COURAGE, CRAFT AND CONTENTION : THE INDIAN SUPREME COURT IN THE EIGHTIES (1985). By Upendra Baxi. N.M. Tripathi Private Limited, Bombay. Pp. xv+151. Price Rs. 75.

THIS BOOK contains three lectures delivered by the author under the Sir Chimanlal Setalvad Lectures series at the Bombay University. These lectures deal with the journey of the Supreme Court of India towards becoming a court for the Indians. They are a coutinuum of the author's earlier efforts to study and analyse the Supreme Court made in his previous works.[1] Over the years with his further exposure to the court's poverty jurisprudence and through his own participation in public interest litigation (We are using the term 'public interest litigation' in the sense in which it is usually understood and in spite of Baxi's objection to it)[2] the author has acquired further insights into the societal role of the court.

The first lecture deals with the thrust of the Supreme Court in the last decade towards liberal interpretation of the Constitution, and deformalisation of its process with a view to facilitating access to the small Indians. The second lecture is a critique of the conceptual confusion pertaining to the independence of judiciary with special reference to *S.P. Gupta* v. *Union of India*,[3] commonly known as *Judges* case. The third deals with the basic structure unalterability laid down by the court, first in *Kesavananda Bharati* v. *State of Kerala*,[4] and later reaffirmed in *Minerva Mills* v. *Union of India*.[5]

In his preface Baxi gives instances of governmental lawlessness. We hope one day he also talks about judicial lawlessness which is not insignificant. He himself is not unaware of this and if one reads between the lines, he will feel such awarenesss on his part from his writings. He, for example, says that the way the judicial appointments are made many "a wolf in sheeps' clothing" can "move on to the High Bench".[6] Who is an activist judge? According to Baxi, this is a term used by those who claim to judge the judges. There are five classes of such judge-judgers. The first group, which he calls the scientific judges, includes law teachers, social scientists and investigative journalists. We do not know why he does not use the term 'jurist'. Is it because the term is used in India to describe any lawyer or judge and has, therefore, lost its special meaning? Since

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1. *E.g.*, Upendra Baxi, *The Indian Supreme Court and Politics* (1980).
2. Upendra Baxi, "Taking Suffering Seriously : Social Action Litigation before the Supreme Court of India", 8-9 *DEL. L.R.* 91 (1979-80).
3. A.I.R. 1982 S.C. 149: (1981) Supp. S.C.C. 87.
4. A.I.R. 1973 S.C. 1461 : (1973) 4 S.C.C. 225.
5. A.I.R. 1980 S.C. 1789.
6. Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* 5 (1985).

the Constitution uses this term in article 124(3)(c), it has a special meaning. Since clauses (a) and (b) provide for advocates and judges respectively, an eminent jurist is other than these. We lament that our bars, governments and even the benches have not allowed this class to come up. Recognition as a jurist is given most reluctantly to a person who is neither a judge nor a practising advocate. There are a few academics who really belong to this clan but are seldom recognised as such.

The second group consists of the executive which makes appointments of judges, the third of the lawyers, the fourth of the victims of judicial power, police, prison officials, custodial officials, administrative authorities, corporations, universities, landlords and other associations, and the fifth (the last) consists of the beneficiaries of judicial power. Baxi rightly concedes that victims (group 4) and beneficiaries (group 5) often overlap. In fact, if one is a victim, the other is a beneficiary and this keeps on changing and, therefore, the victim is a beneficiary under certain circumstances. A decision may be held by some as progressive while others may regard it as reactionary. The property decisions of the Supreme Court including *R.C. Cooper* v. *Union of India*,[7] commonly known as *Banks Nationalisation* case, were held by property owners and their lawyers as vindicative of democracy and the rule of law, whereas the socialists regarded them as anti-change. In fact, the court's decisions such as *People's Union for Democratic Rights* v. *Union af India*[8] or *Bandhua Mukti Morcha* v. *Union of India*[9] are regarded by some as mere exercises in populism. The same decisions are regarded by others as great thrusts towards social justice. In fact, judicial activism is not something new. It has existed right since the beginning. The dissenting judgment of Justice Fazl Ali in *A.K. Gopalan* v. *State of Madras*[10] was the first instance of judicial activism. Was Chief Justice Gajendragadkar not an activist judge? Was Chief Justice Subba Rao an activist judge? Baxi is right in saying that "[j]udges are evaluated as activists by various social groups in terms of their interests, ideologies and values."[11] But is judicial activism determined only partisanly? Are there no objective criteria of judicial activism? What would you say of the dessenting opinion of Lord Atkin in *Liversidge* v. *Anderson*[12] or of the decision of the Warren Court in *Brown* v. *Board of Education*?[13]

Activism is judicial policy making which furthers the cause of social change or articulates concepts such as liberty, equality or justice. But what is social change? It is not a value neutral concept. In a changing

7. A.I.R. 1970 S C. 564.

8. A.I.R. 1982 S.C. 1473. See S.P. Sathe, "Constitutional Law—I", XVIII *A.S.I.L.* 300 at 320-22 (1982).

9. A.I.R. 1984 S C. 802.

10. A.I.R. 1950 S.C. 27.

11. *Supra* note 6 at 7.

12. [1941] 3 All E.R. 338 at 349.

13. 98 L.Ed. 873 (1954): 347 U.S. 483.

society, like in India, the Constitution visualises a new social order. The articulation of such order is doubtless activism. Judicial interpretation is not a mechanical process. It envisages the use of judicial discretion. *A.D.M. Jabalpur* v. *Shivakant Shukla*[14] was the lowest watermark of negative judicial function. It proceeds from a faulty notion of judicial function. Judicial activism can never grow in vacuum. If the Supreme Court of the fifties and sixties was pro-property and used its legalism in support of the *status quo* and against change, it was because the constituency of lawyers and judges for accountability was essentially of the property owners, law and order establishment keepers and highly placed caste Hindus.[15] Why does the court of Justice Krishna Iyer or Justice Bhagwati cater to the needs of the poor? Should we not go into this question? What are the causes of today's activism? Justice Krishna Iyer had at least the background of Marxism; Justice Bhagwati does not have any such background. Neither in terms of class, nor in terms of ideology he belongs to any rebellious clan. Why has he been activist? Activism does imply discovery of unwritten elements of the Constitution and such elements are bound to arise from time to time in an open textured system. The unwritten element is not always in favour of the establishment. It may be against it also. The meaning of 'equal protection' given by the Warren Court in *Brown* was an unwritten anti-establishment element. Activism is unfolding of such unwritten elements. *L.C. Golaknath* v. *State of Punjab*[16] was also activism but it was essentially anti-power. *People's Union for Democratic Rights* and *Bandhua Mukti Morcha* are judicial activist thrusts against political, economic establishments. Evaluation of judicial activism cannot be done from value neutral position. Baxi should have undertaken a scrutiny of the limitations of judicial activism and should have examined how much social mobilisation is necessary for sustaining judicial activism.

In his lecture on the independence of judiciary, Baxi examines how the judiciary is seen differently by the executive and the bar. The executive talks of a committed judiciary and the bar talks of an independent judiciary. Both, however, have commitments to their respective unwritten predilection in mind. The members of the bar who loudly protested against the supersession of Justices Shah, Hegde and Grover in 1973 did not find anything objectionable in a demand for the supersession of Justices Chandrachud and Bhagwati in 1978 on the ground that they did not like their positions in *A.D.M. Jabalpur*. It is unfortunately true that the bar has applied double standards in this regard.

Baxi's analysis of the basic structure decisions is rather intuitive and

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14. A.I.R. 1976 S.C. 1207: [1976] Supp. S.C.R. 172.

15. This refers to *State of Madras* v. *Champakam Dorairajan*, A.I.R. 1951 S.C. 226.

16. A.I.R. 1967 S.C. 1643. See, generally, S.P. Sathe, *Fundamental Rights and Amendment of the Indian Constitution* (1968).

not supported by empirical evidence. In *Indira Nehru Gandhi* v. *Raj Narain*,[17] were the judges motivated by the desire to save the court? If so, would it not also be a justification for their total surrender in *A.D.M. Jabalpur*? Was the decision in *Indira Gandhi* an effort for survival or was it an effort to seek accommodation with the powerful executive without loss of face? We are raising this question because the court has rarely challenged the supreme executive in a really head-on manner. This invalidation of *Banks Nationalisation or Privy Purse* (*Madhav Rao Scindia* v. *Union of India*[17a]) orders came at a time when the supreme executive's supremacy was itself in doubt. The court's abject surrender during the emergency has only a silver lining provided by *Indira Gandhi* dicta in which the Constitution (Thirty-ninth Amendment) Act 1975 was held invalid. Our judges have unfortunately not shown signs of political socialisation which commentators like Baxi assume for the purpose of presuming their statesmanly behaviour in cases like *Indira Gandhi*. Even during the activist period since 1978, has the court really questioned the governmental lawlessness at the highest level? Or has it merely been peripheral?[18]

The *Indira Gandhi* decision, we are inclined to believe, was inspired merely by a desire to save the legitimacy of the court from the people than from the desire to save it from the supreme executive. It is a matter of history that when *Golaknath* was decided in 1967, the premise of Chief Justice Subba Rao sounded unrealistic and obsessionist to many of us.[19] The dissenting judges of *Kesavananda Bharati*, therefore, asserted almost the same position which was taken by the court earlier. But in *Indira Gandhi* there was a concrete case of a constitutional amendment which crossed the limits of desirability. Chief Justice Ray, Justices Beg (as he then was), Mathew and Chandrachud (as he then was), therefore, went by the majority ratio of *Kesavananda Bharati* and Chief Justice Chandrachud reiterated that position in *Minerva Mills* as well as *Waman Rao* v. *Union of India*.[20] Baxi's criticism that "*events* not *words* in judgments, the *context* not the *text*, determine the meaning of a precedent case"[21] is to be admitted without being apologetic. This reviewer cannot agree with the author that article 31-C as amended by the Constitution (Forty-second Amendment) Act 1976 must also be constitutionally valid for the same reasons for which the original article was upheld by the court in 1973. Even the original article was not upheld *in toto*. But the amended article would

17. A.I.R. 1975 S.C. 2299. See S.P. Sathe, "Forty-Fourth Constitutional Amendment", XI *E.P.W.* 1702 (1976), and also in A.B. Shah (ed.), *Democracy and Constitution: (42nd Amendment) Bill* (1976) (Citizens for Democracy).

17a. A.I.R. 1971 S.C. 530.

18. See *A.K. Roy* v. *Union of India*, (1982) 1 S. C.C. 271; *Inderjit Barua* v. *Election Commission of India*, (1985) 1 S.C.C. 21.

19. See Sathe, *supra* 16, and "Constitutional Law I", (1967-68) *A.S.I L.* 1.

20. A.I.R. 1981 S.C. 271.

21. *Supra* note 6 at 87.

have for all practical purposes made articles 14 and 19 impotent. The majority's intervention to strike down the amendment was, therefore, absolutely justified.

In the end, it must be said that we are not convinced that the Supreme Court has displayed any special courage even during its activist period. There might have been individual justices with such virtues but it is hard to say that the institution has, as a whole, projected itself as a bulwark against governmental lawlessness. In really challenging situations, the court has yielded.[22] This lack of courage is camouflaged by craft and contention.

The book has appendices containing important communications which were produced in the *Judges* case.

Baxi has been extremely thoughtful in dedicating the book to the memory of the late Dr S.N. Jain, whose untimely death has been a great loss to the academic world and to his friends, like the author and the reviewer.

*S.P. Sathe**

22. See *A.D.M. Jabalpur and Judges* case.

*Pro-Vice-Chancellor, University of Poona, Pune.