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Enculturing Law?

Some Unphilosophic Remarks

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The Provocation

More than fifty years of postcolonial Indian legal education (at least in the chronological sense as something that occurs after decolonization) have merely 'modestly developed traditions of legal scholarship'. This is so because law teachers of yesteryear and also 'specialist' colleagues in other allied social science and humanities disciplines have 'by and large failed in building a research project in law with distinctly Indian problems and possibilities'. And the 'vice-like grip of doctrinal legal analysis' has rendered 'teaching and learning law' a 'self-referential enterprise in the interpretation of rules'; Indian legal scholarship, on this view of the matter, remains overwhelmingly exegetic and dismally doctrinal, content with 'commentaries' which merely 'chart the movement of doctrinal legal trends across various fields'. As a result, legal education in India has not been successful in going beyond meeting the minimal requirement of producing 'legal technicians' for a range of legal markets. Overall, 'legal education in India' has been unable 'to respond holistically and meaningfully to contemporary challenges'. It is with this provocation that the Law and Culture programme at the Centre for the Study of Culture and Society, Bangalore, convened the conference on 'Enculturing Law: New Agendas for Legal Pedagogy' from 11 to 13 August 2005.

The provocation is grave and sustained. It is grave because of the key assumptions it makes; it is sudden in its summons for 'building a research project in law with distinctly Indian problems and possibilities'. It is sustained because it (a) blights both Indian legal education and research without even suggestively exploring the historic patterns of research and writing, and (b) urges us to relate the specific vicissitudes of Indian legal education and research on the 'Global South' guided by an aspiration to create new patterns of critical solidarity through the specific practices of 'enculturing law'.¹

In what follows, I explore some dialogue-friendly approaches to understand the provocation and to decipher the stated promise of the oncoming futures of Indian legal education. In the process, I offer some unphilosophic remarks on understanding the cultures of law.

Analytical Silences

What sense may we make of the perennial dichotomy between the 'doctrinal' and 'non-doctrinal'? Is 'doctrinal' ever devoid of 'non-doctrinal' and vice versa?² How may we essay an understanding of the relation between the two realms? Is the doctrinal an *asocial* consociation of juridical thought and judicial practice,³ unresponsive to historical transformations? Is the non-doctrinal mode – here the empirical, contextual – always inherently redeeming? Are all legal doctrines necessarily dogmatic? To what extent (to recall Roscoe Pound's diction) does the 'technical' element in law remain at odds with its 'ideal' element? Is the 'ideal' less mystifying than the 'technical' element in law?⁴ Is a critique of the 'doctrinal' directed only at the state law form or people's law formations as well? Or are we to read *mélanges* of legal pluralism as merely suggesting that the signature of the customary or community law formation is constituted by a lack of the doctrinal?

In any event, even within the state-centric conception of law, how may we understand the emergence of 'progressive' doctrines? This, in part, is a historical enquiry, but I raise the issue here in terms of the tasks of an analytic understanding of the condemnation of the 'technical'. To concretize, how may one consider salient legal doctrines: the doctrine of basic structure and essential features of the Indian Constitution, the Bhopal Case enunciation of the doctrine of absolute multinational enterprise liability, the varieties of estoppel doctrines (including promissory estoppel, legitimate expectations, and constructive *res judicata*), the doctrine of 'fair use' in copyright (or even copyleft), the doctrine of community property, the doctrine of 'creamy layers' invigilating the programmes and measures of affirmative action, the doctrine of standing that social action litigation in India transforms into cascading forms of participatory access in the domains of governance, rights, and justice?

Second, when may doctrinal analyses or textual exegeses become 'vice-like' in their 'grip'? There is simply no way to answer this question in any value-neutral way.⁵ But for any critique of the doctrinal, it remains important to state what values may after all be at stake and this is a far more demanding enterprise than any stark contrasts may suggest. Value judgements, as we know, differ according to ideologically favoured/ingrained dispositions. Thus the neocon and neoliberal approaches celebrate in the contemporary global moment the sacrosanct nature of the doctrine of the 'free' market via a revival of near-absolute classical legal doctrines giving salience to rights to private property over the means of globalized relations of production, consumption, exchange and distribution. Critics celebrate as progressive legal doctrine formations that challenge and confront this new *doxa*. There is no doubt whatever that both camps agree in characterizing as regressive and violent, by way of retrospective judgement, and perhaps by the same token also somewhat ahistorically, some notable examples of the violence of legal doctrine.⁶ There have existed (and even continue to exist) doctrinal approaches or traditions that justified and promoted slavery, coloniza-

tion, genocide, apartheid, crimes against humanity, sex-based violence, state and non-state terrorisms.⁷ Thus, some doctrinaire approaches to law may be said to be pernicious when they enforce a distinctive closure of legal thought and sensibility in ways that disable any imagination that enhances states of human well-being and of human freedoms. The 'vice-like' grip imagery suggests scope for its other, the 'virtuous' doctrinal reading of the law, its processes and purposes, unless, of course, all that is 'doctrinal' must always remain ethically irredeemable. But were we to regard the closure as necessarily dialectical, as do historians of social evil and legal wrong, closure does indeed occur but never in ways that altogether forbid acts of interpretive insurgency. Repressive legal doctrines invite impertinent gestures of interpretive infidelity. One may even go as far as to suggest that the stronger the 'vice-like grip', the greater remains the incipient tendency toward social struggles against the injustice and violence of the law. We may not ever fully understand the 'grip' from outside struggles to loosen its shackles.

I make here no defence of repressive legal doctrines but only wish to suggest that any serious concern with legal education and research becomes insensible, even quixotic, when the 'doctrinal' stands thus altogether derided and denied. The practices of subaltern resistance and critique of the doctrinal law (outside the realms of fully-fledged practices of philosophical anarchism or legal nihilism) favour at the end of the day different doctrinal regimes in diverse genres such as provided by human rights, capabilities, well-being and flourishing, and people-oriented reworking of governance-imbued notions about 'the rule of law'.

However, because even the virtuous legal doctrinal regime must sustain the force-monopoly of state law, we stand presented with the need to distinguish (to invoke Robert Cover's germinal distinction) between jurispathic and jurisgenerative forms of violence,⁸ or the 'foundational' and 'reiterative' violence of the law (as Derrida names this).⁹ On this perspective of the ontological and epistemological violence of the law itself, the 'vice-like grip' necessarily infects all forms of law, whether pre or postmodern.

Third, are teaching and learning law 'self-referential' enterprises in the interpretation of rules? This raises a basic epistemological, and not merely jurisprudential, problem. We learn when 'teaching' John Austin, Hans Kelsen, H.L.A. Hart, Ronald Dworkin, among others, that this entire talk about the authority of the law as an ongoing enterprise necessarily remains self-referential. Hans Kelsen demonstrated a long time ago that the juristic performance of the acceptance/presupposition of the *grundnorm* as being 'by and large' efficacious is a necessary condition for all legal thought or theory; otherwise, we invite an infinite logical regress of any posited ground of the obligation to obey not just the law but indeed any rule formation. Gunther Teubner, in our own time, has reiterated the paradox of self-referentiality as an inevitable grounding for the authority/authorization, or self-founding of 'modern law'.¹⁰ He insists that 'the paradoxes arising from self-reference are not an end-point, but the starting-point for further

evolution'.¹¹ No Indian law teacher pursuing the enigma of the Basic Structure doctrine so happily unleashed by the Indian Supreme Court in *Kesavananda Bharathi*, would here disagree.

Fourth, the indictment suggested by the rolled-up images of 'contemporary challenges' to which the past formations of India legal education/research have been unable to respond 'holistically and meaningfully' raises a crowd of definitional questions: What are, or how may we proceed to construct, these 'challenges' and from *whose* and *what* perspectives? What does it mean to say 'holistically and meaningfully'? This raises also a larger question: which other form of education may have done so?

Fifth, there is the issue of these 'challenges' formed in terms of 'legal markets' whose needs for technical services are met by doctrinal legal education. Is the issue here one of market regulation or reform, inviting then a re-examination of the assumptions concerning the relationship of legal education and research to the practice of law or one pertaining to the creation of radically different markets for legal services? How may we understand the emergence of the new markets in relation to national and cross-national 'Old' and 'New' social movements? Or, as some of us in the unlovely past of Indian legal education and research sought to achieve, does this name the problem of creating services for social justice markets both within and outside legal education and the profession?¹² And how might transformative pedagogies distance themselves from some fake pluralisms now relentlessly pursued by global hegemonies in terms of 'good governance' and 'alternate dispute resolution'?

The Problematic Sphere of Doing 'History'

There are many histories of Indian legal education and we lack adequate narratives of them. Serious pursuit of these histories of legal learning is one important programmatic contribution that our dialogue may make. This is a task fraught with many imponderables. In this section, I look at some difficulties in developing general histories of legal education. I use the notion of general history as signifying patterns of institutional development of the certificatory/credential and other related regimes of legal education. If by 'history' we signify, with William Twining, 'an exercise of construction and imagination commensurate with the complexity of human experience',¹³ this names the beginnings of the task, not its endings. At issue is the relative autonomy of the calling and craft of the historian of legal education. How far can we capture the distinctively 'legal' in human 'experience'? We all too readily flounder on the Scylla of 'experience' and the Charybdis of the distinctively 'legal.' 'Experience', as a category of understanding, remains problematic as we know from the travails of the inaugural contrast that Oliver Wendell Holmes sought to install between the roles of 'logic' and 'experience' in the life of law.¹⁴

But the complexity of legal and ethical experience (to borrow the title of the felicitous work by F.S.C. Northrop) forbids the reduction of the distinctively

'legal' entirely to the domain of the politics of desire produced by state law and its province and function. Put another way, the gifts of understanding brought to us by many traditions of pursuing legal pluralism may no longer be forfeited in the grasp of the distinctively 'legal'.¹⁵ The institutional histories of law, understood both as state and people's law formations¹⁶ and their propensities for violent domination, as well as forms of coequally violent and passive resistance to this, ought at least to guide conceptions of specific histories of legal education in terms of 'effective histories' (to steal a phrase from Foucault) of the law's 'effects – of its violence as well as knowledge – upon those who come up before it or are otherwise affected by it'.¹⁷ This means at least that general histories of legal education may not be kept apart from the social histories of the law itself and as furnishing ensembles of means and techniques for social control.

Almost everywhere, not just in India, entrenched conceptions of teaching law celebrate the visions of the law's autonomy and integrity and the 'law' necessarily conceived as a state law formation. The resilience of these conceptions has troubled innovators of legal education everywhere. How may we best proceed to understand the contribution of pluralist perspectives to the histories of learning law? Indeed, how may we essay a historical understanding of the many-sided pluralisms of the state's law formation, on full view, for example, in the 'colonial' and 'postcolonial' articulation of state differentiation, especially the inherent tendency towards the autonomization of judicial power? State law speaks to us with a forked tongue. A reductionist view of state law poses some threshold difficulties even for a state-centric understanding of the institutional development of legal education and its varied, and often incommensurate, social impacts.

The struggle to preserve a non-reductive understanding of state law stands more or less fully archived in the positivist and naturalist, as well as sociological and semiotic contributions to legal theory or jurisprudence. Taking this understanding as a historic 'given', there is still some merit in recalling the early Roberto M. Unger's valiant endeavour at the construction of a post-Weberian understanding of four dimensions of the autonomy of law: the institutional, the methodological, the professional and the troublesome 'substantive' autonomy.¹⁸ And in the narratives of the Law's Empire, Ronald Dworkin posed the issue of autonomy as one of law's integrity in a constant struggle to distinguish between 'legislation' and 'adjudication'.¹⁹ In contrast, Stanley Fish derides almost fully the claims of law's desire for autonomy.²⁰ I desist foregrounding here the similar torment that haunted US and Scandinavian Realists, though not without lamenting the fact that the contributions of the latter have as yet to be fully revisited, in particular the corpus of Carl Olivecrona, A. Hagerstorm and Alf Ross, that in various ways depicted the magical realism of state law. I mention all this, necessarily in passing, to suggest the modes in which even modest claims of law's autonomy stand contested from within entrenched curricular and pedagogic conceptions. I suspect further that all this also guides us to an understanding of the inherent and conflicted pluralisms of state law formations. May we then not ask

how we retrieve specific Indian and Global South understandings of law in their everyday teaching and patterns of writing? What processes of creative mimesis have addressed these tense pluralisms of state law formations?

Further, if one was to understand pluralism not as a substantive domain of multiplicity of laws but as 'castes of mind', or as histories of mentalities, how may we imagine the tasks of doing general histories of legal education? At one level, such histories surely ought to explore the interaction between the 'state' and 'people's law' formations; in this respect, 'enculturing law' means learning and studying law as a composite 'couture of many cultures' always entailing the traffic of ideas, sensibilities, beliefs and values between the state and people's law (the latter no longer to be regarded as that curious epistemic bag lumping together the diverse 'customary,' 'communitarian,' 'personal' and other 'non-state' social beliefs, behaviours, and conducts). How may legal education histories tell stories concerning the relations of support and antagonism between state law and people's law cultures in distinctive patterns of violent social exclusion as well as some of benign inclusion? In what senses have patterns of legal education articulated markers of both continuity and discontinuity in the relations of struggle for hegemony and social facts of symbiotic existence among the differing realms of law? How may we tell stories about imparting law within the curricular and pedagogic 'mix' of the state and *faute de mieux* the 'non-state'?

Even more is involved in terms of the histories of received and imposed as well as rebellious pedagogies. What constituted the origins and resilience of the received pedagogies? How may we understand and archive at least two kinds of reception: of the taught traditions of the common law and the modernizing tradition derived from US acculturation?²¹ How indeed may we trace the histories of epistemic rivalries thus entailed, both in terms of their neo-colonial grasp over the future of Indian legal education and research and of a wider location presented by the histories of the 'making of South Asian studies'?²² What presence or voice may we concede to the formative role of the civil law tradition?²³

A more fundamental issue, then, stands posed in terms of unravelling biographical and institutional histories of the 'givers' and 'takers' of the received pedagogies and how the reception managed to inhibit the flow of the dissenting voices within the Anglo-American taught traditions. As far as I know, the 'givers' constituted a white male elite of prestigious Anglo-American law schools; neither the learning arising from the then nascent critical legal studies traditions nor from feminist critique of the law nor from critical race theory ever reached Indian shores. What has reached are the contrasting models of common law and case method-based approaches to legal learning that transferred forms of law teaching into a form of 'madness', fetishizing understandings of the law.

Any genuine comparative excursus will also cure Indian legal scholarship of the excessively court-centric understanding of state law forms, which came to India via the dynamism of the Ford Foundation modernizers' penchant for 'case method' legal learning. This no doubt made an important contribution

in weaning studies of law from a treatise-based, doctrinal understanding of law. But it also, in part at least, induced what has been termed as the scholarly 'love' of common law tradition, law reports constituting 'case madness' which translates in a 'mad lawyers' discourse'. This 'softening of the brain' constitutes, in the wounding words of Peter Goodrich, a form of 'biblio-spongiform encaphalopathy'.²⁴ The histories of metropolitan Indian legal education (if only because the 'reforms' never wholly percolated to the *mofussil*) as forms of enduring psychiatric illness, or the crises of downright 'lunacy' and institutionalized trauma, have yet to be archived. On this register, we no longer pursue the programmes of clinical legal education but rather regard some forms of legal education as themselves clinically iatrogenic.

It is just as well that 'rebellious' pedagogic practices remained almost wholly indigenous. Nowhere, in the histories of the 'givers', exist any precedents for the type of feminist critique of the law launched by the Open Letter to the Chief Justice of India authored by four law teachers in regard to the Supreme Court of India's misogynist performance in the Mathura rape case²⁵ that in fact generated a sustained, many-sided movement against the patriarchal violence of Indian law. No precedents exist in that world for the inaugural contribution made by legal academics in democratizing access to justice via the radical transformation of constitutional standing for activists that sought to initiate judicial protection of the rightless peoples of India.²⁶

However, it also needs saying that these do not by any means exhaust the impact of related courageous praxes originating outside the law schools. For example, it is simply unconceivable that the Total Revolution Movement launched by Jayaprakash Narain in the 1970s has left no trace on teaching, learning and writing about the 'law'. Much the same may be said concerning narratives of similar 'exogenous'-looking Indian Green, feminist, animal rights, identity, and the distinctively Indian human rights and anti-corporate, anti-globalization movements. The sad fact is that we have failed to construct an archive both of the narrative histories of linkages and a reflexive history of law-teaching practices.

The historic identity of Indian law teachers as communities of organic knowledge producers lies submerged within some lifeless narratives of the encounters between the 'receivers' and the 'givers'. In sum, we have failed to theorize, even as we acted against miserable productions of subjectivities constituted by contemporary Indian law and jurisprudence, the production of Otherness. I salute in this context the Alternate Law Forum, and especially Arvind Narrain and his colleagues in the movement for bringing back to our attention the Indian law's shaping of 'despised sexualities' (to evoke a phrase from Nancy Fraser). Surely, any 'rebellious' legal pedagogy needs to address the complex and contradictory practices of subjection through the governance of sexuality, made now more insistent by the varied and tormenting histories of the National Population Policy.²⁷ Likewise, we surely need recourse to adaptive histories of messages from critical race theory, unfortunately submerged by the constitutionally

mandated waffle concerning the curious constructions of the 'Scheduled Tribes' ascribed in dominant caste metaphors as *adivasis* (aboriginal peoples) or *girijans* (the forest peoples.)

Bringing Back the Learners?

The reductive lumping of 'law students' or legal learners mystifies. These are human beings with infinitely varied social, educational, economic and 'ethnic' backgrounds, including the millennially deprived learners of the law, peoples living with disabilities,²⁸ the sexually constituted subjects of the law, and the constitutionally colonized rightless masses of impoverished rural and urban Indians. Elite theories (especially of the now fully entrenched National Law School prototypes) homogenize, in several modes, the actually existing learning communities, their needs, and aspirations. Regardless, the question remains: how may historical narratives bring the learners back in?

The cherished aspirations of 'enculturing law' stand impoverished when we speak only, or overwhelmingly, in the barbaric idiom of globalization of all law teachers as semi-autonomous service providers and students as collective customers of pedagogic and curricular histories. These one-dimensional modes block *in limine* any creative understanding of the different gender, race and class subject positions of 'teachers' and 'learners' alike. How may we take account of the different histories of the recipients of legal learning? Put crudely, what imageries of these recipients may have evolved over time in legal education? A while ago, I sought to popularize Paulo Friere's notions concerning 'the banking conception' of law teaching in India where the teacher becomes a 'depositor' and the students emerge as 'depositories';²⁹ yet monolithic narrative modes remain the sovereign violent norm in attempts to understand Indian legal education and research, *as if* there existed *no* diversity, or histories of Otherness, in teaching, learning, researching and writing the 'law.'

Let alone legal education, even general histories of education in India have yet to produce historic narratives that at the very least distinguish between the 'old' and 'new' 'professionalisms'.³⁰ Likewise, these remain almost a million miles from any understanding of the patterns of violence of legal and other forms of education to which Celia Haig-Brown brought to our attention in her classic work.³¹

I have in view here not just histories of law teaching but also those of legal learning by generations of our students. If the switch-over from 'teaching' to 'learning' 'the law' is ever to occur, we need at least to share the concrete interactional ways in which some Indian law students have actually challenged the *doxa*. Any attempt at developing critical South solidarities must at least remain conversant, or if inconversant, complicit, with the diverse ways of constructing the Law's Empire.

Yet histories of learning the law direct attention towards an understanding of the ways in which the 'learners' may have shaped 'teaching'. Whatever may be our evaluative stances concerning postcolonial legal education, con-

structed by the orders of both inclusion and exclusion, it is a global social fact, even truth, that the ideologically conflicted, politically messy and perhaps historically inefficacious programmes and measures of affirmative action for the Scheduled Castes and Tribes have brought millennially denied peoples to the roles of both professional learners and teachers.³² I know from my own experience as a law teacher in India (and many Indian colleagues I hope will testify to this) how startlingly this infusion has challenged even our self-styled, reflexive pedagogies.

I was born anew as a law teacher several times over in one lifetime when some students (at the Delhi and Jawaharlal Nehru Universities) whom I urged to read Nehru's famous tract *Discovery of India* returned to me with the question: 'What, and whose, India did Nehru thus after all discover, even invent?'

Other Sites of Legal Learning

We surely need to grasp the complicated relation between state formation practices and patterns of legal education. Legal education under the university system auspices occurs as an aspect of (what Michel Foucault termed as) the exercise of constituting 'certificatory sovereignty' contrasted with production, circulation, and consumption of non-certificatory/non-credential forms of institutionalized knowledges about the law. These include a range of university-based educational initiatives not directed at providing credentials for entry into legal practice. These non-certificatory programmes of learning the law occur at various sites celebrating the role and function of liberal legal education in the university such as:

- Humanities and social science learning
- Various programmes of the Open Universities and, within the 'closed' ones, the distance, adult and continuing legal education programmes which seek to promote some aspects of learning the law
- Legal learning promoted in management and technology institutions, exemplified in India by the Indian Institutes of Management and Indian Institutes of Technology
- Post-certificatory legal education programmes and off-campus based learning systems, in many regions in terms of continuing education of legal professionals and the judiciary.

But such programmes may prove to be too constricting a range of non-certificatory legal learning modes. I have in view here four such ventures: first, the ILO-inspired worker education programmes; second, the often antagonistic state and civil society programmes directed at the promotion of legal literacy; third, the grassroots people's education programmes that provide quotients of critical legal learning in strategic, even opportunistic, uses of legal knowledges enabling the 'wretched of the earth' to move centimetre-by-centimetre towards amelioration of their states of human rightlessness; and fourth, the

various *programmschriften* pursued by militant movements for the destruction of extant regimes of lawful illegalities, in turn fostering new legal utopias or hypertopias.

May I suggest that we endeavour to understand somehow the extraordinary complexity of relation/non-relation between and across these diverse sites of certificatory and non-certificatory programmes of legal learning or indoctrination? Should not our quest for new, even radically different, critical legal pedagogies lead us to enlarge our understanding of the 'histories' of legal education to the relations between credentialist and beyond-the-certificatory realms of reason and passion for legal education in India as elsewhere? In essence, we need to reconfigure Professor William Twining's illuminating contrast between the figurations of Pericles and the plumber.³³ In doing histories of legal education in India, we may well extend this metaphor in an age of globalization of law which invites the servants and savants of Indian legal education to now merely become Macaulay-type educationist servitors of corporate globalization.

Politics and Legal Education

The relationship between college and university education and power politics has been a subject of constant concern for students of education in India.³⁴ Party affiliations and political patronage often outlive any serious commitment to ideological politics which demonstrably affect the everyday life of teaching and learning in Indian universities. The issue of the medium of instruction has fanned many a violent upstaging of political career, both inside and outside Indian campuses. Long dormant conceptions of 'value education' (from the 1948 Radhakrishnan Report to the 1999 S.B. Chavan Committee Report) have been frequently exploited to promote specific regime aims and styles. Political perceptions concerning the role of education in 'nation building' have generated cycles of often noxious party and cadre-based interventions in educational processes and university leadership. Regime styles that actively install and promote factional politics within university education also thrive from languages of accountability in institutions of 'higher education'. Even the entirely constitutionally justified and valid promotion of policies of educational reservation for the millennially deprived classes has been pursued in some explosively traumatic modes by political leaders, whose faith in affirmative action and loyalty to equity in access to education remains, to say the very least, rather opaque. State funding has been used to discipline and punish Vice Chancellors who dare to assert conceptions of university autonomy. Various national governmental regimes have developed onerous procedures limiting the potential of scholarly mobility for cross-national dialogical enterprises, and research concerning so-called 'sensitive' issues defined at will by a reigning minister or bureaucrat. Considerations inimical to the functional autonomy of universities and visions of academic excellence have often presided over the making of university educational regimes.³⁵ College and university managements thus, overall, favour and foster the plenitude of Gresham's Law. Even the otherwise enchanted realms of

management and technological institutions of learning have not escaped capricious governance styles. Campus violence, in the main fostered by militant student union outfits of political parties, is often regime-sanctioned. This unfortunately includes staff and student politics concerning even issues such as sex-based campus harassment.

In this overall frame, it is remarkable that the life of the mind has still managed to survive the fallouts of everyday campus politicking, fomented by political regimes; this, as it were, constitutes a modern miracle. All this testifies, though in a different context, to Foucault's motions concerning the dialectic of the politics of certificatory sovereignty. This fragmentary narrative is in part intended to achieve some understanding of the travails of education in the Global South and to provoke some radical disagreement concerning the ways that fashion more benign narratives of the relationship between state power and university education in India.

The question, for the present purposes, concerns the ways in which party politics may be said to have affected the itineraries of legal education. This is a vast theme and I can offer here only a few random remarks.

To start with, despite high-minded periodic concern voiced since the 14th Report of the Indian Law Commission in the 1960s, and the subsequent takeover by the Bar Council of India of the power to recognize law degrees for purposes of legal practice, undergraduate legal education has remained an ethical orphan, neither fully owned or adopted by the state executive power within the federal system nor by the University Grants Commission of India.³⁶ The various state governments, aside from some flagship institutions often known as government law colleges, and indifferent support to postgraduate departments in law, have disowned any financial responsibility for undergraduate legal education.

Even before the advent of neoliberal policy regimes in India, legal education was owned by and practiced in law colleges run by charitable trusts and societies managed mostly by industrialists. State governments funded commerce and arts colleges, but not law colleges. I accidentally reached an understanding of the political animus behind this invidious treatment in a running argument with the government of Gujarat during my term as the Vice Chancellor of South Gujarat University (1982–1985); the then Chief Minister (who himself, like most leading Indian politicians, had a law degree) was brutally frank in his assertion that the government serves the public interest in the best manner by not being implicated in the production of legal competencies that challenge and disrupt state/regime/governmental performance. Behind the façade of the argument suggesting the lack of adequate state resources, the reality of state abstention articulated a libidinal anxiety, even fear, of state managers and political classes. I am unable to say, without further research, how widespread this symptom is across the Indian states. But I believe that a close study of the arguments advanced by many states in a social action petition by Professor S.P. Sathe that finally prompted the Supreme Court of India to end this discriminatory regime may well sustain an across-the-board generalization.³⁷

I may only suggestively invite here some attention to the rather tantalizing differential between the colonial and postcolonial governance of Indian legal education. The colonial 'rulers' viewed the production of legal competencies and knowledges as an aspect of the repertoire of skills and competences needed for colonial 'governance'. In contrast, at least some postcolonial 'rulers' curiously regarded such production as fostering anti-governance cultures! How may we understand and narrate all this, especially given the statutory role and functions assigned to the Bar Council of India to invigilate standards of legal education, a role already stymied at birth, as it were, by elevating the politics and pathologies of the Indian Bar as the presiding deity over the future of legal education? Indeed, how may we ever fully understand the new political passion embracing a mad rush for the reproduction of National Law School-type legal education?

The Conference statement is right, no doubt, in raising concerns regarding the second wave of reprivatization of production of legal knowledges and competencies and in asking us to critique 'the content that academic programmes must now assume'. How may we understand the new forms of reprivatization that mime and even cannibalize the initial 'ideals' governing the National Law School Universities? Unlike the privately run law colleges that minted millions by admitting large masses of students at affordable fees, the National Law School Universities of India, and kindred institutions, now perhaps generate remarkable revenue surpluses by levying high fees on the chosen few.³⁸ Unlike the privately run law colleges of yesteryear which only performed perfunctory legal education, the latter day counterparts insist on quality legal education, with full-time faculty, residential campuses and recruitment of students at school-leaving age. These brand equity National Law School prototypes continue the itinerary of fulfilment of the vision of some US founders of 'modern' legal education. But is this necessarily the best progress narrative that historians of Indian legal education have to offer?³⁹ In any event, while I fully recognize the implicit orders of correlation thus posed between globalization and legal education, I also believe that the tasks ahead are not exactly or eminently well served by funerary orations on the end of the nation state genera.⁴⁰

How far have the practices of power politics shaped the practices of teaching law? Have political regime changes impacted on legal education and research? Have these impacts been strong and, at times, decisive? Put another way, one may ask: how have political practices and regime styles 'encultured law'?

Some profiles are clear enough: many law teachers and student leaders remain openly affiliated to leading political parties, and so do the leading lawyers who constitute the leadership of the state and central Bar Councils with the power to affect the standards of legal education. Further, political affiliations animate many attempts at the 'modernization,' and now 'globalization' of Indian legal education as well as the production of Indian legal scholarly performance. However, it is difficult to draw any sustained inferences from these facts about any structural relation between party politics and legal education histo-

ries. Perhaps we need to explore the unexamined political dimensions of curricular change and pedagogic reform.

It is in this context that I may perhaps indulge in some anecdotal material. For a long time, Indian law schools organized the teaching of 'personal law' frankly named as Hindu and Muslim Law. The modernizing wave of curricular changes replaced this organization by renaming units of instruction as Family Law I and II. It was this renaming that led some Law School curriculum committees (known as Committees of Courses), regardless of my protests, to so organize the curricular content of these two courses as to altogether marginalize the instruction in Islamic law. I am in no position to say that this signified any early form of 'saffronization' of law teaching; nor am I able to say how far Islamic jurisprudence is given the dignity of discourse in certain law-teaching regions in the present times. But, overall, the way 'personal law' is taught matters a great deal to the future of Indian constitutional secularism. Equally important is the denial of difference entailed in such curricular offerings: nowhere (outside perhaps the North-East) is instruction in indigenous people's law offered; there is virtually no instruction in Parsi law or Zoroastrian jurisprudence, nor in the Christian and Judaic systems. Indeed, one may go through a distinguished career in law teaching and studies without even a nodding familiarity with these systems of jurisprudence.

Curricular changes rarely reflect any sustained concern with the practices of violent social exclusion (outside the jurisprudence of affirmative action.) Very few course offerings exist, for example, concerning people living with disability, sexual exploitation at the workplace in disorganized labour markets, child labour, other slave-like labour practices, trafficking in human beings, the rights of unorganized and migrant labour. The Delhi Law School pioneered courses and readings in an umbrella course called Law and Poverty; at no time in my twenty-three years of teaching did the enrolment exceed, on an average, 6–8 students per year! The idea that this course offering be made a compulsory subject remained subject to violent opposition. The related suggestions that we arduously assembled in the 1994 UGC Curricular Development Centre Report that I was privileged to lead, have obviously failed to leave the soundproof rooms in which some contemporary leaders of Indian legal education flourish.

Perhaps all this suggests that the dominant patterns of curricular change and even modernization remain heavily affected by some implicit class, caste, and gender biases. We need to systematically explore histories of legal education and research to demonstrate the tenacity of these biases. Only then may our dialogic search for enculturating law serve its stated ends in some measure.

To return to the theme of histories of legal education, all I can say here is that an incredible amount of labour of collective learning and sharing remain necessary, for, at the very least, furnishing the raw material for projects aiming at some order of descriptive realism concerning Indian legal education. Our shared ignorance concerning the evolution of teaching and research cultures is, indeed, immense. We need to know how cultures of teaching and research have

developed over the decades; we need to retrieve from oblivion, the profiles of some of the pioneers of legal education reform and of those who encouraged generations of law teachers to undertake research and to publish. We need to know the reasons why some curricular and pedagogic innovations succeeded in some law schools but failed altogether in others. Further, we also need to grasp the patterns of relationship between undergraduate and postgraduate studies and doctoral studies and advanced research in law. The stories of learning/unlearning experiences of Indian law students should also form a crucial aspect of our enculturating law talk. Because most contemporary law teachers were once at the receiving end of 'pedagogies', we must begin by sharing experiential notes, without waiting for any lush Foundation funding for information-retrieval of generations of our present-day 'victims'. Put another way, no doing of 'histories' of legal education and high-minded talk concerning 'enculturating law' may achieve any self-assigned purposes outside the frame of the *ethic of listening* celebrated by Corradi Fiumara.⁴¹

'Enculturating' Law

Because the 'law' always stands culturally embedded, the question always is: what elements in the construction of Otherness in the 'old' may be problematized, which may be modified and carried over, and which wholly dis(re)membred in the construction of the 'new' and how might the telos of that 'new' be constructed after all? These are difficult questions concerning the dialectical play, even war, between what Raymond Williams named as the 'residual,' 'dominant' and 'emergent' cultures (conceived both in terms of the cultures of law and law as culture.)

Before we begin the pursuit of 'enculturating law', we ought to ponder a paradox. How is it that the relatively unencultured legal professional in India, poorly educated (at least in terms now fully legislated by the National Law School mindsets) in the colonial times, these pleaders and *vakils*, these half-baked, forensic creatures, were actually able to torment the British Raj legalities (as Bernard Cohn so often fully brought to view)?⁴² How may we ever understand the social fact that the 'premodern' and poorly educated lawyers in the Indian independence struggle achieved so much to transform the unBritish rule of law (to borrow a phrase from Dadabhai Naoroji) into what now parades as some paradoxes of postcolonial Indian law and jurisprudence? And how may we understand that a similar breed likewise has continued to contribute enormously to the protection of rights and preservation of human liberties in postcolonial India?

How may we further fully understand, in view of the 'modesty' of achievement of Indian legal education and research, the fact that faceless district lawyers still led judges in nine Indian High Courts (themselves also products of 'modest' Indian legal education) with such eminent success to deny the sovereignty of the dreaded security legislations during the 1975–76 Emergency Rule by resurrecting the elementary rights of personal liberty?⁴³ Which faceless dis-

trict lawyers contributed so vigorously to the solidity of the practices of Indian constitutional secularism by maintaining since 1950 an extraordinary regime of stay orders over the Ayodhya Ram Mandir/Babri Masjid for over four long decades, which was disrupted, with catastrophic and barbaric effects, by the subsequent products of 'modernized' legal education? How may we fully understand the enormous contribution made by plain and relatively 'unencultured' and 'ordinary' lawyers to the fashioning of the profoundly litigious Indian cultures of democratic ordering? In contrast, though this requires further empirical exploration, I do wish to suggest that that most 'encultured' law products of the National Law School prototypes now serve better the causes of globalized lawyering than the future of human rights in a globalizing India.

How may we 'enculture' law outside the ways of a historically sensible and sensitive grasp of that which already precedes us when we begin to think of the present moment? What fidelity to histories, or at least the craft of historical narratives, may any search for relocation of legal education and research owe to the past successes and failures in imaging their role in a changing society? Further still, we need to ask whether formal, both pre-postmodern and postmodern, legal education matters *at all and for whom?*

Notes

- ¹ The conference call statement is available at <http://cscsban.org/html/EncullLaw.htm>
- ² Incidentally, this was the very issue I opened up in my *Socio-Legal Research in India* (ICSSR Monograph 12, 1973) and was variously responded to (notably by Professor S.N. Jain) in a special number devoted to legal research methodologies of the *Journal of the Indian Law Institute* 23 (1982).
- ³ This in turn raises several questions concerning the doctrinal element arising from other 'authoritative legal materials,' a notion by which Roscoe Pound invited our attention to decisional materials other than the judicial, an arena that Ronald Dworkin subsequently differentiated in terms of the domain of principles and policy. See U. Baxi (2003).
- ⁴ By 'ideal', Pound (1958) meant to suggest not merely the 'mental pictures' or the images of a 'good' legislator and a judge (and of other lawpersons) but also 'the end or the purpose of law as social control – what we are seeking to bring about by adjustment of relations and ordering or conduct' by 'systematic application of force of politically organized society'.
- ⁵ This perhaps overstates the matter. Perhaps, the 'values' of a good doctrine or doctrinal development may be measured simply in analytical or formal theory terms such as clarity of enunciation, internal conceptual consistency and even as 'integrity' in a Dworkinian sense in terms of crafting the best possible narrative 'fit' of interpretive change. Even on this register, it is not clear how the legislator may proceed to propound and install doctrines or at least translate these as initially crafted by the judge-jurist combine.
- ⁶ See Fitzpatrick (1992, 2001); Goodrich (1995); Nottir (2005); Tuit (2004); Mamdani (1996); Young (2001).
- ⁷ See especially, Mamdani (2003); Robertson (1999); Rummel (1997); Power (2002).
- ⁸ Cover (1983).
- ⁹ Derrida (1992, 2002).
- ¹⁰ Max Weber demonstrated that the production and substance of 'belief systems' concerning the authority of law remain historically and sociologically diverse, and often incommensurable. See generally Cotterell (1997) and more recently Sarat (2004).
- ¹¹ Teubner (1999).

- ¹² I deal more fully with the problem of conversion of human rights movements into human rights markets in Baxi (2002a: Chapter 7).
- ¹³ Twining (1994: 191).
- ¹⁴ See Hurst (1964a, 1964b). Further, no reader of Gadamer (2005) or of Koselleck (2002) may fail to return to doing legal history with the hermeneutic complexity of 'experience'. See more recently Schinkel (2005).
- ¹⁵ See Griffiths (2002); Baxi (1985).
- ¹⁶ Baxi (1982).
- ¹⁷ Goodrich (1995).
- ¹⁸ Unger (1976). But also see Unger (1996).
- ¹⁹ Baxi (1990).
- ²⁰ Fish (1994).
- ²¹ See Krishnan (2005).
- ²² See the fascinating narrative in Assyag and Benet (2005).
- ²³ Duncan Derrett has archived for us the histories of interaction between varieties of Indian colonizers and the Hindu law. Joseph Minattur was the only Indian legal scholar to retrieve for us the legal history of French law and jurisprudence in Pondichery. My research reveals an unhappy lack concerning the working of Portuguese law in India. As far as I know, Professor Krishna Mohan Sharma's article in an *American Law Review* (apologies for this non-specific citation) remains the only available indicator of an attempt to understand civil law enclaves within an Anglicized Indian legal tradition. And the specific contributions of Professor Charles Alexandrowicz (from Krakow) who nurtured for well over a decade the Department of International Law at Madras University and Conrad Dieter (Heidelberg) are unfortunately rarely mentioned.
- ²⁴ All this incidentally reminds me of my very first address at the Hyderabad Conference of the Association of Indian Law Teachers (1974) where I sought to contrast two forms of legal consciousness in India: the *All India Reporter* and the everyday consciousness of the law's multifarious workings.
- ²⁵ See Baxi, Sarkar, Kelkar and Dhagamwar (1979); P. Baxi (2004).
- ²⁶ See Baxi (2000a, 2000b); Sathe (2001).
- ²⁷ See Baxi (2000c) and Baxi (2002b).
- ²⁸ I still recall with horror how, as a Dean of the Delhi Law School, I had to wrestle with the Controller of Examinations over a mindless application of the rule that disallowed a visually disabled student from enrolling at an examination simply because he had failed to comply with a notice, pasted on the notice board, concerning the relevant last dates for application! Indeed, it never occurred to the University that some folks may not be able to read the pasted notifications! I similarly had to struggle against the University legality concerning the recourse to helpers for visually disabled or differentially abled students, who required the services of an amanuensis, under the regimes that enacted a suspicion of unfair academic practices by people living with disabilities. I tried, as the Vice Chancellor of Delhi University, even amidst the resource crunches generated by the then Finance Minister Manmohan Singh, to provide for Braille library services as well to provide a quotient of reservations for the differentially abled law students in particular and students generally. I thus focus piquantly on the situation of the 'peoples living with disabilities'.
- ²⁹ Baxi (1979: 9–10). It is refreshing indeed now to read the debate over three contrasting conceptions of legal education in the United States: the 'midwife' conception contrasted with the 'universal filling station' imagery (where legal education recipients tank up the knowledge that they will need later) and the 'sports coach' conception in which a law teacher may impart to the player the sport skills that he or she needs best. See Woodhouse (1993).
- ³⁰ See, as regards this distinction, Sachs (2003).
- ³¹ Haig-Brown (1998).
- ³² All this happened long before the unfortunate Ford Foundation transferral of the American agendum of pursuing 'diversity' in Indian legal education, and this flourishes happily despite this.

- ³³ Twining (1966–67: 396).
- ³⁴ Lloyd and Rudolph (1972) should still guide our understanding of the relation between party politics and university education.
- ³⁵ Incidentally, I recall with some poignancy that many Vice Chancellors, including V.V. John, thus resorted to a 10+2+5 legal education with a single-minded view to avoid the presence of rowdy law students on the campus! A singular educational innovation stood as a moment of de-militarized styles of campus governance!
- ³⁶ It does not as a rule fund undergraduate legal education (outside the auspices of national universities) though it occasionally provides matching resources for some development projects and enables some national coordination through its panel on legal education.
- ³⁷ See the reflections in Baxi (1996).
- ³⁸ The explosive issue of 'capitation' fees, that has affected many sectors of professional education (see Kaul 1993) has not in any severe mode visited the high investment from students and parents that National Law Schools, and their prototypes, now pursue with such eminent success.
- ³⁹ I must here fully acknowledge my own failure in the pursuit of the vision of the National Law School at Bangalore, with which I remained heavily pregnant for 13 years allowing a caesarian surgery, after all, by Madhava Menon. It is indeed interesting that Jayanth Krishnan in his recent survey of 'modernizing' legal education finds of interest only two arcs of transition: the Ford Foundation auspices and its astonishing revitalization by Menon, for which he deserves credit. See Krishnan (2005).
- In the process remain wholly ignored even a bare mention of alternate imageries of the socially relevant legal education which animated five national workshops under the auspices of the University Grants Commission in 1975–76, its massive Curriculum Development in Law Report, 1993, the landmark seminar at the University of Dharwar on teaching jurisprudence, the ICSSR recognition of law within the ambit of social science research production and the several workshops in social science research methods – all of which I was singularly privileged to initiate and lead. This interregnum is important, even decisive because here, altogether summarily presented, it:
- breached the Ford Foundation-induced models of curricular and pedagogic transformation
 - transformed understandings of teaching of jurisprudence and Indian legal history
 - aspired, and, with some success, accomplished, empirical and sociological explorations the Indian constitutional and legal development
 - enabled recognition of legal studies as worthy recipients of sociological research funding
 - reshaped, overall, legal education – pedagogy, curricular reform, and research landscapes
 - encouraged student-based legal learning directed to initiatives for law reform and imaginative delivery of legal aid and services to the 'poorest of the poor' and in the process launched a critique of unconstitutional and anti-constitutional governance policies and practices.
- ⁴⁰ See regarding this Baxi (2006: Chapters 8, 9). Also see, in a comparative context of the travails of legal education in the era of neoliberalism, Thornton (2005) and Cownie and Bradney (2005).
- ⁴¹ Fiumara (1990). See also Todd (2003); Ellsworth (1997); Fraser (1997) and hooks (1994).
- ⁴² Cohn (1965).
- ⁴³ Though denied in fullness by the infamous habeas corpus Shiv Kant Shukla Supreme Court Bench. See Baxi (1989).

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