TWO-WEEK CAPACITY BUILDING PROGRAMME

On

Access to Justice in Ancient and Medieval India: Revisiting Possibilities and Challenges for Legal Pluralism in 21st Century

16-29 July 2022

Organised by

***Centre for Comparative Public Law (CCPL),* Himachal Pradesh National Law University, Shimla in association with *Indian Council of Social Sciences Research (ICSSR)*, New Delhi**

CCPL, HPNLU, Shimla in association with ICSSR, New Delhi

Indian Council of Social Science Research

About the University

The Himachal Pradesh National Law University, Shimla (HPNLU, Shimla), placed in the geographical terrains of the Himalayas, is among the premier law schools in India. The institution is one of the few educational centres in the country which enjoys natural endowment of mesmeric beauty of location topography and enjoyable weather conditions throughout the year. The University is bestowed with all-natural conditions conducive of seeking, creating, and imparting knowledge. The institution is taking every possible step to achieve excellence in the field of law education and research.

Centre for Comparative Public Law	Indian Council of Social Sciences Research
The *Centre for Comparative Public Law* (CCPL) has been established by HPNLU, Shimla to further advance research in Public aw. The principal objective of CCPL is to undertake studies and investigations about fundamental categories/concepts of public law, advanced jurisprudence, and comparative legal systems.	Indian Council of Social Science Research (ICSSR) was established in the year of 1969 by the Government of India to promote research in social sciences in the country. Among other goals, the Council, sponsors social science research programmes and projects and administer grants to institutions and individuals for research in social sciences.

आज़ादी का अमृत महोत्सव

Conception of the CBP 2022

Access is one of the most celebrated terms of modernism and has acquired status of the foremost slogans of 'liberal progressive agenda' in the 21st century. Often used by policy makers, economists, jurists, socio-political scientist, and technologists,[1] it refers to the spirit of inclusion, absence of barriers, and removal of socio-legal structures responsible for exclusion. Access is, primarily, immanent in the ideals of justice.[2] The broad subject of access raises questions of participation in practices of the institutions, distribution of goods, sharing of power, rewards and punishments, etc. It requires a system of law and legal administration. The availability and working of a 'people' centric corrective justice dispensation system constitutes prerequisite for access. An institution centric adjudicatory mechanism serves to make human social existence means for the legal system, in its own right, legitimizing it and survives as an end in itself.

The tensions between access and in-access (denial), and consequently, the incidence of inclusion and exclusion are immediately rooted in the very structure of social order produced by the 'law'. Ultimately, however, it embodies and stands firmly on the conceptual categories found from history, culture, and organizing values in philosophy. The dominant categories, in modern India, were received from the West during European suzerainty.

Cultural influences of epistemic practices are often underrated by social and political theorists in understanding the influence of colonization over the Southern countries. Power in traditional sense is easily perceived since it manifests without ambiguities. In cognitive and epistemic form, power is not easily observable and the subjects and agents both take it for granted as if it is their own voice. The solution to the problem requires a process of unlearning. Mohan Das Karamchand Gandhi was, perhaps, the first Indian, who realized the importance of unlearning. Gandhi believed that, 'India needed to unlearn what she had learnt during the colonial years. Indeed, *for Gandhi, it was the Western educated elite who most needed to "unlearn" its attachment to a civilization that had degraded not just India but most of the world. India would do better to loom inwards, to return to and revive its traditional institutions*. In Hind Swaraj,

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1 See, Jeff Orlowsji, *The Social Dilemma Documentary*, NETFLIX, *available at*: www.netflix.com/us/title/81254224?s=a&trkid=13747225&t=cp&vlang=en&clip=81275293 (last visited on 10 Apr., 2022).

2 Upendra Baxi, *Access, Development and Distributive Justice: Access Problems of the 'Rural' Population* 18 (3) JILI 376 (1976).

Gandhi associated this path to true self-rule with the pursuit of self-reliance'.[3] K. C. Bhattacharya has described the problem as 'the slavery of spirit':[4]

> '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.'

The normative as well as empirical ideas, that of 'justice' and of 'access to justice', are integrally dependent on the dominant models of law. The dichotomy of law and justice is a product of modernism. Roman jurists, for example, had single expression, *ius* or *jus* for both, law, justice or right. For them, law was an articulation of the community's conception of justice. Justice alone created and sustained order; and when dissociated from it, the law became a source and an instrument of disorder.[5] The concept of justice was inseparable from the concept of righteousness, which created good order. Identically, ancient conception of *Dharma,* signified duties as well as the sense of righteousness- what is the right way to conduct one's life or social transactions.

Dharma, has its root in Sanskrit *dhatu* (mother) '*dhri*', which literally means to hold, to own, to 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 the community. Rather, opposite of it, the king and the community were under a 'pure duty' to dispense justice and uphold the social order'. Justice, then, had the identical status of being a common good as air, water or other natural resources. Here a pure social/public good refers to anything, tangible or intangible, the production and distribution (of opportunities of access) of which cannot be afforded to be left to, what are known, today, as the norms of the market: demand and supply through invisible hands. In such a model, the issues and talk of 'access', premised on the theories of liberal rights and claims, operationalized through

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[3] *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 on 12 Apr., 2022).

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

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

exclusive professionals, would have little or no meaning. The problem would be only relevant to be discussed the other way around: the main issue would be 'absolute duties of the community' to disburse justice!

The peculiarity about liberal legal system 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 the law. It has a self- declared claim to the ultimate 'truth', and a practical project for the universalization of the particular approach towards legal categories. The sustenance of positivism is drawn from the liberal belief in 'institutional fetishism'.[6] The law and its methods are concerned with creation of monopoly expelling the vast varieties of practices, branded as non-legal social norms.[7] 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.[8]

Justice dispensation, according to the law, epitomizes the principle, be it the professions at the Bar or the Bench or that of orders of the justice forums. The approach to social order which is grounded in domination and subordination of ranks through the lenses of power, obviously, denounces that access to justice is, primarily, a moral and cultural problem. The Western paradigm treats the problem of access as multiple issues of *techniques*, legal technology, and procedures.

The well-known Latin maxim, *Ubi jus ibi remedium,* signifies the spirit of Access to Justice. In other words, what is the meaning of a right if its violations do not get remedied? Any substantive rights would be meaningless, in its all formal declarations, unless there is a system of adjudicatory mechanisms, which affords effective remedies against it.

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6 Roberto M. Unger, WHAT SHOULD LEGAL ANALYSIS BECOME? (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.' *Id. at* 2-7.

7 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,* Waynie Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST MODERNISM 329 (1997).

8 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 on 20 Apr., 2022).

Adjudicatory mechanism cannot be usefull unless it is backed by a radical possibility of 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 privileged groups, classes, or persons. The substantive openness requires availability of the forum and the remedy from it to all, which is not contingent upon individual capacity and the will to change the course of action. Franz Kafka's '*The Trial*' demonstrates this paradox succinctly.[9] Giorgio Agamben's *Homo Sacer,* elucidates this 'state of in-distinction' in the following aesthetically expounded words:

> '…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.'[10]

Agamben, further, 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.'[11] The contradictory state of affairs, fortifies further the tensions between access and in-access in liberal legal order. Access, in symbolic sense, is universally

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9 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 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"].

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

11 Giorgio Agamben, *Id.* at 49.

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 39A, symbolize the Kafkaesque riddle.

Law has regulatory, emancipatory as well as repressive potential. 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.'[12] The ruling concept of law, in the liberal legal and political theory, simply, identifies law, nation and the state. The phenomenon of state monopoly, of law and legal processes, has a history not more 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.[13] Legal pluralism emerged, in nineteenth century, with the studies in indigenous forms of law in the third world. Earliest debate started with early anthropologists who undertook 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.[14] In the twenty first century, Legal pluralism has become one of the central themes in the reconceptualization of the law/society relation.[15] John Griffith, defines legal pluralism, 'as that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.'[16] Sally Merry defines it, to mean, 'a situation in which two or more legal systems co-exists in the same social field.'[17]

In modern India, there are illusionary appearances of pluralist law and legal processes. For example, Gram Nyayalaya,[18] Gram Panchayat[19] Family Courts, methods and modes of alternative dispute resolution mechanisms, and tribal councils[20] in Scheduled

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12 Boaventura de Saousa Santos, TOWARD A NEW LEGAL COMMON SENSE 85 (2002).

13 *Id.*, note 8 at 85.

14 *See generally*, Bronislaw Malinowski, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926: 1940).

15 Selly Engel Merry, *Legal Pluralism*, JOURNAL OF LAW AND SOCIETY ASSOCIATION 872 (1988).

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

17 *Id.*, note 46 at 870.

18 The Gram Nyayalayas Act, (2008), Act No. 4 of 2009.

19 *See generally*, the Relevant laws, Panchayati Raj Acts, enacted by different states in India.

20 *See* Articles 244, 275, 371-A-371-J read with Fifth and Sixth Schedule to the Constitution of India 1950, and different Councils, their power and jurisdiction etc.

Areas etc. Further, though there are significant departures in respect of the standard (civil & criminal) procedure, these grassroots judicial forums are bound to follow. These forums are, yet tied to the overall ranks of hierarchy under the general system of judiciary. Most importantly, however, the Gram Nyayalaya and Panchayats are bound to follow the general 'state law'. Obviously, attempts to puruse the methods and objectives of pluralism are, conspicuously, absent. A, contrary but unique position of, in the ways discursive to the dominant liberal paradigm of law and judicial techniques, is to be found in the status of 'commercial arbitration'. 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 institution is challenged as the 'privatization of justice'.[21] The privatization of justice, including criminal justice, and political sovereignty, in Common Law, has a long history.[22] The very possibility of privatization pre-supposes possessive individualism and the man abstracted from his culture, collective psychology, mediate and immediate circumstances of his community.

The legal pluralism, conversely, is concerned with norms and practices of the accumulated cultural-legal traditions and the psycho-cognitive identity of the particular community, in which a being is an integral part and occupies a unique ontological location within it. Heidegger neologized it as 'facticity'.[23] The fact that multiplicity of 'the laws', legal forums, and courses of justice administration co-exist, at the same time, in a given society, call for a larger movement for the study of societies in India. This is different from decentralization of politico-legal power and administration.

The primary requirement, therefore, for undertaking any studies in legal pluralism, is to look upon law, relatively, 'law uncoupled' from the modern state. The necessity of decoupling law from state, tentatively, would necessitate re-reading of state laws and many constitutional provisions. The pre-colonial and colonial periods offer rich landscape of pluralism in law and legal administration. Many reminiscences of these, survive today, eclipsed or overshadowed by the monocropping of the modern positivism. "Access" in the culturally-cognitively assimilated law and informal legal forums (in tribes, villages, clans, etc.,) are easier and invariably found in every society. Indian communities, in this respect, offer rich mines for pluralists, which, at the same time, promises to furnish solutions and salvation for the problems the modern liberal legal system is facing in India.

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

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

23 Martin Heidegger, BEING AND TIME 127, 231 (Jon Stambaugh Trans. 1953, 1996).

Glimpse from the past

CCPL organised the maiden edition of the Capacity Building Programme in July 2021. The title of the CBP was – *Comparative Public Law and Hindu Philosophy: Research and Teaching Dimensions in 21st Century India*. Eminent scholars in the field of law conducted sessions on various aspects of the topic including but not limited to figures such as – **Hon'ble Mr. Justice V. Ramasubramanian** (Judge, Supreme Court of India), **Prof. Upendra Baxi** (Professor Emeritus, Jindal Global Law School), **Prof. M.P. Singh** (Professor Emeritus, University of Delhi), **Prof. I.P. Massey** (Dean, National Law University Jodhpur), **Prof. A. Laxminath** (Eminent Professor, HPNLU, Shimla), **Prof. Virender Kumar** (Founder Member and Former Director, Judicial Academy, Chandigarh), **Prof. Makarand Paranjape** (Former Director, Indian Institute of Advanced Studies, Shimla), **Prof. M.R.K. Prasad** (Principal, Salgaokar Law College, Goa), **Dr. Madhav Janardan Ratate** (Head of the Department, Department of Dharmashastra and Mimamsa, Benares Hindu Univesity), **Dr. Ashutosh Dayal Mathur** (Associate Professor of Sanskrit, Department of Sanskrit, St. Stephens College)) among others. The topics of discussion encompassed areas such as – *Relevance of Mimamsa and Nyaya Philosophy for Contemporary Public Law in India, Indian Traditions of Human Rights, The Hindu Philosophical Thought and Human Rights - I & II*, etc. The CBP in 2021 was organised through the online medium and witnessed immense enthusiasm and participation from scholars across the country. Building on the foundation of the first CBP, CCPL & ICSSR brings to you the second edition of the CBP bearing the overall theme in similar lines.

About the Capacity Building Programme (2022)

Centre for Comparative Public Law (CCPL), HPNLU, Shimla in association with the ICSSR, New Delhi is organizing this Two-week intensive capacity building programme for interested candidates from the field law, social sciences, and philosophy. The CBP would be conducted in the University Campus at Shimla. The programme shall focus on the areas delineated in the concept note. The resource persons and trainers from across the country in the field of ancient legal and philosophical knowledge systems shall conduct sessions during the CBP. The programme is expected to help participants in building foundations for further research and development in the field of study.

Objectives of the CBP

The nature and the width of the subject is quite vast. The Programme proposes to derive possible insights, by connecting the themes of 'access to justice; pluralism; and indigenous norms, institutions, and institutional practices. This is truly a gigantic task, feasible to be touched only peripherally in a programme such as the present one. In view of these, the *CCPL*, intends, modestly, proposes to concentrate on the objectives given below. The immediate objective, apart from those below, is that the subject may be appreciated, in its full import, through insights gained from the eminent resource persons during the two weeks of deliberations –

1. To examine the functioning of institutions responsible for administration of justice in modern India.
2. To investigate the challenges Indian Legal System faces in contemporary time.
3. To elucidate the efforts of Indian governments, parliament, and judiciary made to overcome the challenges for 'access to justice' in post-Independent India.
4. To discover the principles and conventions revealed or embodied in Vedas, Dharmasutras, Dharmashastras, tribal indigenous practices
5. To understand Mimamsa and Nyaya schools of philosophy and their role in the development of ancient Indian justice administration.
6. To address the challenges by providing adequate suggestions for the improvement of Indian Legal System in context of its accessibility;
7. To examine if some of those ancient Indian legal principles may be revived for the improvement of the conditions for access to justice in Modern India;
8. To investigate the question of legal-pluralism in context of Indian Legal System of ancient and medieval India.

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Tentative List of Topics/ Broad Thematic Areas for the CBP
Access to Justice in Ancient India – Fundamental Principles Discernible from Shrutis
Mimansa Rules of Interpretation
Theories of Knowledge & Indian System of Logic – I & II
Relative Location of Community, King (Political Authority), and Autonomous Existence of Law in Ancient and Medieval India – I
Tribal Culture and Justice Dispensation System
Access to Justice and Fundamental Principles under the Constitution of India
Modern Technological Developments and Challenges to Legal Pluralism
Liberal Legal Profession and Capitalistic Spirit
Liberal Legal Profession and Challenges to Legal Pluralism
Access to Justice in Modern India – (In)Compatibilities of Legal Aid and Pro-bono Lawyering as against the Historical and Cultural Norms of Ancient India
Possibilities of Incremental Change in the Contemporary Legal Institutions and Principles
Basic Tenets and Hindu Philosophy and their (in)compatibility with the Western liberal Law and Economic Systems
Insights from *Vyavahara* Rules for Justice Dispensation in Modern India
Modern Philosophical Pluralism and Cultural Influences in Legal System and Formal Legal Institutions
Crisis of the Indian Legal System: Lessons from Ancient India
Access to Justice as a Facet of Human Rights
Problem of Research Methodology with respect to Ancient and Medieval Literature

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