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**HINDU LAW, LEGAL SYSTEM, AND PHILOSOPHY: A Discourse on Recontextualizing Legal Studies in India**

*Chanchal Kumar Singh & Mritunjay Kumar*

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# HINDU LAW, LEGAL SYSTEM, AND PHILOSOPHY: A Discourse on Recontextualizing Legal Studies in India

*Chanchal Kumar Singh*[*] *& Mritunjay Kumar*[**]

[***Abstract:*** *The most of the modern problems, Indian law and legal system face have genesis in the British colonial legal strategies. Reception and so called Indianization of English law relegated indigenous knowledge, practices and understanding of law and can be seen as a psychological project of common law and legal scholarship. The project facilitated the objectives of the modernism by eliminating all possible alternative traditions of knowledge, culture, history, legal philosophy, or jurisprudence, prevalent in the ancient societies, for example, in India and other parts of Asia. The historical and comparative study of the Hindu rich traditions of knowledge and cultural heritage have potential to offer practical solutions for many challenges the Indian legal system encounter in this century. There is need to go beyond paradigm of 'faith of right framework' and to question the suspicious, predatory, and abductive juridical structure of the modern Indian legal system, interpretation, and concepts in law for salvaging legal philosophy from the spirit of slavery that has produced a deep cultural as well as historical alienation of self. The Indian law and legal education confront massive problems even after seventy years of the independence from the colonial rule. It includes multifarious incidence of 'exclusion' from access to social and natural goods, socio-economic disasters such as hunger deaths, malnutrition, access to justice, education, health, and ecological and environmental tragedies, to name a few, and can directly be traced to be the products of modern common law in India. Historical and comparative studies in the Hindu philosophy and ancient social practices can offer multiple insights for the present law. Indian law makers and legal scholarship can have an entire repository of solutions laying in it. In addition, such studies can be useful in developing a better understanding of 'the idea of law or legal system itself', in a globalized world.]*

[*] *Dr. Chanchal Kumar Singh,* is an Assistant Professor of Law and Director, Centre for Comparative Public Law, Himachal Pradesh National Law University, Shimla. *Email: chanchalsingh@hpnlu.ac.in*

[**] *Mritunjay Kumar* is a Ph.D. Research Scholar and Visiting Faculty at Faculty of Law, University of Delhi, Delhi. *Email: mkumar@law.du.ac.in*

# I

## Introduction

The liberal education in general and liberal legal education in particular, undoubtedly has have, apart from economic and political, a psychological project. The psychological project consists in destroying legacies of the cultural and educational history of the indigenous societies. This is a very powerful but subtle project difficult to be discerned by an ordinary regimented mind.

It is important to note that the so-called liberal education system or the Western education system helped European powers to gain status, in the early modern period, of ruling global powers as colonial or imperial centers. The psychological project formed the substratum of the education system, facilitated the legitimacy of the political and territorial colonial rule for as long as it indeed persisted and soft imperialism of knowledge that still continues in the twenty first century.

The intellectual, scientific, and literary movements through which the Western powers came to dominate, in the sixteenth century onwards, over the different societies and land across the world, were the products of European renaissance and enlightenment. Renaissance and enlightenment, however, do not represent discovery and creation of new wisdom and knowledge. Those epochal developments, however, epitomized the ingenuity of scholars in reviving the ancient Greek and Roman knowledge, conceptual legal categories, and cultural systems during the period. The psychological project facilitated the objectives of modernism by eliminating all possible alternative traditions of knowledge, culture, history, legal philosophy, or jurisprudence, prevalent in the ancient societies, for example, in India and other parts of Asia.

The quest for discovering truth and creating a discourse to eclipse truth involve two different strategies. One is pursued with a sagacity of innocence to discover the eternal truth, as believed to be present in nature and in its harmony, while the latter has to do with discursive practices, guided by the motive of rationalizing the discourse. One of the easiest projects one can undertake is to rationalize the prejudices and to portray a picture of different cultures to distort its unique patterns as per pre-arranged and refined motives. The process of questioning ignorance as well as prejudices and developing the capacity of unlearning are crucial steps for pursuing truth. Orientalism, as a cultural ideology from the perspective of global north, was the project to demean certain ways of life at the normative scale of superiority and inferiority of cultures. This has, notably, been exposed by Edward Said in his classic work, *Orientalism*. Orientalism as a "*project of otherisation*" was practiced with a zeal to create an image of immaturity of once potentially-alive civilizations. In words of Said:

> "The Orient and Islam have a kind of extra-real, phenomenologically reduced status that puts them out of reach of everyone except the Western expert. From the beginning of Western speculation about the Orient, the one thing the orient could not do was to represent itself. Evidence of the Orient was credible only after it had passed through and been made firm by the refining fire of the Orientalist's work".[1]

Some notable practices can be illustrated starting with Hegel who claimed that India was a place where the possibility for the growth of science, philosophy, and history was potentially there but it failed to sprout into maturity. Neera Chandhoke remarks:

> "Accepting that chronologically, philosophy, religion, and art took root in the Orient that is in Persia, China, Egypt and India, he suggested that India has remained stationary and fixed… . After explorers, missionaries, traders and commercial companies conquered India, and as the exotic became known, he suggested, it was clear that India had nothing to offer to the world. India's tradition is a matter of the past; it never reached the level of philosophy and science. That is a genuinely and uniquely European achievement, which culminated in 19th century Germany, with presumably Hegel as its most distinguished spokesman".[2]

Hegel's fascination towards oriental wisdom and his naïve belief culminated into a rationalizing discourse to provide the legitimacy for conquering and civilizing the 'immature civilizations'. The portrayal of India as 'yet to achieve the status of civilization' was based upon dogmatic belief that only Europeans have a sense of history, philosophy or science, and other cultures, apart from Europe, have remained stagnant, historically and philosophically. And the European civilizations achieved their superior status through rigorous pursuit of questioning and challenging the prejudices and irrational mediaeval beliefs.

Karl Marx perceived India from the perspective of Eurocentric narratives and declared that Indian societies were static. He was of the opinion that the villages in India were isolated and stagnant, and destined to culminate into 'oriental despotism'.[3] He went onto proclaim the colonial intervention as 'social revolution',[4] which will help India to develop an integrated economy and it will further connect India to the world market. Marx's normativity to judge a society like India was a result of his limited understanding with respect to 'private land ownership',[5] which was not developed, as he believed, until Britishers intervened for the development of society and political economy in India. In extension to Marx's understanding,

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1 Edward Said, ORIENTALISM 283 (1978, 2014).

2 *See* Neera Chandhoke, *A New Central Vista, and the Political Conceit of the Ruling Classes*, THE WIRE (Dec. 13, 2020) *available at*: https://thewire.in/politics/central-vistal-indian-philosophy-history.

3 Karl Marx, *The British Rule in India*, THE NEW-YORK HERALD TRIBUNE (Jun., 25, 1853) *available at*: www.marxists.org/archive/marx/works/1853/06/25.htm. *See* Kolja Lindner, *Marx's Eurocentrism: Postcolonial Studies and Marx Scholarship*, RADICAL PHIL. 27 (2010).

4 *Id*.

5 *Supra* note 3, Kolja Lindner.

Max Weber adopted capitalism as a standard to evaluate the historical development of a society, for he attempted to discover the ideological base of capitalism in religion and established a connection between Protestantism and capitalism in Europe.[6] Notably, he conceived the spirit of Hinduism and Buddhism not so conducive for the development of capitalism in India.[7] In that sense, India could not progress, as he believed, from the feudal structure of society to an advanced stage of production: capitalism.

Similar narratives were developed by scholars of all genres. From liberal and conservative theorists as well as French physiocrats[8] to English utilitarians,[9] all contributed in the creation of the meta-narratives that the indigenous India lacked the basic postulates of civilization, including law and legal system. Colonial historians such as James Mill declared that 'the Indian civilization never prospered except under foreign domination'.[10] These exaggerated declarations were meant to justify and hide a colonial exploitive face under the mask of civilizing missions.

Mythical declarations, be it a portrayal of dreamland or backwardness and barbarity, were continuously made. For example, Diderot warned the Europeans that India is a place of incredible extravagances, not to be taken seriously'.[11] Macaulay claimed the superiority of the European nations in terms of knowledge-traditions. He concluded:

> "I certainly never met with any orientalist who ventured to maintain that the Arabic and Sanscrit poetry could be compared to that of the great European nations. But when we pass from works of imagination to works in which facts are recorded and general principles investigated, the superiority of the Europeans becomes absolutely immeasurable. It is, I believe, no exaggeration to say that all the historical information which has been collected from all the books written in the Sanscrit language is less valuable than what may be found in the most paltry abridgements used at preparatory schools in England'.[12]

In a series of mythical narratives, used to justify and rationalize the civilizing mission, almost all scholars of so-called repute on Indian traditions of knowledge or modern theoreticians such as Robert Lingat, Robert M. Unger, Mark Galanter, etc.,

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6 *See* David Gellner and D.N. Gellner, *Max Weber, Capitalism and the Religion of India* 16(4) SOC. 527 (1982).

7 *Id*.

8 Ranajit Guha, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT 38 (2016).

9 *See generally*, Eric Stokes, THE ENGLISH UTILITARIANS AND INDIA (1959).

10 *See generally*, Thomas McEvilley, THE SHAPE OF ANCIENT THOUGHT: COMPARATIVE STUDIES IN GREEK AND INDIAN PHILOSOPHIES 1-732 (2002).

11 *Id*.

12 *See* Anirban Mitra, *The Infamous Macaulay Speech That Never Was*, THE WIRE, New Delhi (19 Feb., 2017) *available at*: https://thewire.in/history/macaulays-speech-never-delivered.

have denounced the ancient Indian traditions of legal scholarship to the extent that Indians could not develop anything similar to jurisprudence or legal philosophy what western hemisphere has witnessed hitherto. But more strangely, the contemporary Indian leaders of legal education go one step further than European epigones (see below).

# II

## Slavery of Spirit: Relegation of Legal History

The possibility that history of indigenous legal institutions, idea and location of law in socio-political life of the society could have had crucial consequences for the modern India was relegated. The process of this relegation was long drawn over a period of 150 years. From the time of colonial rule, Indian intellectuals were trained in the same liberal education, mostly in Britain or the U.S.A., and imbibed, in their mentality and methodology, 'the belief system' of the colonial masters.[13] The Western writers and scholars of Hindu legal philosophy faced the difficulty in appreciating the crucial differences between the two traditions of knowledge of law, legal system, and legal philosophy. That consists of four folds differences in conceiving social life, norms, and social institutions. Particularly, excluding the so-called modern India and its social order, the ancient Indians had quite a different approach to look upon the problem of social order.

*First*, the Western academic tradition, since the ancient Greek period till now, has seen law, legal system and philosophy within the overarching paradigm of political power, *i.e.*, 'the state'. No philosophy or legal academics is imaginable, by the *Westerners*, outside and independent of the conceptual category of the state.[14] The institution and conceptions of state during different historical periods have controlled and decisively determined the character and nature of scholarships. Thus, what qualifies to be defined as law or legal system is pre-judged through the conceptual category of the state, which entails the predetermined characterization of the third world as, 'existing with absence of a legal systems', from a narrow perspective or ideology of law. *Second*, law, legal system, and legal categories,

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[13] Ashish Nandy, *The politics of Secularism and the Recovery of Religious Tolerance* in SECULARISM AND ITS CRITICS 321 (Rajeev Bhargava (ed.) 1998): 'A significant aspect of the post-colonial structures of knowledge in the Third-World is peculiar form of imperialism of categories. Under such imperialism a conceptual domain is sometimes hegemonized by a concept produced and honed in the West, hegemonized so effectively that the original domain vanishes from our awareness view.'

[14] *See generally*, Chanchal Kumar Singh, *State and Equality from Sadācār(A) To Bazaar: Searching Alternative Impressions in Light of the Sanskriti Litigation*, I SML. L. REV. 7 (2018).

consequently, are not developed beyond the nucleus of political power. *Third*, the conceptualization of interface of nature (including natural resources) and human individual or collective beings have been theorized on the premise that it is a duty of the latter to master and conquer the former. In this respect, the two Western meta-systems of knowledge, liberalism and Marxism, share much in common premises for formulation of law and legal system. The difference between them could be discovered, only, in terms of translating the shared substance into practical institutional apparatus. And the *fourth*, the devilish tools of '*reason and rationality*' crafted into its modern shape since European renaissance, supposed to be the sole forger of law and social norms, which, by its nature takes the discourse back to its "*infinite regression*" until the legal building-blocks are presupposed to avoid further examination from the tool of reason.[15] Certainly, a post truth world, post modernism, and the emerging contemporary discourses on law are inevitable consequences of the regressive nature of reason.

For instance, *one*, consider the recent judgement of the Supreme Court of India to the effect that the penal rule against adultery is unreasonable, irrational, and therefore invalid,[16] without considering the question of parenthood of the child begotten out of adultery. *Second*, the Bar Council of India and University Grants Commission decide the rules of the class attendance regressively to the effect that presence in the classroom is equal to sincerity and commitment for learning and teaching. *Third*, the emerging debate on counting of services rendered by wife, mother, and other women in the family[17] for the purposes of salary and remuneration, as if, works done out of love, affection, and sentiment could be reduced into neologism of *right and duty*, and are transferable in terms of monetary value!!

The intuitive idea is that, the Western academic habitude of doing legal and social theory deprives the whole humanity from some of the alternative systems of social and political ideas, primarily based upon a symbiotic relationship amongst human

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[15] *See* Ronald P. Sokol, JUSTICE AFTER DARWIN 72-73 (1975): 'If we continue to ask why that is unjust, we can perhaps proceed further to give reasons, but at some point we shall be compelled to acknowledge that there can be no end to the questions it is possible to ask. The regression is infinite. And yet we do call things just and unjust, blithely ignoring philosophic puzzles and infinite regressions.' *See,* Mritunjay Kumar, *Episteme of Justice: A Genealogy of Rationality*, II SML. L. REV. 1 (2019).

[16] *See generally*, *Joseph Shine* v. *Union of India*, 2018 SCC OnLine SC 1676.

[17] Faizan Mustafa, *Removing the creases in housework* valuation, THE HINDU (21 Jan., 2021) *available at*: https://www.thehindu.com/opinion/lead/removing-the-creases-in-housework-valuation/article33620752.ece. *See,* Samarender Reddy, *It's Time We Start Valuing Women's Household Work by Paying Homemakers*, THE WIRE (17 Mar., 2021) *available at:* https://thewire.in/women/its-time-we-start-valuing-womens-household-work-by-paying-homemakers (last visited 20 Mar., 2021).

beings and between human species and nature, which could be said to be the natural growth of the historical and social institutions.

Due to their training in Western methodological learnings and value systems, the Indian scholars, too, utterly fail to develop or learn the lost way of doing legal philosophy.[18] Thus, be it constitution, form of government, concepts of property or ownership, the central ideas in the liberal legal philosophy with respect to justice, liberty, democracy, equality, the scholars suffer from the nostalgic rationalization emanated from the European enlightenment, to judge the achievement of the Indian indigenous past. The judgment is due to inferiority complex. As a result, the last two generations of the academics have turned away,[19] and driven towards, and to only cherish, what the Common Law academics have been able to offer. The two generations of epigones had been defending the western discursive values so much so that Indian past has been caricatured into nothingness. They are continuously identifying and comparing the ancient law and legal systems with the products of modern Western culture and practices.[20]

In contemporary time too, there is blind adherence to the popular beliefs and methods of legal reasoning and study. For instance, Lingat[21] observes that, 'the jurisprudence is absent in *Dharmsastras*… and traces of it can only be identified with *Mimamsa* literature and after…' The present-day legal scholars, such as Fali S. Nariman and M.P. Singh argue, in their works on Indian Legal System, that the ancient India could not develop something like legal system at all.[22] Moreover, along with so called nationalist historians, the legal scholars repose faith in the credence of seamless continuity and homogeneity of cultural and normative systems of

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[18] There are few academic works produced post 1960s. e. g. J.D.M. Derret, THE INDIAN SUBCONTINENT AND EUROPEAN INFLUENCE (1970); Robert Lingat, THE CLASSICAL LAW OF INDIA (J. D. M. Derrett trans. 1973). A. S. Altekar, STATE AND GOVERNMENT IN ANCIENT INDIA (1958); S. Radhakrishnan, INDIAN PHILOSOPHY. (J. N. Mohanty ed. 2008); Surendranath Dasgupta, A HISTORY OF INDIAN PHILOSOPHY (2015); Bimal Krishna Matilal, EPISTEMOLOGY, LOGIC, AND GRAMMAR IN INDIAN PHILOSOPHICAL ANALYSIS (Jornardon Ganeri (ed.) 2015). Yet there is little or no attempt for promoting the findings of these studies formulating them from the point of view of law and policy making. *Cf.* The Legal Education Rules of the Bar Council of India even does not legal history to be one of the essential subject to be taught by law Schools in India. *See,* BCI Legal Education Rules (2008).

[19] Till late 1940s and few in the early 1950s.

[20] The classic example of it is offered by K P Jaiswal. *See,* K. P. Jaiswal, HINDU POLITY: A CONSTITUTIONAL HISTORY OF INDIA IN HINDUS TIMES Chap. XXII (1919). Jaiswal tries to establish under comparative influence of liberal philosophy that in ancient India there existed several forms of democratic constitutions and government.

[21] *See*, Robert Lingat, THE CLASSICAL LAW OF INDIA 229 (J. Duncan M. Derrett trans. 1973).

[22] M P Singh & Niraj Kumar, INDIAN LEGAL SYSTEM: AN INQUIRY (2019). *See generally*, Fali S. Nariman, INDIA'S LEGAL SYSTEM: CAN IT BE SAVED? (2006).

society throughout the period of ancient and medieval India, implying that there were little philosophical debate in India.[23]

These belief systems and their uncritical acknowledgement, apparently, have facilitated the project of 'liberal law' and the Western Education System. For a true analysis the phenomena, one needs to refer the work of K.C. Bhattacharya, known as *Swaraj in Ideas:*[24]

> There is cultural subjection when one's traditional cast of ideas and sentiments is suppressed without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. This subjection is slavery of the spirit: when a person can shake himself free from it, he feels as though the scales fell from his eyes. He experiences a rebirth and that is what I call Swaraj in Ideas.

# III

## Traditional and Modern Law

Marc Galanter, in his scholarship on the traditional legal systems of India, has successfully portrayed the multiple discourses behind the displacement of traditional law in India, especially the methods deployed by British in order to change the autonomous and autochthonous character of traditional laws and legal systems.[25] In *The Displacement of Traditional law in Modern India*, he questions if traditional Hindu law still exists? Remarks of Galanter are noteworthy:

> 'What, then, is the role of Hindu law in the Indian legal system today? The *dharmasastra* component is almost completely obliterated. While it is the original

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[23] *See* acute debate and challenges to each knowledge system in ancient India: Nyaya, Vaisheshika, Budhhism, Vedanta, etc.

[24] Krishna Chandra Bhattacharya, *Swaraj in Ideas* in FOUR INDIAN CRITICAL ESSAYS 13 (Krishna Chandra Bhattacharya & Sisirkumar Ghose eds., 1977).

[25] *See also* J. Duncan M. Derrett, HISTORY OF INDIAN LAW 2-3 (1973): 'In that year (1772) the East India Company's Presidency at Calcutta, presided over by Warren Hastings, decided that its new-founded civil courts in Bihar, Orissa, and Bengal should administer Islamic Law to Muslims and the law of the 'Shaster' (Dharmasastra) to Hindus when disputes arose upon any of the small number of topics, which included marriage, succession, religious institutions and matters related to caste discipline. Soon afterwards the King's court at Calcutta (called the Supreme Court) was created with a similar instruction by Parliament …and the East India Company gave its courts again, by a further Regulation, the jurisdiction to apply not English law, but Justice, Equity, and Good Conscience in all cases where neither the personal law nor the Company's Regulations afforded a rule of decision. The British merchants thus shouldered the responsibility to administer…the corpora of ancient laws, and where these did not give the answer the (at first) amateur judge was to turn to a developed system of law, consistently with natural justice.'

> source of various rules on matters of personal law, the *sastra* itself is no longer a living source of law; these rules are intermixed with rules from other sources and are administered in the common-law style, isolated from *sastric* techniques of interpretation and procedure'.[26]

In the formative years of Indian Republic, two different ideologies were at a dialectical relationship; one was demanding the revival of indigenous character of law and the institutions, displaced in the process of colonization and modernization, and other embraced the Eurocentric modern habitude. Marc Galanter, in *The Aborted Restoration of 'Indigenous' Law in India,* demonstrated the conflict of ideologies between tradition[27] and modernity or in terminology of Henry Maine, an interface between status and contract;[28] a stereotypical bracketing of progressive and static societies in his seminal work, *Ancient Law*. British scholar like William Jones believed in the profoundness of Indian societies and its scholarly heritage which led to widespread curiosity among the Europeans about the East.[29] On the contrary, Hegel pronounced that India had not reached to the stage appropriate for development of science and philosophy.[30] These systems of knowledge, as per his opinion, developed in the West and has been accepted by the rest of the world. His contemporary, Arthur Schopenhauer was deeply influenced by oriental wisdom; particularly the Buddhist scholarship, which had great influence on his thinking.[31] One of the great thinkers of contemporary age, Bimal Krishna Matilal establishes that the critical and logical schools of the Indian knowledge traditions, which were extremely dynamic and pluralistic in their approaches. His works in logic, grammar,

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[26] *See* Marc Galanter, *The Displacement of Traditional law in Modern India* in LAW AND SOCIETY IN MODERN INDIA 31 (Rajeev Dhavan (ed.) 1992).

[27] *See* Marc Galanter, *The Aborted Restoration of Indigenous Law in India* in LAW AND SOCIETY IN MODERN INDIA 39 (Rajeev Dhavan (ed.) 1992): 'The Constituent Assembly (1947-49) contained no spokesmen for a restoration of *dharmasatra*, nor for a revival of local customary law as such. An attempt by Gandhians and 'traditionalists' to form a polity based on village autonomy and self-sufficiency was rejected by the Assembly, which opted for a federal and parliamentary republic with centralized bureaucratic administration. The only concession to the Gandhians was a Directive Principle in favor of village panchayats as units of local self-government.'

[28] *See* Henry Maine, ANCIENT LAW 422 (1876, 1906).

[29] *See* Alfred Master, *The Influence of Sir William Jones upon Sanskrit Studies* 11 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES 798- 806 (1946).

[30] *See* Rimina Mohapatra and Aakash Singh Rathore, HEGEL'S INDIA: A REINTERPRETATION WITH TEXTS 4 (2017): 'It is remarkable how much effort Hegel expended on what he frequently characterized as "fantastic," "subjective," "wild," "dreamy," "frenzied," "absurd," and "repetitive". Hegel also presented a scathing social critique of the caste order, a theme reiterated in many of his works. The central provocative issue thus is: if Indian art, religion, and philosophy are so grossly inadequate to Hegel's system of philosophy, what explains his decades-long fascination with it in this unparalleled way?.'

[31] Arthur Schopenhauer, THE WORLD AS REPRESENTATION AND WILL 351 (E. F. J. Payne (ed.), 1819, 1948}.

and metaphysics of ancient Indian knowledge traditions familiarize with the traditions of Hindu philosophy to the larger audience of English-speaking world. The dialogues amongst *Nyaya*, *Nyaya Vaisheshika*, and *Mimamsa* traditions enriched their own approaches of logical analysis, which culminated into divergent schools among the Buddhist scholarship itself.[32] Indian philosophical traditions had unique blend of materialism and spirituality which may be deciphered from the various traditions of philosophy developed in ancient India.

Modern legal systems across the world are established at the premise of individualism, the central organizing category of modernism. The present legal system, in India, is no exception to this development. Modern law was accepted uncritically at the dawn of the Indian republican dreams on the fundamental premise that villages are den of ignorance or the traumatic space for parochialism, especially keeping in mind the various social evils, which are highlighted by progressive scholarship to the extent that India had nothing great for self-pride in their entire historical journey as a civilization. It is easily conceivable that the most of the modern social problems, in essence are product of the modernism. And attempt to search solutions within the paradigm of the latter is bound to be counter -productive.

At the foundations of modern law, the 'idea of freedom' was conceived in ways in which it causes '*individualistic bafflement*'. And ill-conceived notion of ego-centric pragmatism reduced the concept of individual as a subject as well as object of law. Henry Maine explains the social impact of official law on the Village Community of East,[33] which had been autonomous (from the centres of political power in the society) since Vedic period till the displacement of traditional law and traditional legal systems during the colonial period. In the end, a top to down bureaucratic model was developed by British, which has remained, curiously, sturdy till toady.

In the top-down model of governance, the moot question remains un-answered; whether the philosophy of 'Integral Humanism',[34] envisioned by Deendayal Upadhyay or the aspiration of *Swaraj* conceived by Mahatma Gandhi is possible, in its essence, to be realized? For many modern thinkers, the traditional approach towards the modern problems is not appropriate and sufficient. But the reality is that history is a great teacher and torch-bearer for the imaginative progress. Today's achievements were once a gigantic task. And each society finds its solutions within their cultural and historical realm. In this sense, modernity played a crucial role for the Europe in the displacement of the traditional law of the third world.

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[32] Bimal Krishna Matilal, EPISTEMOLOGY, LOGIC, AND GRAMMAR IN INDIAN PHILOSOPHICAL ANALYSIS 23-62 (Jonardon Ganeri (ed.), 1971, 2005).

[33] Henry Maine, VILLAGE-COMMUNITIES IN THE EAST AND WEST: SIX LECTURES DELIVERED AT OXFORD 31-62 (1871).

[34] *See generally* Deendayal Upadhyay, INTEGRAL HUMANISM (2014).

It is easy to reject someone but to listen someone with total attention is a great meditative art of learning and un-learning. In that sense, it is important to understand the limitation of the black-letters of law, which is a leitmotif of modernity. Swami Vivekannada was critical about the notion of modern positive law, which for him, was the *anathema of freedom*. In his words, 'nature with its infinite power is only a machine; freedom alone constitutes sentient life'.[35] The freedom and autonomy of the village communities of the ancient India was lost in the process of developing a centralized model of governance under British rule, which became possible only after a complete make-over of the traditional law and legal systems. In that sense, the modern Indian law was directly a product of the British colonial strategies begotten of political demands and economic necessities.

# IV

## Myopic Legal Academic Habitude in India

The anthropological and sociological studies of ancient societies in Australia and India testify how enslaved Indian scholarships have been, so far, about the awareness of the indigenous society, its laws and legal system. The colonial project for Australian continent comprised of the infamous theoretical category of '*terra nullis*' with the implication that there were no local inhabitants and hence no local law. The theory was based on the project meant to deny existence of a society or social order of aboriginals prior to the arrival of the colonial powers in that continent for about four hundred years. The liberal philosophy and law successfully established and defended that theory till late twentieth century.

As late as in 1970s, Rechard Blackburn, without referring to the theory of *terra nullis*, in *Millirrpum* v. *Nabalco*,[36] reached to the same conclusions as entailed by theory, and consequently denied 'the doctrine of communal native title' of aboriginals. The basis of the theory and denial of existence of local law and a system of social order is to be found in writings of Blackstone and Lord Mansfield.[37] However, by the late twentieth Century, the Australian Judicial System conceded to the claim that the aboriginals had a sort of legal system and social order prior to arrival of the Europeans. In *Mabo* v. *Queensland*[38] (Mabo II, in 1992), the Australian High Court overruled *Millirrpum* v. *Nabalco* and *on the basis of historical and anthropological studies*, accepted the contentions of aboriginal communities that they could advance claims

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[35] *See* Swami Vivekananda, *Law and Freedom: Teachings of Swami Vivekananda*, *available* at: http://www.vivekananda.net/ByTopic/LawFreedom.html (last visited 15 Dec., 2020).

[36] (1971) 17 F.L.RE. 141.

[37] *See generally*, *Johnson & Graham's Lessee* v. *McIntosh* U.S. 8 Wheat. 543 543 (1823).

[38] [1992] H.C.A. 23; [1992] 175 CLR 1.

(to coastal lans and natural resources), before the present liberal legal system, based on indigenous ancient norms.

Strangely, Indian legal scholars are denying the existence, in ancient India, of a well-developed system of law and associated judicial institutions. The intuitive idea is that Indian legal academics needs to liberate themselves from the tutelage of Common Law. A new beginning is required to be made to think about Indian renaissance through the method of critical investigation of ancient Indian legal tradition, social theories and philosophy.

A researcher has to start with the approach, as opposed to the Western belief, to investigate state and law separately. For millenniums, these two categories existed quite distinctively, and in terms of source, autonomous from each-other, and the later (law) predated the former. The authority of law, independent of the king, signifies that the state did not own law,[39] and the sources of it were to be found in the social practices.

These practices worked in its dual characteristics: they were neither public nor positive.[40] Rules or standards acted as sources of the standard or conduct, validity as well as reason for their binding quality they carried with them.[41] S*rutis, Smritis*, and *Dharmsastras* etc., were not imposed upon the people from the above or outside of the society.[42] In all probabilities, the *Manav Dharmsastra* and other similar texts are the anthropological representations of the codification of the social practices prevailing.[43] The authors or commentators of these texts were no one but astute social observers akin to Roman Glossators.[44] 'Legal pluralists' have been able to

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[39] *See, supra* note 11, Warner Menski: '… ancient Hindu law never seemed to accept the more or less total dominance of the state, as modernity infected legal scholars and Indologists often tend to do, positivistic readings and interpretations of the ancient grammar of Sanskrit law are in my view quite misguided.'

[40] Roberto Mangaberia Unger, LAW IN MODERN SOCIETIES: TOWARD A CRITICISM OF SOCIAL THEORY 50 (1976).

[41] *See e.g.* the concept of 'social Rules' by Hart. H. L. A. Hart, THE CONCEPT OF LAW 52-60 (1972).

[42] Upendra Baxi subscribes to the view that – 'It should not be assumed that the commentators (Brahmanas) role or the function was to canonize customs. Customary rules are often imprecise and incomplete. Interpretation offers then a framework that demands adjustments and correctives …it allows gaps to be filled. It is this framework through which interpreters could exercise upon custom, even when custom has not directed its choice.' *See* Upendra Baxi, TOWARDS A SOCIOLOGY OF INDIAN LAW 7 (1986); *See also* Robert Lingat, THE CLASSICAL LAW OF INDIA 142, 172 (J. D. M. Derrett (trans.) 1973).

[43] Max Muller ed., THE SACRED BOOK OF THE EAST Vol. XXV THE LAWS OF MANU Book II, Verse 6 (G. Buhler trans. 1886). The *verse* exhaustively enumerates the sources of law in the that order of priority: Vedas, Traditions and virtuous customs of the learned, customs of holy men, and self-satisfaction (options for opting rules applicable to a dispute).

[44] The Indian social observer and the Roman Glossators differed in the vital respect that the

demonstrate that 'Law' or phenomenon of legal rules were comprised not by the interaction of state law and local social norms, 'but primarily management of the combination of various forms and aspects of natural laws (perhaps largely religious) and social norms (probably in large part secular)'.[45] The chief sources of law, according to Manu, comprised in:[46]

> "[t]he customs handed down in regular succession (since time immemorial) among the four chief (*vernas*) castes and the mixed (*races*) of the country is called the conduct of virtuous man".[47]

The Customary (autonomous) character of law; rather to restate the proposition in a more straightforward manner; that the unique character of these texts is brought by another *verse* in Manu, where a victorious king is ordained to respect the customs (as stated by sages) of the conquered territory:[48]

> "[L]et him (the victorious king) make authoritative the lawful customs of the inhabitants, just as they are stated to be …".

A significant account of the status of law is to be found in the Kautilya's Arthasastra. R. Shamasastry, comments in the introduction of his Kautilya's Arthasastra, on the subject of, the relationship of the law and the King in the following terms:

> "The king being the supreme arbiter, was himself liable to punitive fine that amounted to handsome of recompense to forces of Nature that might set right any imbalance in cases, of a miscarriage of justice. Needless to say (that) Kautilya took some firm steps in this direction".[49]

The spontaneous idea is that these meta-texts are to be taken on their own merits. If not exclusively the mirrors of society of the time, they are to be treated as the practical sociological compilation accompanied by some amount of philosophical speculations.

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Roman counterparts had Law Codes before them to explain and expound. The Social observers (Indian Sages) were expected to compile the immemorial customs in addition to interpret them.

45 Warner Menski, *Sanskrit Law: Excavating Vedic Legal Pluralism* 9 (SOAS School of Law Legal Studies Research Paper Series, Research Paper No. 5 / 2010), *available at*: www.soas.ac.uk/law/researchpapers (In his Kite model of law Menski identifies Dharmshastra with the ancient natural law. Even in the West early 'natural law' had religious character. He concludes, "Early law tends to be seen as something religious. Indeed, the basic concept of natural law in its Eurocentric manifestations suggests this, reflected in the work of major early scholars like St. Thomas Aquinas". *Id*. At 11.)

46 *Supra* note 43, LAWS OF MANU, Book II, Verse 18.

47 From the Brahmana born in that country, let all men on earth learn their several *usages. Id.* Book II, Verse 20.

48 *Supra* note 43, LAWS OF MANU, Book VII at 203.

49 R Shamasastry, *Preface to* KAUTILYA'S ARTHASHASTRA LXX. (R Shamasastry (trans.), 2014).

Further, access to social goods and control of individual members of the community in ancient societies were ensured not by some theoretical categories such as liberty and equality or through the tool of reason, but by social norms or principles of 'non-exclusion' from such access. Examples, from ancient practices, may demonstrated, which were primarily distributed or availed as social goods: education, health, and the administration of justice to availing of the services rendered, even, by private members of the community, access to water and other resources of livelihood and wellbeing.

Thus, ancient Indians did not find any necessity to develop the abstract concept of state or theories such as liberty, equality, and property, etc., into predatory categories, capable of abductive essence and potentialities, in which they do exit today as essential parts of the modern liberal law. Predatory and abductive characters of equality and liberty are manifest from the paradigm of so-called liberal law; from the rules established to regulate the professions and services of lawyers/doctors on the one hand and *riksha* pullers or taxi drivers on the other hand. One may ponder over and find the real socio-economic impact of the practices, emanating from such liberal legal categories and rules thereon. A little deeper analysis can establish that the kind of internal conflict and problem of partiality the modern concepts of equality or liberty are beset with, could not find, indeed, occasion in the Hindu philosophy.

Thus, it is essential to escape and abandon, while undertaking studies in Hindu law and legal philosophy, the structural and conceptual categories perpetuated by the Western education system. This problem is unique in legal studies because of the imposition of Common Law. Perhaps, this is the reason for little or almost absence of the systematic studies on this aspect of law and legal systems in India.

# V

## Indian Theories of Knowledge and Consequences for Modern Law

It is submitted that the systems of knowledge such as, *Nyaya, Vaisesika*, *Bauddha, Mimansa, Jaina, logicians and grammarians*, etc. had developed different theories of knowledge, role of language in perception, reasoning and logic, which were far comprehensive than what the modern liberal academics have achieved so far.[50] It is important to note that, for example, Bhartrhari, the great grammarian and philosopher (3rd Century A.D.) had already expounded theories of meaning and

[50] Bimal Krishna Matilal, EPISTEMOLOGY, LOGIC, AND GRAMMAR IN INDIAN PHILOSOPHICAL ANALYSIS (2015).

usage of language,[51] what the works of modern Western linguistics, such as Wittgenstein[52] or Ferdinend de Saussure teaches, and raised the questions with respect to knowledge, grammar, language, and the perception of reality.[53]

There is a very subtle but crucial phenomenon, in the system of knowledge, construction of categories or concepts and consequent establishment and working of a social order that is simply ignored or taken for granted. This phenomenon may be understood in the context of solving the question that, what role the theories of knowledge, language, logic, and grammar play in development of the concepts, such as, law, rights, justice, equality or equity, nationalism, and other cultural as well as social categories? The principles and systems of morality are replaced by liberal law by its own conception of, 'civil morality'.[54] That is, the sources of standards of moral conduct historically existing and located in religion, culture, tribal, or village sentiments, etc., are replaced by positive law. Moreover, a much-celebrated emerging concept, such as 'constitutional morality', in the absence of sociological and historical investigation, can only be rejoiced in the romanticized legal culture of liberalism.

A similar challenge can easily and must be mounted against the fundamental categories of the modern law: equality, liberty, justice, good life, and happiness to name a few. The theories of justice propounded by John Rawls, Robert Nozick, and Amartya Sen, for examples, are hardly grounded in the sociological as well as historical context of knowledge. These concepts are sociologically empty and historically inconsistent with the reality. The theories of justice are crafted by secular theologians like modern myths without keeping in mind the actual facts, lived and practiced in the society. Whatever contents of the latter one may derive, but these theories of justice represent, in fact, the accumulated knowledge and belief system of the European societies. These facts about knowledge, knowledge production, and the liberal education system form a unique structural framework.

At the cost of repetition, it must be restated that any particular social order in a community at a given epoch of history is the byproduct of psychic and social framework through which its members are connected and share the bond with each-other. This framework is supplied by the theories of knowledge that the intellectuals of that society and by that which its forefathers have developed. When that framework is imposed from the outside on a people, the individual, having an artificial capacity to connect to the framework, loses forever the natural capacity to connect with the other members of the community, and can only connect to the very

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[51] *Id*.

[52] Ludwig Wittgenstein, TRACTATUS LOGICO PHILOSOPHICUS (1921).

[53] Ferdinend de Saussure, COURSE IN GENERAL LINGUISTICS (1916).

[54] *See,* Bhikhu Parekh, *The Modern Conception of Right and its Marxist Critique* 13(3-4) INDIA INT'L CENT. Q. VOL. THE RIGHT TO BE HUMAN 7 (1986).

framework itself. Clearly, the politics of imposing a knowledge system over a community by the British, while imposing its own education system had the apparent psychological agenda to destroy what existed before.

The destruction through the positivistic methodology of the Western Education is pursued, today, without having a proper understanding of the cultural, historical, and indigenous knowledge systems. In the Indian context, the legal education, institutions, and philosophy on the one hand and history, culture, as well as religion on the other hand offer burning examples. Unfortunately, even after the seventy years of independence, Indian Education in general and Legal Education, in particular, have not been able to realize what lies ahead of them.

# VI

## Insights for Indian Legal Knowledge

During early middle ages, the discovery of the ancient Justinian Code at Bologna (Italy) attracted scholars from whole of the Europe. It is said that in the eleventh century, after the discovery of the Code of Justinian, (*Codex Justinianus* or Corpus Juris Civilis), Bologna had more than 10000 scholars from the different legal systems of Europe.[55] The historical and comparative study of the Code, it is believed, helped Europe ushering into the age of enlightenment and modernity. The major legal systems of the continental Europe and the United Kingdoms were rebuilt thereafter.[56]

The history of "comparativism" in ancient and medieval India has a different story. In Ancient India, *Nalanda* and *Takshashila* were great Centres of learning. Greek, Chinese, and Prussian/Arabian scholars, such as Fa-Hien, Huien Tsang, Ibn Batuta, Megasthenes, Al-Masudi, and many others travelled to India to study the Indian political and social systems. However, instances of similar voyages from India to the other part of the world are not known and perceptible in the graveyard of history. Within Indian traditions of philosophy, there were several streams amongst whom the comparative influences are visible, such as, *Dharmsastras, Nyaya, Mimansa, Bauddha, and Jain,* etc. These traditions, though benefiting from each-other, prospered and matured in the same land, culture, and amongst the same set of people, which were tempered by the invasions of Turks and Mughals from the eleventh century onwards. These facts (along with the colonial knowledge system), provisionally, can be seen as the chief reasons for languishing of the idea of law,

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[55] Frederick Pollock & F W Maitland, THE HISTORY OF ENGLISH LAW BEFORE EDWARD I (1898).

[56] *See* Martin Laughlin, FOUNDATIONS OF PUBLIC LAW 1-17 (2010).

legal system, and political institutions, or the branch of knowledge called, jurisprudence, during middle ages.

The National Education Policy, 2020 claims to be rooted in Indian ethos to contribute and transform India into a global knowledge superpower. The vision of the policy is to instill among the learners a deep-rooted pride in being Indian. The policy is intended also to cherish the traditions of the rich heritage of ancient and eternal Indian knowledge and thought. The pursuit of knowledge (*Jnan*), wisdom (*Prajna*), and truth (*Satya*) are acknowledged to be the highest human goals in Indian thought and philosophy. The policy recognizes that the aim of education, in ancient India, was not just the acquisition of knowledge as preparation for life in this world, or life beyond schooling, but for the complete realization and liberation of the self.

In that context, the policy prescribes for Legal education to be redeveloped and directed towards national reconstruction through instrumentation of democracy, rule of law, and human rights. Accordingly, the curricula for legal studies has to reflect socio-cultural contexts along with, in an evidence-based manner, the history of legal thinking, principles of justice, the practices of jurisprudence, and other related content appropriately and adequately.

Common Law, liberal legal study and judicial process, in India, appear to have, from the early period, insulated themselves from, and eliminated any possibility of formal introduction of epistemological constituents and, ingredients of knowledge gained in other disciplines of study and semantical techniques or methods employed as such. An interesting fact is that none of the major English law dictionaries contain entries such as epistemology[57] or semantics[58]. Thus, it is a known fact that legal studies in India draw less upon and contribute little towards disciplines such as cultural, historical, and religious or linguistics, ancient religious studies and scriptures. Establishing a robust conversation between the latter branches of studies and law has, certainly, the potentials to find the solutions of the problems India faces in this century.

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[57] Epistemology, is concerned with 'the study or a theory of the nature and grounds of knowledge with reference to its limits and validity'. In this way, it relates to knowing/knowledge of a category or construction of that category investigating into and assessing effects of definitive extent and limits to which a seeker of knowledge in a particular branch can draws upon, borrow, or depend on understanding of things in other disciplines.

[58] Semantics is a branch of knowledge dealing with meaning of words or phrases in language or/and contexts known as 'philosophy of language'. It believes that words do not picture reality. In other words, reality does not control language and states that language actually constructs social reality. The important thing to notice for this branch of study, is the meaning of words as actually used.

# VII

## Conclusion

The Indian legal system, law, and legal education face massive problems. It includes multifarious incidence of 'exclusion' from access to social and natural goods, socio-economic disasters such as hunger deaths, malnutrition, access to justice, education, health, and ecological and environmental tragedies, to name a few, and can directly be traced to be the product of modern common law in India. The nature of the common law, as a system of practical knowledge, in its own right, is closed system of norms. That relegates and prohibits insights from other sources or branches of knowledge. Thus, the teachings of the indigenous practices that all social goods: education, access to justice, food, opportunities of livelihood or natural resources such as water must be organized on the moral principle of 'non-exclusion' have little space in today's Indian law. Such ancient principles cannot invade or inform Indian common law. The common law scholarship is unable to realize that the immutable principle of non-exclusion forms the core of any morally defensible theory/rule of equality. The closed nature of law making and judicial process, legacy of the English law, leave social goods, public functions and common goods of the humankind in the hands of state facilitated capitalism which is open to all on the basis of freedom of will or market that is expressed in the ingenious legal category of liberty; unique paradox of common law in India. Kafka explains the closure of institutions when he writes, 'you cannot enter a door which is open'.

Historical and comparative studies in the Hindu philosophy and ancient social practices can offer multiple insights for present law. Indian law makers and legal scholarship can have an entire repository of solutions laying in it. The social fact, for instance, of hunger deaths is everyday reality. It represents the last but the most visible and uncontestable, manifestations of 'suffering, (deprivations of) basic needs, and absence of constitutionalism. An allegory about famine and hunger deaths can, intuitively, unravel the paradoxes of the modern Indian law and Indigenous Hindu practices.

Common law legal philosophy and scholarship in India, hitherto, have failed to capture the true character of famine and its relations to, that of, hunger deaths, a reprehensible phenomenon of contemporary India. Famine, as a socio-economic catastrophe, has not occurred in recent times. Non-occurrence of famine, in post-Constitution India, is a proof for many public philosophers, including Amartya Sen, for rationalizing and privileging the legal system over Chinese and other post-colonial communities. However, hunger deaths have been, throughout India, a usual spectacle to eyes and ears of the liberal legal system of India. *The Jurisprudence of hunger deaths holds the key, in particular, to the understanding of socio-legal philosophy, Indian Constitutionalism, and the legal system in general*. The two phenomena are not

to be confused with each other. Ancient, medieval well as colonial periods have several records of famine. But only the modern India accounts for innumerable hunger deaths with seamless continuity and increased frequency in globalizing India. In other words, neither the ancient nor the medieval Indian history have any significant record of frequent hunger deaths which is often witnessed in present-day India.

The phenomena of famine have its causes and sources largely outside the socio-legal structure of the time. However, in a unique sense, hunger deaths, including suicides out of socio-economic distress, are products of, primarily, legal structure and its philosophy. Secondly, that of distorted economic and socio-psychological fabrics of the society. Situations of hunger deaths are produced through carefully crafted legal web of access-barriers; inclusion-exclusion; privilege-denial of ones' reach to the enjoyments of socially produced goods. This complex web works as a modern technology. The exclusion, denials, and barriers ensure seamless continuity of such deaths. Fundamental law, the Constitution, in the tradition of common law, produces procedure established by law to 'rationalize hunger deaths'. Constitutional procedure, then, is equal to Constitutional substance, in this case, hunger deaths. Memories, that the hunger deaths are antithetical to customary understanding of the civilization has no place in the corners of Indian common law.