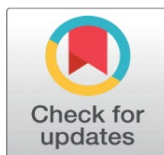


LIMITATIONS OF POSITIVE LEGAL JURISPRUDENCE AND THE ROLE OF INDIAN SPIRITUALITY: SOME PRIMARY REFLECTIONS

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ABSTRACT

Except introduction, the paper has been divided into four parts. Part I gives the brief introduction of positive legal jurisprudence and highlights its basic problems. Part II elaborates upon the core values of the Indian Spiritualism and highlights the philosophical base of the Indian spiritualism from Upanishads. Part III discusses the application of Indian spiritual values into the Indian Constitution and also highlights the problems of non-invocation of spiritual vocabulary and categories into legal discussions and debates. Part IV ends the study with conclusion.

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1. INTRODUCTION

The Indian Legal System is mostly dominated by the positivist jurisprudence that emerges from Britain and imposed on India during her subjugation and continued predominantly even after independence as a perfect tool of maintaining order and administration. Positive legal jurisprudence relies on supremacy of power and pays no heed to the claims of justice. It is an attempt to maintain order rather justice. In contrast to this, Indian spirituality believes in individual divinity and one's cosmic unity with other animate or inanimate bodies. In this respect it is pertinent to see how Indian spirituality can help to ameliorate the lacunae of positive legal jurisprudence. This brief paper is a modest attempt towards this end.

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PART I

POSITIVE LEGAL JURISPRUDENCE: A BRIEF INTRODUCTION

The legal positivism emerges from the basic point as how to regulate humans unending desire to pursue different forms of material goods while maintaining stability and order. This jurisprudence somewhere tries to answer the then existing and emerging political, economic and social conditions of Europe. The basic realities that were being dealt with this jurisprudence were the results of traumatic and uncertain political wars of Europe, emerging market economy in Europe and the colonial encounters of the European powers with native kingdoms and masses.

The origin of legal positivism can be traced from the writings of Hobbes. Hobbes wrote *Leviathan* in 1651. The English Civil War was the political background under which *Leviathan* was written. Just two years before the *Leviathan*, the British king had been executed and the whole England was devoid of law and order. There was hardly any peace and trust left. The whole community was denigrating from within and man was indeed a 'wolf to his fellow man'. Hobbes deliberated upon the idea of 'natural condition of humanity' under these politically and socially fragile realities of the English society. He depicted the character of individual as brutal, nasty, selfish, poor, violent and solitary. The individual in this natural state of Hobbes had absolute freedom where everyone was free to do whatever he wanted. Though there were some persons who would be superior to others in strength and intellect but such persons, by the limitations imposed by nature, needs rest, food, sleep etc and during those hours they would remain open to be attacked and killed by the joint efforts of the weaker individuals. So there is war of all against all. He depicted the situation in the following words. He observed:

"To this war of every man against every man....nothing can be unjust. The notions of right and wrong, justice and injustice have no place. Where there is no common power, there is no law: where no law, no injustice or justice. Justice or injustice are none of the faculties neither of body nor mind... they are qualities that relate to men in society, not in solitude."

To ameliorate this pathetic situation where nothing is secured, the individuals came into contract called 'social contract' whereby they have chosen a common power to make and implement laws, and surrender their some of the freedoms to that common power. Hobbes said that something become good because one desires it but one does not desire something because it is good. He admits the absolute freedom for individuals to remain in moral or immoral conditions as individual choices.

This concept of contraction society as well as the nature of Hobbesian humanity has been the subject of extensive criticisms. Some normal questions that are generally being asked to this notion are 'how can merely a contract be the basis of society?', 'what provides the binding force to that contract?', 'what was the common language of social contract?', and if there is common language, it must also have some common values that might negate the notion of 'war of all against all'. Most of the subsequent positivist philosophers are in one way or other affected by the basic understandings of Hobbes. The whole positivist jurisprudence is immune from any consideration of morality or humanity. Bentham while advocating his utilitarian philosophy advocated for satisfaction of maximum wants. So law should ensure the maximum happiness for maximum number of peoples. Any concepts of good or bad were shunted. Law became the facilitator for the material pursuit of the individual. In this way, it just restricted itself to provide maximum happiness to the maximum peoples irrespective of any other just or unjust considerations.

Subsequently, Austin while defining law says that law is the command of sovereign. Sovereign is such common determinate individual or body of individuals who receives habitual obedience from the bulk of the masses and does not give habitual obedience to any such common determinate body in a political and independent society. This definition turns all the colonies as non-sovereign and makes all their customs and tradition contingent on the wishes of the colonial sovereigns. Law has nothing to deal with justice, good or morality. This concept of Austin was also criticized by another positivist called HLA Hart.

HLA Hart, another very prominent positivist jurist propounded the theory of primary and secondary rules and said that law is the combination of primary and secondary rules. Primary rules impose obligations and secondary rules confer powers to do something about primary rules. He criticized the Austin theory of command and habitual obedience, and found the binding force of law in the 'internal aspect of law'. Individuals follow the law because they think that this is the standard way to live the life. It is the social pressure that demands conformity. He said that in any society there are two kinds of persons. First are those that follow the law from its 'internal aspect', and the second are those that follow it from 'external aspect'. The second aspect represents those that follow the law merely from the fear of punishment. Such persons would fail to understand the essence of law in the society and merely mechanically follow it.

However, he specifically clarifies that this 'internal aspect of law' has nothing to do with morality. For him, the space of morality is carved out to tackle the natural fear of human beings.

No one can be perpetually in alert mode to protect himself from another and so the concept of government as well as morality was invoked. Morality was not the essence of individual's nature but it is the passive by-product to avoid the harshness created by the human nature.

Similarly, Hans Kelsen while propounding his pure theory of law asserts that this is the pure theory of law only and not the pure theory of justice. His notion of *grundnorm* is restricted to analyse the law only from physical framework, though his own theory does not even provide sufficient answer to the nature of *grundnorm*. He said that *grundnorm* can only be pre-conceived.

This is also one of the specific characteristics of the positivist jurisprudence that all of them, in their ultimate analysis, relied on the factors that are outside the legal realm. Austin relied in 'habitual obedience', Hart in 'internal aspect of law' and Kelsen in 'grundnorm'. All these notions are the happenings in the physical world and they are outside the law. However, they were relied by the respective scholars as a starting point to define the law.

Positive legal jurisprudence is the product of the particular time and caters the interests of the dominant voices of that time. It was the time of colonial expansions, market economy, consumerism and positivism has taken care or taking care of these interests. Positivists legal jurisprudence mostly centers around the material pursuit of the individuals. It also directly or indirectly facilitates the market based economy that relies more and more on consumerism. It has once helped colonialism to spread and get strengthened.

It depicted and the image of the individual as one who always try to accumulate more and more. It does not take care of individual good and bad but only remain interested in collectivizing the rights without giving any individual touch. For example, the whole debate of rights talks about claims of individuals but it does not take into account what would be good for the person. Person having right can use it to his betterment or to his peril. The choices are seems to be free in the right discourse. But in reality, these choices are formulated by the far encroaching advertisement agencies. Even the wide freedom of choice does not mean that individual would always choose the best option. To make the good choice, one needs the better awareness about oneself and this knowledge of self would not be possible without the experienced spirituality. Another point is that positive legal jurisprudence predominantly attempts to maintain order and does not give much emphasis on justice. Spirituality gives emphasis on the justice or just relations of human beings.

PART II

INDIAN SPIRITUALITY: SOME CORE VALUES

The term Indian Spirituality has been used here to reflect some basic principles about the nature and the self that came to be recognized in the Indian subcontinent through many years of deliberations and contemplation during the annals of Vedic and post-Vedic histories. These principles still define the essence of India. India would lose her soul and deviates from her goal of universal peace (*vishwashanti*) without understanding and incorporating these principles into her day to day administrative and legal mechanisms. India is not merely a political entity but basically it is a spiritual entity that continuously tries to achieve harmony in self and nature. The Indian spirituality is like an old banyan tree whose roots are deep in history, whose branches encapsulate the most refined and pure thoughts about self (Atman) and universe (Brahman) and whose shadow has the immense potential to provide solace to the suffering humanity.

However, it must be noted that the basic principles of Indian spirituality have no similarity with Savigny's historical school that talks about *Volkgeist* (spirit of people). Savigny's *Volkgeist* reflects the praise for customs and shows antagonism for legal reforms through legislation. Indian spiritualism does not show any adamancy to customs. It is not the custom at all but it is the principles of individual's own personal and public life. It is one's reflection towards one's inner self and its union to the outer reality. It is the belief in *Dharma* that is rule of law with the ultimate goal of salvation i.e. eternal bliss.

The Indian spiritualism is the result of the extensive debates and discussions. It is open to new knowledge, new reforms, new enquiries but it sets the goal or purpose of all intellectual deliberations, enquiries and reforms. The goal of Indian spiritualism is to live in harmony with all other animate or inanimate bodies. Indian spirituality beliefs firmly in the oneness of self and the world. All animate and inanimate bodies are the reflections on one ultimate reality. It rejects all forms of duality and establishes oneness of all. Indian spirituality is the term that reflects the feelings of universal compassion, oneness of animate and inanimate bodies, belief in one objective and ultimate reality, belief in oneness of self and the universe, and the acceptance of purposive life aimed to realize these ideals. These are the experienced realities and not an intellectualized concepts bereft of one's own experience.

There are many scriptures and commentaries that may be termed as reflecting the vast Indian knowledge about the ultimate reality and the goals of human life. India, throughout her history, has been the land of extensive debates about ways of salvation and good conduct. The attempts to find out the ultimate reality started from Vedas and continued till the early thirteenth century. Many schools of thoughts about the ultimate reality and philosophical traditions aiming to understand self and universe have developed during this period.

The hallmark of the Indian spirituality is the unity of nature and humans. Here, unity does not connote union of two different entities but rather it connotes the oneness of two such objects that are generally described or understood differently. It is the oneness of two concepts, one is essence of the individual and second is physical framework to which this individual is associated. In the whole Indian philosophy, the two words are used predominantly. These are *Brahman* and *Atman*. Though these words represent two different notions but they have been used interchangeably in most of the philosophical discussions in the *Upanisads*.

Brahman is the single source of the visible universe. The word Brahman was derived from the root *brh* meaning to *grow* or to *burst forth*. The Upanishad accepts that the primary cause of the Universe is what burst forth spontaneously. It is like sound coming out from the mouth. It comes in spontaneity, comes from nothing but have its existence. The Upanishad establishes that the source of outside reality is one so there is oneness in the outside world.

The concept of *Atman* was evolved as the meaning of self or soul. It is the essence of oneself and must be distinguished with the physical framework (body, breath etc) to which the individual is associated. The search for *Atman* is subjective and the matter of one's own introspection. With the development of thought process, the objective reality of the outside world (*Brahman*) was identified with the subjective essence of oneself (*Atman*). This led to the understanding of *Aham Brahmasmi*. It means the individual and the world is the manifestation of the same reality and both are therefore one. There is no break between man and nature or between individual and the God. Thus the individuality is the reflection of divinity and the nature is the extension of oneself or the identity of oneself. The philosophy that 'I live; yet not I, but God live in me', is the basic reflection of this unity. This basic unity also explains many other principles of Indian Spiritualism like, *vasudhava kutumbkam*, *sarve bhavantu sukinah*, *mansa vacha karmana* etc.

All animate or inanimate bodies are the reflections of the divinity do not mean that there is functional similarity also. Since different objects in nature, perform different functions as per their predetermined characteristics, individuals also have their duty as per their capabilities to perform such duties effectively. The capabilities and characteristics of the individual is determined by the presence of three *gunas* (*Sat, Tam and Raj*). This also gives the concept of duty rather than right. So, the individual duties should be determined as per their characteristics and capabilities that individuals show. Indian Spiritualism does not admit any hierarchy of the tasks or duties performed by the individuals. Duty is the way to self-refinement and nurturing the divinity within one self.

PART III

INDIAN SPIRITUALITY AND THE INDIAN CONSTITUTION

Indian Constitution though embraces the elements of Indian spirituality in its preamble and enabling provisions but it does use the vocabularies and categories of positive jurisprudence. This creates the problem as to its essence and sometimes makes it very pedantic and mechanical. This section elaborates how the words of the constitution were given such meanings that in true sense correspond to their spiritual meanings, but this was done by using the non spiritual category and vocabulary. This creates disconnect between the society and law and results in failure of law to reflect societal values.

The Indian spiritual is a fulcrum of empathy, compassion and unity of all the available frameworks. It has the immense potential to infuse life and new vision to the law. Seen from spiritual perspectives, law is not merely a means of imposing order over chaos but it is the quest of just order. Spiritual legal order would not be satisfied merely with order that is bereft of justice. It will go an extra mile to do justice. It does not merely read and apply the law in mechanical sense but it takes cognizance of all the conditions and circumstances revolving around such application. The whole jurisprudence of Public Interest Litigation (PIL) depicts this reality in India.

Justice in the spiritual legal system would be inclusive. It is based on proper and integral application of the principles of liberty, equality and fraternity. It does not give precedence of one over another. The trinity of liberty, equality and fraternity is an integral whole and can never be fragmented in the spiritual framework. It is the unity of fundamental rights as an integral whole and the unity of both ends and means. So, any procedure through which anyone's fundamental rights can be compromised must also be just, fair and reasonable. There is unity of both means and ends as observed in the legal language of *Maneka Gandhi* case.

Spirituality admits the immense potential of spiritual development and transformation in the individual. It differentiates between sin and sinner. Sin is bad but sinner can subsequently evolve. What Krishna Iyer J said that 'every saint has a past and every sinner has a future' or what Gandhiji has said that 'hate the crime but not the criminal' are the true reflections of spirituality in the criminology. Spiritual criminal justice system believes in reformation than retribution. The current Indian system somehow also reflects this reality of reformation.

But the problem lies somewhere else. The Indian Constitution, its laws and courts' judgments incorporate the elements of spirituality here and there but without accepting it. The constitutional and legal provisions and judgments are not discussed with the symbols and language that are germane to the Indian psyche. The legal debates and discussions centered around vocabularies of rights, claims etc. But the same result could also be achieved by invoking the vocabulary of spirituality, cosmic unity and duty.

This disjunction created by language and categories shorten the understandings of the legal practicers as to the true essence of the words used in the Constitution in the Indian context. Words and experiences are not generally contextualized and remain in limbo. It also makes law alien to the understanding of the common man. One has to remember that Constitution or any law is not an end itself but they are the product of the larger reality that reflects both material as well as spiritual beings of the nation. Categories, symbols and arguments to discuss law and constitution in the court rooms need to remain connected to the Indian spiritual realities. It will give value to the judgments, enhance the authority of law and improves its comprehensibility by the masses. Though in current scenario, there is no easy alternative of positive laws to regulate but use of spiritual terminology and vocabularies would give new dimension to the legal administration.

PART IV CONCLUSION

This brief paper finds that there are stark differences between positive legal jurisprudence and the Indian spirituality. The positive legal jurisprudence starts with a very gloomy picture of society and human being whereas spirituality emerges from the acceptance of divinity and cosmic unity of the individuals. Positive legal jurisprudence concerns only with the enforcement of order but spirituality focuses on justice. Since India is a spiritual country, her constitution reflects the ideals of spirituality but it uses the non-spiritual categories and vocabularies to reflect these ideals. This creates the problem in transcending the true essence of constitutional provisions and judgments to the public and officials. In this way, even the historical judgments become routine in their application without creating much difference on the ground. So there is a need to use spiritual language, vocabularies, categories in the legal proceedings so that their essence could transcend the corners of law and positively affect the populace in better manner.

CONFLICT OF INTERESTS

None.

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