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ARTICLE

Reading Upendra Baxi as a guide to the study Indian constitutionalism: a comment

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Abstract
This short comment is an attempt to zero in on the prodigious work of Professor Upendra Baxi, to locate him as a scholar of the material and contextual constitution. Having done so, it attempts to illustrate the power of the material constitution through my work and interests in Indian constitutional practice. Broadly, it plots a rough and idiosyncratic outline of the imprint of Baxi's work on the study of Indian constitutionalism.

Keywords Baxi · Constitutionalism · Constitutional studies · Material constitution · Contextual constitution

1 Prefatory

Professor Upendra Baxi, or Upen, as most of his students know him, was my teacher at Warwick University. Though my year in Warwick (2002–3) was the first time I got to sit in on Upen's classes, he was already an intellectual compass well before I set foot into his class through his prodigious scholarship on almost every aspect of Indian public law. But you did not have to be a student of Indian law to appreciate his scholarship—he was easily one of the most imaginative and provocative teachers that any of us in his classroom had encountered across all our lives as students. Bringing stories from South Asia, Africa, Australia, the Americas, he would hold us in rapture by telling us about the power of law to both crush human aspiration as well as, on occasion, to open out small paths towards hope and freedom.

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One such tale of hope that continues to remain with me was the Canadian Supreme Court's recognition of native title in the now well-known case of *Delgamuukw v British Columbia*.[1] We did, of course, discuss the technical detail of the case like any good lawyer must, but we were intrigued by the way in which Baxi started us off in reading that case by taking us to its schedule. Hidden in that schedule were the names of almost fifty tribal chiefs who had brought that case to court. By making us read those unfamiliar names Baxi taught us the perennial importance of reading the law as form of mediation through which lives and worlds of "little people" were often shaded into the margins. This, even as the court recognized the native title of indigenous people over lands expropriated from them by a colonial state. It is this dimension of Baxi's work which foregrounds the material effect of law on the lives of its subjects, and especially the most disadvantaged and vulnerable, that I want to emphasize in this note.

Of course, in a lifetime of scholarship that has been as productive as Baxi's, the materiality of law has been examined across a range of themes. These include the Indian higher judiciary and the doctrinal forms it has evolved over the years,[2] environmental regulation especially the failures after the disaster at Bhopal,[3] the political economy of the Indian legal system,[4] as well as the social and political theory of Indian public law.[5] Across all these areas of scholarship a recurring theme in his work has been the impossibility of viewing law merely as a set of self-actualizing norms. And consequently, he would repeatedly argue that law is necessarily a field of power that both constitutes and is constituted by institutionalized competition between different social groups, both within and beyond state boundaries. It is this methodological approach in Baxi's work that has played a key role in transforming the landscape of Indian legal scholarship, especially for the new generation of social, political and cultural theorists studying law from the 1990s and onwards. To work through the impact of even this aspect of his scholarship is no easy task, and so all that I will do here is to pick on the material dimension of Baxi's work as a social and political theorist of the Indian constitution.[6] In doing so, I will also illustrate the forms in which it has opened out academic enquiry that I have personally found both

[1] [1997] 3 S.C.R. 1010.

[2] Upendra Baxi, Courage, Craft, And Contention: The Indian Supreme Court In The Eighties (1st ed. 1985); Upendra Baxi, Indian Supreme Court And Politics (1980).

[3] Upendra Baxi, Inconvenient Forum And Convenient Catastrophe: The Bhopal Case (1986); Upendra Baxi & Amita Dhanda, Valiant Victims And Lethal Litigation: The Bhopal Case (1990).

[4] Upendra Baxi, The Crisis Of The Indian Legal System (1982).

[5] *See*, *e.g.,* Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism*, *in* India's Living Constitution: Ideas, Practices, Controversies 31-63 (Zoya Hasan et. al. eds., 2002) [Hereinafter referred as "Baxi 2002"]; Upendra Baxi, *Outline of a 'Theory of Practice' of Indian Constitutionalism*, *in* Politics And Ethics Of The Indian Constitution 92-118 (Rajeev Bhargava ed., 2008); Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 Cardozo L. Rev. 1183 (1999).

[6] For a far more elaborate account of the material constitution *see* Marco Goldoni & Michael Wilkinson, *The Material Constitution*, 81 Modern L. Rev. 567–597 (2018).

useful and engaging. Thus, the comments that follow are personal impressions, but those that I suspect might resonate with many other scholars of Indian law in general and Indian constitutional law in particular.

2 Baxi's constitutional method

As a constitutional scholar, a considerable portion of Baxi's work addresses normative questions centring on the appropriate interpretation of the text and doctrine set against the background of the institutional conflict in the 1970s and 80s between the courts and legislatures. However, in the 1990s the profile of his scholarship expanded considerably into the socio-cultural and political dimensions of constitutional analysis. To plot this on his own schematic map, all constitutional questions can be divided into questions regarding the assertions of a constitutional text (C1), interpretative traditions reading the text and its possibilities (C2) and reflexive scholarship on constitutional practice (C3).[7] Up to the 1990s, much of Baxi's scholarship could be said to emphasize issues pertaining to C1 and C2. However, beyond the 1990s, Baxi was much less of a scholar of the text and its interpretative conundrums and far more a scholar of the issues that made possible the very constitution of the text and its traditions of interpretation. That is, the C3 styled analysis have assumed centre stage in Baxi's theoretical preoccupations across this period.

An obvious strength of Baxi's scheme for constitutional analysis is the fact that it is not necessarily tied to or is a reiteration of the hegemonic normative goals of liberal politics. On the contrary, as an analytical scheme Baxi's C1, C2 and C3 are able to view constitutional governments as historically constituted regimes that are defined by specific socio-economic contexts. Thus, it is for instance possible to think of contexts that make for Islamic constitutions, revolutionary constitutions, communist constitutions, liberal constitutions and so on. In other words, even though liberal constitutionalism exerts its hegemonic sway on the contemporary world through its emphasis on equal liberties for disembodied citizen subjects, it is perhaps an insufficient glue to generate the legitimate affections of subjects in numerous contexts across the modern world. Or put differently, the attention to material detail of specific historical contexts allows us to see with Baxi that normative regimes are not self-enforcing and that it is only in historically and materially located circumstances that a constitution acquires life and traction.

This scheme also allows Baxi to locate the Indian Constitution in material terms as well as a conceptual and governmental framework driven by the desire for social transformation in a society held back by imperial domination. However, as he also notes, this is no straightforward task, as the constitutional document and its traditions of interpretation have pulled in different directions. Therefore, as Baxi himself points out: the Indian constitutional project could contain conflicting interpretative imaginations and desires that draw on left leaning groups, the liberals, the Adivasis, Dalits, Gandhians, Nationalists and so on.[8] In turn this raises normative

[7] *See* Baxi 2002, *supra* note 5.
[8] *Id.*

and cognitive challenges that the roving sweep of Baxi's analysis does not always unpack. Systematic enquiry that follows from the materiality of Baxi's general account would demand answers to questions such as what might be the basis on which a political unity can be fashioned across the various constitutional visions that he has identified? What are the dominant social visions that make up the constitutional project and how does it achieve its hegemony over other visions that challenge it? How is an equilibrium between social forces secured through the operation of legal rules and institutions? And, what is the telos that emerges from the dominant social visions embodied in the constitution?

Baxi does attempt answers to many of these questions but they are distributed as fragments across the span of his work. I am not in a position in this comment to undertake the task of systematically reconstructing this "materiality" as I have called it in Baxi's constitutional scholarship. However, what I do propose to do is to locate some of my own intellectual concerns in this strand of constitutional imagination. Thus, by picking on the idea of conflicting imaginations contained in the constitutional document, I would like to illustrate this aspect of Indian constitutionalism especially as it has become a problem for conceptions of Indian political unity.

3 Contemporary constitutional practice

If multiple and conflicting constitutional imaginations is a defining problem in the Indian constitutional journey, then my own entry into this debate, as it has been framed by the likes of Baxi, has been to explore it in the exchange between the constitutional ideas of the earlier colonial state and those that inspired the new constitution of independent India. It is of course difficult to speak of a colonial constitutional imagination as clearly distinct from the imagination of the constitution at independence when the contemporary constitution has carried over more than two thirds of the scheme of the government that preceded it. However, even if government was largely carried over, there were significant aspects of constitutional imagination which the independent constitution challenged and sought to remake.

One such problem was a deeply embedded colonial belief that the pluralism of Indian society was an impediment to political unity and the articulation of people. This belief was so deeply a part of colonial government that even the forms in which Indians were allowed a limited participation in British government also amplified these beliefs. That is, through schemes of government like that of separate religious electorates. The partition of British India could be viewed as a vindication of this view of India being a nation of deeply divided groups. However, it was undoubtedly also the case that the overwhelming opinion in independent India denied this vision of irreconcilable social division. This encounter was of the utmost significance because it went to the heart of the very possibility of India being able to articulate itself as a free people set on a new constitutional project. And accordingly, a vision of a nation united in its profound differences on the constitutional path to throw off

its imperial yoke and to transform its traditional society was inserted in the place of the older frames of colonial constitutionalism. Even so, I have found that aspects of the colonial imagination of division lives on in contemporary constitutional practice which I will briefly illustrate.

It is my belief that the continuing life of the colonial constitution can be found in many pivotal debates in contemporary constitutional practice. However, let me explain myself with the case of religious freedom which is an aspect of individual and social practice that was explicitly organized by the Constitution's vision to reform India's traditional society. The Indian constitutional scheme regulating religion is contained in Article 25 of the Constitution which protects the right to religious freedom. Though there are other constitutional provisions that also bear on the right to religious freedom, it is in Article 25 that the Constitution lays out both the general contours of the right to religious freedom as well as the power of the state to reform traditional and regressive aspects of religious practice.

Thus, in its detail, one part of Article 25 is structured like a standard liberal freedom where the right to practice profess and propagate religion is qualified by standard liberal restraints demanding that such practice does not affect the similar rights of others (Article 25(1)). However, in addition, Article 25 is simultaneously also organized to permit the state to 'regulate or restrict economic, financial, political or other secular activity which may be associated with religious practice' (Art 25(2)(a)) or, 'provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus' (Art.25(2)(b)). This explicit mandate for the exercise of state power to reform traditional or regressive aspects of religious practice has permitted state practice to structure religion into an essentially religious core, protected by the right to religious freedoms and a not so essential or perhaps secular periphery which has been made available for state led reform.

As such this form of institutionally designing a right to religious freedom does not disclose the colonial mindset of a society organized parochially and organized against itself. This, however, becomes apparent when viewed against judicial interpretation of essential religious freedom. Thus, in one of the earliest and most authoritative judicial decisions on the determination of what counts as being essentially religious (*The Commissioner Hindu Religious Endowments, Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt*[9]), the Supreme Court was called to decide on the constitutional validity of the Madras Hindu Religious and Charitable Endowments Act, 1951. It was contended by the petitioner in this case, the chief religious functionary of the Shirur Mutt, that this statute which granted the government power to take over mismanaged Hindu religious institutions as a trustee, violated the community's right to religious freedom and to manage religious institutions as permitted by Art 25(1) and Art 26 of the Constitution.

Countering the claims of the petitioner, the State contended that it had the broadest powers of reforming and regulating all "secular" aspects related to a religious tradition under Art. 25(2). A stretched reading of the power contained in Art 25 and

[9] MANU/SC/0136/1954.

26 might suggest that the State could indeed regulate and reform religion as long as it did not completely extinguish the right to religious freedom. However, the court categorically refused to accept this contention that the right to religious freedom extended only to the essential bonds of belief between believers and their deities.

Instead, it held that

> … what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself… and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities…[10]

In other words, the court stressed that the essential core of a religion was to be determined by taking into account those doctrines and practices that a community *subjectively* viewed to be essential to their religion.

It is important to note that the subjective determination of the core of a religious tradition is a unique manner of determining the character of the "essentially religious". That is, it demands that courts participate in the internal hermeneutics of a religious tradition on what forms an essential part of that tradition. Consequently, following the *Shirur Mutt* case, Indian courts have over the years acted almost as theologians sifting between different kinds of religious claims, establishing some while denying others. Thus, for example, the Supreme Court has held that the sacrifice of cows did not constitute an essential part of the Islamic faith[11]; overruled Muslim claims that prayer in a mosque was crucial to the Islamic faith[12]; refused to accept traditional rights of the Tilkayats of the Shrinathji temple at Nathdwara which was taken from them by the Nathdwara Temple Act, 1959[13]; stipulated that the tandava dance was not a significant part of the Anand Margi community[14]; declared that the followers of Aurobindo did not constitute a distinct religion[15]; that the tradition of Santhara or ritual suicide did constitute a part of the Jain religion,[16] and so on.

As obvious, each of these cases exemplifies a particular form of public reasoning where the state has felt compelled to assert its sovereign authority to secure religious regulation and social reform through arguments internal to a particular tradition or practice. Thus, the slaughter of cows could have been addressed solely as a matter of efficient animal husbandry or the prevention of cruelty; restrictions to access to a mosque or to other religious practices such as the tandava dance could have been addressed as issues meriting intervention if they threatened public order; state intervention in the functioning of religious institutions as justified by the need to prevent mismanagement in all traditions rather than in one particular tradition and so on.

[10] Id.
[11] *M.H. Qureshi* v. *State of Bihar*, AIR 1958 SC 731.
[12] *Ismail Faruqui* v. *UOI*, (1994) 6 SCC 360.
[13] *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajastan*, AIR 1963 SC 1638.
[14] *Jagdishwaranand* v. *Police Commissioner*, *Calcutta*, AIR 1984 SC 51.
[15] *S.P. Mittal* v. *Union of India*, AIR 1983 SC 1.
[16] *Nikhil Soni* v. *Union of India*, 2015 Cri LJ 4951.

That is, many of the cases that the court decided could have produced a form of secular public reasoning that was not rooted in specific traditions but which could have been justified independently of these traditions.[17] However, constitutional reasoning regulating religion has taken precisely this route and has been the model that has structured the legal conceptualization of religion in India. It is this model that this comment would like to present as part of a parochial and even colonial form of conceiving Indian society.

4 In lieu of a conclusion

An important aspect of the colonial view of the irreconcilable social differences of India was the belief that many of these differences were on account of the essentially religious and irreconcilable nature of many of India's most important religious traditions like the Hindus, the Muslims and so on. It is quite a different matter that the enormously diverse religious traditions of India do not easily answer to the call of terms like Hindu and Muslim. But that is a matter for another occasion. For the present discussion, it is sufficient to demonstrate that Indian constitutional practice continues to characterize its social body as essentially irreconcilably religious, quite like the colonial state, in order to be able to exercise state powers of social reform over religion. And in doing so, the constitutional scheme of independent India also reinforces religious difference quite like the colonial state, when organizing the state's power over the exercise of religious freedom.

To return to Baxi at this point, it must be obvious that the instantiation of Baxi in my own intellectual concerns in constitutional studies is an example of a C3 styled analysis. Equally, it is a material, historical, and context driven account of Indian constitutional development, especially its unique efforts to stitch together social consensus in fashioning a new and transformative constitutional program. As a pioneering scholar of the contextual and material constitution in India, a whole generation of scholars like myself engaged in C3 styled analyses follow in the illustrious footsteps of Professor Baxi.

[17] *See also* Partha Chatterjee, *Secularism and Tolerance*, *in* Secularism And Its Critics 345-79 (Rajeev Bhargava ed., 1999).