"DEATH OF A DISCIPLINE": LOCATING HETERODOXY IN LAW

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Abstract

The paper reminds us of the impending disasters in the discipline of law and attempts to suggest the frames in which new questions need to be carved in, for sustenance of the discipline. It reminds scholars of their anxiety that often brews when they notice the divergence between what they write and expect about the order of the world, and what they see in reality. The paper encourages the scholars to embrace this anxiety. This embrace – as it argues – is a much needed entry point into heterodoxy. It elucidates on what is meant by disciplinary heterodoxies, and explores three significant efforts of heterodoxy in law: critical legal studies, third world approaches to international law and law and development. Examining their births and 'deaths' the essay draws a pattern of what constitutes such deaths, and how heterodoxy sustains itself. It discusses the (dis)enchantment of heterodoxy with notions of 'leftism' and argues for more fertile understanding of it. Finally, it dissects a heterodox mind, tickling the reader with symptoms of arrival of heterodoxy.

I Introduction

FEW WOULD disagree that the world has gone into uncomfortable disarray. The organizational and governance structures of the present global order are collapsing unabated. Without a great war, every family is fighting a war of their lives. Without a great depression, microcosmic reality is beset with inaccessibility. The dangers of risk society[1] are manifested in everything we do. Concepts of liberty and rights are increasingly getting diluted. Hopes are crumbling and uncertainty is only perpetuating itself. A quick closed-eye reflection reveals to us where we have brought ourselves.

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1 See Ulrich Beck, *Risk society: Towards a New Modernity* (1992). See also, Anthony Giddens, "Risk and responsibility" 62 *Modern Law Review* 1 (1999).

The monstrosity of Afghanistan and Iraq wars that announced the widening powers of hegemony justified in a new vocabulary; the enormity of financial debacle that sent nourishment tremors from glass buildings of Canary Wharf to the last standing shacks in poor villages continents across; the fervour of rising powers of the non-western nations with thoughtfully brutal emphasis on spikey growth leading to increasing inequalities; of the increasing rate of shrinking of Arctic ice and disturbing climate change effects, resulting in nature striking back; the unpredictable and yet so obvious Arab Spring, and then of the succeeding 'banality of evil' and disastrous suppression of hope in the region; the devastating societies reclaiming themselves into ISIS; the mind-boggling array of networks where war and terror money travels; the horrifying depths of the Mediterranean which serves as an everyday graveyard of hopeless migrants risking their lives for tiny hopes of better future. And to cap it all, the manner in which such woes get expressed in legal vocabulary and human lives become piece of newly structured statistics. Even those who come close to atonement begin doubting whether something was wrong at all. Apologies and condemnations achieve a new level of superficiality. We are at a very peculiar moment in history. One of the key defining and decisive elements of our experiences with events such as these is that of perpetual and increasing uncertainty. Indeed, uncertainty sums up the thread which binds these events into our memory.[2] We are uncomfortable because nothing seems to be able to predict a safe and secure future. Living in this intergenerational iniquitous architecture is a direct result of how little we are able to govern ourselves. This is a high point in the crisis of predictability.

In moments like these, people turn to the torchbearers of knowledge ((un)commonly known as scholars), and ask them (if there is some hope left), where are we headed. For it is they, who theorize about what's going on, and offer corollaries on which policy decisions for future are based upon. These torchbearers reside in universities and research institutions, who are observing the marginal revolutions taking place in societies around the world, and trying to put them in an equation that can explain whether the destruction is creative or not, and what to do if that is indeed the case. Based on their diagnosis of social, political and economic diseases that are expected to hit the population, they prescribe policy medicines. The process works through a quagmire of ideas. These ideas form literature. A solid literature forms the seeds sown in policy soil.

The trouble is we are reaping things we didn't intend to sow. Literature is not leading us to the truth. Policy medicines are not treating the disease. In fact, at times it is exacerbating it. And scholars gasp in horror of their failures. Since the failure is

2 *Ibid.*

collective, it is thinly shared and is hardly visible. But like any collective conscience, it surfaces as silent discomfort, a self-estrangement.[3] The self-estrangement that scholars go through is surfaced in the emergence of radical, critical and new ways of thinking about global governance, law and policy.

This paper is about the efforts of scholars to resolve their conflicts and self-estrangements they go through, their sites and various contestations. It explores the frames through which these efforts exhibit themselves, and argues that these frames need to constantly reshape themselves. Through reminding the necessity of identifying the blind spots in a discipline, the paper sheds light over there, developing the idea of heterodox approaches. Since law is integral to global governance and policy, the paper focuses on law in its various manifestations.[4] The paper is divided as follows. Part II develops a narrative of how moments of disciplinary crisis expose the fault lines of the assumptions. This exposure of ambiguity and blind spots of a discipline create an academic anxiety which encourages the development of heterodoxy. The paper also explains what the contours of a heterodox approach are. This part asserts the need to realign the axis of our inquiry in law schools and by legal academics. In Part III, the paper elaborates previous efforts for filling up the ambiguities in legal discipline. In particular, the author discusses heterodox tools in critical legal studies, third world approaches to international law and law and development. Part IV explores the question of what is meant by 'death' of a heterodoxy, and various manifestations of it. In Part V, the paper dwells on the frequently invoked association of heterodoxy and notions of 'leftism' and argues for a more fertile understanding of it. Part VI discusses what a heterodox mind is, and develops a framework for invoking it. Part VII concludes.

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3 The phrase is borrowed from Trubek and Galanter, *infra* note 5.

4 Law's centrality in policy is reflected in the increasing scholarship that reflects this relation ship. This is also exhibited in Harvard Law School's Institute for Global Law and Policy (IGLP: www.harvardiglp.org), which organises an annual workshop inviting young career academics in law and allied disciplines from around the world, and the remarkable pace and rigor at which the network has grown signifies assertion of law and policy relationship. The website mentions: "IGLP is a collaborative faculty effort to nurture innovative approaches to global policy in the face of a legal and institutional architecture manifestly ill-equipped to address our most urgent global challenges. Global poverty, conflict, injustice and inequality are also legal and institutional regimes. The IGLP explores the ways in which they are reproduced and what might be done in response….Much about how we are governed at the global level remains a mystery. Scholars at the Institute are working to understand and map the levers of political, economic and legal authority in the world today."

II Voids in assumptions as the entry point of heterodoxy

Moments of crisis in a discipline could be valuable lessons. Such moments reveal the fundamental basis on which world order is hinged. And consequently, they show the fault lines of these bases. Indeed, during predictable times, there is no need to dig into such foundational pillars. The precariousness of the foundation strikes during moments of institutional crisis. The difficult times offer effortless and yet powerful nudges to scholars to begin (re)thinking. Such times compel scholars to rip open their theories that are now beginning to unpalatably diverge from reality. Scholars begin their processes of removing the chaff, and strip their theories down to the bare minimum. Eventually, they reach the assumptions on which theories were built. Assumptions are crucial – perhaps the most crucial. Ideas that create informed judgment over how the social order ought to be built are essentially developed basing their veracity on certain conditions which scholars believe will hold true. Ideas are true for as long as these normative assumptions hold. These assumptions are rarely visible, and become part of an implicit understanding.[5] As soon as the understanding develops fissures, the ideas fall apart. When the ideas begin losing value since they are no longer able to explain the reality, scholars– in their debugging exercise– arrive at the site where buck stops. Trubek and Galanter express this very succinctly:[6]

> Indeed, it may be that these fundamental assumptions are most likely to reveal themselves in times of crisis. Thus it may be that a body of social thought tends to become most self-conscious when the cognitive relations and normative assumptions which underlie it have been subjected to challenge.

Hence, these are moments that inspire epistemic violence,[7] and therefore, generate paradigm shift. These moments create a collective will to disregard the conventional and welcome the new, since the old no longer convinces us. During such times, target

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5 David M. Trubek and Marc Galanter, "Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States" 1974 *Wis. L. Rev* 1062, 1069 (1974). This article is widely popular for recognizing and (by some accounts) leading to the death of the scholarship of law and development at that time. As a matter of fact, 2014 year marked the 40th anniversary of this article, which is often referred to as the most cited piece in law and development. Trubek has commemorated this anniversary in his recent article. See David Trubek, "Law and Development: 40 Years after Scholars in Self Estrangement– A Preliminary Review" *Legal Studies Research Paper Series Paper No. 1255,* University of Wisconsin Law School (2014).

6 Trubek and Galanter, *id.* at 1069.

7 Epistemic violence is a term attributed to Michel Foucault, developed by Spivak, which is largely how this term is used here. See Gayatri Chakravorty Spivak, "Can the subaltern speak?" in Patrick Williams and Laura Chrisman (eds.), *Colonial Discourse and Postcolonial Theory: A Reader* (1988).

is no longer the existing social theories, for their failure has become totally discernible. Target is the frame under which these theories fell. These frames were guided by questions. Target is then those questions. Attacking the fundamental questions and assumptions creates new ways of imagining the world. As David Kennedy mentions:[8]

> Moments like this can make people retrench – can give new life to old ideas and failed solutions. They can lead people to put their heads down, burrow deep into their technical specialty, and hope things somehow work out for the best. But such moments can also open the door for innovation and for revitalizing heterodoxies long consigned to the intellectual dustbin. In moments like this, the terrain for intellectual engagement becomes broader – and more contested. Old ideas defend themselves more tenaciously. Technical specialties become ever more specialized. And critical thinking can suddenly be heard.

These moments develop discipline's practice of renewal.[9] Disciplines are compartments through which we categorize modes of inquiries. Disciplines are powerful towers of intellectual territory from which their fiefdoms are run, rather dictatorially, and unilaterally. The arrogance of disciplines does not emerge from any millennium old compelling thought process, but from various social pressures that became path dependent in merely two centuries. 'Path dependent',[10] since there isn't any necessary logic for them to continue the way they are, except for the fact that they are continuing the way they are, and now, switching costs of these paths are unaffordable.[11] Every discipline has a vocabulary, a politics and therefore, blind spots.[12] In his famous work on repeating renewal, Kennedy writes:[13]

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8 David Kennedy, "Introduction: The Critical Impulse," Address at the Harvard Law School's IGLP Workshop 2014, in Doha (hereinafter, Kennedy, Doha Address). *Available at:* http://www.law.harvard.edu/faculty/dkennedy/speeches/2014%20 Workshop% 20Doha% 20Opening%20Plenary%201.3.14.pdf (last visited on Sep. 8, 2014).

9 David Kennedy, "When renewal repeats: thinking against the box" 32 *NYUJ Int'l L. & Pol.*335 (1999) (hereinafter Kennedy, Renewal).

10 See Paul A. David, "Clio and the Economics of QWERTY" 75 *American Economic Review* 332 (1985). See also, Paul Pierson, "Increasing returns, path dependence, and the study of politics" 94 *American Political Science Review* 251 (2000). See generally, W Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (1994).

11 Three things happened that created the institutional inertia of disciplines and hierarchization of scholarly attention. Firstly, the thrust of industrial revolution began laying greater emphasis on sciences that could directly or indirectly produce suitable workforce. See M. Bridgstock *et al.*, *Science, Technology and Society: An Introduction* 111 (1998). The structuring of universities in departments, sorting out students who attend classes in a timely fashion with each department run on administrative lines produced a fertile ground for most students to receive and accept an industrial state of the world. Secondly, there was an ever-increasing surge of data in existing disciplines, which created a pressure on scholars to develop new ways of ordering the new

> [T]he first idea about the politics of a professional discipline: the forms of expertise that constitute the vocabulary of the discipline might have biases or blind spots that could affect the distributional consequences of the discipline's governance activities. And might do so even when this sort of bias or blindness is self-consciously denied and avoided in the discipline's everyday work generating and defending the various institutions, doctrines, and policy ideas that make up the profession's most direct contribution to global governance.

Two points are worth mentioning. Trubek and Galanter cautioned us for thinking about scholars as "cynical schemers, creating an elaborate tissue of myths to…further their pet projects."[14] According to them, even though law and development had run into its existential crisis, it was not because of insincerity of the discipline's scholars, who may have been unreflective and ingenuous, but not dishonest. Kennedy on the other hand, believes that the blind spots remain invisible because and for as long the belief in the discipline's institutions is defended by scholars themselves,[15] even though there may be instances when simply the modes of expertise within which the apparent benign disengagements with politics attracts biases. The author's inclination here is to believe the centrality of politics and vocabulary of a discipline. The inclination is shaped by a tool used by Trubek and Galanter in their innocuous picture of scholars, who say that deliberately scheming scholars will not undergo a moral crisis in the first place which was indeed happening. By same token, given that there is hardly any visible moral crisis in the field of law and governance, there is a temptation to believe that politics is visible, yet ignored. This makes an honest stakeholder very anxious.

Secondly, and connectedly, the anxiety results not from the visibility of biases and blind spots, but from their sustenance through advancing a vocabulary to explain

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data, to "limit the realm of possible experience". See Peter Weingart, "A short history of knowledge formations" in R. Frodeman, J.T. Klein and C. Mitcham (eds.), *The Oxford Handbook of Interdisciplinarity* 5 (2010). The third was the fossilization of American-style-fashioning their departments, which was quickly borrowed by most of the modern world. Also responsible was the idea of 'dual institutionalization'. See Andrew Abbott, *Chaos of disciplines* (2001). Disciplines act as macrostructure of labour market for faculty thereby embedding careers within discipline rather than within the same university. At the same time, disciplines constitute microstructure for each individual university. Due to this duality, no university could have challenged the disciplinary system without eroding the career prospects of its own graduates.

12 *Supra* note 9.

13 *Id.* at 373.

14 Trubek and Galanter, *supra* note 5 at 1088.

15 *Supra* note 9. Here, Kennedy is talking about the disciplinary failure of international law as a means of global governance. His intuition is "that the discipline encouraged those who deployed its expertise to see some things and not others, and to contribute to global governance in ways that favored the interests of some and not others."

the biases in such stylized manner of self-criticism, which "cleanses the discipline's vocabulary of overt signs of bias or blindness,"[16] and in other ways, legitimizes them. Legitimate biases are either those that don't matter (for who?) or are not prerogative of this discipline. Sometimes, they are reconciled through the 'plastic'[17] vocabulary again.

A standard way to discern that there is indeed a moment of crisis in a discipline is to be convinced that answers to questions impregnated in the fabric of the discipline are not found in the very discipline's theories. Or, sometimes, the discipline's guide posts lead us to different answers to the same questions, often running in opposite directions. A worry begins creeping in. Kennedy says, the worry itself is the finding.[18] Such a finding raises suspicion. A good time for welcoming heterodoxy!

The positive side is that just like only an emotional disturbance can compel the soul to seek for spirituality, only a moment of crisis in a discipline can offer a view to the ambiguity, uncertainty, vagueness and inconsistency in that discipline. The awareness of problem's intractability pushes us to go deeper into the discipline and its visible tools. We try to assess where is the sharpness of these tools lost, and how can it be honed. We try figuring out how these tools were manufactured, so they can be improvised in the hope of finding an answer. In this process, perhaps we end up realizing that these tools were manufactured with a 'political' process to begin with, and therefore, militate against offering a solution to the problem at hand. In other words, these tools in fact are a part of the problem, exacerbating and quietly creating the problems we are seeking to address through these very tools.[19] One of our responses could be to redesign these tools from scratch, thereby attracting the possibility of creating another sub-field. Alternatively, a scholar faces the existential crises and begins looking for answers elsewhere. The new location of inquiry may either form part of her previous discipline, or simply bridge that discipline with the new location.[20] It is also possible that the discipline's boundaries are pushed further, and its area inflated to subsume the items languishing at the periphery.[21] Finally, the discipline's disease is surgically treated to increase its luminosity and made visible problem sets that had *hitherto* been cornered in darkness.

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16 *Supra* note 9 at 374.

17 *Id.* at 375.

18 *Supra* note 8.

19 *Ibid.*

20 If the scholar lives for long enough time, s/he may get a Nobel or an equivalent for doing so.

21 David Kennedy calls it opening up of the aperture. See *supra* note 8. This is also discussed later in the paper.

Economics is a case in point for heterodoxy.[22] When the Great Depression struck the world, all economic theories were recast in new Keynesian vocabulary, stripping the old (and supposedly failed theories) off their assumptions.[23] This went on for a while, when post-war consensus was breached by discipline's scholars at the perceived crisis (and failure) of socialism.[24] Followers of neoclassical for next few decades then sadly witnessed rise of Marxist economics,[25] feminist economics,[26] institutional economics,[27] experimental economics,[28] post-Keynesian,[29] new Keynesian,[30] ecological economics,[31] and of late, thermo-economics[32] and complexity economics.[33] Each of these sub-fields originated from anxiety with the (mainstream) neoclassical economics, and have in time, been either able to build a new sub-discipline, or pushed the boundaries of economics. Their origins are rooted squarely in their disenchantment

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22 See for example, David Dequech, "Neoclassical, mainstream, orthodox, and heterodox economics" 30 *Journal of Post Keynesian Economics* 279 (2007).

23 Keynes proposed the idea that aggregate demand needs to be produced through government intervention and reduce unemployment his work. His magnum opus, captures the ideas technically. Keynes, John Maynard, *General theory of employment, interest and money* (2006). For the political impact and interventions, see generally, Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle between Government and the Marketplace* (2008).

24 Hayek's *Road to Serfdom,* and Friedman's *Capitalism and Freedom* have influenced the policies of Reagon and Thatcher, which in a way, marks the birth of neoliberal policies.

25 See for example, Sukhamoy Chakravarty, "Marxist economics and contemporary developing economies" 3 *Cambridge Journal of Economics* 22 (1987). See generally, Geroge Catephores, *An Introduction to Marxist Economics* (1989).

26 See Marilyn Waring and Gloria Steinem, *If women counted: A new feminist economics* (1988). See also, Marianne A. Ferber, and Julie A. Nelson (eds.), *Beyond economic man: Feminist theory and economics* (2009).

27 For old institutional economics, see, John R. Commons, "Institutional economics" 26 *American Economic Review* 237 (1936). For new institutional economics, see Oliver E. Williamson, "The new institutional economics: taking stock, looking ahead" 38 *Journal of Economic Literature* 595 (2000). Several prominent scholars of this field have won Nobel prizes.

28 See for earlier literature, Vernon L. Smith, "Experimental economics: Induced value theory" 66 *American Economic Review* 274 (1976). See also, Daniel Kahneman, "Experimental economics: A psychological perspective" 93 *American Economic Review* 162 (2003). This field also boasts of Nobel prizes.

29 See generally, Marc Lavoie, *Foundations of post-Keynesian economic analysis* (1992).

30 For brief overview, see, Robert J. Gordon, "What is new-Keynesian economics?" 28 *Journal of Economic Literature* 1115 (1990).

31 See Robert Costanza, J.H. Cumberland, H. Daly, R. Goodland, & R.B. Norgaard, *An Introduction to Ecological Economics* (2002).

32 See Stanislaw Sieniutycz and Peter Salamon, *Finite-Time Thermodynamics and Thermoeconomics* (1990).

33 See J. BarkleyRosser, Jr. "On the Complexities of Complex Economic Dynamics" 13 *Journal of Economic Perspectives* 169 (1999).

with the assumptions of neoclassical and its various avatars, and the discipline's utter failure in explaining the world.[34]

This is the heterodoxy of a discipline. In becoming aware and accepting the failures and the crises of the discipline, scholars create new ways of imagining the old and rekindle old ways of imagining the new. They restate the assumptions, torture the existing ones to pull out the covered, draw contestations and perform unconventional rites. They force the discipline to evolve. Heterodoxy can be best – or perhaps only be – understood in relational terms.[35] It has no existence unless a mainstream exists. Heterodoxy is the *other* of a discipline. It is the critical. It is whatever the mainstream isn't. It can be heard in the voice in our head which doesn't get satisfied with available answers. It can be felt in the scholarly anxiety with existing frames. It manifests itself in the critical inquiry.

III Law and its heterodoxy: Three cases

Are we in a moment of time when law and its notions of governance are losing their narrative? Do we feel that we are in the midst of a disciplinary crisis, and can anxiety be felt in the air? An affirmative answer to this question will not surprise many of us. Part of this loss is ontologically visible, and part is reflected in global governance generally, which heavily invokes tools and frameworks of existing legal paradigms. The latter is more important, and in some way, leads to the former.

The content of Institute for Global Law and Policy at Harvard Law School reminds us of the fragilities in existing frameworks that we have tried to stick the world into.[36] Pressing concerns on global poverty, inequality, injustice and conflict are starkly posed, reminding us how ill equipped our legal and institutional architecture is to address their most potent enemies. The relationships between state and market actors; state and non-state actors and between different states have become more opaque and incomprehensible. Sustenance of this kind of awareness raises fears of an imminent collapse of human sensitivity, developing sites of 'banality of evil.'[37] To

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34 See for example, Tony Lawson, "The nature of heterodox economics" 30 *Cambridge Journal of Economics* 483 (2006). See also, F. Lee, *A History of Heterodox Economics: Challenging the mainstream in the twentieth century* (2009); Shelia C. Dow, "Prospects for the progress of heterodox economics" 22 *Journal of the History of Economic Thought* 157 (2000); David Dequech, "Neoclassical, mainstream, orthodox, and heterodox economics" 30 *Journal of Post Keynesian Economics* 279 (2007).

35 Akbar Rusalov, "Heterodoxy, the Critical, and the Left (Some Notes)" *Institute for Global Law and Policy "Global Legal Thought: The Legacies of Heterodoxy" Roundtable II: The Politics of Legal Thought, Harvard Law School* 3 (2014).

36 *Available at:* www.harvardiglp.org/about/ (last accessed on Sep. 8, 2014).

37 The phrase is borrowed here (and also above), from Hannah Arendt. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1976).

carve out a response, one needs an understanding of how are they reproduced, and the feeling that existing equations don't have required variables is becoming commonplace. The global governance standards are driven by powerful institutions (think about World Bank for instance), their donor nations; and their policies have only increased the gaps between the haves and the have-nots, let alone alleviate the distributional mess. Much of their activities were offered conceptual, theoretical and even empirical support from a range of legal scholars. They legitimized the new empire building. The question is who validates the scholars' intentions?

Consider the legal architecture of intellectual property rights (IPR). Patents afford monopoly power to the manufacturer (say of drugs) for twenty years to ensure that there are sufficient incentives to innovate (if the manufacturer is not granted right to its product which can be cheaply copied, s/he will have no incentives to invest in R&D and new drugs will not develop). At least so goes the rationale. Multinational pharmaceutical firms are globally governed through the legal framework of Trade Related Intellectual Property Rights (TRIPS), negotiated at the World Trade Organisation in 1995, with great promises that synonymize trade with development. And yet, the access to medicines situation in developing world has exacerbated. More than two billion people in low and middle income countries (upto 50% in parts of Asia and Africa[38]) do not have access to essential medicines,[39] and 60-90% of developing countries household-expenditure on health is on medicines alone.[40] At the same time, pharmaceutical industry has become a $550bn monolith, increasing at 10% annually.[41] This is complemented by steadily rising drug prices, across the world.[42]

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38 World Health Organization (WHO), *Equitable access to essential medicines: A framework for Collective Action* (Geneva, 2004). *Available at:* http://whqlibdoc.who.int/hq/2004/who_edm_2004.4.pdf (last visited on Sep. 9, 2014).

39 World Health Organization (WHO). "Access to Essential Medicines" in *The World Medicines Situation* (Geneva, 2004).

40 J.D. Quick, "Ensuring access to essential medicines in developing countries– A framework for action" 73 *Clinical Pharmacology and Therapeutics* 279 (2003).

41 KPMG, Report on Indian Pharmaceutical Industry (2006). *Available at:* https://www.in.kpmg.com/pdf/Indian%20Pharma%20Outlook.pdf (last visited on Sep. 9, 2014).

42 See Frank Davidoff, "The heartbreak of drug pricing" 134 *Annals of Internal Medicine* 1068 (2001). See generally, Robert Langreth, "Big Phama's Favorite Prescription: Higher Prices" *BusinessWeek* (Bloomberg, 2014); *available at*: http://www.businessweek.com/articles/2014-05-08/why-prescription-drug-prices-keep-rising-higher (last visited on Sep. 9, 2014). Jonathan Rockoff, "Drug Prices Rise despite calls for Cuts" *Wall Street Journal* (Mar. 17, 2011); *available at:* http://online.wsj.com/news/articles/SB10001424052748704629104576190621185676798 (last visited on Sep. 9, 2014).. For Indian case, see Rashi Aditi Ghosh, "Rising Medical Costs Pinching Indian Pockets" *DNA* (Sep. 19, 2013); *available at*: http://www.dnaindia.com/health/report-rising-medical-costs-pinching-indian-pockets-1891089 (last visited on Sep. 9, 2014). See

Pogge reminds us how global governance of intellectual property, built on foundation of market reliance, leads to moral contestations.[43] The premise on which the governance of patent is based creates friction with public policy goals inherently. Instead of creating an inclusive policy, we have ended up embracing the policies that seek to prefer certain interests over others, and in comfortable silences. How and why have the governance frameworks established and legitimized the sources of the misery we expected it to relieve ourselves from? Seems like a blind spot the size of an elephant.

Historical antecedent – heterodox tool – may shed some light. This was the time when with the decline of American manufacturing and growth of technology-led firms, the United States had begun raising the public perception of the importance of IPR.[44] The result was the linking of IP with trade and seeking global protection.[45] This attracted a lot of resistance, particularly by developing countries like India.[46] However, with the intense political manoeuvring and bargaining power that the US had over trade with India and other countries, coupled with pressure groups of pharmaceutical companies, developing nations succumbed. A comprehensive agreement was tabled and negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade in 1994, called Agreement on Trade Related Aspects of Intellectual Property Rights[47] (TRIPS). Essentially, countries embracing TRIPS were required to fulfil greater IP protection, with the patent period fixed at twenty years, and in return got access to foreign markets and a safety net from whims of unilateral sanctions from their governments.[48] TRIPS was a revolution in the world

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generally, WHO Report, "The World Medicines Situation" 2011 *available at:* http://apps.who.int/medicinedocs/documents/s20034en/s20034en.pdf (last visited on Sep. 9, 2014).

43 Thomas Pogge, "Access to medicines" *Public Health Ethics* (2008). He begins his article thus: "I would pay three million to go into space, says the banker to his attorney. — I wouldn't go if you paid me, the latter laughs, for me the French Riviera is quite exciting enough. Ah, I would pay a million for an extra year of life, the elderly tourist effusively tells his lover. — We have never had even a hundred dollars, the Cambodian teenager replies, we are a large family."

44 Peter M. Gerhart, "Reflections: Beyond Compliance Theory–TRIPS as a Substantive Issue" 32 *Case W. Res. J. Int'l L.* 357, 367 (2000).

45 It is well illustrated how senior management of Pfizer was responsible for creating this link, by bringing together various other interested corporations and making IP privileges the most important priority of the United States in the 1980s. See John Braithwaite and Peter Drahos, *Global Business Regulation* (2000).

46 Elizabeth Chien-Hale, "Asserting U.S. Intellectual Property Rights in China: Expansion of Extraterritorial Jurisdiction?" 44 *J. Copr. Soc'y* 198, 226. See also Robert C. Bird, "Defending Intellectual Property Rights in the BRIC Economies" 43 *Am. Bus. L.J.* 317, 328–29 (2006).

47 See Marrakesh Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 300, 313 (Annexure 1C).

48 See Marrakesh Agreement, annex 2, *id.,* art. 418.

of intellectual property with pharmaceutical companies emerging as major winners.[49] To be a member of WTO, countries had to sign TRIPS (although their signing was deferred until later, by when they were thought to develop sufficient expertise to be able to withstand competitive forces from the industrialized world).[50] No wonder then that distributional priorities of existing legal frameworks are skewed to favour the side which is most favourable to frame them.

What have we got here? For as long as we attempt to theorize to the pressing concerns of access to medicines in altering the existing structure to make it more exclusive, we will achieve only marginal advancement, if at all; and that too at glacial pace. This is because we will use the same vocabulary that the discipline is entrenched in, thereby having us entrenched in the discipline itself. We need an alternative vernacular to identify the problem. We need a torch of distrust and to march forward seeking a radically different world order. What that order will look like is a question that only time can tell. But the necessary precursor to that order is to explain the blind spot.

Intellectual property is one such example. It did attract some critical scholarship,[51] but it was largely hinged on critical legal studies (CLS) rather than producing its own radical agenda. CLS is an interesting case in point. It began as a powerful heterodoxy of law, but in time got subsumed under its own weight. This is also a fate the third world approaches to international law are approaching, sadly. A quick look at these two movements will help us appreciate the genesis of heterodoxy and its rather disappointing (yet rationalised) expiry. The paper proposes to shed some light on law and development, and explore its contours as a phoenix-like heterodoxy.

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49 Jerome H. Reichman, "Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options" 37 *J.L. Med. & Ethics* 247, 247 (2009).

50 Countries like India, China, Brazil were given time until 2005, while other countries, particularly the LDCs were offered a delay of few more years (patents until 2013 and pharmaceutical patents until 2016). See Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the Transition Period under art. 66.1 for Least-Developed Country Members, IP/C/40 (Nov. 30, 2005); Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the Transition Period under art. 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, IP/C/25 (July 1, 2002).

51 This happened under the influential critical legal studies movement, more on which will follow later. Notably, Cardozo Arts and Entertainment Law Journal organized a symposium, "The Spring Symposium: Critical Legal Studies & the Politicization of Intellectual Property and Information Law," 31 *Cardozo Arts and Entertainment Law Journal* (2013). Entire transcript is *available at*: http://www.cardozoaelj.com/wp-content/uploads/2013/08/Transcripts-31.3.pdf (last visited on Sep. 19, 2014).

52 John Henry Schlegel, "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies" 36 *Stanford Law Review* 391 (1984).

Critical legal studies

With CLS sprouted out of a small conference in Wisconsin in 1977,[52] which combined the tenets of legal realism,[53] critical Marxism, and structuralist and poststructuralist literary theories.[54] The movement is associated with 1970s and 80s, largely driven and membered by left bodies of student organisation. The conference was dissolved by 1990s,[55] but it has had (and continues to have) a significant influence on legal academia.[56] The project aimed at changing the existing social system of hierarchy, critiquing the injustice and oppressiveness of existing arrangements, "a utopian par, and a positive theory of how things got so bad and why they stay that way."[57] It emerged from the anxiety in being unable to understand how law creates structures that it has been set up to confront against. In some ways, it was the direct descendant, in emotions at least, of the postmodern sentiment that "things are not going well", and that there is a sense of miscarriage of justice, where law and ethics have been separated.[58]

CLS attacks the central assumption of law that follows from Kantian notion of autonomous individuals, and posits that individuals are not 'free' but are tied to an array of associations drawn through social and political milieu they are part of. They realised that classical liberalism's aspiration to secure liberty through the rule of law is flawed, since no determinate rule system can secure liberty.[59] Entitlements are power over others, and if this is treated as an axiom (understandably so), then freedom to act without harming others and freedom to transact with consenting others are self-defeating pursuits.[60] Hence, every seemingly-precise rule will inevitably contain counter-rule that will contradict it fundamentally. In this sense, liberal rights theory is not formally realisable, and therefore essentially attracts political discretion.

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53 See Debra Livingstone, "Round and round the bramble bush: From legal realism to critical legal scholarship" 95 *Harvard Law Review* 1669 (1982). See for a contrar view of the relation between CLS and Legal Realism, Jeffrey A. Standen, "Critical Legal Studies as an Anti-Positivist Phenomenon" 71 *Virginia Law Review* 983 (1986).

54 Guyora Binder, "Critical Legal Studies" in Dennis Michael Patterson (ed.), *A companion to philosophy of law and legal theory* 267 (2010).

55 Duncan Kennedy – one of the founders – had famously said, critical legal theory is dead, dead, dead. See Mark Tushnet, "Survey Article: Critical Legal Theory (Without Modifiers) in the United States" 13 *Journal of Political Philosophy* 99 (2005).

56 See also, Mark Tushnet, "Critical legal studies: A political history" 100 *Yale Law Journal* 1515 (1991).

57 Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in Wendy Brown and Janet Halley (eds.) *Left legalism/left critique* 178 (2002).

58 Costas Douzinas, Peter Goodrich and Yifat Hachamovitch, (eds.) *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent* 3 (1994).

59 *Supra* note 54 at 268.

60 *Ibid.*

In a way therefore, in viewing legal doctrines as hollow shells that are layered within the social context, CLS scholars attempted to make the social context self-consciously and visibly an important variable to explain legal constructions. In suggesting that society and politics are legally constructed, they contributed to social and political theory more than analytical jurisprudence.[61] An important takeaway from churning these ideas is that legal language was indeterminate because of indeterminacy of the social context to which it refers.[62] This indeterminacy thesis proves to be highly fertile in explaining existing inequities and meaninglessness of law in addressing it. So for instance, one can show how doctrinal legal materials are inherently contradictory by arriving at two different answers for same issue.[63] If legal doctrines are indeterminate, then it will be exemplified in the value-laden quality of the social knowledge on which it is based. Consequently, law will only favour interests of certain (powerful) groups who are most suitably positioned to receive those benefits. Legal rules were "socially constructed to reflect prevailing interests of power and domination, and...the mythology of legal discourse serves to mystify and pacify the oppressed."[64] Given how CLS explains what leftist social thought can look like,[65] it assumed an enterprise status, the critical legal studies movement.[66]

Third world approaches to international law (TWAIL)

TWAIL, as the "the broad dialectical of opposition to International Law"[67] emerged from a series of meetings and conferences, the first one in 1997 at Harvard Law School participated by students and junior faculty sympathetic to critical race theory, law and development studies and new approaches to international law movement (NAIL).[68] The discourse sprang from the disenchantment scholars felt with poverty and inequality under the universal claims made by public international law and international economic law, which not only overshadowed the research in third world with fewer resources but also limited the possibility of appraising the

61 *Id.* at 269.

62 Duncan Kennedy, "Legal Formality" 2 *Journal of Legal Studies* 351 (1973).

63 See for instance, Duncan Kennedy, "Semiotics of Legal Argument" 42 *Syracuse L. Rev.* 75 (1991).

64 Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin" 15 *Phil. & Pub. Aff.* 205, 216-35 (1986).

65 See however, *supra* note 56, (where he explains why CLS is not leftist but a post-modern movement).

66 See generally, Roberto M. Unger, "The critical legal studies movement" 96 *Harvard Law Review* 561 (1983).

67 Makau WaMutua, "What Is TWAIL?" 94 *Am Soc'y Int'l L. Proc.* 31 (2000).

68 James ThuoGathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" 3 *Trade, Law and Development* 26 (2011).

work coming from developing countries.[69] In examining how history of international law was being told, the analysis of power and knowledge were at the centre of the scholarship.[70]

The scholarship revealed that international law developed out of colonial experience. It showed how international law is a "predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West."[71] Mapping across various themes,[72] the movement argues that the failure of international law in its universal claims is a result of the weight of imperial conquests that it still carries.[73] The continued and increasing racial discrimination, economic exploitation, and cultural subordination can be understood if the blind spot that captures international law's relationship with colonial encounter is brought into centre.[74] Dissecting the jurisprudential rubric of international law, one notices the civilizing missions of international law, and the dynamic of difference (like culture) between Europeans and non-Europeans generates the problems inherent therein, by its very construction.[75] Indeed, the international economic governance, international human rights and rules related to use of force contain the colonial disempowerment fossilized in it; just like the mandate and trusteeship system of international law carries the dynamic of difference, and seeks to "obscure its colonial origins, its connections with inequalities and exploitation inherent in the colonial encounter."[76]

In their aim to address material and ethical concerns of the third world,[77] history becomes central, and new forms of subjugation through governmentality are shown to resemble older forms of domination.[78]Yet, in its primary thrust to challenge alone the dominant narratives of international law, it has been criticized to be nihilistic in its approach, since there is little it has offered in form of a positive agenda for reform or

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69 *Id.* at 29.

70 This was also mentioned in TWAIL Vision Statement. See Karen Mickelson, "Taking Stock of TWAIL Histories" 10 *Int. Community L. Rev.* 355, 357 (2008).

71 *Supra* note 67.

72 For an excellent overview, see Anthony Anghie, B.S. Chimni, K. Michelson and O.C. Okafor, *The Third World and International Order: Law, Politics, and Globalization* (2003).

73 Anthony Anghie, *Imperialism, Sovereignty And The Making of International Law* (2005).

74 *Ibid.*

75 *Id.* at 9, 29.

76 *Id.* at 117, also quoted in *supra* note 68 at 25.

77 B.S. Chimni, "Third World Approaches to international Law: Manifesto" 8 *International Community Law Review* 3, 4 (2006).

78 James Gathii, "Imperialism, Colonialism, and International Law" 54 *Buff. L. Rev.* 1013 (2007).

action.[79] When this is read in conjunction with the fact that TWAIL scholarship, instead of replacing, seeks to overcome "international law's problems, while still remaining committed to the idea of an international normative regime largely based on existing institutional structures."[80] In essence therefore, TWAIL has often followed the language of international law itself, thereby using the same frames to attack international law, in which the very discipline is constructed.[81] It has in time, developed its own blind spots, thus calling for a more radical imagination.[82]

Law and development (L&D)

Some may dispute that L&D is heterodoxy in the first place. The paper would delve into the question later, but suffice to say at this stage that it has taken off the discipline in placing role of development at the centre of law. It developed its own superstructure, and vociferously called for support from financial donors, offering positive heterodoxy. L&D is an interesting case. It died in 1970s, but resuscitated in1990s. Its first *avatar* was driven by belief of developed world to enhance economic development of poor countries through law reform, thereby driving international donor agencies (USIAD, Ford) to fund law reform projects. The famous article by Trubek and Galanter rang its death knell.[83] The article argued that the field of L&D failed because it had unproven assumptions about how law can foster economic change, undue reliance on import of Western institutions, little empirical grounding, highly ethno-centric, belief in liberal thrust of law and lawyers, and geared more towards policy without ensuring academic rigor.[84]

The 1980s, and 90s witnessed re-emergence of the L&D, sometimes referred to as the second moment of L&D movement.[85] So while the first moment advocated

79 See for the criticisms, Jose Alvarez, "My Summer Vacation Part II: Revisiting TWAIL in Paris," *available at:* http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/ (last accessed on September 3, 2014); and David P. Fidler, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law" 2(1) *Chinese J. Int'l L.* 29 (2003).

80 Luis Eslava and Sandhya Pahuja, "Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law" 45 *Journal of Law and Politics in Africa, Asia and Latin America* 195, 206 (2012).

81 John Haskell, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law" 27 *Canadian Journal of Law and Jurispudence* 383 (2014).

83 Trubek and Galanter, *supra* note 5 at 1062. See however, Trubek, *supra* note 5 (in which he argues that the field did not die simply out of publication of the article but had developed fault lines anyway and the article only surfaced them).

84 Trubek and Galanter, *supra* note 5.

85 David M. Trubek and Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* (2006).

state intervention, the second moment pushed forth the idea of market's role in fostering economic development. The third moment in which we currently reside, recognizes limits of market, and makes social aspects central to the discourse, often churning out the idea of new developmental state.[86]

The resurrection (second moment) of L&D, which brought the funding agencies, academic support and systemic reforms[87] is attributed to a development of new players and new vocabulary. The new players were economists who became attracted to development and institutional variables (of contract,[88] property,[89] role of legal institutions,[90] regulation[91]) for enhancing law reform strategies. In doing this, they also provided a scientific language of economics, for which time was particularly ripe in the prevailing environment of Thatcherism and Reagonism. The new vocabulary they found was to replace law and development with 'rule of law.'[92] It is important to appreciate that proliferation of 'rule of law' view of L&D is also be attributed to its valuable nourishment from World Bank and other international organizations.[93] In addition, the legal academy had begun developing receptivity to "law and …" scholarships, which provided fertile grounds for growth of law and development studies.[94]

The third moment carries with it, a perennially changing blueprint which offers scope for experimentation, since there are no cut-out answers to effectuate development through law.[95] It appreciates the global political forces of transnational law in growing capitalist economies, while still emphasizing importance of the developmental state. The heterodox apparatus of law and development has been fairly successful in demonstrating a distinctive place in academy and policy circles. Yet, it has its own

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86 See for example, the project on Law and the New Developmental State (LANDS), *available at:* http://law.wisc.edu/gls/lands.html (last accessed on Sep. 4, 2014).

87 Kevin E. Davis, and Michael J. Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics" 56 *American Journal of Comparative Law* 895 (2008).

88 See generally, Kenneth W Dam, *The law-growth nexus: The rule of law and economic development* (2007). See also, Douglass C North, *Institutions, institutional change and economic performance* (1990).

89 *Ibid.*

90 Michael J. Trebilcock and Ronald J. Daniels, *Rule of law reform and development: Charting the fragile path of progress* (2009).

91 *Ibid.*

92 Trubeck, *supra* note 5.

93 Alvaro Santos, "The World Bank's Uses of the Rule of Law Promise in Economic Development" in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* 253-300 (2006).

94 *Ibid.*

95 *Ibid.*

fissures, largely emanating from shifts in development theory and state practice. With growing importance of the state in neoliberal agenda of development, the role of L&D has been steadily increasing, in manner that has enabled it to emerge as an irreplaceable narrative of law. But this very advantage becomes its vulnerability.

IV Why heterodoxy fails, if and when

Movements emerge and fail. Yet, the experience with CLS, TWAIL and L&D has offered breathless law its own ventilator, for whatever time. It may be pertinent at this juncture to take a closer look at the demise of CLS, punctuated sustenance of TWAIL and comfortable perch of L&D in the erstwhile blind spots of law. In doing so, we may be able to carve out a pattern which may aid our understanding of how heterodoxy may sustain, and thus infuse life into the dying discipline.

CLS crushed under its own weight and internal inconsistency with respect to the depth of its adherence to Marxism. Neacsu offers an excellent analogy of CLS with a character called Kenny, from the television cartoon show, South Park, where Kenny dies in every episode, and often, his death is self-inflicted.[96] CLS has suffered many such self-inflicted injuries. One of them comes from Kennedy himself, who in his two versions of his work on legal education as a means to produce hierarchy invoked Marxist notions in very different weights.[97] His 1983 'little red book,' titled, 'Legal Education and Reproduction of Hierarchy: A Polemic against the System,' which called for a resistance against ideological instruments which reproduce hierarchy.[98] And then, soon, in an altered form, he wrote the same argument in which he departed from referring to Marxist views, unlike in the Polemic.[99]

The intellectual struggle of CLS scholars with its Marxist roots discouraged them from taking a clear and crystallized position that becomes characteristically theirs[100] and diverged from a concrete action. This could have been due to CLS's obsession with critiquing liberalism, instead of conservatism. And in doing so without an anchor, CLS became another liberal theory by itself.[101] CLS became a decentralized array of opinions and atomized intellectual projects that failed to provide a general perspective.

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96 E. Dana Neacsu, "CLS stands for Critical Legal Studies, if anyone remembers" 8 *JL &Pol'y* 415 (1999).

97 *Ibid*.

98 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983).

99 See David Kairys, "Legal Education as Training for Hierarchy" in David Kairys *et al* (eds.)*The Politics of Law: A Progressive Critique* 54 (1998).

100 See for example, Peter Gabel and Duncan Kennedy, "Roll Over Beethoven" 36 *Stan. L. Rev*. 1 (1984).

101 G. Edward White, "The Inevitability of Critical Legal Studies" 36 *Stan. L. Rev*. 649, 672 (1984).

With no coherent objective, it churned a wide range of scholars – ultra-moderates to unreal-radicals – and led to coagulation of separate blocks of ideas, like feminists, critical race theorists, and the like.[102] This naturally led to loud dissenters within the co-called group, and even a partially-unified discourse could not emerge. In such disarray, even though CLS has produced substantial debate on the question of law not being neutral, there is little it has done to answer it. It died.

Why did the heterodoxy, which began with an enormous promise, die so soon? Could the disparate sources and strands of scholarship as regards their Marxist weightage have such an explosive effect that it disintegrates the movement? If law is politics, CLS has a political location too,[103] and in any such location, disagreements in methodology and scope are integral to its fertility. If the premise is as expansive as understanding any legal claim by observing moral, epistemological and empirical assumptions embedded in the claim, heterodoxy is bound to stretch into adendritic drainage pattern, which actually could be a healthy sign of growth. Although in all fairness, the CLS scholars have always found to share certain common commitments, however less.[104]

CLS however, did suffer from its failure in providing answers. It was honest to accept the anxiety of the discipline, indefatigable in spreading the feeling of anxiety across legal academia, but disturbingly foolish in not providing the cure of the anxiety. No doubt that raising the right question is primary to any epistemological inquiry, equally primary (and sometimes more, when anxiety is depressive) is provision of answers. When foundations are shaken, people abandon the building until they are replaced with stronger ones. If they cannot be replaced, and abandoning is not an option, people continue to reside deliberately not recognizing the shake. And whoever reminds them of it, they will shrug at the news. If reminders persist, they will shrug at the person. Critical disciplines (or sub-disciplines) that do not have promise of answers have short lives. They offer fresh frames to understand how the world works, but if they bring bad news without solutions, they become transcendental nonsense no one wants to listen to after a point.

On an alternative note however, death of CLS can be understood as disintegration rather than its burial. The ashes of CLS have led to the rise of powerful phoenixes of feminists, critical race theory critics, postmodernists, cultural radicals and also political economists.[105] In some sense therefore, the legacy of critical thought lives on, in

102 George P. Fletcher, "Comparative Law as a Subversive Discipline" 46 *Am. J. Comp. L.* 683, 690 (1998).

103 *Supra* note 56 at 1517.

104 *Id.* at 1518.

105 *Id.* at 1517-1518.

different forms. And influential place occupied by the disintegrated splinters of CLS has warmed up legal academia around the world. This may be either be symptomatic of pluralistic visions of law schools, or an earnest desire to follow certain mode of inquiry. Regardless, the offshoots of CLS have occupied their own space within legal academia.

TWAIL has survived – although it may be too early to conclude this, given some fissures are creeping in. TWAIL scholarship– while offering valuable insights into understanding the role of colonial encounter in contemporary international law and attempting to reclaim the promises of the system– uses the same frames it criticizes.[106] This leads to a situation where many reform proposals by TWAIL– unless too general – tend to develop a resemblance to the ones coming from European liberal scholars.[107] Over time, TWAIL has abandoned the possibility of harnessing on Marxist scholarship of twentieth century, thus returning to the fold of liberal conceptualization, and encourages TWAIL to pick up assumptions that need explanation in the first place.[108] TWAIL, even though non-western in its destination, is a Western scholarship – published in West, by mostly Western scholars. Foucault and Saïd remind us of how Western literature has a fascination for everything non-European as sources of institutional transplant and renewal.[109] If TWAIL is a political project by itself,[110] then the politics of the personal in scholarship is bound to colour the impressions emanating therefrom.[111] TWAIL being a disparate movement with little formal authority and membership,[112] various strands bring with them multiple questions. And in their attempts to propose answers, TWAIL scholars have often used the liberal language and posed their faith in liberal concepts.[113]

Being a political project is hardly a dampener – on the contrary, it is an essentiality. The location of the project in the West (scholars and institutions) is being addressed effectively. A large number of TWAIL scholars hail from the Global South, and the

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106 *Supra* note 81.

107 *Id.* at 404

108 *Ibid.* See also, P.L. Bergman and T. Luckmann, *The social construction of reality* (1966).

109 Michel Foucault and François Ewald, "Society Must Be Defended" 1 *Lectures at the Collège de France, 1975-1976* (Macmillan, 2003); See also Edward Saïd, *Orientalism: Western Conceptions of the Orient* (1978). (Both cited in *supra* note 81 at 403).

110 *Supra* note 77. See also, Antony Anghie, "TWAIL: Past and Future" 10 *Int'l Community L. Rev.* 479 (2008).

111 See for an excellent personal comment, Fakhri, Michael, "Questioning TWAIL's Agenda" 14 *Or. Rev. Int'l L.* 1 (2012).

112 *Supra* note 68.

113 *Supra* note 81.

next TWAIL conference (February 2015) is scheduled to be held in Cairo, Egypt. Concerted efforts by Western scholars of TWAIL have made significant efforts to produce the site of scholarship at the site of colonization. Not having a formal authority is not a pivotal reason for possible decline either – all disciplines, let alone heterodoxy, have to be polyamorous, polycentric and porous borders. In fact, centrality of an argument is the meta-inquiry which heterodoxy stands up against in the first place.

Yet, akin to what may have set the decline of CLS in motion may organise the fate of TWAIL too. TWAIL is a questioning exercise, more than offering any concrete answer(s). More importantly, it hardly offers any positive agenda for reform in international law. While the idea of challenging the Eurocentric versions of modernity advanced through international law is noteworthy, it has only contextualised the problem, and located the blind spot without furnishing how to go about it. In some ways therefore, it pushes forth a nihilist argument.[114] Like CLS, TWAIL has helped contextualize something obvious. It has made us anxious with the oversight, and at the same time, explained whatever went ignored. Yet, the anxiety remains. What next? We know the right question is not whether invasion of Iraq was legal or not; the real question is how they used legal instruments and arguments to invade Iraq.[115] And this is inescapably central to understanding the legitimate hegemonic order of the world. But then, what do we do about it? We know colonial encounters are fossilized in international law. How do we de-fossilize it? Or from where do we excavate the new order of international law then? An eerie silence of these questions, and absence of a positive agenda for reform leaves sensitized scholars in an even more anxious depression. Once the anxiety will reach a critical mass, we may begin seeing intellectual emigration.

Both CLS and TWAIL have been said to have picked up the liberal language, thus building their own structures in frames they began to destroy in the first place. It may appear that developing the language of liberals could be a natural by-product of being located in legal academia and talking to legal academics. Radicalizing the movement – as many scholars have lamented was not done enough[116] – may have produced a bunch of highly erudite academics talking only to each other. Yet, adopting the tone of liberal language adds to the sufficient conditions to de-radicalize CLS and TWAIL. Languages provide a symbolism, meaning and syntax to understand a feeling

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114 *Supra* note 79 (both sources).

115 Usha Natarajan, "A Third World Approach to Debating the Legality of the Iraq War" 9 *Int'l Community L. Rev.* 405 (2007), cited in *supra* note 111 at 9.

116 See for example, *supra* note 96.

that doesn't have a universal semiotic. The politics of language[117] becomes important. Language osmosis – like institutional osmosis[118] – is inevitable, and that's not the problem. The problem is its unidirectional nature. Only one language gets transferred, and not the other. That's what happened in CLS[119] and is happening in TWAIL.[120] Liberal language found its way through and to the fundamental crevices of heterodoxy, but not the other way round. This changes the heterodoxy. Inductive effect of language creates blind spots in heterodoxy, for which another heterodoxy is needed.

L&D is an interesting case because it (inadvertently) avoided falling into the traps CLS fell into and TWAIL may fall. L&D died, and then rose again, and continues unabated. Several reasons can be attributed to its envious position in legal heterodoxy. Firstly, after its rebirth, L&D brought concepts of economics (and brought economists) into legal domain. These concepts were essentially then-mainstream in nature, driven by (a) Hayek-Friedman ideas of free market and trade, (b) importance to contract and property rights institutions, and (c) political will to attract investments. These are neoliberal constructs, and therefore, law used the language of economics to show how instrumental law can be for development.

Secondly, and connectedly, evolution of legal doctrine has always implicitly assumed development to be key feature that legal design should aim at. The genealogy of common law[121] shows that its genesis during the middle ages is rooted in procedural thinking and substantive law emerged later.[122] This was due to fiscal priorities of law as King William I had mandated. All land in England was traceable directly or indirectly to the Crown, and all property holdings were subject to inescapable taxation.[123] Since tax can come only if there are no private disputes over land, the Curia Regis (Council consisting of King and his advisors, who checked tax revenues) took the character of court, resolving disputes.[124] Common law was not based on principles of justice, but

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117 See for example, Ngugi WaThiong'o, *Decolonising the mind: The politics of language in African literature* (1994). See also, Stephen May, *Language and minority rights: Ethnicity, nationalism and the politics of language* (2011).

118 When American troops went to Vietnam and transferred their institutions (with a naïve idea that this will prevent them from Communism), they thought they would return to their homeland untouched. But that didn't happen. American institutions returned home transformed. See Stuart Schrader, 'Policing Empire,' *Jacobin, available at*: https://www.jacobinmag.com/2014/09/policing-empire/ (last visited on Sep. 19, 2014).

119 *Supra* note 96.

120 *Supra* note 81.

121 Development of Roman Law had striking similarity with how English Common Law developed century later.

122 Konrad Zweigertand Hein Kötz, *Introduction to comparative law* 186 (1998).

123 *Id.* at 183.

124 *Id.* at 183.

on principles of procedures, which aimed at resolving private disputes to ensure fiscal responsibilities of the estates are not undermined. Legal institutions (definitely in common law countries) have been victim to institutional inertia. In form of an unwritten and implicit understanding, law's role to favour economic development has been the cornerstone of its existence. Notions of precedent based, incremental approach of common law that favours development has been around.[125] LLSV literature's common-law-is-more-efficient conclusion reflects these very sentiment,[126] which was proudly picked up by World Bank. If law has an implicit goal of furthering economic development, then L&D has essentially made it explicit. In doing so, L&D has made visible invisible assumptions which rather than contextualizing the intellectual frame in which law asks questions, throws light on foundations of a project whose outcome have always been visible. This struck a chord with everyone.

Thirdly, L&D furnishes answers, and perhaps does only that. The content of L&D sharply crystallizes the comprehensible problem, and makes straightforward answers. For economic development, law plays a role in a certain way. Once that is implemented, economic development will follow. It eschews tracing the meta-narratives that contain questions of widening schisms between haves and the have-nots in the world; rather focuses on examining the location of law in inequality and poverty. With little time spent on the exploration, it comes up with an answer. Fix the laws, and you fix the economy. This appeals. It gives policy ammunition to international organizations, pumps in money and leads to departments in universities begin recruiting people who can fancifully talk to policy makers, news editors and economists and legal academics with same rigor about law reforms. It grows exponentially, let alone die.

Fourthly, the very frame of L&D charts friendly terms with law. It does not attempt to radicalize the law, but only tweak its direction in a particular way. It exposes a purpose of law, which lay hidden. In a sense therefore, both L&D as heterodoxy and law as orthodoxy are not arch rivals, but have many common commitments. This in turn makes the language osmosis a two-way process. Hence, if one observes L&D talking in the same way as mainstream legal semiotic function, one shouldn't be

125 See for example, Paul G. Mahoney, "The common law and economic growth: Hayek might be right" 30 *The Journal of Legal Studies* 503 (2001).

126 LLSV refers to the team of La Porta, Lopez de Silvanes, Shleifer and Vishny, who conduct a series of econometric studies to see quality of legal institutions (result of legal origin) and their impact on economic growth. Two of the most cited ones are: La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, "Legal determinants of external finance" 52 *Journal of Finance* 1131 (1997). La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, "Law and finance" 106 *Journal of Political Economy* 1113 (1998). These papers have been severely criticized though, on several accounts.

surprised if legal semiotic has picked up frames of thought from L&D. Such linguistic excursion complements each other.

Fifthly, L&D has been malleable and has not worn the stubborn dress that refuses to come out even when intellectual fervour is high. This is not to say that the principles of L&D are foundation-less and can be altered for conveniences. It merely suggests that L&D has not been averse to reforming itself at the level of superstructure keeping foundational assumptions intact. This is one of the reasons that it learned from its mistakes in 1970s, and re-emerged as a powerful intellectual theory in 1990s.[127] More importantly, as the idea of new developmental state pushes itself in securing state's place in developmental efforts, L&D has swiftly shifted gears to afford clarity to its own principles in changing contexts and priorities.[128]

So what have we got? A pattern that encourages us to theorize, why heterodoxy emerges and what ensures its sustenance. How potent the weapon of ability to answer could be, for heterodoxy to have a long life is fairly clear. Institutional and climactic conditions play a role unquestionably, and so does the flexibility to attune to these conditions. But essentiality lies in acquiring an infallible spirit to probe answers, when questioning is settled. This is what L&D did, CLS did not, and TWAIL should.

V What is usually 'left' in heterodoxy?

The paper interprets this question at two distinct levels, playing with semiotics. The first concern is conceptual, and the second is literal. It first examines the proposition that is considered by many – whether the notions of 'left,' or plainly, left-wing politics are characteristic to any heterodox project. Then, the paper goes on to dwell on what remains in heterodoxy after critical thinking has been offered. In other words, when do we say heterodoxy has won, arrived or been successful (if at all we can construct such frames).

That heterodoxy is essentially leftward tilted is a dominant perception, and often unapologetically so. There might be some truth in the perception, but universalizing heterodoxy is by definition, an antithesis. The 'leftist' bias has done more harm than good to the larger academic goal. Ideological labels such as 'left' and its many *avatars* have rendered some sort of emptiness in the models of inquiry they are put upon. They have semiotic slipperiness and intellectually explosive tendencies offering little order to problems. At certain extremes, they are "just sloppy analytical categories: mushy, fuzzy, and possessed of a disturbingly long history of being co-opted by all kinds of demagogues and other repugnantly opportunistic elements. And all of this is

127 Trubek, *supra* note 5.

128 *Supra* note 86.

there before we even start talking about the whole history of essentialisation, reification, and fetishization behind these labels."[129]

The first step towards developing an academically receptive environment for heterodoxy is to strip itself from ideological labels. For many, L&D may not be a heterodoxy. But it indeed is. Heterodoxy has one and only one existence– it is relational. It may be oppositional, differential, minor, disagreeable, unclean, hidden, silent, the other. Whatever it may be, it exists in relation to something else. It is self-consciously constructed as the other. If this is also the case with the 'left' (which it is), we may not be far from believing that 'left' and heterodoxy have some acquaintance definitely. Theoretically, heterodoxy has nothing to do with 'left', but on the ground, their shared existence on the 'relational' existence brings them closer.[130] But if heterodoxy is relational, what happens if it is adopted as mainstream – something against which it is relational? If Pirate Party in Germany assumes power with unanimous mandate, will it continue to be heterodox?[131] Another way to think of this question is to illuminate our imagination about future of a heterodox path. This brings me to my second point of inquiry in this section – what is left of a heterodox project, once it has been established. There could be three futures of such a project.

First, the complete internalization of heterodoxy into the orthodoxy, which indeed helps the orthodoxy to get cured of its blind spot. But then, does this mean that heterodox has become part of the orthodox, and in that case, to what extent has heterodoxy been successful? This should surely be the case. The purpose of heterodoxy was to change the orthodox. By its permanent fixation in the dominant, the gene of the discipline changes. The death of heterodoxy when it gets absorbed by the discipline is a death scholars want to see. It vanishes as the other, and becomes additional part of the orthodoxy, ensuring that the space it has occupied within the mainstream remains clear of the ambiguities that led to its emergence. L&D may fall into this category.

Second, when heterodoxy dies. But in vain. Heterodoxy is not absorbed but eclipsed by the orthodoxy, and blindfolds the emerging scholars from what lay in the past. In its dying efforts, heterodoxy is unable to clear the discipline of its blind spots. It becomes a martyr in disciplinary civil war. It remains an institutional memory, with occasional death anniversary celebrations, but largely remains in those very crevices it had earlier sought to fill. Sometimes when a passer-by scholar looks at it, she tried to revive it, but with little success. For many, CLS suffered from this fate.

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129 *Supra* note 35.

130 I thank Akbar Rusalov for discussion on this.

131 Note that the author could have used Shinzo Abe or Marine Le Pen's name here too. She is a heterodox project in her agenda's relational existence.

Third, the heterodoxy clears up the orthodoxy, but does not get absorbed in it. It takes the blind spot out, and organises its treatment outside, building a new sub-genre that is connected with the mainstream through a tiny bridge. Hence, one who is a loyal scholar to mainstream discipline, keeps an observer status for the sub-genre that contains heterodoxy within it. If s/he chooses to, the bridge is accessible. The bridge has two-way traffic indeed. Offshoots of CLS may belong to this category. In disciplines other than law – for example economics – there are a plethora of such examples. In these cases, if one wants to treat the blind spot, the entire darkness is taken out of the disciplinary space and operated outside. Once done, it stays there, since it never had (or will not have) any room for itself inside. It is interesting that this lets the heterodoxy survive indefinitely, but is still an inferior future compare to the first one.

To understand what differentiates heterodoxy from orthodoxy, matters of ontological concerns are central. When we adopt certain modes of analysis and inquiry, we are inevitably carrying them with certain ontological preconceptions. Doubtlessly then, some forms of methods of analysis are appropriate for some material and not others.[132] In our case, the ontological presupposition of law does not have a universal resemblance to the nature of social reality. Hence, even though nature of heterodoxy contains a variety of different projects, their common essence is that of opposition to mainstream, and this opposition is ontological in nature.[133] Various heterodox traditions differ in their orientations in ontology, by trying to closely align its existence with that of how social reality exists. Social reality is an organic view of nature, which recognizes interconnectivity and disregards the atomistic way of treating things.[134] CLS did exactly that – bringing the context in the picture and similarly, TWAIL reminds us of why history is important. L&D is a complex case. It began with a non-oppositional orientation to existing ontology. It didn't last long (its first *avatar*). Today, it often draws extensively from the social, avoiding its obsession with the economic. The new developmental state aligns itself with social reality, ontologically superior to scientific atomistic conceptions of economics. Whenever it doesn't it behaves like mainstream.

VI A heterodox mind

Heterodoxy is the most important and powerful agent of disciplinary change. This change is more fundamental, because unlike at the periphery, this occurs at the heart – and either changes the discipline, spins part of the heart outside, or dies. But whatever happens to heterodoxy, its arrival is a mark of high thinking. Its arrival reflects crucial moments on which disciplinary revival and renewal is rested. Such

132 *Supra* note 34.

133 *Id.* at 493.

134 *Id.* at 495.

renewal attempts to resolve the ambiguities, illuminate the blind spots and address fundamental inconsistencies within a discipline. By identifying the impending death of a discipline, heterodoxy pushes the life of the discipline forward.

How do we cultivate heterodoxy? We need to be prepared and ready to see the gaps, and to accept that we are indeed ignorant of how the world functions. We need to be worried, anxious and dissatisfied with the state of the world. It is not the disciplinary gap that should worry us – we haven't even reached at that stage. Simply the world of difficulties – which is all around us – should make us anxious, and make us ponder why our tools are not working. Have they gone blunt or are they working in opposite direction? We should let our critical sensibilities sprout.

For a heterodox mind, Kennedy says, three things are essential.[135] First habit is to expand the aperture. In doing so, we must see what law says, and then look at the world. We observe the hollowness of formal legal institutions and divergence between reality and expectations. We can do this only if we venture to look out, expanding the vision we have. Look out in other boundaries, like international law is not international alone. In addition, note that this vision is not spatial alone, but temporal as well. And therefore, invoking history becomes paramount. Once the aperture expands, we view gaps and contradictions stuck to the discipline. And that is the second habit – to routinely assess and thematise existing gaps, many times, to pull it open of its repression.[136] Thirdly, one should refuse and re-assess the familiar distinctions. Kennedy mentions how heterodoxy makes these distinctions indistinguishable. It alloys public and private; politics and economics; and knowledge and power.[137] And law is the laboratory that produces our imagination of these dyads.

Let us take the example of labour law.[138] We look at the official law and find determinate solutions to problems of labour relations. We go out and see the world. We see millions of innocuous transactions taking place outside formal organisations, in unorganised or informal markets.[139] Characterised by impoverishment, vulnerability, informal sector has been growing steadily as more economies have begun to liberalize,

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135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 This is part of the research project which the author carved out with Prashant Iyengar and the author thanks him for his ideas. The author also thank the participants of the Colloquium at Harvard Law School, in June 2015 including but not limited to Jorge Esquirol, Kerry Rittich, Vidya Kumar, Vik Kanwar, Y-VonneHutichinson, Cyra Choudhary and Adelle Blackett for their discussion on these issues.

139 According to recent ILO estimates, the informal economy provides employment to 71% of non-agricultural workers in sub-Saharan Africa, 71% in Asia, 51% in Latin America and 47% in Middle East and North Africa.

resulting in iniquitous conditions that are hostile to labour welfare. The complete absence of social security in this economy intensifies threats to health, housing and livelihood. With women forming a bulk of informal sector, issues of gender become starkly posed as well. With no space in labour law, let alone their answers, we now become anxious and dissatisfied with the state of the world. We become impulsive, but we calm ourselves down, and begin thinking critically. Let us expand the aperture. In studying informality, academics and policy makers frequently suffer from a 'regulatory' bias, viewing all actors in this economy as subjects who lie in waiting only to be eventually reappropriated by the law. From this standpoint, intervention strategies tend to be pitched only at the level of legal reform, domestic implementation of international labour standards, reducing costs of entering into the formal system etc. Policy responses remain embedded in locating gaps in regulatory frameworks. Such interventions harbour basic assumptions about labour and labour law which in our bigger aperture seem painfully incomplete and disturbingly limited. We need to thematise these gaps. An examination of basic assumptions that underlie labour regulation and their weaknesses will yield a more informed judgment about possibility of creating an alternative legal order that is more hospitable to those inhabiting the informal economy.

What are the familiar distinctions here? Labour and leisure perhaps. Nothing could be more unified and yet presented in distinct settings. Heterodoxy can study labour as a way of life rather than a commodity. It is important to understand that labour doesn't stand *apart* from, but rather is contextual and invokes the cultural and the political. While labour seeks to celebrate heterogeneity, labour law proceeds to build upon conceptions of labour as they evolved in the mercantile environment in the West.

Many questions suddenly become starkly posed. What factors were responsible for the creation of labour law, as a concept, in history, and how did informality get excluded? Whether the frustrating attempts of labour law's responses to increasing labour vulnerability in informal economies symptomatic of problems in labour law architecture or are simply a problem of their implementation? How do we integrate informal labour with the cultural and the political? Is labour law equipped in the first place to offer customized solutions to the problem of labour in an inherently diverse Global South?

In attempting to answer these questions, we will develop certain form of heterodoxy. We may be able to coagulate the naturally occurring (informal) labour dissolved in the semantics of labour law's idea of it, and begin a fresh idea to approach it. If labour is essentially an economic concept, there is a strong likelihood that answers to labour vulnerability in informal sector may lie in devising financial infrastructure

with support of appropriate legal framework, rather than labour law. In this vein, we can learn for instance, from National Rural Employment Guarantee Act offered an intersecting solution of labour and finance. Heterodoxy will create microscopic lenses to observe and theorize about informal markets and their networks. Labour law is ubiquitous, but how can it bypass something even more ubiquitous in developing countries – the informal markets.

At a general level, heterodoxy here can begin as an exercise of questioning rather than answering, and in the process, it may alter the frames of references in which questions are carved out. The idea is to take a few steps backwards, instead of moving forward, and excavate the silences of answers unsought. The process is expected to unfold gaps in the questions, and consequently explore alternative paradigms to find answers.

VII Conclusion

Law's ubiquity and centrality of struggle coexist.[140] This doesn't seem to make sense. Struggle is real. Law is constructed. So the fault must lie with law. We think about it hard. And if anxiety persists, we need to figure out why. We dig the frames of questions, recalibrate them, and attempt to find answers. The cycle of getting anxious, questioning the questions and providing with alternative answers is the everyday workout plan for any discipline to continue to be relevant. Critical impulse is a powerful proxy of arrival of heterodoxy.[141] When discipline's promised illumination is unable to offer visibility in some corners, there is an impulse to take the light close. We find that the darkness in the corner concealed something we can't discern in disciplinary light. Our impulse makes us more anxious. We begin examining the characteristic of the light. And we realise it had promised more than it could show. We challenge it, and thrust our heterodoxy in it. Impulse is critical, and critical is impulse. And this impulse has to come from academia. As Pierre Bourdieu mentions:[142]

> [I]t is not, as is usually thought, political stances which determine people's stances on things academic, but their positions in the academic field which inform the stances that they adopt on political issues in general as well as on academic problems.

The paper has few modest desires. It wants to tickle legal scholars, wake them up from the conforming slumber they are comfortably napping in, and show how late it has been. It wants to encourage them to see the diverging reality from what they study

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140 *Supra* note 8.

141 *Ibid.*

142 Pierre Bourdieu, *Homo Academicus* xvii-xviii (transl. by Peter Colier; Polity Press, Mahoney, 1988).

and teach, and nudge them to think critically. To do that, the paper defends and desires anxiety; it makes anxiety central to legal scholars' emotions. Pursuit of critical thinking is a perpetual goal we need to own up to, which will not be triggered until people get anxious.

Two items will be crucial to keep the anxiety running. First, the site of anxiety needs to return to where it should belong – the third world (or whatever that means). Pursuit of critical thinking has condensed mostly in Western institutions, for a variety of reasons. One can be sympathetic to their intentions and also fortunate to have found a voice there, for that's the voice which has historically mattered the most. Yet, its sustainability is profoundly rested in sharing the power structure of this knowledge (in a non-Foucaultian sense). For this, one cannot blame the scholars of leading universities of the world, since their initiative contains suggestive tendencies to understand where the third world comes from. The complacency is ours. This is not to disregard the exceedingly high quality of research taking place in this part of the world, most of which does not seize the academic limelight only because it belongs to poor nations. This is to push ourselves to be anxious. To be worried. And to report the worry. This is to encourage all anxious academics to come together and share their anxiety. This is to blame those academics who think anxiety is not a good thing, and therefore who never confront the reality. The future of heterodoxy rests precisely in the lands which have gigantic anxiety waiting to be unearthed. This excavation needs realisation, which needs to come from within.

The second is nurturing the anxiety and impulse of young legal scholars. Young scholars are advantageously positioned to appreciate the reality, but not the textbooks. They have seen the world through their own eyes, made sense of it through whatever they have read and heard, and are fresh into understanding 'larger and deeper' explanations. Their dissatisfaction with existing explanations needs to be preserved, and nurtured. They haven't yet got so deep into the box that they would have forgotten how the box would look like. Their image of the world and their entry point into the academia have to be the crucial moments when their urge to dissent with present order will be at its height. And that's where pillars of heterodoxy can be built.