International Journal of Law, Justice and Jurisprudence

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Conceptualizing jurisprudence from decolonial perspective: A critical appraisal

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Abstract
The expression Jurisprudence means philosophy of legal knowledge. It is neutral expression that theorise about law. But the expression is constructed from different perspectives, where one dominating perspective overrules to other. This paper investigates one such dominating perspective of law named colonialization. Because of colonial mind setup, our ancient values, cultures and knowledge (legal) has made obsolete. It was considered barbarian and outsider. These indigenous values and knowledge are called decolonial jurisprudence. It is a counter narrative towards colonial set-ups. Accordingly, it deconstructs the established colonial narratives about justice, freedom and equality. It promotes diversity in expression and knowledge. By following decolonial theory one may deconstruct eugenics centric body and sexuality discourse. The paper is theoretical in nature, and aims at investigating decolonial ancient Indian values of law-justice and related interpretations. Paper establishes the fact that decolonial jurisprudence is not a revenge towards colonial discourses, rather it is about understanding and appreciating diversity of knowledge and tries to counter the hegemonic perspective of colonial behaviour.

Keywords: Decolonial jurisprudence, diversity, legal knowledge, deconstruction, and colonialization.

Introduction
Jurisprudence, as we know is knowledge or philosophy of law. Jurisprudential exposition of legal thought facilitates readers to delve into deep philosophical questions related to law. These are the questions that start with 'why', against 'what' [1]. These questions are related to wisdom, logic and reason; therefore it is about questions related to (legal) knowledge. But whether such reason(s) or knowledge is independent and universal in its existence or depends on particular ideology or approach? Whether such knowledge has any teleological construction? [2] And whether it operates within a constructive normativity? In Foucauldian sense 'knowledge is not for knowing; knowledge is for cutting [3]. The expression is strategically important in situations where knowledge itself is confined between boundaries of global north (colonial) and global south (decolonial), where former is dominating the world [4]. Thus, it has created the hegemony of its own and colonialization of (legal) knowledge has epistemicide the inclusivity of such knowledge. Thus, Colonialization of legal philosophy has constructed the fixed boundaries of legal discourse. Whereas, legal philosophy as a discipline offers a space for openness and testament to freedom [4]; it facilitates the true deliberative democratic discourse, where equal and open space is provided for different values and practices. It works on the principle of heterogeneity and discourage homogeneity [5]. Therefore, in epistemological terms there shall not be any hierarchy and knowledge should remain free and independent [6].

On the other hand, colonialization has promoted the particular norm as "modern" and dehumanized other forms of knowledge. The one expression was promoted and made visible over other. Colonial legacy (of law) becomes Insider (civilized) and indigenous knowledge was/is considered outsider (barbarian). In fact, the postcolonial studies (which had emerged from French poststructuralism) had discussed, analysed or formulated the concept of "truth" from global north perspective and continue to reflect the colonial totality [7]. It has shadowed our traditional values and knowledge with the veil of "modernity" and made us oblivion about our realities [8]. The colonialism has promoted the imperialist ideas, which are no more than the greed of power; resources and land. This had ruined our identity and culture [9].

Understanding Decolonization
The term decolonization is about *psychological, cultural and economic freedom* from an indigenous perspective. It is about sharing of local knowledge and practices of individual sovereignty, community and cultural values.

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It recognises the ability of indigenous population to practice right to self-determination over their land, cultures, political and economic systems. In context of law, it represents understanding and interpreting law from the local perspectives and not concentrate only at cosmopolitan approach. By following decolonial approach one can understand the eastern approach towards human rights and related interpretations. Decolonial jurisprudence aims at debunking the colonial orders of knowledge. It deconstructs the 'market' of colonial knowledge and discourse and replaces it with many open and diverse expressions. Therefore, decolonial idea proposes a kind of openness and freedom of thought; the cleanliness of coloniality of being and knowledge; the detachment of rhetoric of modernity and its imperial imaginary [10]. Decolonial perspective is about understanding the heterogeneity of knowledge; and deconstructing the epistemic homogeneity. Thus, it is a dialogue between the Eurocentric thinking i.e. object of critique and Non-European thinking reclaimed from deconstruction, repression and neglect. It is about First-person perspective; voicing their own idea and philosophy [11]. It provides centre stage to local and individual experiences where one can think in a deinstitutionalized manner. It is about understanding and appreciating diverse cultures, norms and values. Thus, decolonial theory promote diversity and human fellowship beyond boarders [13].

Decolonization from Indian Perceptive: Understanding Law and Justice from ancient Indian Literatures
Decolonial perspective provides the opportunity to know the eastern or non-western understanding of jurisprudential values as enriched through ages. For instance, Indian system of knowledge consists of three components of Indian philosophy. It includes Vyakarana [14] (Grammar); Nyaya (logic) and Mimamsa (exegesis). For the purpose of this paper I am discussing ancient Indian *Nyaya* philosophy or *Nyaya Sutras* and *Mimamsa* principles of interpretation. *Nyaya* philosophy is ancient Indian Sanskrit text composed by Gautama. The text contains five books, consisting two chapters each. It is a description about rules of logic and reason, ontology and epistemology. The *Nyaya Sutra* provides the information about knowledge while explaining the sixteen categories of knowledge [15]. The first book discusses the nature of argument and process of valid proof. It provides for statement of purpose of text, nature of argument. It also deals with the ways or methods to analyse opposing views. The second and third book discuss about *pramana* (epistemology) and *prameya* or object of knowledge respectively. The second book presents the theory of doubt and provides when perception, comparison and inference is reliable and unreliable. It further argues that the reliability of testimony depends on the reliability of the source. Similarly, third book deals with theory of body and soul followed by theory of sensory organs and their role in receiving and testifying the knowledge. It also talks about theory of defects and idea that everything has cause and consequence. Other books discuss the nature of knowledge, which argues about significance of correct knowledge to destroy defects. It also discusses the ways to avoid errors and present twenty-two ways of losing an argument. Thus, *Nyaya* tradition or philosophy sets the critical approach towards validity of truth. It promotes the questioning or deconstruction of all information around truth [16]. The central propositions of Nyaya Sutra is that all knowledge intrinsically is not valid; the most knowledge is not valid unless proven; and truth exist independent to the fact we know it or not. It elaborately discusses about four means/methods of gaining knowledge- *Pratyaksa* (perception); *Anumana* (inference); *Upamana* (comparison and analogy) and *Sabda* (word, testimony). Accordingly, it is argued that perception is the primary means to gain true knowledge. Gautama defines perception as the knowledge that arises by the contact of one or more senses with the object of phenomenon. Discussions on both object and subject are important in the process of perception. (Gautama). It is further argued that *pratyakha* leads to *laukika* (ordinary knowledge), where five senses of human beings clearly and directly apprehend reality [17]. Similarly, *Anumana* (inference) is based on epistemic rationale. Inference is a knowledge that derives from or relative to other knowledge. It follows a priori; a cause to effect. It is important for gaining a valid knowledge. For instance, if ash is found in forest land (fact), then it can be asserted there was a fire (knowledge). The cause of fire is subject to further investigation. The same (investigation) can be processed through *Upamana*, whereby knowledge is gained through comparison while detecting the similarity between different incidents of fire in forest. *Upamana* method is secondary and follows perception. The forth component of gaining knowledge is *sabda*, means relying on word. *Sabda-pramana* is one of the accepted and reliable methods of knowledge. The idea is based on the fact that human beings are unable to know numerous facts within in a limited time and space. Thus, there is need to relay on others including parents, teachers, family, ancestors and intellectuals who share their knowledge through spoken/deliberated or written form. The source of such knowledge must be comprehensible and reliable.

Thus, it is clearly understood from the aforementioned description about Nyaya that the ultimate purpose of human life is to understand and quest for exploring truth. It is the way to question the existing expressions about justness; justice and law (colonial expressions). It facilitates the questioning of knowledge in order to attain 'true' knowledge [19]. Similarly, Mimamsa philosophy [20] is extremely helpful in understanding the meaning; specifically Mimamsa rules of interpretation are helpful in case of conflict between different expressions and laws [21]. In ancient Indian litrature, provisions had been made for solving conflicts between Sruti and Smriti, between one Smriti and another; between Smriti and custom. The idea is used to resolve conflilct between two conflicting interpretations. for instance, few such priciples of interpretation includes *sarthakeya* (words should have purposeful meaning); *Arthaikatwa* (same words should have the same meaning); *Gunapradhana* (reconciliation of all ideas with the principal one); *Samangasya* (contradiction should not be presumed and on the contrary reconciliation should be attempted); *Vikalpa* (Choice between two meanings is permitted); *Anarthakeya* (an expressions or interpretation that makes a word or phrase meaningless should be avoided) [2]. According to former Justice M. Katju and Justice AK Ganguly,

'*Mimnsa* Principles are important and there for over 2500 years. But today there is very less application of these rules because of unfortunate use of other (colonial) literatures by Advocates….*Mimamsa* principles needed to be revived'.
The above discussion is clear enough to understand the

point ancient Indian philosophy of *Nyaya* and interpretations are very significant and effective in understanding the law and justice in its letter and spirit. It promotes the idea of questioning the existing form of knowledge and thus facilitate in exploring the constitutional morality from diverse perspectives. But while getting conditioned towards western concept of law and justice, we tried to colonialize the ancient Indian values and principles of intellect. In a process, we adopted colonial mind-set in our institutions including educational and justice, whereby we follow the normalized ways of doing things and ignoring and rejecting the diverse, indigenous expressions of knowledge and justice.

The expression can further be substantiated by referring to Amaratya Sen, who argued values such as freedom; equality and tolerance have been part of our ancient traditions of east. According to him, ancient Indian model of development primarily include human agency, and is completely against the colonial model of exploitation and consumerism [22]. Thus, the doctrine of 'Living Originalism' argues about understanding the local experiences while interpreting the constitutional values [24]. Therefore, decolonial perspective of knowledge is about knowing our traditional values and system of knowledge. It doesn't follow arrogant approach towards destroying the knowledge (colonial) but rather it is about deconstruction. It debunks the idea of 'othering' and promotes the virtue of 'sameness' [25]. In this manner it represents the Dworkinian concept of law as integrity, which is about learning and interpreting legal knowledge form all perspectives [26]. Therefore, decolonial method of research in law and related fields equips researcher to question the "unique" scientific knowledge and empirically (data) driven proposition of grand narratives of "truth" [27]. Thus, while acknowledging and critiquing the western literature, decolonial jurisprudence tries to establish a harmony between discourses.

Impact of Decolonial knowledge in General: Case Study on Disability-Sexuality Discourse

After discussing the theoretical concept of decolonial jurisprudence and its Indian perspective, now it is important to discuss certain illustrations that demonstrate the contribution of Decolonial Jurisprudence. It is also relevant to understand that decolonial jurisprudence serve as a critical method of research, whereby it questions the existing colonial normativity around discourse. For the said purpose, researcher will be reflecting towards colonial/western construction of identity, gender and sexuality. As discussed above, western discourse of law and justice operates within its constructed boundaries. It operates within fixed binary patters [28]. For instance, the identity of individual is constructed within a "mainstreamed" race, gender, sex, and cognitive and physical capabilities [29]. Thus, it created a white supremacy, patriarchy; heterosexuality; abled bodies as 'normal' identities [30]. It has *normalized* our thinking. To illustrate the proposition, one may consider the following incident, where a lesbian couple decided they wanted to have a child, preferably a deaf one. Both partners were deaf, and proudly so. Like others in the deaf-pride community, they considered deafness a cultural identity, not a disability to be cured. Being deaf is just a way of life. In hope of conceiving a deaf child, they sought out a sperm donor with five

generations of deafness in his family. And they succeeded. They were surprised when their story was reported in Washington post, brought widespread condemnation. Accordingly, people charged the couple of inflicting disability of their child.

Is it wrong to make a child deaf by design? According to couple, they do not view this as any different from what many straight couples do when they have children. For instance, in an advertisement that appeared in Harvard Crimson, an infertile couple was seeking egg donor with specific conditions. Accordingly, donor had to be at least five feet, ten inches tall, athletic, and to have a combined SAT score of 1400 or above. In order to meet the desired donor the advertisement offered a payment of 50,000$ [31]. But there was no objection from the society regarding specific demands related to height etc. The illustration demonstrates the colonial conditioning of our mind within a particularity of knowledge and justness [32]. Similarly, sexuality is constructed within the idea of consumerization, which operates within a charmed circle of sex [33]. It sets an artificial hierarchy among diverse sexual orientations, which ultimately dehumanize the humanity. Moreover, colonial version of sexual discourse was institutionalized in eugenics centric theory, which rejects sexual heterogeneity. Accordingly, it offers its "solution" or "alternative" to its own constructed "problem". For example, it offers a fixed labelling thorough providing the institutional identity to human diversity [34]. Thus, decolonial expressions offers counter narrative to these institutionalized patters that influences law and justice and henceforth promotes intellectual diversity.

Conclusion

Decolonial jurisprudence is reflection towards diverse cultural, social, moral and scientific values. It is a concept, which promotes diversity in expression and knowledge. But because of colonialization/westernization of our mind, body and soul, we are unable to follow and recognize the values and contribution of our ancient legacy and related contribution. On the other hand, colonial narrative has depicted a very narrow picture of human diversities and ancient (Indian) values and justice. It has strategically replaced the Sanskrit and Hindi from our education system and replaced it with a different expression. Similarly, modern education system has devalued our own culture and dialogues. It has stopped us from questioning the truth and related discourses, and on contrary it become offensive and disrespectful to question. In the name of modernity, we disoriented ourselves from our cultural values and roots. Through strategic manner very wrong interpretations of our cultural, indignity is publicised and we are conditioned to consider our values as orthodox and conservative. Thus there is need to revive our traditional Vedic philosophy, which inculcates the value of question and facilitate the process of investigating the truth. Thus, in true sense decolonial jurisprudence is about promoting justice, equality and dignity in true manner.

References

1. 'Why' question in philosophy deals with Ontological study about being, becoming and reality. It is useful in questioning the process of knowledge formulation. It is about transcendental knowledge (Immanuel Kant). See: Ontological Arguments, 1996. Available at:

https://plato.stanford.edu/entries/ontological-arguments/.

2. The word teleological is derived from Aristotle's concept of teleology. In its literal sense it means 'purpose'.

3. Michel Foucault is a postmodernist thinker, who argues about construction of knowledge and its circulation for particular purpose. See: Colin Gordon (Ed.), Power/knowledge, selected interviews and writings by Michel Foucault , Pantheon Books, New York, 1980.

4. In fact, auto-correction (dictionary) of MS word doesn't recognize word 'decolonial'. The example is indicative of colonial construction of language. See: J. Derrida, Theory of Deconstruction.

5. Lewis R. Gerdon, Decolonizing Philosophy, 2019.

6. Habermas J. Theory of Deliberative Democracy & Critical Theory.

7. In other words there shall not be politics of knowledge and it must remain neutral. But in practice, pursuit of knowledge (of natural world) has long been politicized. In some cases this has been subdued, a matter of inflection; in others it has been more pronounced, a dominant agenda for research. Hence there is power that shapes the interactions of indigenous and western knowledge system. See: Laurelyn Whitt, Science, Colonialism and Indigenous People, The Cultural Politics of Law and Knowledge, Brandon University, 2009.

8. Walter Mignolo D. The Politics Of Decolonial Investigation, Duke University Press, 2018.

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10. Edward Said, culture and imperialism, 1993.

11. Catherine E. Walsh, Walter Mignolo, Decoloniality: Concepts, Analytics, Praxis Reviews & Rating, Duke university Press, 2018.

12. Rosalind Morris (Ed.), Can Subaltern Speak, Reflection on the History of an Idea, Colambia University Press, 2010. Also see: Gayatri Spivak, Can the Subaltern Speak?

13. Kiran Asher, Priti Ramamurthy, Rethinking decolonial and postcolonial knowledge beyond regions to imagine Transnational solidarity, Cambridge University press, 2020.

14. Etymologically *Vyakarana* means separation, distinction, analysis and explanation of something. It relates to the Vedic field of language analysis. It is about understanding of words in the process of investigating the truth. According to *Bhartrhri*, the energy called word has the nature of an egg. It develops in the form of an action, and realizes itself as a sequence of parts. (*Vakyapadiya*).

15. These sixteen categories are important in attaining correct knowledge for perfection, it includes: *pramana* (means of right knowledge); *prameya* (object of right knowledge); *samsaya* (doubt); *prayojana* (purpose); *drstanta* (familiar instance); *siddhanta* (established tenet); *avayava* (member of an inference); *tarka* (reasoning); *nirnaya* (ascertainment or results); *vada* (discussion); *jalpa* (sophistic disputations); *vitanda* (cavil); *hetvabhasa* (fallacies); *chala* (quibbles); *jati* (futile rejoinders); *nigrahasthana* (methods of loosing argument).

16. This is the reason that ancient Indian philosophy is supposed to believe the inspiration of existentialist and postmodernist philosophies.

17. For detailed exploration see Max Muller, Indian Philosophy, Vol. IV, second edition, 1952.

18. The idea that is followed in postmodernist theory. See: Foucault, Subject and Knowledge.

19. The *Mimamsa* rules are given by saga Jaimini.

20. Srikishna BN. Mimamsa V. Maxwell, Student Bar Review, Vol. 16, 2004. Also see: Max Muller, INDIAN PHILOSOPHY, Vendanta and Purva Mimamsa, Vol. II, 1952.

21. In case of U.P. Bhoodan Yagna Samiti v. Braj Kishore, 2239 AIR 1988; court recognized the importance of these rules.'

22. Amratya Sen, Development as Freedom, Oxford Publication, 2003.

23. The concept was developed by Professor Jack Balkin. According to this notion, while interpreting right to freedom- inference could be drawn from Indian National freedom Movement. Similarly, one may understand the idea of 'Constitutional Morality' from Indian perspective along with its cosmopolitan character. See: Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (Ed.), Locating Indian Constitutionalism, The Oxford Handbook Of The Indian Constitution, 2016.

24. Emmanuel Levinas, Totality And Infinity: An Essay On Exteriority, 1961.

25. Integrity of Law, according to Dworkin, is a technique to remove the friction within law. He argues the wholeness in understanding the law make it *seamless web*. See: Ronald Dworkin, Law's Empire, 1986; Roland Dworkin, Justice for Hedgehogs, 2011.

26. Modernity or coloniality has promoted the data obsession among people, where everything is analyzed through data. See: Evgeny Morozov, To Save Everything, Click Here, The Folly of Technological Solutionism, Public Affairs, New York, 2013.

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31. Elizabeth Reis, Bodies In Doubt: An American History Of Intersex, 3rd Ed., Johns Hopkins University Press, 2021.

32. Gayle Robin, Thinking Sex, 1984.

33. For instance, a person with disability-diversity is only recognized through "certification" and no one is concerned about the individual self of that person. Therefore it is argued that identity is external and confuses the individual self. See: Dan P. McAdams, Ruthellen Josselson and Amia Lieblich (Ed.), Identity And Society, Creating Self In Narrative, Northwestern University, Chicago, 2006.