

Constitutionalism and the Rule of Law: In a Theatre of Democracy (2023)

by A.K. Sikri. Eastern Book Company, 34, Lalbagh, Lucknow-226001
Pp. LXXX+608. Price Rs. 1526/-

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The Book under review, fittingly titled *Constitutionalism and Rule of Law: In a Theatre of Democracy* a significant contribution to the intricate tapestry of democratic thought emerges from the pen of the esteemed former Supreme Court Justice A.K. Sikri. Drawing upon the insights gleaned from the book that embarks upon a profound exploration of the foundational ideals and doctrines that serve as the very bedrock upholding democratic societies. Justice Sikri, drawing deeply from the wellspring of his extensive and rich judicial experience, delves into an intricate analysis, meticulously examining the symbiotic and nuanced interplay that exists between constitutionalism and the rule of law. Within the discerning gaze of this work, constitutionalism is presented not merely as an abstract concept but as the formidable force embodying the supremacy and the essential framework of a constitution, that is a thoughtful construct designed to limit the reach of governmental power. This is aligned with the rule of law, depicted as a principle demanding that all individuals and entities, crucially including the state itself, stand equally subject to the just and fair principles that underpin the legal system.

The book thoughtfully navigates the delicate and often precarious balance required between the inherent authority of the state and the fundamental dignity of the individual. It illuminates, with compelling clarity, how these two vital principles, one the constitutionalism and other, the rule of law do not function in isolation but collectively coalesce to safeguard the delicate edifice of democracy. This collective strength manifests through the mechanisms they provide, ensuring accountability from the government, affording robust protection to fundamental rights, and diligently fostering the pursuit of social justice. Graced by a foreword from the Chief Justice of India, D.Y. Chandrachud, (as he was then) introduced by the esteemed legal scholar Professor Upendra Baxi, and concluded with an afterword by the erudite former Supreme Court judge, Justice Rohinton Fali Nariman, this Book under review is well-organized with 22 essays in four Parts, (Fifth Part contains few leading cases) and insightful speeches. This book, as a rich tapestry of

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essays and orations, shines a light upon the ever-evolving landscape of jurisprudence. This dynamic legal philosophy, as presented in the sources, actively shapes not only the practicalities of democratic governance but also the critical function of judicial review, and the ongoing, vital endeavour for equality before the law. Ultimately, the Book is more than a scholarly text; it serves as a potent invitation, compelling readers to critically engage with the enduring challenges and the persistent aspirations that define constitutional democracy.

The first part consisting of six essays starts with the 'Role of the Judge in a Democracy'. This essay is based on the lecture delivered by the author in the Justice H.R. Khanna Memorial Lecture which emphasised on the critical responsibilities of judges within a constitutional framework. The author honours Justice H.R. Khanna as an audacious personality for his dissenting opinion in the landmark *ADM Jabalpur*² and portrays him as a model of judicial courage and integrity. Drawing inspiration from Justice Aharon Barak, the author emphasizes that a judge in a democracy must primarily uphold the Constitution and the rule of law. This perspective emphasizes the judiciary's indispensable role as a guardian of democratic values, particularly in moments of institutional upheaval or political turmoil. By quoting Justice Aharon Barak, the author affirms that judges do not function in a vacuum; rather, each judge brings to the bench a distinct worldview shaped by their experiences, values, and understanding of justice. This diversity of thought fosters ideological pluralism—an essential strength within the judiciary that ensures decisions are not monolithic but reflect a rich interplay of perspectives. Such pluralism not only enhances judicial independence but also fortifies the rule of law in a democracy by allowing the law to adapt and respond to evolving societal needs. Despite varied perspectives, all judges share a fundamental duty to uphold the Constitution and democratic values, extending beyond resolving disputes. This essay reflects on the evolving role of judges and constitutionalism in bridging the gap between law and society. The author writes how the constitutionality of statutes is affected by changes in society and cites cases like- *Uphaar case*,³ *Nirbhaya, Talwar case*,⁴ *Jessica Lal*,⁵ *Triple Talaq*,⁶ *Vishaka case*,⁷ *Aruna Shanbaug*,⁸ *NALSA*⁹ and *Jeeja Ghosh*¹⁰ to reflect. However, the author puts a note of caution for the future by touching upon

² *A.D.M. Jabalpur v. Shivakant Shukla*, (1976)2 SCC 521.

³ *MCD v. Uphaar Tragedy Victims Assn.*, (2013)14 SCC 481.

⁴ *Rajesh Talwar v. CBI*, (2012)4 SCC 245.

⁵ *Manu Sharma v. State (NCT of Delhi)*, (2010)6 SCC 1.

⁶ *Shayara Bano v. Union of India*, (2017)9 SCC 1.

⁷ *Vishaka v. State of Rajasthan*, (1997)6 SCC 241.

⁸ *Aruna Ramchandra Shanbaug v. Union of India*, (2011)4 SCC 454.

⁹ *National Legal Services Authority v. Union of India*. (2014)5 SCC 438.

¹⁰ *Jeeja Ghosh v. Union of India*, (2016)7 SCC 761.

the aspect of judicial activism and to balance the same with judicial restraint to continue to treat the Courts as the 'Temple of Justice'.

The second essay 'Constitutional Democracy: India's Moments' explores India's journey with constitutional democracy, emphasizing the Constitution as the supreme legal authority—or Grundnorm—designed to guide the nation through clearly defined objectives and institutions. The author connects this to Hobbes' theory of social contract and liberal democratic principles like limited government, rule of law, and sovereign citizenry, 'We the People'. A central argument is that these ideals are only achievable through a truly independent judiciary, free from interference by the executive or legislature. The author puts forth his idea that the Constitution as an instrument of governance, and constitutionalism as attributes of better governance and a welfare state, works for 'we the people' as the focal point of democracy. The author highlights the longevity of the Constitution and its acceptance and endurance by recalling Justice Krishna Iyer when he labels the Constitution of India as 'The Nation's Safety Valve'.

Essay 3, 'Judicial Review: The Indian Experience', discusses the Indian perspective on judicial review. It traces its philosophical roots to the maxim *ubi jus ibi remedium*, which means that where there is a right, there must be a remedy. While this principle has historically been upheld as fundamental by the Indian Supreme Court, the author notes that the contemporary interpretation of judicial review has evolved, diverging significantly from its traditional definition of superior courts revising inferior court decisions. Further, the author cites Henry J. Abraham's view on judicial review, reinforcing that courts have the essential power to invalidate laws, or government actions that conflict with constitutional principles. This essay continues the exploration of core constitutional principles in India, focusing on judicial review, rule of law, and the separation of powers.

Essay 4, 'Rule of Law: Protecting the Constitution and Democracy in India', shifts focus to the rule of law as a foundational concept in protecting democracy and the Constitution in India. It underscores the distinction between formal democracies, based on electoral representation, and substantive democracies, grounded in rule of law. The idea that "law is above all" is emphasized, highlighting that no individual or institution is beyond its reach. The essay concludes by demonstrating the deep interconnection between constitutionalism, liberal democracy, and the rule of law. These elements are not merely complementary but inseparable, with an ideal constitution ensuring democratic vibrancy, accountability, human rights, and protection from arbitrary power.

Essay 5, 'Judicial Review and the Principle of Proportionality', discusses how the concept of proportionality, which is of global jurisprudential significance, is used as a tool



for judicial review in India. It describes how this principle contributes to a rational and balanced decision-making process, particularly in three key areas: punishment for offences, administrative decisions, and legislative actions. Through detailed analysis, the essay explores how the Indian Supreme Court has interpreted and applied proportionality to ensure reasonableness and fairness in governance. The author cited many writings and case laws on the principles of proportionality like Aharon Barak, Kai Möller, Moshe Cohen-Eliyan, and Iddo Porat, to name a few.

Essay 6, 'Proportionality: A Balancing Act for Achieving Constitutional Rights', expands on proportionality as a critical method for balancing constitutional rights, portraying it as an essential for upholding the rule of law. The essay incorporates a poignant quotation from Raymond Chandler to underscore the moral strength required of individuals directing a just legal order. The essay also invokes Lon Fuller's concept of the "Inner Morality of Law," emphasizing that legal systems must meet certain minimum standards to be legitimate and differentiated from authoritarian regimes. The essay underscores the pivotal role of the doctrine of proportionality in achieving the principles of the rule of law as an essential tenet of modern constitutional theory.

Proportionality supports democratic values and reinforces the constitutional mandate of balancing power with reasonableness. Basically, this essay presents proportionality as a cornerstone of constitutional adjudication and ethical governance.

Essay 7, in the second Part of the book, is a lecture given by the author in a program among Rotarians, particularly emphasized on 'Fundamental Duties'. This essay highlights that in a democracy striving for equality and inclusive growth, it is essential that all citizens actively participate, understanding not only their rights but also their duties. Further, it critiques the citizen's tendency to focus solely on rights, neglecting the corresponding responsibilities. The narrative calls for a shift from an individualistic 'I versus You' mindset to a collective "We" approach. Drawing on Cicero and Plato, the author affirms that we are social beings, born for one another. The author has beautifully highlighted the 'Corona untouchability' in this essay and reminded what Confucius said: "Destruction has noise, but creation is quiet" in reference to fundamental duties.

Essay 8, 'Judiciary's Relevance in a Democracy: The Role of Law Schools', explores an essay originally presented in memory of Late Shri G.L. Sanghi. This reflects the enduring impact of those who contribute to the growth of legal scholarship and civic awareness. This essay focuses on the evolving responsibility of law schools in shaping future change-makers, and the mission of law schools extends beyond merely producing lawyers. Fundamentally, it

is about cultivating great legal minds. The author also discusses the role of a judge and the role of lawyers to act as social engineers, and the responsibility of law schools to ensure the quality of thought.

Essay 9, 'Social Transformation Through Judicial Process in India', is a deep dive into how judicial interventions have driven societal change. This involves redefining national identity, revitalizing foundational values, and pushing for a just society. The author critiques the Indian legal and political system's current state, describing it as fragmented and spiritually adrift, suffering from a collective amnesia of its constitutional promises. The judiciary is called upon to counteract this condition through a radical, justice-oriented legal movement that prioritizes eradicating poverty and social inequality over elite comfort. The essay draws on Justice V.R. Krishna Iyer's insights, what he observed in *State of Karnataka vs Shri Ranganatha Reddy*, that 'the social philosophy of the constitution shapes creative judicial vision and orientation...'¹¹ Basically this essay also underscores the judiciary's potential and responsibility in steering India toward meaningful, inclusive progress, guided by constitutional principles and social justice and to adjudicate in social context.¹²

Essay 10, 'Growing Significance of Dignity Jurisprudence in the World of Ascending Human Rights', explores the philosophical and legal foundations of human dignity, focusing primarily on the influence of Immanuel Kant, and the judicial legacy of Justice MRA Ansari, in whose memory this lecture was delivered. The essay begins by observing how Kant's philosophy profoundly influenced the modern understanding of human dignity, primarily through his ethical doctrine rather than legal theory. This essay reflects on the profound influence of World War II in reshaping the global understanding of human dignity. It begins by outlining three conceptual models of dignity that existed prior to the rise of written constitutions in democratic nations. The horrors of the war served as a stark awakening for governments, underscoring the urgent need to affirm and safeguard human dignity. This recognition found formal expression in foundational international instruments such as the United Nations Charter and the Universal Declaration of Human Rights (1948), both of which enshrined dignity as a core value. On the national front, too, despite the relatively recent development of written constitutions, there has been a marked emphasis on the protection of human rights rooted in the idea of dignity. Even in nations like the United Kingdom and Israel, where constitutions are not codified, the municipal laws ensure protection.

¹¹ (1977)4 SCC 471.

¹² See Prof. N.R. Madhav Menon, "Social Context Education for Social Justice Adjudication" 1 *Journal of National Judicial Academy* 241 (2005).



The author cites Professor Upendra Baxi,¹³ who presents dignity as a "meta-ethical" concept. He emphasizes that dignity pertains to the complex relationships between individuals and society, hinging on the idea of "respect." In Baxi's view, dignity involves honouring individual autonomy and the ability to make free, and informed choices. A just society is one that ensures the necessary contexts and conditions for such autonomy. Importantly, this respect for dignity acts as a safeguard, placing limits on the actions of the state, legal frameworks, and regulations, thereby empowering individuals in a meaningful and structural way.

In essay 11, 'Human Rights of the Disabled: World in a Slow Motion', the author highlights how these ideals extend into the domain of disability rights. Inspired by Joseph P. Shapiro's 'No Pity',¹⁴ the essay challenges societal ignorance and misunderstanding of persons with disabilities, as reflected in Shapiro's provocative subtitle, "You Just Don't Understand", and the stark observation that "Nondisabled Americans do not understand the disabled ones". It further examines the slow progress in recognizing the dignity of differently-abled individuals. It critiques international human rights frameworks for their insufficiently responsive implementation regarding equality, which should be based on non-discrimination and reasonable differentiation. True equality, it argues, must ensure that all individuals can equally enjoy rights and freedoms, which requires eliminating barriers to participation. The author gives the example that public facilities not accommodating the needs of disabled persons, results in exclusion and a denial of rights. Therefore, the commitment to equality must go beyond mere non-discrimination, to actively preventing systemic injustices through protective laws and inclusive practices.

In practical terms, this involves adopting positive rights, affirmative action, reasonable accommodation, and a broader social justice approach to uphold the dignity of all, particularly marginalized or disabled groups. The author eloquently delineates the legal status of persons with disabilities within both international and national frameworks, while also advocating for the recognition and realization of their rights. In doing so, the essay seeks not only to inform but to awaken public conscience and foster greater awareness of the challenges faced by the disabled. It emphasizes the need to rethink rights categorically to improve disability policies and societal attitudes.

¹³ Upendra Baxi, "First Justice H.R. Khanna Memorial Lecture: Protection of Dignity of Individual Under the Constitution of India", Lecture delivered at Indian Law Institute, New Delhi.

¹⁴ Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (Universal Book Traders, Delhi, 1993).

Essay 12, 'Negotiating Spaces: Gender Justice', continues the discourse on human rights by expanding on gender justice and explores the judiciary's role in achieving gender justice. The author questions the nature of judicial responsibility, initially presenting the conventional view that a judge merely applies existing law to resolve disputes. However, this simplistic view is challenged by acknowledging the reality that judges often interpret the same law differently and may evaluate facts and evidence through divergent lenses. The existence of terms like "liberal judge" and "conservative judge" underlines that judicial decisions are not purely mechanical but are influenced by interpretation, context, and personal judgment.

The third part of the Book opens with Essay 13, 'Mediation: New Dimension of Access to Justice', and Essay 14, 'The Power of Mediation'. These essays, centered on mediation and its role in expanding access to justice, affirm that justice must extend beyond procedure and legality. It must be grounded in humanity, compassion, and inclusiveness. At the heart of this discourse is Justice V.R. Krishna Iyer's assertion that "access to justice is basic to human rights." Justice is thus portrayed not merely as a legal construct, but as a profound philosophical and ethical value that intersects with theology, politics, and economics. The essays recognize that justice has long been debated by jurists and philosophers, each offering diverse perspectives. Within this framework, these essays underscore the contemporary shift toward viewing mediation as a practical and inclusive means of achieving justice. The author asserts that mediation is not an empty "promise," but a means capable of producing real, tangible miraculous outcomes, even when effectively employed.

Essay 15, 'Exploring the Relationship Between Conflict and Law', addresses the philosophical and practical implications of conflict as a natural component of human society. The author emphasizes that while conflict can be disruptive, it also presents opportunities for constructive transformation, if these are properly resolved through legal mechanisms. The essay is structured under distinct sub-headings to explore different dimensions of this relationship: "Conflict and Law", highlights the legal system's role in managing disputes, particularly through mediation; "Conflict of Law" deals with jurisdictional clashes in international contexts; and "Conflict in Law" considers the internal tensions within legal systems caused by evolving social contexts, necessitating reform.

Essay 16 is 'The Inexplicable Yet Unavoidable Relationship Between Law and Literature. Here, the author argues that while law and literature are distinct disciplines, they are intricately interwoven. Each can exist independently but often complements or



completes the other, creating a mutual enrichment. Literature gives emotional and narrative depth to legal principles, while law provides structure and formality to abstract ideas. This reflection on their symbiotic relationship underscores the broader theme of the text: justice is not merely procedural but deeply connected to human expression, morality, and understanding. The author focuses the thematic exploration of the deep and multifaceted relationship between law, literature, and the broader socio-cultural framework.

The discussion begins with a reflection on the interpretative power of words, which are central to both legal practice and literary expression. The author contrasts the functional role of law, that relates to defining rights, punishing wrongs, and awarding compensation with the imaginative nature of literature, which creates worlds, characters, and experiences that allow readers to engage emotionally and intellectually. Both fields, despite their apparent divergence, rely on narrative structures, persuasive language, and the power of interpretation. The author illustrates this point by highlighting how foundational legal texts (like the Constitution or judicial orders) and legal performances (such as courtroom arguments) share literary qualities that resonate with audiences. Conversely, literature often embeds legal themes, as seen in 'Pride and Prejudice', where the plot hinges on the legal principle of primogeniture. The text then moves to a contemplation of law's dynamic nature. It presents judgments as evolving constructs influenced by time, context, and societal change, emphasizing their susceptibility to reinterpretation. Despite these fluctuations, law maintains a structured continuity through the reliance on precedent, which adds credibility and consistency to legal outcomes. The globalized legal landscape is depicted as a forum where numerous legal perspectives and judgments compete, reinforcing the idea that law is a living, adaptive discipline.

Essay 17, 'Globalisation of Judging', delves into the paradox of how national courts now function on a global stage. It raises the intriguing question of why domestic judicial systems seem prepared to engage in global discourse, despite the complex challenges that globalization brings. This transition is portrayed as both remarkable and revealing. It suggests a transformation in the judiciary's role and its increasing relevance in the international order. The essay extends the evolving narrative of the judiciary's transformation in a globalised context, emphasizing how courts now operate beyond the bounds of national jurisdiction. This interconnectedness illustrates how legal systems are increasingly integrated, with foreign judgments serving as valuable reference points in shaping domestic legal outcomes.

Essay 18, 'Law and Economics' builds on Posner's foundational work.¹⁵ This essay explores the interaction between law and economics, particularly in a transnational context, and investigates the Indian judiciary's role in advancing economic analyses within legal frameworks. The analysis centers on two core questions: when and how these distinct yet increasingly intertwined disciplines converge, and what implications this has for legal practice and policy-making. The essay underscores the growing relevance of interdisciplinary approaches in understanding law's role in a globalised, economically driven world. The author cites the works of scholars like Amartya Sen, Martha Nussbaum, Noam Chomsky and many more while dealing with human rights and economic analysis of law.

Essay 19, 'Spirituality and Legal Profession', explores a vital perspective on the essence of spirituality, the principle of being true to oneself. The author draws a profound connection between justice and spirituality, presenting the latter as a core value within the legal process. While the law seeks to resolve disputes and deliver judgments, spirituality, the author suggests, delves into the deeper roots of conflict. Both, however, share a common purpose: the pursuit of truth and justice, and the minimization of wrongdoing and crime in society. The fourth part of the book is devoted to a profoundly meaningful theme 'A tribute to my teachers'. This reflects the deep respect and reverence the author holds for his mentors. It comprises two essays: 'Professor Upendra Baxi: A Remarkable Intellectual Journey and Works', and 'Professor M.P. Singh: An Appreciation'. These essays serve not only as heartfelt homages but also as meditative reflections on the author's own professional journey that is shaped and enriched by the enduring influence of his distinguished teachers.

In particular, Essay 20, acknowledges Professor Baxi's profound impact on India's legal education and jurisprudence, highlighting how his ideas have influenced not just legal professionals but also the broader society. Professor Baxi is praised for his social philosophy and his refusal to be constrained by conventional academic boundaries. His work is presented as both intellectually liberal and deeply rooted in public service, leaving a lasting imprint on India's legal landscape. Essay 21, commemorates the remarkable academic and professional accomplishments of Professor M.P. Singh. The essay outlines his trajectory from a law lecturer to a vice- chancellor, traversing academic milestones and geographical boundaries. His prolific output of scholarly work is acknowledged as a vital contribution to both Indian and global legal education. His efforts are portrayed as instrumental in shaping generations of students and educators alike, signifying his lasting impact on the legal landscape.

¹⁵ Richard A. Posner, *Economic Analysis of Law* (Aspen Casebook Series, 2014).



The final essay 22, 'Bidding Adieu: My Farewell Speech', serves as the author's personal reflection on retiring from a long and distinguished career spanning 42 years as a lawyer and judge. Through this essay, he revisits the core teachings and values discussed throughout the book.

The final part of the book highlights several important and landmark cases which the author adjudicated as a judge of the Supreme Court of India. These cases have played a pivotal role in safeguarding justice and upholding the rights of the common man. Whether addressing the right to privacy,¹⁶ the rights of persons with disabilities,¹⁷ performers' rights to carry business etc,¹⁸ the rights of LGBTQ¹⁹ individuals, the right of those in a vegetative state,²⁰ or the protection of witnesses,²¹ each judgment reflects a steadfast commitment to constitutional values and human dignity.

Overall, the author succeeds in addressing a wide range of themes with clarity and depth, doing full justice to each subject explored. Readers are encouraged to engage with this book for its profound insights, drawn from Justice A.K. Sikri's extensive judicial experience. Written in lucid prose and systematically structured, the book offers a panoramic view of the foundational principles of constitutional democracy. Through a compelling collection of essays, it thoughtfully examines the interplay of law, justice, and governance in upholding individual dignity and protecting democratic ideals.

¹⁶ *K.S.Puttaswamy v. Union of India*, (2019)1 SCC 1.

¹⁷ *Jeeja Ghosh v. Union of India*, (2016)7 SCC 761.

¹⁸ *Indian Hotel and Restaurant Association & An v State of Maharashtra*, (2019)3 SCC 429.

¹⁹ *National Legal Services Authority v Union of India*, (2014)5 SCC 438.

²⁰ *Common Cause v Union of India* (2018)5 SCC 1.

²¹ *Mahender Chawla v Union of India*, (2019)14 SCC 615.