Sur vol.3 no.se São Paulo 2007

The Rule of Law in India

Upendra Baxi

ABSTRACT

The author underscores that the patrimonial liberal Rule of Law (ROL) discourse usually disregards alternative traditions. First, it does not permit any reflection on the normative socialist ROL conceptions. Second, it disregards the very existence of other ROL traditions: for example, the pre-colonial, those shaped by the revolt against the Old Empire, or the non-mimetic contributions by the proud judiciaries in some "developing societies".

In this context, the author analyses the distinctiveness of the Indian ROL and argues that it offers revisions of the liberal conceptions of rights. The author adds that the Indian ROL stands normatively not just as a *sword* against State domination, but also as a *shield*, empowering a "progressive" state intervention in civil society. Finally, the author introduces some current trends in the constitutional jurisprudence and highlights the leadership of the Supreme Court in the development of an extraordinary form of jurisdiction under the rubric of social action litigation.

Keywords: Rule of Law – Federalism – Thin notion of Rule of Law – Thick notion of Rule of Law – Judicial review

A new discourse?

The Rule of Law (as a set of principles and doctrines — hereafter ROL) has a long normative history that privileges it as an inaugural contribution of the Euro American liberal political theory. ROL emerges variously, as a "thin" notion entailing procedural restraints on forms of sovereign power and governmental conduct, which may also authorize Holocaustian practices of politics[1] and as a "thick" conception involving the theories about the "good", "right", and "just".[2]

The patrimonial liberal ROL discourse organizes amnesia of alternative traditions. It allows not even a meagre reflection on the normative socialist ROL

conceptions. It disregards the possibility that other ROL traditions of thought ever existed: for example, the pre-colonial, those shaped by the revolt against the Old Empire, or the non-mimetic contributions by the proud judiciaries in some "developing societies".[3]

Likewise, a community of critical historians has demonstrated that in the countries of origin, both the "thin" and "thick" versions for long stretches of history remained consistent with violent social exclusion; the institutional histories of ROL in the metropolis for a long while remained signatures of domination by men over women, by the owners of means of production over the possessors of labour-power, and by persecution of religious, cultural and civilizational minorities. Students of colonialism/imperialism have stressed that the ROL values remained wholly a "whites-only" affair.[4] The triumphalist celebration of ROL as an "unqualified human good" even goes so far as to reduce struggles against colonialism/imperialism as an ultimate unfolding in human history of the liberal values coded by the ROL.[5] Even the insurgent histories that generate a universal recognition of human right to self determination and further the itineraries of contemporary human rights stand misrecognized as the miming of the Euroamerican ROL world-historic imagination! The historic fact that non-Western communities of *résistance* and peoples in struggles have enriched 'thick' ROL conceptions is simply glossed over by the persistent myths of the "western" origins;[6] the promotion of ROL as prize cultural export continues old contamination in even more aggressive forms in this era of contemporary globalization.

The "new-ness" of contemporary ROL talk

In contemporary talk, however, ROL goes transnational or global. It is no longer a bounded conception but is now presented as a universalizing/globalizing notion. In part, the new "global rule of law" relates to the emerging notions of global social policy and regulation.[7]

More specifically, the networks of international trade and investment regimes promote a view that national constitutions are obstacles that need "elimination" via the newly-fangled discourses of global economic constitutionalism.[8] The war *on* "terror" now altogether redefines even the "thin" ROL notions.[9] The paradigm of Universal Declaration of Human Rights stands now confronted by a new paradigm of trade-related, market-friendly human rights.[10] The inherently undemocratic international financial institutions (IFIs), notably the World Bank, not the elected officials in "developing" societies, now present themselves as a new global sovereign who decides how the "poor" may be defined, poverty measured, the "voices of the poor" may be globally archived, and how poverty alleviation and sustainable development conditionalities may expediently redefine "good governance". The precious and manifold diverse civil society and new social movement actors do not quite escape the Master/Slave dialectic; even when they otherwise contest wholesale, they accept in retail the new globalizing ROL notions and platforms.

Space constraints forbid a fully detailed analysis of the newness of ROL; however, it remains appropriate to point at least to some crucial factors. First, the current extension of ROL to the realms of international development, economic, strategic and even military international orders is discontinuous with the Cold War, which marked at least two violently competing paradigms of ROL: the bourgeois and the socialist. Today, the socialist ROL, a form in which private ownership of means of production was not considered the foundation of a "good" society and human freedom, has almost disappeared from view.[11] Second, increasingly now it becomes difficult to keep apart the ROL from the new human rights and global social policy languages; I may rather refer here for example, to voluminous ongoing work of the United Nations human rights treaty bodies, the effort to develop the right to development, the Millennial Development Goals and Targets, which develop rather different kinds of globalizing ROL-oriented normativity. Third, the merger between these human rights and global social policy carries some costs. The so-called universal human rights become eminently negotiable instruments in the pursuit of diverse global policies. Fourth, even as the so-called "judicial globalization" promotes an unprecedented salience of judicial actors, their modes of activist justicing, at national, regional and supranational levels introduces new ways of articulation of ROL values and standards, it also, at the same moment, promotes, the structural adjustment of judicial activism.

Fifth, human rights and social activism practices contribute more than ever before to a multitudinous re-articulation of the rolled-up ROL notions. Human and social rights activism needs to contest the hyper-globalizing ROL talk, promoting the reach of the communities of direct foreign investors, often personified by the new sovereign estates of multinational corporations (MNCs), and more generally by their normative cohorts, principally international financial institutions, and development assistance regimes. At the same time historically situated activist agencies also remain confronted with the need to reinvigorate some proceduralist and some "thick" ROL conceptions.

Sixth, the new ROL discursivity/idolatry presenting it as a new form of global public good remains unmarked and untroubled by the bounded ROL conceptions, which had as its cornerstone the doctrine of separation of powers, or differentiation of governance functions, that fosters the belief in limited governance, an antidote to tyranny, signified by concentration of powers. True, as Louis Althusser[12] reminded us, the doctrine also masks the "centralized unity of state power". The bounded ROL talk at least provided platforms of critique; the globalizing ROL knowing no such conception that may limit "global good governance" further undermines the "rationality" of the bounded ROL conceptions.[13]

At stake then remains in the new ROL discourse a deep contradiction between ROL as a globalizing discourse that celebrates various forms of "free" market fundamentalisms and some new forms that seek "radically" to universalize human rights fundamentalisms. This incommensurability defines both the space for interpretive diversity and also a growing progress in measurement that standardize, via human rights and development indicators/benchmarks, new core meanings of the ROL.

Government of laws and men

ROL notions have suffered much by two popularizing aphorisms: ROL signifies "government of laws, not of men"; "Rule of Law is both, and at once, government of law and of men". If "men" is used inclusively as signifying all human beings, the slogans may signify secularity: not Divine authority but human power makes both government and law. This however poses the question whether constitutions and laws based on religion disqualify at the threshold from being ROL societies. On a different plane, in the feminist practices of thought that inclusiveness remains always suspect. It identifies literally both these slogans as representing the government of, by, and for men. This raises the question concerning feminization of state and law in a post-patriarchal society. Likewise, the emerging critique on the platform of rights of peoples living with disability translates both "government" and "men" as affairs of dominance by all those temporarily able-ed. This raises the question of indifference to difference. I may not here pursue these, and related, questions for reasons of space save to say that all ROL notions that ignore them remain ethically fractured.

The ROL message that those in power should somehow construct and respect constraints on their own power is surely an important one. But the importance of this sensible requirement is not clear enough. To be sure, rulers as well as ruled ought to remain bound by the law (conceived here as a going legal order, an order of legality) regardless of the privilege of power. But it is never clear enough whether they ought to do so instrumentally (that is in Max Weber's terms "purpose rational", even expedient rule following conduct) or intrinsically (legality as an ethical value and virtue.) Instrumentalist compliance negotiates ROL languages in ways that perfect pathways of many a hegemonic and rank tyrannical credential. To follow ROL values because they define the "good", the right, and the "just" law and state conduct is to develop a governance ethic. It is at this stage that massive difficulties begin even when we may want to consider the ROL tasks as those defining the "rule of *good law*".

Elucidating "good" law entails "a complete social philosophy" which deprives the notion of "any useful function". As Joseph Raz[14] acutely reminds us: "We have no need to be converted to rule of law in order to discover that to believe in it is also to believe that good should triumph". But the "good" that triumphs, as a "complete social philosophy", may be, and indeed has often been, defined in ways that perpetuate states of Radical Evil— complete social philosophies have justified, and remain capable of justifying, varieties of violent social exclusion. Is this the reason why contemporary postmetaphysical approaches invite us to tasks of envisioning justice–qualities of the basic structure of society, economy, and polity, in ways that render otiose the Rule of Law languages?[15]

What ROL addresses and doesn't?

In any response to this question**,** it may be useful to make a distinction between ROL as providing constraint-languages and facilitative languages. As constraint–

languages, fully informed by the logics and languages of contemporary human rights, ROL speaks to what sovereign power and state conduct may not, after all, *do*. It is now normatively well accepted that state actors may not as ways of governance practice genocide, ethnic cleansing, institutionalized apartheid, slavery/slave-like practices, and rape and other forms of abuse of women. Outside this, the ROL constraint languages stipulate/legislate the following general notions.

1. State powers ought to be differentiated; no single public authority ought to combine the roles of the judge, jury, and executioner
2. Laws/decrees ought to remain in the public domain; that is, laws ought to be general, public, and ought to remain contestable political decisions
3. Governance via undeclared emergencies remains violative of ROL values and illegitimate
4. Constitutionally declared states of emergency may not constitute indefinite practices of governance and adjudicative power ought not to authorize gross, flagrant, ongoing, and massive violation of human rights and fundamental freedoms during the states of emergency
5. The delegation of legislative powers to the executive ought always to respect some limits to arbitrary sovereign discretion
6. Governance at all moments ought to remain limited by regard for human rights and fundamental freedoms
7. Governance powers may be exercised only within the ambit of legislatively defined intent and purpose
8. Towards these ends, the State and law ought not to resist, or to repeal powers of judicial review or engage in practices that adversely affect the independence of the legal profession.

These “oughts”, far from constituting any fantastic wish-list, define the terrain of ongoing contests directed to inhibit unbridled state power and governance conduct. The question is not whether these “oughts” are necessary but whether they are *sufficient*. It is here that we enter the realms of the ROL facilitative languages which leave open a vast array of choices for the design and detail of governance structures and processes. These choices concern the processes of composing legitimate political authority, forms of political rule, obligations of those governed and of those who govern.

Constitution of legitimate authority

The ROL does not quite address this dimension. Assuming, however, that universal adult franchise constitutes a core ROL value, the ROL seems equally well served by both the “first past the post” or “proportional” and “preferential” voting systems and related variants. Neither the thin nor the thick ROL versions offer any precise norms and standards for the delimitation of constituencies in ways that avoid gerrymandering representation.[16] Further, ROL remains rather indifferent to the

question of state funding of elections; nor does it engage corporate campaign funding. Elections cost big money for political leaders and parties at fray; what "regulation" may violate the liberal ROL freedom of speech and association values remains an open question. So do appeals to forms of "hate speech" in the competitive campaign politics. The dominant ROL discourse moreover remains indifferent to the question of affirmative programs of legislative representation, which modify the right to contest elections for cultural and civilizational minority groups and coequal gender representation. The ROL languages, for weal or woe, insufficiently address the notion of participation, do not extend so far as to prescribe means of constitutional change such as referenda, or the right to recall of errant or corrupt legislators.

Forms of political rule

As concerns structures of governance, ROL remains rather indifferent to choices amongst *federalism* over *unitary*, *republican* over *monarchical*, *secular* over *theocratic*, *flexible* over *rigid*, constitutional formats**.** Nor do these foreclose choices concerning the scope and method for amending constitutions. The composition, of judicial power and of the administration of justice (methods of judicial appointment, tenure, and removal of judges, constructions of judicial hierarchies, etc.) remain infinitely open within the ROL languages.

Obligations of governed and of governors

The celebrated constraints upon lawmaking (legislative) power do *not* entail any ethical *obligation* to make laws for instance, a public 'right' to have a law made for disadvantaged, dispossessed, and deprived peoples; these remorseless non-decisions impact upon many a human, and human rights, future. Niklas Luhman reminded us poignantly that political decision concerning the making/unmaking/remaking of laws remains nothing but the *positivization of arbitrariness*. However, this arbitrariness is overridden by the disciplinary globalization where the South States have mandatory obligations to make law favouring the communities of direct foreign investors over those of their own citizens; these obligations stand fostered by transnational corporations and international financial institutions which themselves owe very little democratic accountability and human rights responsibilities.

Finally, without being exhaustive, how may ROL address its Other? A multitude of mass illegalities often historically generate forms of citizen understandings that eventually redefine interpretations of the ROL. Inflected by indeterminate notions of popular "sovereignty", these divergent insurgencies signify terrains of struggle of the Multitudes against the Rule of the Minuscule.[17] What space may we, and how, may "we", (the ROL "symbol traders") provide for these militant particularisms in our narratives?

This summary checklist of anxieties is *not* intended to suggest that we dispense altogether with the ROL languages and logics. Rather, it invites sustained labours that subject the normative and ideological histories and frontiers of ROL with very great care and strict scrutiny.

Towards this end, I reiterate my one sentence summation: ROL is always and everywhere a terrain of peoples' struggle incrementally to make power *accountable*, governance *just*, and state *ethical*. Undoubtedly, each romantic/radical term used here (accountability, justice and ethics) needs deciphering and in what follows I seek to do so by reflecting on the Indian ROL theory and practice.

Originality and mimesis-postcolonial Indian ROL

Of necessity, many a colonially induced historic continuity[18] marks the Indian Constitution. But the colonial inheritance relates more to the apparatuses and institutions of governance than to conceptions of justice, rights, and development. These in turn affect continuities with the colonial past. The distinctiveness of the Indian ROL lies in providing space for a continuing conversation among four core notions: "rights", "development", "governance" and "justice".[19] Thus it also offers revisions of the liberal conceptions of rights, which affect distinctive forms of constitutional life of the South.[20]

The hegemonic ROL talk underestimates the world historic pertinence of the Indian constitutionalism ROL conceptions. In the scramble for a New Empire, the constituent imagination of the so-called "transitional societies" remains tethered primarily to what these former socialist societies may learn from the American constitutional experience. Thus stand monumentally sequestered some considerable opportunities for comparable learning from the Indian ROL experience and imagination. Postsocialist constitution-making has much to learn from the originality of the postcolonial form; however, and despite renewed interest in comparative constitutional studies, it seems that the "New" Europe has very little to learn from the old Global South.

For the moment, I briefly consider below the relatedness of these four key notions: governance, rights, justice, and development.

Governance

The Holocaust of the Partition of India furnishes the histrionic moment in which the Indian constitution stands composed. The establishment of frameworks for collective human security and order was considered as a crucial ROL resource in the same way that today the making of a new global ROL remains affected by the two "terror" wars. The notion that the radical reach of self-determination ought to be confined merely to the end of the colonial occupation furnishes a new leitmotif for Indian governance; integrity and unity of the new nation redefines Indian ROL to authorize vast and ever proliferating powers of preventive detention and eternal continuation of many colonial security legislations as laws in force.[21] Since its birthing moment, the Indian ROL itineraries are shaped by both the doctrine of the reason of the state and the accentuated practices of militarized governance. No ROL value consideration in

general, overall, is allowed to intrude upon state combat against armed rebellion aimed at secession from the Indian Union. In this the Indian experience is scarcely unique.

What is distinctive, however, is the governance/management of the politics of autonomy.[22] In theory, Parliament has the power of redrawing the federal map, creating new states, diminishing or enlarging their boundaries, and even the names of states without any democratic deliberation. Yet the almost constant creation of new states within the Indian federation, along linguistic/cultural/identity axes, entails multitudinous people's movements, considerable insurgent and state violence. The politics of autonomy requires Indian understanding of the federal *principle* and *detail*.

If the federal principle privileges the *local* within the *national*, respecting the geography of difference in ways that authorize local knowledges, cultures, powers, and voices to inform and shape governance, the federal detail —mainly the distribution of legislative, executive, and administrative powers— seeks to negate this. True, this distribution of powers can only be changed by constitutional amendments and these remain difficult of negotiation and achievement in the current era of coalitional politics. However, the Indian Parliament retains a generous residuary authority that empowers it to legislate on matters not specified in the state and concurrent list; further, the laws it may make often have an overriding national authority. Additionally, Article 35 specifically gives Parliament overriding powers to make laws that outlaw millennially imposed disabilities and discriminations on India's untouchables (Article 17) and slavery and slave-like practices (Articles 23-24.) And, drawing heavily from the "experience" of comparative Commonwealth federalism, especially Canada and Australia, the Indian Supreme Court innovates constantly in its interpretive provenance to further hegemonic national role for the Union government.

India's distinctive cooperative federalism remains defined and developed by many institutional networks. The constitutionally ordained National Finance Commission constructs human rights normativity in allocation of federal resources to states. The constitution and the law create India-wide national agencies[23] entrusted with the tasks of protection and promotion of the human rights of "discrete and insular" minorities. The Comptroller and Auditor General of India, assisted by the Central Vigilance Commission, at least help fashion the discourse concerning corruption in high places. And, overall, the Indian Election Commission has incrementally pursued the heroic tasks of attainment of a modicum of integrity in the electoral process. The ways in which these and related agencies actually perform their tasks is a subject of lively political discourse, within the practices of investigative journalism, and social movement and human rights activism made constitutionally secure by the exertions of State High Courts and the Supreme Court of India.

All this enables continual re-articulation of people's power confronted by a heavily militarized polity and state formation, which put together and often inflict heavy democratic deficit on the processes, institutions, and networks of governmentability. Thus, increasingly civil society interventions activating high

judicial power have led to some softening of the anti-democratic aspects of the Indian Constitution at work.[24]

Overall, it seems to be the case that the federal principle holds within normative restraints of the federal detail. Put another way, Indian federalism contributes to the ROL discourse not just as facilitating governance but also as empowering participatory forms of citizen resilience and self–reliance. This experience needs to be accorded a measure of dignity of discourse in our "comparative" constitutionalism conversations.

Rights

The Indian ROL notions remain deeply bound to the ways in which fundamental rights stand conceived. Far from reiterating either the liberal or libertarian theologies of rights as corpus of limitation on state sovereignty and governmental conduct, the Indian ROL conceptions also empower progressive state action. Thus, for example, the following constitutional rights enunciations authorize legislative and policy action manifestly violative of some liberal conceptions of rights:

- Article 17 outlaws social practices of discrimination on the ground of "untouchability"
- Articles 23-24, enshrining "rights against exploitation", outlaws the practices of agrestic serfdom (bonded and other forms of un-free labour) and related historic practices of violent social exclusion
- Articles 14-15 authorize, under the banner of fundamental rights, state combat against vicious forms of patriarchy
- Articles 25-26 so configure Indian constitutional secularism as to empower state to fully combat human rights offensive practices of the dominant "Hindu" religious tradition
- Articles 27-30 provide a panoply of fecund protection of the rights of religious, cultural, and linguistic minorities.

The Indian ROL stands here normatively conceived not just as a *sword* against State domination and violation and historic civil society norms and practices but also as a *shield* empowering an encyclopaedic regime of "progressive" state intervention in the life of civil society. In so doing, it engages in simultaneous disempowerment and re-empowerment of the Indian State in ways that makes more complicated governance, politics, and constitutional development. In terms of social psychology of the yesteryear, the Constitution thus inaugurates "cognitive dissonance" in ways that necessarily marks its rather schizoid course of development.

The rights texts, enunciated in a coequal world-historic time of the Universal Declaration of Human Rights, further impact on the development of international human rights norms, standards, and even values. I have here in view Part IV of the Constitution which enacts the distinction between regimes of civil and political rights

and social and economic rights, which subsequently dominate the global human rights forms of talk.

The Directive Principles of State Policy declared as paramount as fashioning the ways of governance – acts of making law and policy – thus incarnate the previously unheard code of state constitutional obligations. Many actually installed at the time of origin, and subsequent governance mechanisms and arrangements, articulate institutional ways of moving ahead with this mission. I do not burden this text with any detailed enumeration.[25]

The Indian ROL conceptions further fashion an extraordinary scope for judicial review powers – a new jewel in the postcolonial Indian crown, as it were. The extraordinary powers to redress violation of fundamental rights have achieved, here summarily put, the following results. First, a stunning achievement which refers to administrative law jurisprudence directed to combat and control uses of discretionary powers; second, wide adjudicatory surveillance over legislations accused of violating fundamental rights or the principle and detail of Indian federalism; third, the enormous achievement fashioned by the Supreme Court of India giving its inaugural, and awesome powers of invigilation over the exercise of plenary amendatory powers via the doctrine of the basic structure and the essential features of the Constitution. These powers now stand further routinized to bring home micro-accountability for the exercise of everyday legislative, executive, and administrative exercises of power under adjudicatory surveillance.[26]

The exercise of judicial midwifery to deliver human rights and limited governance is not uniquely Indian; what is distinctive of the Indian story is that justices increasingly believe, and act on the belief, that basic human rights are safer in their interpretative custody than with representative institutions. This belief and practice combine to produce a distinctive type of “constitutional faith” (to borrow a fecund expression of Sanford Levinson, 1988) which further enduringly renders legitimate expansive judicial review.

Justice/Development

An extraordinary feature of the constitutionalism that informs Indian ROL is posed by the question of *justice of rights*. I have recently elaborated this in some anxious detail[27] suggesting further that the problematic of justice of rights may not be grasped by conceptions of Indian development, or the constitutionally imagined/desired social order. In the moment of making the constitution at least three salient justice- of- rights type questions stood posed. First, if promotion and protection of human rights and fundamental freedoms entailed maximal deference to full ownership over the means of production as the very foundation of freedom, how may “just” social redistribution *ever* occur? Second, how may fullest deference to communitarian rights be reconciled with the individual rights of persons who wish to belong to a community and yet also protest against individual rights violation within privileged acts of group membership? Third, how far should go group-differentiated rights that privilege programmes of affirmative action, not just extending to

educational and employment quotas, but also to legislative reservations for the scheduled castes and tribes, as ways of righting past and millennial wrongs?

These three interlocutions also define the constitutional conceptions of "development". If one were to take the Preamble and the Directive Principles of State Policy at all seriously, development signifies the *disproportionate* flow of state and societal resources that enhance real-life benefits for the Indian impoverished masses that Babasaheb Ambedkar luminously and poignantly described as India's *atisudras*, the social and economic proletariat. Much before the right to development-based notions of governance and development arrived on the scene of global ROL, the Indian constitution had already codified this understanding. In any event, the "justice of rights" problem has been variously recurrent in the Indian experience and I offer to view below some vignettes.

ROL as unfolded by the Indian Judiciary

The Indian Supreme Court is a forum with unparalleled vast general jurisdiction. It is not a constitutional court, though much of its business relates to issues concerning the enforcement of fundamental rights. The law laid down by the Court is declared to be binding on all courts throughout the territory of India and by necessary implication upon citizens and state actors. Further, not merely all authorities of the state are obligated to aid the enforcement of the apex judicial decisions but also the Court is empowered to do "complete justice", an incredible reservoir of plenary judicial power, which it has used amply in the past two decades. Legislative overruling of apex judicial decisions occurs but infrequently; however, an extraordinary device called the 9th Schedule has been invoked since the adoption of the Constitution to immunize statutes placed in it from the virus of judicial review, even when ex facie the legislations inscribed therein remain fundamental rights violative. In a recent decision, the Supreme Court has assumed powers of constitutional superintendence over the validity of laws thus immunized.

In the early years, the Court took the view that although the Directives cast a "paramount" duty of observance in the making of law and policy, their explicit non-justiciability meant that the rights provisions overrode the Directives. This generated high –intensity conflict between Parliament and the Court, resulting in a spate of constitutional amendments. In the process, much constitutional heat and dust has also been generated, in the main over a "conservative" judiciary that seemed to frustrate a "progressive" Parliament committed to agrarian reforms and redistribution leading to Court "packing" Indian – style.[28]

Over time, two kinds of adjudicative responses developed. First, the Supreme Courts began to deploy the Directives as a technology of constitutional interpretation, favouring an interpretative style that *fostered*, rather than *frustrated*, the Directives. This "indirect" justiciability has contributed a good deal towards fructification of the substantive/ "thick" versions of the Indian ROL. Second, in its more activist incarnation since the eighties, the Court has begun to *translate* some Directives into rights. Perhaps, a most crucial example of this is the judicial

insistence that the Directive prescribing free and compulsory education for young persons in the age group 6-14 is a fundamental right.[29] The Court here generated a constitutional amendment enshrining this right as an integral aspect of Article 21 rights, to life and liberty.

Simultaneously with the adoption of the Constitution, Indian Justices strove to erect fences and boundaries to the power of delegated legislation (processes by which the executive power actually legislates.) They conceded this power but with a significant accompanying caveat: the rule-making power of the administration ought not to usurp the legislative function of enunciation of policy, accompanied by prescriptive sanctions. Thus came into being the "administrative law explosion", where Justices did not so much invalidate delegated legislation but vigorously policed its performance. The executive may make rules that bind; but courts made it their business to interrogate, and even invalidate, specific exercises of administrative rule-making. A stunning array of judicial techniques over the review of administrative action has been evolved.

Justices asserted judicial review power over the constitutionality of legislative performances. Laws that transgressed fundamental rights or the federal principle and detail activated the "essence" of judicial review power. Whenever possible the Supreme Court sought to avoid invalidation of laws; it adopted the (standard repertoire of "reading down the statutory scope and intendments so as to avoid conflict and by recourse to the peculiar judicial doctrine of 'harmonious construction"). But when necessary, enacted laws were declared constitutionally null and void. And even when resuscitated by legislative reaffirmation, they were re-subjected to the judicial gauntlet of strict scrutiny. The instances of judicial invalidation of statutes far exceed in number and range the experience of judicial review in the Global North.

Going beyond this, Indian Justices have assumed awesome power to submit constitutional amendments to strict judicial scrutiny and review. They performed this audacious innovation through the judicially crafted doctrine of the Basic Structure of the Constitution, which stood, in judicial, and juridical discourse, as definitive of the "personality" defined, from time to time, as the "essential features" of the Constitution. They proclaimed the "Rule of Law", "Equality", "Fundamental Rights", "Secularism", "Federalism", "Democracy" and "Judicial Review" as essential features of the Basic Structure, which amendatory power may not ever lawfully transgress.

Initially articulated as a judicial doctrine crafting the limits of amendatory power, the regime of the Basic Structure limitation has spread to other forms of exercise of constitutional, and even legislative, powers. The ineffable adjudicatory modes also mark a new and a bold conception: "constituent power" (the power to remake and unmake the Constitution) stands conjointly shared with the Indian Supreme Court to a point of its declaring certain amendments as constitutionally *invalid*.

This judicial, and juridical, production then momentously (because Justices undertook the task of protecting the constitution against itself!) traversed

constitutional jurisprudence of Pakistan, Bangla Desh, and Nepal. The “comparative” ROL discourse so far wholly passes by this diffusion.

To conclude this narrative, the appellate courts under the leadership of the Supreme Court had devised an extraordinary form of jurisdiction under the rubric of social action litigation [SAL] still miscalled “public interest litigation”. Here summarily put, the SAL has accomplished the following astonishing results:

- a radical democratization of the doctrine of *locus standi*; every citizen may now approach courts for vindicating the violation of human rights of co-citizens
- the “de-lawyering” of constitutional litigation in the sense that petitioners-in-person with all their chaotic forensic styles of argumentation are being admitted
- the establishment of new styles of fact-finding via socio-legal commissions of enquiry to assist adjudicatory resolution
- the generation of a new adjudicatory culture; the SAL jurisdiction is conceived not as adversarial but as a collaborative venture between citizens, courts, and a recalcitrant executive
- the invention of continuing jurisdiction through which courts continue to bring about some minimal restoration of human rights in governance practices
- the fashioning of new ways of judicial enunciation of human rights, a complex affair in which the Supreme Court especially brings back to life rights deliberatively excluded by the constitution makers (such as the right to speedy trial), creates some component rights to those enunciated by the constitutional text (such as the right to livelihood, privacy, education and literacy, health and environment), re-writing the constitution by way of invention of new rights (such as right to information, immunity from practices of corrupt governance, rights to constitutional secularism, the right to compensation, rehabilitation, and resettlement for violated populations).

This new judicial disposition, or *Dispositif*, had its share of acclaim as well as criticism. The acclaim registers the emergence of the Supreme Court itself as an integral part of the new social movement aspiring to re-democratize the Indian state and governance. The criticism takes in the main two principal forms. First, the agents and mangers of governance cry “judicial usurpation”. This outcry has a hollow ring indeed because in reality SAL assumes many labours and functions that increasingly coalitional regime political actors simply can no longer manage; put another way, the Supreme Court assumes the tasks of national governance, otherwise appropriately assigned to democratic governance. Second, the frequently disappointed SAL litigants cry foul when the SAL fails to deliver its promises. The expectational overload here remains diverse and staggering, respecting no limits of the capacity, opportunity, and potential of judicial power as an arm of national governance. Thus, the apex Court often falters and fails in addressing, let alone redressing, contentious politics concerning ways in which the Judiciary may:

- fully declare mega-irrigation projects constitutionally human rights offensive

- deprive constitutional legitimating of the current policies of privatisation/ deregulation as being anti-developmental and human rights violative/offensive
- translate, with full constitutional sincerity, the current motto: women's rights are human rights, with due deference to religious and social pluralisms
- the adjudicatory voice promote "the composite culture" of India (Article 51-A) in fashioning ROL conceptions, of rights, justice, development, and governance
- foster and further participation in governance as the leitmotiv of the constitutional conception of the Indian ROL. How may they "best" meet the argument against concretising equality of opportunity and access for the millennially deprived peoples via educational/employment quotas in State administered/aided educational institutions and state and federal employment.[30]

Some conclusionary remarks

It is beyond the bounds of this essay to provide even a meagre sense of violence and violation embedded in the histories of rule of law in India. Not merely have the impoverished been forced to cheat their ways into meagre survival, "jurispathic" (to evoke Robert Cover's phrase) dimensions of the extant Indian ROL have continually worked new ways of their disenfranchisement. These stories of violent social exclusion may be told variously. I have recently narrated the institutionalisation of the "rape culture" in the context of Gujarat 2002 violence and violation.[31]

But it is to literature rather than to law that we must turn to realize the full horror of the betrayal of the Indian "Rule of Law". Mahasweta Devi's *Bashai Tudu* speaks to us about the constitutive ambiguities of the practices of militarized 'rule of law' governance and resistance in contemporary India. Rohintoon Mistry's *A Fine Balance* educates us in the constitutional misery of untouchables caught in the ever-escalating web of "constitutional" governance. These two paradigmatic literary classics abundantly invite us to pursue a distinctively Indian law and literature genre of study, outside which it remains almost impossible to grasp the lived atrocities of Indian ROL in practice.

These also make the vital point (with the remarkable Indian *Subaltern Studies* series) that the pathologies of governance are indeed normalizing modes of governance as a means of controlling (to evoke Hannah Arendt's favourite phrase) "rightless" peoples. The jurispathic attributes of the Indian Rule of Law at work can be described best in terms of social reproduction of rightlessness. Indian judicial activism begins to make and mark a modest reversal.

The Indian story at least situates the significance of the forms of creationist South narratives for contemporary Rule of Law theory and practice. Time is surely at hand for constructions of multicultural (despite justified reservation that this term evokes) narratives of the Rule of Law precisely because it is being loudly said that "history" has now ended, and there remain on horizons *no* meaningful "alternatives" to global capitalism.

The authentic quest for renaissance of the Rule of Law has just begun its world historic career. ROL epistemic communities have choices to make. Our ways of ROL

talk may either wholly abort or aid to a full birth some new ROL conceptions now struggling to find a voice through multitudinous spaces of people's struggles against global capitalism that presage alternatives to it.

We need after all, I believe, to place ourselves all over again under the tutelage of Michael Oakeshott.[32] He reminds us, preciously, that far from being a "finished product" of humankind history, the Rule of Law discourse "remains an individual composition, a unity of particularity and generality, in which each component is what it is in virtue of what it contributes to the delineation of the whole". That virtue of the "whole" may not any longer legitimate Euro American narratology. Rather the task remains re-privileging other ways of telling ROL stories as a form of participative enterprise of myriad "subaltern" voices.

NOTES

1. G. Agamben, *Homo Sacer*: *Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1995. See also G. Aderni, "Legal Intimations: Michael Oakeshott and the Rule of Law", *Wisconsin Law Review*, 1993, p. 838; U. Baxi, "The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture" in Kalpana Kababiran (ed.), *The Violence of Normal Times: Essays on Women's Lived Realities*, New Delhi, Women Unlimited in association with Kali for Women, 2005, pp. 332-384; U. Baxi "Postcolonial Legality" in Henry Schwartz & Sangeeta Roy (eds.), *A Companion to Postcolonial Studies*, Oxford, Blackwell, 2001, pp. 540-555; B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques*, London, Pluto Press, 1984; M. Galanter, *Competing Equalities*, Delhi, Oxford, 1984; M. Hidyatuallah, *The Fifth and Sixth Schedules of the Constitution of India*, Gauhati, Ashok Publishing House, 1979; C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Cambridge, The MIT Press, George Schwab trs, 1985; A. Sen, *Development as Freedom*, Oxford, Oxford University Press, 1999 and J. Stone, *The Social Dimensions of Law and Justice*, Sydney, Maitland, 1966, pp. 797-99.

2. See, for this distinction variously elaborated, L. Fuller, *Morality of Law*, New Haven, Yale University Press, 1964; N. McCormick, "Natural Law and the Separation of Law and Morals" in Robert P. George (ed.) Oxford, *Natural Law Theory: Contemporary Essays*, Clarendon Press, 1992, pp. 105- 133; J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford Clarendon Press, 1980 and G. Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, 1988.

3. A valuable comparative beginning is made by a group of scholars: see, R. Peernbohm, *Asian Discourses on the Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and U.S.*, London, London and Routledge, 2004. The present essay substantially extends and revises my contribution to the volume.

4. See R. Young, *Postcolonialism: An Introduction*, Oxford, Blackwell, 2001 and U. Baxi, "The Colonialist Heritage" in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, pp. 6-58. See also the materials therein cited.

5. E. P. Thompson, *Whigs and Hunters: The Origins of Black Act*, London, Allen Lane, 1975.

6. U. Baxi, *The Future of Human Rights*, Delhi, Oxford University Press, 2nd ed., 2006.

7. Differently presented, for example in Braithwaite and Dathos (2000), Chibundo (1999) and B. S. Chimni, "Cooption and Resistance: Two Faces of Global Administrative Law", *New York Journal of International Law and Politics*, vol.37, Number 4/Summer 5, 2005, pp.799-827.

8. See Gill (2000) and Schneiderman (2000).

9. See U. Baxi, "The War *on* Terror and the 'War *of* Terror', Nomadic Multitudes, Aggressive Incumbents & the 'New International Law'", *Osgoode Hall Law Journal*, v. 43, number 1 & 2, 2005, pp.1-36. See also M. L. Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law", *New York University Public Law and Legal Theory Working Papers*, Paper 43, 2006; Idem, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Rendition'", New York, ABCBY and NYU School of Law, 2004.

10. U. Baxi, *The Future of Human Rights*, Delhi, Oxford University Press, 2nd ed., 2006.

11. But seeR. Peernbohm, "Let One Hundred Flowers Bloom, One Hundred School Contend: Debating Rule of Law in China", *Michigan Journal of International Law*, v. 23, 2002, p. 471.

12. L. Althusser, *Montesquieu, Rousseau, Marx: Politics and History*, London, Verso, Ben Brewster trs, 1982.

13. Indeed, the separation of powers invests the executive with sovereign discretion in the realms of macro and micro development planning, arms production (inclusive of weapons of mass destruction), decisions to wage many types of (covert as well as overt) war, or management of insurgent violence. Our ROL talk unsurprisingly, but still unhappily, more or less, ends where the militarized state (the "secret" State, to evoke E. P. Thompson, *Writing by the Candlelight*, London, The Merlin Press, 1989 begins.

14. J. Raz, "The Rule of Law and its Virtue", *Law Quarterly Review*, v. 93, 1977, p. 208.

15. J. Rawls, *The Law of Peoples*, Cambridge, Harvard University Press, 1999; Idem, *Political Liberalism*, New York, Columbia University Press, 1993. See also J. Habermas, *etween Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, The MIT Press, William Rehg trs, 1996.

16. See J. Morgan Kouseer, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, Chapel Hill, University of North Carolina Press, 1999.

17. I invite your attention to such diverse phenomena as May 1968, the campus protest in the United States against the Vietnam War, massive peoples demonstrations against the Uruguay round and the WTO, the Tiananmen Square, the struggles against apartheid regimes in the United States and South Africa, against perversions of the East and Central European socialist legality and more

recently the protests against the invasion of Iraq and the various 'velvet' and 'orange' revolutions. For befittingly amorphous notions of 'multitudes' see, A. Negri, *Insurgencies: Constituent Power and the Modern State*, Minnesota, University of Minnesota Press, Muarizia Boscagli trs, 1999; A. Negri & M. Hardt, *Empire*, Cambridge, Harvard University Press, 2000; and in a rather dissimilar genre see P. Virno, *A Grammar of Multitude For An Analysis of Contemporary Forms of Life*, Los Angeles and New York, SEMIOTEXT{E}, Isabella Bertoletti, James Cascaito, Andréa Casson trs., 2004.

18. G. Austin, *The Indian Constitution: The Cornerstone of Nation*, Delhi, Oxford University Press, 1964; Idem, *Working a Democratic Constitution —The Indian Experience*, Delhi, Oxford University Press, 1999, pp. 540-555. U. Baxi, "The Colonialist Heritage" in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, pp. 6-58.

19. Jawaharlal Nehru captured this relationship by insisting that the "rule of law" must not be divorced from the "rule of life".

20. The Indian constitutionalism makes normative impact on postcolonial constitutionalism, illustrated most remarkably and recently by the post-apartheid South African Constitution. So inveterate, however, are Euroamerican habits of heart that the dominant, even comparative, discourse represents the Indian and related Southern forms of constitutionalism as merely mimetic.

21. The Indian Supreme Court has thus constructed a magnificent edifice of preventive detention jurisprudence subjecting acts of detention to strict scrutiny, while sustaining legislative constitutionality of such measures. But see, U. K. Singh, *The State, Democracy, and Anti-terror Laws In India*, New Delhi, Sage, 2007.

22. See, for more recent perspectives, R. Samaddar, *The Politics of Autonomy*, New Delhi, Sage, 2005.

23. Such as, for example, the Inter-State Development Council, the Planning Commission, Human Rights Commission, the Minorities and Women Commissions, the Scheduled Castes and Tribes Commission, the Central Vigilance Commission, The Indian Law Commission.

24. For example**,** the extraordinary power to impose the President's Rule, suspending or dismissing state governments/legislatures once liberally exercised has now been attenuated to a vanishing point by various decisions of the Supreme Court. The power to declare and administer the states of constitutional Emergency, in situations of armed rebellion and of external aggression that result in wide-ranging suspension of human rights under Part 111 of the Constitution, have been steadily brought under judicial scrutiny and human rights-friendly constitutional amendments.

25. The reference here is to a variety of Directives reinforcing structures of governance – structures such as the Commission for the Scheduled Castes and Tribes, the Planning Commission, the Finance Commission, the Election Commission, and some recent national human rights institutions such as the National Human Rights Commission and the National Commission for Women, some also replicated in state governance. Although explicitly declared non-

justiciable, the Directives cast a “paramount” duty of observance in the making of law and policy. Because of this, Indian courts have deployed the Directives as a technology of constitutional interpretation: they have favoured interpretation that *fosters*, rather than *frustrates*, the Directives. This “indirect” justiciability has contributed a good deal towards fructification of the substantive/ “thick” versions of the Indian ROL.

26. I do not burden this article with references and sources that testify to this achievement. Interested readers may find it useful to consult treatises on Indian constitutional and administrative law, notably by Durga Das Basu, H. M. Seervai, M.P. Jain, S.N. Jain, S.P. Sathe, I.P. Massey, Rajiv Dhavan, among eminent others.

27. U. Baxi, “Justice of Human Rights in Indian Constitutionalism: Preliminary Notes” in Thomas Pantham and V. R. Mehta (ed.), *Modern Indian Political Thought*, Delhi, Sage Publications, 2006, pp. 263-284.

28. See S. P. Sathe, *Judicial Activism in India*, Delhi, Oxford University Press, 2002. U. Baxi, *The Indian Supreme Court and Politics* Lucknow, Delhi, Eastern Book Company, 1980 and Idem, *Courage, Craft, and Contention: The Indian Supreme Court in mid-Eightie,s* Bombay, N. M. Tripathi, 1985.

29. C. Raj Kumar, “International Human Right Perspective on the Right to Education: Integration of Human Rights and Human Development in the Indian Constitution” in 12 *Tulane International and Comparative Law* 237, 2004.

30. The various constitutional amendment bills providing reservation for women in national and state legislatures have yet to materialize. Their chequered contemporary legislative histories remain mired, in socially significant ways, over the issue of “reservations within reservations”. That is the issue whether this device should be stratified so as to enable/ empower women doubly/ multiply oppressed by state and civil society, through provisions for a representational quota for women belonging to “underclasses”.

31. U. Baxi, “The War *on* Terror and the ‘War *of* Terror’”, Nomadic Multitudes, Aggressive Incumbents & the ‘New International Law’”, *Osgoode Hall Law Journal*, v. 43, number 1& 2, 2005, pp. 1-36.

32. M. Oakeshott, *On Human Conduct*, Oxford, Oxford University Press, 1975, pp. 1-31.

Address:University of Warwick
Coventry CV4 7AL, UK
Email: u.baxi@warwick.ac.uk

UPENDRA BAXI

Professor Upendra Baxi, currently Professor of Law in Development, University of Warwick, served as Professor of Law, University of Delhi (1973-1996) and as its Vice Chancellor (1990-1994). Professor Baxi graduated from Rajkot (Gujarat University). He holds LLM degrees from the University of Bombay and the University of California at Berkeley, which also awarded him with a Doctorate in Juristic Sciences.

Replied from **Sur - Revista Internacional de Derechos Humanos**, São Paulo, n.6, p.7-27, 2007.