



MARX, LAW AND JUSTICE (1993). By Upendra Baxi. N.M. Tripathi (P) Ltd., Bombay. Pp. xvi + 203. Price Rs. 200.

THE AUTHOR of the book under review¹ dedicates it to his daughter Pratiksha (meaning wait) hoping that her (or all our future generations, we may say) “pursuit of sociological imagination will embrace Marxian legacy as the common heritage of humankind.”² In the opinion of the reviewer, it is the best possible pulsating preamble disguised as a *dedication*. This small disguised but decipherable dedication to his dearest one reveals not only the dedication and love of the author for Marxian jurisprudence but also divulges much about the kind of approach to the Marxian jurisprudence to follow in the thickly printed pages of the book.

The instrumentalist approach in the Marxian conception of law views it as a tool of the ruling classes which is used to suppress the working classes. Law, according to the author, provides “a normative language which camouflages the core coercion underlying the law.”³ In concealing the behavioural reality of repressive violence, law is endowed with the public-interest virtue in the same manner as religion is endowed with the divine character. In his opinion, the law’s relation with public interest “makes the normativity of law an inestimable ally of the ruling formations.”⁴ He, however, finds serious handicap of instrumentalism in not being able to tell us why ruling classes adopt or evolve different types of legal systems or instruments.⁵ But let one not forget that laws and legal systems differ because of their local character. Nevertheless, they are appropriated by the *heterogenous* ruling classes for hegemonic purposes.

Baxi points out that “tools, even most sophisticated, cannot remain tools and develop relative autonomy from the blueprint and design which form their matrix.”⁶ Indeed, Marx says, “the judge... has the duty of interpreting the law as he *understands* it after *conscientious examination* in order to apply it in a particular case.”⁷ In the post - Dunkel era, this may be a constant reminder for the judges (in the Third World liberal - capitalist democracies) whose activism will ensure greater relative autonomy of law.

1. Upendra Baxi, *Marx, Law and Justice* (1993).

2. *Id.* p. v.

3. *Id.* at 19.

4. *Id.* at 20.

5. *Id.* at 22-3. Hugh Collins offers an explanation. “The origin of the ideology in social practice permits individuals to express the variety of their experiences in diverse ideas and values....there is always scope for different interpretations of a set of production relations, and this allows countries with similar material bases to have diverse ideologies, which in turn leads to a variety of legal conceptualizations of similar problems.” See, Hugh Collins, *infra* note 50 at 71.

6. *Id.* at 25.

7. K. Marx and F. Engels, 1 *Collected Works : 1835-1843*, pp. 165-6 (1975). (Emphasis added).



One of the most problematic areas in the Marxian discourses has continuously been the issue of relationship between the 'base' and 'superstructure'. In fact, it is an issue of relationship between law and economic structure. One way of visualising this connection is to see law being '*determined*' by the economic structure. Another way of explaining the nexus is that law is not so much determined; rather conditioned by the economic structure. The author, however, suggests that the base (economic structure) neither '*determined*' nor '*conditioned*' the superstructure of *colonial* law in India.⁸ In the Marxian collocation, one finds himself grappling with some basic questions: Are the '*relations of production*' same as '*property relations*'? Or, the more acute question, - '*if the economic structure is constituted of property (or ownership) relations, how can it be distinct from the legal superstructure which it is supposed to explain?*'"⁹ To find answers to these questions the book re-examines the three main approaches in this context in a characteristic and easily comprehensible style.¹⁰

The *first* approach, advocated by Plamenatz, emphasises that it is relations of property *as expressed* by law which determine the economic structure, not the other way around.¹¹ Baxi does not approve of this idea.¹² The *second* approach, known as *Rechtsfrei* approach, aims at disconnecting the relations of property from a description of the relations of production because the latter can be viewed as '*relations of effective power over persons and productive forces*'"¹³ without reference to legal relations. The *third* approach finds '*dislocations*' or non-correspondence between the '*relations of production*' and '*relations of property*' at many stages of development. Baxi finds the *third* approach convincing (as it allows us to appreciate the relative autonomy of the law as well as of economic structure from the law) and feels that such analysis keeps us closer to Marx.¹⁴

Marx (despite whatever Marxists may say) was of a clear view that superstructures may be relatively autonomous *per se* and in relation to base.¹⁵ Baxi, keeping in mind this view, and rejecting crude determinism, goes on to enquire into the various facets of the materialist conditioning of law. There is no doubt that law is required as an indispensable component in the times of reproduction to become an inseparable and important part and parcel of the mode of production. But, the author argues, '*if reproduction destroys the appearance of exchange relations, based on just equivalence and free contract, reproduction of the law requires improvisation in its forms and ideologies justifying and enforcing domination*'"¹⁶ Baxi approves the scriptural dictum of Eorsı : '*Each mode of production, each*

8. *Supra* note 1 at 32.

9. G.A. Cohen, *Karl Marx's Theory of History: A Defence* 216-7 (1978). (Emphasis added).

10. *Supra* note 1 at 34-9.

11. J. Plamenatz, 2 *Man and Society* 282 (1963) referred to in *supra* note 1 at 35.

12. *Ibid.* See also, Cohen, *supra* note 9 at 231-4.

13. *Supra* note 1 at 37. (Emphasis added)

14. *Id.* at 39.

15. *Id.* at 40.

16. *Id.* at 43. (Emphasis added).



economic structure has its corresponding law - type''.¹⁷ Furthermore, law may be constitutive of the character of distribution in one case and a consequence of social relations of production in other cases. Baxi insightfully suggests that, in contemporary India, law as a superstructure contains far more possibilities in a *dual* mode of production to influence economic structures than a strict understanding of the base and superstructure metaphor will allow.¹⁸ If his suggestion is seriously examined for drawing conclusions in contemporary India, the theory of 'dislocations', together with the thesis of reproduction of class relations, would require a bleaching and a fresh tone-up.

Marx was apprehensive about the use of notions of 'fair' and 'just' distribution and 'justice' in the capitalist mode of production as those could become slogans for the agitating proletariat who would concentrate only on them and forget to question the basic foundations of capitalism.¹⁹ After going through the scanty writings of Marx on 'justice', the author suggests that Marx had no theory of justice but only implicit approaches to the notion of justice.²⁰ Baxi, however, states : "The simultaneous affirmation of the death and rebirth of distributive justice is not... distinctive to post-Marx controversies; rather it lies at the very heart of Marx's own thinking".²¹ Analysing the controversial slogan of Marx "From each according to his ability, to each according to his need", he asserts that the slogan is a *maxim of distributive justice which can only arise in a true communist society as described by Marx*.²² The author, however, demolishes the possibility of presence of *any* idea of distributive justice in a true communist society in the following paragraphs using the persuasive arguments of Allen Buchanan. He quotes Buchanan : "superiority of communism is that it makes principles of distributive justice *otiose*".²³ An intensive inquiry into the issue of the need and place of principles of (distributive) justice in a true communist society was called for at this stage of discussion. The author leaves us, half way, in the lurch while we hoped to sail through a dark sea of confusion. At the practical level, for a Marxist, as distinguished from a Marxian, it means a lot to know whether in a perfect communist set up principles of justice would exist or not. Baxi, in his prefatory note to the book, quotes Marx's thesis of Feuerbach : "Philosophers have understood the world; the task however is to *change it*".²⁴ But philosophers do not interpret each and everything. The issue of justice-standards in a true communist society is problematic, and an Achilles' heel for the philosophers. Marx is clear that in the first phase of communism, equality as a standard of distributive justice has no meaning. According to him, as noted earlier, in the socialist society of first stage, 'right to equality' carries with it its 'bourgeois

17. G. Eorsi, *Comparative Civil (Private) Law : Law Types, Law Groups, the Roads to Legal Development* 48 (1979). Quoted in *id.* at 43.

18. *Id.* at 45.

19. *Id.* at 54.

20. *Id.* at 57.

21. *Id.* at 53.

22. *Id.* at 58. (Emphasis added).

23. Allen Buchanan, *Marx and Justice* 59 (1982). Quoted in *id.* at 59. (Emphasis added).

24. *Supra* note 1, preface.



birthmark'' because of the inherent defects inherited from the capitalist society. But Baxi wishes to maintain a distinction between 'bourgeois equality' and 'socialist equality with bourgeois birthmark'. He acutely and unhesitatingly remarks that "even when the socialist equality is so trenchantly identified as a 'right to inequality'" in *Gotha Critique*, as carrying its "bourgeois birthmark," *it is certainly not the same as bourgeois equality.*"²⁵

In other words, Baxi is saying that socialist *inequality* is not the *same* as bourgeois *inequality*. Implicit in it is a spiritual admission that socialist inequality is not as bad as bourgeois inequality. It is because that inequality in a socialist society is a lever by which the whole social level is raised, whereas inequality in a capitalist society is a weapon for enrichment of the few and impoverishment of the many.

In the post-Dunkel era, the "fear of being fired is replaced by the fear of the flight of capital, plant closure, transfer of operations, and plant disinvestment."²⁶ The author is clear and sure that exploitation is "unjust considered from the standpoint of the justice standards of capitalist mode itself."²⁷ Labour power is endowed with human consciousness, and in wage-bargain the duty of not treating the wage-workers as 'beasts of burden' is heavy on those non-workers-participants who manufacture consent of the workers to their own needs. In such a pitiable situation, the author poses a question : "Would it be doing Marx too great an injustice to say that those duties should be described as those mandated by a conception of distributive justice"?²⁸ On a different plane, to reach the same conclusion, it may be remembered that for Marx freedom is a "human good, the way in which *all* people ought to live."²⁹ The author remarks :

Thus even as the *Capital* celebrates the death of the bourgeois notions of distributive justice, it also celebrates the rebirth of the "politics of production" viewed as struggles at the workplace against oppression and exploitation. And that struggle, howsoever confined and cribbed by the stage of development within the capitalist mode, is itself the process by which the nature of, and level, of 'justice' is both determined and established.³⁰

For Baxi, justice is a "process of continual struggle to recover the confiscated core humanity of the working classes."³¹ If his reasoning is taken seriously, this struggle will be an *endless* one because he would not rule out the possibility of application of justice standards in a *true* communist society.³² His motto is - struggle and struggle; be it either anarchy or socialist society or *true* communist society.

25. *Id.* at 59. (Emphasis added).

26. M. Burawoy, *The Politics of Production* 150 (1986). Quoted in *supra* note 1 at 77.

27. *Supra* note 1 at 77.

28. *Ibid.*

29. G.G. Brenkert, *Marx's Ethic of Freedom* 158 (1983). Quoted in *id.* at 72. (Emphasis added).

30. *Id.* at 77.

31. *Id.* at 78.

32. *Id.* at 58.



The juridical world outlook is a celebrated theme of bourgeois jurisprudence which presents law in its creationist role. To quote Engels :

[T]he idea took shape that these laws originated *not in the economic facts* but were *formally established by the state and introduced by it*. And since competition - the basic *form* of contracts between free commodity producers-is the great equalizer, equality before the law became the grand rallying cry of the bourgeoisie.³³

The author introduces the thesis of Tumanov to discuss the *five* characteristics of juridical *weltanschauung*³⁴ which has been the hallmark of bourgeois propaganda.

Baxi finds in the newly emergent juridical world outlook, occasioned by the involvement of law, now, in the issues of, (i) human rights, (ii) feminism, (iii) new international economic order (NIEO), (iv) struggle against apartheid, (v) right to peace, and (vi) right to environment/development, the potential possibilities of avoidance of the excessive fetishisation of law which has been the gospel of bourgeois jurisprudence.³⁵ At the philosophical plane, the author avers (but with some modesty) the emergence of a competing paradigm—the socialist juridical world outlook—as we witness Marx's mortal embrace of Hegel's *Philosophy of Right*.³⁶ With this averment, he proceeds to examine the Marxian critique of 'law as ideology'. He does it in a novel way.

The novelty of the way lies in the author's suscitating approach through which Evagency B. Pashukanis, a martyr-jurist of socialist jurisprudence, breathes a new fragrant lease of life in the pages of the book. Put another way, Pashukanis sees his D-day in this book.

Pashukanis formulates a materialist theory of *legal form*³⁷ to apply it to Soviet law. He thinks that the dialectic of 'bourgeois juridic form' and 'socialist content' was the main feature of what others prefer to call "proletarian law". As the bourgeois legal forms persist even after the class structure has ceased to exist, he suggests that under "the dictatorship of the proletariat (*they*) acquire a new socialist content without casting off the form itself"³⁸ The withering away of bourgeois law does not mean "the disappearance of the juridical factor from social relations."³⁹

Pashukanis criticises dogmatic jurisprudence for failing to explain problems of 'production of legal norms', 'the constitutive factors for the production of *their*

33. Quoted in V.A. Tumanov, *Contemporary Bourgeois Legal Thought : Marxist Evaluation of Basic Concepts* 40 (1974). (Emphasis added). Quoted in *supra* note 1 at 134.

34. For a fuller discussion see, *supra* note 1 at 134-5.

35. *Id.* at 136.

36. *Id.* at 139.

37. Pashukanis' *Law and Marxism : A General Theory* 87 (1978) reprinted in Chris Arthur (ed.), *Supra* note 1 at 148.

38. E.B. Pashukanis, "Soviet State and Revolution in Law" in *Soviet Legal Philosophy* 272 (1951) cited in *supra* note 1 at 145. (Emphasis added)

39. Pashukanis, *supra* note 37 at 61 cited in *id.* at 148



range of variation' and 'diversity in normative legal content.' Baxi stresses the following view :

[I]n the Third World societies exhibiting tendencies or truths of 'dual' or mixed modes of production the problem of the range of variation - both normative and institutional - needs a more serious engagement than the presently constituted discourse of Western Marxism allows.⁴⁰

As regards the 'problem of legitimation', Baxi believes that the corpus of Marx himself offers varying starting points for an analysis of both the problematics (*problematic of power and problematic of authority*). The emergence of "official state power or a distinct authority" poses the problem of what he names as *surplus authority*⁴¹, more so when, according to Pashukanis, "direct, *unmediated class rule*" is a historical possibility.⁴² Pashukanis characterises state in a capitalist society as an impersonal force standing above every individual capitalist, and which does not mediate every individual relation.⁴³ But mediation *without coercion*, that too by the state, is not possible. The author emphasises :

Deprivatization of coercion, its depersonalization, provides the justification for state authority....Power becomes authority under the auspices of the Rule of Law, in its myriad versions.⁴⁴

Bourgeois law advertises the state as a rule of law state, normativising and justifying 'coercion'; which is presented as an unproblematic legitimate force. Terror is the cousin of coercion. Nicos Poulantzas, accepts it as an integral part of the state.⁴⁵

'Rule of law' and 'reign of terror' co-exist in all kinds of modern societies. Law and state manifest, in the words of Marx, their "policemanic character" in dealing with those who try to strip off the mask of 'rule of law' from the face of the state to reveal its 'illegalities' or 'reign of terror' ⁴⁶ Marx (and Engels) did not err in visualising that power and law can become circumstances of reckless terrorism, but in our times he observes :

The problem of terror may appear marginal to the First World thinkers and theorists, their political economies having moved beyond primitive accumulation. It may, should they concede its existence at all, strike them as a manifestation of the "contemporaneity of the non-contemporaneous." But the problem is very real for most Third World countries today.⁴⁷

40. *Supra* note 1 at 150.

41. *Id.* at 151.

42. Pashukanis, *supra* note 37 at 139 cited in *ibid*

43. Pashukanis, *id.* at 143, cited in *ibid*.

44. *Supra* note 1 at 154

45. See, N. Poulantzas, *State Power, Socialism* 81 (1980)

46. *Supra* note 1 at 88.

47. *Id.* at 86.



State is a class-bound class-coercive agency. In the Marxian understanding of the state, a relatively autonomous character of the state (and of law too) is, however, recognised. But state theorising is invariably one-sided. The quest for understanding the state, ‘has invariably focussed on the composition and decomposition of the executive power.... It is, therefore, not surprising at all that adjudication does not feature in the landscape of state theorizing.’⁴⁸

The judge has become a nodal point in the affairs of the modern state. Applying crude instrumentalism it may be easily concluded that he is dictated by the ruling class. The judge is, however, very much concerned with coherence and consistency of the legal system which allows him to be relatively free from ‘polity and economy in ways which at times reinforce and at times rupture’⁴⁹ the centralised unity of state power. His love for internal logic of the legal system propels him to give decisions under the hallowed doctrines. The dominant ideology may, however, direct the judicial concept of justice Collins says:

[F]or a Marxist, during the evolution of legal systems, the life of the law has been in neither logic, nor the imaginative ability of lawyers and judges to manipulate their learning to suit their masters, *but in the need to resolve contradictions within the dominant ideology which force themselves upon the consciousness of jurists in the guise of conflicts between legal rules.*⁵⁰

While the role of dominant ideology in the social and legal formations cannot be denied, Baxi highlights the attractive theme of the educative image of the law to add another dimension to the issue of the relative autonomy and role of law in all societies including the capitalist ones. Gramsci thinks that the role of law is, of course, coercive but it is also educative (persuasive); it strengthens and promotes the ‘will to conform’ both in hegemonic classes and subaltern masses.⁵¹ The thesis of the relative autonomy of the ‘state law’ gets strengthened by the situation that ‘if state law often requires subversion and supplantation of people’s law, it also, on occasions, requires supplementation and sublimation of people’s law formations for the performance of its hegemony-forming tasks.’⁵² Discussing the Poulantzas thesis on relative autonomy of law, Baxi states that ‘‘historiography of legal institutions has, barring notable exceptions, still to respond to the issue as to how law was shaped by popular struggles against patterns of domination.’’⁵³ Paying tributes to Poulantzas, in the last paragraph of the book, the author concludes : ‘‘a relative autonomy of law shaped by struggle is, ultimately, the name, for the dying Poulantzas, for ‘‘democratic socialism.’’⁵⁴

48. *Id.* at 166.

49. *Ibid.*

50. Hugh Collins, *Marxism and Law* 73 (1982). (Emphasis added)

51. See, A. Gramsci, *Selections from the Prison Note Books* 260 (1971) cited in *supra* note 1 at 172.

52. *Supra* note 1 at 176.

53. *Id.* at 186.

54. *Id.* at 191.



The constitutional jurists need to understand the tremendous significance of the thoughts of Marx and his academic descendants on the state and the law. The book under review may serve as a baton-reminder for them since Indian constitutionalism has groped into the darkness of ignorance for long.

*Subir K. Bhatnagar**

*LL.M., Ph.D., Reader in Law, Law Faculty, M.D. University, Rohtak



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