
DECODING THE FRAGILE BALANCE BETWEEN VIOLENCE AND JUSTICE: A CONSTITUTIONAL PARADOX

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ABSTRACT

This essay critically examines the conflict between the pursuit of justice and the rule of law, which lies at the core of Indian constitutionalism. The paper examines how political and foundational violence are ingrained in the Indian Constitution, drawing on Upendra Baxi's groundbreaking critique, *The (Im)possibility of Constitutional Justice*. It challenges positivist legal interpretations that place obedience above legitimacy and calls into question the idea of sovereignty in a democratic setting. The paper makes the case for a move away from strict legal positivism and toward jurisprudence that is infused with moral, social, and humanistic considerations by contrasting Austin's command theory and Kelsen's pure theory of law with the normative requirements of a rights-based constitutional order.

The paper illustrates how state-sanctioned legal mechanisms can sustain injustice by analysing clauses like Article 22's preventive detention and the 38th and 59th Constitutional Amendments' erosion of judicial review during the Emergency. The conversation emphasises how constitutional supremacy can be abused and stifle the very democratic values it aims to protect when it is separated from morality and the general welfare.

The paper advocates for a more compassionate implementation of constitutional provisions, drawing on Max Weber's theory of state violence and Baxi's metaphor of the Constitution as an "engineered" structure with both hardware (coercive power) and software (normative values). In the end, it promotes a rethinking of constitutional interpretation, one that reestablishes the value of human dignity, decentralises power, and harmonises the state's conscience with the Constitution. Only then will the Indian Constitution be able to move past its inherent inconsistencies and function as a genuine charter of justice for everybody.

Keywords: Indian Constitutionalism, justness, morality, legal concepts

Introduction

The Constitution of India formulated by several Indian jurists, social reformers and political leaders such as B.R. Ambedkar, had quenched newly independent India's thirst to introduce a legal framework as the charter of the Country. They excelled in understanding the Nation's needs and its people's expectations from the legal framework which would regulate the whole Country by an application of uniform laws throughout India. Nonetheless, with evolving times and an influx of modern ideas, present-day scholars encounter a 'paradox of sovereignty'. The Legal Scholar, Upendra Baxi, through his literary piece 'The (Im)possibility of Constitutional Justice' accuses the Indian Constitution of being a victim of such a paradox. The term 'sovereign', defined by John Austin as a person or a body who holds supreme power of making, executing and administering laws and whom the larger political society obeys, becomes a disputed title. "It is slightly paradoxical and flawed in the democratic context, to consider the Legislature as 'sovereign' separate from the people who are the real sovereign according to the Indian Constitution"¹. The literary piece by Upendra Baxi idealizes the protection of fundamental rights enshrined in the Constitution and highlights the presence of foundational and political violence in the practice of the Indian judiciary, because of which the 'sovereign' i.e. the people have to suffer. Such constitutional violence ultimately 'threatens the underlying values of Indian Constitutionalism.'²

Can the supremacy of a law be equated to its justness?

Following the provisions of the Constitution rigidly without taking into view normative considerations such as social order, public interest, economic aspects and more, would make us all believers of legal positivism. Legal positivists such as Austin and Kelsen believe in what law simply 'is', and since the Constitution is the supreme law, it governs all forms of authorities, organisations and individuals. Quoting Austin, "The existence of law is one thing, its merit or demerit is another", which implies that the presence of law is primary and its 'justness' is a secondary aspect which isn't related to the laws' existence. Therefore, in his description of Law as a 'command backed by sanction', Austin separates law from morality in its entirety, and there exists no room for consideration of public interests, corruption of political

¹ Snigdha Nahar & Abhishek Dadoo, *Constituent Power & Sovereignty: In Light of Amendments to the Indian Constitution*, 1 NUJS L. Rev. 559, 560 (2008), <https://docs.manupatra.in/newslines/articles/Upload/E18CFC1E-071A-42EB-A6E5-EF3494215981.pdf>.

² UPENDRA BAXI, THE (IM)POSSIBILITY OF CONSTITUTIONAL JUSTICE: SEISMOGRAPHIC NOTES ON INDIAN CONSTITUTIONALISM (2002).

power, etc., during the interpretation and implementation of law. ‘The very basis of Austin’s sovereign theory is the presumption of habitual obedience to the supreme law, either voluntarily or because of the fear of sanctions that might be charged on them in case of non-obedience.’³ The modern society, however, seeks the ‘justness’ of the Constitution wherein the laws are legitimate and accustomed to normative human considerations. Austin enforces a positivist idea which excludes the morals of democracy and decentralisation of powers, whereas Baxi’s idea of ‘legitimate laws’ strives to induce the provisions of the Constitution with “normativity of human rights norms and standards”⁴ which would seek to remove political anarchy and implement the core values of a democracy. A transition in the ideology was observed in 1975, when ‘Mrs. Gandhi’s decision to implement a national emergency and introduce the thirty-eighth amendment, which shielded the judicial review of any laws adopted during an emergency, even if they impinged on the fundamental rights of the citizens,’⁵ was observed as excessively arbitrary. To bring justice, the Law needs to abstain from enforcing a ‘state-sponsored vision of a good life’⁶ and inculcate human interests and public participation in the administration and governance of the Nation.

Foundational violence as embedded in the Indian constitution

“A government is an institution that holds a monopoly on the legitimate use of violence”- Max Weber

As thoughtfully as the Constitution of India was formulated by its founding fathers, its provisions have an overbearing effect on society and its people, and it often ignores the basic structure of the Constitution i.e. the welfare of the people as utmost importance. The hardware of the Constitution consists of the state’s material power to enforce and implement laws, its power of coercion and the architecture of the armed forces and security establishments. However, the hardware is never questioned for its unjustness, which results in the corruption of the whole legal system. Flaws can be detected in the provisions such as in Article 22 of the Constitution⁷ which allows preventive detention of individuals without trial or conviction.

³ Austin’s Sovereignty Theory and its Relevance in Modern Indian Political and Legal Environment, IPLEADERS (1st March, 2024, 8:30PM), <https://blog.ipleaders.in/austin-sovereignty-theory/>.

⁴ UPENDRA, *supra* note 2, at 33.

⁵ SNIGDHA, *supra* note 1, at 561.

⁶ UPENDRA, *supra* note 2, at 35.

⁷ INDIA CONST. art. 22.

Thus, the contemporary normative constitutional theory suggests combining the force of the legislature with normative consideration of the circumstances and human interest.

Upendra Baxi's take on the positivist theory can be explained using a simple analogy- 'why is a mechanic valued less than an automobile engineer, even though a mechanic knows the workings of a car inside out? It is because the mechanic views the car only as a machine, whereas an engineer studies the theory behind how the car operates and what role the parts play.'⁸ The reading commits to reverse the views of scholars like Roscoe Pound who tag jurisprudence and law as a mechanical concept. Fundamental rights meant for the benefit of the larger society are often ignored many times, such as under the fifty-ninth amendment, which gave the central government the right to annul Article 21 during an emergency. Thus, the laws have to be applied not mechanically, but with human considerations to honour the basic structure doctrine. The conscience of the Constitution will be fulfilled only when it is adhered to in its true sense of positive morality. Legal concepts are not self-contained concepts, and judicial discretion should account for normative legal, social, economic and psychological considerations. "Shehnai"⁹, in the words of Upendra Baxi, will only be played when our legal system removes state illegality and treads on the path of constitutional justice.

Conclusion

"In the words of one of the Constitution's principal architects, their goal was to remove India from medievalism and create a society based on 'law, individual merit, and secular education.'¹⁰ The drafters recognised the pressing need for a charter that would empower individuals and reflect the true meaning of democracy. This goal will be achieved only when the provisions under the Indian Constitution are applied on a case-by-case basis, such that the application is flexible and can be moulded as per the victim's need for justice. 'The conscience of those wielding state authority does not match that of the Constitution. This is evident in the Indian state's criminal disregard of the constitutional rights of large segments of its citizens in (i) conflicts over the acquisition and use of natural resources, (ii) capital's overriding influence over labour terms of employment, (iii) struggles for national self-determination, (iv) religious-

⁸ SNIGDHA, *supra* note 5.

⁹ UPENDRA, *supra* note 2, at 41.

¹⁰ Maureen Callahan VanderMay, *The Role of the Judiciary in India's Constitutional Democracy*, 20 Hastings Int'l & Comp. L. Rev. 103 (1996), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1436&context=hastings_international_comparative_law_review.

communal pogroms, and (v) atrocities perpetrated against the "underclass."¹¹ Thus, the need of the hour is to bring to light the flaws of the Indian constitution and voice the amendments to be brought to secure fair justice to all whom the Indian Constitution applies.

¹¹ Anand Chakravarti, *Conscience of the Constitution and Violence of the Indian State*, 47 ECONOMIC & POLITICAL WEEKLY 33, 33 (2012), <https://www.jstor.org/stable/41720407>.