



Fragments on reading and teaching Baxi: pedagogy, deconstruction, style

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Abstract

In this article I reflect on some aspects of Baxi's essay "Law and State-Regulated Capitalism in India" (1991). I wish to evoke, firstly, how Baxi's critique of Indian law allows students to experience 'negative thinking' through its undermining of basic assumptions about law and the State. Secondly, I attempt to make sense of Baxi's reference to 'law's illegalities' by using Derrida's conception of the impossibility of fixing the limit between the legal and the illegal, which is associated with the impossibility of justice itself. Finally, I offer a brief analysis of some technical aspects of Baxi's writing style to show how the text's powerful literary properties shape our experience of its argument.

Keywords Pedagogy · Negative thinking · Hesitation · Deconstruction · Style

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Teacher: *What can you tell me about the Kesavananda Bharati case and the Golaknath case?*

A few hands shoot up. There is a murmur in the classroom. One can make out a few words, *basic structure, constitutional amendment*, that are repeated in the confident answers received from those who raised their hands.

Teacher: *Yes, basic structure doctrine. But what were these cases really about? What were the facts? What was the social context?*

A hesitation. A somewhat more tentative answer from the back, more a question than an assertion:

Student: *Land reform?*

Teacher: *Yes, they were related to land reform. But can anyone tell me the specific facts from which these cases arose? Or, more generally, about the significance of these legal developments for land reform?*

More hesitation, then silence.

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When accepting the invitation to write this comment on Upendra Baxi's article "Law and State Regulated Capitalism in India",¹ particularly on teaching it, I told one of the editors of this volume that I did so "with hesitation and trepidation". Hesitation and trepidation not just because I would be attempting an unfamiliar task, but because here it would involve reflecting, in print, on my own half-formed and incoherent ideas about pedagogy. Even more daunting was the idea of attempting to do justice to the depth and power of Baxi's text, which rises further in my estimation on each re-reading.

Of course, to be in a state of hesitation is fundamental to any creative enterprise, both at inception and through the process of creation. But I gradually came to the realisation that the doubts I was now feeling as a potential commentator were not divorced from my own experience of the text, which had always been, in some way, an experience of instability and uncertainty. Further reflection – or rather, some form of associative intuition – brought me to the realisation that hesitation was an important element in my own teaching practice, especially when teaching "critical" legal theory.

¹ Upendra Baxi, *Law and State Regulated Capitalism in India: Some Preliminary Reflections*, in CAPITALIST DEVELOPMENT: CRITICAL ESSAYS, 185-209 (Ghanshyam Shah ed., 1990).

In one very straightforward sense, the practice of teaching necessarily involves hesitation, because teaching is itself a creative enterprise. But what does hesitation have to do with pedagogy? If being “critical” entails questioning and undermining established patterns of thought, it appears to me that one of the goals of teaching critical ideas is to induce a hesitation in students’ minds, i.e. to produce a lack of certainty in both their assumptions and their conclusions, in their own perceptions of the limits of what they know and of what should or should not be included within those limits. The act of pausing to doubt one’s own convictions and intuitions is the necessary first step towards genuinely critical thought, and I find myself concerned with the attempt to communicate my own doubts and uncertainties, transmitting not knowledge but an awareness of the absence of knowledge. In a classroom discussion, this hesitation may appear as a momentary lack of confidence in responding to a question, whether stemming from a sudden doubt regarding the veracity of one’s information or, more fundamentally, from a sudden awareness of the contingent nature of one’s beliefs.

Baxi’s wide-ranging Marxist analysis of the Indian legal system provides many opportunities for a teacher to bring about such “induced hesitation”, as it covers issues from corruption to labour law to the Green Revolution while providing a framework for the analysis of Indian law and practice in terms of capitalism, exploitation and power. I will briefly discuss one of these issues that relates to the classroom exchange I have described above.

Writing at the end of the 1980s, Baxi points out how the agrarian reforms in India in the 1960s and 1970s constituted a form of primitive accumulation and were part of the generalised growth of capitalist relations in agriculture, and how landmark constitutional law cases such as *Golaknath* and *Kesavananda Bharati* along with the Emergency-era tussle between judiciary and executive/legislature represented nothing but a ‘superstructural discourse’, a mechanism for the hegemonic legitimation of ‘the massive inauguration of state capitalism’.² Through the production of legal controversies involving the 9th Schedule and Parliament’s powers to amend the constitution, the separation of powers appeared as the arena of struggle whereas the specific content of agrarian reform and the manner of its implementation were no longer in focus. The emphasis on agricultural productivity along with the tolerance for ‘private legislation’ (and a host of other tacit understandings and practices that Baxi calls ‘the unwritten Constitution’) are shown to be essential to the transformation of the Indian economy into a capitalist one, while the State masks the logic of exploitation and accumulation with the language of development and social justice.

² *Id.*, at 189.

Third-year law students are – or should be – familiar with the major constitutional law cases and related doctrinal issues. The hesitation arises when they are confronted with the idea that there might be something *more* worth knowing about these developments, that the legal principles they have studied do not constitute the entirety of relevant knowledge. Baxi’s assertion that the conflict between different theories of constitutional interpretation and the struggle between the ‘branches’ of government was not the *real* issue, that the real meaning of these discourses lay elsewhere, comes as a jolt. This impact is created not through an addition of information – if there is any such addition, it is merely ancillary – but rather through a taking away of conviction and certainty, a negation.

Here, and indeed throughout the text, Baxi exemplifies what Marcuse calls *negative thinking*, the thinking that attempts to ‘break the hold of the established, contingent reality and strive for a truth incompatible with it’³; the thinking that in itself constitutes an ‘experience of the denying, deceptive, falsifying power of the established reality’.⁴ Marcuse says that negative thinking is the only way for philosophy to challenge the status quo, because it allows us to imagine the possibility of a different reality, or at least the possibility that the things we take for granted are not inevitable but contingent. By exposing the language of “basic structure”, “constitutional amendment” and “fundamental rights” as being merely a legitimating discourse for the ruthless beginnings of capitalism, Baxi dissolves our comfortable assumptions about the nature and function of legal institutions and legal doctrine.

In terms of pedagogy, the successful transmission or communication of negative thinking produces hesitation as I have described it. The characterisation of weighty issues of constitutional discourse as mere illusion provides an experience of the ‘falsifying power of the established reality’ in a particularly vivid manner to students who are being indoctrinated in that very discourse. In the classroom, there is a sharp, almost audible intake of breath at moments when the constructed edifice of constitutionalism and “rule of law” is shaken and the ground trembles, however briefly, underfoot. The genius of Baxi’s analysis and its unique adaptability to this pedagogical enterprise is to provide us, in the space of a short article, with both the starting points for such negative exploration as well as a map to guide the way.

³ H. MARCUSE, *ONE-DIMENSIONAL MAN*, 131 (Routledge, 2nd edn. 1991).

⁴ *Id.* at 144.

Deconstruction is a philosophy of hesitation.⁵

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Teacher: *Why do you think we have so much corruption in India? Are Indians just essentially dishonest?*

Student 1: *No, sir, there is just as much corruption in many other countries.*

Student 2: *It's because we are a poor country and public servants aren't paid enough.*

Student 3: *It's because we're lacking good governance and mechanisms for accountability.*

Student 4: *It's because our politicians are useless!*

Teacher: *Well, do you think all this can change? Can we get rid of corruption?*

Hesitation. A few confused expressions, a few wry smiles and shakes of the head. A few murmurs saying *yes, why not? Maybe, some day?*

Teacher: *But Baxi tells us that it can never change. Corruption is not an anomaly that we can somehow excise from the otherwise beneficial working of the State. The Indian State cannot get rid of corruption because corruption is inherent in the very nature of the capitalist State. The divide between public resources and private capital is a myth, an illusion, and we are all taken in by it.*

Silence.

*

Deconstruction is a philosophy of hesitation. I have, of course, taken the quote out of context.⁶ But it allows me to jump to an essential philosophical aspect of Baxi's critique of the Indian legal system, a critique which one may think of as being "deconstructive" in the loose sense of a critical approach that questions established discourses and exposes patterns of hierarchy and domination. I want to briefly explore how there also appear elements of "deconstruction" in a more specifically Derridean sense, in the manner in which Baxi brings us to the limit of *legality* and to the impossibility of justice.

⁵ SIMON CRITCHEY, *THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS* (3rd ed., 2014).

⁶ In his study of Derridean ethics, Critchley uses the phrase in the context of the issue of 'closure' in Derrida. It is linked in a later passage to the problem of 'logocentric totality'; there is, perhaps, some distant resonance of this in my comment below on the limits of legality in both Derrida and Baxi.

The final section of the article is an extraordinary indictment of State violence in India. Under the slightly confusing title of ‘surplus repression’, Baxi shows us how the Indian State systematically uses extreme force to establish and maintain a ‘reign of terror’ over its own populace. I want to briefly highlight the underlying tension, in Baxi’s approach, between the *legal* and the *illegal*. Indeed, this tension runs through the entire text like a current; he begins the article by declaring that his aim is to ‘seek an understanding of the illegalities of the contemporary Indian law’,⁷ and again and again he holds this law up to standards of justice only to find it wanting.

How is one to understand these standards of legality that Baxi relies on but never defines? At first sight, one might well consider that Baxi is operating within the natural law tradition of legal philosophy, denying “validity” to positive laws when they do not conform to some “higher” source of law; hence, Indian law is *illegal* in the multiple aspects he identifies. It is not enough that there be a Parliament, a Court, a Government for there to be *law* in the truest sense, as the actions of these contingent law-makers and law-enforcers must be judged with reference to a more certain standard that is only imperfectly, if at all, captured by statutes and constitutions. Natural law philosophy typically suggests that we may identify these standards through reason, beginning with some fundamental assumptions about human life. These fundamental assumptions include a fundamental *purpose* for the existence of human beings as well as an understanding of humans as social creatures: the need for human laws which are somehow in conformity with these assumptions – often founded in religion – can then be deduced in a rational framework.

But something rather different emerges from Baxi’s analysis; the lack of an identified higher standard is not a flaw but an essential element of his approach. There are no fundamental principles that allow one to determine the validity—or “legality”—of laws. The line between the legal and the illegal is not one that can be drawn easily, or rather not one that can be drawn at all. At the very edges of the law’s operation it trembles violently into illegality; our own characterisation of something as legal or illegal may be a hesitant, uncertain one. Nowhere is this clearer than in the context of the use of force by the police,⁸ which is the most immediate contact between the sovereign violence of the law and the vulnerable bodies of its subjects. Baxi wants to expose the ‘standardless, and therefore, illegal use of force by state agents and agencies’.⁹

The absence of “standards”, then, is what makes the use of force illegal. But where are these standards to be found? At what point does the use of force by the police, the very embodiment of the law and authorised by it to use force, become illegal? As everywhere in the law, there are apparently easy cases: it is possible to

⁷ Baxi, *supra* note 1, at 185.

⁸ MARGARET DAVIES, *ASKING THE LAW QUESTION* 378 (3rd edn. 2008).

⁹ Baxi, *supra* note 1, 200. The connection between this and state-regulated *capitalism* is not immediately obvious. Baxi might be suggesting that the reign of terror allows the state to maintain the working-class population (they are the ones who face the brunt of the “illegal” violence) in a perpetually disciplined state. However, this suggestion is not spelled out; Baxi says instead that the State’s violent oppression fuels popular insurrection which in turn justifies more excessive use of force. That this represents and contributes to both discipline and hegemony is a radical idea that one wishes he had explored further.

identify obvious instances of illegal behaviour that would themselves constitute crimes such as murder or rape. The requisite standards are to be found within the law itself. But how is the legal/illegal line to be drawn in a case where a policeman physically restrains a suspect with just a little more force than is absolutely necessary? Or touches the (sexualised) body just a little more than is absolutely necessary? Or when peaceful demonstrations are dispersed by tear gas and water cannons? Or when pellets are fired at eye-level against a group of protesters instead of at the limbs or torso?

In Derrida's classic lecture/essay "Force of Law"¹⁰ – published at around the same time as Baxi's article – the perpetual making and remaking of the limit of the legal is shown to be stemming from the essentially deconstructible nature of the law; law is deconstructible because it is founded on text and constructed through interpretive practices. This deconstructible nature of law is what allows us to aim for – although never be certain of achieving – justice, which is "undeconstructible". It is no coincidence that Derrida also identifies the police as the ultimate and most perfect embodiment of the tension between legal and illegal force, a tension which is extended in Derrida's exposition to the founding violence of the legal system itself. This founding violence is neither legal nor illegal, which makes it impossible for us to say that the legal system can ever be entirely just.

It seems to me that this paradox haunts Baxi's analysis. On the one hand, the law is critiqued for not being just. On the other hand, justice itself, the higher law that Baxi implicitly relies upon, cannot be defined or delimited or described as it is undeconstructible, it is 'an experience of the impossible',¹¹ the end of hesitation. And it is because of this impossibility that Baxi does not attempt to identify the principles of justice and legality he is using to condemn the Indian legal system; these standards *must* remain indeterminate. Unlike classical natural law jurisprudence, Baxi and Derrida are refusing to inscribe the "higher law" into a framework established by—and hence always discoverable by – reason.¹² Baxi's deconstruction of the Indian legal system is a trepid movement towards this unattainable and indescribable justice.¹³

¹⁰ Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority' in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE*, 3–67 (Drucilla Cornell et. al., eds., 1992).

¹¹ *Id.*, 15: '[D]econstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on). It is possible as an experience of the impossible, there where, even if it does not exist (or does not yet exist, or never does exist), *there* is justice.'

¹² See DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY & LAW*, 98–108 (1997). This is why I think it is missing the point to accuse Derrida of relying on hidden Platonic or natural law concepts of justice; Litowitz is an example of such an accusation.

¹³ See generally Carolyn D'Cruz, *Responding to a Heritage: Justice, Deconstruction and Injunctions of Marx*, 6(2) *SOCIAL SEMIOTICS* 159–178 (1996). In later work, Derrida himself engages with Marxist approaches that speak of justice as an emancipatory ideal.

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Silence.

Students: *Yes!*

Teacher: *What if he catches them and pins them down with just a little bit more force than is needed? Or lets his hands linger on their body just a little longer than seems necessary? Would this be illegal?*

Hesitation.

*

I want to digress with a brief discussion of style. It is a significant digression – not least because I am moving far away from the brief I was given by the editor – but, I hope, still relevant to this celebration of Upendra Baxi's work. My own experience of teaching Baxi's text is inextricably bound up with my experience of reading it, and I will attempt to highlight what seems to me to be an important but unremarked element of Baxi's writing, namely its singular literary properties.

There is a strange trembling in Baxi's language that seems to come not from anxiety but from anger, a sort of nervous energy that both drives it relentlessly forward and gives it an instability that the text seems barely able to control. I think this trepidation arises from and at the same time embodies the urgency of Baxi's critique of the Indian legal system. Rare among such discussions of law and political practice,

the urgency arises not solely through substantive argument but through formal texture; this subtle but powerful consonance of form and content is what gives the analysis such force. The text does not merely state its critique but performs it.

To illustrate this, I would like to explore how this trembling energy operates at the phonetic and syllabic level.¹⁴ This exploration will be a superficial one; I am not attempting a comprehensive analysis (although the text deserves it). I merely intend to highlight a couple of striking elements.

The primary literary device that emerges in the text in my reading is alliteration and assonance. I have not come across another academic work with such sustained use of it.¹⁵ Again and again Baxi repeats initial consonant and vowel sounds in quick succession. Through this repetition of sounds, alliteration can create a staccato effect that when overdone may disrupt the reading experience. Here, however, it is startlingly effective. Very often in the text we find a coruscating flood of plosive alliteration, especially involving the voiceless /k/ and /p/ sounds:

Corruption is the hard core pornography of power

The coitus politicus in its momentary interruption at the full public gaze appears to endow the public with the illusion of enhanced capabilities to combat corruption.

peaks and pinnacles of power

the criminogneity of corruption (sic)

The power of the government ... is plenary. It cannot be compelled...

Considerations of political patronage to compliant elements within the trade union movement must, largely, explain the pathology of power...

Reading these lines aloud brings out how the spitting plosives embody the rage and contempt underlying the analysis, the tongue momentarily stopping air flow through the mouth to then release it with anger. Through insisting on the sound, the alliteration systematically repeats this subtle physiological process that is mirrored in our reading, adding to the force of argument. Further, the extent and nature of the alliteration and the interaction of the two sounds varies throughout the text, creating a dynamic staccato rhythm. In phrases such as *Corruption is the hard core pornography of power* and *Considerations of political patronage to compliant elements*, the two sounds weave a sonic web in which they balance and play off each other. Elsewhere, we find one sound dominating to produce an even more marked effect of emphasis and disruption, the alliteration creating an awkward, percussive movement: *capabilities to combat corruption; peaks and pinnacles of power*.

¹⁴ For a glossary that defines some of the technical terms I use in this section see THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS (Chris Baldick ed., 1990)

¹⁵ Although I have seen some hints of it elsewhere in Baxi's own writing.

This technique is highly original in academic writing, and remarkably effective. Of course, while the two plosive sounds I have picked out form the most obvious examples of this alliterative effect, I do not mean to imply that they dominate the entire text (although they do seem to dominate the section on corruption – I am not sure if there are any conclusions to be drawn from this); there are many other examples of alliteration and assonance to be found. They go along with another stylistic peculiarity of the text, one that is a bit harder to pin down. In many places, belying conventional literary wisdom, the text gains visceral power through a heavily Latinate vocabulary, the often convoluted syntax piling up the multi-syllabic words and toppling them over on the reader with almost irresistible force. While Latinate diction typically gives distance as it is “intellectual” rather than visceral, in Baxi’s hands the additional short and unstressed syllables add velocity, the occasionally missing punctuation and articles and prepositions only adding to the effect. The use of multisyllabic words and these quirks of syntax have the effect of pulling the reader into the text and carrying them along at quickening pace. The text washes all before it. At the same time, Baxi’s vocabulary creates a tortured, awkward rhythm where the reader encounters a thicket of syllables through which the syntax forces them; the effect can be overwhelming. It is relatively harder to single out examples of this as the gathering force of the sentences emerges fully only when read together, in context:

four decades of the working of the Indian Constitution have produced affirmation of the amplitude of State power which tends to negate both rectitude and integrity in the wielding of it

The absence of any sustained public discourse on the Indian states’ proclaimed penchant for, or pronounced inability to inhibit, infliction of death and mayhem on its own citizens

Note the assonance of *affirmation/amplitude* and *inability/inhibit/infliction*, which go along with the ever-present plosives *proclaimed/penchant/pronounced*. The awkward syntax of *tends to negate both rectitude and integrity in the wielding of it* mirrors the tortuous working of the Constitution that the passage describes.

The prohibition of ‘third-degree’ methods in criminal law is modest as well as minor: it does not define prohibited practices which are well-known, nor does it provide evidentiary regimes where complaints of torture can be expeditiously and equitably examined.

planning has become a process absorbing the social consequences of vandalistic capitalist behaviour

the concepts and practice of planning anachronistically inaugurated in India

In the first quoted line above, we move from the soft alliteration of *methods/modest/minor* to the harsher, multisyllabic assonance of *expeditiously and equitably examined*. In the third line there is a similar move, this time from the plosives of *concepts/practice/planning* to the twisted, awkward *anachronistically inaugurated in India*. These movements evoke our experience of the Indian legal and political system that is seemingly founded on clear and just principles but is in reality enmeshed in abusive and exploitative practice. A similarly tortured construction appears in *vandalistic capitalist behaviour*, the internal rhymes and assonance of *vandalistic capitalist* adding emphasis. In each of these lines the multisyllabic words bring both emphasis and violence through their combination of “extra” short syllables in conjunction with the play of consonant and vowel sounds.

The diaspora of agrarian reform laws into a vast and varied discourse concerning the co-existence of a plenary parliamentary power to make, remake or unmake the Constitution.

In the future elaboration and accentuation of this contradiction, the Indian legal order will increasingly experience its own internal incoherence

I trust there is no need to continue highlighting how the patterns and rhythms of sound facilitate our experience of Baxi’s diatribe; the reader will find such patterns emerging throughout the text. It is rare for a work of legal theory to combine analysis and polemic to such devastating effect, and rarer still for it to employ such striking stylistic tools to do so. Filled with these rushing syllables and hammering alliteration and assonance, Baxi’s style gives an accelerating intensity to his critique of the legal system and to his demands for justice. At the same time, he offers us neither comfort nor resolution (I dare say that few would find much comfort or resolution in the further evolution of the Indian legal and political apparatus since his time of writing). There are no certainties and no solutions. By the end of the text we find ourselves standing on the brink of the “internal incoherence” of the legal order, a chasm created by the law’s illegalities. In Baxi’s prose, depth of feeling and of insight come together in the violence of language, so that—for one textually mediated and hence perpetually reproducible moment—both author and reader are caught, hesitant and trembling, on this edge.