Charles Larmore (2003: 177) suggests, the aim of ‘a common point of view’ concerning what justice may mean ‘is to adjudicate disagreements by argument [for a] public life founded on what mutually acknowledged principles...of fairness entail’. Public reason allows scope for ‘reasonable pluralisms’ and ‘overlapping consensus’, based on the important distinction between the ‘rational’ and the ‘reasonable’.

A rarely noted aspect of Rawls’ notion of public reason is its other: the ‘non-public’ reason of social groups and collectivities. Rawls instances thus churches, universities, scientific associations and professional social groups; these hold non-public power ‘with respect to political society and citizens generally’. Their acts of reasoning remain ‘public with respect to their members’, forming ways of ‘reasoning as to what is to be done’. Furthermore, Rawls draws attention to the fact that voluntary exit from such associational forms of life remains possible if one is simply a member of a part of a wider political community; in contrast, exiting from the state remains far more onerous (Rawls 1996: 220–2).

The distinction between public and non-public reason surely remains important, if indeed not decisive, for Rawls’ imagery of a well-ordered society. For one thing, autonomous forms of associational life are an aspect of liberty and, moreover, ought to be regarded as integral to theory and practice of ‘reasonable pluralism’. For another, associational forms shape a ‘background culture’ (ibid.: 220). Rawls is particularly sensitive to the importance of religion as providing comprehensive conceptions of the good life, whose forms of non-public reason public
political institutions ought, as far as possible, to strive fully to respect. This poses several dilemmas of toleration for political institutions that ought to function as custodians of public reason. Without a sincere respect for the plurality of world views reflected in non-public religious power and reason, these custodians or guardians – be they legislators or justices – may not achieve the virtue of toleration as an aspect of the basic structure of political institutions or the burdens of judgement borne by adjudicatory leadership communities. Although the Rawls of *A Theory of Justice* here differs from the Rawls of *Political Liberalism*, how far the two may assist adjudicatory leadership tasks in the state regulation of hijab (headdresses and ‘modesty’ garments worn by Muslim women) and of building minarets in public spaces remains an open question. If one were to extend this framework to ‘severely divided societies’ across the global South (as Donald Horowitz (2003) names them), the tasks of adjudicatory leadership become even more formidable than those framed with the expedient and often hollow Euro-American prose of ‘multiculturalisms’.

Equally at stake remain cross-border flows of the networked traffic in ideas, arrangements and institutions now represented by all our talk of globalization or ‘neoliberalism’. Rawls refrains from addressing these forms of non-public reason – especially forms of corporate power: nevertheless, the first pages of *The Law of Peoples* (Rawls 2001) forcefully draws our attention to the fact that even laws may be bought and sold for a price in the US Congress (the reference being here to electoral campaign funding as an aspect of the sacrosanct rights of the first amendment). However, overall Rawls does not address the global networks of power and influence, especially those of the multinational enterprises, which even adjudicatory leadership may not fully escape (see Baxi 2010). As a resolutely non-cosmopolitan thinker, Rawls does not endorse calls for a theory of global justice.

Nonetheless, it remains not too far off the mark to say that performances of deliberative public reason, especially in the global South, remain fully confronted by the ‘reason’ of the non-public powers, increasingly constituted by the communities/networks of direct foreign investment, ‘sovereign’ funds, international and regional financial institutions, global corporations and multilateral-treaty-based trade agreements that stridently claim immunity and impunity from local ‘constitutional essentials’. However, various forms of adjudicatory leadership have wrestled with the crisis of global public reason thus made manifest before them by such contemporary forms of neoliberalism. Accordingly, the Philippines Supreme Court and the Bombay High Court, both confronted with the need to adjudicate the constitutional
legitimacy of their state’s accession to the Dunkel (final) draft WTO agreements while granting *locus standi* (respecting the demands of procedural fairness), deferred adjudication to a future point of time when the adverse impacts on constitutional/human rights may be more fully demonstrated. By contrast, ‘neoliberal’ adjudicatory leadership constitutes the *time of* [human rights and constitutionalism] *that never will be*. It is this establishment of *null political time* (Agamben 2005) that constitutes the structures of ‘engagement’ and of ‘postponement’, as Gayatri Spivak names them. The emergent global economic ‘new constitutionalism’ (Gill 1992; 2003a; Grear 2010; Schneiderman 2008; 2010) illustrates the structures of engagement rather poignantly. Courts and justices increasingly accelerate the promotion and protection of the trade-related market-friendly human rights of multinational enterprises and related entities (Baxi 2008b) while at the same time disengaging themselves from the tasks of promoting and protecting the human rights of human beings, especially the worst off. The ‘sacrifices’ of ‘an economic-corporate kind’ that Gramsci thought will need, or ought, to be made by the hegemonic blocs are not writ large on the formations of neoliberal global economic law.

True, adjudicatory leadership and constitutional forms to sustain ‘ethico-political’ hegemony require that ‘account be taken of the interests and tendencies of the groups over which hegemony is to be exercised’ (Hoare and Nowell-Smith 1971: 161). However, what may ‘taking account’ historically signify in ‘neoliberal’ terms? Forms of adjudicatory leadership, even the most ‘activist’ ones, may take account of such interests and yet remain at the same moment inarticulate in terms of what Jacques Derrida (2002) famously names as the tasks not just of *responsibility* but of those constituted by the tasks of *response-ability*.

Taking account or judicial notice of proliferating human rightlessness and avoidable human and social suffering is one way of naming activist or progressive adjudicatory leadership. However, ‘taking notice’ is not equal to transforming what Gramsci names as ‘the decisive nucleus of economic activity’ (Hoare and Nowell-Smith 1971: 161). Indeed, as one privileged to assist the birth and growth of social action litigation in India, where, momentously, the Supreme Court of India became the Supreme Court for deprived, dispossessed and disadvantaged Indians, I now remain a more or less helpless witness to what must be named as the *structural adjustment* of the Indian adjudicatory leadership. I think that the situation is not dissimilar for Brazil and South Africa.

How, then, may one adapt Gramsci’s reference to ‘the interests and tendencies of the groups over which hegemony is to be exercised’? This requires us to go beyond Rawls’ narratives of public reason. Thus,
I briefly make reference to the distinction between public reason and forms/grammars of popular and insurgent reason.

Popular reason speaks to us of the ‘unreason’ of human rights in the face of the ‘reason’ of hyper-globalization. This is a form of sentimental reason that contests the narratives of neoliberalism via forms of people’s politics of civil disobedience and protest, at times inviting not just symbolic violence (forms of destruction/defacement of state and private property) but also the practices of violent protest, now terminally signified in the figuration of the suicide bomber, in which the human body itself becomes a very destructive weapon. How may interpretive adjudicatory leadership respond to such popular reason? This is a crucial comparative concern for all those who talk incessantly about counter-hegemony, if only because popular reason may not always be benign or progressively hegemonic – as, for example, we learn from the discourse of hate speech.

Insurgent reason has as its aim the reinvention of the constituent power of the people against the ensemble of the constituted powers of the dominant social formation (Negri 1999). Moreover, insurgent reason pressed to the end of an ethical project of revolutionary violence may not qualify as Rawlsian public reason, even when it prepares the ground for the organization of ‘well-ordered’ societies governed by public reason. Derrida’s (2002) notions of foundational and reiterative violence, of the constitutions and the laws, also highlight this issue. However, insurgent reason may also aim at and lead to revolutionary transformations via relatively peaceful means. Two references must here suffice. The variously coloured revolutions in post-socialist societies have brought into existence constitutional and political leadership forms without ‘foundational violence’. So, in the most part, did a man called Mohandas Karamchand Gandhi, whose ethical project for emancipation and freedom without foundational violence attracted at least a brief notice from Gramsci (rare in progressive Eurocentric texts) with reference to his concept of passive revolution (Hoare and Nowell-Smith 1971: 153; see also the discussion in Baxi 1993). Here we might ask: would any extension of Gramsci to experiments in subaltern leadership, which Richard Falk has poignantly evoked in terms of ‘citizen pilgrims’ (e.g. Martin Luther King, the Dalai Lama, Aung San Suu Kyi) and to collective subaltern movements and projects of the indigenous, feminist, ecological, child rights, refugees and stateless persons, migrant workers and allied forms, merely constitute moments of passive revolution? Put rather crudely, is non-violent popular reason always exhausted by the protean meanings of ‘passive revolution’ with and since Gramsci, or is revolution better thought of as a continuum of different forms and
moments of revolt and transformation? Put counterfactually, how may the forms/modes of Gramscian adjudicatory leadership differ from the Gandhian? How may these institutional moral agents remain ever unaffected by what Lenin famously described as differing ‘juridical world outlooks,’ or the Weltanschauung (Baxi 1993)? More to the point, how may adjudicatory leadership practices encounter all that fond talk of constituting a smooth surface for the triumphant march of global capital?

Thus, how may activist adjudicatory leadership patterns, for example, arrest the untoward growth of flexible labour markets that cancel prior juridical histories that have given legal and ethical recognition to worker rights as more than mere factors of production? Pierre Bourdieu names ‘neoliberalism’ as a declaration of endless war against all forms of plurality (see Mitrovic´ 2005). All that may be ‘safely’ and for the moment said is just this: transformative or visionary adjudicatory leadership presents a continuum. It may, and often does, proselytize new visions of public reason as related to insurgent and popular reason. However, its practices must speak to different tasks, such as shaping the variegated approaches towards the judicial/juridical capabilities and potentials to develop and promote the essentially contested notions of rights, justice and the rule of law.

My discussion in this section reflects several of the tensions, even contradictions, between two complex spheres of norms: international economic law and human rights law and jurisprudence. The forms of cognitive dissonance thus produced permit no summary presentation. However, with regard to apex/summit national courts, adjudicatory leadership remains often confronted with a choice amid the imperatives of long-term economic development and the here-and-now demands of social justice. Nevertheless, a major perplexity is posed by the perpetual exile in international economic law formations of the ‘J’ word (justice), which seems no longer politically correct; what takes its place are contingent acts/feats of global social policy, such as those represented in the unfeeling and even soulless prose of Millennium Development Goals and Programmes of Action (Baxi 2008b; 2010).

Contemporary neoliberal economic globalization practices present a difficult and contested terrain for adjudicatory leadership. Although

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4 Once again, I name all this as adjudicative rather than judicial leadership, because the tasks of interpretive leadership may best occur only to the extent that the overall integrity of adjudicative institutions is reasonably assured. Further, these tasks also depend on the ways that justices at their work negotiate the privilege of their relative autonomy (from society, economy and polity) and respond as best they can to demands of social accountability for the exercise of their hermeneutic powers.
adjudicatory leadership always occurs in bounded societies, it is inter­peled within networks of transnational judicial/juridical adjudication as a form of life that marks its presence everywhere (i.e. globalizing adjudicatory leadership and its different narratives). On the one hand are imageries advancing the values of international economic law, such as the EU and WTO judicial institutions, NAFTA and the international financial institutions networks (Braithwaite and Drahos 2000). On the other hand are imageries of the International Court of Justice, the International Criminal Court and the UN-related ad hoc tribunals directed towards genocide and crimes against humanity: the UN human rights treaty bodies and related specialized agencies such as the WHO, International Labour Organization (ILO), UNICEF, UNHCHR and UNDP (now heavily invested with the tasks of judicial reform as integral aspect of ‘good governance’). Further, one ought to note some remarkable accomplishments in terms of the African and Latin American arrangements directed towards the protection and promotion of internationally and regionally enunciated human rights values, norms and standards. Thus, contemporaneous manifestations of adjudicatory leadership comprise a seamless web. How may we ever grasp its infinite-looking yet finite forms? One way to rethink involves ways in which ‘global public adjudicatory reason’ may cohabit, or transgress, the virtue of constitutional and deliberative democracy by reinforcing notions of deliberative public reason. By contrast, hyper-globalizing narratives of progress affirm the virtues of public–private partnerships as the best possible mechanisms for serving the infrastructures of human rights values, norms and standards; in so doing, they trump the reason of contemporary human rights.

**Adjudicatory leadership and political leadership**

As noted in Chapter 2, by Nicola Short, Gramsci’s formulation of political leadership as involving a ‘mass element’, a ‘principal cohesive element’ and an ‘intermediate element’ of leadership (Hoare and Nowell-Smith 1971: 152–3) frames a number of questions and issues for the development not only of transformative adjudicatory leadership but also of more general conceptions of global leadership.

First, how may adjudicatory leadership respond to the ‘mass element’ comprising ‘ordinary, average men’? Put differently, what may be said to be wrong, and for what good reasons, with judicial responsiveness to the worst-off people?

Second, Gramsci insisted that the presence of the people matters but that they require ‘somebody to centralize, organize, and discipline
them’. In the absence of this cohesive force, ‘they would scatter into an impotent diaspora and vanish into nothing’ (ibid.: 152). If so, how ought adjudicatory leadership forms contribute to this task of cohesion?

Third, the force of ‘cohesive, centralizing, disciplinary power’ also speaks to the ‘power of innovation’ (ibid.). In what ways can the changing forms of adjudicatory leadership recombine/reconfigure these diverse elements, and with what innovations? Here, it matters not only ‘what it actually does’ but, equally, ‘in what provision it makes for the eventuality of its own destruction’ (ibid.: 153). Although Gramsci had the communist party specifically in view, I think his observations extend coequally to the courts.

Fourth, the aporia of leadership: it can be either progressive or regressive. Indeed, politics and law may either ‘carry out [their] policing function to conserve an outward extrinsic order which is a fetter on the vital forces of history’ or ‘carry it out in the sense of tending to raise the people to a new level of civilization expressed programmatically in its political and legal order’ (ibid.: 155). Gramsci’s precious message remains extremely relevant to adjudicatory leadership, since it, like the communist party, and often with it, has to respond to the following considerations (ibid.: 156):

In fact, a law finds its lawbreaker . . . among the reactionary social elements that it has dispossessed, . . . among the progressive forces that it holds back [and] among those elements which have not yet reached the level of civilization which it can be seen as representing . . . When the Party is progressive it functions democratically (democratic centralism); when the party is regressive it functions ‘bureaucratically’ (bureaucratic centralism). The Party in the second sense is a simple, unthinking executioner.

Fifth, Gramsci, much like Max Weber, had a relational conception of leadership and power. For Weber, it is clear that power was not a property of a person but always a social relation between the power wielders and the power yielders; Gramsci seemed to share this view of leadership, but with a different thrust, of course. Accordingly, Gramsci referred us to a ‘continuous insertion of elements thrown up from the rank and file into the solid framework of the leadership which ensures continuity and the regular accumulation of experience’ (ibid.: 188; emphases added). These italicized expressions fully suggest that, although leaders may lead, they may often be led. However, what the second italicized phrase may mean is not entirely clear: if leadership is open to ‘continuous insertion’ by the led, how far may we say that the framework of leadership can remain ‘solid’? Equally, how may we understand the last italicized term? Is it suggestive of the regular accumulation of
governance/dominance or of a commonality of experiences between the leaders and those led? Moreover, since ‘accumulation’ is a temporal/historical process, how shall we speak to the time, manner and circumstance of leadership?

A brief remark by Gramsci suggests that leadership in this way may be merely an affair of the immediately past and present generations. This suggests at least two ‘components’ for any insurgent theory of leadership: (1) a finite conception of political time and space; and (2) a certain sort of reflexivity that invites a return to spontaneity in terms of critical popular common sense, which, somewhat paradoxically, imperils, as well as reinforces, the ‘solid framework of the leadership’.

Reflexivity entails the development of the capability to take interest in our interests, or what Rawls names the development of ‘public reason’. For Gramsci, this signifies what he named (following Antonio Labriola) a ‘philosophy of praxis’. If so, one may well ask how adjudicatory leadership can straddle the constantly shifting conceptions of ‘hegemony’, involving confluence as well as contradictions between ‘social’ and ‘political’ power formations.

Gramsci suggested that one version of ‘hegemony’ has as its goal the creation of a new intellectual and moral order and a new type of society, in which (ibid.: 181–2; emphasis added):

Our own corporate interests, in their present and future development, transcend the corporate interests of the purely economic class, and can and must become the interests of the other subordinate groups too. This is the most political phase, and marks the decisive passage from the structure to the sphere of complex superstructures..., bringing about not only a unison of economic and political aims but also intellectual and moral unity, posing all the questions around which struggle rages not on a corporate but a ‘universal’ plane, and thus creating the hegemony of a fundamental social group... over a series of subordinate groups.

All this opens up a dialectical consideration of adjudicatory leadership as leadership of influence. As Weber reminds us constantly, tasks, or transformations, of leadership as social and economic enterprise begin only with the displacement of social relations embedded in charismatic or patroninal relationships. This means at least the advent of complex and contradictory conceptions of ‘legal-rational’ domination. Put another way, this form is always crisis-ridden by the aporias of ‘formal’ as opposed to ‘substantive’ rationality. I read adjudicatory leadership as offering ‘pedagogies for the oppressed’: forms that afford dignity of articulation for the planet’s worst-off beings, including sentient creatures and other objects in ‘natural’ nature and socially produced ‘Nature’.