LIBERTY AND CORRUPTION:THE ANTULAY CASE AND BEYOND (1989). By Upendra Baxi. Eastern Book Company (P) Ltd., Lucknow. Pp. 176. Price Rs. 100.

THE MONOGRAPH[1] written with a mix of sarcasm and irony lays bare how the judicial process gets entangled with various trifles which ultimately eclipse the substantive justice.

Baxi tells us the story of a public interest prosecution which ended in a fiasco—even without making a real beginning. This reviewer would not agree with Baxi that if *Kesavananda*[2] decided the limits of the amending power of Parliament subjecting it to the doctrine of basic structure, *Antulay*[3] in the ultimate analysis, celebrates a return to parliamentary sovereignty in the area of maintenance of rectitude and integrity in political and public life. *Antulay* does not bring us back to parliamentary sovereignty, rather it reveals to us how judicial review as well as parliamentary sovereignty—two doctrines of liberal democracy—could be made dysfunctional by a strategy of delay and repetitious applications to courts raising hyper-technical issues by a resourceful and manipulative litigant.

The book takes us through various stages of the *Antulay* case to show how prosecution against corruption got bogged down in appeals, cross appeals, petitions and reviews. Baxi rightly observes that the book is not about a man called Antulay, it is about "the entire Indian legal system which got itself placed in the dock through a litigation named after him".[4] The *Antulay* case was the first attempt to transmute a wide ranging political discourse on corruption in high places to a judicial discourse.[5] For the first time the Indian judiciary was called upon to put in the dock as accused a powerful and somewhat charismatic political leader.

Baxi gives us a whole chronology of the events connected with the *Antulay* case ranging between 9 June 1980 when Antulay announced the setting up of two *Pratishthans* to 29 April 1988 when the Supreme Court delivered the final *Antulay* decision (*Antulay VIII*) which according to him was "a judicial coup d'etat in India".[6] During this period, the *Antulay* case travelled through eight stages which Baxi describes from *Antulay I* to *Antulay VIII*. *Antulay I* dealt with the formulation of charges against Antulay as approved by the Supreme Court; *Antulay II* was the writ petition in which the High Court held that Antulay's actions in respect of distribution of cement were

---

1. Upendra Baxi, *Liberty and Corruption : The Antulay Case and Beyond* (1989).
2. *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.
3. *A.R. Antuley* v. *Union of India*, (1988) 2 S.C.C. 602.
4. *Supra* note 1 at 7.
5. *Id.* at 12.
6. *Id.* at 16.

mala fide exercise of power; *Antulay III* dealt with whether sanction was required for the prosecution of the C.M. and if so whose; in *Antulay IV* the court dealt with the question whether legislators were public servants. In that case, the Supreme Court transferred the criminal trial from the special judge to the High Court. *Antulay V* went into the justification for the sanction and *Antulay VI* into whether private prosecution lay in anti-corruption cases. In *Antulay VII* the court referred the question of rightness of its decision to transfer the case from the special judge to the High Court to a larger Bench and in *Antulay VIII* a seven judges Bench actually held that *Antulay IV* had been wrongly decided and therefore the trial of Antulay by the High Court was wrong—it had to proceed from trial by a special judge.

Baxi criticises too indulgent a use of the power of special leave to appeal under article 136.[7] Why should the court have gone into the charges framed by the trial court and decided whether those accepted or rejected were rightly done so ? Further the author observes that "even extraordinary jurisdiction has to be exercised with some regard for equity".[8] He asks why special leave petitions were not used in respect of withdrawal of prosecution involving two other C.Ms. The author says that although he does not intend to "atribute any improper motive to Supreme Court Justices" he would surmise that "the political complexion of the case could not have been distant from the judicial mind".[9] Baxi describes graphically "the first and an inaugural, social action litigation petition dealing with corruption in high places"[10] contained in the writ petitions against refusal of cement allotment by Chief Minister Antulay.

In chapter five, the author takes us through the "amniocentic power of sanction to prosecute". He argues that such a sanction "will only deprivilege an individual within the overall structure of privileged bureaucracy".[11] Baxi asks "Is it to be conceived as an autocratic power or democratic power?"[12] He strongly argues for judicial review of the exercise of power to withhold sanctions.[13] It is submitted that the theory and practice of judicial review does not foreclose such a judicial review in respect of the PCA.[14] If it has not yet resulted in a reported judicial decision, the reason is not that it does not exist, rather it is that nobody has invited it. Since the

---

7. *Id.* at 38.
8. *Id.* at 40.
9. *Id.* at 41.
10. *Id.* at 45.
11. *Id.* at 56.
12. *Id.* at 61.
13. *Id.* at 65.
14. Such judicial review of the power to accord sanction for prosecution exercised under section 197 of the Code of Criminal Procedure has been displayed in the following cases : *Bakshish Singh Brar* v. *Gurmej Kaur*, (1987) 4 S.C.C. 663; *Badrinath* v. *Government of T.N.*, A.I.R. 1986 Mad. 3.

prosecution of a chief minister—a highly placed political personality—for corruption itself was a maiden phenomenon in 1980, judicial review of the refusal to sanction prosecution might be visible only in the nineties.

In *Antulay IV* the Supreme Court transferred the Antulay trial from the special judge appointed under the Prevention of Corruption Act 1947 to the High Court with a view to expediting it. The speedier trial is not only a right of the accused, it is the right of the society also to have criminal accused tried expeditiously. Baxi observes that it was difficult to find justification for the Supreme Court's order in *Antulay IV*. But he tries to build such jurisdiction under article 136 for fulfilling the main function of the system of justice, namely speedier disposal of corruption cases. As we have said above, the court is not bound to act merely on the assertion of the right to speedier trial by the accused. Speedier trial is a very important systemic value and the Supreme Court as the apex court is bound to provide it so that "the legal system promotes justice" as required by article 39*A* of the Constitution. It was unfortunate that the highest court should have entertained a writ petition against its own judgment and then reversed it. *First* such a writ could have been disposed of by invoking the authority of a binding precedent of *Naresh* v. *Maharashtra*[15] in which the majority led by Chief Justice Gajendragadkar had held that the writ could not lie against a judicial decision on the ground that it violated any of the fundamental rights. *Second*, after revisiting it, the court came to a wrong conclusion on the basis of a wrong reasoning. Besides raising substantive points against the decision (such as wrong application of *West Bengal* v. *Anwar Ali*[16] *dicta*), Baxi points out rightly that even an erroneous decision need not have been overruled, particularly in respect of a matter that had been under litigation for the last four years. The author raises pertinent questions about institutional accountability. Could the court not have invoked the doctrine of prospective overruling in such a situation? *Antulay IV* could have been overruled without setting aside the trial of Antulay with a caution that in future such transfer of a case to the High Court would not be permissible.

---

15. A.I.R. 1967 S.C. 1. This reviewer had upheld the minority opinion of Justice M. Hidayatullah (as he then was) in that case. See, S.P. Sathe, "Constitutional Law", VI *A.S.I.L.* 1 (1970). But in *Naresh* the High Court had violated the fundamental rihht of freedom of the press by holding a trial in camera. Therefore what the petitioner in *Naresh* challenged was not the decision of the High Court but only an order of the court to hold a trial in camera. The dissenting judgment also would not help in challenging a decision of the Supreme Court as being violative of the fundamental rights. That would mean that even art. 141 is subject to art. 13. Since interpretation of art. 13 itself becomes the "law" within the meaning of article 141, it is doubtful if such a position could be taken. Although the Supreme Court can overrule its own decision, the court would not give retroactivity to the overruling decision. Prospective overruling of the decision is therefore implicit in art. 141

16. A.I.R. 1952 S.C. 75.

Baxi's book is a good case study that throws much meaningful light on the working of the judicial system in India. It shows how a resourceful litigant can frustrate a litigation for corruption against him and how he benefits from the overpluralistic nature of the court processes. It also tells you how and why litigation gets bogged down in technicalities.

*S. P. Sathe**

*Principal, I.L.S. Law College, Pune.