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CHHATRAPATI SINGH AND THE IDEA OF A LEGAL THEORY*

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Abstract

This paper seeks to restore the critical importance of Chhatrapti Singh's (CS) jurisprudential significance; it focuses primarily on his work *Law, Anarchy, and Utopia*. The paper critically evaluates CS thought, developing a distinction between CS-I (the legal philosopher) and CS-II (the activist citizen).Following the philosopher Leibniz, CS insists that each one of us has a normative obligation to create a Utopia (best possible normative world) developing further the thought that legal philosophy is the 'first philosophy'. The Utopia that we have an obligation to develop is that of a 'universalized Dharma'; the article examines ways in which law takes us back to *dharma* and *dharma* back to modern law. In a Kantian vein, CS insists on the regulative idea of moral progress; '...continuity in moral progress must not only be in knowledge but also in being a person'. Each individual finite self, says CS, here quoting and endorsing Kant, is a vessel and vehicle of 'infinite progress' and thus refers us to also to 'the presupposition of an infinitely enduring existence and personality of the same rational being... called the immortality of soul'. CS insists that Kant then needs to accept 'the possibility of rational will becoming a holy will as ontologically true and not just as epistemological truth' and further that the 'idea of law demands this'. CS-I failure to give due right to the ethics of Marx is as telling as his innovation of Rudolf Stammler's notion to 'right law' is summoning. Obviously, more work is needed on CS; and this paper in an invitation to do so.

I Introducing CS

CHHATRAPATI SINGH (CS hereafter) was India's finest legal philosopher and continues to be the only post-Independence Indian legal philosopher. And yet, he is the least read not just in the Indian law schools but also departments of politics or philosophy.

The puzzle deepens when it is found that his work has scarcely been noticed by jurisprudents in the 'West.' Two examples must suffice. In workshop on utopian legality (at King's College, London, November 25, 2005) there was an air of incredulity when the author mentioned CS as amongst the finest students of Leibniz! And as late as

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2009 Amartya Sen in *The Idea of Justice* has no reference whatsoever to the CS reflections in his analysis of the conceptions of justice in Indian philosophy. But for LASSnet event, his germinal text *Law from Anarchy to Utopia* (hereafter *LAU*)[1] would have gone unnoticed.

Trying to unravel this gross disregard of the contribution of CS in terms of sociology of knowledge or social epistemology must remain a task for another day. What is important to recall is the fact that undeterred, he continued his primary interests, above all in the pages of *The Journal of Indian Law Institute*. But CS also realized that he needed to translate his philosophical concerns in the contexts of social action for justice. Thus is born CS-II, a figure more familiar than CS-I, writing imaginatively about the common property resources and rights, water law and jurisprudence, environmental law generally, and legal education and research. Even then the connoisseurs of CS- II rarely revisit CS-I!

In this paper, the author addresses primarily CS-I, though he has fond memories of working constantly with CS-II. They agreed most of the time.[2] Of course, they also went through a cycle of tenacious disagreement, for example, over the nature of adjudicative leadership (triggered by social action litigation) and his reading of the scandalous judicial settlement orders in the *Bhopal* case.[3] CS was prone to regard the amount of US$470 million an act of indirect apology to the Bhopal-violated! The author thought this as cruelly naïve indeed —given the fact that the Union Carbide Corporation induced this settlement against India's claim of US $3 billion, and further

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1 Chhatrapati Singh, *Law from Anarchy to Utopia* (OUP, 1985).

2 See, for example, Upendra Baxi "Introduction" to Chhatrapati Singh, *Water Rights and Principles of Water Resource Management* (New Delhi, The Indian Law Institute/Mumbai, NM Tripathi Ltd. 1991). Interested readers may also find an evidence of commonality of views in The UGC Curricular Development Centre Report on Legal Education and Research (New Delhi, 1993). Cutting across the staid sterile debate about liberal and professional legal education (which even more acutely inflects the globalization of Indian legal education and research (LER), CS proposed that we may never lose sight of the idea of a just LER that also seeks to create 'soldiers for justice'. It may only be mentioned that the labours of CS-II in this sphere need wider attention.

3 See, Upendra Baxi, "Writing about Impunity and Environment: the 'Silver Jubilee' of the Bhopal Catastrophe" *J. Human Rights and Environment*1:23 44 (2010); See also, Upendra Baxi and Thomas Paul (eds), *Mass Disasters and Multinational Liability: the Bhopal Case* (NM Tripathi, Bombay; Indian Law Institute, New Delhi 1985); Upendra Baxi (ed), *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case* (NM Tripathi, Bombay; Indian Law Institute, Delhi,1986); Upendra Baxi and Amita Dhanda, *The Valiant Victims and Lethal Litigation* (N. M. Tripathi, Bombay, Indian Law Institute, New Delhi 1990). See further James Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press, Toronto 1993); David Dembo, Ward Morehouse and L Wykle, *Abuse of Power: Social Performance of Multinational Corporations: the Case of Union Carbide* (New Horizons Press, New York 1990); Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (Amnesty International Publications, London 2004).

did everything possible to hurt and harm the Bhopal-violated. CS insisted that his way of reading was hermeneutically open; the author counter-insisted (putting this point here rather summarily) that texts may only be read within the contexts and further that acts of reading are annexed always with fiduciary responsibility towards the worst off and rightless co-citizens and co-persons. He was not entirely persuaded but, he eventually did not publish his views by way of a 'letter to editor'.

The institutions could not realize and admire the worth of CS. Unfazed by the venality of institutions, and with support of friends including Leila Seth J, CS was able to found and run an independent centre in environmental studies in Delhi, which instantly proved a runaway success both in terms of research agendum and training programmes. In this otherwise reticent person lay oceanic forms of resilience. Had CS lived his full term of life, his would have been a catalytic presence in the spheres of human rights and social movement activism in a neoliberal/hyperglobalizing India. In any event, his work *LAU* anticipates, in so many fecund ways, the World Social Forum motto: 'Other Worlds are Possible'.

II CS notions of 'theory' about law

In *LAU*, CS presents the idea of a 'theory' as a form of gesture of epistemic self-determination, or emancipation. He suggests that that 'theory' of/about law is already a site of belligerent occupation. CS accordingly conceives the idea of a 'theory' as ways of 'seeing through western social ideologies and outgrowing their dominance, both emotionally and in thought...'

'Seeing through' and 'outgrowing' epistemic 'dominance' are then explicitly presented as tasks of legal philosophy. Indeed, CS further insists that the search for knowledge has 'always been for self-liberation or the liberation of society'. While some may agree with CS-I, perhaps, many knowledge/theory makers may say that the qualifier 'always' puts the matter too strongly! Further, even many theorists of law may contest the notion that the idea of law constitutes always a quest for the 'amelioration of society through law'. However, CS-I (as well as CS-II) remains intelligible only by privileging this articulation. Some reasons that CS-I provides in support of his position are briefly highlighted:

First, philosophy of law remains emancipative because it 'discusses the conditions of peace and justice which are necessary for economic, political, religious, scientific, and cultural growth'.[4] Linked with this assertion, also is the claim that it 'must take priority over all social philosophies'.

Second, of course, one must distinguish between the ideas of law from social practices occurring under its name. CS put it this way: '...a theory of the idea of law is different

4 *Supra* note 1 at vii.

from a description of social transformation in which law plays a part'.[5] The idea of law is offered here as a 'metaphysical' rather than a 'political' idea.[6] Put another way, the idea is one that secures 'optimal conditions for freedom and maximum compossibilty of feats and artefacts...'.[7] Incidentally, CS does not speak of plurality but of variety' of 'feats, artefacts, and systems'.[8] Is this more apt than the staid discourses about legal 'pluralism; and now 'multiculturalisms?

Third, and accordingly, the 'law' conceived this way may not be based on the 'will' of a few persons but ought rather to be imagined as seeking to 'maximize the conditions under which each individual or group of individuals can *realize* themselves and attain their *moral ends*'.[9]

Fourth, CS believes in the conception of law as *dharma* consequent upon the discovery of a new and 'truer' *dharmasastra*[10] based on a reinterpretation of the notion of a 'theory of self'(*atman*) and a reconfiguration of Hindu and Buddhist notions of *karma,* here understood as a 'theory of what constitutes a course of legal action...'.[11]

Fifth, closely following yet extending Leibniz, CS argues that the quest for the 'best of all possible worlds' remains presented in terms of the best possible 'normative' world. In a striking passage, CS puts his vision thus:[12]

> [T]he most fundamental ground for the obligation to act in accordance with the law is neither the will of the sovereign nor the dictates of socially accepted officials. It lies in the necessity that binds all creators to create normatively the best possible world by means of the only best normative system, i.e. the legal system. All creators are bound to create the normatively best possible world because it is the only system that in which all creators can create, and the conditions for such a society are made possible by the one and only one normative system—the system by law. It is only by creating that people realize their individuality and social freedom, whether it be a creation of things, artefacts, or norms. The acceptance of the sovereign's will or that

5 *Id.* at xi.

6 *Id.* at 150-157.

7 *Id.* at 139.

8 *Id.* at 133.

9 *Id.* at 129 (emphasis added).

10 *Id.* at ix-x; xiv-xv.

11 *Id.* at iv; see also *id.* at 226-229. ln a sense, this rediscovered *Dharma* seats well with the Kantian notion of moral law, obligation, and the Kingdom of Ends, even when providing for CS the ways of critiquing and reconstructing Kant. CS-I believes that both *Dharma* and Kant enable us to arrive at universal elements of the idea of law applicable everywhere and 'on which every jurisprudence must be eventually based'.

12 *Id.* at 140.

of its officials' has its justification in these metaphysical truths; they are not by themselves the basic grounds.

Thus, *sixth*, the idea of law is 'metaphysically absolutely necessary because it is the only system which can maximize co-operation and coexistence, and in which the principle of plenitude can operate'.[13] Thus also for CS: "Since the first basic legal principle obliges us to create the best normatively possible world, the creation of Utopia is a legal obligation that binds us all".[14] It is superfluous to add that CS-II soulfully pursued this obligation for him and urged all his companions to do so by discovering "better and clearer descriptions of Utopian conditions in our legal documents".[15]

Seventh, CS-I insists rightly that "...we have a legal system so that we may have a civil society" and "it is wrong to believe that that we have a civil society so that we may have a legal system".[16]

Some of these claims may be briefly addressed for further clarity.

Legal philosophy as the 'first' philosophy

Consider propositions third to fifth and seventh above as explicating the elements of this claim. The author is not sure how it may be received by professional philosophers, who have their own turf wars, and even an exchange of 'friendly fire', about which genre of philosophy as an enterprise (for example, ontology ever since the insistence of Heidegger or language with and since Wittgenstein) in their discipline should really claim to be the first philosophy. It would not be a matter of surprise if they were to dismiss quickly this claim of CS.

Further, the very grounds which CS advances for his claim ('conditions of peace and justice') are not the sole province of legal philosophy; as is obvious, normative ethics and political philosophy may well take the view that legal philosophy is only a subset of their empires of thought. Moreover, it may be argued that CS unfoldment of a metaphysical idea of law itself presupposes 'metaphysics' as a kind of meta philosophy; if so, the claim for legal philosophy as the first, best, or only philosophy remains discredited in the act of its making.

Making a point about the importance, even centrality of legal philosophy is one thing; to say that it constitutes a metaphilosophy by itself is a different thing. CS makes a fairly persuasive case for the former proposition, though not for the latter.

13 *Ibid.*

14 *Id.* at 149 (emphasis added.)

15 *Ibid.*

16 *Id.* at 183.

But is it the case that in saying this latter, one also risks a removal of the cornerstone of CS-I enterprise? While a lot of precious elements of theory in *LAU* still survived the questioning of this claim, CS insisted (in several conversations with the author before the publication of *LAU*) that the claim of legal philosophy to be the first philosophy was central to his enterprise. Leaving the task of adjudication of this difference between us to the next generation of his readers, the author offers the following remark.

The distinctive province of legal philosophy, per CS-I, was constituted by concerns about peace and justice. The idea of law itself does not make much sense outside these concerns. Those who would want to pursue it have to make best narrative sense of these two inherently conflicted notions. 'Peace' without justice means only the power of the strong over the vulnerable, the peace of a graveyard. Pacification is, *faute de mieux*, a political practice often representing conquest but always signifying a notion of peace as constructed by the dominant. And yet, ever since Aristotle in the 'western' philosophical discourse, 'justice' may not be achieved outside minima of social peace.[17] The idea of law is central for CS-I because properly thought of it offers not so much the notion of peace as order but as moral order that combines 'peace' with 'justice'.

The task of legal philosophy then consists not so much in terms of establishing a 'good' social order (which may also pursue efficiency) — whether in governance (now puzzlingly enunciated in the languages of 'good governance') or in market (the languages of the pursuit of globally competitive economic growth rates as indicators of human and social development) as a non-moral good. CS-I does not of course directly concern himself with the *avatars* of neoliberalisms— conceptions of order, governance, and development which continue to create and perpetuate vast masses of impoverished and condemn rightless human beings to suffer as objects of 'development.' He remains more concerned with the European lineages of ideas of peace and order that justify political obligation to obey the 'sovereign' power and in confronting this with his distinctive notions about the law as a universal *dharma*.

In many a context, one needs to distinguish between CS-I (a philosophical thinker) and CS-II (a 'public intellectual'). Understood retrospectively, then, both CS constitute a bridge between meta-philosophy and transformative social praxes. Whatever one may want or wish to say about the tall claims of legal philosophy as the 'first philosophy' in CS-I needs, it is suggested, to be read in the context of CS-II.

CS-I is concerned with the promotion of an ethical idea of law which resolves this duality or tension between 'peace' (howsoever established and maintained) over

17 See, more recently, for a human right to peace, Jean M Woods, "Theorizing Peace as a Human Right" *Human Rights & International Legal Discourse* 2: 7,178-236(2013). Woods would have endorsed the overall positions of CS.

demands of 'justice' (howsoever justifiably framed). In so doing, CS clearly elevates a particular philosophical tradition over others. What remains important is not so much his act of choice but his reasons for this elevation.

The 'metaphysical' rather than a 'political' idea of law

The elevation of the 'metaphysical' idea of law (hereafter MIL) constitutes the quintessence of CS-I enterprise, although CS-II thinks and acts differently, a story that may not be pursued here fully save saying that CS-II would not have emerged had he not specifically engaged the 'political' idea of law!

The Aristotelian conception of 'metaphysics' as the 'knowing' of the eternal as against that which is contingent and transitional informs the metaphysical idea of law that CS-I proposes. Roughly put, by MIL CS-I signifies a grasp of the being of the idea of law—its non-contingent essence, its ethics always standing above politics, the idea of law as the 'regulative' principle of freedom as defined by 'reason' always in the service of cooperative forms of collective moral existence. The *LAU* instances all these and related instantiation of the MIL and configures it in the imagery of Kantian *dharma*, an aspect that is reflected upon in the next section.

For the moment, it remains necessary to call attention to the fact CS-I develops the notion of MIL in several complex, and often tense, ways. He wishes to distance himself coequally from theistic *iusnaturalist* traditions (discourses that derive the idea of law from a divine source) and positivist ones (which collapse the idea of law as function of the articulation of politics of sovereign power). This is why CS-I is so keenly insistent on disengaging the 'ought' from the 'is'; to reiterate *'...a theory of the idea of law is different from a description of social transformation in which law plays a part'*.[18]

How may this statement be read? At one level, it is a call to analytically separate description from prescription; one's ideas about law may contribute to, and even at times shape, the practice of social change; however, the ideas about law do not constitute the idea of law. If so, 'history' may never affect 'theory' of the idea of law, or MIL.

Is it the case that CS-I is making this strong claim? If so, how may one locate his MIL in terms of the discipline named as the 'history of ideas' or sociology of knowledge now called 'social epistemology'? Do not metaphysical discourses about the idea of law have their own discursive histories? If they do, how may one distinguish between the discursive and the non-discursive—the material elements of domination and the means of force and violence? How may the 'material' histories in turn affect the discursive ones? If, and to make a less strong statement, 'theory' ought always to be at

18 See, *supra* note 1 at xi (emphasis added).

hand for judging 'history,' how may this always stand above 'social transformation of which law is a part'? Repeated readings of *LAU* are necessary to grasp this nuanced CS-I claim.

It may be illustrated by raising a simple-looking question: How may one read Marx alongside with CS-I? If CS-I understands his Leibniz well, he clearly misunderstands Marx.[19] The trouble CS has with Marx is that he takes seriously the standard vulgar Marxian understanding of law as 'superstructure'. More to the present point remains the fact that law is present always at the base (mode of production), if only because relations of production are already and always juridical relations. Without recognition and protection of the near-absolute rights to property and freedom of contract, capitalist economy simply remains inconceivable. If so, the idea of law may not be reducible to 'superstructure'; juridical relations of production are not unrelated to the forces of production.

Marx's critique of law was that of the bourgeois law formation justifying the exploitation by those owning means of production over those who own nothing than their labour power, not of all law. CS-I thinks otherwise as yielding the conclusion that Marx rejected the idea of law altogether.

CS-I had, as it were, get Marx out of the way as quickly as possible because Marx suggested a materialist reading of history of different modes of production (economic formations) — such as pre-capitalist and socialist, which result in different notions of 'law' and its 'justice'. CS-I, in contrast, was in quest of a transcendent and universal notion of law as *dharma*. *LAU* suggests that Marx's and Marx-like modes of thinking about the idea of law are unsustainable because these do 'not get its legitimacy from some a priori principles', nor are these 'oriented to the idea of justice.'[20] The second indictment itself remains 'unjust' because Marx did develop a notion of justice.[21] The first count requires one to grasp the notion of law as *dharma*, which is discussed below.

Law as universalized *dharma*

Taking his third/fourth claims here together, it may be said without a trace of overstatement that what CS offers is a distinctly Kantian notion of law as *dharma*. Kant's notion of a 'regulative idea' is CS-I notion of *dharma*. Thus one arrives at

19 *Id.* at 122-127.

20 *Id.* at 115. The author decided for reasons of friendship, in his 1984 Krishna Menon Memorial Lectures (published later as *Marx, Law, and Justice* (1993) not 'take on', as it were, CS positions, hoping always that his forthcoming work on the 'Dialectics of Law' will engage Marx differently; unfortunately this never came to pass.

21 See, Upendra Baxi, *Marx, Law and Justice* (N.M. Tripathi, 1993).

regimes of representation is which MIL stands as teleological, not theological. And neither remains tethered to a transcendental signifier—'God' or 'Nature'. CS adopts a narrative strategy in which Gods as creators of *nomos* and *telos* stand replaced by finite human creative agents who have to construct this all over again in the absence of a divine transcendental signifier.

Put another way, CS does not read *dharma* as any 'theology' of natural law. CS makes a distinction, in the concluding remark of *LAU*, between '*natural law theory*' and a 'theory that is *natural to law*'.[22] The latter genre consists in showing 'the autonomy and purity of legal theory by distinguishing it from political, religious, customary and other contingencies...' It is this that enables CS-I finally to conclude that law as *dharma* 'is the only basis on which a co-operative and peaceful international kinship can be established'.

One way to understand this claim stands provided by the distinction that CS-I offers:[23]

> [T]here are two aspects to any theory of morality concerning both individuals and society: one concerning moral ends and the other concerning the moral conditions to achieve these ends. In traditional Indian philosophies where the distinction is clearly maintained..., the study of moral ends comes under the study of *purusartha*, and the study of conditions for them comes under *dharmasastra*. A theory of *purusartha* is different from the theory of *dharma*.

By *purusartha* CS means a 'teleology of moral ends' to which a theory of *dharma* has nothing to contribute, its province and function being to 'tell us how the moral conditions in which the decided (or hoped for) moral goods can be achieved'.[24] Marrying this perspective to Kant's notion of the 'Kingdom of Ends', CS suggests that this is not a state of affairs "in which the moral ends have been attained' but only a 'kingdom in which everyone can attain his moral end when he so desires".[25]

This is a principal reason for CS-I insistence on the imperative distinction on the one hand from imagining law as a 'political system' and on the other the idea of *dharma* purified of its dross of 'merely ritualistic, conventional and customary practices'.[26] Thus, one stands redirected to a roseate Kantian (neo-Kantian) notion

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22 *Supra* note 1 at 251-52 (emphasis added).

23 *Id.* at 215.

24 *Id.* at 216.

25 *Ibid.*

26 *Id.* at 197.

that 'human beings' as moral agents and as "well- intentioned beings... do always act rationally without any compulsion or fear".[27]

A cache of concerns arise here and only barely (for reasons of space) silhouette some of these here.[28] A special sort of philosophical anthropology is at work in the foregoing observations; if all humans are moral and well-intentioned agents, how does one explain the issue of evil, or even 'Radical Evil' as Kant named this,[29] (though of course CS-I does engage this problem in the context of Leibniz[30]).

Nowhere does CS address the *dharmic* justifications for the institution and practice of untouchability as constituting such radical evil; and Babashaeb Ambedkar—the Aristotle of the *dalits*, as the author fondly calls him, does even feature in *LAU*, as if purging the dross from *dharma* may not engage the politics of resistance. From the dalit perspective the *sastric* idea of law remained far from a 'moral enterprise.'[31]

CS-I knows the difficulties inherent to this conflation between Kant and *dharma*. These remain, rather difficult to expound. Even so, distinction between two ideal types of approaches to understanding MIL remains important. CS-I distinguishes between two types of autonomous legal theories: one which he names as "mystical autonomous legal theories" in which the idea of obligation stands grounded *via* traditions in which "the idea of dharma is grounded in a cosmology which is ultimately intelligible only through some mystical experiences" and, two, which grounds it in a "conceptual scheme based on rational principles applicable to the created social order".[32]

This distinction indeed marks the passage from cosmos to *nomos*. The qualifier 'mystical' as contrasted with the 'reason' of the 'created social order' in turn mystifies! The mystical elements, or even the mythic ones, that present the sovereignty of rational reason over other kindred forms of reasons such a popular or sentimental reason remain no distant strangers either to the idea of law as *dharma* or the idea of modern law.

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27 *Ibid.*

28 See especially the contributions by Patrick Olivelle and Donald R. D. Davis, Jr., in Timothy Lubin, Donald R. Davis Jr. and Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction* (Cambridge University Press, 2010).

29 See, Maria Pia Lara (eds.), *Rethinking Evil: Contemporary Perspectives* (Berkeley, University of California Press, 2001); Adi Ophir, (with Rela Mazali)), *The Order of Evil: Towards an Ontology of Morals* (London, Zone Books, 2005).

30 *Supra* note 1 *at* 130-131.

31 See, Upendra Baxi, "Restoring 'Title Deeds to Humanity': Lawless Law, Living Death, and the Insurgent Reason of Babasaheb Ambedkar" (Ambedkar Memorial Lecture 2013 Ambedkar University, Delhi).

32 *Supra* note 1 at 235.

Regardless of this, CS-I himself offers a complex account of the MIL as operating on two different registers. The first register is provided by his conceptual relation (some would even say indebtedness) to the 19th century CE German jurist Rudolf Stammler, who famously propounded the notion of natural law 'with a changing content.' CS-I contests, interestingly, Stammler's notion of a 'right law' for lacking a "theory for being able to distinguish between the arbitrary coercion of the state or political system and legally justified coercion of the sovereign".[33] Further, CS-I insists that his 'teleology of law' far from providing a 'social ideal' offers an 'essentially Indian orientation' by offering 'methodological principles which are as internal to legal actions as are the basic structural principles'.[34] And in his view Stammler 'does not provide us any epistemological criteria' enabling distinctions between the 'right law' on the one hand and 'customs and conventions' on the other.[35]

MIL as 'right law' has different narrative strategies and trajectories; if so, CS-I does not help our understanding of his own position by his complex insistence that that his remains an endeavour of 'characterizing and discovering the idea of law to [Kantian] practical reason alone'.[36] Understandably, then, he promises a more full engagement with Stammler's thoughtways as his future task, unfortunately cut short by his premature mortality.

The second register may interest law persons (judges and jurists) more intensely. Expressing the role-obligations of justices, CS-I prefers an 'Indian' idiom: 'the judge is the only person (in society)whose *samnaya dharmo* (common *dharma*) is the same as his *varna—ashrama dharma* (the *dharma* of the profession or station)'.[37] Further, having this unique two-fold duty entails a two—fold co-related right: the right to the protection of his ideas as an ordinary citizen and the right to the protection of the expression of his ideas through his office. That is, his office must be protected from any external force that may limit the actualization of his duties; his office must have complete freedom of speech.[38]

The author is yet to come across in contemporary discourse such an articulation of the ontological ethical virtue or value of autonomous adjudicature. CS-I moreover enriches our understandings of the idea of judging, and justices, by drawing attention to the fact that they do not merely adjudge 'persons' but also adjudges 'rules':[39]

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33 *Id.* at 260.

34 *Ibid.*

35 *Id.* at 260-261.

36 *Id.* at 261.

37 *Id.* at 250.

38 *Ibid.*

39 *Id.* at 251.

> The judge separates law from the rules which come from various sources. Discards illegitimate rules and gives back laws to the people. He is able to do so by the discriminating power he has gained by through the knowledge of the idea of law and the meaning to legal enterprise. A judge who is not able to so discriminate evidently does not understand the legal enterprise; he is then acting in accordance with the dictates of politicians or other such peoples. How well a judge is able to discriminate between a mere rule and a law depends on how well he understands the idea of law.

In this remarkable passage, CS-I incarnates the idea of judge as an embodiment of public reason; the gifted John Rawls was to name (in 1993) the US Supreme Court as an 'exemplar' of public reason.[40] "How do we know", asks CS-I, "whether he [the judge] is doing his duty or not?" is a question answered by CS-I in an assertion that the duties of the citizen and the judge are the same—namely, to provide and promote the realization of the idea of law as a moral enterprise. The question then arises: What happens when citizens and citizen-justices honestly differ in their idea of law? The answer that CS-I provides requires a difficult recourse to the Kantian notion of the 'Kingdom of Ends' and to the notion of best possible world developed by Leibniz.

Reading Leibniz with CS-I

The universalized *dharma*, or the MIL, entails the task of finding ethical/moral bases for establishing a social order. Because our conceptions of such basis may differ it becomes necessary to exert for the best possible normative order. Such an order while advancing a conception a common agreement about these bases ought at the same moment to respect differences. And this may only happen, CS-I insists, *via* a theory of the idea of law (MIL) celebrating the principle of individual autonomy as responsibility towards the construction and maintenance of a shared moral enterprise. Very summary as this narrative remains, it is clear to CS-I that neither utilitarian nor contractarian approaches offer us the best possible guides. What then is needed is the recognition of humans as moral agents is their creative agency and potential directed to attain 'possible worlds'.

These worlds may in turn be of many kinds: the physical (natural nature), and the 'normative' (ethical and the 'metaphysical or, as it were the 'second nature'). CS understandably turns to Leibniz who insisted on the difficult thought-image of 'compossibilty' (possible together) of *physical* and a *moral* and *metaphysical* worlds.

Important here remains CS-I articulation that as 'human beings we create a possible world'.[41] Put differently, each one of these three worlds is created by us humans. As

40 See John Rawls, *Political Liberalism* (New York, University of Columbia Press, 1993).

41 *Supra* note 1 at 131.

CS-II was to affirm in an activist mode, the physical world with its 'variety, richness, and abundance' (to evoke a phrase from Leibniz) may exist only in so far as our metaphysic and morals allow these to so do; as such the law, the MIL, had to be always thought of in terms of respect for diversity of lifeforms in 'Nature'.

CS-I shows in some detail how Leibniz demonstrated that even God as a supreme creator of the world remained bound by some 'necessary' logical and moral constraints in His act of creation. Even God thus may not indulge in any transgression of the law of non-contradiction: if God was the personification and source of the good, He may not create even the possibility of evil (the famous problem of 'theodicy'). Nor may He create a world in which just and pious persons may still suffer even as the wicked ones roam free.

Incidentally, CS-I says that Leibniz was mistaken because it may be said, after all, that God did not create the world but men did and thus imported/imparted evil unto it; and as such incidental creators of evil it remains for them to cleanse the world they create of this potential.[42] In a sense, CS-I offers a post-Leibniz reading, one in which as he says we have an obligation to create a Utopia (the best possible normative system that is the law).

This important narrative shift secularizes the idea of creation of the many different worlds and the orders of their compossibilty:[43]

> When the Bible says that God created us in his own image or when the Gita says that Atman is a finite aspect of the Parmatan, I think that what they mean is that God's desire to create the best possible world is continuous in us. We wish to create the best of all possible worlds.

If so, CS-I remains entirely right to suggest that 'logical and moral constraints are universal in the sense that they limit all creative agents, whether they are creating the factually possible world or the normatively best possible world'.[44] The latter, CS-I recognizes fully 'demands the resolution of many incompatible and conflicting normatively possible worlds': his response is just this— "... there can be only one best possible normatively possible world" because: (a) "... [the] desire and the attempt to create private normatively possible systems [do] not [remain] ... compossible with other normative systems" and (b) "Man being a moral agent like God is in the end obliged to do the same thing ... to create the best of all possible worlds"[45] fully respectful towards the idea of law as a best possible normative system providing respect for the 'variety' of 'feats, artefacts, and systems'.[46] The author hopes that law persons and

42 *Id.* at 131.

43 *Ibid.*

44 *Ibid.*

45 *Id.* at 132.

46 *Id.* at 133.

jurisprudents will tarry awhile with this richly rewarding CS-I thought ways and professional philosophers may find this turn towards Leibniz as fascinating as their enchantment with John Rawls and his distinguished successors.

Towards an ontology of law

How may even the best possible normative system of law help us to understand the 'ontology' of law?[47] Here, two related but distinct questions arise. First, if '[m]an being a moral agent like God is in the end obliged to do the same thing ... to create the best of all possible worlds'[48] the idea of being and remaining human must logically precede the idea of a jural or juristic being (paradigmatically, the idea of a citizen). Second, are legal agents as moral agents bound by prior norms, values, and ends in recognizing/creating (or de-recognizing/de-creating) juristic persons and entities?

CS-I offers a most interesting Kantian detour in response to the first question. He suggests, in a purported departure from Kant, that being and remaining human and in quest of best possible normative world, affirming MIL involves an 'ontological continuity' with the divine or holy will; this in turn means that '...continuity in moral progress must not only be in knowledge but also in being a person'.[49] Each individual finite self, says CS-I here quoting and endorsing Kant, is a vessel and vehicle of 'infinite progress' and thus refers us to also to 'the presupposition of an infinitely enduring existence and personality of the same rational being... called the immortality of soul'.[50] CS-I insists that Kant then needs to accept 'the possibility of a rational will becoming a holy will as ontologically true and not just as epistemological truth' and further that the 'idea of law demands this'.[51]

While it remains difficult to essay an analysis of CS-I understanding and critique of Kant, his equivalence of the idea of self with the 'concept of an *ataman*'[52]— the idea of 'divinity within finitude' as 'ontologically continuous with the divine will'[53]— fascinates at least in three ways. First, the idea of self is not contingent but transcendent; second, being 'divine' signifies that evil is 'accidental' or 'abnormal'; and third '... the only grounds on which the idea of dignity can be sustained in law is that which recognizes the idea of rational or moral progress to be inherent in the concept of a legal person'.[54]

47 *Id.* at 197-217.
48 *Id.* at 132.
49 *Id.* at 210.
50 *Id.* at 208.
51 *Id.* at 209.
52 *Id.* at 212.
53 *Id.* at 211.
54 *Ibid.*

These three propositions are 'fascinating' because put together these uncommonly ground the idea of human dignity in an ontological continuity between the 'divine' and the human creator of nature and *nomos*. The 'divine' in CS-I is not necessarily a figure of God[55] but rather symbolizes the idea of creation as an act of 'holy will' (opposed in CS-I to 'profane' acts of will which bring about 'accidental' or 'abnormal' evil). At least such imagery enables CS-I to distinguish social philosophy and its conceptions of self from the ontological grounding of dignity in which the 'law does not postulate human dignity in reason' but 'wants to assert that each human being has dignity'.[56] As already noted earlier, CS's insistence (in the second proposition) that evil is 'accidental to human nature'[57] is discomfiting. CS insisted, however, that if 'law [MIL] took evil to be a natural aspect of human behaviour ... it would lose the fundamental basis for asserting that human beings have inherent dignity' and further 'it would lose the central motivation for attempting to remedy or reform evil persons or situations'.[58]

Prescinding CS's surprising utilitarian move here (if only because he castigates fully utilitarianism as militating against MIL) any grasp of comparative social theory of human rights suggests fully otherwise.[59] Put another way, the histories of comparative human rights theory, movement, law and jurisprudence demonstrate that regarding the human capacity to think and perform evil as 'natural' provides the motivation, even the leitmotif, for the worldwide historic struggles articulating human dignity as a supreme virtue and value. CS-II remains, closer to the author's position.

The third proposition — 'the only grounds on which the idea of dignity can be sustained in law is that which recognizes the idea of rational or moral progress to be inherent in the concept of a legal person'[60] — remains enigmatic. It tends to conflate the 'rational' with the 'moral' conceptions of self, neither of which may have much to do with the *atman*. It is true that one needs to move beyond the social constructions of self[61] but it is not clear that this may best be done *via* the notion of a human person as an *atman*.[62]

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55 *Id.* at 131.

56 *Id.* at 209.

57 *Id.* at 211.

58 *Id.* at 201.

59 See as to this Upendra Baxi, *The Future of Human Rights* (OUP, 2008).

60 *Supra* note 1 at 211.

61 *Id.* at 213.

62 The author remains perplexed by the observations such as the following: The classical Greek [notions of] self... is on a teleological path marked by a progressive awareness not only in knowledge but in being. In the Indian view, the ontic status of being (atman) is not given a priory, depends on knowledge and action. A rishi or a sage or a pandit is not just a person who knows more, but is a morally better person, who having a greater self-realization, can act better. This union of ontic and epistemic status in the concept of self is clearly something that distinguishes the Indian view from the Greek view. (*Id.* at 214.)

More to point is the idea of a legal/juridical person itself, such as the citizen, clubs, corporations, and related business entities,[63] trade unions, church and the state best narratively represented thus. These are entities created by the law, neither pre-existing in 'nature' or 'society'. One may add to these now in the world today the claims of intellectual property rights in artificial intelligence, cloned animals and future cloned humans.[64]

CS-I considers briefly several theories of juristic personality'[65] but dismisses them all as expedient or empirically grounded; in his view these approaches do not disclose why certain entities should be treated as juridical/legal persons and others not so. He accordingly suggests that what 'is a permissible legal ontology ... is evidently a moral question...'[66] and proceeds to answer this question by the following proposition:[67]

> Every agent within jurisdiction about whom there is no evidence that he or she or it will be, or is, an obstacle to the achievement of freedom, equality, independence, and the best normatively possible world, must be explicitly recognized by law as being as legal entity.

It is difficult to grasp the notion of 'ontology' as fervently 'ethical'. Yet, it would be unfair, if not churlish, to suggest that the notions of 'freedom', 'equality', and 'independence' remain indeterminate or inchoate, if only because CS-I has elaborated throughout *LAU*, Kantian/universal *dharma* ideas about the ends of law; thus only he is able to postulate a theory of juristic person who best serves these ends.

Obviously, this approach has certain advantages over the conventional theories of legal personality, a most important one being that recognition or creation of entities as legal persons can never be an ethically arbitrary act. On this view then practices of systems of violent social exclusion (apartheid) based on race, colour, birth, descent, caste, religion, or sex will be regarded as thus arbitrary. Entities that claim to deny legal personality of human beings on these grounds are clearly not in the service of the ends of the law and therefore render themselves ineligible of claiming that status. Even a state which falls short of serving the ends of law would cease to be (ethical) state and '... it would only be a system by decree, force, or fiat'.[68]

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63 See, Upendra Baxi, *supra* note 59, chs. 8 and 9.

64 See, Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (OUP, 2007).

65 *Supra* note 1 at 199-203; though the Kantian in CS-II has little time for conversation with semiotics of law, especially work of Griemas. See as to this, Bernard S. Jackson, *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985).

66 *Supra* note 1 at 202.

67 *Id.* at 203 (emphasis in original).

68 *Id.* at 205.

In sum, this 'principle of legal ontology' serves to mark off the obligations of recognition owed by a community or a state to entities that manifestly serve the ends of law and of outlawing those that manifestly do not, though CS-I recognizes the intermediate categories in which it may remain difficult to say whether they have the potential to serve the ends of the law.[69]

While the manifest categories enable one to make sound ethical judgement that satisfy the principle of legal ontology, this may not be said about the intermediate categories. Do corporations, national or multinational and allied business entities that primarily pursue profit and power serve the 'ends of law?' CS-I does not explicitly confront this question but one may read elements of his response in the very definition of the intermediate category, which stand constituted by either the lack of 'positive evidence' that 'they will enhance the ends of law' or the 'negative evidence' that 'they have attempted to do so'.[70] Such entities may claim legal recognition as juristic persons until a point when 'we have some but not *conclusive* evidence that they will get in the way of the ends of law'; even then such evidence may only suggest restrictions 'limiting their activities', not any denial of their claim to legal personality.[71] In deciding upon 'evidence', it remains important to acknowledge, that one looks at MIL as *dharma*, not as *purshartha*.

CS-II devoted himself to the enterprise of such regulation of these entities. Yet, one remains diffident at least as concerns corporate conduct which (as in Bhopal) claims impunity and immunity from the logics of the ends of law as its very rationale of existence. It is simply not clear how to translate the voguish languages of corporate social responsibility, bioethics, and business ethics in the languages of CS's MIL.

One also remains diffident concerning ways of extending this CS-I rationale to the recognition of the rights to legal personhood claimed on behalf of non-human animal persons or for the personifications of 'objects' in 'nature' (such as rainforests, rivers, mountains, endangered species, and biodiversity in general). How may such acts of juristic personification serve the ends of law? An un-elaborated remark concerning the idea of law as a best possible normative system providing respect for the 'variety' of 'feats, artefacts, and systems'[72] here remains extremely pertinent, of course. Overall, however, CS-II is here a superior guide concerning all this than CS-I!

The author does not wish to complicate things any further by dwelling on CS-I observations on the idea of an ethical state (cited earlier). The difficulties here presented are rather immense. The 'state' as constituting and hopefully even representing a

69 See the five categories mentioned in *id.* at 205-206.

70 *Id.*at 203.

71 *Id.* at 203-204 (emphasis added).

72 *Id.* at 133.

territorially bounded society of nation-peoples (the 'imagined communities') provides, as is well-known, not just an essentially contested concept but a fatally contested one. While no one may disagree with the universally constituted notion of MIL as *dharma*, no 'theory' of and about the idea of law may afford to ignore the difficult relationship between 'violence' and 'justice' as aspects of state formative practices. In the course of CS and the author's long and difficult conversations preceding the publication of *LAU*, CS sought to convince the author that he was misreading him. The author repeatedly re-read his text; yet, could not bring himself around his view that the best normatively possible world — the MIL fully addresses this (and to say the least) agonizing relationship. More is at stake in the contemporary circumstance cruelly crystallized by the practices 'war on terror', which thrive on the languages, logics, and paralogics of 'outlaw' states and peoples against whom any hastily assembled regimes of the 'coalition of willing states' may launch a permanent war.[73] To be unfair, though hopefully not in the extreme, to CS, it is an enigma as to how to extend the following observation to the wars on and of terror:[74]

> The principle determining the ontology of law is synthetic in the sense that it informs one about how the system is to be populated but it is also a priori because it basis itself on human reason rather than the experience of any particular legal system. In this sense, it is a normatively synthetic a priori position.

The anarchic: the dystopic and the utopic elements in CS-I

The dystopic, for CS-I remains in the main 'anarchy' — a condition or state of affairs posing not merely a 'question of disorder' but also 'of orders which are pathological'.[75] CS accentuates as pathological a multitude of 'pathological disorders', whether these may be 'maintained through colonialism, imperialism, dictatorship or straightforward repression' or 'acts of terrorism or guerrilla warfare'.[76] In a remarkably prescient pre-9/11 mode of thought, CS is able to maintain that that 'whereas terrorism brings about disorder quickly, pathological order brings about disorder in the long run'. More crucial remains his insistence that the 'pathological' misfortunes the idea of law:[77]

> In all anarchic states the idea of law is either misunderstood or misconstrued. Such states, evidently, do not provide conditions in which the idea of a legal order can be realized'... A totally non-anarchic state of affairs within a society is what I call utopia' .

73 See for a further elaboration, Baxi, *supra* note 64, ch.5.

74 *Supra* note 1 at 204.

75 *Id.* at xiii.

76 *Ibid.*

77 *Id.* at xiii.

Some a cache of concerns are presented hereafter:

First, are the situations and experiences of colonization/imperialism merely to be thought of in terms of misrecognition of the 'idea of law'? *Second*, is anarchy a concept interstitial to the distinction between 'normal' and the 'pathological'? If so, how may this be understood in the light of the critique offered by Michel Foucault and Georges Canguilhem? *Third*, are we justified in saying the organized political violence, backed by insurgent public reason, remains always 'pathological', such that organized political violence against injustice and tyranny must at the threshold remain 'unethical"?[78] *Fourth*, are acts of insurgent popular reason—those that we used to describe once-upon— a -time in the diction of 'revolution' states of 'anarchy,' devoid of elements of a 'Real Utopia'? *Fifth*, and related, if non-God like finite and frail humans are to be creators of the best possible world (as CS rightly insists) accordingly if each one of humans becomes infinitely capable of creating the best possible is insurgent reason[79] always to be ethically devalued normative system of 'law'?

Yet, for once, and in a refreshing reflexive moment, CS is also able to say that 'of course no legal system can work without a *theory of justice without involving a theory of state*'.[80] CS also says earlier that:[81]

> The legal system aims at an absolute value—justice; it's fundamental principles are synthetic a priori propositions while political systems function according to conventions, depending on social needs; moreover their foundational principles are analytic.

This may be so; but CS-I moves on with a few paragraphs of justice[82] and without a word on 'state' theory. CS-II has, in contrast, many specific stories to tell concerning this in the spheres of water, forest, or environmental rights; CS-II puts in question the 'conventions' of the state in terms of ownership of land, forests, water and water-based resources; he also develops a fiduciary notion of sovereign power, an extraordinary denouement of course!

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78 But see, Virginia Held, 'Terrorism, Rights, and Political Goals' in R. G. Frey and C. W. Morris (eds), *Violence, Terrorism, and Justice* 73, at 80 (Cambridge: Cambridge University Press, 1991) and Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996.) See also, Baxi, *supra* note 64 , ch. 5.

79 A category developed simultaneously by the author with a related one of popular sentimental reasons in contrast to John Rawls' distinction between 'public' and 'non-public reason : see as to this Upendra Baxi, "Adjudicatory Leadership in a Hyperglobalzing World: Apex Courts as 'Exemplars' of Public Reason" in Stephen Gill (ed.), *The Crisis of Global Leadership* 161-178 (Cambridge University Press, 2011).

80 *Supra* note 1 at 176 (emphasis added).

81 *Id.* at 164-165.

82 *Id.* at 176-177.

This is not the place to develop the unaddressed issues in *LAU*; even so, we do need to learn from Emmanuel Levinas, if only in order to distinguish between 'those who seek to have a State in order to have justice and those who seek justice in order to seek the survival of the State'.[83]

III Conclusionary remark

In so far as CS-I offers his work mainly (as) a criticism of legal positivism the improperly-so called teachers, even self-styled experts, in 'jurisprudence' need to disturb their doxa by reading *LAU*. There is no South Asian or even a third world scholar who has done so much to shake the foundations of legal positivism. This is high praise yet fully deserved. And saying this does not obscure some deep disagreements of the *LAU* narrative.[84] It is hoped hope that Indian political theorists and jurisprudes may after all begin a conversation with CS-I and social and human rights activists, the direct and remote beneficiaries of the luminous presence of CS-II may even begin reading *LAU*.

Overall, both CS invite us to take the idea of law (MIL) seriously. Putting the two CS together has the advantage, of listening to an 'early' Marx who said in 1850, that profound social transformation occurs only when '*thinking humanity remains capable of suffering and the suffering humanity begins to think'*.

Howsoever, CS may contest this juxtaposition; his call to us all towards an obligation to construct a Utopia marks his quintessential contribution.

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83 Emmanuel Levinas, *Difficult Freedom: Essays on Judaism* 218 (Baltimore, Johns Hopkins University Press, 1997; Sean Head, Trans) (emphasis added).

84 For example: the acute logician in CS-I fails to grasp the eminent reasons why Hans Kelsen insisted that the basic norm or the grundnorm is a postulate (as he said an acceptance of the fact that it is 'by and large efficacious'). All normative systems become indelibly possible when such postulates prevent infinite logical regress. CS-I misreads Kelsen (and he is here in some august company) when he inveighs against his maxim: 'Basic norm may have any content.' By this statement, Kelsen sought to educate us about logical properties of closed normative systems, a principle that CS himself articulates in terms of 'completeness' of law as a normative system. Likewise, the alternate candidate to the grundnorm proposed by H. L. A. Hart in terms of the 'rules of recognition' seems to me primarily designed to analytically separate the existence of 'law' issues from their justice-qualities and indeed even obligations of disobedience.Further, CS-I assertion is 'quaint' (to say the least) that insists (in so many words): 'The Marxist view of law thus stands or falls with Hart's or Austin's view; and Hart and Austin provide the grounds for Marxists claims' (*supra* note 1 at 113). This caricature is scarcely redeemed by a narrative gesture that immediately says: '... The Marxist theory presents a deeper and a more serious kind of legal positivism because it at least faces the problems directly' (*supra* note 1 at 113).