TWO-WEEK CAPACITY BUILDING PROGRAMME

On

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

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***Concept note:***

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## Introduction

'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 & 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.

Colonial objectives of the European powers were accomplished through brute force as well as the Western epistemic practices.[3] The history of violence, in its crude form, is easily discernable with its genocidal practices where (entire) tribes and communities were persecuted and, in many cases, decimated.[4] The epistemic practices justified and rationalized the acts and consequences of the violence. It, however, notably annihilated the entire traditions of alternative knowledge systems:[5] science, medicine, law, philosophy, and historical-cultural capital of such societies. While former was achieved, chiefly, by violent might of colonial powers, the latter aims

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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) JOURNAL OF INDIAN LAW INSTITUTE 376 (1976).

3 For e.g., 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).

4 *See generally*, Amitav Ghosh, THE NUTMEG'S CURSE: PARABLES FOR A PLANET IN CRISIS (2021).

5 *See generally,* Edward W. Said, ORIENTALISM (1978).

were furthered through embracing of the alien cognitive and epistemic practices, as epitome of knowledge, by native people trained and conditioned in modernity. Law and the legal system, in India, represent the primary subject matter of such cognitive practices.

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, Gandhi associated this path to true self-rule with the pursuit of 'self-reliance'.[6] K. C. Bhattacharya has described the problem as 'the slavery of spirit':[7]

> '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.[8] 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

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6 *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).

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

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

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 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!

These are two paradigmatic world-views of justice, the first being fraught with moral problems, logical incoherencies, and inherent contradictions.

Historical and anthropological studies have established that every community and people have a unique psyche or soul. The alien epistemic and institutional practices are bound to be, therefore, counterproductive.[9] The traditional models of jurisprudence and the methods of scientific study, have faced decisive challenge in the previous century. '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'.[10] As far as the law, judicial institutions, and administration thereof are concerned, there is a general agreement, that all is not well with the *modern* Indian legal system.[11] It is noteworthy that there is a subtle but significant difference between the modern Western systems of knowledge and that of the South.

It is the characteristics of the Western knowledge systems, for example, law or natural science, that it tends to monopolies the entire field, the common law legal system is a vibrant example. Whereas, India's own historical and socio-cultural experience make it abundantly clear that whatsoever field it may be, including law and judicial process, competing varieties (plurality) have not only been

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9 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 'the self-generation of legal norms'. *See,* Selly at note 47. *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).

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

11 For e.g., Hannah M Varghese, *The Legal System Works Differently For The Poor': Orissa High Court Chief Justice Muralidhar* LIVELAW.IN (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 on 16 Apr., 2022).

continuously existing but have also been believed to be desirable. It is clear, therefore, that pluralism of the West is of recent origin and of different kind. Indian communities, on the other hand, have lived for thousands of years, by the rich heritage of diversity. The uncritical 'reception'[12] of Common Law, institutions, and judicial techniques, in independent India, therefore, has caused, obviously, more socio-economic problems than what its parent countries face today. In many streams of liberal studies, 'liberalism' is branded as a failed project of the West, and pluralism (of post-modernism), an offspring of modernity, is looked upon as its deliverer!

**Liberal Law and Tensions Between Access & Denial (Exclusion)**

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'.[13] The law and its methods are concerned with creation of monopoly expelling the vast varieties of practices, branded as non-legal social norms.[14] 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.[15]

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,

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

13 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.

14 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).

15 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).

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.

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 being innovated by the Union Government, respectively. Roberto Unger has hypothesized this phenomenon as rationalizing and humanizing tendencies, which ensure the stalling of the transformative change a legal system may witness in its evolutionary ascendance.[16] 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 legitimation of epistemic practices while causing epistemic violence against non-western paradigms of ontology, deontology, moral psychology, law, and epistemology. Uncritical reliance upon authority, may sometimes, culminate into 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, has 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 fulfills his obligations to authority. They refer not to the goodness of the person *per se* but to the adequacy with which a subordinate fulfills his socially defined role. The most frequent defense of the individual who has performed a heinous act under command of authority is that he has simply done his duty… . In asserting this defense, the individual is not introducing an alibi concocted for the moment but is reporting honestly on the psychological attitude induced by submission to authority'.[17]

Hannah Arendt in her work, '*Eichmann in Jerusalem*: *A Report on Banality of Evil'*, has explained the dilemma of a modern bureaucratic person who loses the capacity to think and feel and surrenders itself before an external authority without judging the moral aspects of

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16 *Id.* Note 13.

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

the rule or the command.[18] The tendency towards obedience of the rule of 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 his, '*Escape From Freedom'*, shows how a command of higher authority (here liberal law) or an aspiration of a group, is uncritically obeyed to the extremes of its (commands') 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 Dostoevski, 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'.[19]

The problems of access to justice, or its opposites, and possibilities of legal pluralism, in India, need to be studied in these backgrounds. As far as, the access to justice, in liberal legal system is concerned, to ordinary people, it appears a monster or a leviathan better to be avoided, kept away, if possible. Paradoxically, the common man is compelled to believe, if you fight against a monster, you will become one of them, you will become a monster too.

## International and National Legal Framework for Access to Justice

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). Article 6, of the UDHR declares, 'Everyone has the

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[18] 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").

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

right to recognition everywhere as a person before the law'.[20] Article 7 proclaims that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.[21] Article 8, specifically recognizes right to Access to remedy, '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'.[22] 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'.[23]

The entitlement for the Access to Justice is recognized by Constitution of India. Article 14 of the Constitution guarantees, 'The State shall not deny to any person equality before the law and the equal protection of the laws within the territory of India'[24]. Indian 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.[25]

Order XXXIII, rule 18 of the Code of Civil Procedure, 1908,[26] lays down that State shall provide free legal aid to poor people. Section 303 of the Criminal procedure Code, 1973,[27] prescribe that, 'every accused person has a right to be defended by an advocate of his or her choice'. Section 304 of the Code lays down rules for free legal aid to poor and indigent persons at the expense of the State.[28]

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20 Article 30, UNIVERSAL DECLARATION HUMAN RIGHTS, (1948).

21 *Id.*

22 *Id.*

23 *Id.*

24 The Constitution of India, 1950.

25 *Id.*

26 Order XXXIII, rule 18 of the Code of Civil Procedure, 1908, prescribes: '*Power of Government to 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.'

27 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'.

28 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".

In spite of all these legal provisions, Access to Justice has been a distant goal for ordinary masses. The Supreme Court's initiative to 'take suffering seriously'[29] since *Hussain Ara Khatoon*,[30] resulted into the birth of the National Legal Services Authority established 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'; person 'in custody'; or person 'in receipt of annual income less than rupees nine thousand'.[31] 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'.[32]

In *Anita Kushwaha* v. *Pushpa Sadan*,[33] 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'.[34] Recently, the Chief Justice of India, Justice Ramanna, highlighted the inclusiveness of legal aid scheme in India.[35] Because of non-application of 'means test', the program covers 70% of Indian population.[36] NALSA has recently introduced 'Legal Aid Defense Counsel System' on a pilot basis, wherein lawyers are being engaged on a full-time basis in cases adjudicated in the District-Session Courts.[37] 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.[38]

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

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

31 The Legal Services Authorities Act, 1987.

32 *Id.*

33 (2016) 8 S.C.C. 509.

34 *Id.*

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

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

37 *Id.*

38 *Id.*

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 & Legal Awareness Program".[39]

As per data available, in 2019, only 54% of the total Indian population has accessibility to internet.[40] This data may have slightly improved by now. but the digital divide, not only population wise but also demography wise, in India 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.

## Access to Justice and Challenges Ahead

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. Adjudicatory mechanism cannot be useful 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.[41] Giorgio Agamben's *Homo Sacer,* elucidates this 'state of in-distinction' in the following aesthetically expounded words:

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

40 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 on 10 Apr., 2022).

41 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

> '…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'.[42]

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'.[43] The contradictory state of affairs, fortifies further the tensions between access and in-access 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 39A, symbolize the Kafkaesque riddle. Normative order is organized as ideology and behind its curtain the *status quo* is preserved, either attached to class interest or it facilitates some privileged professions. Carl Schmitt, in his classic work, on 'Constitutional Theory', has explained the connection between the Constitutional law reforms and its role in protection and preservation of the current order:[44]

> 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…. . An especially differentiated concept arose in this way. More specifically, it is no longer self-evident that every state has a constitution. Yet there are states with and those without a constitution, "constitutional" states and "non-constitutional" states. One even speaks of a "constitutional state constitution," of a state constitution that corresponds to a constitution more precisely, which would be nonsensical if a particular political program did not lie behind the concept of a constitution.[45]

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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"].

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

43 Giorgio Agamben, *Id.* at 49.

44 Cark Schmitt, CONSTITUTIONAL THEORY 89 (1928).

45 *Id.*, at 89.

A characteristic way out, is, not to be found, in the liberal law itself but certainly outside the ruling models of it. Pluralism may offer numerous insights. Ancient epistemic systems and institutional practices may contain answers to the today's problem of access to justice. It is noteworthy that the tradition, in India, did continue into entire medieval period. A distinctive feature of Indian legal pluralism can be traced to the fact that the pluralistic practices were not circumscribed by a monopolized over-aching system of rank and subordination: state. The unique possibility and challenges to the pluralism, in India, are, tentatively, described below.

**Pluralism and Access to Justice**

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'.[46] 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.[47] 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.[48] In the twenty first century, Legal pluralism has become one of the central themes in the reconceptualization of the law/society relation.[49] 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'.[50] Sally Merry defines it, to mean, 'a situation in which two or more legal systems co-exists in the same social field'.[51]

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

47 *Id.*, note 8 at 85.

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

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

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

51 *Id.*, note 46 at 870.

In modern India, there are illusionary appearances of pluralist law and legal processes. For example, Gram Nyayalaya,[52] Gram Panchayat[53] Family Courts, methods and modes of alternative dispute resolution mechanisms, and tribal councils[54] in Scheduled 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'.[55] The privatization of justice, including criminal justice, and political sovereignty, in Common Law, has a long history.[56] 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'.[57] 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.

Dharmasastras and Dharmasutras provided various social rules regarding administration of justice in Post-Vedic period, which were, on the one hand, not dependent upon king and its sovereign function to administer justice, on the other hand, it was not decided by parties. The rules were socially located in the psychic experience of the community. Legal pluralism is possible in a culture where social harmony is conceived in terms of natural equilibrium. Interference in natural phenomenon disrupts the social harmony, as is believed in many tribal cultures. Similar approach is found in the system of ancient and medieval India. in Vedic Communities, when nature

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

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

54 *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.

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

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

57 Martin Heidegger, BEING AND TIME 127, 231 (Jon Stambaugh (trans.), 1953, 1996).

was considered as sacred- moral whole, whose laws were discovered and embraced in social and cultural life of the community. The socio-legal order, in such societies, was based upon mutually exclusive logic without relying upon hierarchy or authority.

The most desired objective of such communities was to maintain harmony in social and natural order. Nature was, then, not believed as crude matter, rather it had a moral worth and dignity. Rituals, in such societies, provided religious and social meaning to the community. Mythology, poetry, and sign languages were developed to convey the meaning which are impossible to convey effectively through words or sentences in rationalistic sense. The wisdom of community was transferred from one generation to another generation in oral form without positing it in textual sense. Such a tradition was flourishing since the goal was not to salvage individualistic ego of an author rather to transmit wisdom. The emergence of written tradition of knowledge became possible in an individualistic culture of authorship, incentivization, and innovation.

The rationalistic approach to law and culture suspected the camouflaged dichotomy between nature and religion in the early modern period. The suspicious gaze resulted into disenchanted world-view; the life of law was established after divorcing it from nature, culture, and historical movements. For example, for Hindus, Law was the highest source of justice, which was above any king or minister. All sources of law were, in those societies, de-hyphenated from the power of state. *Sruti*, *Smriti*, *Sadachaar*, and *atma-santushti* (self-satisfaction) were considered as the sources of law. These sources reflect the plural conception of law, prevalent in the Hindu systems of law. Werner Menski in *Sanskrit Law: Excavating Vedic Legal Pluralism*,[58] 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'.[59]

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

59 *Id.*

## *Objectives of the Programme*

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 Centre for Comparative Public Law*, intends, modestly, proposes to concentrate on the objectives given below. The immediate objective 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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