



Upendra Baxi: feminism, law, and the human

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Abstract

This short tribute to Upendra Baxi's work builds a conversation between his insights and my own work. I show how Baxi's oeuvre inspires me to think through some of the key feminist debates, ranging from what it means to be human to the politics of solidarity. I do this by discussing Baxi's intellectual as well as activist work, which has inspired scholars and those engaged in social movement campaigns for gender justice. This continuing solidarity across borders of thinking and acting is truly inspirational.

Keywords Human rights · Suffering · Solidarity · Feminism

1 Introduction

At the heart of Upendra Baxi's work remains his concern with a set of key questions: what makes the human, human? What makes the human vulnerable to pain and suffering? What can the collective idea of the human do through a politics of solidarity to challenge modes of power that inflict injury? Baxi's concern with the human is, however, not only philosophical or jurisprudential; it is an everyday concern that finds reflection in his generosity towards those who fall within the warmth and perspicacity of his presence.

I was lucky enough to get to know Upen (as he is almost universally called by those who know him) when he gave me and my newly-wed husband nearly an hour, in a very busy day, to discuss children's rights in theory and in the context of the Indian legal system. My parents knew Upen (both of them were professors in Delhi University) and thought that my husband (a legal scholar working on children's rights, who Upen later came to affectionately call Jeremy San) needed to speak to Upen to begin thinking about children's rights outside the European context. At that

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time, Upen was the Vice-Chancellor of Delhi University, engaged in the everyday strands of political and administrative work. In spite of that, he found time for us; and Prema, his partner, wife, friend, gave us tea. So began our entry into Upen's world and of Upen's into ours.

Upen came to the University of Warwick in 1996 as professor of law and development and was there for over a decade. He dedicated time to colleagues, students, admirers, and friends—generously, thoughtfully and critically. Upen and Prema's home on Northumberland Road was an open house for us all, where many evenings were spent discussing the latest on Indian politics, jurisprudence, cricket and Bollywood. The range of interests and knowledge that Upen has is as wide as it is deep. I write in this personal vein because for Upen, in good feminist tradition, the personal is the political; his activism, while always underpinned by his intellectual work, has always been important to him—be it the historic “Open Letter” written in the wake of the Supreme Court's Mathura judgment, or his current writing of regular columns for the *Indian Express*.

2 Political activism and solidarity

The Indian women's movement emerged, in part, out of the extraordinary political mobilisation against the rape of Mathura, a young tribal woman, by two policemen inside a police station, and against the Supreme Court judgment that acquitted them. This movement was supported by a group of lawyers who wrote a stringent critique of the case and pointed to the structural inequalities that framed it. Rape, as Pratiksha Baxi has pointed out, came to be defined through this mobilisation on and off the streets, as an act of power through which patriarchy is reproduced.¹ Recovering that history of activism, of bridging the gap that has emerged between activism and theorisation, creating new forms of engagement as we theorise in more creative ways, all form part of the praxis of the future that we must aspire to. Upen's political activism, harnessed to his legal acumen, produced a document (with three other legal scholars) that gave a growing feminist movement in India a set of well thought out arguments to build on and engage with.

Writing an open letter to the Supreme Court about its judgement on the Mathura Rape case was a significant intervention, not only in defending Mathura's rights, but also in challenging the Court to reassess its decision to acquit the perpetrators:

Nothing short of protection of human rights and constitutionalism is at stake... You will no doubt forgive us for this impertinence of writing an open letter to you. But the future of judicial protection of human rights at grassroots level in India at the turn of the century, a concern we all share as citizens and as lawmen, leaves us with no other and better alternative.²

¹ PRATIKSHA BAXI, *PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA* (2014).

² Upendra Baxi et al., *An Open Letter to the Chief Justice of India*, (1979) 4 *SCC* (Jour) 17.

The Mathura case and its aftermath, which include the “Open Letter”, are widely seen as catalysts for a second wave feminist movement in the country. This epistolary form of speaking truth to power remains an important historical document alerting us to why the mobilisation of epistemic authority is often crucial in giving ballast to the political demands of the time.³

Upen’s mentorship, friendship and activism underlines his attention to a politics of solidarity. His work has always helped me ask (if not answer) the question: can we imagine new ways of thinking about resistance and change through alliances of the excluded? Nowhere is his understanding and compassion brought together better than in his book *The Future of Human Rights*. Here, Upen is concerned not just with the legal regimes of human rights but the human suffering that human rights discourse and laws seek to address, or rather that he would like them to address. Upen brings together in one frame both the importance of human rights and their limitations. He encourages us to view human rights as imperative to mitigating structural violence against the poor and the disposable, and at the same time to note the malleability of human rights in the hands of authoritarian and the neoliberal regimes of political and social power. He writes:

Peoples’ movements everywhere interrogate the practices of the politics of cruelty. That, to my mind, is an inestimable potential of human rights languages, unavailable to previous history. That being fully said, we ought to note that not all forms of human violation stand addressed by the languages of human rights. Nor do all violated people have equal access to the languages of human rights; having access to a growingly common human rights language is not the same thing as marshalling the sure power to name and redress human violation. Impunity for human—and human rights—violation coexists with human rights implementation and enforcement.⁴

The careful marshalling of an argument for human rights and revealing its limits allows Upen to pursue theoretical debates that are more pertinent and urgent today than ever before, without forgetting the costs of making claims against the state or mobilising against the extractivist neoliberal agenda. Upen remains attuned to the *possibility* of human rights discourse and legal provisions giving some protection to those who need it, because he is aware of the need to disaggregate the power of this discourse and revise it in new ways to include those who are excluded from its justice regime. In my own work, I have tried to keep this Janus-faced aspect of political power in mind when analysing the state. I have noted the relative autonomy of state fractions from the existing social relations and infrastructural capacity of the state on the one hand, and the state’s embeddedness in social relations and the consequences of such embeddedness for women on the other. Such an approach, I have

³ The same sense of political engagement led Upen to be active in the legal battles against Union Carbide in its attempt to evade responsibility for the Bhopal gas atrocity.

⁴ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 2 (2002).

argued, points to the potential for a strategy for struggle that is both ‘in and against’ the state.⁵

Upen’s work keeps the human not only theoretically ever-present; he is also concerned with the suffering that attaches itself to the person in terms of both the structural and the everyday. He writes: “‘Human rights’ constitute not just a multitude of normative orderings but also distinct realms of human experience’.”⁶ This is not only a mark of the man but also teaches us to always attempt to hold on to our own humanity when approaching meta-questions of ethics, morality or political and economic structures. Upen’s concern makes me wonder how we—the academic, the scholar or even a broader epistemic community—who are interested in transformative politics, can write at such levels of abstraction that human beings disappear from our analyses?

In asking this question I reflect upon two issues: first, that the absence of the human form is also an absence of a gendered, sexed and raced human being. If we overlook the embodied form of social relations that we write about, it is no wonder that we neglect the place of colour and sex/gender in our work. Second, the abstraction gets in the way, I feel, of communication. How can we change the world if we cannot change our vocabulary to engage the people we write for? If our vocabularies become so enmeshed in our particularised modes of thinking, how can we translate the work of others to understand their standpoint? Upen’s academic writing is sophisticated and erudite, and this is matched by his commitment to writing for the wider public in newspapers, blogs and through interviews that illuminate without intimidating! Upen comments, ‘the mission [is]... one of *humanizing human rights*, going beyond rarefied discourse... to histories of individual and collective hurt. Narratives of concrete ways in which women’s bodies are held *in terrorem* do not [however] feature in human rights theory.’⁷

In my work, I have tried to keep these two aspects of analysis together. The theoretical arguments about social reproduction under capitalism have been, in my work, situated in the everyday rhythms of gendered lives. Feminists have drawn attention to the primacy of women’s unpaid domestic work, sexuality, and procreation as practices indispensable to capitalism, describing it as ‘unfree labour, revealing the umbilical connection between the devaluation of reproductive work and the devaluation of women’s social position’.⁸ Social reproductive work within the household is largely perceived as women’s work. This preconception influences not just women’s participation in the labour market (supply side), but also labour recruitment (demand side) decisions. Markets are, after all, gendered institutions. Therefore, even within the framework of a monetized economy, which privileges economic

⁵ Shirin Rai, *Women Negotiating Boundaries: Gender, Law and the Indian State*, 4 Soc. & LEGAL STUD. 391, 391–410 (1995); Shirin Rai, *From the Nation-State to Global Governance: A Gendered Analysis*, in STATE IN INDIA: REFLECTIONS ON CONTEMPORARY POLITICS (Vidhu Verma ed., forthcoming).

⁶ Upendra Baxi, *supra* note 4.

⁷ *Id.*

⁸ SILVIA FEDERICI, REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION AND FEMINIST STRUGGLE 97 (2012).

growth, prevailing gendered norms of the labour market mean not just a loss of realizing human capital but also the neglect of social reproductive work.

Upén has distinguished between universal human rights and ‘trade-related, market-friendly human rights’ or between human rights *movements* and human rights *markets*.⁹ The argument that I make in my work on social reproduction is that the free labour of women in the home is needed for the continuance of capitalist production. This, however, comes at the cost of depletion of human bodies, selfhoods, households and communities. These costs, I would argue, form part of the regime of everyday violence that affects women who find voice neither in the international regime of market friendly human rights, nor in “women friendly” empowerment discourse of international development institutions, which Upén has called ‘structures-in-dominance’. In this context, Upén has correctly noted that CEDAW has been concerned with discrimination, not violence, against women.¹⁰

This can also be seen in the UN’s socio-economic measures such as the Sustainable Development Goals (SDGs). As I have argued elsewhere, Goal 8 of the SDGs, which advocates ‘sustainable economic growth and decent work for all’, falls short of its own ambition by not addressing issues of social reproductive work and, thus, of gender equality.¹¹ The argument is that if appropriate attention is not paid to social reproduction (structural gendered segregation) as a critically important part of the Decent Work Agenda (SDG 8), we will not be able to address the depletion (structural violence) that is accrued and experienced in performing this work. Therefore, the goal of gender equality (SDG 5) remains in hock to the neoliberal regimes that continue to focus on economic growth and exclude unpaid domestic labour from the GDP.

3 Politics of human rights and politics for human rights

Here, Upén’s distinction between politics *of* human rights and politics *for* human rights becomes pertinent. This alerts us to the importance of engagement towards change. It underlines, as I have argued in my analysis of the state, that we cannot let go of existing political institutions as being outside of the purview of our political struggles. This is for a simple reason: laws and policies matter. As Michèle Barrett has argued, ‘The law itself encodes fundamental assumptions about gender division and it is salutary to consider how recently it is that women have been recognized as legal subjects in their own rights’.¹² In the words of Martin Luther King:

[I]t may be true that morality cannot be legislated, but behaviour can be regulated. It may be true that the law cannot change the heart, but it can restrain the heartless. It may be true that the law cannot make a man love me; but it can

⁹ Upendra Baxi, *supra* note 4.

¹⁰ *Id.* at 72.

¹¹ Shirin Rai et al., *SDG 8: Decent Work and Economic Growth—A Gendered Analysis*, 113 *WORLD DEV.* 368, 368–380 (2019).

¹² MICHÈLE BARRETT, *WOMEN’S OPPRESSION TODAY: PROBLEMS IN MARXIST FEMINIST ANALYSIS* 236 (1986).

restrain him from lynching me; and I think that is pretty important also. And so, while the law may not change the hearts of men it does change the habits of men if it is vigorously enforced and through changes in habits, pretty soon attitudinal changes will take place and even the heart may be changed in the process.¹³

Contesting the systematic exclusion of a group of people, then, also matters. Upen's engagement with the political and with movements of change is wonderfully discussed in his article, "Emancipation as Justice: Babasaheb Ambedkar's Legacy and Vision". In this he brings together the personal and political, and the historical and legal assessment to argue, with Ambedkar, that discrimination (against Dalits, women, racialised others) is not a 'social' but a political and economic problem. Upen notes that Ambedkar 'also proceeds to unravel the structural sources of production of misery in Hindu ideology, religion and social organisation. In the process...[he] raises for the first time in Indian jurisprudence the problematic of "law-less laws"... [that] the rule of law always co-exists with a reign of terror'.¹⁴

It is when we consider struggles *for* human rights that the politics of legal change becomes visible. In my own work, I have thought about how 'expanding solidarities—of the marginalised... also provide alternate visions of belonging, of redistribution of resources, power and social roles'.¹⁵ What new forms of solidarity—universalist but not homogenising—can we work towards? This reimagining of solidarity is an important question to raise in the current climate of economic fragility, the rise of a politics of hate, and the attack upon democratic opposition with the continuous strengthening of the executive branch of the State. This political landscape makes the need for an ampler understanding of the forms of capitalist exploitation and resistance to these urgent. Solidarity—in such a capacious form—militates against, what Giroux calls, 'the sheer weight of apocalypse'.¹⁶ According to Sharon Welch, solidarity is the opposite of indifference: 'To remember the reality of oppression in the lives of people and to value those lives is to be saved from the luxury of hopelessness'.¹⁷ Upen's work on holding together the politics of and for human rights as distinct alert us that change is possible only through a dialectical approach to action.

This understanding can only come about if there is a more symmetrical relationship among those whose vision of change coalesce around similar forms of politics—we often get into political hot water with our potential allies if we are not in tune with issues of representation, for instance. Solidarity is reflexive: it illuminates

¹³ Martin Luther King, Speech at Newcastle University on Receipt of Honorary Doctorate in Civil Law (Nov. 13, 1967), <https://www.ncl.ac.uk/media/wwwnclacuk/congregations/files/Transcript%20of%20Dr%20Martin%20Luther%20King%20Jr%20speech%2013th%20November%201967.pdf>.

¹⁴ Upendra Baxi, *Emancipation and Justice: Babasaheb Ambedkar's Legacy and Vision*, in CRISIS AND CHANGE IN CONTEMPORARY INDIA, 141–142 (Upendra Baxi & Bhikhu Parekh eds., 1995).

¹⁵ Shirin M. Rai, *The Good Life and the Bad: Dialectics of Solidarity*, 25 SOC. POL.: INT'L STUD. IN GENDER, ST. & SOC'Y 1, 5 (2018).

¹⁶ Henry Giroux, *Solidarity, Struggle, and the Discourse of Hope: Theory, Practice, and Experience in Radical Education, Part II*, 12 REV. OF EDU., 247–255 (1986).

¹⁷ SHARON WELCH, COMMUNITIES OF RESISTANCE AND SOLIDARITY: A FEMINIST THEOLOGY OF LIBERATION 90 (1985).

practices of power at work within different discursive and institutional relations of domination, but it also remains vigilant about its own practices. In these acts of solidarity, we can see how Marx thought (in unfeminist vocabulary) of the ‘species being’—that each human being must, by virtue of being human, imagine ‘himself’/herself as the example of being human.¹⁸

Multiple imaginings of society and the state/law require modes of working together towards these new horizons. However, an insistence that we take the experience of those engaged in bringing about change seriously, is important as well. Struggles for change, I have argued (with Sumi Madhok) do not unfold in individualist, ahistorical, universalist and acontextual frames; they do so in specific contexts, in languages that are laden with histories and through agency that is framed by risks.¹⁹ While not acting might prolong social injury, strategizing for change must involve attention to the parameters of power within which agential subjects seek to act. However, a good life cannot be realised if the costs of its realisation are too high for too many. Human rights discourses and legal regimes can be a defence against such costs.

4 Conclusion

The UK that Upen lived in whilst teaching at Warwick has changed dramatically as the consequences of the Brexit referendum filter through. From the misguided but partially palatable politics of multiculturalism, we are experiencing a shift in gear towards a politics of xenophobic hate. In India, too, the erosion of constitutional morality is making democracy fragile as the new forms of “lawless laws” are performed everyday with impunity against communities of citizens as they are systematically othered. New and violent worlds of hate and rejection surround us in speech and action, and we must urgently think of what new forms of solidarity we might generate to challenge this ‘necropolitics’.²⁰ By developing such solidarity, by standing with others in struggles defined by historical processes to build concrete forms of sociality, we can develop what Welch calls a ‘redeemed [global] community’.²¹ Upen’s strong and gentle voice continues to inspire in developing this new politics of solidarity.

¹⁸ See Thomas E. Wartenberg, “Species-Being” and “Human Nature” in Marx, 5: 2 HUMAN STUDIES 77–95 (1982).

¹⁹ Sumi Madhok & Shirin Rai, *Agency, Injury and Transgressive Politics in Neoliberal Times*, 37 SIGNS, 645 (2012).

²⁰ Achille Mbembé, *Necropolitics*, 15 PUB. CULTURE 11 (2003).

²¹ SHARON D. WELCH, COMMUNITIES OF RESISTANCE AND SOLIDARITY: A FEMINIST THEOLOGY OF LIBERATION 74 (1985).