

Salman Khurshid, Sidharth Luthra, Lokendra Malik and Shruti Bedi (ed), *Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi)*, (New Delhi, Cambridge University Press, 2020), Pp. 430, Price: 999.

THE BOOK under review is a collection of essays written by some of the eminent scholars in the field of constitutional law in honour of Prof. Upendra Baxi, who is a great scholar of international repute in the field of constitutional law, jurisprudence and human rights law. The admirably erudite corpus of Baxi¹ produced over the years has contributed a great deal towards the making, unmaking and remaking of constitutional jurisprudence in India. His journey as an academician is, in many ways, reflective of the journey of Indian constitution as he has been writing, with critical tone, on the ways judiciary and the legislature have performed their constitutionally assigned functions inviting criticism and, on occasions, accolades as well.² In sum, he has a towering presence in the galaxy of legal scholars in India both as a teacher and an author.³

To quote, *in extenso*, in 2003, Ronald Dworkin wrote thus: “I very much admire Upendra Baxi’s erudition—his learning ranges from the intricacies of Lockean scholarship to the subtleties of contemporary and post- modern literary theory—but even more the skill with which he integrates this learning with a deep knowledge of the constitutional traditions of so many countries including his own....He makes it plain how much an American constitutional scholar may learn from the history of Indian constitutional jurisprudence and development, in particular. His own work shows not only how careful and detailed a useful comparative constitutional jurisprudence must be; but also how profitable it can be.”⁴

The theme for the collected essays in the book is judicial review and the three attendant issues: process, power and problems. The theme so selected is apposite given the body of work that Baxi

¹ Available at: <https://warwick.academia.edu/UBaxi> (last visited on Feb. 1, 2022)

² William Twining, “Upendra Baxi: A Tribute”, *Journal of Law, Social Justice and Global Development* (2007), available at: https://warwick.ac.uk/fac/soc/law/elj/ugd/2007_1 (last visited on Feb. 02, 2022).

³ Oishik Sircar, “A Minor Jurisprudence of Pathos: Upendra Baxi as a Teacher and Writer” 9 *Jindal Global Law Review* 203-222 (2018). Also see, Debolina Dutta, Adil Hasan Khan and Oishik Sircar, “Upendra Baxi in Our Times: Law, Life, Liminality”, 9 *Jindal Global Law Review* 153-154(2018); Prakash Sharma, P.P. Mitra and Aditya Vikram Sharma, “Upendra Baxi and the Legal Education: An Open Reflection of Illustrious Career” in S. Shivkumar, Prakash Sharma and Abhishek Kumar Pandey (Eds.), *Clinical and Continuing Legal Education: A Roadmap for India*, Thomson Reuter (2020), 417-456.

⁴ Ronald Dworkin, “Response to Overseas Commentators”, 1 *International Journal of Constitutional Law* 651–662 (2003).

has produced over the decades. He has been a vocal critic of the Supreme Court, and at the same time, he has also championed the cause of the marginalised people. He laid the foundation to the advent of social action litigation (and demosprudence) in India.⁵ The different chapters written by people of eminence cover some of the important aspects of the constitution and constitutional jurisprudence in India. They also indicate the need to ponder upon dynamics of constitutional law in the contemporary era, where the constitution has been put to test with ever-surfacing newer challenges, more so in respect of the individual rights of the people and the role that judicial review has to play to keep the *constitutional expectation* of the people alive.⁶ Judicial review, according to Basu, implies that “courts of law have the power of testing the validity of legislative as well as other governmental actions with reference to the provisions of the constitution.”⁷ Moreover, it is not concerned with the decision, rather it concerned with decision making process.⁸ Exercise of the power of judicial review may, at times, entail great constitutional consequences, which often are frowned upon by other organ of the state as being violative of the doctrine of separation of powers.⁹

All said, the book under review, therefore, bears great relevance. The book has a lengthy foreword by Justice A K Sikri, who explores, in his prefatory remark, the various facets of the ‘two roles of a judge in democracy’¹⁰ which requires a judge to uphold the constitution besides undertaking what he calls *social context adjudication*. He also explores “Baxi’s demosprudence”¹¹ before concluding that “Baxi’s legacy shall guide Indian jurisprudence, or rather demosprudence...for generations to come.”¹² The foreword is very eloquent of the

⁵ Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India”, 4 *Third World Legal Studies* (1985), available at: <https://scholar.valpo.edu/twls/vol4/iss1/6/> (last visited on Feb. 03, 2022); Upendra Baxi, “Demosprudence Versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies”, 14 *Macquarie Law Journal* (2014). He proposes “three forms of prudence, or bodies of thought which determine the province of constitutional hegemony. These are: legisprudence (the principles or theory of legislation that take it beyond the contingency of politics), jurisprudence (that determines the principles, precepts, standards, doctrines, maxims of law and the concept of law) and demosprudence (judicial review process and power that enhances life under a constitutional democracy)”. *Id.* at 7.

⁶ Richard Primus, “Constitutional Expectation”, 109 *Michigan Law Review* 91-110 (2010).

⁷ D. D. Basu, *Tagore Law Lecture on Limited Government and Judicial Review* (1972).

⁸ *Chief Constable of North Wales Police v. Evans* (1982) 3 All ER 141. Also see, V. S. Deshpande, *Judicial Review of Legislation* (1975).

⁹ Rabindra Kr. Pathak, *Judicial Process* (New Delhi, Thomson Reuters, 2019); B C Nirmal, “Book Review: Rabindra Kr. Pathak, *Judicial Process* (New Delhi, Thomson Reuters, 2019)”, 62 *Journal of the Indian Law Institute* 211-216 (2020).

¹⁰ *Supra* note 1 at xxi-xv.

¹¹ *Id.*, at viii

¹² *Id.*, at xx.

contribution of Baxi as well as of his continued relevance. The prefatory is followed by the introductory where M P Singh brings to fore some of the his personal reminiscences that he fondly recalls with respect to his relations with Baxi, and at the same time, provides a curtain-raiser of the contributions made by different scholars to the book. It sets the tone for the book, showcasing briefly, what one may expect in the ensuing chapters.

Of the twenty chapters in the book, few are worth-mentioning given the depth and expanse of the topic they deal with. The inaugural chapter by Mark Tushnet highlights Baxi's concern for social rights, pointing out, at the same time, the difficulties that arise in the judicial enforcement of such rights. He further explores the *limits on judicial enforcement of social welfare rights* and the limits on judicial enforcement of equality rights.¹³

James Manor in his chapter titled 'The Interplay between Law and Politics in India' underscores the fact that good politics helps in enactment of good laws. He cites MGNRERA, 2005 and the Forest Rights Act, 2006 among few of the examples that he discusses in his chapter. He is aware of the 'porous boundary' that separates law and politics.¹⁴ He holds the view that politics and law interact both for the better and for worse.¹⁵ The present chapter has much to offer in terms of the exploration of the relationship between law and politics, and the ensuing consequences.

Balram Gupta writes lucidly about judicial review as a tool to shape constitutional jurisprudence¹⁶ whereas John Mceldowney discusses different and differing "perspectives and reflections" for the twenty first century on judicial review.¹⁷ His chapter is a critical summation from a "Baxian" perspective of some of the important issues that matter the most in the twenty first century. He brings forth Baxi's perspective and reflections on globalisation, law and the economics of poverty. He analyses at some length *social action litigation* which has been one of the seminal contribution that Baxi has made to constitutional jurisprudence in India. He also points out that Baxi's vision about a more widespread adoption of socially responsible litigation

¹³ *Supra* note 1 at 14-19.

¹⁴ *Id.*, 1 at 27.

¹⁵ *Id.*, at 41.

¹⁶ *Id.*, at 127-144.

¹⁷ *Id.*, at 60-78.

is finding favour in the context of climate change, and there is strong evidence to show that this is a development that will influence the future in many countries.¹⁸

The chapter by Amita Dhanda titled “The Baxian Bioscope on Indian Judicial Process”¹⁹ is a searching analysis of Baxi’s writings on, and relating to, judicial process which may be defined as “the study of what judges do and what they ought to do.”²⁰ The spotlight of the chapter is on Baxi’s “indigenous theory on judicial process”.²¹ Dhanda after discussing at length the various aspects of judicial process in India through the lens of Baxi’s juristic writings concludes thus: “Baxi as a scholar has played both critic and advisor to the judiciary, standing up for it where needed and castigating it where required. He has looked at judicial process as a social justice lawyer.”²² She further remarks: “...he brought home to judges that there were no technical barriers that prevented them from undertaking their constitutional duty of wiping every tear from every eye.”²³

Given the fact that there are myriad issues that bear great relevance *vis-à-vis* judicial review, the topics covered in other chapters are equally of great importance. One such chapter on judicial review of legislation by tribunals in India by P. Puneeth is a critical analysis of the tribunalisation of justice. The book also covers issues such as appointment of distinguished jurist as judges in the Supreme Court of India in a chapter²⁴ where Lokendra Malik fervently argues for the appointment of judges in the Supreme Court from the category of “distinguished jurists”, particularly eminent law professors.²⁵ Anurag Deep brings to fore very deftly the human rights concerns as regards with criminalisation of membership of terrorist organisations in India and the United States of America. The chapter on judicial dissent and judicial review by Yogesh Pratap Singh is a well-articulated analysis of the dynamics of judicial dissent whereas the concluding chapter by Salman Khurshid on constitutional morality is an in-depth exploration of the

¹⁸ *Id.*, at 69.

¹⁹ *Id.*, at 145-162.

²⁰ *Id.*, at 145.

²¹ *Id.*, at 146.

²² *Id.*, at 158.

²³ *Ibid.*

²⁴ *Id.*, at 136-151.

²⁵ *Id.*, at 249. Also see, Rabindra Kr. Pathak, “A Tale of a Failed Constitutional. Experiment”, 1 *Rostrum’s Law Review* 145 (2014). See generally for a brief Baxian perspective on the issue, Upendra Baxi, “Demosprudence and Socially Responsible/Response-able Criticism: The NJAC Decision and Beyond”, 9 *NUJS Law Review* 153 (2016).

invocation of the doctrine of constitutional morality and its application in a number of judicial pronouncement in the preceding decade or so. The authors in other chapters equally enhance the worth of the academic content of the book through their searching analysis and observations.

Given the noble aims that the book under review seeks to achieve, it is a fitting tribute to the scholarship of Upendra Baxi. The topics covered under the book are well written, and do justice to the theme of the book. The book will enrich lawyers, judges and scholars interested to explore the working of judicial review in India. It deserves to be on the bookshelves of everyone for whom Baxi's writings have provided intellectually provocative moments of reflection and jurisprudential rumination.

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