Himachal Pradesh National Law University, Shimla (India)

HPNLU Law Journal

Journal Articles *ISSN:2582-8533* *HPNLU Law Journal*

.

Volume II (2021)

ACCESS TO JUSTICE IN PRE-COLONIAL INDIA: Revisiting Possibilities and Challenges for Legal Pluralism in 21st Century

Chanchal Kumar Singh, Mritunjay Kumar & Aayush Raj

Contents

Volume II | *ISSN: 2582-8533* | April 2021-March 2022

ACCESS TO JUSTICE IN PRE-COLONIAL INDIA: Revisiting Possibilities and Challenges for Legal Pluralism in 21st Century

Chanchal Kumar Singh,[*] *Mritunjay Kumar*[**] *& Aayush Raj*[***]

[***Abstract***: *The tension between access and in-access and the incidence of inclusion and exclusion are rooted in the very structure of social order produced by law. The latter embodies and stands firmly on the conceptual categories evolved in history, culture, and the organizing principles of society. The dominant categories of moral and legal values prevalent in modern India were received from the West during European suzerainty. The reception of law and legal institutions from the Common Law System (CLS) was entrenched in the organised cultural practices and narratives established by the colonial master. The reception fostered a legal system much alien to the plural legal systems prevalent till the time. This paper explores the characteristics of legal pluralism in the pre-colonial India and what impacts the reception of CLS had over them. An attempt has also been made to investigate the question of access to justice in context of legal centralism emerged and evolved in the colonial and the post-colonial India].*

'The plain truth is that the justice of the courts is unattainable by some citizens through want of the necessary financial resources; while in the case of many others, it is not worth having at the cost which it involves'.[1]

— Heber Hart

I

Introduction

Access is one of the most celebrated concepts of our age and has acquired the status of foremost slogan of liberal progressive agenda in the 21st century. This concept is often

[*] Associate Professor of Law, Himachal Pradesh National Law University, Shimla. Email: chanchalsingh@hpnlu.ac.in

[**] Assistant Professor of Law, Himachal Pradesh National Law University, Shimla. Email: mritunjaykumar@hpnlu.ac.in

[***] Assistant Professor of Law, Himachal Pradesh National Law University, Shimla. Email: aayushraj@hpnlu.ac.in

[1] Heber Hart, THE WAY TO JUSTICE 17 (1941).

used by policy makers, economists, jurists, socio-political scientist, and technologists, etc. It denotes the spirit of inclusion, absence of barriers, and removal of socio-legal structures responsible for exclusion. Upendra Baxi conceptualizes access in following words:

> 'Access, according to its dictionary meanings, connotes generally ability or means to participate or a permission or liberty to do so or to approach or communicate. But this very generality of meanings should alert us to the complexity of the notion of access. Sociologically, access may be regarded as a form of interaction, which may generate (depending on the scope, duration, actors and other variables) access relationships and structures (or institution)'.[2]

The generality of this concept makes it prone to be misused; this may be one of the reasons that the concept of access has acquired the status of 'transcendental signified'.[3] When a signifier refers too many referents; everyone presupposes some meaning of it without reflecting adequately on its meaning and value. Upendra Baxi categorizes the questions related to access in these words:

> 'The complexity of access relations comes to full view when we ask: (i) access by whom and to whom? (parties); (ii) access to what? (values, resources, public or private goods); (iii) access through what? (formal/informal procedures, norms, institutions); (iv) access for what? (self/collectivity, manifest/latent aims); and (v) access in what? (that is, in what social milieu/cultures)'.[4]

The broad theme of access raises the questions of participation in the practices of institutions, distributions of goods, sharing of power, as well as rewards and punishments, etc. There is nothing in our society outside law[5] and legal institutions; hence, the practice of inclusion-exclusion is organized by law and legal institutions. The tension between access and in-access and the incidence of inclusion and exclusion are rooted in the very structure of social order produced by law. It embodies and stands firmly on the conceptual categories evolve in history, culture, and the organizing principles of society. In this sense, the question of access may be contextualised in terms of how law and legal institutions respond to this question. Access to justice, a species of access, may be conceptualised as inclusion of the parties or participation in the resolution and adjudication of disputes. Over the years, its meaning and use have circumscribed around the availability of advocates for legal representation in the court. Especially, in a country like India, where about 25.01 per cent of its population are multi-

---

[2] Upendra Baxi, *Access, Development and Distributive Justice: Access Problems of the 'Rural' Population* 18 (3) JOURNAL OF INDIAN LAW INSTITUTE 376 (1976).

[3] Jacques Derrida, OF GRAMMATOLOGY 20 (Gayatri Chakravorty Spivak trans., 2013).

[4] Upendra Baxi, *Access, Development and Distributive Justice: Access Problems of the 'Rural' Population* 18 (3) JOURNAL OF INDIAN LAW INSTITUTE 376 (1976).

[5] Giorgio Agamben, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 15 (Daniel Heller-Roazen trans., 1998}.

dimensionally poor'.[6] And the cost of litigation starting with the district-level courts to the Supreme Court is too high to be afforded by the poor. Apart from the economic barrier, there are also other obstacles, such as legal illiteracy, technicality of legal language, complexities of legal procedures, professionalization of law and predatory practices of lawyers to extort fees without any limitation whatsoever, etc. In these backgrounds, access to justice becomes a difficult challenge to achieve, without which rule of law is nothing but a rhetorical nonsense.[7] Virendra Kumar has aptly explored the concept of access in context of Constitution and Human Rights and finds:

> 'One of the most critical and crucial questions of constitutional import is: how the central objective of inclusive society, premised on justice, liberty and equality, is accomplished? It is to attain this objective, the notion of access to justice as an integral part of Rule of Law, to be read as Rule of the Constitution, comes into play. In this respect, there are at least two broad perspectives, which may be deciphered from the Constitution. One, wherein we endeavour to establish inclusive society by having access to justice with the instrumentality of courts. Two, wherein we tend to create inclusive social order without the intervention of courts'.[8]

From this perspective, it is important to explore the question of access to justice vis-à-vis institutional setting of courts and its procedures, which had continuity with its colonial past, and the institutional legal culture existed in pre-modern India. With the emergence of Indian Republic, India aspired to achieve an inclusive society through Constitution. It is significant to explore the challenges, solutions, and failures, which are required to be addressed in order to realise the constitutional-hope.

This paper explores the following questions: (a) What access to justice refers to and what is the relationship of law and state with it? (b) What was its relevance in pre-modern India? (c) What kind of dispute resolution mechanisms existed in ancient and medieval Indian societies? (d) How colonisation impacted the functioning of legal institutions? (e) What kind of experiments the post-colonial India did to undo the colonial impacts over Indian legal institutions and practices? First section of the paper introduces the theme of exploration. Second section investigates the institutional structures like state, law, and dispute resolution mechanisms as well as their procedures in historical-comparative method of analysis between the pre-colonial and the post-colonial India. Third section examines the legal transplant happened in the colonial India and why Indian elites chose to retain most of their features even after the Independence. Fourth section examines the legal norms in International and Municipal laws vis-à-vis access to justice.

---

[6] PTI, *UNDP Report says 415 mn People Lifted out of Poverty in India: Govt*, THE ECONOMIC TIMES (Dec., 12, 2022, 04:34 PM, IST), *available at*: https://economictimes.indiatimes.com/news/india/undp-report-says-415-mn-people-lifted-out-of-poverty-in-india-govt/articleshow/96172829.cms (last visited Dec. 27, 2022).

[7] Virendra Kumar, *Access to Justice towards the Creation of Inclusive Social Order as Envisaged under the Constitution: A Juridical Critique of Human Rights Perspective* 21 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION, INDIA 6 (2022).

[8] Virendra Kumar, *Supra* Note 7.

Fifth section explores the possibilities and challenges with respect to legal pluralism in pre-colonial and post-colonial India. Lastly, sixth section concludes the study.

II

Access to Justice: Two Paradigms

The concept of *Access to Justice* signifies many meanings and contexts. One of the contexts is the access to dispute resolution-adjudication institutions and their procedures. These institutions are the by-product of the larger structure of state, law, and social institutions. In this sense, it is important to investigate the transformation of state, law, and other social institutions from pre-colonial to post-colonial India. Two paradigms may be understood in context of pre-colonial and colonial/post-colonial legal institutions. How far pre-colonial socio-legal cultures could be traced in post-colonial India? It is significant to explore their similarities and differences so as to examine their impacts over the practices of access to norms, institutions, and procedures. The institutional changes also bring impacts on the idea and practices of access. It is in this context, the concept and praxis of access need to be examined vis-à-vis institutional structures and practices.

(a) State, Law, and Dispute Resolution Mechanisms: Colonial and Post-colonial

State is defined as 'mode or condition of being'.[9] The term signifies the condition of being or existing, in another sense, it is understood as 'a politically organized body of people usually occupying a definite territory'.[10] One definition speaks a language of ontology and other one refers to a political meaning. There cannot be any perfect definition of any word existing in the world of language. Purpose of definition is to develop the probable idea about something existing in the worldly reality either perceived by senses or deduced through logic. What is significant about the state is that it may be understood in these following contexts: (i) Ideal State; (ii) Positive State; (iii) Natural State; and (iv) Social State.

Ideal State needs to be understood with reference to state as an idea or form, which is imagined by political scientists and ideologues. For example, Plato in Greek imagined the perfect form of everything which is decaying or deteriorating in time. State as a form or idea is conceived in terms of certain norms conceptualized by political scientists and philosophers. Ideal State remains normative in character, which signifies the value upon which the contemporary political organizations are established or aspire to achieve its

[9] *See*, Merriam Webster Dictionary, *available at*: https://www.merriam-webster.com/dictionary/state (last visited Aug. 20, 2022).

[10] Merriam Webster Dictionary, *Id.*

ideals. Constitutional cultures around the world expound the ideals in their Constitutions so as to actualize it in future. There are many ideals of state, including liberal, feminist, socialist, Gandhian, communist, syndicalist, anarchist, and theocratic, etc. These ideals may be further classified, since no school of thought is devoid of plurality. Positive State signifies the power centre, which could be perceived in the apparatuses of political organization, including legislature, executive, judiciary, police, army, and bureaucracy, etc. Positive State exists as an organization of power; its devolution, distribution, separation, and limitation. Social Contractarians in early-modern age sketched the concept of Positive State, particularly Jean Bodin, Thomas Hobbes, and Machiavelli imagined a body of power as a replica of other-worldly God in form of sovereignty. Natural State may be imagined in terms of geographical and climatic reality, which is not controlled or restricted by moral or political considerations of an organized political community. Nature has its own state of being which does not necessarily respect any arbitrary imagination of the human species.[11] Social State may be conceptualized as the social and cultural conditions, guide the social life of community. Social State may co-exist with Positive State as long as the latter allows the sufficient autonomy to former. For example, a hilly life of mountain or a rural village may have its own rituals, socialization rules, and the organizing principles which bind the community. Certainty, the Positive State and its laws are applicable on the social life of communities, but there may be a possibility whereas the positive state does not supplant the social rules and customs of the communities or tribes, rather supports them, or at least, leave them alone, so that they may function and flourish without any hindrance.

(b) Janpati to Bhupati: Shifting Terrains of State

History of ancient and medieval India finds multiple narratives vis-à-vis institutionalized structure of state. One of the narratives suggests the fact that states in ancient India were known as *Janapada*, especially the time when Buddha and Mahavira were bringing religious reforms in India. So-called major or minor states in ancient India should be seen more as power-bases centred on a prince than as territorial sovereignties.[12] Bimal Krishna Matilal explains the idea of state prevalent in ancient India in these words:

> 'The King was the Lord of the people (*narapati*), rather than the Lord of the land (*bhupati*). So the word *jana* (people) in *Janapada* may be important. The thesis that the King had power over a people rather than over a tract of land can be challenged, although it was clear that the Western concept of the ownership of land was something not known exactly in the same sense in ancient India….The king had the power on the produce of the land only. In view of such consideration, all that we

---

[11] Friedrich Nietzsche, BEYOND GOOD AND EVIL 14-15 (Ian Johnston trans., 2009).

[12] Bimal Krishna Matilal, THE COLLECTED ESSAYS OF BIMAL KRISHNA MATILAL, Vol. 1, 286 (Jonardon Ganeri ed., 2002).

> can say is that we are dealing with a different conception of state in the Indian context'.[13]

King used to take share in crops in lieu of services he was providing to the subjects. It was in nature of fee rather than tax in modern conceptual categories. Fee is charged as consideration for services, on the contrary, tax on the land is taken in capacity of having imperium or ownership over it. The principle emerged in western political culture, the onerous gift received by Indians in colonial period as the plan of Permanent Settlement, which changed the character of state once for all.[14] It was brought for 'forming or restoring the Constitution of an Empire',[15] and to establish 'permanence and duration of the English power in India'.[16] This understanding of sovereignty as a centralizing fulcrum of power originated in Roman law and then it was embraced as the foundational norm in conceptualizing the sovereignty in the western political thought in medieval and early modern-period.[17] However, Indians did not conceive the centralising character of state what British brought to India, i.e., king as the proprietor of all lands within its territory. From ancient to medieval India, as one of the well-accepted narratives suggests, that the proprietorship in lands belonged to people. This continuity was the unique feature of pre-colonial Indian societies. Ranajit Guha while referring Sir Philip Francis, a Physiocrat, provides the account vis-à-vis proprietary right of the emperor over land in medieval India:

> 'When the Moguls conquered Bengal, he wrote, there is no mention in any historical account, that they dispossessed the Zemindars of their lands. Land was left in the hands of the original proprietors and was not taken away by the conqueror for distribution among his retainers either as an act of favour or in exchange of money. He referred to a historical note prepared for him by Muhammad Reza Khan in which the latter maintained that Princes have no immediate property in the lands'.[18]

In words of Sir Philip Francis, 'The Company…had conceived an early, but erroneous, opinion that by the constitution of the Mogul Empire the governing power was the proprietor of the soil'.[19] In that sense, British inversely transformed the character, form, and political functions of sovereign with the introduction of the plan of Permanent Settlement. The transformation of sovereign character in colonial India was impossible without changing the legal and judicial system. For Hasting established the Supreme Court of Judicature to enjoy his 'personal despotism'. In words of Ranajit Guha:

---

[13] Bimal Krishna Matilal, *Id.*

[14] Ranajit Guha, ELEMENTARY ASPECTS OF PEASANT INSURGENCY IN COLONIAL INDIA 127-128 (1983).

[15] Quoting Sir Philip Francis by Ranajit Guha, *Id.*, at 185.

[16] Quoting Sir Philip Francis by Ranajit Guha, *Id.*, at 117.

[17] Ernst Hartwig Kantorowicz, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 1-55 (1957).

[18] Ranajit Guha, *Supra* note 14 at 127-128.

[19] Ranajit Guha, *Id.*, at 124.

> 'It has been the policy of Mr Hastings to abolish the Sovereignty of the Mogul in fact, and to deny it in Argument....Considering that the Company coined money in the name of Shah Alam and collected revenues by virtue of his grant, it was only fair that the country should be administered either in his name or that of his representative, the Nawab of Bengal....But Hastings had no sense of justice. He had adopted the dangerous measure of trying to bring about the total Annihilation of the Soubah's Rights before the government of His Majesty the King of England was prepared to assume power in Bengal....Hastings had deliberately created a political void in order to promote the Supreme Court, and the latter was, of course, a mere instrument of his personal despotism'.[20]

The purpose of creating the Supreme Court of Judicature was 'to extend the Jurisdiction of the Supreme Court and to give to that Court a complete and effectual Control over the Country'.[21] Establishment of the Supreme Court by Warren Hasting was not initiated with a view to establish the court of justice rather it was intended to take control over the state of affairs from Mogul. The plan was influenced from the philosophy of French Physiocracy, which believed in the reformation of land-use, production and distribution of resources on the principle of market, so that land as a resource could be utilized for maximum profits. The plan of Permanent Settlement was conceived as a policy to dismantle the feudalistic mode of production and allow land to be governed by the principles of market as it happened in European societies.[22] Though, the reverse happened in Indian case. Ranajit Guha explains this ironical development happened after the introduction of Plan:

> 'Physiocratic thought, the precursor of Political Economy (Permanent Settlement), was an implacable critique of feudalism in its native habitat and proved to be a real force in undermining the *ancien regime*. Ironically, however, while being grafted to India by the most advanced capitalist power of that age, it became instrumental in building a neo-feudal organization of landed property and in the absorption and reproduction of pre-capitalist elements in a colonial regime'.[23]

Whether the plan succeeded or failed is a subject of exploration on multiple counts. But it certainly brought a complete overhaul in the structure of legal and political institutions existed hitherto. Thereby, the structures, procedures, and functions of state, law, and disputes resolution mechanisms were transformed for achieving all-pervading industrialisation and marketization. Before colonial period, social state co-existed with positive state, so much so that social and positive states were enabling each-others in a symbiotic bond. In ancient and medieval India, autonomy of the villages,[24] towns, tribes,

---

[20] Ranajit Guha, *Supra* note 14 at 187-188.

[21] Ranajit Guha, *Id*.

[22] Karl Polanayi, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 35-44 (1944, 2001).

[23] Ranajit Guha, *Supra* note 14 at xii.

[24] Henry Main, VILLAGE-COMMUNITIES IN THE EAST AND WEST 64-101 (1871).

and clans has been discovered as a historical fact,[25] which was respected by Positive State, unless situations demanded its interference for the well-being of people. British colony reversed the equilibrium and established the centralised legal and political order, and thereby compromised the autonomy exercised by Social State till then. The purpose of centralisation was certainly to control the political economy in a direction of industrialisation in terms of *capitalistic mode of production* and changing the feudalistic economic order, which was blamed for bringing stagnation in Indian societies. On the contrary, as believed, the Europe developed themselves through industrialisation.

Apart from changing the character of state, British conceived the idea of law as a positivized, rationalized, and secularised tool, created by sovereign, whose purpose was fixed to normalize and civilize the society at the touchstone of reason, utility, and public policy, decided by a few elites. Law was established as a replica of violence,[26] positivized to swallow all the violent means and ends prevalent in social order.[27] The sole question, which vexed the theorists of the day, was how to conceive the idea of legitimacy, and positivists succeeded in turning the wheel of law from virtue, morality, justice, and natural rights to public order, legitimacy, certainty, and efficiency, etc. Ancient and medieval Indian societies did not allow sovereign as the authority in creation of law.[28] Duncan M. Derrett, quoting Medhatithi, writes:

> 'Medhatithi roundly declared that a king cannot make a law overriding Dharma, and the evidence of history does not disclose any exercise of the alleged regal power of independent legislation. Again, he says of the king, He cannot make a new law. The royal edict is merely declaratory, and not innovative'.[29]

In ancient India, the character of law was social and ethical, whose growth was organic, just like a language grows. By and large, the nature of law was customary in character, which was not created by one body or authority such as sovereign.[30] Such societies did not follow any script or scripture to organize the social order rather oral tradition was prevalent to transfer the wisdom from one generation to another.[31] In Vedic period, *Vedas* were the source of law. Later on, the sophisticated traditions of epistemology (*Nyaya*) and hermeneutics (*mimamsa*) facilitated the development of jurisprudence in India.[32] There were four sources of law, such as *Sruti* (revelation), *Smriti* (tradition),

---

[25] Anant Sadashiv Altekar, STATE AND GOVERNMENT IN ANCIENT INDIA 225-244 (2002).

[26] Walter Benjamin, TOWARDS THE CRITIQUE OF VIOLENCE 1-50 (Peter Fenves & Julia Ng eds., 2021); Max Weber, ECONOMY AND SOCIETY 54 (Guenther Roth & Wittich Claus eds., 1978).

[27] Norbert Elias, THE CIVILIZING PROCESS SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS xiii (Edmund Jephcott trans., Eric Dunning & Johan Goudsblom, *et.al.*, eds., 1939, 2000).

[28] Duncan Derrett, RELIGION, LAW AND THE STATE OF INDIA 76 (1973).

[29] Duncan Derrett, *Id.*

[30] Duncan Derrett, *Id.*

[31] Bimal Krishna Matilal, *Supra* note 12 at 272-298.

[32] Robert Lingat, CLASSICAL LAW OF INDIA 143 (1973).

Sadacara (good custom), and *Atma-Santushti* (self-satisfaction).[33] All these sources were outside of the power of sovereign to create law. Rather, customary laws had special place, whose development was gradual but organic. As Upendra Baxi writes, 'The pre-colonial Asian societies were principally governed by the non-state law. Colonization processes superimposed western legal norms, institutions and culture. Even so, most social life still continued to be under the domain of people's law'.[34] British, on the contrary, imagined the idea of law in Austinian trilogy of command, duty, and sanction.[35] The top-down jurisprudential imagination was a parochial and narrow approach, restricted the imagination of law within the fulcrum of power. In words of Upendra Baxi:

> 'Top-down perspectives deny existence or value to those areas of social reality and process which are uncongenial to the establishment or official *Weltanschauung*. They also turn out…to be hegemonical by favouring the assumption that patterns of legal and social rationality institutionalized in the SLS (State Legal System) are inherently superior, if not manifestly so, to those institutionalized in the folk, group, people's or non-state law'.[36]

The colonial administration transformed the form and nature of law in India and relegated the social character of law into marginality. It was their dogmatic belief that Hindu law could be found in *sastras*; with this assumption, they relied upon the interpretation of a few pundits with respect to laws written in *sastras*,[37] and neglected the customary practices, which were the 'living law'[38] of the societies. A *Code of Gentos Law* was prepared by eleven *pundits* in 1776 and this is the way 'Anglo-Hindu Law'[39] emerged in colonial period. In terms of justice, equity, and good conscience, the colonial judges exported the common law legal principles in India and anglicised the character of law, to which Max Weber calls 'expropriation of law'.[40] The unity of Hindu society was dependent upon law; whose ontological character was not created by one body or authority rather it was growing as an interactive communication between *sastric* laws and customary practices. Elevating one over other was as worst as separating death from life or divorcing day from night. In words of Robert Lingat (quoted by Upendra

---

[33] Robert Lingat, *Id*., at 3-17.

[34] Upendra Baxi, *People's Law in India- The Hindu Society* in Masaji Chiba ed., ASIAN INDIGENOUS LAW IN INTERACTION WITH RECEIVED LAW 216 (2013).

[35] Upendra Baxi, THE CRISIS OF THE INDIAN LEGAL SYSTEM 45 (1982).

[36] Upendra Baxi, *Supra* note 34 at 216.

[37] Upendra Baxi, *Supra* note 34 at 216; Marc Galanter, *The Displacement of Traditional Law in Modern India* 24 (4) JOURNAL OF SOCIAL ISSUES 65-91 (1968).

[38] David Nelken, *Eugen Ehrlich, Living Law, and Plural Legalities* 9 (2) THEORETICAL INQUIRIES IN LAW 443-471 (2008).

[39] Upendra Baxi, *Supra* note 34 at 225.

[40] Upendra Baxi, Id., at 224; Marc Galanter, *The Displacement of Traditional Law in Modern India* 24 (4) JOURNAL OF SOCIAL ISSUES 65-91 (1968).

Baxi), law 'sustained the unity of the Hindu world, thanks to the authority of the law'.[41] The unity of it was 'unrealizable at the lower level, but was realized on the higher level in an ideal participation amongst all Hindus'.[42] The ideal 'received the dynamic imparted to it by faith, by Hinduism itself, with the result that custom and written law are inextricably woven together to give rise to law'.[43]

Legal centralism around Positive State emerged in Roman law, which was applied in many parts of Europe in early-modern period. This school of thought was rationalized under the social contract tradition, whose charismatic effects reduced the non-state's laws as second-category, which are often tested, prohibited, and allowed by Positive State. The culture of legal centralism, established through State Legal System, made impacts on access to justice. Since, the legal centralism transformed the nature, character, and functions of dispute resolution mechanisms in such a way that Positive State monopolized the adjudicatory and prosecutorial functions.

It is a fallacy to believe that courts and other institutions are separate from state-controlled bureaucracy. For example, the establishment of courts in colonial India was an extension of bureaucratic functions developed in Germany. As per Roberto Unger, 'Judicial and administrative functions were inseparable; both were exercised together by prince and estates as part of their joint responsibility for the administration of justice and the maintenance of the fundamental law of the realm'.[44] In twelfth and thirteen centuries, 'trained clerks'[45] were designated as bureaucrats. In words of Roberto Unger, 'The men who staffed these bodies might have had special training and significant power of their own, but they remained members of the king's household and tools of his policy'.[46] It is only 'in the state-building monarchies of the fifteenth, sixteenth, and seventeenth centuries the separation between private service to the prince and government work gradually became clearer',[47] and bureaucrats started functioning for 'universal purpose' instead of serving 'factional advantage' only.[48]

Bureaucracy 'constitutes a specific social category—not a class', as believed by Marx and other Marxist thinkers. 'This means that, although the members of the State apparatus belong, by their class origin, to different classes, they function according to a *specific internal unity*'.[49] In words of Nicol Poulantzas:

---

41 Upendra Baxi, *Id.*, at 223, Robert Lingat, CLASSICAL LAW OF INDIA 256 (1973).

42 Upendra Baxi, *Id.*

43 Upendra Baxi, *Id.*

44 Roberto Unger, Law in Modern Society 182 (1977).

45 Roberto Unger, *Id.*

46 Roberto Unger, *Id.*

47 Roberto Unger, *Id.*, at 183.

48 Roberto Unger, *Id.*, at 184.

49 Nicos Ponlantzas, *The Problem of the Capitalist State* in Robin Blackburn ed., IDEOLOGY AND THE SOCIAL SCIENCES 238-272 (1972).

> 'The fact that they (Bureaucracy) belong precisely to the State apparatus and that they have as their objective function the actualization of the role of the State. This in its turn means that the bureaucracy, as a specific and relatively 'unified' social category, is the 'servant' of the ruling class, not by reason of its class origins, which are divergent, or by reason of its personal relations with the ruling class, but by reason of the fact that its internal unity derives from its actualization of the objective role of the State'.[50]

With the separation of power, king's authority was restricted in Britain and other European societies. Industrialisation exposed multiple challenges, hence, all the important tasks vis-à-vis administration were delegated to bureaucrats. The adjudicatory powers were delegated to judges, who were earlier members of curia-*regis*[51] (royal council) in England. Judges were authorized to pass the writs on behalf of royal authority. In that way, the adjudicatory power of king was delegated to judges, and in due course of time, they started exercising their power autonomously.

Judicial system evolved on the similar premise of bureaucracy and developed its own internal unity, working culture, and institutional procedures, which were quite similar in many ways to the structure of bureaucracy. Both the institutions structured on the principle of hierarchy and subordination and adopted rational techniques to justify and rationalize the decisions. Some of the other similarities include record-keeping practices, professionalization, and detachment from the persons they are dealing with, etc. In fact, both the institutions actualized the role of Positive State. With this background, official courts were established in colonial India,[52] which marginalised the working of multiple institutions responsible to resolve the dispute since antiquity. People's courts were organized and sustained by Social State. Such courts include *Kula* (members of family were resolving the disputes), *Shreni* (members of same craft, trade, or profession were resolving the disputes), *Puga* (members were of the same place irrespective of castes, trades, or professions).[53] Every village had an *elderly council*, which was consisting of elder people to resolve the dispute.[54] These councils were functioning autonomously in a sense that royal administrations were not inclined to encroach their domain of functioning.[55] The equilibrium of decentralised functioning of institutions was distorted

---

[50] Nicol Poulantzas, *Supra* note 49.

[51] Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts to Say What the Law Is*, 23 ARIZONA LAW REVIEW 581 (1981).

[52] Marc Galanter, *The Displacement of Traditional Law in Modern India* in Rajiv Dhawan *(ed.)*, LAW AND SOCIETY IN MODERN INDIA 17 (1997); ('…the period of initial expropriation, can conveniently be dated from Warren Hastings' organization in 1772 of a system of courts for the hinterland of Bengal. This period was marked by the general expansion of government's judicial functions and the attrition of other tribunals, while the authoritative sources of law to be used in governmental courts were isolated and legislation initiated').

[53] M. Rams Jois, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA, Vol. 1, 491 (1984).

[54] Anant Sadashiv Altekar, *Supra* note 25 at 225-244 (2002).

[55] Anant Sadashiv Altekar, *Id.*

by British colonial regime with the introduction of official courts in India. Such courts brought the culture of hierarchy and subordination, replaced the informal-participative character of social institution with formal, technical, and specialised procedures and techniques of adjudicating disputes, in which parties had negligible role to play, except becoming a passive stakeholder of the court-room proceedings. Marginalization of such informal institutions was deliberately pursued by Positive State to establish its own authority over adjudicatory mechanisms. In words of Marc Galanter:

> 'Traditional tribunals still functioned, though certain subjects (e.g. criminal law) were withdrawn from their purview. On the whole, these tribunals lost whatever governmental enforcement their decisions had previously enjoyed. The caste group was now treated as a private association. While it thus enjoyed an area of autonomy, it no longer could invoke governmental enforcement of its decrees. At the same time, the sanctions available to the indigenous tribunals declined in force. The new opportunities for mobility, spatial and social, provided by British rule not only increased transactions between parties beyond the reach of traditional sanctions, but also made out-casting and boycott less fearsome. With their own sanctions diminished, their ability to invoke governmental support limited, and the social relations necessary for their effectiveness disrupted, the indigenous tribunals declined as the government courts flourished'.[56]

Marginalisation of social institutions impacted the social life of community in a sense that their autonomous existence was dismantled and, in its place, the Social State became subservient to Positive State and its centralized narratives. In that context, the dichotomy of access-(in)access emerged vis-à-vis social goods, such as education, health, natural resources, social resources, and access to justice, etc.

(c) Legal Centralism and Dichotomy of Access and Exclusion

The peculiarity about legal centralism under Positive State lies in the fact that it monopolizes the formation and enforcement of law and theorization thereof. The hegemony is based upon certain methods, a unique academic habitude, broadly known as positivism of social sciences, including law. It has a self-declared claim of the access to ultimate truth, and a practical project of universalization of legal categories prevalent in Western societies. The sustenance of positivism is drawn from the liberal belief in 'institutional fetishism'.[57] The law and its methods are concerned with the

---

[56] Marc Galanter, *The Displacement of Traditional Law in Modern India* in Rajeev Dhawan *(ed.)*, LAW AND SOCIETY IN MODERN INDIA 20 (1997).

[57] Roberto M. Unger, WHAT SHOULD LEGAL ANALYSIS BECOME? 2-7 (1996); ('The rationalizing Legal Analysis refer to institutional structures and superstitions including institutional fetishism which forbid any attempt, even for academic purposes, to explore the democratic transformative opportunities for realizing experimental thinking, practical democratic experimentalism of/and institutional possibilities').

monopolization, relegating the vast varieties of practices as non-legal social norms.[58] The monopoly feeds upon the hierarchy of authority (power) based on the philosophy of subordination and domination, a fundamental principle, which, Blackstone claimed, was necessary for a good society.[59] In that way, access to justice as a moral and cultural problem is denounced. The liberal legal system treats the problem of access merely as the issue of techniques and procedures.

For example, one can investigate the history and principles of emergence of legal aid, legal services, and pro-bono lawyering instituted by the Indian Judiciary and innovated by the Union Government, respectively. Roberto Unger has hypothesized this phenomenon as 'rationalizing and humanizing tendencies',[60] which ensure the stalling of the transformative change the Indian legal system requires in its evolutionary ascendance.[61] These, therefore, it is submitted, are destined to backfire.

Thomas Hobbes' interventions in 'state of nature' were imagined on the ground of the authoritative challenge men were capable to put against power relationships found in the nature. The notion of power was crucial in the establishment of scientific disciplines, which were based upon the legitimation of epistemic practices and 'epistemic violence' against non-western paradigms of ontology, deontology, moral psychology, law, and epistemology. Uncritical reliance upon the authority often culminates into the blind obedience to irrational authority as happened under fascist regimes in Germany, Russia, and Italy, prior to and during the Second World-War. Stanley Milgram through his experiments demonstrated how 'group psychology' develops at the cost of compromising individual moral autonomy. In his words:

> 'The most far-reaching consequence of the agentic shift is that a man feels responsible to the authority directing him but feels no responsibility for the content of the actions that the authority prescribes. Morality does not disappear, but acquires a radically different focus: the subordinate person feels shame or pride depending on how adequately he has performed the actions called for authority. Language provides numerous terms to pinpoint this type of morality: loyalty, duty, discipline, all are terms heavily saturated with moral meaning and refer to the degree to which a person fulfils his obligations to authority. They refer not to the goodness of the person per se but to the adequacy with which a subordinate fulfils

---

[58] Hans Kelsen's Nomo-dynamics falls in this category of legal theory, whereas purity of norm is desired up to an extent that law is mistreated merely as a legal vessel, which may be channelized by socio-political factors into certain direction. *See,* Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST MODERNISM 329 (1997).

[59] BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND at 104-108 Book IV, Chap. 8: Of Praemunire (The Avalon Project: Documents in Law, Legal History and Diplomacy, Yale Law School, Lillian Goldman Law Library), *available at*: http://avalon.law.yale.edu/18th_century/blackstone_bk4ch8.asp (last visited Apr. 20, 2022).

[60] Roberto Unger, *Free Classical Social Theory from Illusions of False Necessity*, BIG THINK, *available at*: https://www.youtube.com/watch?v=yYOOwNRFTcY (last visited Nov. 25, 2022).

[61] Roberto Unger, *Id.*

> his socially defined role. The most frequent defence of the individual who has performed a heinous act under command of authority is that he has simply done his duty….In asserting this defence, the individual is not introducing an alibi concocted for the moment but is reporting honestly on the psychological attitude induced by submission to authority'.[62]

Hannah Arendt in *Eichmann in Jerusalem: A Report on Banality of Evil*' explained the dilemma of a modern bureaucratic person who loses the capacity to think and feel and surrenders himself before an external authority without judging the moral aspects of rule or command.[63] The tendency towards the obedience of rule or command emanates from inferiority complex, in which the person tries to escape from himself, his self, humanity in him, from his freedom and responsibilities and becomes a part of supposedly bigger power or a group. Erich Fromm in *Escape from Freedom* exemplified how a command of higher authority or aspirations of a supposedly higher group is uncritically obeyed to the extreme of moral bankruptcy:

> 'The individual finds himself 'free' in the negative sense, that is, alone with his self and confronting an alienated, hostile world. In this situation, to quote a telling description of Dostoevsky, in The Brothers Karamazov, he has 'no more pressing need than the one to find somebody to whom he can surrender, as quickly as possible, that gift of freedom which he, the unfortunate creature, was born with'. The frightened individual seeks for somebody or something to tie his self to; he cannot bear to be his own individual self any longer, and he tries frantically to get rid of it and to feel security again by the elimination of this burden: the self'.[64]

The problems of access to justice and its relationship with legal pluralism in India need to be studied in these backgrounds. As far as access to justice in a liberal legal system is concerned, for general masses, accessing courts and other associated legal institutions appear to be burdensome.

---

[62] Stanley Milgram, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 145-146 (1974).

[63] Hannah Arendt, EICHMANN IN JERUSALEM: A REPORT ON BANALITY OF EVIL 135, 149 (1963, 2006); ('So Eichmann's opportunities for feeling like Pontius Pilate were many, and as the months and the years went by, he lost the need to feel anything at all. This was the way things were, this was the new law of the land, based on the Fuhrer's order; whatever he did he did, as far as he could see, as a law-abiding citizen. He did his duty, as he told the police and the court over and over again; he not only obeyed orders, he also obeyed the law…. The case of the conscience of Adolf Eichmann, which is admittedly complicated but is by no means unique, is scarcely comparable to the case of the German generals, one of whom, when asked at Nuremberg, how was it possible that all you honorable generals could continue to serve a murderer with such unquestioning loyalty? replied that it was not the task of a soldier to act as judge over his supreme commander. Let history do that or God in heaven… Eichmann, much less intelligent and without any education to speak of, at least dimly realized that it was not an order but a law which had turned them all into criminals').

[64] Erich Fromm, ESCAPE FROM FREEDOM 173 (1965).

Normative and practical aspects of justice are created by law. Often law and justice are treated as two separate categories. The dichotomy of law and justice was established in early modern period. In Roman and Hindu law, both the categories were integrally connected. For example, *ius* or *jus* was used to signify law, justice, or right. For them, law and justice were artefacts of the community. Justice, for them, alone created and sustained order; and when dissociated from it, the law became a source and an instrument of disorder.[65] The concept of justice was inseparable from the concept of righteousness, which created good order. *Dharma* signified duties as well as righteousness- what is the right way to conduct one's life or social transactions. *Dharma* has its root in Sanskrit *dhatu* (mother) or *dhri*, which literally means to hold, own, maintain and preserve. Law and dispensation of justice had a similar status that of primary social goods. Ancient and medieval literatures offer innumerable examples, which impeccably lead to the conclusion that it was not the individual's burden to seek justice (in corrective sense) from the state or community.[66] Rather, opposite of it, the king and the community were under a duty to dispense justice and uphold the social order. Justice, then, had the identical status of being a social good as air, water, or other natural resources. Here a social/public good refers to anything, tangible or intangible, the production, distribution, and opportunities of access of which is not dependent upon the principle of demand and supply premised upon monetization. It may also be defined as goods which are free from the monopolization by the individuals. In such a model, the issue of access, premised on the rights and claims, operationalized through self-sustaining profession, would have no meaning. It was an absolute duty of the community to facilitate justice without any dependence on economic capability. These are two paradigmatic world-views of access to justice, the first being fraught with moral problems, logical incoherencies, and inherent contradictions, and second one was morally just and logically appropriate.

Historical and anthropological studies have established that every community has a unique cultural code, which evolves with the people. In words of Masaji Chiba:

> 'It has become accepted that law must be recognized as an aspect of the total culture of a people, characterized by the psychological and ideational features as well as the structural and functional features of each fostering people'.[67]

Any interference with the culture proves to be counterproductive.[68] In that sense, the traditional models of jurisprudence and the methods of scientific study faced decisive challenges in the previous centuries.

---

[65] Bhikhu Parekh, *The Modern Conception of Right and Its Marxist Critique* in THE RIGHT TO BE HUMAN (Upendra Baxi ed., 1988).

[66] Anant Sadashiv Altekar, *Supra* note 25.

[67] Masaji Chiba, ASIAN INDIGENOUS LAW: IN INTERACTION WITH RECEIVED LAW 1 (2009).

[68] Anthropologists and pluralist sociologists assert that the law is manifestations of culture of the community and each historical community must be acknowledged to have the capacity of

Contd…

As far as legal norms, judicial institutions, and administration of justice are concerned, there is a general agreement that all is not well in Indian legal system.[69] Reason may be advanced for its failures with respect to a centralist leal tradition revolving around Positive State. Contrary to it, India's own historical and socio-cultural experiences make it abundantly clear that law and judicial process had plurality, which predominantly existed until the colonisation of legal norms and institutional practices reduced them to marginality in colonial period. It is apparent that the pluralism of the West is of recent origin and of different kind. Indian communities, on the other hand, lived for thousands of years by the rich heritage of diversity. The uncritical reception[70] of the common law legal institutions and juristic principles in independent India, therefore, has caused crisis of severe character vis-à-vis access to law, court, and legal representation. Such problems had no relevance in pluralist legal cultures prevalent till the emergence of centralized legal tradition under the colonial tutelage in early modern India.

(d) Access to Justice: Breaking the Circularity of Included-Exclusion

The Latin maxim, *Ubi jus ibi remedium,* signifies the spirit of access to justice. In other words, what is the relevance of a declaration of right if its violations do not attract appropriate remedies? Any substantive right in its formal declarations remains meaningless, unless there is a system of adjudicatory mechanisms, which facilitate effective remedies against its violations. The usefulness of adjudicatory mechanism depends on its openness, not simply in a formal or symbolic sense. Further, the idea of openness does not have a mere formal import i.e., open only for a few privileged groups, classes, or persons. The substantive openness requires availability of the forum and the remedy from it to all, which must not be contingent upon individual capacity and the will to change the course of action. Franz Kafka's *The Trial* demonstrates this paradox succinctly.[71] Giorgio Agamben's *Homo Sacer* elucidates the paradox of formal openness:

'the self-generation of legal norms'. *See generally,* Acharya Shriman Narayan Agarwal, THE GANDHIAN PLAN OF ECONOMIC DEVELOPMENT FOR INDIA (1944); *See also,* Acharya Shriman Narayan Agarwal, THE GANDHIAN CONSTITUTION OF FREE INDIA (1946).

[69] Hannah M Varghese, *The Legal System Works Differently For The Poor': Orissa High Court Chief Justice Muralidhar*, LIVELAW (16 Apr., 2022), *available at: https://www.livelaw.in/top-stories/the-legal-system-works-differently-for-the-poor-chief-justice-muralidhar-196750* (last visited Apr. 16, 2022).

[70] *Cf.* provisions of Sections 39 (2) and 8 (3), (Developmental Clauses) 40, of the Constitution of South Africa, 1996, which require the Court to reform the received common law in accordance with the provisions of the Constitution.

[71] Franz Kafka, THE TRIAL 153-155 (Mike Mitchell trans., 1925, 2009); ('Outside the Law there stands a doorkeeper. A man from the Country comes to this doorkeeper and asks to be allowed into the Law, but the doorkeeper says he cannot let the man into the Law just now. The man thinks this over and then asks whether that means he might be allowed to enter the Law later. That is possible, the doorkeeper says, but not now… If you are so tempted, why

Contd…

> '…law demands nothing of him and commands nothing other than its own openness…. law applies to him in no longer applying, and holds him in its ban in abandoning him outside itself. The open door destined only for him includes him in excluding him and excludes him in including him'.[72]

Agamben elaborates Kafka's idea as to what it means to be open for a legal system. He writes, 'Nothing-and certainly not the refusal of the doorkeeper-prevents the man from the country from passing through the door of the Law if not the fact that this door is *already open* and that the Law prescribes nothing'.[73] The contradictory state of affairs fortifies further the tensions between access and exclusion in liberal legal order. Access, in symbolic sense, is universally theorized as desire or norm to be achieved under constitutional structure of governance, but its realization is kept subservient to the social and political contingencies. The empirical status of constitutional guarantee under Article 14 and the promises held out in Article 39-A symbolize the Kafkaesque riddle. Normative order is organized as ideology and behind its curtain the *status quo* is preserved, either it serves the bourgeoise class interest or facilitates some privileged professions. Carl Schmitt, in his classic work on *Constitutional Theory* explained the connection between the Constitutional law reforms and its role in protection and preservation of the current order:

> 'For political reasons, that which is designated as a true or genuine constitution often only corresponds to a particular ideal of the constitution. In particular, the liberal bourgeoisie established a certain ideal concept of constitution in its struggle against the absolute monarchy (or alien rule) and identified it with the concept of constitution in general. One spoke only of constitution when the demands of bourgeois freedom were fulfilled and a decisive political influence was secured'.[74]

A characteristic way out is not to be found in the liberal legal system but certainly outside the ruling models of it. Pluralism may offer numerous insights. Ancient and medieval Indian legal systems may provide answers to the contemporary problems of access to justice. It is noteworthy that ancient legal traditions in India did continue in

---

don't you try to go in, even though I have forbidden it? But remember, I am powerful. And I am only the lowest doorkeeper. Outside each room you will pass through there is a doorkeeper, each one more powerful than the last… The man from the country did not expect such difficulties; the Law is supposed to be available to everyone and at all times, he thinks. When the man from countryside failed to enter into the door and waited whole life for it. He was permitted by gatekeeper to ask question. The man asked, everyone seeks the Law, so how is it that in all these years no one apart from me has asked to be let in? The doorkeeper realizes that the man is nearing his end, and so, in order to be audible to his fading hearing, he bellows at him, No one else could be granted entry here, because this entrance was intended for you alone. I shall now go and shut it').

[72] Giorgio Agamben, HOMO SACER: SOVEREIGN POWER AND BARE Life 50 (Daniel Heller-Roazen trans., 1998).

[73] Giorgio Agamben, *Id.* at 49.

[74] *See generally*, Carl Schmitt, CONSTITUTIONAL THEORY 89 (1928).

entire medieval period. A distinctive feature of Indian legal pluralism can be traced to the fact that the pluralistic practices were not circumscribed around overarching statist system of rank and subordination.

(e) Absence of Access-Narrative in Pre-colonial India

The question of access is relevant only when the political and legal institutions are functioning in their own internal unity without having concern or compassion with the people. In such systems, people's participation in the functioning of institutions is negligible. This issue has become relevant in the modern-liberal paradigm of state, since institutions are alienated from people in an authority-based institutionalization. The professionalization of judicial system also established a strong commitment of professionals to safeguard the professional interests instead of changing them for justice and welfare of the people. On the contrary, access to justice was not a significant question to ponder upon in the societies flourishing on the people's participation in governance and adjudication. In this context, ancient and medieval Indian societies maintained the harmony between Social and Positive State in such a way that *people's law* was thriving without any interference from Positive State. For them, access to justice was not a question required any solution. Since, the institutional mechanisms and people were 'un-alienated'[75] and connected in a symbiotic bond.

III

Legal-Political Transplant and Slavery of Indian Mind

(a) Colonization and Legal-Transplant

The dominant categories of moral and legal values prevalent in modern India were received from the West during European suzerainty. The colonial objectives of the European powers were accomplished through brute force as well as epistemic practices.[76] The history of violence in its crude form is easily discernible with its genocidal practices where entire tribes and communities were persecuted, and in many cases, decimated.[77] The epistemic practices justified and rationalized the acts and consequences of the violence. It notably annihilated the entire traditions of alternative knowledge systems:[78] science, medicine, law, philosophy, and cultural values of such societies. While former was achieved by military powers employed by the colonial

---

[75] Akeel Bilgrami, SECULARISM, IDENTITY, AND ENCHANTMENT 129 (2014).

[76] For example, Bentham declared, 'Mill will be the living executive and I shall be the dead legislative and for British India'. *See,* Adam Kuper, THE REINVENTION OF PRIMITIVE SOCIETY: TRANSFORMATIONS OF A MYTH 34 (2017).

[77] Amitav Ghosh, THE NUTMEG'S CURSE: PARABLES FOR A PLANET IN CRISIS 249-251 (2022).

[78] *See generally,* Edward W. Said, ORIENTALISM (1978).

masters and the latter aims were conquered through epistemic practices, embraced by native people trained and conditioned in colonial habitude of knowledge system. Law and the legal systems in post-colonial India developed and sustained out of such cognitive blindness.

Cultural influences are often underrated by social and political theorists in understanding the influence of colonization of the Southern countries. Power in traditional sense is easily perceived since it manifests without ambiguities. In cognitive and epistemic form, power is not easily perceptible so much so that agents presuppose the authenticity of their voice. The solution to the problem requires a process of unlearning. Mohan Das Karamchand Gandhi, for example, unlearnt the influences of modern values. Gandhi believed that India is required to unlearn what she had learnt during the colonial period. Indeed, for Gandhi, it was the Western educated elites who are required to unlearn the values that had degraded not only India but most of the world. India would do better to loom inwards, to return to and revive its traditional institutions. In *Hind Swaraj*, Gandhi associated this path to true self-rule with the pursuit of self-reliance.[79] K.C. Bhattacharya described the blind obedience to modern values as 'the slavery of spirit':

> 'There is cultural subjection only when one's traditional cast of ideas and sentiment is superseded 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'.[80]

(b) The Cataclysm of Failed Project

The failures related to access to justice could be related to the modernized value system which has proved to be catastrophic for the simple social life of the community, governed by religious meaning, transmitted generation after generation through customary practices. The idea of the *failed project* can be considered the afterword in some studies and the vantage point for some studies. In his work, *The Elementary Forms of Religious Life*, Durkheim concludes that the system that has emerged as a part of the failed project and in the guise of giving a scientific and objective direction to the world community, writ large, has in turn, done disservice and has fostered, disassociation, of which many societies are bearing the burden. He discusses:

> 'All religions, even the crudest, are in a sense spiritualistic: for the powers they put in play are before all spiritual, and also their principal object is to act upon the moral life. Thus, it is seen that whatever has been done in the name of religion cannot have

---

[79] *See* Karuna Mantena, *The Futility of Violence*, LEGAL THEORY WORKSHOP 14 (Jan., 2015), *available at*: https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/LTW_KarunaMantena.pdf (last visited Apr. 12, 2022).

[80] Krishna Chandra Bhattacharya & Sisirkumar Ghose, FOUR INDIAN CRITICAL ESSAYS 13 (1977).

> been done in vain: for it is necessarily the society that did it, and it is humanity that has reaped the fruits. But it is said, what society is it that has thus made the basis of religion? Is it the real society, such as it is and acts before our very eyes, with the legal and moral organization which it has laboriously fashioned during the course of history? This is full of defects and imperfections. In it, evil goes beside the good, injustice often reigns supreme, and the truth is often obscured by error. How could anything so crudely organized inspire the sentiments of love, the ardent enthusiasm and the spirit of abnegation which all religions claim of their followers? These perfect beings which are gods could not have taken their traits from so mediocre, and sometimes even so base a reality'.[81]

The monopolised scientific practices have brought to fore, rather infested the minds with, mundane questions and trend towards a more scientifically oriented society. This orientation has subsided the scope for existence and continuity of norms which do not confirm scientific re-engineering. It is important, if one is to see through the *failed project*, one must see the underlying trends that have fuelled the carrying forward of the project. In this context, the expounding of literary works by Edward Said is a remarkable analysis.[82] In his work, *Culture and Imperialism*, he traces the organic structuring of *superiority* by way of the literary works, world-wide, during the 17th-19th centuries. He summarises the essence and direction of his studies, thus:

> 'There is, I believe, a quite serious split in our critical consciousness today, which allows us to spend a great deal of time elaborating Carlyle's and Ruskin's aesthetic theories, for example, without giving attention to the authority that their ideas simultaneously bestowed on the subjugation of inferior peoples and colonial territories….Doing this by no means involves hurling critical epithets at European or, generally, Western art and culture by way of wholesale condemnation. Not at all. What I want to examine is how the processes of imperialism occurred beyond the level of economic laws and political decisions, and-by predisposition, by the authority of recognizable cultural formations, by continuing consolidation within education, literature, and the visual and musical arts were manifested at another very significant level, that of the national culture, which we have tended to sanitize as a realm of unchanging intellectual monuments, free from worldly affiliations'.[83]

Therefore, this and other anthropological studies serve as a vital point for the current context of *liberal legal order* that has been chosen and accepted as supreme. Said in his work refers to the *predispositions* used by the colonialists and the manner in which the infestation gestated over a period of time,[84] the glimpses of which we are witnessing

---

[81] Emile Durkheim, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 436-437 (2016, Kindle Edition).

[82] Edward W. Said, CULTURE AND IMPERIALISM (1994); *See generally*, Edward W. Said, *Supra* note 78.

[83] Edward W. Said, *Id.*, at 12-13 (1994).

[84] Edward W. Said, *Id.*, at 101; ('No area of experience was spared the unrelenting application of these hierarchies. In the system of education designed for India, students were taught not only English literature but the inherent superiority of the English race. Contributors to the

Contd…

today. The disenchantment that has been thus created is not only replete in the narratives of the colonies, but the tyranny is also reflected in the approach that the developed West has taken within their lesser developed fringes.[85] This scheme has also amply manifested the bureaucratic structure created by the *objective* legal systems, resulted from received common law which has significantly drawn an *ought* within individuals. Cultural epistemes have been the most potent and vivid tools for underrating the other[86] and promoting the narrative for *why* the liberal legal order is required.[87] This has subsequently led to the death of new idea, criticism, or dissent.[88]

Plato aptly explained that 'those who tell stories, rule the society'.[89] The kind of narrative that has been created by the West, especially the colonial rulers, reflects succinctly on their narrative powers and impacts on the human cognition. It is, therefore, that the liberal legal order is not a gateway to realising human values and making rights accessible, rather it is a threshold that is eulogised to permeate the ashes of *failed project*.

---

emerging science of ethnographic observation in Africa, Asia, and Australia, as described by George Stocking, carried with them scrupulous tools of analysis and also an array of images, notions, quasi-scientific concepts about barbarism, primitivism, and civilization; in the nascent discipline of anthropology, Darwinism, Christianity, utilitarianism, idealism, racial theory, legal history, linguistics, and the lore of intrepid travelers mingled in bewildering combination, none of which wavered, however, when it came to affirming the superlative values of white, i.e., English civilization').

85 Dee Alexander Brown & Amy Erlich, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 396 (2007); ('Bureaucrats and Christian gentlemen visited them frequently, uttering words of sympathy and writing endless reports to various organizations. Joseph was allowed to visit Washington, where he met all the great chiefs of government. They all say they are my friends, he said, and that I shall have justice, but while their mouths all talk right, I do not understand why nothing is done for my people…. General Miles promised that we might return to our own country. I believed General Miles, or I never would have surrendered').

86 Zeynep Celik & Leila Kinney, *Ethnography and Exhibitionism at the Expositions Universelles*, 13 ASSEMBLAGE 34 (1990).

87 Edward W. Said, *Supra* note 82 at 164; (Said discusses the stories and narrative that developed which, sans imperialism will have no use).

88 Edward W. Said, *Id.*, at 299-301; ('There has not yet developed a discourse in the American public space that does anything more than identify with power, despite the dangers of that power in a world which has shrunk so small and has become so impressively interconnected….But that is not all. For decades in America there has been a cultural war against the Arabs and Islam: appalling racist caricatures of Arabs and Muslims suggest that they are all either terrorists or sheikhs, and that the region is a large arid slum, fit only for profit or war. The very notion that there might be a history, a culture, a society-indeed many societies-has not held the stage for more than a moment or two, not even during the chorus of voices proclaiming the virtues of multiculturalism').

89 Eric D. Beinhocker, THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS 126 (2006).

IV

Legal Norms for Access to Justice

(a) Access to Justice and International Law

The pluralistic conception of law allows it to transcend the barriers of positivism. The International law appears to be a source of aspiration or possibility to develop law into certain specific direction. Normatively, International Law contains prescription for countries to recognize the necessity of proper forum while adjudicating a dispute related to violation of any right. The right to access to justice is recognized by UDHR (Universal Declaration of Human Rights, 1948).[90] Article 6 of the UDHR declares, 'Everyone has the right to recognition everywhere as a person before the law'.[91] Article 7 proclaims that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.[92] Article 8 specifically recognizes the right to access remedy, which declares, 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law'.[93] Article 10 of the Declaration lays down that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him'.[94]

(b) Access to Justice and Municipal Law

The entitlement to access to justice is recognized by the Constitution of India. Article 14 of the Constitution guarantees that 'the State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India'[95]. Article 39-A of the Constitution is more specific:

> 'The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.[96]

Order XXXIII, rule 18 of the Code of Civil Procedure, 1908[97] lays down that State shall provide free legal aid to poor people. Section 303 of the Criminal procedure Code, 1973

---

[90] Universal Declaration of Human Rights, Dec. 8, 1948, U.N.G.A. Res. 217(III).

[91] Universal Declaration of Human Rights, *Id.*, at Article 30.

[92] Universal Declaration of Human Rights, *Id.*

[93] Universal Declaration of Human Rights, *Id.*

[94] Universal Declaration of Human Rights, *Id.*

[95] The Constitution of India, 1950.

[96] The Constitution of India, *Id.*

[97] Order XXXIII, rule 18 of the Code of Civil Procedure, 1908, prescribes: '*Power of Government to*

Contd…

mandates that 'every accused person has a right to be defended by an advocate of his or her choice'.[98] Section 304 of the Code lays down rules for free legal aid to poor and indigent persons at the expense of the State.[99]

In spite of all these legal provisions, access to justice has been a distant dream for ordinary people. The Supreme Court's initiatives to 'taking suffering seriously'[100] since *Hussain Ara Khatoon*[101] culminated to the birth of Legal Services Authorities in India through Legal Services Authority Act, 1987. The law intends to institutionalize legal aid and awareness programmes. The Act has supposedly helped in the emancipatory project of access to justice for poor and indigent people. Section 12 of the Act provides a list of beneficiaries entitled to free legal aid under the Act. The list includes 'a member of a Scheduled Caste or Scheduled Tribe', 'a victim of trafficking in human beings or beggar', 'a woman or a child', 'a person with disability', 'a victim of a mass disaster, ethnic, violence, caste atrocity, flood, drought, earthquake or industrial disaster', 'an industrial workman', a person in custody; or a person 'in receipt of annual income less than rupees nine thousand'.[102] Section 2(c) of the Act defines 'Legal Services', which include 'the rendering of any service in the conduct of any case or other legal proceedings before any court or other authority or tribunal and the giving of advice on any legal matter'.[103]

In *Anita Kushwaha* v. *Pushpa Sadan*,[104] the Apex Court has recognized four important characteristics of *access to justice* to be achieved, i.e. 'effectiveness of adjudicatory mechanism, reasonable accessibility in terms of distance, speedy adjudication, and affordability of the mechanism'.[105] The former Chief Justice of India, Justice Ramana,

---

provide for free legal services to indigent persons: (1) Subject to the provisions of this Order, the Central or State Government may make such supplementary provisions as it thinks fit for providing free legal services to those who have been permitted to sue as indigent persons'.

98 Section 303, The Code of Criminal Procedure, 1973, lays down, 'Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice'.

99 Section 304, The Code of Criminal Procedure, 1973, reads, '(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State'.

100 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* 4(6) THIRD WORLD LEGAL STUDIES 107 (1985).

101 *Hussainara Khatoon* v. *State of Bihar*, 1980 S.C.C. (1) 9.

102 The Legal Services Authorities Act, 1987.

103 The Legal Services Authorities Act, *Id.*

104 *Anita Kushwaha* v. *Pushpa Sadan*, (2016) 8 S.C.C. 509.

105 *Anita Kushwaha* v. *Pushpa Sadan, Id.*

highlighted the inclusiveness of legal aid scheme in India.[106] Because of non-application of 'means test', the program covers 70% of Indian population.[107] NALSA has recently introduced 'Legal Aid Defence Counsel System' on a pilot basis, wherein lawyers are being engaged on a full-time basis in cases adjudicated in the District-Session Courts.[108] This Program has been implemented in 17 Districts across the Country. About 1600 cases were properly addressed by the counsels engaged under this program in 2020.[109]

The Central Government has recently implemented DISHA (Innovative Solutions for Holistic Access to Justice in India) scheme. The purpose of the scheme is to achieve 'Tele-law: Reaching the unreached, *Nyaya Bandhu* (Pro-bono Legal Services), *Nyaya Mitra*, and legal literacy as well as legal awareness program'.[110] As per the data available, in 2019, only 54% of the total Indian population has accessibility to internet.[111] This data may have slightly improved by now, but the digital divide in India, not only population wise but also demography wise, makes this scheme too vulnerable to achieve its desired ends. Moreover, in a model of law that is 'right and duty centric', policy initiatives conceived and implemented after the principles of 'largesse or charity' have doubtful prospects.

V

Legal Pluralism: Possibilities and Challenges

(a) Legal Pluralism: Concept and Evolution

Law has regulatory, emancipatory, as well as repressive potentials. Santos remarks, 'the way law's potential evolves has nothing to do with the autonomy or self-reflexivity of the law, but rather with the political mobilization of competing social forces'.[112] The phenomenon of state monopoly over law and legal processes has a history not more

---

[106] Bhadra Sinha, *Important to reach people of all sections, says CJI Ramana at NALSA awareness programme,* THE PRINT (14 Nov., 2021).

[107] Express News Service, *Access to justice still a challenge for millions: Justice Ramana* (New Delhi, 23 Mar., 2021).

[108] Express News Service, *Id.*

[109] Express News Service, *Id.*

[110] Ministry of Law and Justice, Government of India, *Access to Justice*, *available at*: https://doj.gov.in/division/access-to-justice/ (last visited Apr. 22, 2022*).*

[111] Vijdan Kawoosa, *Connectivity Gets Better But Parts of India Still Logged Out*, HINDUSTAN TIMES (14 Aug., 2020), *available at:* https://www.hindustantimes.com/india-news/connectivity-gets-better-but-parts-of-india-still-logged-out/story-VSqXriMdGUudWb7eBcWzjN.html (last visited Apr. 10, 2022).

[112] Boaventura de Sousa Santos, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 85 (2002).

than three hundred years. It has been a well-established debate in anthropology and sociology that law has never been, in history, absolutely buckled with the state. In the late nineteenth century, as a reaction to legal positivism, the debate found its place in legal philosophy.[113] Legal pluralism emerged in the nineteenth century with the studies of indigenous laws in the third world. Earliest debate started with anthropologists, who undertook the investigations in the societies of Asia, Africa, and Pacific with a view to find answers to the question; how these peoples maintained social order without European law.[114] In the twenty first century, legal pluralism has become one of the central themes in the reconceptualization of law and society relation.[115]

John Griffith defines legal pluralism 'as that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.[116] Sally Merry defines it as 'a situation in which two or more legal systems co-exists in the same social field'.[117] Upendra Baxi conceptualizes it as relative autonomy of non-state legal system from state legal system.[118] Sally Falk Moore defines it as the 'semiautonomous social field, a concept developed to describe multiple systems of ordering in complex societies'.[119] Fitzpatrick's notion of 'integral plurality' throws light 'on the interaction between normative orders, positing that state law is integrally constituted in relation to a plurality of social forms'.[120] Fitzpatrick as a Foucauldian finds an interactive constitutive elements in state and non-state laws; in that interaction both cancel and produce each-other. In his words, 'law is the unsettled resultant of relations with social forms and in this law's identity is constantly and subject to challenge and change'.[121]

David Sugarman develops the thesis of mutual construction between state and non-state law in his *Legality, Ideology, and the State*, in which he expounds the notion of 'a

---

[113] Boaventura de Sousa Santos, *Id.*

[114] *See generally,* Bronislaw Malinowski, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926, 1940).

[115] Sally Engel Merry, *Legal Pluralism*, JOURNAL OF LAW AND SOCIETY ASSOCIATION 872 (1988).

[116] John Griffith, *What is Legal Pluralism*, JOURNAL OF LEGAL PLURALISM 2 (1996).

[117] Sally Engel Merry, *Supra* note 115 at 870.

[118] Upendra Baxi, *Discipline, Repression and Legal Pluralism* in Peter Sack & Elizabeth Minchin eds., LEGAL PLURALISM PROCEEDINGS OF THE CANBERRA LAW WORKSHOP VII, 56 (1985).

[119] Sally Engel Merry, *Supra* note 115 at 878 (1988). *See also*, Sally Falk Moore, Law and Social Change: *The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOCIETY REVIEW 719-720 (1973); (The semiautonomous social field 'can generate rules and customs and symbols internally, but that... is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance').

[120] Sally Engel Merry, *Id.*, at 883 (1988). *See also*, Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL LAW JOURNAL 115 (1984).

[121] Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL LAW JOURNAL 138 (1984).

degree of private ordering through facilitative laws'.[122] Masaji Chiba summarises legal pluralism as:

> 'The coexisting structure of different legal systems under the identity postulate of a legal culture in which three combinations of official law and unofficial law, indigenous law and transplanted law, and legal rules and legal postulates are conglomerated into a whole by the choice of a socio-legal entity'.[123]

Boaventura de Sousa Santos conceptualises legal plurality in context of temporality (time) and spatiality (space); in this context, he explores the three dimensions of law: local, national, and the global and their interaction with each-other.[124] In his study, he finds nation-state as the central time-space of law only for the last two centuries, in that period local and global were marginalized to almost nothingness by the hegemonic liberal thought.[125] Werner Menski in *Sanskrit Law: Excavating Vedic Legal Pluralism* has demonstrated the pluralistic conception of law overlapping in; (a) Religion, Ethics, or Natural Law; (b) Socio-Legal Approach; (c) State Law or Positive Law; and (d) International Law. This is also known as 'Kite Model' of jurisprudence or 'law as plurality of pluralities'.[126]

(b) Legal Pluralism in Pre-Colonial India

The concept of legal pluralism has become relevant in the colonial societies, since Europeans were enmeshed in their own glorified narratives vis-à-vis law and legal system, and preferred to condemn and otherize the idiosyncrasies of legal pluralities at the touchstone of secular ideals, emerged out of conflicting religious ideas, doctrines, and practices in Europe. In that context, it is a burdensome task to project the 'European shadow' over time (history), much distant from our living reality. As a curiosity, one may explore the relevance of legal pluralism in ancient and medieval India. There has been a controversy with respect to the character of law persisted in pre-colonial India. Many Indologists, including Henry Maine, believe that Indians did not develop the systematic jurisprudence like what Europeans did taking inspiration from Roman law in ancient past. It is also believed that pre-modern India failed to separate religion from law and religious sanction from legal one, and therefore religious commands prescribed

---

[122] Sally Engel Merry, *Id.*, at 885; ('State law is itself plural: it contains procedures for establishing facts, general substantive rules that guide citizen action, enforcement of judgments, provisions for physical punishment, modes of appeal, insurance against loss, ideological and symbolic dimensions, and the ability to provide a degree of private ordering through facilitative laws'). *See also*, David Sugarman, LEGALITY, IDEOLOGY, AND THE STATE 885 (1983).

[123] Masaji Chiba, *Other Phases of Legal Pluralism in the Contemporary World* 11 (3) RATIO JURIS 242 (1998).

[124] Boaventura de Sousa Santos, *Supra* note 112 at 99-116.

[125] Boaventura de Sousa Santos, *Id.*

[126] Werner Menski, *Sanskrit Law: Excavating Vedic Legal Pluralism*, SOAS LAW WORKING PAPERS 5-8 (2010).

in *sastras* were non-enforceable.[127] Such generalisation must be examined cautiously, since there is a danger of value-evaluation of different cultures on the premise of a very parochial meaning of law supplied by legal positivism, coming out of power-relationship between governor and governed. Such a value judgement is as good as comparing *homo sapiens* with *modern economic man* and claiming superiority of latter over prior. As Derrett explains:

> 'In a tentative conclusion it will be possible to show the distinctions actually observed in the sastra itself, both in theory and in what we know of practice, between what is known in the West as legal commands as opposed to that which is generally understood to be excluded by them, namely (merely) religious commands. At the outset, however, it is necessary to make plain that, as regards validity, all commands to be found in the sastra were equally binding, and that no command which was enforceable in the Western sense lacked the character of being religious also'.[128]

It is apt to refer Ashis Nandy who claims that 'the nature of statecraft is perfectly secular'. There is no legal system in the world which is not secular.[129] The function of administration and governmentality is a secular act. Even if, law may have its theological origin, but when it comes to application of it for governance, administration, and adjudication, its character is very much secular in nature. It is true that ancient Indian jurisprudence did not separate law from righteousness. The source of obedience of law was not power rather the virtue.[130] Concept of righteousness cannot be treated strictly a theological concept. In Sanskrit, it is translated as *sadacara*, i.e., *sat acara* (good conduct). Good conduct may be conceptualized in theology, ethics, and literature. It may be determined through customary practices as well. Another controversy is whether laws prescribed in *Dharmasastras* may be treated as obligatory just like legal positivists conceive the idea of law. On this question, Derrett rightly reframed the question and asked if law persisted in *sastras* were enforceable to conscience or it had obligatory nature with respect to the penalizing authority of king.[131] In words of Duncan Derrett:

> 'The fruitful distinction for us…is not between legal and religious command, but between that which was merely binding in conscience, and that which was, apart from the conscientious sanction, capable of being enforced by the king or his officer in the course of judicial proceedings'.[132]

---

[127] Henry Maine, ANCIENT LAW 16-21 (1861).

[128] Duncan Derrett, *Supra* note 28 at 77. *See also*, Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab trans., 1922, 2005); ('The central concepts of modern state theory are all secularized theological concepts').

[129] Rajiv Mehrotra, *In Conversation - Prof Ashis Nandy*, YOUTUBE (01 Apr., 2015*), available at*: https://www.youtube.com/watch?v=TGaiygrqnD0 (last visited Jul., 10, 2022).

[130] Duncan Derrett, *Supra* note 28 at 30.

[131] Duncan Derrett, *Supra* note 28 at 76-86.

[132] Duncan Derrett, *Id.*, at 77.

In spite of the fact that there were multiples sources of law, including *dharmasutras* and *dharmasastras*, custom never lost the relevance as a source of law. Most of the courts relied *sastric* laws as one of the most authoritative sources but did not neglect customary laws rather many of its features were absorbed in the *sastric laws*.[133] It was declared by *smriti* that every law suit rests on four feet; *dharma* (righteousness), *vyavhara* (practice), *caritra* (custom and usage), and *raj-sasana* (royal-decree). And each latter source overruled the prior.[134] Probably, *raj-sasanas'* importance as a source of law grew during the Maurya Empire.[135] Despite the fact that *sruti* and *smriti* were considered as the highest sources of law, the *sadacara*, *sistacara*, or *caritra* had great significance, especially when the *Vedas* or *sastras* were silent on certain legal issues. Some Indologists believe that *sastric* laws were not merely prescriptive code rather they were recorded from the social practices.[136] Thus, the Vedic and Post-Vedic age exemplified the multiple ordering of law and legal institutions in which nature, society, ethics, and religion were intermingled. Neither strict separation was desirable nor was it endeavoured to achieve. It is quite evident that nature was the source of morality as word *Ṛta* used in *Rigveda* signifies this notion, very akin to what Marx talks about Naturalism of humans and humanism of nature.[137] The politico-legal order in such societies were based upon sentiments and not strictly governed by hierarchy and subordination. In early Vedic age, social harmony was conceived in terms of natural equilibrium. Interference in natural phenomenon was believed to be one of the many causes which brings disruptions to the social harmony, as it is believed in many tribal cultures even in contemporary time. Nature was then not believed as crude matter to be exploited, rather it was the inspiration of social order.

Rituals were rigorously performed so as to contribute in the sustenance of natural and social order. Mythology in poetic and aphoristic form evolved to convey the meaning which was impossible to communicate effectively through detailed words or sentences in prose. The wisdom of community was transferred from one generation to another in oral form without positing it in text until scriptural tradition came into existence. The rationalistic approach of understanding law, nature, and culture suspected the dichotomy of law and religion in early modern period. The suspicious gaze resulted into disenchanted world-view.[138] The life of positive law was established after divorcing it from nature, religion, culture, and historical movements. For ancient Indians, law (*dharma*) was the highest source of justice, which was above any king or minister. All the sources of

---

[133] Robert Lingat, *Supra* note 32.

[134] Duncan Derrett, *Supra* note 28 at 148-170.

[135] R.S. Sharma, *Rajasasana: Meaning, Scope and Application*, 37 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS 76 (1976).

[136] Donald R. Davis Jr., THE SPIRIT OF HINDU LAW 146 (2010).

[137] Karl Marx, ECONOMIC & PHILOSOPHIC MANUSCRIPTS OF 1844, 44 (Andy Blunden trans., 1844, 2000).

[138] Max Weber, THE VOCATION LECTURES 13 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

law, as explained earlier, were free from Positive State in their developments except *raj-sasana* whose existence was based upon the common consent of people. These sources exemplify the pluralistic conception of law prevalent in ancient Hindu systems of law.

(c) Legal Pluralism in Post-colonial India

In post-colonial India, legal centralism was established around Positive State and its associated court systems, however, some departure could be seen in context of Alternative Dispute Resolution (ADR) mechanisms and revival of *nyaya panchayats* as a subordinate judicial body to official courts. Such imitative gestures vis-à-vis informal legal traditions shaped a hybrid institutional mechanism so much so that state and non-state legal institutions mimicked and produced each-other.[139] Example may be advanced in context of ADR mechanisms, which were established to deviate from the official courts' procedural rigours infected them since the inception of their establishment. Every attempt to bring simplicity in institutional and procedural mechanisms has proved to be counterproductive. Since, the institutional setting was conceived within the structural configuration of statist legal centralism.

Arbitration, conciliation, mediation, *lok adalat*, and *nyaya panchayat*, etc., though, mimic indigenous institutional practices in resolving the disputes, but in reality, they remain functioning as the subordinate bodies of Positive State and its 'bureaucratic rationality' in Weberian sense. Especially, commercial arbitration has become a privilege earned by a few elites, to whom it is serving. The parties to the arbitration are entitled to mutually determine not only the forum and procedure but also the rules that will be binding on the forum. Appropriately, the commercial arbitration may be conceptualized as 'privatization of justice'.[140] The privatization of justice, including criminal justice administration and political sovereignty in Common Law tradition has a long history.[141] 'Possessive individualism'[142] fosters the privatization of justice whose foundation could be seen in the human species abstracted from their culture, collective psychology, and mediate and immediate circumstances of the community.

The Post-colonial India, in its initial phase, was caught in a dilemma either to revive indigenous legal systems and their cultures or adopt the modernized institutions developed in the West.[143] Some of the founding fathers of modern India believed that India had a regressive past vis-à-vis its village life as well as so-called lower castes and women, therefore it is viable to reject the values and principles upon which ancient

---

[139] Upendra Baxi, *Supra* note 34 at 243.

[140] Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J.L. & PUB. POL'Y 578 (1999).

[141] Arther Baridale Keith, A CONSTITUTIONAL HISTORY OF INDIA: 1600-1935 15 (1936).

[142] *See generally*, C.B. Macpherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962).

[143] Marc Galanter, LAW AND SOCIETY IN MODERN INDIA 15-36 (Rajeev Dhavan ed., 1989).

Indian societies were organized.[144] The *suspicion* over the practicing values of ancient Indian past facilitated the imitation of so-called superior civilizations, its institutions, principles, and cultures.[145] Post-colonial India, by and large, adopted most of the common law legal principles (and practices) and marginalized the idea of Social State flourishing in pre-colonial India.[146] In spite of such marginalization, the glimpses (of legal pluralism) of pre-colonial India were not completely abolished. Many of the organizing principles of modern India carry the ancient way of life in a hybrid form. Villages and tribal communities are still governed by the social customs, applicable in every stage of life. Traditional values and modern cultures have created only a 'hybrid state of society', consisting of ancient, medieval, and modern values, though latter is hegemonic in Gramscian sense to the extent that ancient and medieval customary practices are tested at the touchstone of modern values imitated from the West by Positive State.

Ordinarily, social life is still governed and regulated by customs. From the birth of child to marriage or death of a person, the *mantras* of *Vedas* and *Puranas* are used during the course of performing religious rites. It is only in those cases, when the *pathos* of the community is visible, one relies on the Positive State and its official institutions for the solution of problems, such as the disturbance of social equilibrium and the public disorder. Earlier, the issue of public order was resolved by informal institutions like *panchayat* or *elderly council*, which lost the relevance and utility during the colonial period, when the official courts were established and, in that way, informal institutions lost their relevance. The attempt to revive *Panchayati Raj* institutions in official set up has only proved as a futile exercise, since they are merely functioning as the subordinate bodies of Political State and being governed through bureaucratic rationality. The informal institutions do not have any fiscal independence to take the autonomous decision in favor of or to the benefits of community. *Nyaya panchayat* works like a Small Causes Court, whose functioning is not that significant in addressing the grievous malaise emanated in the society. There are multiple examples which may substantiate the proposition that Social State is silently breathing, but its existence is too dim to be recognized before the hegemonic status of positive law created and sustained by Positive State.

Nyaya panchayat in post-colonial India was established to fulfil the aspiration of *gram swaraj*, a social reality of pre-colonial India. However, such institution has become an

---

[144] Christophe Jaffrelot, DR AMBEDKAR AND UNTOUCHABILITY: ANALYSING AND FIGHTING CASTE 110 (2006); (In words of Dr. Ambedkar, 'What is the village but a sink of localism, a den of ignorance, narrow mindedness and communalism? I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit').

[145] Edward W. Said, *Supra* note 78.

[146] Henry Maine, VILLAGE-COMMUNITIES IN THE EAST AND WEST 103-128 (1871).

empty vessel,[147] carrying the legal culture of official courts and their logic of hierarchy, subordination, and enforcement. The chief characteristics of *panchayat* in pre-colonial India were its informality and non-complexity of procedure[148] as well as its culture of resolving and dissolving the disputes through dialogue and reconciliation. All these characteristics are absent in *nyaya panchayat*, since it is functioning as the subordinate institution of official courts. One may identify the dialectical co-existence between formal and informal institutions in post-colonial India so much so that state and non-state laws and legal institutions create and shape each-other. In the process of dialectics, the hybrid legal traditions and institutional arrangements have emerged, which is advancing a new pattern of plurality.

VI

Conclusion

The primary requirement for undertaking any study in legal pluralism is to imagine law in a broader sense than merely coupling with Positive State. Pre-colonial India offers rich landscape of pluralism in law and legal administration. Many reminiscences of these survive today; either eclipsed or overshadowed by the mono-cropping of legal positivism. The issue of access to justice in Social State (tribes, villages, and clans, etc.) was insignificant since it had status of social good. Its status was transformed in the colonial period when British overhauled the structure of law and legal institutions and instrumentalized the access to justice as a scarce commodity for sale and purchase in a 'professionalized market of justice'.

The issue of access to justice is fundamentally connected to the structure of legal institutions and their functioning. It is evident from the analysis that plurality of legal institutions and their functioning dissolves the problem of access to justice and a centralized legal institution on the contrary, problematizes it. This statement could be understood in context of evolution of the centralized legal tradition emerged through Westphalian model of state. The problem of access to justice has further aggravated under the unholy alliance of market and Positive State.

This problem was absent in a world dictated by plurality of socio-legal institutions and norms. In pre-colonial India, plurality of laws and legal institutions never allowed the establishment of legal profession in terms of market-principle. The plurality of laws could be discerned in multiple interpretations and uses of dharma. *Sadharan dharma*, a manifestation of *rta* (law of cosmic order) was applicable to all, irrespective of the

---

[147] Marc Galanter & Upendra Baxi, *Panchayat Justice: An Indian Experiment in Legal Access* in Rajeev Dhavan ed., LAW AND SOCIETY IN MODERN INDIA 54-91 (1989).

[148] Marc Galanter & Upendra Baxi, *Id.*

differences of identity. The concept of *dharma* had also conventional, temporal, and social character; from individual to king, all were bound by different principles of *dharma*. Plurality was also visible with respect to dispute resolution mechanisms, which were polymorphous, hence, the large section of society was not dependent upon Positive State and its justice administration for the resolution of disputes. King's court was only accessed as the last resort once the other social institutions were failed to resolve the disputes. In this sense, the question of access to justice did not have any significance in the political discourse. Modern liberal state in post-colonial India has only produced a crisis of manifold character, in which the slogan of access has got a paramount place, starting with the constitutionalized principle of equality to the principle of non-arbitrariness, reasonable classification, and equity used by the courts. This rhetoric has only superficially addressed the question of access and inclusion. Structurally, the problem has to be examined in context of the fundamental principles upon which the modern institutions are functioning rather malfunctioning.

The modern (human) being is caught in dilemma of unresolvable kind to choose between market and state-centric bureaucracy to avail the basic goods of necessity such as education, health, food, shelter, medicine, and accessibility of institutions for welfare and peace, etc. The idea of social good has been marginalized to the extent that market principle is rewriting the cultural code of social life and its non-exclusionary principle of access. In this context, the ideal of rule of law is only facilitating the rule of market[149] in a sense that all other virtues in law have been reduced to the instrumentalized logic produced by the market-principle of demand and supply.

Access has become a global problem in a globalized world. This problem is further aggravated by the world institutions, responsible to maintain the *status quo* produced by so called liberal market and its invisible hand. *Glocal* has become a new narrative exemplifying the anxiety of assimilating global and local, but in substance, Social State and its practical principles have been repressed and lost its relevance in the meta-narrative of welfare, development, and progress revolving around Positive State in the modern legal systems around the world. Ancient and medieval Indian communities, in this respect, offer rich mines for pluralists and promise to furnish the solutions to the problems the modern liberal legal systems are facing.

[149] Michel Foucault, THE BIRTH OF BIOPOLITICS 173 (1979, 2008).