

The Festschrift titled Judicial Review: Process, Powers and Problems : Essays in Honour of Prof. Upendra Baxi (Cambridge University Press, 2020) edited by Salman Khurshid, Siddharth Luthra, Lokendra Malik and Shruti Bedi was released by Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India in the presence of Chief Justice, Justice Ravi Shanker Jha and Justice Jitendra Chauhan, President, BoG, CJA on Feb.14, 2020 at Chandigarh Judicial Academy. This event was attended by sitting and former judges of High Court of Punjab and Haryana and Supreme Court, Vice Chancellors of different universities, former Chief Secretary, Haryana and other Senior Administrators, former Directors (Academics), CJA and accomplished academicians of different universities and law schools and institutes.

Address by Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India

Jurisprudence and philosophy of Indian laws are comparatively unexplored fields. We have inherited a British-Common Laws System, and are well competing with our western peers in legal evolution. The Indian lawyers, scholars and Courts have traditionally looked towards foreign academia for inspiration and have many a times transposed western legal theories to our nation. All these stake holders have been, nevertheless, conscious of the political and cultural context in which the western theories were to be adopted after appropriate re-modulation.

2. its equally true that till a few decades ago, the foremost legal theorists in the Indian Constitutional field were foreigners, like Mark Galanter and Grantille Austin. It is in this background, that Professor Upendra Baxi's jurisprudence shines even brighter.

3. I would describe Professor Baxi as one amongst India's finest and first legal academics. While our judgments are always open to criticism, only the opinion of a few matters. And Professor Baxi is one of them. His critical

analysis of judicial decisions is received positively by Courts and has also been used as an important source for formulation of laws by Law Commission.

4. His work on the intersection of human rights with Constitutional theory, and particularly its focus on the role of Indian Courts in effecting social changes has been path breaking. Although it would be futile to make a list of all his contributions and achievements, I would point out that Professor Baxi is perhaps second to none when it comes to judicial discussion and adoption of his articles and opinions. The earliest of his work which I recollect is when in 1981 as a Professor of Law at Delhi University he filed a Public Interest Litigation for protection of inmates who were kept in abject dehumanising conditions and were suffering from mental ailments. He persuing this cause even today.

5. This PIL was a part of the initial few foundational batches of cases heard by justice Bhagwati which form the bedrock of modern social action litigation. In addition to being landmark and having been relied upon by the Courts in other jurisdictions, this case highlights another very important facet of Professor Baxi's life, as his work, coincided with the increase in Rights-Based Jurisprudence adopted by Supreme Court of India.

6. Even today, Professor Baxi's work is extremely instrumental. I would take the liberty of adopting a phrase used by Mark Tushnet in the first article of this book to define the recent contribution as a "second-wave of Baxi-influence in Indian rights-Jurisprudence". Whether it be to resolve the ostensible conflict between 'bread' and 'freedom' in the nine judge Puttuswamy case, the permissibility of passive euthanasia, or constitutional interpretation in the NJAC case, Professor Baxi is as influential as ever.

7. Given the stature of Professor Baxi and the recent 'second-wave' of his influence, it is my pleasure to be present at the release of a book celebrating his contributions to Indian legal jurisprudence.

8. The book has been captioned, making it more relevant given the recent developments in Indian law, and its connection with the person the book is dedicated to. The book has contributions by extremely eminent academicians. Their affection for Prof. Baxi is visible in their writing. It begins with a foreword from Dr. Justice A.K. Sikri who applauds the contribution of Prof. Baxi and his influence on the legal professional. The introduction of the book is by none other than Prof. M.P. Singh whose brilliance in the field of constitutional law speaks volumes about the content of the book. I have had an opportunity to go through some of the articles in this book, and I must say that it is a befitting tribute to Professor Baxi. It is a collection of essays authored by distinguished academics both from India and abroad. The legal practitioners who have contributed to this effort too need to introduction. I am also glad to note that some essays have been authorised by young upcoming scholars, like Dr. Shruti Bedi, who all, I hope follow the foot-steps of their senior peers.

9. 'Judicial review' is undoubtedly the most fundamental 'duty' of the Courts, and is integral to any Constitutional Republic. The power of Judicial Review is inseparable part of our Constitutional system and without it, the Rule of Law would become illusory and unrealistic. If there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of our proud democracy and adherence to the Rule of Law, it is the power of 'Judicial Review' which is unquestionably a basic structure of the Constitution. The power of Judicial Review is the strongest instrument to promote and protect the Rule of Law which is essential for the good governance of a civilized society.

10. I may also quote DD Basu to highlight that in addition to keeping other wings of the State in check, and acting as a sword to protect the rights of citizens, the power of Judicial Review, even without its exercise, serves great value. It compels the Executive to be more regardful of constitutional limitations and effectively guides the Legislature as well.

11. Judicial Review is especially relevant in the context of Fundamental as well as Human Rights. Article 21 is the heart of our Constitution, and around this almost all of our human rights jurisprudence has been shaped. Courts, through repeated exercise of judicial review over seventy years of Constitutional jurisprudence, have widened the ambit of Article 21 and have consequently in many ways strengthened individual rights.

12. The Supreme Court of India has earned the title of “the strongest court of the world”. One important reason for this is the incredible development of the law on Judicial Review by the Court. It wasn’t an easy task, as the acceptability of judicial review under the Indian Constitution was not, as it is today. Dealing with a very specific and detained Constitution, the Indian Supreme Court thus started with a disadvantage. It has struggled hard to retain as much judicial review as possible. *Golak Nath* and *Kesavananda Bharti* both were assertions of the finality of decision-making power by the court.

13. The term ‘Judicial Review’ does not find specific mention in the Constitution, though such a power has been bestowed under its various Articles. Even in the absence of these express provisions, the Indian Supreme Court made it clear in one of the earliest cases that the power of Judicial Review is inherent in a codified Constitution and exists independently of Article 13(2).

14. The concept of Judicial Review itself is undergoing a transformation today. The earlier well-settled tests of ‘compelling state interest’ or the ‘reasonableness analysis’ are now supplemented with two-prong tests of ‘rational nexus’ and ‘intelligible differentia’ which have been evolved in the recent past. The Supreme Court has also opined that the State should ‘narrowly tailor’ the laws which infringe on constitutional rights.

15. The boundaries of Judicial Review will continue to expand their wings to cater to the needs of the needy. While the States shall strive hard to perform their obligations under Part IV of the Constitution, the Constitutional Courts will also march ahead to give innovative dimensions to the soul of the Constitution as embedded in its Part III.

Jai Hind

Professor Upendra Baxi could not be present at this event. His address was read out by Prof. Balram K. Gupta, Director (Academics), CJA

I am disappointed at not being with you on this occasion of the release of a Festschrift entitled *Judicial Review: Process, Powers, and Problems* [New Delhi, Cambridge University Press, 2020] edited by Salman Khurshid, Siddharth Luthra, Lokendra Malik, and Shruti Bedi. Shruti has worked tirelessly for this event and I was all set to sail but now stand prevented by a sudden onset of indisposition and a regime of treatment in Delhi.

I am greatly honoured by its release by Hon'ble Mr. Justice Surya Kant of the Supreme Court of India and the presence and participation by Hon'ble Chief Justice of Punjab and Haryana High Court, Justice Ravi Shankar Jha and Hon'ble Mr. Justice Jitendra Chauhan, President, Board of Governors, CJA. The Chandigarh Judicial Academy proudly belongs to a national chain of judicial academies and is extremely fortunate in securing the guidance of Professor (Dr.) Balram Gupta, an imaginative colleague, who has produced generations of legal luminaries.

While modesty is no longer a postmodern virtue, let me say that I do not fully deserve the honour that Justice Arjan Sikri bestows on me when he writes that my "life is an inspirational" such that "gives meaning to this quote from William Bake" who said "The greatest use of life is to spend it for something that will outlast it"(at page xxi). I do not wish to deny the wisdom of William Bake (who can?) but I am glad to be able to say that many a young scholar has

valiantly and valuably gone beyond (what Professor Amita Dhanda calls in this volume as) “Baxi-an bioscope” [at pages 145-144].

The massacre of ancestors and de-pedestalization of old icons is a necessary aspect of social change; and without advocating any form of ancestor-worship, perhaps it is useful to remind the oncoming generations that those who have gone before previously have faced similar problems, and their accumulated wisdom may not always constitute a fetter on vertiginous social change. Here, as in many other spheres, the appellate judiciary has valuable lessons for the problems at hand. Their practice of referring to earlier, even comparatively ancient, decisions is to remind us all that – to use Julius Stone’s words-- continuity with the past is both a historic ‘necessity’ and a ‘duty’.

The theme of judicial review is well analysed in this book, both from the national and comparative perspectives. And I agree with Balram about the Indian situation when he writes, Lord Denning-like, that “Judicial review is the saviour of the Constitution” and “also the basic structure of an ever-expanding constitutional jurisprudence” [page 142].

It is important to recognize that the dissensus concerns not so much the overall goals of the Constitution but some of the ways of interpreting and achieving these. The Indian constitution has since its inception found a way of dealing with political disagreements—namely, human rights adjudication. The entire edifice of judicial review is said, by judges and courts to rest on the faith of the people in the judiciary to understand and implement the constitutional provisions and the spirit animating these.

Here, what is conventionally called 'non- representative' network is claiming at least indirectly some representational profile and power. The opening of the space for legitimate (socially responsible) non-representational and altruistic (not self-interested constitutional) politics is a major contribution of the Indian judiciary to Indian life.

But one must also be able to learn from history and comparison. Judicial review power and processes may prove active in the wider interests of the people at large and that is an inestimable blessing of democratic judicial power and wisdom. But we must never forget, that it can in dark times, disempower, disfavour, and deprivilege the demos.

This has been admirably brought out early by Justice Koka Subba Rao whose opinions castigated "statism" in all forms, including excessive delegation of power; and recently by the poignant performance of Justice Dr. Dhananjay Chandrachud overruling *Shiv Kant Shukla* decision and Justice Rohinton Nariman's recall of the role of historic and creative moments of dissent in the Apex Court.

Equally recently, Chief Justice Dipak Misra was to remind us all:

"A representative form of government should not become a government by elites where the representatives so elected do nothing to give effect to the will of the sovereign. The elected representatives must not have an ulterior motive for representing their constituents and they should not misuse the popular mandate awarded to them by covertly transforming it into 'own rule'. The inherent value of public accountability can never be brushed aside" [*Government of NCT of Delhi v*

Union of India & Another, Para 5 (WWW.LIVELAW.IN. per Dipak Misra, A. K. Sikri, and A. Khanwailkar JJ.; 2018)].

Justice Dipak Misra (and the Court) has inaugurated several new concepts such as “constitutional renaissance”, “constitutional trust” and “pragmatic and purposive interpretation”. These need a massive constitutional gaze and further development but a laudable start, indeed, has been made.

But we must also recall what Yaniv Roznai and Gary J. Jacobsohn have to say, tongue-in-cheek, about the Israeli Supreme Court [pp.163-187]: “... the Israeli case demonstrates how a constitutional revolution can be incrementally brought about by a series of *mini-revolutions, deriving their generative force from activist courts*. In other words, the judiciary as constitutional revolutionary!” [p.178, emphasis added].

My warmest gratitude to you all, and the distinguished contributors to this volume.
