



# Voicing suffering and commitment of the intellectual

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## Abstract

How can we explain the complexities of Upendra Baxi's lifework? He is committed to activism yet is attached to complex theorising; he is committed to the Global South yet has a deep engagement with Northern thinking; he makes a trenchant critique of human rights and law while asserting the importance of human rights and the rule of law; he is committed to human social justice while asserting the importance of climate justice. This article explores Baxi's approach to the relationship between activism and theory, to constitutionalism and the rule of law, to human rights and to climate justice and suggests that any perplexity is resolved through his commitment to giving voice to and alleviating the plight of the impoverished, the disempowered, the suffering, and the rightless in his native India and elsewhere.

**Keywords** Upendra Baxi · Voices of suffering · Activism and theory · Constitutionalism · Rule of law · Human rights · Climate justice

## 1 Introduction

Upendra Baxi's lifework is impressive in its enormity, complexity, and perplexity. The perplexity arises from the combination of his lifelong history of activism and belief in the necessity of complex theoretical analysis; his commitment to the global South combined with a deep engagement with Northern thinking, and his critique of human rights and law together with the assertion of the importance of human rights and the rule of law. This perplexity is resolved through his commitment to alleviating the plight of the impoverished, the disempowered, the suffering, and the

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rightless in his native India and elsewhere.<sup>1</sup> Typically, he insists that we should write about impoverishment because poverty is not a natural state to which the global South succumbs through backwardness but rather the result of human agency, policies, structures, and institutions:

The trouble with the word “poverty” is that it is a passive word, suggesting a state of social affairs, which has to be confronted, as best they can, by state and society, and until then to be endured by those called “poor.” The words “poverty” and “poor” *normalize* what should be centrally *problematic*.<sup>2</sup> Impoverishment is not a natural state but a *dynamic process of public decision-making in which it is considered just, right and fair that some people may become or stay impoverished*.<sup>2</sup>

His commitment to enabling voices of suffering to be heard has led him to integrate the roles of activist, lawyer, theorist, and educator—someone Baran appropriately described as an intellectual as opposed to an intellect worker.<sup>3</sup> He describes an early example of his activism as ‘the only Boalt Hall Asian law student to go marching in protest against the Vietnam War, always threatened by dire consequence of the termination of my student visa.’<sup>4</sup> Later, as a law teacher at the University of Sydney, he proposed a course on aboriginal rights, still a burning injustice in Australia. Faculty opposition broke the conspiracy of silence about aboriginal land rights that prevailed in most academic institutions by catalyzing students and progressive academics to initiate litigation that ultimately led to the course being included in the curriculum. Such experiences formed the backdrop to his activism upon his return to India through the renovation of Indian legal education and research and social action litigation: ‘we learned through hard and harsh everyday experience both the social fact that the law is already given and that it can be changed through some modes of contingent juristic struggles.’<sup>5</sup> This engagement has continued at various levels, symbolized by his long-term involvement with the Bhopal catastrophe prompted by his intense exasperation with the failings of the legal system and the federal state.<sup>6</sup>

Baxi’s activist approach underpins his thinking about constitutionalism and the rule of law, human rights and climate justice and his commitment to hearing the voices of the suffering.

<sup>1</sup> Upendra Baxi, *Taking suffering seriously: Social action litigation in the Supreme Court of India*, THIRD WORLD LEGAL STUDIES, 107 (1985); Upendra Baxi, *Voices Of Suffering And The Future Of Human Rights*, 8 TRANSNATIONAL LAW CONTEMPORARY PROBLEMS 125 (1998).

<sup>2</sup> UPENDRA BAXI, LAW AND POVERTY: CRITICAL ESSAYS, 6 (1988).

<sup>3</sup> Paul Baran, *The Commitment of The Intellectual*, 13 THE MONTHLY REVIEW 1 (1961).

<sup>4</sup> Upendra Baxi, Keynote Address at Law & Society Association Conference: ‘Old’ Law and the ‘New’ Social Movements: Towards Future Histories of Recovering the ‘Law’s Ends?’ (2006).

<sup>5</sup> *Id.*

<sup>6</sup> UPENDRA BAXI & PAUL THOMAS, MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE (1986); Upendra Baxi, *The “Just War” for Profit and Power: The Bhopal Catastrophe and the Principle Of Double Effect*, in RESPONSIBILITY IN WORLD BUSINESS: MANAGING HARMFUL SIDE-EFFECTS OF CORPORATE ACTIVITY, 175–201, (Lene Bomann-Larsen & Oddny Wiggen eds., 2004); Upendra Baxi, *What Happens Next is Up to You: Human Rights at Risk in Dams and Development*, 16 AMER. U. INT’L L. J. 1507 (2001).

## 2 Nothing is more practical than a good theory

Baxi is strongly opposed to an activist position whose suggested motto may be ‘Suffering humans of the world unite because you have nothing to lose but the chains of theory!’<sup>7</sup> While he understands varieties of theory aversion (though is less sympathetic to colleagues than to students) and is a severe critic of ivory tower theorizing as well as the pernicious use of theory to justify historical and contemporary forms of oppression; what Foucault terms totalitarian or ‘all-encompassing global’ theories, he is equally concerned about much ‘pragmatic’ activism that suffers from implicit theories which undermine the causes they seek to promote. Instead, he conceives theory as a contested space in which the critical thinker seeks to liberate subjugated knowledge in the service of the oppressed.<sup>8</sup> Baxi is deeply critical of Northern theorizing that orientalistizes subaltern scholarship and theories that colonize and subjugate knowledge of the global South. As one of us (Abdul) has suggested in another context:

His work will give as much if not more credit to the Southern voices of Gandhi, Ambedkar and Samir Amin, the feminist voices of Nussbaum, Haraway, Fraser and Spivak, as to the modern socialist voices of Gramsci and Marx, the postmodernity of Foucault and Derrida and the ancient voices of the Koran, Upanishad or St Paul.<sup>9</sup>

This may make him difficult to pigeonhole (a fact that probably tickles his mercurial side) but his last gaze on the voices of suffering provides a framework for intellectual liberation that resists the creation of geographical, intellectual ghettos. In his view, the task of the activist intellectual becomes ‘(to) give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights narratology.’<sup>10</sup> Translation is a central role of the intellectual and the teacher, who must take care to avoid problems of translating the voices of the subaltern raised by Gayatri Spivak.<sup>11</sup> For Baxi, this can be ameliorated by sensitive activist engagement with the sufferers.<sup>12</sup>

As two of the many who have been mentored by him and greatly influenced by his thinking, we can testify to his insatiable curiosity, his knowledge of every critical social, political, economic, and legal theory of the past half century, his respectful engagement with interlocutors with whom he differs, and his immense influence on generations of students around the world. His is a restless and tireless intellect, always interrogating and probing.

<sup>7</sup> UPENDRA BAXI, HUMAN RIGHTS IN A POST-HUMAN WORLD 10 (2009).

<sup>8</sup> *Id.*

<sup>9</sup> Abdul Paliwala, *Editorial: Open Baxi – A Celebration*, 2007 LGD 1.

<sup>10</sup> UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS, 90 (2006).

<sup>11</sup> Gayatri Spivak, *Righting Wrongs*, SOUTH ATLANTIC QUARTERLY, 546, 563 (2004).

<sup>12</sup> See Alexandru Cistelean, *Which Critique of Human Rights? Evaluating the post-colonialist and the post-Althusserian alternatives*, 5 INT’L J. ZIZEK STUD. 1 (2011). Suggests that Baxi’s position is close to being anti-theory.

### 3 Demosprudence: constitutionalism and the rule of law

Baxi believes the law is essential but not self-evident, and must, therefore, be analyzed, critiqued, problematized and engaged with to identify its potential and limitations for alleviating suffering and rightlessness. Much of his thinking proceeds by identifying the contradictory, oxymoronic nature of law through his ironic and self-deprecating Baxi-morons. Thus he suggests that ‘State law provides ideologies, institutions, and structures which can be effectively used for domination as well as struggles against domination.’<sup>13</sup> In a perspective reminiscent of E.P.Thompson, Baxi suggests that the rule of law is a key ideology that enables a distinction between state ‘terror’ and ‘legitimate force’ and therefore provides a basis upon which to hold the state and other powerful entities accountable, albeit through laws commonly tilted against the interests of the powerless.<sup>14</sup>

Resistance to injustice through the law is necessary but insufficient and must be supplemented by alternative forms of legality in which he has engaged in such as the Peoples Tribunal movement.<sup>15</sup> For Baxi, the law is far too important to be left to politicians, judges, lawyers and legal philosophers.<sup>16</sup>

He distinguishes between *legisprudence* (principles or theories of legislation above and beyond the contingency of politics), *jurisprudence* (concepts, principles, precepts, standards, doctrines, and maxims of law), and *demosprudence* (judicial review and civil power that enhances life in constitutional democracies), and argues that understanding their interconnections is essential in comprehending the nature and operation of law in late modern society.<sup>17</sup> Baxi has discussed the role of demosprudence in activist movements and the development of judicial interpretation, but it is clear from much of his other work that the underlying issue is the role of demos or the citizenry in the development, construction and interpretation of the law and constitutions. He asserts that ‘Constitutions are not areas of practices of state power; they also provide registers of interpretative practices of active citizenry ... (whose) protestant mode questions the production of constitutional meaning as narrative monopolies of the privileged few.’<sup>18</sup>

Baxi’s work includes extended disquisitions on the role of postcolonial constitutions and the degree to which they are progressive and transformative or conservative and depoliticising, and jurisgenerative or jurispatic.<sup>19</sup> Constitutions born in

<sup>13</sup> Upendra Baxi, *Law Struggle and Change: An Agendum for Activists*, 35:118 SOCIAL ACTION 120 (1996).

<sup>14</sup> *Id.* at 121; E.P. THOMPSON, WHIGS, AND HUNTERS: THE ORIGIN OF THE BLACK ACTS (1977).

<sup>15</sup> Jayan Nayar, *A People’s Tribunal Against the Crime of Silence? - The Politics of Judgement and an Agenda for People’s Law*, (2) LGD (2001).

<sup>16</sup> Upendra Baxi, *Demosprudence Versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 3 MACQUARIE L. J. 14 (2014).

<sup>17</sup> Baxi, *supra* note 18, at 6.

<sup>18</sup> UPENDRA BAXI, OUTLINE OF A THEORY OF PRACTICE OF INDIAN CONSTITUTIONALISM, 93, 111 (2008).

<sup>19</sup> Robert Cover describes jurisgenerative processes through which societies create and give meaning to the law through their particular *nomos*, something that always occurs under the shadow of violence. Cover argues that courts tend to be jurispatic when declaring state law and seek to foreclose alternative interpretations of the law. Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HAR. L. REV. 4, 4–68 (1983).

struggle invariably invoke transcendental neutrality and the promise of unity and equality under (the rule of) law—a tendency that underpins Baxi’s fear that the future history of Southern constitutionalism will be that of a technocratic depoliticisation. For example, he has explored the degree to which constitutions—particularly the Indian Constitution—are simultaneously frameworks of coercion and consent that are used to freeze legal contradictions.<sup>20</sup> However, he argues that these contradictions are less important than the “insurgencies” that characterize life under constitutions because they designate the constituent power to make and remake such documents.<sup>21</sup> Baxi would undoubtedly regard the Indian Supreme Court’s decision to decriminalize homosexuality as an example of demosprudence and the protection of rights through law and struggle.<sup>22</sup>

Baxi argues that constitutions can be read normatively, structurally, historically, and empirically. Drawing on the experiences of Brazil’s, India’s and post-apartheid South Africa’s constitutional histories, Baxi discusses the various ways in which constitutions may provide a bridge during postcolonial transitions, when post-liberal constitutions are brought within an ‘ethics of transformation’ through a process of ‘constitutional insurgency’ by the multitudes described by Antonio Negri.<sup>23</sup> Historically, constitutions are distillations of ‘state formative practices, which constitutionalize the “foundational” as well as “reiterative” violence in the name of constitutional legality.<sup>24</sup> Materialist and structural readings view the transformative nature of constitutions as spaces of three-cornered mediation between ruling classes, states, and ruled classes regarding the fairness of the distribution of primary goods such as equality and liberty. Another structural interpretation of constitutions relates to how they create and facilitate governance machines. ‘Normative/philosophical readings in contrast fully suggest that constitutional arrangements are normative ways of inventing and replenishing social cooperation as promoting a fair and equal distribution of liberty and equality as primary goods.<sup>25</sup> In order to be transformative, a constitution must ‘re-organize both memory and forgetfulness.’<sup>26</sup>

#### 4 The politics of and for human rights

Baxi’s rootedness in the claims of suffering leads him to view the role of human rights theory as persuading everyone ‘that the human is that entity to which everyone owes duties of equal respect and full recognition of worth, regardless

<sup>20</sup> Upendra Baxi, *Preliminary Note on Transformative Constitutionalism*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 15 (Oscar Vilhena et al. eds. 2013). ANTONIO NEGRI, *INSURGENCIAS: CONSTITUENT POWER AND THE MODERN STATE* (2009)

<sup>21</sup> ANTONIO NEGRI, *INSURGENCIAS: CONSTITUENT POWER AND THE MODERN STATE* (2009); Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law*, 23 IND. J. GLOB. LEGAL STUD. 1, 15–37.

<sup>22</sup> Upendra Baxi, *Naz: A Critique*, 49 ECON & POL. WEEKLY 6, 8; *Navtej Singh Johar & Ors v. Union of India*; Writ Petition (Cri.) No. 76 of 2016 (Supreme Court of India).

<sup>23</sup> NEGRI, *supra* note 21, at 23.

<sup>24</sup> Baxi, *supra* note 22, at 25.

<sup>25</sup> *Id.*

<sup>26</sup> Baxi, *supra* note 26, at 29.

of sex, religion, race, residence and like features.’<sup>27</sup> This theoretical approach results in an outline of the tasks of human rights activism in *The Future of Human Rights* (the book for which he is perhaps best known) as ‘making the state ethical, governance just, and power accountable.’<sup>28</sup> For Baxi, human rights discourses are not abstractions but have material effects—indeed, one of his most significant contributions is the development of a materialist conception of human rights in marked contrast to the natural law influences on conventional Western approaches. Taking human rights seriously means taking suffering seriously. His insistence that human rights are authored in struggle by the rightless provides an essential counterweight to liberal assertions that human rights are inherent and inalienable; on the contrary, protecting human rights requires eternal vigilance against predatory sovereign states, transnational capital and oppression based on caste, gender, and religion and constant attempts to appropriate and usurp these rights. Histories of resistance belie top-down accounts of human rights and struggles against colonialism, slavery, apartheid, caste and for women’s votes. The emergence of postcolonial collective rights from the struggles of and in developing countries such as the right to development has been championed by Baxi as manifestations of the optimism of the will over pessimism of the intellect.<sup>29</sup>

He has roundly denounced the politics of human rights, through which particular, often self-serving conceptions of rights are imposed on the rightless, in contrast to the subaltern use of politics for human rights.<sup>30</sup> In the former, human rights ‘become the pursuit of politics— even aggression and war— by other means’, whereas politics for human rights are ‘an alternative politics, seeking against the heavy odds of the histories of power, that order of progress which makes the state incrementally more ethical, governance progressively just, and power increasingly accountable’.<sup>31</sup>

Baxi insists that although human rights may have originated in the West, they are not owned by the West. If this were not so, the emergence of new rights would not be possible. This insight leads him to critique the old and stale debate on universalism and cultural relativism reflected in the self-serving arguments of proponents of Asian values.<sup>32</sup> For Baxi, ‘The “Universal” . . . are practices of resistance to power, which play a creationist role in the making of “contemporary” human rights’.<sup>33</sup> History, culture and context shape struggles and politics for human rights but do not preclude people from different societies asserting their right to rights.<sup>34</sup>

Baxi’s affirmation of the rule of law leads him to emphasize the importance of the juridification of rights in order to provide people with legal remedies. His retort to Amartya Sen’s assertion that human rights, primarily social and economic rights,

<sup>27</sup> Baxi, *supra* note 9, at 22.

<sup>28</sup> Baxi, *supra* note 12, at 21.

<sup>29</sup> Baxi, *supra* note 9, at 4.

<sup>30</sup> Baxi, *supra* note 12, at 80–86 and 152–156.

<sup>31</sup> Baxi, *supra* note 12, at 57, 58.

<sup>32</sup> See Yash Ghai, *Human Rights and Asian Values*, 40 J. INDIAN L. INST. 1/4, 67–86 (1998).

<sup>33</sup> Baxi, *supra* note 12, at 184.

<sup>34</sup> Baxi, *supra* note 9 at 27. Here Baxi is reflecting on Hannah Arendt’s arguments in: HANNA ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1994).

may be regarded primarily as ethical demands<sup>35</sup>; is that there is a substantial difference between ethics and law, and the rights must be justifiable if they are not to become little more than pending claims. ‘To say that human rights statements may be primarily regarded as ethical does not . . . Quite guide us to the different moral histories of values, visions, and virtues articulated by various world-historical constituencies’.<sup>36</sup>

Baxi’s writing on human rights reflects the varied influences of writers as diverse as B. R. Ambedkar, Hannah Arendt, Karl Marx, Friedrich Hegel, Giorgio Agamben, Judith Butler, Wendy Brown, and Jacques Rancière. His engagement with these thinkers underpins his innovative distinction between modern and contemporary paradigms of human rights. The former contained in the 1948 Universal Declaration of Human Rights and the two covenants that flowed from it.<sup>37</sup> The latter are the rights of capital that he aptly describes as trade-related, market-friendly human rights (TRMFHR).<sup>38</sup> Emerging from the bourgeois revolutions and Westphalian sovereignty, the modern human rights discourse is based upon the logic of exclusion, whereas contemporary human rights function according to logics of inclusion with the consequence that ‘the contemporary paradigm inverts the inherent modernist relationship between *human rights* and *human suffering*’.<sup>39</sup> A key difference between modern and contemporary human rights flows from the tension between rights that emerged under the colonial domination of the global North (modern), and rights authored by subaltern communities of struggle and resistance in the global South under varying conditions of neo-colonialism and postcolonialism (contemporary). Baxi argues that modern human rights were impelled by an absolutist rather than a universalist logic. For him, absolutism signifies fixity and non-variability. On the other hand, contemporary human rights provide for existential development based on the principle of universalism under which ‘every human person or being is entitled to an order of rights because every other person or being is so entitled to it.’<sup>40</sup> Thus contemporary human rights are universal ‘precisely because they deny the absoluteness of any positioning of rights.’<sup>41</sup> Nevertheless, such universality does not descend into total relativism because human rights are grounded in the ‘universality of collective human aspiration to make power more accountable, governance progressively just and state incrementally more ethical.’<sup>42</sup>

As neoliberal globalization spread during the last quarter of the twentieth century, hard-won rights-especially socio-economic rights were subordinated to the TRMFHR regime that seeks:

<sup>35</sup> Amartya Sen, *Elements of a Theory Of Human Rights*, 32 *PHILOSOPHY & PUBLIC AFFAIRS* 4, 315–356 (2004).

<sup>36</sup> Baxi, *supra* note 9, at 48.

<sup>37</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

<sup>38</sup> Baxi, *supra* note 12, at 2, 258–264.

<sup>39</sup> Baxi, *supra* note 12, at 42.

<sup>40</sup> Baxi, *supra* note 12, at 185.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

to demote, even reverse, the notion that universal human rights are designated for the attainment of dignity and well-being of socially, economically and civilizationaly vulnerable peoples and communities. [It] insists upon the promotion and the protection of the collective human rights of global capital, in ways which ‘justify’ corporate well-being and dignity even when it entails continuing gross and flagrant violations of human rights of actually existing human beings and communities.<sup>43</sup>

There are apparent disparities between the languages and practices of human rights and governance in the two paradigms. Whereas the modern enunciation of human rights was almost ascetic, contemporary enunciations are carnivalesque and risk their commodification and proliferation by development and human rights industries dominated by legal and other technocrats, and thus in danger of becoming detached from the suffering and the needs of the poor and oppressed.

## 5 Climate justice in the Anthropocene

Baxi’s conception of human rights owes much to his analysis of the depredations of neoliberal globalization and the corruption and inequality that inevitably accompany it and sow the ground for the kind of authoritarianism, populism, and ethnonationalism exemplified by Trump and Modi. The myriad injustices of capitalism and unconstrained, unsustainable economic ‘development’ also inform his more recent thinking about climate justice in the Anthropocene. (In passing, one of Baxi’s virtues is his continuous engagement with contemporary problems and thinking, especially where these lead to harms and injustice). Climate change is a unique and unprecedented transboundary problem that affects everybody on Earth (albeit there are lifeboats for the rich) and poses new challenges for law and human rights, which cannot promote justice if they remain locked in the doxas and confines of Holocene rationality.<sup>44</sup> Climate justice must be universally applicable to provide adequate answers for the suffering and injustices confronting humanity throughout this century and beyond. Climate justice is not possible so long as the human rights and justice claims of the poor and rightless—who are least responsible for creating the problem but most vulnerable to its harmful impacts—are ignored, and their rights violated. Realising the profound impact that climatic harms have on the poor, Baxi again demonstrates his ability to discern the nature of suffering and address changing legal, political and economic realities through theoretical critique to inform praxis.

Baxi’s focus on climate is relatively recent, but he has been concerned about environmental issues and the limits of the law for several decades.<sup>45</sup> He has been outraged by the enduring injustices of the Bhopal tragedy—a prime example of environmental injustice.<sup>46</sup> Climate justice is intimately connected to environmental

<sup>43</sup> Baxi, *supra* note 12, at 234.

<sup>44</sup> Upendra Baxi, *Towards a Climate Change Justice Theory?*, 7 J. H. R. ENV’T 1, 7–31 (2016).

<sup>45</sup> J. BANDHOPADHYAY, *INDIA’S ENVIRONMENT: CRISES AND RESPONSES* (1987).

<sup>46</sup> Baxi, *supra* note 9.

justice and cannot be achieved with reliance only on distributive, gender and global justice or new understandings of what it means to be human in a period in which the adequacy of existing theories are called into question. Baxi thus identifies the need to move beyond and to aggregate existing categories of justice in ways that must reflect the needs and interests of the vulnerable. As he writes, theories of environmental justice have taught us that ‘more than the conventional notions of distributive justice are at stake here: one needs to add to the notion of justice also that of fair and equal participation of the impoverished and the indigenous peoples and concepts of fair procedural justice’.<sup>47</sup>

Anna Grear, a colleague with whom Baxi has closely collaborated, argues that Anthropos—the super-agent of the Anthropocene—is a narrow, self-interested figure that excludes most of humanity and all of nature. The Anthropocene, she writes, is a crisis of hierarchies and that:

Any ethically responsible future engagement with ‘anthropocentrism’ and with the ‘Anthropocene’ must explicitly engage with the oppressive hierarchical structure of the Anthropos itself—and should directly address its apotheosis in the corporate juridical subject that dominates the entire globalized order of the Anthropocene age.<sup>48</sup>

The Anthropocene is a useful concept that has moved beyond Earth system science into the humanities, law, social science and public consciousness. It is, however, also problematic because it implicitly postulates undifferentiated humanity whose members are equally responsible for significant greenhouse gas emissions and climatic harms.<sup>49</sup> Most of the individuals with the most significant historical responsibility for carbon dioxide emissions are the affluent residents of the North. The suffering caused by climate-related harms arises from the ‘industrial development model and its metabolism concerning matter and energy, which altered the geopolitical trajectory of our Earth, is inseparable from the history of capitalist world-systems, of unequal ecological exchange, colonialism, and imperialism, exploitation, and underdevelopment.’<sup>50</sup>

Baxi’s thinking about climate justice thus far has led to some provisional conclusions. First, climate injustices are related to but qualitatively and quantitatively different to other harms of modern industrialization. Climate change constitutes a unique and unprecedented threat to the human rights of the poor and vulnerable who are least responsible for causing the problem. Second, the telluric power of humanity in the Anthropocene generates profound ontological, epistemological, ethical,

<sup>47</sup> Baxi, *supra* note 46, at 18.

<sup>48</sup> Anna Grear, *Deconstructing Anthropos: A Critical Legal Reflection On “Anthropocentric” Law and Anthropocene “Humanity”*, 26 *LAW AND CRITIQUE* 3, 225 (2015).

<sup>49</sup> Dipesh Chakrabarty, *The Climate of History: Four Theses*, 35 *CRITICAL INQUIRY* 221 (2009). We believe Baxi finds Chakrabarty’s speciesism and his failure to link the Anthropocene to underlying structures of social, environmental and climate exploitation such as colonialism and capitalism discomfoting.

<sup>50</sup> Alf Hornborg, *Zero-Sum World: Challenges In Conceptualizing Environmental Load Displacement And Ecologically Unequal Exchange In The World-System*, 50 *INT’L J. COMP. SOC.* 3–4, 237–262 (2009); CHRISTOPHE BONNEUIL & JEAN-BAPTISTE FRESSOZ, *THE SHOCK OF THE ANTHROPOCENE: THE EARTH, HISTORY AND US*, 228 (2016).

philosophical, and legal challenges which cannot be met within existing discourses. For example, climate change challenges the linear teleology characteristic of Eurocentric thinking. Should a theory of climate justice, Baxi asks, ‘engage the ontology and epistemology of a free market and fragile neoliberal self or does it address a rather robust human rights self with powers to resist the total domination of the economy and the polity?’<sup>51</sup> Third, a theory of climate justice must also address the historical challenges posed by past harms and the imperatives of intergenerational justice and, to a different degree, those posed by geographical injustices. Understanding climate (in)justice must flow, bottom-up, from the comprehension of the nature and causes of climatic harms and their impacts on the poor, rightless, and vulnerable. We are thus forced to think anew and ‘rethink the question of responsibility.’<sup>52</sup> Fourth, a theory of climate justice must address the deep anthropocentrism of law, and the preponderance of natural and social science approaches to enable us to identify the nature and scope of obligations owed to other species and the planet. In order to do so, it is necessary to address the limitations in theories of global and environmental justice. Fifth:

Individual and collective human rights and our notions of moral responsibilities and legal liability must be reinvented with a new perspective that respects [the principle of] ‘common but differentiated responsibility.’<sup>53</sup>

Sixth and perhaps the most intractable problem of all is whether climate justice is possible under capitalism and the ‘anti-capitalist and anti-“system” politics’ required in pursuit of it?<sup>54</sup>

## 6 A brief synthesis

Baxi is a *critical* admirer of John Rawls’s theory of justice.<sup>55</sup> The problems Rawls encountered in extending his idealist theory of justice beyond liberal democracies in the *Law of Peoples*,<sup>56</sup> highlights the difficulties involved in developing a theory of climate justice that must necessarily be global and transboundary in an international legal system that remains resolutely sovereign-centric. Baxi’s overall perspective on climate justice reflects his general concern of the need to distinguish between episodic and structural change; the former merely alters the players whereas the latter changes the game. As he writes:

<sup>51</sup> Baxi, *supra* note 46, at 13.

<sup>52</sup> Baxi, *supra* note 46, at 11.

<sup>53</sup> Baxi, *supra* note 46, at 20.

<sup>54</sup> Baxi, *supra* note 46, at 13.

<sup>55</sup> Upendra Baxi, *Some Notes on John Rawls, The Law of Peoples*, INSTITUT D’ÉTUDES AVANCÉES DE NANTES, <https://www.iea-nantes.fr/rtefiles/File/Ateliers/20140619-Huri/baxi-some-notes-on-John-Rawls-lop.pdf>.

<sup>56</sup> JOHN RAWLS, *THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED* (2001).

The problem of justice (and human rights) has always perplexed me; at one end of their struggle the perspectives of the masses of the impoverished, socially vulnerable and disposable peoples in the modern neoliberal world seek justice that is impossible now; at the other, they enact their struggles as if justice was realizable here and now and even in the circumstance of their choosing.<sup>57</sup>

This problem is part of the ‘*aporia*, or paradox, of justice,’<sup>58</sup> Which include the tension between theories of justice and experiences of injustice, and the difficulties involved in reconciling justice for current and future generations- which in turn raises questions about the relationship between theory and praxis that Baxi has grappled with throughout his career. As he observes, the problem of justice is the problem of the compossibility of the natural and the metaphysical, and of the past, present and future.<sup>59</sup> His perspectives on constitutionalism, the rule of law, human rights and climate justice all attest to the need to place the voices of suffering foremost in the search for justice.

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<sup>57</sup> Baxi, *supra* note 46, at 9.

<sup>58</sup> Baxi, *supra* note 46, at 10.

<sup>59</sup> Baxi, *supra* note 46, at 11.