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**Rule of law and Indian society: Colonial encounters,
post-colonial experiments and beyond**

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Abstract:

Establishing rule of law has been an important goal of social development and social evolution in modernity. Rule of law is also an integral part of democratic experimentations historically as well as contemporaneously. But what is the meaning of rule, law and rule of law? Do these mean the same thing in different cultures and histories? Is it possible to learn some new insights and modes of engagement vis-a-vis law and society from a cross-cultural meditation on rule of law. The paper undertakes such an exploration. It covers a long historical terrain of more than five thousand years touching briefly the way Indian society has related to rule of law at various moments of her journey and describing the vision of law in classical India as a life of Dharma, righteous conduct. It also discusses the colonial construction of rule of law in India and different post-colonial experiments too. It particularly discusses the role of Constitution of India in creating a more equal and just rule of law between individuals and groups than what existed under traditional authorities such as *Manusmriti*. Constitution strives to eliminate the humiliation that people suffered under the traditional social system of caste and patriarchy, thus creating new ground for realization of human dignity. The realization of both formal and substantive equality that is happening under the rule of law in contemporary Indian society can facilitate a more creative flourishing of a life of *dharma* or righteous conduct in self and society. But for this, the paper argues, rule of law must be transformationally supplemented by the ideal and practice of self-rule. While self-rule is facilitated by existence of a just social, institutional and legal order which grants legal equality to individuals irrespective class, caste, religion and gender, mere existence of legal procedures in society is not enough for this.

[The modern legal system in the West] is a system which fits an egalitarian and individualistic society xx It starts with individuals and is a manifestation of their own picture of the social order..The classical legal system of India substitutes the notion of *authority* for that of legality..The precepts of *smriti* are an authority because in them

was seen the expression of a law. xx But it has no constraining power by itself. xx
Society is thus organized on the model of itself..

- Robert Lingat¹

Whatever might have been the emphasis of traditional Indian culture, both equality and the individual are central concerns in the contemporary constitutional and legal systems; and it is impossible to understand what is happening in India today without taking into account Constitution, law, and politics.

- Andre Beteille²

In the Indian epics, as in most pagan world views, no one is all perfect, not even the gods. Nor is anyone entirely evil; everyone is both flawed and has redeeming features. [For Radhabinod Pal, the only dissenting judge of the International tribunal judging the Japanese war crimes] The name of justice should not be allowed only for the prolongation of vindictive retaliation.

- Ashis Nandy

Prelude: Dharma and the Rule of Law in Classical Indian Traditions

The classical Indian traditions had a different conception of both rule and law compared to modern Western traditions. While the constraining power of legality is central to modern Western traditions, in India it is moral authority which is at the core of the rule of law.³ The classical law of India is characterized not by positive law and legality but by moral authority and duty what is called *Dharma*. *Dharma* refers to the totality of duties which is incumbent on individuals. *Dharma* also signifies eternal rules which maintain the world. The rule of law entailed in the rule of *Dharma* in classical Indian traditions was part of a transcendental engagement. God or Creator was considered the ultimate source of law. But *Dharma* was a point of connection between the transcendental realm and the life-world and the societal world of individuals. The object of *Dharma* was to create a better world where individuals and societies could attain divine self-realization. As Robert Lingat tells us: "...the law which the *sastras* [sacred texts] communicate to us does not arise from the will of men. The rules of conduct and the duties which it enunciates are preconditions for the realisations of social order as it was intended by the Creator. These rules preexisted the expression of

¹. Robert Lingat, *The Classical Law of India* (New Delhi: Thompson Press, 1973), p. 258.

². Andre Beteille, *Society and Politics in India: Essays in a Comparative Perspective* (New Delhi: Oxford U. Press, 1997), p. 218.

³. Lingat (op. cit., 1973).

them."⁴ Rules in classical India were thought to be of divine origin but in the Western tradition law has been thought of as part of conscious deliberation of individuals in societies. While law is of divine origin in classical India, custom is much more to the ground, it is much more part of social making. Unlike law, custom is a "purely human development in the sense that it develops at the level of human groups involved."⁵ However, unlike Roman jurisprudence, the origin of custom in classical Indian traditions is again attributed not solely to human and societal deliberation; its origin "eludes human memory, which confers upon it an almost sacred character and gives it a force which it neither had nor has in Western civilisations."⁶

In classical India institutions of law and polity were subordinated to an ideally conceived spiritual authority. At the empirical level, the working of such a rule of law did not provide respectful treatment and equality to everybody but at the ideational realm, the subordination of political power to spiritual authority provided a frame for "ideal participation" to individuals.⁷ Deviation from this ideal path was the cause for the onset of disorder, anarchy or what is called *arajakata* in classical Indian thought. The onset of anarchy was caused by deviation of people from the path of *dharma*, righteous conduct. Anarchy does not refer here to an external power vacuum in society, say the interregnum between "the death and succession of kings" but it refers to that condition "when the weak are oppressed and exploited at the hands of the strong."⁸ *Arajakata* refers to the condition when *matsyanyaya* or the law of the fish prevail when the strong swallow the weak without either any guilt of conscience or societal punishment. Both order and anarchy are thought of normatively in classical Indian tradition, more particularly in the traditions of reflections and practice initiated by the *Vedas* and the *Upanishads*. In his recent thought-provoking work, *Beyond Ego's Domain: Being and Order in the Vedas*,⁹ the preeminent Indian political theorist Ramashroy Roy tells us, deviation from the path of *Dharma* which causes the rise of anarchy or *arajakata* is caused by greed and "the tendency ingrained in every individual to acquire for himself as much of worldly goods as possible to the detriment of others."⁹

⁴. Ibid, p. 176.

⁵. Ibid, p. 177.

⁶. Ibid.

⁷. Ibid, p. 259.

⁸. Ramashroy Roy, *Beyond Ego's Domain: Being and Order in the Vedas* (Delhi: Shipra Publications, 1999), p. 8.

⁹. Ibid, p. 2.

In the Vedic perspective, as in the Platonic, establishment of order in the public has to go hand in hand with the establishment of order in the life of the self. This in turn involves overcoming greed, passion and egotism in one's life and developing a capacity for otherness and the public good. Such a process involves "attuning one's soul to the divine ground of being by turning around from passion."¹⁰ "This turning around is necessary because when passions seize control of the individual's life, his soul gets afflicted with disorder."¹¹ But transcendence of one's passion and propensity to control others which, as even the modern theorist Teressa Brennan tells us, constitutes the core of social evil, cannot be overcome by just participation in the polis.¹² "The shortcomings associated with personal character cannot be expected to be rectified by the public realm."¹³ Rather it calls for our rebirth as citizens, citizens of not only the polis, but of the community of good and of Kantian "kingdom of ends" and this in turn calls for following the life of *dharma*, righteous conduct—"to willingly accept a life dedicated to the cultivation of *dharma*."¹⁴ For Roy, "Without the discipline of *dharma*, *matsya nyaya* becomes a harsh reality and public order becomes difficult to maintain."¹⁵ Establishment of order is predicated on following the path of *Dharma* in the life of both self and society deviation from which leads to lawlessness, anarchy (*arajakata*) and disorder in society.

Thus in thinking about order which in a decent society means an appropriate frame of co-ordination in the lives of individuals and societies there is the need for an appropriate self-preparation.¹⁶ The classical Indian perspective on order and rule of law has always stressed the centrality of appropriate self-preparation and self-formation and the limit of external legislation in establishing order. "Curbing and controlling of unruly passions depends not so much on external regulations and sanctions as on generating a psychic force" which promotes "individual salvation and social concord through the development of the sense of sociality that sustains the individual's commitment to *dharma*."¹⁷ In classical Indian traditions

¹⁰ Ibid, p. 221.

¹¹ Ibid.

¹² Teressa Brennan, *History After Lacan* (London: Routledge, 1993).

¹³ Roy (op. cit., 1999), p. 5.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ananta K. Giri, "Rethinking Systems as Frames of Coordination: Dialogical Intersubjectivity and the Creativity of Action," *Man & Development* March, 2000.

¹⁷ Roy (op. cit., 1999), p. 13.

rule of law is for those who are "unable by themselves to develop the source of order in their psyche and need the constant persuasion of *nomos* and the sanctions of law."¹⁸

Dharma or the path of duty or righteous conduct is at the core of thinking about rule of law in Indian traditions. But rule of *dharma* is not confined only to the psychic realm, to the effort of overcoming passion and generating appropriate psychic motivation. Rule of *dharma* needs an appropriate social and institutional arrangement. The interaction between social order, "embodying the principles constituting the rule of *dharma*," and its members is characterized by "reciprocal responsiveness."¹⁹ It "devolves upon the individual to consciously and actively uphold its integrity" and makes "incumbent upon the social order to safeguard individual integrity and dignity."²⁰ In "reciprocal responsiveness," the goal is not merely to establish compatibility between individual and society at an external level but at a deeper level. This is emphasized by both Sri Aurobindo and Coomaraswamy, two great savants of Indian tradition and thought in the modern world. For Sri Aurobindo, "For as it is the right relation of the soul with the supreme, while it is in the Universe, neither to assert egoistically its separate being not to blot itself out in the Indefinable, but to realise its unity with the Divine and the world and unite them in the individual, so the right relation of the individual with the collectivity is neither to pursue egoistically his own material or mental progress or spiritual salvation without regard to his fellows, nor for the sake of the community to suppress or maim his proper development, but to sum up in himself all its best and completest possibilities and pour them out by thought, action and all other means on his surroundings so that the whole race may approach nearer to the attainment of its supreme personalities."²¹ For Coomaraswamy, "The individual is no longer enslaved by his own desires, but has found an infallible guide and mentor in the person of the *Dharma* or Indwelling Spirit."²² Central to politics and self-realization in this pathway is "self-government" or *Swaraj* which depends upon self-control (*atmasamyama*).²³

But what is to be noted that in self-rule or self-governance rule and power are of a qualitatively different kind compared to what is at work in the rule of law in the public domain.

¹⁸ Ibid, p. 282.

¹⁹ Ibid, p. 13.

²⁰ Ibid.

²¹ Sri Aurobindo, *The Synthesis of Yoga* (Pondicherry: Sri Aurobindo Ashram, 1948), p. 17:

²² Ananda K. Coomaraswamy, *Spiritual Authority and Temporal Power in the Indian Theory of Government* (Delhi: Munshiram Manoharlal, (1978), pp. 84-85.

²³ Ibid.

While rule of law in the public domain can afford to proceed only with a controlling, regulative and domineering approach, in self-rule the rule that is at work cannot work only with the model of power as control and domination, characterized by the Nietzschean and Weberian will to carry out one's will against the will and resistance of others, but has to work with a newly transmuted and transfigured understanding of rule and power. Power and rule in self-rule and self-governance calls for a new relationship with self, a relationship of persuasion and dialogue and such a dialogical self-rule is a helpful companion for the realization of dialogical democracy in the public domain.²⁴

In classical Indian traditions, it was believed that the king as the executive of political power must be subordinated to the priest, the *purohita*, the Brahman. Ananda Coomaraswamy puts this as the principle of subordination of temporal power to spiritual authority. This is different from the conventional notion of rulers of classical India as oriental despots. For Coomaraswamy, "The kingship envisaged by the Indian traditional doctrine is thus as far removed as could well be from what we mean when we speak of an 'Absolute Monarchy' or of individualism."²⁵ Even "the supposedly Machiavellian *Arthashastra* flatly asserts that only a ruler who rules himself can long rule others."²⁶ This imperative of self-rule on the part of the rulers in classical Indian tradition is akin to what Plutarch advises in his *To an Uneducated Ruler* to rulers of classical antiquity in the West: "One will not be able to rule if one is not oneself ruled. Now, who there is to govern the ruler? The law, of course; it must not however be understood as the written law, but rather as reason, the *logos*, which lives in the soul of the ruler and must never abandon him."²⁷

Therefore in the traditional conception of rule of law, the practice of self-rule is at the core and this has an epochal significance now as we are face to face with the limits of law as a foundation of a good life and as we suffer from the apathy of legal minimalism. But one difficulty with the traditional conception of law and its model of ideal participation, self-formation and creation of a public order around the *path* of dharma is that institutions in traditional Indian society did not match such an ideal model of self-formation and social order. *Manusmriti* or Laws of Manu has been an important source of law in traditional Indian

²⁴ Fred Dallmayr, "What is Swaraj? Lessons from Gandhi." University of Notre Dame: Manuscript, 1997.

²⁵ Coomaraswamy (op. cit., 1978), p. 86. Coomaraswamy further tells us: "The Inner Sage who may be called the chaplain within you, and to whom the *Purohita*, who is the chaplain of king's house, corresponds in the civil realm." Ibid, p. 85.

²⁶ Ibid.

²⁷ Quoted in Michel Foucault, *Care of the Self* (New York: Pantheon, 1986), p. 88.

society. *Manusmriti* supported distinctions of caste and gender in law. "In ancient India, the Brahmans were considered to be the superior class. As such, they had in law and in fact privileges and prerogatives not held by other sections of Hindu society."²⁸

There were two sources of law in classical India—the texts of law or the *Smritis* as they were called such as *Manu Smriti* and custom. The *sastras* or the sacred texts were sources of written law, and customs, unwritten laws. "The *sastra* incorporated numerous customs, inevitably, since it was itself the fruit of custom systematized."²⁹ Furthermore, since the *sastra* was based on "usage, in particular in its practical (*vyavaharic*) chapters, usage may be cited to explain written law" and the *sastras* (sacred texts concerning law) offered an umbrella "under which various judicial forms could shelter."³⁰ The relationship between *sastric* written laws and unwritten customs was complex. There were many instances when customs contradicted written laws and rulers and judges of society had to accept custom as a ground of valid law. Both the *sastras* and customs were presented as constant and eternal but in reality both changed. However, both of these resisted absolute codification and were subjects of interpretation. In the West, law is associated with the notion of a fixed law and not much amenable to interpretation which makes Zygmunt Bauman to make the contrast between law as characteristic of modernity and interpretativeness as characteristic of postmodernity.³¹ But in classical Indian tradition it was interpretativeness which was at the core of the rule of law. This openness towards interpretation was related to a sensitivity to contexts in Indian traditions which is different from the context-transcendent character of modern law.³²

While the *sastras* and customs provided the sources of law, the actual juridical administration was carried out by the law of the courts. In the administration of justice, the king was the highest appellate court but there was autonomy of judges. The classical law of India, transformed through the passage of time, continued for many centuries and when Muslims began their rule in India it found Islamic law in its neighbourhood. But the Muslim rule did not alter the fundamental structures of classical law of India. As Lingat helps us

²⁸ J.W. Spellman, *Political Theory of Ancient India: A Study of Kingship from the Earliest Times to circa A.D. 300* (Oxford: Clarendon Press, 1964), p. 111.

²⁹ J.D.M. Derrett, *Religion, Law and State in India* (London: Faber & Faber, 1968), p. 158.

³⁰ Ibid, p. 160.

³¹ Zygmunt Bauman, *Legislators and Interpreters: On Modernity, Postmodernity and the Intellectuals* (Cambridge: Polity Press, 1987).

³² A.K. Ramanujan, "Is there an Indian way of thinking? An informal essay." *Contributions to Indian Sociology* (n.s.) 23: 41-58, 1989.

understand this: "The system which the invaders imported was fundamentally similar to that of the Hindus xxx In either case the authority of the law rested not on the will of those who were governed by it, but on divine revelation, on the one hand *The Koran* and the *Sunna*, and on the other hand the *Vedas* and *Smriti*."³³ The Islamic law was applied only to the believers, while Hindus were ruled by the *Dharmasastras*. In both Hindu and Islamic laws interpretation had the same importance, and custom held a significant (if not the same) role, "even though in principle it could not contradict a revealed text."³⁴ But a major transition in law and society took place when Indian society was subjected to British colonialism. Though the initial period was a period of mutual stocktaking where even the ruling British did not want to put an alien rule on the native soil, soon this gave rise to efforts to replace indigenous law within the modern law. This is the story of colonial encounter in rule of law in Indian tradition and society and there is a need to understand this at great length as the foundations of modern law laid during colonialism continue to influence and determine the relationship between law and society in contemporary India.

Rule of Law and the Colonial Encounter

The onset of British rule in India was a major watershed in Indian society and history. The East India Company which ruled parts of India in the 18th century took steps to introduce autonomous judicial and political administration in its territories. As historical anthropologist Bernard Cohn tells us, "In the second half of the eighteenth century, the East India Company had to create a state through which it could administer the rapidly expanding territories acquired by conquest or accession. The invention of such a state was without precedent in British constitutional history. The British colonies in North America and the Caribbean had from their inception form of governance that was largely an extension of the basic political and legal institutions of Great Britain."³⁵ But in its rule over India the British had to create a separate system of political and juridical administration. The early British rulers were careful not to introduce English rules in the Indian soil; they did not want to interfere in the working of the native society. At the same time, the British felt the need to create new instrumentalities of rule in colonial India which would be in tune with the local ethos. In this effort, India also provided a laboratory for experimenting with new models of rule and governance emerging in Great Britain for instance the ones proposed by the utilitarians. As Erik Stokes tells us in his

³³. Lingat (op. cit., 1973), p. 261.

³⁴. Ibid.

³⁵. Bernard Cohn, *Colonialism and its Forms of Knowledge* (Delhi: Oxford U. Press, 1997), p. 57.

Instructive historical study, *English Utilitarians and India*: "The British mind found incomprehensible a society based on unwritten customs and on government by personal discretion, and it knew only one sure method of marking off public from private rights--the introduction of a system of legality under which rights were defined by a body of formal law equally binding upon the state as upon its subjects."³⁶

In the introduction of rules of law in Indian society during the early days of colonialism there were two important considerations: first to create a rule of property in the native land and second to create rules of adjudication. In creating an appropriate rule of adjudication, there were two streams of efforts and consciousness: one which emphasized that the new rules should be based on the existing rules of Indian society; and second, which thought that the native rules were too chaotic and they should be formalized and codified. While Warren Hastings, the first Governor General of Bengal, and scholars of the Early British Raj in India who had much more respect for the native Indian tradition known as Orientalists wanted the new rules to be in tune with the rules of the *Dharmasastras* others such as Thomas Macaulay and James Mill who were influenced by the contemporary regnant ideology of utilitarianism were much more in favor of a formal law in the line of English Law.

Warren Hastings was appointed in 1772, under a new parliamentary act, to the newly created position of Governor- General, and was instructed by the Board of Directors to place the governance of Bengal on a stable footing. Hastings had spent some time in the court of the last of the Muslim rulers of Bengal and from his personal knowledge of the working of the administration he could not share the prevalent British view that Indian rules were despotic.³⁷ Hastings believed that "Indian knowledge and experience as embodied in the varied textual traditions of Hindus and Muslims were relevant for developing British administrative institution."³⁸ He encouraged a group of younger servants of the East India Company to "study the classical languages of India-- Sanskrit, Persian and Arabic--as part of a scholarly and pragmatic project aimed at creating a body of knowledge that could be utilized in the effective control of Indian society."³⁹ The objective here was to help the "British define what was Indian and to create a system of rule that would be congruent with what were thought to

³⁶ Erik Stokes, *The English Utilitarians and India* (Delhi: Oxford U. Press, 1982), p. 82).

³⁷ Cohn (op. cit., 1997), p. 61.

³⁸ Ibid.

³⁹ Ibid.

be indigenous institutions. Yet this system of rule was to be run by Englishmen and had to take into account British ideas of justice and the proper discipline, form of deference, and demeanor that should mark the relations between rulers and ruled."⁴⁰

One of the persons who helped Hastings most in this task is Sir William Jones (1746-1794), a classical scholar who studied Persian and Arabic at Oxford. Jones and his colleagues believed that there was historically in India a fixed body of laws which were inscribed in the texts of Hindus and Muslims. William Jones, like Hastings, rejected the idea that "India's civic constitution was despotic" and believed that "in antiquity in India there had been legislators and lawgivers of whom Manu [the protagonist of the famous and most important *Manusmriti*] was not only the oldest but also the holiest."⁴¹ Based on Jones's dedicated work on the laws of the *Dharmasastras*, his successor H.T. Colebrook published "The Digest of Hindu Law on Contracts and Succession" in Calcutta in 1798. The digest codified Hindu laws which were made invariant compared to the "flexible" laws of the Hindus. In the adjudication of justice, "initially the courts looked to scriptures for domestic and social norms and rested heavily on the interpretation of *pundits* [traditional Hindu scholars] for the Hindu law. These interpretations reflected a Brahminical view of society, which saw its influence in terms of immutable religious principles."⁴² The canonized Hindu laws during the early phase of colonial rule "expanded its authority across large areas of society which had not known it before or which, for a very long period, had possessed their own more localized and non-scriptural customs."⁴³ According to David Washbrook: "The rise of the Hindu law was one of many developments of the period which made the nineteenth century the Brahmin century in Indian history and perhaps helps to explain why the twentieth century was to be the anti-Brahmin century."⁴⁴ During the early days of the colonial rule Britishers were enthusiastic "patrons of the *sastras*"⁴⁵ and believed that the original or earliest legal text was the most authentic. However in such Orientalist constructions of India and the law, "the dynamic interaction between textual law and non-textual custom, which had gradually evolved in pre-British India was hypostatized."⁴⁶

⁴⁰. Ibid.

⁴¹. Ibid, p. 72.

⁴². David Washbrook, "Law, State and Agrarian Society in Colonial India." *Modern Asian Studies* 15 (3): 649-721, 1981, p. 653.

⁴³. Ibid.

⁴⁴. Ibid.

⁴⁵. Derrett (op. cit., 1968).

⁴⁶. Janaki Nair, *Women and Law in Colonial India: A Social History* (New Delhi: Kali for Women, 1996), p. 21.

The search for a formal code in regulation and adjudication followed the introduction of a more secure rule of private property in India. Cornwallis, the Governor General of Bengal succeeding Hastings, introduced the *Zamindari* system there in 1793 which was called Permanent Settlement. Permanent Settlement offered landownership to the *Zamindars* or landlords for a fixed yearly payment to the government. The fixation of this fixed fee ensured regular revenue to the colonial rulers. Introduction of private property was "perceived as the fundamental means for ordering Indian agrarian society" and for establishing "an ideologically coherent and functionally systematic basis for revenue collection."⁴⁷ If the *Zamindars* defaulted on their fixed yearly payment then their estate were to be put up for auction. But Henry Munro, the Governor General of the Southeastern Presidency of Madras, disagreed with Cornwallis' rule of property for Bengal and introduced the *ryotwari* system where landownership was conferred upon individual tenants or the *ryots* rather than on one big landlord. Such a rule of property established direct relationship between the colonial state and the cultivators and Munro argued that such a rule of property was much more in tune with the ethos of traditional Indian society. His critique of Permanent Settlement, the other rule of property introduced by Cornwallis, is instructive: "We have, in our anxiety to make everything as English as possible in a country which resembles England in nothing, attempted to create at once throughout extensive provinces a kind of landed property which had never existed in them."⁴⁸ Munro gave ownership to individual tenants and took for his principle of assessment of land revenue "the traditional criterion of good Indian rulers that the state share of produce should not exceed one-third."⁴⁹ Like William Jones, Munro was much more sympathetic to the native institutions, wanted to restore the jurisdiction of the village *panchayats*, or customary tribunals, composed of village elders, "invest the village headman with limited powers in petty civil and criminal cases, to appoint new grades of indian 'native judges' with greatly extended jurisdiction; and to limit the right of people from the lower courts."⁵⁰

During the British colonial rule, rule of law and rule of property proceeded hand in hand but the conferral of permanent property rights on big landlords in the system of Permanent Settlement devastated Indian country side instead of developing it. "Far from

⁴⁷. Nicholas B. Dirks, "From Little King to Landlord: Property, Law and the Gift under the Madras Permanent Settlement." *Comparative Studies in Society and History* 28 (2): 307-333.

⁴⁸. Quoted in Dirks (op. cit., 1986), p. 318.

⁴⁹. Stokes (op. cit., 1982), p. 84.

⁵⁰. Ibid, p. 141.

defining and protecting existing rights Cornwallis had thrown all into confusion by vesting an almost absolute property right in the great *zamindars* (landlords) and leaving all subordinate interests undefined. The mass of litigation which had ensued from the Permanent Settlement was left to be dealt with by a judicial organization wholly inadequate in scope and arrangement.⁵¹ Furthermore, "The length and cost of the judicial process had grown so huge as to be tantamount to a virtual denial of justice and a 'destructive anarchy'."⁵² Historical anthropologist Nicholas Dirks writes about the impact of this rule of property on Indian society: "The permanent settlement provides one of the clearest examples of the British reification of their concept of old regime within the framework of a new "progressive" system governed by the overarching principles of order and revenue. xxx Boundaries became fixed, relationship became bureaucratically codified. xxx The fixity of the revenue demand was both a metaphor of this change and the fundamental cornerstone of the new regime. To maintain both the revenue demand and local social order, Kings—and Kingdoms—were subordinated to the institutional structures of the new colonial legal system."⁵³

What is to be understood at this point is that pre-British ownership of land did not approximate the British idea of fixed and permanent ownership. There were varieties of ownership right in pre-British India including communal ownership and in parts of India such as Tamil Nadu in the 18th century, "between 60 and 50 percent of all cultivable land was given away under the category of *inam* (tax-exempt) land."⁵⁴ Unlike the new colonial masters, the kings ruled not by "administering a land system in which land owed its chief value from the revenue" it could generate but by making a gift.⁵⁵ But "The British with a very different view of property rights, misunderstood all this, when they attempted to sort out who owned the land, they assumed opposition, not complementarity; the owner, they thought must be either the cultivator or the king, thus creating many of the classificatory problematics of the land systems."⁵⁶

To come back from rule of property to rule of law, we must realize the step by step displacement of traditional law in the colonial period, a displacement which also continued in post-independent India. We must remember that when Sir William Jones and his colleagues

⁵¹ Stokes (op. cit., 1982), p. 141.

⁵² Ibid.

⁵³ Dirks (op. cit., 1986), p. 330.

⁵⁴ Ibid, p. 312.

⁵⁵ Ibid.

⁵⁶ Ibid, p. 311.

gave the digest of Hindu laws, these codified Hindu laws were already displaced from the way they were conceptualized and worked out before. As Archana Parashar writes: "These judges, even though applying the rules of Hindu and Islamic laws, interpreted them according to their understanding and training. Moreover, the rules of procedure and evidence were alien to the systems of Hindus or Islamic laws and when applied to these systems of laws they had the result of transforming them in unforeseen directions."⁵⁷ The British sought to formalize and systematize law in colonial Indian society. "In pre-British India there were innumerable overlapping local jurisdictions and many groups enjoyed one or another degree of autonomy in administering law to themselves. xxx The relation of the highest and most authoritative parts of the legal system to the 'lower' and of the system was not that of superior to subordinate in a bureaucratic hierarchy. xxx Instead of systematic imposition, of 'higher' law on lesser tribunals, there was a general diffusion by the filtering down (and occasionally up) of ideas and techniques."⁵⁸ But the British formalized the higher and the lower ends of justice and sought to make it centralized and systematic.

Thomas Macaulay, member of the Law Commission established in 1835, played a crucial role in this task of codification and formalization. Macaulay's important and lasting contribution to Indian law and jurisprudence was the establishment of the Indian Penal Code. In 1835 Macaulay instructed the Law commission to "frame a complete criminal code for all parts of the Indian Empire which should not be digest of existing laws but should embrace all reforms thought desirable."⁵⁹ Macaulay refused to take any of the existing Indian criminal law system as the basis for the penal code as he marshalled a wealth of evidence regarding the despotic and chaotic nature of the existing penal codes. At this point of time, Hindus and Muslims were governed by not only different civil codes and personal laws but also by different penal codes. Macaulay could sense that establishing a uniform civil code would be difficult as it would touch upon the jurisdiction of Hindu and Islamic religions. So he sought to create a uniform penal code. But it has to be borne in mind that by 1835 "The Muslim criminal law which the British had inherited and claimed to administer, had been so overlaid by Regulation Law that it was unrecognizable."⁶⁰ In 1832 itself the British had discontinued the practice of *fatwa* entailed in the Muslim personal law.

⁵⁷ . Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992), p. 72.

⁵⁸ . Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford U. Press, 1989), p. 16.

⁵⁹ . Stokes (op. cit., 1982), p. 222.

⁶⁰ . Ibid, p. 223.

The draft of the penal code of 1835 had to wait for more than twenty years before it was enacted in 1860 as the general criminal law of India. In this formulation Macaulay was influenced by the British utilitarians, especially by Jeremy Bentham. The utilitarian search for firm rules was also part of an authoritarian project. James Mill who was directly involved in the administration of India had argued that India desperately needed a common code and this blessing can be conferred on her not by any popular government but by an "absolute government."⁶¹ In fact, it is the authoritarian conception which had led Mills to favor the establishment of a Law Commission with as few constitutive members as possible. Making of law here was confined to an elitist process and was not meant to be part of what Habermas would call a public discursive formation of will.⁶² Such an elitist character of law making continues even after more than one hundred and fifty years of the establishment of the first law commission of India as Upendra Baxi writes about the contemporary scene: "law-making remains more or less the exclusive prerogative of a small cross-section of elites. This necessarily affects both the quality of the law enacted and its social communication, diffusion, acceptance, and effectivity..⁶³

After the Sepoy Mutiny of 1857 which was in fact the first Indian war of independence during which Hindus and Muslims fought against the colonial rule of East Indian Company, India came under the direct rule of the British crown in 1858. (So far it was being ruled by the East India Company). In 1864, there was a major reform of the judicial system. The reform abolished the Hindu and Muslim law officers in the various courts of India. The codification of law and consolidation of the court system was further intensified in the quarter century after the takeover of India by the Crown. While the law applied in the courts before 1860 was extremely varied by 1882 "there was virtually complete codification of all fields of commercial, criminal and procedural law" excepting the personal laws of Hindus and Muslims.⁶⁴ While Hindu and Muslim laws previously applied to a variety of topics, now they became confined "to the personal law matters (family law inheritance, succession, caste, religious endowments" (ibid). Moreover, the new codes in place "did not represent any fusion with indigenous law."⁶⁵ Rather they transformed indigenous law. The administration of law in the process moved from informed tribunal into the governments courts "curtailing the applicability

⁶¹ Ibid, p. 219.

⁶² Jurgen Habermas, *Between Facts and Norms: Contributions Towards a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996).

⁶³ Upendra Baxi, *The Crisis of the Indian Legal System* (Delhi: Vikash, 1982), p. 45.

⁶⁴ Galanter (op. cit., 1989), p. 18.

⁶⁵ Ibid.

of indigenous law" and transforming it in the course of its being administered by the government's courts.⁶⁶

The transformation of rule of law that took place in this colonial encounter is looked at through the prism of Henry Maine's differential historical divide of "from status to contract." But for some critical students of Indian history and society, the rule of law in the colonial period fixated boundaries of self and group in a tight manner. This becomes clear when we look into the reification of village, caste and tribe that took place during the British rule. As Richard Smith tells us: "As a unit of administration, the village community had been idealised as a 'petty commonwealth' or 'a little republic' at a time when new territories were being brought under the British rule. xx 'Caste', on the other hand, was a different kind of concept, with different possible official uses. More a unit of knowledge about Indian society than a unit of administration, its great virtue was that it embraced the whole of India and all sections of Indian society. Even if it could not be made the basis for the extraction of revenue [it was important for a bounded construction of Indian society]."⁶⁷ In the process of reification of caste which was appropriated within the "rule by reports": "The notional individual was stripped of the universality of his social roles within a 'village community' and clothed instead by a garment specific to India, 'caste.' The Government may thereby have figured a direct link with each individual, but an individual's right now depended irredeemably on his status in society. *One could almost say that, within the rule of law, the movement from contract to status had come full circle.*"⁶⁸

These newly formulated codes and laws were applied in the lives of people in a complex manner. Arjun Appadurai presents us an ethno-historical description of this complex working of rule of law in colonial India in the field of administration of temples.⁶⁹ In pre-British period, the kings were only the administrators of temples, not the legislators and so there was no law of endowment in the field of temple administration. But with the formalisation of rule of law under colonialism, temples began to be administered on the basis of the English model of

⁶⁶ Ibid, pp. 18-19.

⁶⁷ Richard S. Smith, "Rule-by-records and Rule-by-Reports" Complimentary Aspects of the British Imperial Rule of Law." *Contributions to Indian Sociology* (n.s) 19 (1): 153-176, 1985. p. 172.

⁶⁸ Ibid, p. 173. David Washbrook (op. cit., 1981, p. 654) makes almost a similar observation: "If the public side of the law sought to subordinate the rule of 'Indian status' to that of British contract' and to free the individual in a world of amoral market relations, the personal side entrenched ascriptive (caste, religious and familial) status as the basis of individual right."

⁶⁹ Arjun Appadurai, *Worship and Conflict under Colonial Rule: A South Indian Case* (Delhi: Orient Longman, 1983).

"charitable trust."⁷⁰ But the "English model of the Trust, whereby endowed property was transferred to, and vested in, a trustee for the benefit of other called 'beneficiaries', was clearly not applicable to the Hindu temple, where property was clearly vested in the idol and was only managed in its behalf, by the trustee."⁷¹ It was probably because of such persistent ambiguities that religious endowments were explicitly exempted from the scope of the Indian Trusts Act, which was passed in 1882. Nevertheless, "for lack of a systematic alternative, the English model of trust continued by analogy, to inform the judgments of the Anglo-Indian courts."⁷² Appadurai helps us understand the impact of colonial rule of law on the administration of temples in India: "...the judicial activity of the English courts in Madras between 1878 and 1925 had two far reaching effects on the Sri Partasarati Svami Temple [of Triplicane, Madras, the temple on which Appadurai had carried out ethno-historical research]: First, the notion of a *Tenkalai* community (the community of worshippers built around the temple), was elaborated, refined and codified; at the same time, and paradoxically, various subgroups and individuals within the *Tenkalai* community were encouraged to emphasize the heterogeneity of their interests and to formulate their *special* rights in a mutually antagonistic way, thus making authority in the temple even more fragile than it had previously had been. The court's effort to classify, define, and demarcate the concrete meaning of the concept of the 'Tenkalai' community of Triplicane generated more tensions than it resolved. The 'schemes' for the governance of the temple and the judgements and the precedents created by the court provided more opportunities for litigants to reflexively refine their self-conceptions and their political aspirations. The legal 'texts' encouraged the multiplication of ideas of the 'past' as well as model of the 'future' in respect to temple."⁷³

However, it must be noted that during British colonialism all parts of India were not under the direct rule of the British. During British colonial rule there were in fact two India: the British India and the princely India. The later, consisting of a third of the Indian subcontinent, were ruled by the native princes and constituted a relatively autonomous domain. In these princely states sometimes progressive legislations were introduced especially in the domains of family and personal laws. During colonialism Hindus and Muslims were governed by their respective personal laws which were gender-biased and discriminatory towards women but British rulers did not want to interfere in these personal laws. But rulers of princely states

⁷⁰. Ibid, p. 173.

⁷¹. Ibid.

⁷². Ibid, p. 174.

⁷³. Ibid, pp. 178-179.

undertook some steps to redress such gender-oppressive personal laws. For example, the princely state of Baroda was the first state to introduce provisions for divorce. Of similar such progressive legislations during the colonial period in the other princely state of Mysore, social historian Janaki Nair writes: "Mysore introduced, and took several measures to implement, an Infant Marriage Prevention Act as early as 1894, without the bitter debates that occurred in British India over the Age of Consent Act. A bill according rights to women under Hindu Law, which extended property rights, granted maintenance, adoption and related rights, became law with relatively little opposition in 1933, a full four years before even a partial bill was passed in the Central Legislature."⁷⁴

Bernard Cohn writes about experimenting with establishing a formal rule of law in India within the hundred years between Warren Hasting's attempts in 1772 to the last quarter of the 19th century: "...publication of authoritative decisions in English had completely transformed 'Hindu law' into a form of English case law. Today when one picks up a book on Hindu law, one is confronted with a forest of citations referring to previous judges's decisions--as in all Anglo-Saxon-derived legal systems--and it is left to the skills of judges and lawyers, based on their time-honored abilities to find precedent, to make the law. What had started with Warren Hastings and Sir William Jones as a search for the 'ancient Indian constitution' ended up with what they had so much wanted to avoid--with English law as the law of India."⁷⁵ This last sentence of Cohn provides an important continuum between the colonial and postcolonial moments.

Post-colonial Experiments

The legal system built under colonialism in India continued after India's independence. In the Constituent Assembly which debated for two years (1947-9) the vision and text of the new Constitution there was no concerted effort to institute an indigenous law based on the *Dharmasastras*.⁷⁶ Neither there was any spokesman for the revival of local customary law as such. M.K. Gandhi, the leader of the Indian struggle for freedom, was a great critic of Western mode of life including law. Gandhi had preferred village as a unit of justice rather than individual but an attempt made by Gandhians to "form a polity based on village autonomy and self-sufficiency was rejected by the Assembly which opted for a federal

⁷⁴ Nair (op. cit., 1996), p. 42.

⁷⁵ Cohn (op. cit., 1997), p. 75.

⁷⁶ Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Delhi: Oxford U. Press, 1999).

and parliamentary republic with centralized bureaucratic administration."⁷⁷ As Marc Galanter writes about this formative period of constitutional law in post-colonial, independent India: "The only concession to the Gandhians was a directive principle in favour of village *panchayats* as units of local self-government. The existing legal system was retained intact, new powers were granted to the judiciary and its independence enhanced by elaborate protections."⁷⁸ But while earlier making village panchayats a unit of local administration was part of the Directive Principle of State Policy since 1992 after the 72nd and 73rd Amendments to the Constitution it is now constitutionally mandatory to hold elections to the panchayats at regular intervals and share power with the representatives of *panchayats*.

The founding of the new Constitution of India was a moment of decisive significance in Indian society and history. Indian constitution provided an alternative to the *Dharmasastras* as the foundation of rule of law. The normative dissonance that the Constitution introduces in traditional Indian society is best described by Andre Beteille, the preeminent sociologist of India: "The Hindu society is a harmonic system where inequality exists and is perceived to be legitimate whereas the Constitution ushers in a diachronic system where inequalities exist but they are no longer legitimate."⁷⁹ Constitution guarantees secularism and promises a life of socio-economic equality and dignity to all its citizens. From the beginning, the Constitution of India has been a document of hope for fuller democratic realization. The rule of law enshrined in Indian Constitution not only created the autonomy of the domain of law but had a strong imperative for using law as an instrument for social transformation and creation of a just social order. Jawaharlal Nehru, the first Prime Minister of India, particularly led the State-led movement to use law and Constitution for the sake of socio-economic transformation. Much of the blueprint for socio-economic change was put under the Directive Principle of State Policy. As Rajeev Dhavan, an insightful commentator on this issue, tells us: "The upshot of all this was the creation of a positivistic welfare state that demanded enormous legal empowerment to effect the social and economic transformation of India. If 'law' had any role to play, it had to be functionally geared towards achieving this politically ordained social change."⁸⁰ During the founding of the Constitution, "there was broad social and political consensus on the view that the only way India could dispense substantive *socio-economic*

⁷⁷ Galanter (op. cit., 1989), p. 40.

⁷⁸ Ibid.

⁷⁹ Quoted in Baxi (op. cit., 1982), p. 339.

⁸⁰ Rajeev Dhavan, "Judges and Indian Democracy: The Lesser Evil?" In *Transforming India: Social and Political Dynamics of Democracy*, ed., Francine R. Frankel et al. (Delhi: Oxford U. Press, 2000), p. 322.

justice for its people was not just through planned development, but by an effective transformation of Indian society"⁸¹ and law was to be an instrument in this transformation.

This desire to use Constitution for ensuring socio-economic justice continues to inspire many efforts right upto the present. A recent effort is the institution of public interest litigation in which the Supreme Court of India has revitalized judiciary as an instrument of governance. In public interest litigations, concerned actors—citizens and other voluntary organizations—can bring to the notice of the Supreme Court or the High Courts of states any issues which need immediate attention and redressal on behalf of the affected parties. As Sangeeta Ahuja who has studied this development writes: "Public Interest Litigation (PIL) in the late 1970s was first envisaged by its proponents as a way of ensuring that justice was made available to those without the knowledge of resources to approach the courts and as a forum for the resolution of public importance. Many of the earliest PIL cases detailed the conditions in prisons and instances where fundamental rights had been abused."⁸² Justice P.N. Bhagwati, a former Chief Justice of Supreme Court of India, who had played an important role in instituting Public Interest Litigation, says: "Public Interest Litigation is brought before the Court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional and legal rights of large number of people who are poor, ignorant or in a socially or economically backward position should not go unnoticed and unredressed."⁸³ In the last two decades, the Supreme Court of India has addressed public interest litigation on diverse areas: environment and environmental pollution, corruption, and human rights abuses.

At this point, we can spend a little time on the Supreme Court of India as the highest institution of rule of law of the land. From the beginning, the Supreme Court of India has embodied two different orientations—conservative and radical. In the founding years of the Constitution Prime Minister Nehru expressed dissatisfaction with the attitudes of some Supreme Court judges who gave more primacy to the right to property rather than right to equality in their interpretation of the Constitution. Nehru was keen to abolish *zamindari* or *landlordship* and in this task Supreme Court's primacy on property created stumbling blocks. The Supreme Court today continues to embody these two tensions. In some cases the

⁸¹. Ibid, 321.

⁸². Sangeeta Ahuja, *People, Law and Justice: A Casebook of Public Interest Litigation* (New Delhi: Orient Longman, 1997), pp. 1, 2.

⁸³. Ibid.

Supreme Court has approved radical efforts on the part of the legislature such as providing constitutional approval to the 1990 Governmental notification for implementing Mandal Commission's recommendations for job reservation for economically and socially backward classes. Reservation in education and employment was earlier confined to the most backward and downtrodden castes and tribes, known as the Scheduled Castes and the Scheduled Tribes but the new Government legislation extended reservation to other economically and socially backward castes. While in the first phase of post-independent India the judiciary was thought of as an institution of government, in the second phase judiciary was looked at as an "institution in the constitutional polarity to the government" and now it is being looked at as an "institution of governance in its own rights."⁸⁴ The working of the public interest litigation in the last twenty years is a reflection of the transition of the judiciary as an autonomous institution of governance. Here the Supreme Court has taken some bold though controversial decisions such as the closing of the polluting industries in the capital city of Delhi. In post-independent India, the judiciary has been governed by not only "structural accountability" but also "value accountability." "Since democratic structures are essentially majoritarian in nature, it is felt that decisions should not only be democratically accountable in structural terms, but also 'value accountable,' so that the ends of justice are fairly met."⁸⁵

The British were committed to a statute-based legal system compared to the value-based legal system of the traditional Indian society. But in the working of the contemporary institutions of law in Indian society it is not correct to say that the value-based legal system has been totally replaced by the statute-based law. Though Constitution has replaced the *Dharmasastra*, judges continue to adopt a *dharmasastric* approach to the Constitution in as much as they stress on the inviolable basic structure of the Constitution consisting of democracy and secularism. As Rajeev Dhavan writes: "Even though Indian law is now statute-based and thoroughly 'western' in its approach, it should not surprise us if the basic instinct of Indian judges is to retain a *dharmasastric* approach to otherwise anglophone laws. This might explain their affinity to widely stated doctrines of judicial reviews including the famous basic structure doctrine, which powerfully restates the case for constitutionalism in ways that it has never been stated."⁸⁶ For some observers of the Indian juridical scene such as Chris Fuller the way Indian judges work is similar to a great extent to the working of traditional *pundits*, the interpreters of the sacred texts. For Fuller, "The certainty of modern

⁸⁴ Dhavan (op. cit., 2000).

⁸⁵ Ibid, p. 337.

⁸⁶ Ibid, p. 317.

law is an ideal, but precedent (like legislation) is always in practice subject to judicial interpretation. This was known long before Dworkin placed such stress on the role of interpretation in the legal process. Once the flexibility of modern law is taken into account, the contrast between modern and traditional law becomes but a matter of degree, just as the difference between modern judicial reasoning and classical Hindu religious interpretation is formally slight.⁸⁷

Establishment of a uniform civil code has been part of the directive principle of the state policy of the Constitution. As we have briefly encountered, Hindus, Muslims and Christians followed their differential personal laws during the colonial rule. In fact, during the moments of colonial appropriation there took place Brahminisation and Islamization of the personal laws of Hindus and Muslims respectively as the colonial administrators ascertained and fixed their personal laws "from their scriptural texts."⁸⁸ After independence and the institution of Constitution, personal laws among the Hindu were greatly modified. The Indian Parliament in 1955-56 passed a series of acts known collectively as the Hindu code, which effect a wholesale and drastic reform of Hindu law: "Hindu social arrangements are for the first time moved entirely within the ambit of legislative regulation; appeal to the sastric tradition is almost entirely dispensed with."⁸⁹ Furthermore, "The code makes acceptance of Parliament as a kind of central legislative body for Hindus in matters of family and social life."⁹⁰ But for students of critical family law reform in India such as Archana Parashar, the reform of Hindu personal law did not embody gender equality in a full and substantive manner. "While reforms made to Hindu law were designed to give women more legal rights, it was never the intention to give complete legal equality to women."⁹¹ Furthermore "By projecting the aim of incorporating sex equality and uniformity in Hindu law as desirable goals the political leaders used law reform as an instrument of political development rather than as a means of ensuring legal equality per se."⁹²

⁸⁷. Chris Fuller, "Hinduism and Scriptural Authority in Modern Indian Law." *Comparative Studies in Society and History* 30: 225-248, 1988, pp. 246-247. Fuller further writes: "Hindu scriptural discourse is not and never monolithic.. and it does perennially generate reinterpretations of itself..." (p. 241)). Fuller quotes Lingat: "The role of interpretation amounts to this: it offers society the means whereby it can rediscover itself" (ibid).

⁸⁸. Parashar (op. cit., 1992), p. 66.

⁸⁹. Galanter (op. cit. 1989), p. 29.

⁹⁰. Ibid, p. 30.

⁹¹. Parashar (op. cit., 1992), p. 76.

⁹². Ibid.

But Muslims and Christians continue with their earlier personal laws with very little modification though recently Government has sought to introduce new personal laws in case of the Christians making it easier for Christian women to obtain a divorce. As Dieter Conrad who has studied the Constitutional problem of personal law in the context of rule of law in India writes: "There is within the Indian legal system, a wide area where constitutional rules don't apply, or rather are not applied by either the legislature or the courts. The area in question is not just one among the many sided ramifications of law and social life, but concerns the core of the individual's position as a human person in society. The crucial issue is xx the position of women who in all the personal laws, though in varying degrees are subjected to discretionary treatment."⁹³ For example, polygamy is permitted to males but not to females under the Muslim personal law and on the Hindu side even after the Hindu Code of 1955, daughters continue to be excluded from coparcenary in the law of *mitakhara* joint family.⁹⁴ The existence of such gender-discriminating personal laws continue to challenge law and society in India for a further deepening and universalization of rule of law. But the formation of a uniform civil code, that is how this expected measure of universalization is called in India, has to come to terms with the fact that "major sections of citizens do regard their personal laws as an essential part of their religion."⁹⁵ This factor, says the Supreme Court, has to be taken into account "in determining the scope of permissible legislation."⁹⁶

The case of Shah Bano, a deserted Muslim woman, dramatically presents the difficulties surrounding the formulation of a uniform civil code. Shah Bano, a poor Muslim woman, had applied to Court for maintenance from her former husband and the Supreme Court of India upheld in 1985 the decision of the High Court which directed him to pay maintenance to his divorced wife Shah Bano. But members of the Muslim Personal Law Board of India objected to the Supreme Court judgment as a gross interference with Muslim personal laws and soon conservative political and religious forces in the name of representing and protecting minority religious interest exerted political pressure on the Government. The Government under the leadership of then-Prime Minister Rajiv Gandhi, instead of using this

⁹³ Dieter Conrad, "Rule of Law and Constitutional Problems of Personal Laws in India," in Satish Saberwal & Heiko Sievers (eds.), *Rules, Laws, Constitutions* (Delhi: Sage Publications, 1998), p. 227.

⁹⁴ In traditional Indian society the rights of most Hindu women were governed by the Mitakshara and Dayabhaga systems of law. The Mitakshara conferred coparcenary rights at birth on sons but the Dayabhaga system ensured no such birth right. Thus the chances of a woman "inheriting property under the Dayabhaga was slightly better." The Hindu Code of 1955 did not make difference to inheritance of property on the part of Hindu women living under the Mitakshara system of law. Nair (op. cit., 1996), pp. 196-197.

⁹⁵ Ibid, p. 229.

⁹⁶ Ibid.

occasion for a broad-based dialogue on reform, introduced a new legislation which nullified the decision of the Supreme Court. This is a controversial legislation which denies justice to Muslim women. This is a case of triumph of conservative male Muslim religious and political leaders who claim that they are the sole spokesperson for the entire Muslim population. These leaders resist the formulation of a uniform civil code on the supposed ground that it would interfere with their religious personal laws. But religious leaders need to reinterpret religious laws in the light of contemporary challenges. The key issue here is: can freedom of religion be used to suppress the constitutionally guaranteed right to equality on the part of individuals, particularly women? The real issue here is the "conflict between the rights of minorities and rights of women of minority communities."⁹⁷ The representatives of religious minorities do not represent the voice of suppressed groups within their communities. In this context, a variety of positions are offered. For radical critics such as Parashar, the category of personal law itself should be abolished.⁹⁸ But some others such as Dieter Conrad pleads for introducing "individual choice" in matters of status governed by personal law on the lines of the Special Marriage Act, 1954 or the optional clause in the Muslim Personal Law (Shariat) Application Act, 1937. For Conrad: "...a legitimating element of individual option would ensure that personal law is not simply enforced as an ascriptive status on grounds of religious affiliation alone.xx At the same time paradoxically, peculiarities of the hierarchial law could be more easily justified, if accepted in an act of deliberate individual choice."⁹⁹

Critical Reflections on Rule of Law in Contemporary Indian Society

Sociologist Andre Beteille is a keen and critical commentator on the rule of law in Indian society. For Beteille, in what he calls the populist interpretation and mobilization of democracy, Indian activists, scholars and citizens have not paid enough attention to the need for following scrupulously rules and procedures.¹⁰⁰ For Beteille who provides a constitutionalist procedural approach to democracy, democracy hangs by the thread of procedure but the general tendency in "our society is for life to be regulated by persons rather than by rules."¹⁰¹ For Beteille who builds upon Irawati Karve's view that Indian civilisation has been shaped by principle of accretion (in accretion, there is continuous accumulation of rules

⁹⁷. Parashar (op. cit., 1992), p. 229.

⁹⁸. Ibid, p. 258.

⁹⁹. Conrad (op. cit., 1998), p. 230.

¹⁰⁰. Andre Beteille, "Citizenship, State and Civil Society." *Economic and Political Weekly*, Sept. 4, 1999.

¹⁰¹. Andre Beteille, "Experience of Governance: A Sociological View." In R.K. Darr (ed.) *Governance and the IAS* (New Delhi: Tata McGraw Hill, 1999), p. 200.

without the elimination of the old ones), "When we add new rules, we do not necessarily discard old ones, so that other rule becomes crowded with obsolete, anachronistic and inconsistent rules. In India administration by impersonal rules resists systematization because that demands continuous elimination of old and anachronistic rules."¹⁰²

Beteille's contention that Indians have difficulty in subjecting themselves to a rule of law is corroborated by other critical commentators such as Satish Saberwal and Upendra Baxi. For Saberwal, "Indian society has not been historically inclined towards working with general rules: in Manu's codes, for instance, punishment depends on the culprit's caste status."¹⁰³ For Upendra Baxi, "Indian political elite and upper middle classes have not internalized the value of legalism."¹⁰⁴ What Upendra Baxi, the critical legal theorist of India wrote twenty years ago, holds good even today: A large segment of Indian population feel that "rule following is not merely unjustified but counterproductive in terms of their interest."¹⁰⁵ Corruption and governmental lawlessness where states violate laws especially with regard to human rights abuses and where Governments default "in the implementation of their statutory obligations"¹⁰⁶ are further challenges to the establishment of rule of law in India.

Beteille draws our attention to the distinction between the Directive Principles of State Policy and Fundamental Rights enshrined in the Constitution. "All Fundamental Rights, including the right to equality, are enforceable by the courts. As against these, the Directive Principles of State Policy are not enforceable by the Courts although they are of great social and political significance."¹⁰⁷ But over the years the primacy of Fundamental Rights has been relativized to accommodate striving for social justice and egalitarian policies. As Beteille writes, "Almost immediately after the new Constitution was adopted, two major instruments of the policy for greater equality, agrarian reform on the one hand and benign quotas on the other came up against the processes of Fundamental Rights. These provisions had to be realigned by the First Amendment to the Constitution so as to accommodate policies designed to reduce disparities between classes and disparities between castes."¹⁰⁸ In such a

¹⁰² Ibid, p. 228.

¹⁰³ Satish Saberwal, "Introduction: Why Do We Need Rules and Laws?" in Satish Saberwal & Hieko Sievers (eds.), *Rules, Laws, Constitutions* (New Delhi: Sage Publications, 1998), p. 16.

¹⁰⁴ Baxi (op. cit., 1982), p. 7.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, p. 28.

¹⁰⁷ Andre Beteille, *Society and Politics in India: Essays in a Comparative Perspective* (Delhi: Oxford U. Press, 1997), p. 192.

¹⁰⁸ Ibid, p. 202.

process, equality as a right has given way to equality as a policy where individual right to equality and equal opportunity is compromised. Beteille is particularly critical of introduction of reservation in education and job for socially and economically backward castes which for him makes a mockery of individual right to equality, especially equality of opportunity.

But while Beteille seems to lament the dilution of equality as a right by the populist mobilizations of equality as a policy interlocutors such as Upendra Baxi on the other hand applaud the transformation of constitutional imperatives into concrete measures for the realization of the socio-economic rights of people. Baxi however draws our attention to the way existing legal institutions create hurdles for the realisation of the emancipatory and normative promises of Constitution. For example, "the Constitution and the law have generally strong redistributive thrust"; yet "the orientation of the major institutions of Indian Legal System is towards maintenance and even aggravation of the status quo. The legal institutions generally decelerate and even prevent the inherent dynamism of constitutional aspirations towards a just social order."¹⁰⁹ However for critical students of law and society such as Rajeev Dhavan the constitutional promises for a just world order are themselves half-hearted. In the words of Dhavan: "There was never any great dissonance between Nehru's developmental plan for the Indian people and the positivist theory of law that the British had bequeathed to the courts of independent India. The fact that the Constituent Assembly had scripted a judicially enforceable Bill of Rights into the text of the Constitution did not disturb the positivist credentials of Indian law. The fundamental rights guaranteed to the citizen had been perceived as essentially "legal rights" granted by a super statute: each one of the rights had been hedged in by limitations and was interpreted like any other statute."¹¹⁰

Baxi also draws our attention to the continuance of the "the colonial model of reactive mobilisation of law rather than pro-active mobilisation."¹¹¹ He also urges us to realize the problem of access to rule of law: "The state legal system, pervasive in urban areas, is only slenderly present in rural areas. The low visibility of the state legal system and its slender presence renders official law (its values and processes) inaccessible and even irrelevant for people."¹¹² The exorbitant court fees that people have to pay also discourage them from taking part in the rule of law. Of course in this regard, there emerged some efforts to make law more accessible. Forty years ago Nyaya Panchayats were established to redress this

¹⁰⁹ Baxi (op. cit., 1982), p. 30.

¹¹⁰ Dhavan (op. cit., 2000) p. 32.

¹¹¹ Baxi (op. cit., 1982), p. 47.

¹¹² Ibid, p. 345.

balance but these did not make much headway.¹¹³ Even in the new Panchayat Raj System the task of realizing justice at the local level has not made much headway.

India is at present ruled by a coalition of parties which are part of what is called National Democratic Alliance and its leading partner is Bharatiya Janata Party which is actively sympathetic to the agenda of Hindu fundamentalist forces. The churning of Indian political and social system in the recent years has led to the demise of one party dominance in India's political and electoral firmament. This has led to apparent political instability at the centre. For instance, in the last five years alone, three general elections have been conducted for Indian Parliament—in 1996, 1998 and 1999. After the last general election, the ruling coalition has established a Constitution Review committee to review the Constitution. The review is meant to look into "salient issues in the area of governance primarily federalism reforms [pertaining to the relation between the Center and States which is still characterized by unfairness with regard to sharing of economic resources and political power], attainment of political stability for the present and future, Union Governments in an era of fractions coalitions."¹¹⁴ While the review commission is likely to examine the issue of conversion of some Directive Principles into Fundamental Rights (especially the right to primary education), the widespread fear and uproar in contemporary Indian society is that the present review of the Constitution is a surreptitious attempt on the part of the ruling party to do away with the basic structure of Indian constitution such as secularism and parliamentary democracy. For Upendra Baxi, there is no need for a Constitution review panel as Constitution has allowed numerous changes within it through amendments. But while the Constitution allow changes *in* it; it does not allow change *of* it: "Changes of Constitution are not allowed any scope by the present Indian Constitutionalism which denies legitimacy for its profound subversion."¹¹⁵

The need to be vigilant about any subversion to Constitution is presented in a passionately engaged manner by none other than the President of Indian Republic, K.R. Narayanan. Narayanan was born into a poor untouchable family in Kerala and had difficulty in going to primary school in his locality. He is now the President of the Republic of India and his journey from an untouchable hamlet in Kerala to the office of the President of the Republic symbolizes the social transformation that has taken place in post-independent India

¹¹³ Baxi (op. cit., 1982); Galanter (op. cit., 1989).

¹¹⁴ Upendra Baxi, "Karv Seva of the Indian Constitution? Reflections on Proposals for Review of the Indian Constitution." *Economic and Political Weekly*. March 11, 2000, p. 892.

¹¹⁵ Ibid, p. 891.

in which the Constitution of India has played an inspiring role. Narayanan urges those forces in Indian society who are bent on changing the Constitution to ponder whether they have failed the Constitution or the Constitution has failed them. In his address to the nation on the eve of the Golden Jubilee of the founding of Indian Constitution on January 25, 2001 Narayanan urged his fellow countrymen to realise: "We cannot ignore the social commitments enshrined in our Constitution" and President Narayanan speaks directly to those forces in Indian society who want to subvert the emancipatory promises of the Constitution: "Let us remember, it is under the flexible and spacious provisions of our Constitution, that democracy has flourished during the last fifty years. Today India has been acknowledged as a great democracy—indeed the greatest democracy in the world and the Indian Constitution as the embodiment of the political, social and economic rights of people."¹¹⁶

By the way of Conclusion: Rule of Law and the Calling of Self-Transformation

In this essay, we have covered a long historical terrain of more than five thousand years touching briefly the way Indian society has related to rule of law at various moments of her journey. We have looked at the idea of the rule of law in classical Indian tradition and its working under the Constitution of independent India. The present Constitution of India has sought to create a more equal and just rule of law between individuals and groups than what existed under traditional authorities such as *Manusmriti*. Constitution strives to eliminate the humiliation that people suffered under the traditional social system of caste and patriarchy, thus creating new ground for realization of human dignity. The realization of both formal and substantive equality that is happening under the rule of law in contemporary Indian society can facilitate a more creative flourishing of a life of *dharma* or righteous conduct in self and society. In the first section of this essay we have seen how self-rule is central to realization of order in both self and society. But self-rule is facilitated by existence of a just social, institutional and legal order which grants legal equality to individuals irrespective class, caste, religion and gender. Modern law thus can create an appropriate sociological condition for the realization of a life of *dharma* in self and society.

But though modern rules of law are necessary, they are not sufficient for the realization of self-rule, self-governance and order in society. It is here that modern rules of law both in contemporary India and the West can learn from aspects of Indian traditions which

¹¹⁶. President K.R. Narayanan's address to the Nation, New Delhi, Jan. 25, 2001.

emphasize self-development and self-transformation. In fact, it is the practice of continued self-transformation which constitutes a beyond in thinking about rule of law, self and society and spiritual traditions of India continuously challenge us to invite and incorporate this beyond in our routines of law. As J.D.M. Derrett writes: "...the unbroken tradition of Hindu legal scholarship has emphasized the concept that Hindu law concerns itself with eternity and with morality judged against the greater background, and not with material, temporary considerations."¹¹⁷ For Sasheej Hegde, "Rules and laws in Indian traditions" point towards a morality of subjectivation, a morality that extends beyond the space of power.¹¹⁸ There is an imperative / prescriptive dimension of rule of law in Indian tradition but this "may neither be merely foisted on the practices of groups and institutions as extrinsic constraints, nor be made merely instrumental to their exercise or the principle of universalization that this could help realize must however be friends on a clarification of the *moral* point of view."¹¹⁹ The epithets "legal and moral are taken to be broadly coeval" and in Indian traditions "looked at as complementary modes of marking power."¹²⁰ The transformational supplement of morality in the working of rule of law where morality means much more than obeying societal norms but acting righteously in accordance with one's conscience has an epochal significance now. As Veena Das writes: "'Texts (including the *Dharmasastras* which lay out rules of conduct) do not prescribe behavior in the sense of laying out areas of obligation as much as describing codes of conduct considered to be exemplary or desirable. xx by characterizing this as a purely *Brahmanic* conception, one loses the opportunity of treating it as an important conceptual resource."¹²¹

The rules of law in modern western tradition began with an emancipatory promise but even by mid-nineteenth century in the West law as emancipation was over-ridden by law as regulation. The crisis facing rule of law in the contemporary world, both India and the West is "the collapse of emancipation into regulation" and the task here is to rethink and revitalize the emancipatory dimension of rule of law.¹²² But this calls for not only incorporating the old models of emancipation where emancipation entailed struggles with the external oppressive

¹¹⁷ Derrett (op. cit., 1968), p. 101.

¹¹⁸ Sasheej Hegde, "Rules and Laws in Indian Traditions: A Reconstructive Appropriation." In *Rules, Laws, Constitutions*, eds., Satish Saberwal & Heiko Sievers (New Delhi: Sage Publications, 1998), p. 116.

¹¹⁹ Ibid.

¹²⁰ Ibid, p. 99.

¹²¹ quoted in Hegde (op. cit., 1998), p. 102.

¹²² B. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995).

other but also imagining, embodying and realizing emancipation in a new way where emancipation from societal oppression and the consequent empowerment is accompanied by emancipation from one's egotistic passion and desire to control other people and an aspiration to contribute to a participatory and transformational creation of society as a space of spiritual freedom and shared intersubjectivity.¹²³ Working on this new challenge of emancipation at the core of which lies work on self-development, self-transcendence on self-transformation requires a new view of the subject and also society. Santos who urges us to realize that "the collapse of emancipation into regulation symbolizes the exhaustion of paradigm of modernity" makes this connection clear. "A narrow view of ourselves tends to encourage even a narrower view of the other."¹²⁴ For Santos, the new paradigm of law that is emerging in the context of the contemporary crisis of modernist legalism entails a triple transformation where "power becomes shared authority," "despotic law becomes democratic law," and "knowledge as regulation becomes knowledge-as-emancipation."¹²⁵ But for the realisation of this triple transformation there is the need for realisation of a new subjectivity: the task is to invent a "subjectivity constituted by the topos of a prudent knowledge for a decent life."¹²⁶ And as Paul Ricoeur would urge us to realise in his recent provocative interpretation of justice: "...the question with a juridical form who is the subject of rights? is not to be distinguished in the final analysis from the question with a moral form who is the subject worthy of esteem and respect?"¹²⁷

For Santos the "emergent subjectivity" of law lives in the frontier and to "live in the frontier is to live in abeyance, in an empty space, in a time between times."¹²⁸ Living in an empty space and empty time calls for realizing the dialectic between time and eternity, tradition and modernity and here openness to emptiness as an integral dimension of space, time, being and society in Indian socio-spiritual traditions can help us in bringing emancipation to the heart of rule of law. "Emergent subjectivity" of law requires an emergent ethics where apriori rules and regulations are not enough for making prudential judgments with regard to dealing with dilemmatic situations in law, ethics and morality and also for living a life of justice

¹²³. Ananta K. Giri, "Moral Consciousness and Communicative Action: From Discourse Ethics to Spiritual Transformation." *History of the Human Sciences* 1998; Ernesto Laclau, "Beyond Emancipation." In Jan N. Pieterse (ed.), *Emancipations, Modern and Postmodern* (London: Sage, 1992).

¹²⁴. Santos (op. cit., 1995), p. xi.

¹²⁵. Ibid, p. 482.

¹²⁶. Ibid, p. 489.

¹²⁷. Paul Ricoeur, *The Just* (Chicago: University of Chicago Press, 2000), p. 1.

¹²⁸. Santos (op. cit., 1995), p. 491.

and responsibility.¹²⁹ The task here is to bring the dimension of responsibility as unconditional obligation to the working of the rules of law where responsibility as obligation "overflows the framework of compensation and punishment."¹³⁰ A life of responsibility calls for prudential judgement which in turn calls for continuous guidance of conscience.¹³¹ But in modern Western legal and political tradition, exemplified in the works of Kant, Rawls and Habermas, the voice of conscience has all the features of social legality internalised as pure morality. But in bringing conscience to the heart of law, we have to realize that conscience is not just a product of society. It is the voice of conscience which tells "me that all other life is as important as my own."¹³² Here an ontologically responsive interpretation of conscience for a just working of rule of law is crucial and here Indian approach to rules of law through *dharma* can help us.

In his critical reflection on law and society in India, Andre Beteille writes, "Individual rights do not have the same depth and firmness in India, the same anchorage in its social structure, than they do in the United States."¹³³ But this relativisation of individual right in contemporary Indian legal systems can help us work out a much more balanced relationship between individual rights and group rights. Modern western legal tradition has granted unquestioned primacy to individual rights but with the social and theoretical revolution of postmodernism and multiculturalism, legal systems in the West are slowly opening themselves to recognising and instituting group rights. But the realisation of a proper balance between individual and group rights is still a great challenge and here experiments in the West can learn from Indian experiments with policies of compensatory discrimination which

¹²⁹. Ananta K. Giri & Philip Quarles van Ufford, *Reconstituting Development as a Shared Responsibility: Ethics, Aesthetics and a Creative Shaping of Human Possibilities* (Madras Institute of Development Studies: Working Paper, 2000).

¹³⁰. Ricouer (op. cit., 2000), p. 12.

¹³¹. In this context what Ricouer writes deserves our careful consideration: "Finally, it is to the virtue of prudence that we are led once more by the dilemma arising from the question of the side effects of action, among which fall its harmful effects. But it is then no longer a question of prudence in the weak sense of prevention, but one of *prudencia*, heir to the Greek virtue of *phronesis*, in other words, the sense of moral judgment in some specific circumstance. It is to such prudence, in the strong sense of the word, that is assigned the task of recognizing among the innumerable consequences of action those for which we can legitimately be held responsible, in the name of an ethic of the mean. It is in the end this appeal to judgment that constitutes the strongest plea in favor of maintaining the idea of imputability in the face of the assaults from those of solidarity and risk." Ricouer (op. cit., 2000), p. 35.

¹³². Ibid, p. 152.

¹³³. Beteille (op. cit., 1997), p. 198.

have sought to work out a balance between individual rights and group rights.¹³⁴ The Indian experiment on arriving at a creative and transformative relationship between individual and society in both tradition and modernity is still incomplete but it has all along striven to relativize the egoistic primacy of either group right or individual right, society and individual by bringing a dimension of transcendental beyond to the routines of rule and law. The spiritual traditions of India have all along emphasised that society is not merely a contract. This is an insight of immense help in rethinking and reconstituting law and society in the contemporary order. As Paul Ricoeur challenge us:

The question is worth asking: what is it that makes society more than a system of distribution? Or better: What is it that makes distribution a means of cooperation? Here is where a more substantial element than pure procedural justice has to be taken into account, namely, something like a common good, consisting in shared values. We are then dealing with a communitarian dimension underlying the purely procedural dimension of the social structure. Perhaps we may even find in the metaphor of sharing the two aspects I am here trying to coordinate in terms of each other. In sharing there are shares, that is, these things that separate us. My share is not yours. But sharing is also what makes us share, that is, in the strong sense of the term, share in..

I conclude then that the act of judging has as its horizon a fragile equilibrium of these two elements of sharing: that which separates my share or part from yours and that which, on the other hand, means that each of us shares in, takes part in society.¹³⁵

¹³⁴ Galanter writes: "Compensatory discrimination offers a way to leaven our formalism without entirely abandoning its comforts. The Indian example is instructive: India has managed to pursue a commitment to substantive justice without allowing that commitment to dissolve competing commitments to formal equality that make law viable in a diverse society with limited consensus. The Indian experience displays a principled eclecticism that avoids suppressing the altruistic fraternal impulse that animates compensatory policies, but that also avoids being enslaved by it. From afar it reflects to us a tempered legalism—one which we find more congenial in practice than theory." Galanter (op. cit., 1989), p. 567.

¹³⁵ Ricoeur (op. cit., 2000), p. 132.