

The Labyrinth of Law in India

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Abstract

This paper seeks to reflect on a wide range of themes. The discussion of the dominant, European philosophies of law and its critique propounded by one of the finest legal scholars in India, Chhatrapati Singh were done. The paper also aims to look at the journey of law in India, from overlapping jurisdictions as existed in pre-colonial times, to the establishment or rather imposition of a foreign legal system by the British. This leads us to understand how 'law' reached its present form, in Article 13 of the Indian Constitution. In the latter section, the transformation of law in its localization, and its pointing towards the fact that there is little resemblance to written law was indicated.

Keywords: Labyrinth; Law; India; Jurisdictions

In Search of Law

The recognition that even in the simplest form of society some forms of rules is necessary seems almost inevitable. If we look back, some of the best remaining evidence of the earliest societies concerns their systems of law and justice. There existed morals codes and texts like the Code of Hammurabi, the code of Justinian, the Twelve Tables, and the Vedas, all remnants of civilizations that focus on the laws and legal structure governing their societies for centuries [1]. Ancient texts such as the Bible, Quran, and the Torah likewise provide a lasting legacy of law that governed and continues to govern societies. The earliest philosophers also focussed on, in at least in part of their study, the role of law and the best laws that could govern a society. Plato, Aristotle, Cicero, Aquinas, Hobbes, Locke, Rousseau, Montesquieu, Kant and Bentham are some philosophers among these. There is a general agreement amongst most that law is an overarching structure that provides the prism through which we view our interests and our concerns. Law also shapes our perceptions of appropriate standards of behaviour which are required to coexist in a society.

Today while most legal theorists, lawyers and politicians celebrate its virtues and supremacy, many lament its limitations and question its empirical practice. Yet, undeniably, everyone sees law as a vehicle for change and necessary ingredient for continuous upward mobility of the society. Law is perceived as a tool that incessantly works to throw out the 'bad' and bring in the 'good' in the society. Law has a decisive role to play in defining and defending the values and ideals that sustain our way of life. In India, we adopted and gave ourselves the Constitution which recognises certain basic fundamental rights of individuals to outline the contours of the state, and cherish values of liberty and equality for citizens. This reflects its significance in our political, moral, social and economic lives. However, despite the all-pervading existence of law, we live in an inequitable and unjust world.

Discussing such a crucial concept like law with so much of baggage, we may tend to oversimplify and slip into rhetoric when mulling over its proper nature and functions. For a proper understanding of the fundamental nature of law, justice, and the meaning of legal concepts, it is essential that we undertake the analysis of all the related aspects to comprehend its reflection on the society. Unless we understand what constitutes the idea of law, we would not be able to understand the dynamics of existing social systems and their interrelationship with the prevailing legal system.

When we explore the different aspects of law normatively, we find that it is both- empowering the state on one hand, and also restricting

it on the other. It emerges as an indispensable ideal that seeks to define the modern state's sovereignty and establish its contours & periphery. It is taken as the starting point a rather simple definition culled from a dictionary: 'the whole system or set of rules made by the government of a town, city, state or country [2].' In its broadest sense it includes or subsumes 'all patterns of socially expected and approved rule enforcement [3].' Understandably, there is no clear line of demarcation between law and other rules prevalent in societies. As Weber puts it, 'law, convention and usage belong to the same continuum with imperceptible transitions leading from one to the other [4].' Resultantly, 'we may think of law as a part of the continuum in which the sanctions applied to the neglect or infraction of rules involve the use or threat of physical force by an individual or group possessing the socially recognized privilege of so acting [5].' Therefore, Galanter maintains that in order to understand law in India and most other legal systems, merely comprehending contents of texts in a law library is not enough. The law may be understood as stretching from this official lawyers' law at one end to concrete patterns of regulations on the other. Articulating the context is pertinent, and so understands the attitude of the administration and clientele towards it. However, before examining law in India, a short jurisprudential detour becomes essential. It becomes pertinent to understand its philosophy; questions pertaining to relationship between law and force and the sovereignty of law. In the Indian context, it is crucial to understand the evolution of Article 13, how it came about in the constitution in its present form, which can be best understood by examining India's legal history, from pre-colonial times till the framing of the constitution. Author intend to look into few of these themes in sections to come.

Law above All Else?

In modern states, law has become a crucial instrument to ensure indiscriminate and unbiased use of power (it is for later to discuss whether neutrality is the basis of functioning or is it an illusion in practice). Modern law is seen as constituting a new liberating

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Received December 22, 2015; Accepted December 30, 2015; Published January 06, 2016

Citation: Ikshula (2016) The Labyrinth of Law in India. J Civil Legal Sci 4: 164. doi:10.4172/2169-0170.1000164

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instrument of change. As such the legal system represents the amalgamation of diverse interests. Its essential purpose is to balance power and interests to establish supremacy of law and achieve liberty and equality for all. How far this is achieved shall be discussed in the specific case of India, in the last section of the paper. Normatively, most crucial element of jurisprudence is that it establishes a *government of law and not of men*, necessarily ruling out arbitrariness in practice of law and exercise of rights. One may also mention here the oft heard statement by celebrants of law- 'howsoever high you maybe, the law is still above you.' This reflects civil society's endeavour "to combine that degree of liberty without which law becomes tyranny with that degree of law without which liberty becomes license [6]." For any state, it is not sufficient to just have law; it must be fair, just and reasonable law. According to Sorabjee, nationally or internationally, law is essential to curb arbitrariness in decision making to create a culture of rule of law and social justice [5].

Philosophy of Law

Why at all should a society be just? If it has to be, what are the means to achieve a lawful, just and equitable society? Does this law consist of a set of universal moral guidelines in congruence with the nature? Or, is it simply a set of largely man-made, valid rules and commands or simply norms? These are some chief questions that await anyone attempting to crack the gist, the idea and purpose of law. The discussion with European philosophy of law, which dominates legal studies, followed by a critique propounded by Indian legal scholar Chhatrapati Singh. For a preliminary understanding, philosophy of legal studies can be understood through various lenses, some of them being – Legal Positivism, Natural Law and Marxist Theory of Law.

Moral questions pervade our lives. There are situations and junctures where legality of something comes to be defined in terms of its being *natural* or not. The debates about abortion, gay and lesbian marriage, euthanasia are some examples. And it is in thinking of these examples that we can contend that laws do not exist in a vacuum, they are based on moral codes. From ancient times there exists a notion that a law exists above men, above those in power, above the sovereign. The norms that have this character have been called Natural Law. Its main claim, put simply, is that what naturally is, ought to be. In its antiquity, natural law was grounded in its entirety in religion. While the God and Ten Commandments are the sources of Christian law, *ius naturale* was the source of Roman law. Indian law in pre-colonial times was too, grounded in religion. While Hindu law was originated in *Dharmasastras* [7], Islamic law is exercised according to the *shari'ah* [8].

Throughout the Middle Ages natural law served the interests of the Church and Papacy in Europe. However, with the theory of human rights, of life, liberty and property gaining ground during the French Revolution in 1789, and as proclaimed by the American Declaration of Human Rights, an ideological basis for the defence of individual freedom challenged and undermined natural law. The theory rekindled after the Second World War, when numerous eminent jurists expressed interest in natural law.

Natural Law theorists like St. Augustine, Thomas Aquinas, John Finnis and more recently Lon Fuller argue that what is law must depend on moral criterion. For Augustine, law was a "natural necessity" [9]. He saw the state and law not sinful in them but as a part of the divine order which could restrain the human vices due to sin. He saw the future of mankind not in the sphere of social reform by promoting a juster regime on earth, but rather by the 'attainment of a commonwealth of

God's elect, which would replace the existing regime dominated by man's sinful nature[5].'

Augustine's assertion held ground for many centuries. Later, Aquinas contended that state was not a necessary evil but a natural foundation of society, grounding it in the established theology of his day. He saw natural law as restraining evil instincts of man and also setting for him the path for social harmony. Law, claimed Aquinas, that conflict with the requirements of natural law lose their power to bind a society together morally. A government, in other words, that abuses its authority by enacting laws which are unjust (unreasonable or against the common good) forfeits its right to be obeyed because it lacks moral authority. Such a law Aquinas calls a 'corruption of law [10].' With this law began to be seen not so much as a negative force, but as a positive instrument for realizing divine goals.

Lon Fuller in his *The Inner Morality of Law*, points out that what law is, must be clear, general, practicable, consistent and public, and, what law is should be determined by what law ought to be [11].

Fuller asserts that 'virtues of a formally proper law produce a necessary connection between law and morality. This is the basis for his theory of 'procedural natural law', according to which 'a desire towards perfect legality provides some sort of protection of fundamental human rights [5].

On the other end of this philosophical spectrum lie legal positivists. It was one of the aims of positivists to establish the autonomy of law as a system of positive norms whose validity can be determined within the framework of the legal system itself, without recourse to any other system. Bentham, Hobbes and Austin are said to have laid the foundations of modern legal positivism. Early proponents argued that even the legitimacy of law did not depend on moral criteria; law must be obeyed, however much it falls short of moral ideals. Among jurists, John Austin is considered the founding father of legal positivism. He conceived of law as commands from the sovereign backed by force [8]. The gist of Austin's argument lies in linkage of law to power and coercion. He contended that law is the command of the sovereign. Sovereignty was not to be derived from legal rules investing someone with supreme power, but from the sociological fact of power itself [12]. Law for him was a rule laid down by this sovereign to which obedience could be enforced by some penalty prescribed for failure to obey.

Hans Kelsen accentuates a similar belief asserting that law requires some kind of coercion in order to see that there is obedience of law. Law is, for him, a coercive order- "it follows that a legal order may be characterised as a coercive order, even though not all its forms stipulate coercive acts... law is the primary norm which stipulates sanction [9]". Law has but one purpose: the monopolization of force. Legal theory, argues Kelsen, 'is no less a science than physics or chemistry, thus we need to disinfect the law of the impurities of morality, psychology, sociology, and political theory [5].' However, unlike Austin, he was not of the view that legal validity is something that could be reposed but must be explained in normative terms. Hence he advocated a sort of 'ethical cleansing' under which analysis is directed to the norms of positive law. His 'pure' theory thus excludes that which we cannot

Objectively know, including law's moral, social, or political functions. Kelsen's concept of a 'norm' entails that to be valid, 'a norm must be authorized by another norm which, in turn, must be authorized by a higher legal norm, what he calls the *Grundnorm*, in the system. The validity of the basic norm rests, not on another norm or rule of law, but is *assumed*-for the purpose of purity. It is therefore a hypothesis, a wholly formal construct [5].

Among modern philosophers, H.L.A Hart and Joseph Raz are two of the most sophisticated proponents of the positivist view of law. Hart's *The Concept of Law*, published in 1961, set out in an eloquent and straightforward manner a theory of law in the modern guise the separation of law and morality. While endorsing it, Hart distances himself from the existing theory of legal positivism, from both the utilitarianism and the command theory of law championed by Bentham and Austin, and paces following a contextualist approach.

Law, in Hart's analysis, is a system of rules. His argument is as follows. All societies have social rules. These include rules relating to morals, festivals, games, education etc., as well as obligation rules that impose duties or obligations against doing or not doing an act. The latter may be divided into 'moral rules and legal rules (or law).' As a result of our human limitations, like being mutually disinterested, being selfish, access limited resources, limited altruism, approximate equality etc., there is a necessity for obligation rules in all societies. Further, in Hart's analysis, legal rules are divisible into primary rules and secondary rules. The former are constituted by rules against use of violence, theft, deception etc., to which human beings are lured but which normally they should repress to coexist in close proximity. Primitive societies can be said to have been knit around these primary rules imposing obligations. However, as societies become more interwoven and resultantly more complex, primary rules do not suffice. That is when legal rules come into being. In modern societies three types of secondary rules are introduced: rules of change, adjudication, and recognition. Unlike primary rules, the first two of these secondary rules do not generally impose duties, but usually confer power. The rule of recognition, however, does seem to impose duties. The core of Hart's theory is the existence of fundamental rules accepted by officials as guiding procedures by which the law is enacted. The most important of these is the 'rule of recognition' that states the requirement of a law as a valid law within a particular legal system.

As already pointed out, Hart rejects Austin's conception of rules as command of the sovereign, and the notion that rules are phenomena that consist merely in externally observable activities or habit. Instead, like Wacks points out, he asks us to consider the *social* dimension of rules, namely understanding its validity in a society, the manner in which members of a society perceive the rule in question, and their approach towards it. This internal aspect distinguishes between a rule and a mere habit. However, he does not relegate importance to morals in his thesis. According to him, there exists no necessary connection between law and morals is in congruence with the assumption that law can be identified by its distinguishing characteristics and interpreted by reference to its apprehensible content alone.

Contemporary legal positivist Joseph Raz drains law off its moral content, based on the idea that legality does not depend on its moral merit. For him, the existence and content of every law may be determined by a *factual* enquiry about conventions, institutions, and the intentions of participants in the legal system. Thus, the institutional character of law means simply that law is identified by its relationship to certain institutions (e.g. the legislature or judiciary). Anything – however morally acceptable – not admitted by such institutions is not law, and vice versa [13].

Raymond Wacks in *Philosophy of Law* has pointed out to three 'thesis' that Raz identifies which are made by positivists and attacked by natural law theorists:

The 'social thesis': that law may be identified as a social fact, without reference to moral considerations. The 'moral thesis': that the moral

merit of law is neither absolute nor inherent, but contingent upon 'the content of the law and the circumstances of the society to which it applies'.

The 'semantic thesis': that normative terms such as 'right' and 'duty' are not used in moral and legal contexts in the same way [5].

Raz actually posits a stronger argument for the 'social theses (the sources theses) as the essence of legal positivism. The major reason for his validation of the 'sources thesis' is that it explicates 'primary function of law: the setting of standards by which we are bound, in such a way that we cannot excuse our non-compliance by challenging the rationale for the standard' [5]. As he considers the social thesis better than the moral thesis of law, he concludes establishing his case against a moral obligation to obey law.

The above-discussed schools of thought render importance to law, as being essential and necessary. However, there is one important and influential school of law by which law is considered neither valuable nor necessary, that is, the Marxist school. In his youth, as a left Hegelian, Marx drew from radical Hegelian view that "true law was the systematization of freedom, of internal rules of universal coherent human activities and could therefore never confront human beings from outside as a form of coercion, seeking to determine them as though they were animal [14]." Later, during the course of still developing his critique of society based on private property, Marx took the view that actual, existing law was "a form of alienation, abstracting the legal subject and legal rights from concrete human beings and social realities, proclaiming formal legal and political equality while tolerating and encouraging economic, religious and social servitude, divorcing man as a legal subject and man as a political citizen from the economic man of civil society [5]." From 1845 onward, Marx developed a view that law was an 'epiphenomenal', part of the superstructure. It was a superstructure built on a base of specific material conditions, commodity production and market relations in a capitalist society. As an aspect of state, 'law was a means of suppression, organized power in the hands of the capitalists that was directed against the proletariat [13].' However, the events in socialist countries from

1970s were followed by an elevation of law in these societies. It is now seen as 'regular, essential, fair and efficient means of steering society in conditions of social ownership which will not wither away when class disappears [15].'

Chattrapati Singh, one of the finest legal theorists in India, adopts a different approach. He takes upon him the task of not defining what law is, or what justice is, but primarily focuses on finding the basis of acting justly. He criticises modern legal positivism for being averse to metaphysics, and the modern natural and social science to teleology, both ending up giving us a partially complete picture [16]. Singh asserts that the Western thought is inadequate to understand law, and his primary task is to underline those shortcomings, since it has become dominant in jurisprudence and philosophy of law. One will have to turn to Indian tradition to seek these answers. There is little that modern legal theories have learnt from Greek or Roman experience, leave alone the experience of the East. Singh took forward the task of creating a space for alternative literature, asserting that law necessarily does not begin with Blackstone or Austin. He sees the necessity of 'outgrowing the dominance of West, both, emotionally, and in thought [15].

For Singh, the morality of society is different from its legality. In so far as principles of justice draw from morality, justice becomes the meeting point between law and morality. The administration of Justice in this case becomes administration of morality accepted by society.

However, Singh emphasizes, that principles of justice are nothing but, pithily put in his own formulation, “generated by human reason in its application to praxis and that these principles are same as the universal principles of morality that a society can legislate for itself, the principles of morality (strictly speaking external or social morality) become one and the same [17].” Law, for him therefore, is external morality, and a just law is one that is based on principles of justice. For him the basis of juridical obligation is same as legal obligation.

The basis on which a legal system is built and sustained is very different from that of a coercive system and ‘the latter is only a substitute for the legal system, it is not the legal system itself [18].’ As such, it is not possible to coerce anyone to behave legally. Enforcement of law is a contradiction in terms. According to Singh, ‘force is used when people fail to act legally; and then the aim of using force is not to make them act legally but to prevent them from acting illegally in future [5].’ Singh maintains that legal positivist’s base the grounds of obligation to follow *just* laws on factors other than the individual’s own will, i.e. they reduce the obligation to external compulsion or use of force. He propounds, what he calls, an *autonomous theory* of legal obligation based on a conceptual scheme applicable to created social order. This can be grounded only in what the individual him/herself wills in accordance with his/her reason. These can be mystical, derived from communal experiences or be based on rational principles applicable to the social order. He points out that reference to mystical theories is very limited in Western tradition, and is more prevalent in Indian tradition for the simple reason that law was majorly confused with some aspects of religion. However, he rejects them on the basis of their not being universal experiences. The very working of law demands the assumption ‘that there are self-determined actions whose merits or demerits can be evaluated in the courts of law [5].’

Further, he blames theories of Hart, Kelsen and others for not being able to help us distinguish between a democracy and a dictatorship. He has even criticised rationalists and metaphysicians like Rawls and Kant for being inconsistent. Acting justly, for Singh, exists prior to a contract, meaning, a genuine contract or treaty is only possible when people are first willing to act justly. These theories, he argues, are no different, for they invoke the will of others, in distant past, which now constrains our will. Singh in this piece unveils the limitations and therefore points to using a different approach for devising philosophy of law and principles of justice.

The Case of India

No society can be understood properly without a reading of its legal doctrine. India, like all societies, has its own story of evolution of the legal system as it is today. In pre-British India, there existed numerous communities with shared and overlapping traditions. Sudipta Kaviraj calls these communities in the traditional society, in pre-British India ‘fuzzy communities.’ The ‘fuzzy communities’ were constituted by people belonging to different caste, religion, gender, occupational group etc. This blended sense of community meant a fuzziness of law, that is, the existence of innumerable, overlapping local jurisdictions. Distinct norms directed each community, while some also shared ideas of legality with other communities. The various groups enjoyed autonomy in administering law to them. During Mughal rule, the empire had its administrative centres in cities, while royal courts exercised general criminal jurisdiction, and decided on civil and family matters of Muslims. The Hindus were generally allowed their own tribunals in civil matters. When these came before the court, Hindu Law was applied [5]. This reflects that the governing system in India

did not impose anything new in empirical practice. There was a general diffusion by the filtering down of the ideas and techniques from the top. Kaviraj claims that “acting ‘on behalf’ of society was unavailable to the state [2].”

With the arrival of British in India, we witness the rise of a ‘modern legal system’. According to Galanter, the overlapping jurisdictions, absence of lawyers, unwritten records made national unification difficult [2]. This situation was unlike Europe, where local law subsumed and eventually replaced by State authorities. This juncture represents the ‘displacement of a traditional institutional complex within a highly developed civilization by one of largely foreign inspiration [5].’ In undertaking a process to establish state institutions for administering law in the society, the British took a step towards what Galanter calls ‘the expropriation of law.’ He has classified in three distinctive stages the development of the *modern* [2] legal system:

“The first, the period initial expropriation, began with Warren Hastings’ organization in 1772 of a system of courts for the hinterland Bengal. The second period began in about 1860, with the extensive codification of law and establishment of a system of courts. Third is the period after independence, when further rationalization of law and development of a unified judicial system took place all over India [19].”

After 1765, the East India Company got the right to collect revenue in Bengal, Bihar and Orissa, but the Mughal Empire remained in place. The judicial system remained in hands of Indian officers until 1772, when Warren Hastings took over. Bernard Cohn highlights that those officials, who were in India at this time, had agreed that India has a state system, which of course declined by after mid 18th century, but which had recognizable institutions and functions of a state. Hastings, followed by William Jones and Colebrook, insisted that the system in India should be in congruence with the design of the traditional society to not face rebellion from within. It was a fundamental British policy that, in matters of family, inheritance, caste and religion, Indians were not to be subject to a single, territorial law. The British deployed Pundits and Maulvis for translation of Hindu and Islamic texts into Persian, and from Persian to English. However, the translations were not free from anomalies. Even when explicit attempts were made to preserve customary law and use it for jurisdiction, there were changes made in the custom during the process of it being recorded from a body of orally transmitted precepts to evidence. This meant that the focus of this system was ‘more on mutual resolution of conflict rather than punitive justice (except in case of rebellion), and punishment when meted out depended on the status of the accused [20].’ Eventually, “what had started with Warren Hastings and William Jones as a search for the ‘Ancient Indian Constitution’ ended up with what they had so much wanted to avoid, the introduction of English law as law of India [19].”

The Charter Act of 1833 threw open judicial positions to Indians, and provided for appointment of a law commission for codification of laws. The law commission under Lord Macaulay completed the task of codification by 1837, but it was only after the Revolt of 1857, that the Crown took over the governing of India, from the East India Company. This marked the full implementation of simplified, systematized and codified law in India. The Code of Civil Procedure was introduced in 1859, while the Criminal Procedure Code in 1862. As Radhika Singha has pointed out in *A Despotism of Law* the new code sought to establish, “the universal principles of jurisprudence based on a notion of indivisible sovereignty and its claims over an equal abstract and universal legal subject [21].”

The codification led to the need for justifying the implementation of a foreign legal system in India. The British regarded it as necessary for governing India and contended that indigenous legal system was full of 'gaps and interspaces'[22]. Only the implementation of a statutory codification based on English law could get them rid of this vacuum. It was believed that by providing the Indians with an 'impartial' judicial system and equal protection of law would assure stability of the imperial government. However, the new law was not as moral as it was made to appear. There is abundant literature highlighting the nefariousness of British judges and officials after the import of Rule of Law to India. Partha Chatterjee has categorically stressed that the rule of British in India must be understood from its inception as integrally linked to a rule of colonial difference [23], which implies playing up the differences between the ruler and the ruled increase the discrepancy of power between the two. This also meant depreciating the culture of the colonized population. Elizabeth Kolsky [24] has pointed out that racial and physical violence was a constant and constituent element of British dominance. She claims that 'archives overflow with instances of Britons murdering, maiming and assaulting Indians and getting away with it, white violence remains a closely guarded secret of the British empire.' Galanter sees it in a positive light and calls it one of the 'most remarkable and unanticipated results' of British administration - 'the elevation of textual law over lesser bodies of customary law.'

Unravelling Article 13

Embedded in India's national struggle for independence was a constitutional struggle. Beginning from intellectuals like Dadabhai Naroji and Surendranath Banerjee, who demanded for greater representation, to Mahatma Gandhi, who demanded complete severance of colonial ties, nationalists of different hues had put up a legal and constitutional fight. The Constituent Assembly being a representative body with members belonging to different communities, languages, regions and religions, had many important objectives in mind. After suffering at the hands of a foreign government, granting fundamental rights to all citizens of India and ensuring equality before law of all were two primary concerns. Article 13 of the Constitution that safeguards the Fundamental Rights of citizens reads as follows:

"Laws inconsistent with or in derogation of the fundamental rights-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, unless the context otherwise requires,

(a) "Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368 [25]."

Article 13 can be seen as an attempt to fill the gap between

foundational values of constitution and social realities. It is the result of the conscious effort of the framers of the Constitution to make fundamental rights justifiable explicitly and put prohibition against their violation. Originally Article 8 in the Constitution of India, the Article underwent various changes facing criticisms or because of shortcomings during the Constituent Assembly debates. Article 13 has been invoked quite frequently for the declaration of laws contravening as void. It has therefore come to be regarded that these rights are fundamental, entrenched in such a way that they cannot be tampered with by any government [26].

Strikingly, judiciary is not included in Article 12 within the term 'state'. It is a settled position that while performing non-judicial functions courts fall within the meaning of state and when it comes to rule-making, the power lies solely with the 'state.'

The word 'law' occurs in Clause (2) in the article while it is defined in clause (3). The word is defined widely, including all other forms like Ordinance, order, bye-law, rule, regulation, notification, custom or usage. Here-

Ordinance: An ordinance is a 'law' as per this article. It is issued by the President of India when the parliament is not in session.

Order: An order, provided it has the force of law, is a law under Article 13.

Bye-Law: they are laws made by a local authority or corporation under the definition of state as described in Article 12.

Rules and Regulations: Rules has been described as law provided they have statutory character. In *Ghulam Rasul v State of J & K* [23] it was established that in order that a rule should be designated as a law, it must be established that it has force of law.

Notification: 'Law' as defined by Article 13 includes notifications also. Thus, notifications that challenge fundamental rights can be challenged under this article.

Customs or Usages: By the operation of Clause (3), the term law includes custom or usage having the force of law. Therefore, a custom that yields to fundamental rights can be/is a law.

The expressions 'laws' and 'laws in force' have been defined in two separate clauses in Article 13, however, it was held that these definitions are not intended to be applicable only to those respective clauses where the expression law is used. Thus, in the *M.R Venkatraman vs Commissioner of Police (1951)* case, where the bench held that although Clause (1) used the expression 'laws in force', the definition of 'law' as in Clause (3) is also applicable to the 'laws in force'[5]. In several other cases it was held that order, ordinance, bye-laws, rules and regulations, notifications, customs and usages to be included in the ambit of law.

Clause 3(a) of Article 13 extends the meaning of law to both, pre- and post-constitutional laws. It mandates such laws to have the 'force of law.' Commentators point out that the constitution is silent on the meaning of this expression, and therefore it requires a judicial as well as jurisprudential exploration. If we think in a relatively humbler sense, it may simply mean any custom, usage, order, notification- having the effect of law. In another sense, as one commentator sees it, it can be taken to mean that laws, made by the state are always backed by force [27]. If we recall the section *Law and Coercion* in this paper, we would remember that the relationship between law and coercion is tense. This implies that state ensures that laws are obeyed, and ensures punishment is meted out in case of disobedience. Besides that, customs and usages

when given a state backing tend to acquire a new vigour and *force*.

Article 13 also makes way for judicial review. This legislation creates scope for reviewing pre-constitutional and existing laws. Although the legitimacy of judicial interventions in Constitutional matters has sparked debates, yet in most cases, the power of judicial review is evoked to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. Article 13, therefore, may be called a guiding light if laws are inconsistent with fundamental rights. It 'lays down the supremacy of the FR over any other law in case of inconsistency between the two [28].' D.D Basu, therefore opines that 'the very adoption of written constitution with a Bill of Rights and judicial review implies that courts shall have the power to strike down a law which contravenes a fundamental right or some other limitation imposed by the constitution [22].'

The Doctrine of Severability is an important aspect of understanding Article 13. According to D.D Basu, it is 'nothing but the common law of *ultra vires* imported in the realm of constitutional law.' In other words, this doctrine simply means that if any particular provision of a statute is unconstitutional, and that provision is independent of or severable from the rest, only the offending principle will be declared void. In case it is not separable, the whole statute stands failed. In the Indian Constitution, Clauses (1) and (2) are subject to Doctrine of Severability. The application of the Doctrine separates the invalid part of the law from the valid part. Further, when the provisions of the law to which the doctrine is being applied are so interwoven that they are not severable, the entire law is *ultra vires*. In *A K Gopalan vs. State of Madras* case, section 14 of the *Prevention Detention Act 1950* was declared to be *ultra vires*. The Preventive Detention Act (PDA), 1950, was the first detention law after the Constitution was enforced. Justice J.C Kania observed that, 'the impugned act, minus section 14 could remain unaffected [29].'

Another important doctrine to be understood in context of Article 13 is the Doctrine of Eclipse. This doctrine is related to validation of void laws. Certain existing law may get eclipsed if a provision which is not severable clashes with the FR. There exists a conflict of opinions about whether this applies to pre-constitutional laws only, or post-constitutional laws also. The implications of different opinions are bound to have far reaching impact on the nature of law as provided under article 13 of the constitution. It is normally accepted that the doctrine of eclipse applies only to pre-constitutional laws. In *Deep Chand v State of UP (1959)*, "the court held that the doctrine of Eclipse can be invoked only in the case of law valid when made, but a shadow is cast on it by supervening constitutional inconsistency [28]." D.D Basu is of the view that doctrine of eclipse is not applicable to post colonial laws [30]. There are several other cases from which it can be inferred that there still remains a contestation and confusion over this issue.

The question whether 'law' in Article 13, clause (2) includes amendments or not rose first in *Sankari Prasad vs. Union of India* where the First Amendment was challenged [31]. It was maintained that 'law' must include constitutional amendment, pointing out to the fact that framers of the constitution had deliberately intended to make FR immune from any interference. However, later a bench ruled out such an interpretation, stating that "although law must ordinarily mean constitutional law, in context of Article 13 it must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments of constitution [5]."

Clause (4) was inserted in Article 13, which states: "Nothing in this article shall apply to any amendment of this Constitution made

under article 368." This clearly meant that Article 13 does not control Article 368. This provision tilted the power structure in favour of the Parliament when it comes to amending the Constitution. It brought Fundamental Rights within the purview of amendment procedure and judicial intervention or review of those amendments was prohibited. This amendment was challenged in *Kesvananda Bharti vs State of Kerala*, in which the majority overruled the *Golak Nath* decision, enunciating the basic structure doctrine.

Conclusion

A constitution framed after a freedom struggle normally should be fresh, creative and original. However, the Indian Constitution carries a colonial baggage [32]. Drawing on the Gramscian notion of 'passive revolution', many political scientists suggest that there is a degree of continuity between the colonial state and the Indian republic despite independence and elections [33]. A scholar charges the constitution makers of *not being able to think* of a new system altogether [34]. The Indian Penal Code that was inherited by the post-colonial state of India is an example that explains the manner in which the imperial powers of a foreign government are transformed into the normal powers of an independent regime. This draws upon the failure of the postcolonial state to bring about the massive social and economic transformations that it promised.

Upendra Baxi, on the other hand, points out in his essay 'Post Colonial Legality' that the Indian Constitution is marked by 'continuities and discontinuities [34]'. He contends that postcolonial societies are not determined by 'single organizing principles.' It remains a plurality of spheres, identities and anecdotes that these societies have to deal with while framing their constitution. They, he argues, "inevitably carry their birthmarks [35]." There are major transformations that Indian constitution-makers brought about with intense normative rigour, wrestling with some ancient wrongs such as the practices of untouchability (article 17), of the Hindu patriarchy, and of agrestic serfdom (article 23 and 24). It is because of such strong steps to differentiate from the colonial regime, the Indian Constitution has been called a transformative constitution.

While the constitution did usher in a new order, its claims of obliterating the past remain unconvincing, even to contemporary commentators. The constitution text contained aspects of imperial charters and colonial legislations, and in several cases, reproduced sections verbatim. Even after independence, the law in practice extinguishes the voices of suffering. Scholars have revealed how state law is transformed in its localization, often bearing little semblance to written law [32-36]. Also, various researchers have argued that "the emerging bourgeoisie that dominated the new leadership was unable to establish a complete hegemony over the new nation, and entered into an alliance between an older dominant class with only a partial appropriation of the popular masses (through elections) [31]." It has been this dominant bourgeoisie that has alienated the subaltern of its rights by managing a monopoly over access to and impunity from law. Law in this sense could be seen as the language of the state that helps it maintain the status quo. While many have described law as both, determining the state's periphery and simultaneously strengthening it, in effect, more than establishing the state's contours, law can itself be seen as having an extremely debilitating effect, given the official sanction it has. These laws equip the state so much that resultantly, there is massive discrepancy of power between the rulers and ruled. Then the modern regime of power can be said to be exhibiting the same exclusion and exemption, as did the colonial state. Therefore, reliance on law alone does not ensure justice to all citizens.

In a democracy, one of the most dangerous situations is when those who are responsible to enforce the rule of law take it in their own hands. K.G Kannibaran contends that “there is an overwhelming play of violence as power and power as violence, sometimes in the breach of law and sometimes as tool for its enforcement [35].” Perhaps the most vital issue in the modern state era is freedom of citizen and respect of her/his civil and democratic rights, and what measures are adopted to guarantee these. This reflects on the close relation between law and liberty, and the immense significance of the role of judiciary. However, when we take note of the massive violation human and fundamental rights by the state itself, who is the sole guarantor of these rights, would we not think that this present legal system that is laden with numerous infirmities? Is it not reminiscent of the violence unleashed by the British colonial government in India? Even though independent India’s government tried maintaining a balance between historical and sociological elements, while taking a positivists approach, observing and experiencing law in practice once cannot help but see the failure. However, we cannot help but look at the same law to seek justice despite knowing how it is fraught with uncertainties and frailties!

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Citation: Ikshula (2016) The Labyrinth of Law in India. J Civil Legal Sci 4: 164. doi:10.4172/2169-0170.1000164

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