

II. WHAT IS LAW: A GRAND QUESTION WITHOUT A GRAND ANSWER

- GHAYUR ALAM*

Abstract

This essay attempts to identify and highlight some problems that scholars of law have been struggling with in answering the grand question: what is law? The question is neither a professional's question nor a question of law but a question about law.

The question has been described as 'persistent question' by H. L. A. Hart and as 'ancient question' by Ronald Dworkin. Both the learned scholars answer this question in their own ways but the question remains 'persistent' and 'ancient'. Tomes after tomes, articles after articles have been written to answer this question highlighting the relevance and significance of thereof. The idea shared in common by all such writings is the 'content or substance of law' (both procedural and substantive), i.e., what is and what is not part of law. This essay, however, neither attempts to identify 'is part' or 'is not part' of law nor does it seek to highlight the relevance or significance of the question.

Problem is plenty – not scarcity – of answers which are abstract, ambiguous, complex, prolix, obese, opaque, and vague. This essay, therefore, is expected to serve at least two related purposes. One, other scholars may add and modify the menu of problems. Two, ways and means can be

* Professor in Business Laws and IPR Chair at The National Law Institute University, Bhopal, India

worked out to solve these problems or at least to minimize them.

Keywords: *Law, Question, Scholar's Question, Professional's Question, Plenty, abstract, complex, prolix, obese, opaque, ambiguous, and vague.*

I. INTRODUCTION

This essay attempts to identify and highlight some problems scholars of law have been struggling with in answering the grand question: what is law (*hereinafter*, 'the grand question'). For purposes of convenience, this essay is divided into three parts. Part – I analyses the nature of grand question. Part – II attempts to identify and highlight some problems scholars in answering the grand question: what is law? Part – III concludes.

Part I: Nature of the Grand Question: What is law?

This grand question is about reality of law. Verb 'is' in the question though by nature seems to be transparent but the plenty of answers to the grand question establishes that the nature of verb is opaque. If the verb in the question is opaque the subject 'law' about which the question is asked also becomes opaque. This twin opacity of has been looked into from a myriad of angles. Broadly, these angles are the angles of meaning, definition, concept, theory, structure, and function.

Meaning of word is not only polysemous but also multilayered. Definitions are generally incomplete. Concepts are contested. Theories are varied. Structure is dynamic. Functions are multiple. All these problems are present in the answer to the grand question.

Grand question has been described as ‘persistent question’ by H. L. A. Hart and as ‘ancient question’ by Ronald Dworkin. Both the learned scholars answer this question in their own ways but the question remains ‘persistent’ and ‘ancient’. Tomes after tomes, articles after articles have been written to answer this question highlighting the relevance and significance of thereof. The idea shared by all such writings is the ‘content or substance of law’ (both procedural and substantive), i.e., ‘what is part of law’ and ‘what is not part of law’. This essay, however, neither attempts to identify ‘is part’ or ‘is not part’ of law nor does it seek to highlight the relevance or significance of the question.

Question is a scholar’s question.¹ A scholar is fundamentally concerned with constructing and deconstructing concepts and theories. Concepts

¹ Scholarship is relentless pursuit of truth and true knowledge with honesty in the dispassionate, objective, and fearless way. Scholar’s enterprise is different from the enterprises of student, professional, expert, and vocationist. A student is one who studies. In other words, one who does not study is not a student. Study, however, does not mean mere reading of text as is generally understood. Reading and re-reading of a text coupled with thinking with enthusiasm, intense dedication, relentless perseverance, and fervent zeal are some of the essentials of study. Studentship, therefore, is the beginning of scholarship. Scholarship is dependent on studentship. Quality of studentship determines the quality of scholarship. A professional, on the other hand, has the ability to efficiently and effectively translate the concepts and theories into practice. A professional is not bothered about the question what is law.

and theories help professionals to answer practical questions. Construction and deconstruction of concepts and theories may be *a priori*, *a posteriori* or both. Nonetheless scholar's enterprise is different from professional's enterprise though related with each other.

Professional's question may be easily answered in the light of the provisions of article 13 (3) of the Constitution of India (*hereinafter*, 'Constitution') which read as under:

In this article, unless the context otherwise requires, –

- (a) "law" includes any Ordinance, order, bye-law, rule, regulations, custom or usage having in the territory of India the force of law;
- (b) "law in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

The above definitions of "law" and "law in force" are for purposes of article 13 only. These definitions are neither general nor are they for the purposes of the whole Constitution because chapeau of article 13 (3) limits the scope of these definitions by using the expression 'in this

At best she is concerned with the question: what is/are *the* law(s) for the given fact situation. An expert is a specialist or superspecialist who knows more and more about less and less, or performs a particular task in the best manner. A vocationist is one who has acquired certain skill sets through apprenticeship or training.

article'. Both the definitions in clauses (a) and (b) are inclusive and not exhaustive as they employ the connector 'includes'. None of these clauses employ the term 'Act' or 'Code' but they are implicit in these definitions. Absence of explicit mention of these terms cannot be described as *casus omissus*. Therefore, there are three constituents of 'law' and 'law in force' namely: (i) form of law, (ii) in the territory of India, and (iii) having the force of law or not previously repealed. Clause (a) of article 13 (3) recognizes 7² forms of law. Clause (b) of article 13 (3) recognizes only one form of law, i.e., law passed or made before the commencement of this Constitution, i.e., Act or Code – which raises the number of forms from 7 to 9. Had the words 'or after' after the word 'before' what is implicit would have been explicit. These definitions do not recognize 'amendment' as a form of law but the inclusive nature thereof does include 'amendment' increasing the number of forms to 10. It must be noted that clause (4) of article 13 excludes 'amendment' to the Constitution from the purview of article 13 but amendment in general nonetheless is a form of law. In addition to definitions under article 13 (3) definitions which are applicable to article 13 only, article 366 (10) defines "existing law" for the purposes the whole Constitution as follows:

² (i) Ordinance, (ii) Order, (iii) Bye-law, (iv) Rule, (v) Regulations, (vi) Custom, (vii) Usage. None of the forms by and in itself constitute 'law'. Each of them becomes 'law' if it is having in the territory of India the force of law.

“[E]xisting law” means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation.

The above given definition in a sense is exhaustive because it employs the connector ‘means’. Article 366 (10) recognizes only 6 forms of law and does not include custom and usage. Act, Code, and Amendment seem to be implicit in the above definition for the same reason for which they are implicit in article 13 (3). Clause (b) of article 13 (3) and article 366 (10) relate to law passed or made before the commencement of the Constitution of India. Clause (a) of article 13 – though limited in scope and application – is the only clause in the Constitution of India unlimited in time and hence covers law passed or made both before and after the commencement of the Constitution of India. In addition to the definitions of these expressions in the Constitution, the General Clauses Act, 1897 (10 of 1897) also provides an insight into the meaning of law and related terminologies. Section 3 (29) this Act defines “Indian law” as follows:

“Indian law” shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United

Kingdom or any Order in Council, rule or other instrument made under such Act.

The General Clauses Act, 1897 explicitly mentions ‘Act’ and also provides definitions of: “Central Act” under s. 3 (7), “enactment” under s. 3 (19), “Provincial Act” under s. 3 (46), “Regulation” under s. 3 (50), “rule” under s. 3 (51).

Both the text of the Constitution and the provisions of the General Clauses Act identify three elements of law, namely: (i) forms of law, (ii) force of law, and (iii) in the territory of India. These three elements together constitute the whole of law.

A professional, therefore, has to see if the above identified three constituents concur together or not. If they do, professional’s question is answered. Law practice whether transactional or litigation are generally ‘within’ and about only these three constituents of law. Rarely the validity of these constituents challenged in a *lis*. Therefore, the grand question is not a professional’s question.

Word ‘law’ – like bulk of the English words – is polysemous. Hence, it signifies several meanings. Not only the word ‘law’ is commonly known but it is also known that this word signifies a thing called law, i.e., something called ‘law’ exists. Knowledge of existence of a thing, however, does not necessarily mean that one who knows the existence thereof also knows the meaning thereof. Knowing the meaning necessarily entails knowing the thing ‘as such’ or knowing it ‘as it is’.

Knowing ‘it as such’ means knowing it without any bias, without any prejudice, without any favor, without any fear, without any value preference, without any liking or disliking. Object of knowledge must be detached and separate from the subject that seeks to know it. This type of knowledge is often described as ‘scientific knowledge’ and ‘positivist knowledge’, i.e., as posited by human beings. Only facts (phenomenon) can be known scientifically. Facts are constant. Law is dynamic and evolving. Law as it exists today can be known scientifically. Can the law of tomorrow or in the morrow be known scientifically? The idea of existence has been beautifully and poignantly captured by Urdu poet Mirza Ghalib’s in the following words, “*Duboya mujhko hone ne, na hota main to kya hota*” [My existence made me drown beneath, if I didn’t exist then what would have happened?]³. The last stanza of couplet, “*Hui Muddat ke Ghalib Mar gaya, par yaad aata hai, wo har baat be kehna ki yuon hota to kya hota*” [“Eon’s past “Ghalib” had died but still he lingers in memory because he used to ask had it been the case then what would have happened]⁴ highlights scholar’s quandary.

As the grand question is persistent and ancient, therefore, law is both known and unknown. Hence, not completely and fully known. Unknown of law may be known with the help of some known. The grand question goes to the very root of law and seeks to discover the

³ *Beauty and Tragedy* <<https://beautytragedy.wordpress.com>> accessed 10 June 2020.

⁴ *ibid.*

nature of law which is both static and dynamic at once, both certain and flexible simultaneously, and both absolute and relative at the same time. Simultaneous coexistence of conflicting values is part and parcel of genetic material of common law. At common law, rules and exceptions were born together as twins. Therefore, the grand question what is law raises following questions at the least:

1. Is law a fact?
2. Is law an idea?
3. Is a law a concept?
4. Is law an idea derived from sense perception or experience?
5. Is law independent of sense perception or experience?
6. Is law based on certain value judgments?
7. Is law based on morality?
8. Is law separate from but related to morality?
9. Is law based on theism, deism, agnosticisms, atheism, or secularism?
10. Is law an instrument of justice or of injustice or is it both?
11. Is law a cause of justice or of injustice or is it both?

12. Is law a handmaid of power?
13. Is law an instrument of State?
14. Is law a liberating force or an exploitative force or is it both?
15. Is law a shield or a sword or it is both?
16. Is law egalitarian or non-egalitarian or it is both?
17. Is fairness or unfairness a constituent of law?
18. Is rationality or reasonableness the guiding principle of law?
19. Is non-arbitrariness or arbitrariness a constituent of law?
20. Is law a legitimizing instrument?
21. Is law a means or an end or is it both?
22. Is law a form or a substance or is it both?
23. Is a law a rule or rule is a law?
24. Is law ontological, deontological, teleological, utilitarian, majoritarian, authoritarian, or authoritative?
25. Is law a social institution or an institution different from society?

No grand theory is available to provide even the least plausible and convincing answers to the above asked questions. Although Kelsen's

Pure Theory of Law sought to answer the grand question with the help of the idea of *grundnorm* yet it is confined only to the form of law – hierarchy of norms ‘ought’ syllogistically arranged – irrespective of the content or substance of law. Kelsen’s ‘is’ is ‘ought’ and every kind of law – good, bad, ugly, or beautiful – may fit Kelsen’s model if it is logically derived from “international customary norms ought to be obeyed” or “constitution ought to be obeyed”. ‘Law and ...’ movements⁵, on the other hand, has been producing explanations from their predefined positions.

The questions therefore are: what is reality? What constitutes reality? How is it constituted? Who constitutes it? How does it matter? Law is a lived reality. A reality both absolute and immutable. We live by law every moment – both consciously and subconsciously. There are laws of nature. There are laws of men and women. There are laws of laws. We can neither escape law nor can we ignore it. This reality, however, is a multilayered one. Genetic material of this reality is a surprising mix of facts and fictions. Facts are real, but how fictions can be real? Fiction

⁵ The ellipsis may fill up with any of the following word(s): Economy, Society, Sociology, Literature, Language, Politics, Political Economy, Culture, Religion, Deconstruction, Postmodernism, Critical Studies, Poverty, Liberty, Justice, Welfare, Science, Reality, Philosophy, Rationality, Technology, Management, History, Anthropology, or the name of any other discipline or idea. ‘Law and ...’ movement is an interdisciplinary and transdisciplinary movement in legal scholarship. Chief examples of this movement are ‘Law and Economics’, ‘Economic Analysis and Law’, ‘Law and Language’, ‘Law and Literature’, ‘Law and Philosophy’, ‘Law and Logic’, ‘Law and History’, ‘Law and Political Science’, ‘Law and Society’, ‘Sociology of Law’, ‘Law After Society’, ‘Law and Psychology’, ‘Law and Behavioural Sciences’, ‘Law and Science’, ‘Law and Technology’, and so on so forth.

is a ‘real thing’ in law and are as necessary (sometimes more necessary) as hard facts. This mix of facts and fictions may be misleading at times, if difference between the two is not noticed. For example, the solemn resolve that “WE THE PEOPLE” took and recorded the same in the Preamble to the Constitution is a legal fiction. It is not a fact. Reasonable man is not a real man. It is a creation of legal fiction. A person may not be a human being and a human being may not be person. Person may be a company or a corporation. Can we work without these legal fictions? The answer is an emphatic ‘NO’. Legal fiction is a necessity and is not a luxury in or of law. Legal fiction, therefore, is part and parcel of the genetic material of law.

The way law is enforced or implemented, or the way people orient their behavior towards law, or how legal actors behave towards law are perceptible by senses but none of these factual situations answer the grand question. These situations may either show adherence or otherwise to the idea of law. Idea is a conceived. Conception of an idea may be based on observation and experience or may be independent of observation and experience.

‘Is’ of the grand question is directly connected with politics and is largely State centric – ideally law should be society centric. Politics determines the quality of Constitution. Constitution determines the

kind of State. Different Constitutions lay down different models⁶ of State. The Constitution of India describes 'India' as Sovereign Secular Socialist Democratic Republic. These are five constitutional features together constitute one India without any punctuation. Constitution of India is supreme human law in India. Human law is separate from and above the human being. Human beings make law for themselves at least in theory. Once the law is found or made by humans, it acquires a separate existence. Maker is not the made. Even those who directly or indirectly make law cannot claim immunity from the law on the ground that they are the makers of the law. The legislators and the judges are as much under the law as are those who do not participate in the law making.

However, State centric approach neglects laws in the primitive society and tribal society. This neglect cannot produce complete answer to the grand question. Further, answer to the grand question varies with the varying ideology of States and society. Furthermore, within the same politico-legal system the reality about and of law is different in the understanding of a poor man, a rich man, police man, an official, an institution, a legislator, a judge, a law teacher, a law student, a woman, an illiterate, a literate, or any other individual. Reality of law varies with the varying privilege or power or immunity different types of

⁶ Communist States, Socialist States, Capitalist States, Republic States, Democratic States, Theocratic States, Bureaucratic States, Aristocratic States, Monarchy, a Nation without State, a State without Nation have different and conflicting constituents of law.

people enjoy or do not enjoy within the legal system according to their legal status. Decades ago, I was taking Sociology of Law class and for purposes the class discussion I requested some administrative staff to come to the class for few minutes. They acceded to my request. When they entered the classroom in a state of surprise and bewildered. I requested them to take a seat and asked them in Hindi: What this university is about? They all said, “*Yahan Qanoon ki padhai hoti hai* (Law is being taught here).” When I asked them “*Qanoon kya hai* (what is law? They used the words, “police”, “thana,” “adalat,” “patwari,” and “jail”. This was understanding of law. Their understanding was closer to professional’s understanding but bound to be different from the scholar’s understanding.

Scholar’s understanding is recorded in jurisprudence literature which records as many answers to the grand question as is the number of Schools of jurisprudence. Within the same school of jurisprudence, there are different flavors. Plenty within and beyond plenty. Origin of scholar’s understanding of the grand question at common law may be traced with in work of Sir William Blackstone (1723-80) who was appointed as the First Vinerian Professor of English Law in the later fifties of eighteenth century. English law based on common law was not recognized as a discipline by any university of England or elsewhere in the world. Even in England, civil (Roman) law and cannon law were taught as university subjects. Inns of Courts provided instructions for law practice by way of apprenticeship. Apprenticeship

is not scholarship. Apprentices do not ask scholar's questions. First scholar and expositor of common law, Sir William Blackstone wrote Commentaries on the Laws of England. Although before Blackstone others have written about English law, but his Commentaries was that of scholar of law and many historians consider it as the first comprehensive work on English law.

Second English scholar, Sir Jeremy Bentham (1748-1832) described common law as "Demon of Chicane" and "dog law" and advocated the theory of legislation-architecture. He tried to limit and censor common law and supplant it by legislation. He wrote many books on law and legislation and explained difference between censorial (ought) jurisprudence and expository (is) jurisprudence. The latter type was concerned with the grand question.

Third English scholar, John Austin (1790-1859) used scientific method to answer the grand question. When he was appointed as a Professor of Law, the time of scientism (known and knowable by humans) and positivism (posited by humans) had come. These two 'isms' together brought humans at the center of knowledge creation. Before the birth of these two ideas, humans were considered as interpreters of knowledge at best and not creators of new knowledge. These isms together elevated the status of humans from interpreter to creator. Human beings came to be recognized as the author and creator of scientific knowledge – knowledge posited by humans rather than by divinity and/or superstition. Science delivered technology. Technology

delivered Industrial Revolution. Industrial Revolution created an alternative to agricultural employment in the form of industrial employment. Working population got an opportunity to choose. Ability to make free economic choices brought about other types of freedom. Industrial employment required knowledgeable and skilled labor force. Knowledge and skill development required educational infrastructure. Scientism and positivism did not only produce new knowledge but also provided bread to hungry. Science became too popular in masses and became the mantra of progress and development. Mantra of science charmed not only the working class but also attracted connoisseurs and intelligentsia. Adam Smith (1723-90) and Auguste Comte (1798-1857) developed arguments to prove that their respective discipline of Economics and Sociology is a science. Austin saw the opportunity and lapped it. He too developed the argument to prove that law is science. Opposition from social scientists against law as discipline was looming large during his tenure. Austin had to establish English law as a discipline and meet the opposition of social scientists who were of the opinion that law lacks intellectual rigor. Hence, does not rise to the dignity of a discipline. Therefore, law is not worthy of being included in the university curricula. Austin did what he could. He asked the grand question: what is law? A grand question wanted a grand answer. The only place from where the grand answer can come was science.

Austin located the source of law in the sovereign of an independent political society. He described law as rules. Rules attaching sanctions

to a legal wrong. Austin had to locate the sovereign as the determinate body of person or persons, for, the idea of ‘determinacy’ was necessary to prove that law is science. Science is about facts. It can know phenomena as perceptible to senses. So, Austin had to prove that law is fact. Therefore, it can be known scientifically. Therefore, law is a science. Therefore, law has intellectual rigor. Therefore, law qualifies as a discipline. Therefore, law is eligible to be recognized as a university subject. Austin pleaded well and won the case. Since law became a university subject in the nineteenth century England, attempts were made by “insiders” to understand the reality of law from “within,” i.e., to understand and explain law as a discipline having her own intellectual rigor. Christopher Columbus Langdell was appointed as the First Dean of Harvard Law School in 1870. He developed another argument to prove that law is a science. Langdell argued that law library is the laboratory for students and teachers of law. Cases (Law Reports) are like specimens and instruments. He introduced case method of law learning at Harvard Law School.

Historical school of jurisprudence was contemporaneous to legal positivism. Savigny of Germany was of the view that law is found and not made and it grows or changes with society like its language or culture. Another historian from England, Sir Henry Sumner Maine introduced the idea of historical jurisprudence to common law tradition tried to demonstrate that society and law hitherto has moved from status to contract. Somehow the historical school of thought could not

become as popular as positive school. Perhaps, law is made rather than being found. Even if found, it is found in books and not in the society. It is observance or non-observance of law that is found in society. It does not follow that custom or usage do not play any role whatsoever in the present time.

Both positivists and historical movements shared a common method. They rejected theological, philosophical, metaphysical explanations. These methods also rejected superstition and reason in equal measure as a method to answer the grand question.

By the end of nineteenth century, it was firmly established that law is a science. Nineteenth century may be described as a century witnessing predominance of science and ‘pure discipline’. It was also a century of fact-based approach captured by the dicta “I believe it, when I see it” in contradistinction to value-based approach captured by the dicta “I see it, when I believe it”. Prominent and preeminent mantra was “If science can know it, it is knowable. If science cannot know it, it is hardly worthy of attention.” In times of deepfake the formula of “I believe it, when I see it” is raising serious concerns and issues.

Seed of interdisciplinary⁷ study of law was sown by Justice Oliver Wendell Holmes in his path breaking article *The Path of Law* published

⁷ Idea of relating, supplementing, and sometimes attacking and demolishing one discipline with other disciplines, therefore, is the defining method of contemporary scholarship in all the disciplines. Now most of the Nobel Prizes are given for works involving interdisciplinary studies. The very idea of interdisciplinary is post-

in 1897 by the Harvard Law Review wherein he predicted that next century is going to be the century of economics and therefore law students should read economics and relate it with law.

With the beginning of second half of twentieth century an era of interdisciplinarity in general and in legal scholarship in particular was set in motion. Scholars started identifying linkages between and among disciplines to better understand their own discipline. As scientism influenced law, legal education, and legal research in the nineteenth century, the interdisciplinarity influenced law, legal education, and legal research in the second half of twentieth century.

Beginning of the twentieth century may be described, *inter alia*, as the beginning of the end of British Empire. Which was about to create an imperial-vacancy. The United States of America (USA) started trying to fill the vacancy. Before the beginning of the World War – I, USA was a country in heavy debts. After this War USA became an economic power and lender to rest of the world. During that period, Roscoe

disciplinary. Idea of discipline is a relatively recent idea. Early knowledge seekers did not approach knowledge in compartments and departments. For example, Aristotle wrote almost on law, medicine, logic, politics, justice, and so on and so forth. Idea of division of labor gave birth to idea of specialization. Scientism gave birth to the idea of discipline and specialization. For around two and half century the idea of “specialization” influenced the attention of scholars. With the beginning of the latter half of the twentieth century “super-specializations” into less and less came into prominence. About orthopedics it is often said that she/he specializes only in left knee and nothing else including right knee. For the treatment of right knee consult the orthopedic specializing in right knee. Modern day scholarship ranges and varies from “super-specialty” to “specialty” to “interdisciplinary” to “trans-disciplinary” and in some cases “counter-disciplinary.” These shifts in the market place of ideas have influenced and is influencing legal scholarship.

Pound was appointed as fourth Dean of Harvard Law School in 1916. His work contributed to the Sociological School of Jurisprudence. Concept of “social engineering” through law became another focus of legal scholars. Focus of legal scholarship shifted from ‘source of law’ (law comes from sovereign or is found in the society or comes from nature) to ‘functions of law’. This shift marked a shift from the ‘nature of thing’ to the ‘functions of thing’. Law became ‘means’ to ‘an end’. End of law was generally described as justice. It was argued that reality of law can be known by focusing on “law in action.” However, the phrase law in action is misleading because law is neither sentient nor autonomous and automatic. Law requires human agency to act. Law can never act or be in action on its own. In other words, law does not act because it cannot act. It is the officials charged with the responsibility to implement law who act, badly act, or do not act at all. So, only actions of officials of law became the focus of attention. This approach sought to understand the concept and theories in the light of practice, malpractice, or non-practice of officials of law. Question is: can concepts and theories be measured or judged with the help of practice? Or, practice can be measured or judged in the light of concepts and theories? There is no doubt that practice does inform concept and theory which may be modified. But if practice becomes the standard, then standard in the form of concept and theory ceases to be standard.

A branch of Sociological Jurisprudence known as Realist School of thought came into existence. Realist combined psychological and sociological methods to understand and explain “what a judge actually does”, “what a judge had in the breakfast may have an effect on his legal behavior”, or “if the judge had a fight with the spouse, it will have bearing on her/his judgment” and so on so forth. Focus of this strand was “what a judge does” and not “a judge says”. According to this view, law is what a judge does. In contrast to the view of Bentham, according to this view, law is primarily made by judges and not by legislature. Every legal actor other than a judge plays a subservient role. Law made by legislature at best is probable law and what a judge does – not what she says – is really the law. Both Sociological Jurisprudence and Legal Realism were popularized by US scholars.

Came the second half of the twentieth century and it witnessed three major scholarly movements in law, namely legal positivism, natural law theory, and interdisciplinarity. There were movements within each of these movements. Two articles published in Harvard Law Review in 1958 by two legal giants brought the grand question once again to the center stage of legal scholarship. World War – II was over. Nazi regime and British Empire had fallen. Nuremberg Trials and Tokyo Trial were over. Cold War between US and Soviet Union was at its peak. US had become a superpower. Shift in economic and political powers reflected in the scholarly power. H. L. A. Hart, a British legal scholar, was inspired by linguistics method championed by Ludwig Wittgenstein.

Hart recognized the concept of law in the union of primary and secondary rules. Hart was critically inspired by the work of John Austin and tried to construct the concept of law by reproducing the characteristics of law and posited that law and morality are separate but related concepts. Building on the works of Austin and Wittgenstein, Hart explained relationship of law and morality with the help of “being obliged” and “having an obligation”. Former according to him is exemplified by gunman’s situation of your purse or your life. The latter expression signifying the idea of law having a relationship with morals.

H L A Hart published an article in Harvard Law Review in 1958 – *a US publication* (emphasis supplied). Hart argued that law and morality are separate but related – a positivist argument. Lon L Fuller, a US legal scholar, published a response to the article of Hart in the same volume of same Law Review and argued that law cannot be separated from morality – natural law argument. These arguments in these two articles are generally referred to as “Hart-Fuller Debate”.⁸ Fuller in his response (article) developed eight formal principles of legality popularly known as desiderata. Four years ago, Fuller has published an article in 1954 in the Journal of Legal Education wherein he demonstrated that as “means” and “forms” of law are neglected by legal

⁸ Hart-Fuller Debate was general in nature. There was another debate in England between Hart and Lord Patrick Devlin. This debate was also about law and morality. But this debate was about private-public space and individual liberty and choices vis-à-vis social cohesion.

scholars hence there is a need to focus on “means” and “forms” of law. For this type of study, he coined the term ‘eunomics’.

Ronald Dworkin argued that law is a department of morality. Dworkin, therefore, gave primacy to morality over law unlike Hart who described the relationship between the two as distinct but related. Dworkin championed interpretative jurisprudence and emphasized social purpose of law.⁹ Dworkin also emphasized the primacy of theory over pragmatism in a response to Judge Posner. Dworkin also distinguished standards, principles and rules. To Dworkin the idea that law is a union of rules, was not central. Rather he focused on ‘principles’ to minimize and avoid the limitation or absence of rules.

The “Law and . . .” movement particularly in the United States of America attempted to understand and question the reality of law from the perspective of “outsider”. Methods of other disciplines were employed by scholars to understand the reality of law. Over a period of time a number of “Law and . . .” approaches recognized many disciplines within a discipline with which “Law” was attempted to be connected with. For example, there are many variations of Law and Society movement. One variation is Sociology of Law. Other variation is Socio-Legal Studies. Third variation is Jurisprudential Sociology. It may be noted that this “Law and...” movement also described as

⁹ *Riggs v Palmer* 115 N.Y. 506 (1889).

interdisciplinary movement, trans-disciplinary movement, or as counter-disciplinary movement.

The proposition that “law exists” is a categorical and absolute proposition. Since law exists, it can be known. If it can be known, it must be knowable. If it is knowable, it can be understood. If it can be understood, it can be explained. It is pertinent to emphasize at this juncture that reality is always independent of knowledge thereof. Reality may be known, less known, or unknown but it is there and wants to be known. Law if completely known and understood – from all the angles, from inside, from outside, and from all the sides – constitutes the reality of law.

Reality should ideally be discovered. But in reality, reality is manufactured either by theoretical wisdom or by practical wisdom or by both. A concept or a theory may work or it may not work. What if a concept or theory does not work? Whether a concept or theory which does not work should be worthy of our attention? For example, the concepts or theories of law that we discuss in our classrooms – assuming that the concepts and theories are fully and properly understood in the class – whether we also discuss the relevance thereof that they have in the street, or in the neighborhood, or on a high way, or in the court rooms. The professionals generally denigrate concepts and theories as bookish at worst and as academic at best. In judicial parlance, ‘academic view’ is an epithet used to reject an argument. Courts often leaves a question undecided by labelling the question as

‘academic’, ‘conceptual’ or ‘theoretical’. This disenchantment of towards concept and theory demonstrates that concepts and theories of law hardly work in the real world. If that be the case then legal profession is not a profession at all. At best it is a vocation, or apprenticeship, or masonry.

Story of seven blind men each touching the different parts of body of elephant and each understanding and describing the elephant in his own way cannot explain the problem in understanding the reality of law for the simple reason that law is not an elephant nor elephant is law. Elephant is tangible. Law is not tangible. Hence it cannot be touched either by blind men or by sighted men. At best, idea of law is elephantine. But idea cannot be touched. The problem of understanding its reality is also elephantine and not asinine. The elephantine metaphor can explain individual experiences or encounters not with law but with officials of law. Individual experiences or individual’s experiences do not constitute reality of law. As law is an idea, it must be conceived and constructed. Concept of law comprises of values. Therefore, understanding of values is essential for understanding law. But values may blind us.

Scholars have been making attempts to know and describe the reality of law with the help of arguments. All sorts of arguments have been used: ontological, deontological, cosmological, design, teleological, scientific, utilitarian, structural, functional, modern, postmodern, deconstruction and what not.

Despite the fact that there are plenty of answers to the grand question, there is no grand answer to the grand question. The question is why no answer has been able to rise to the dignity or status of grand answer. Following seeks to identify some of the problems which are coming in the way of answers to the grand questions.

Part – II: Some Problems in Answering the Grand Question: What is Law?

Needless to state that identification of the problem is the first necessary condition towards the solution of the problem. As stated above, the main problem in answering the question is plenty of answers. Question remains the same. Answers are many and varied and they also evolving with time. In the following paragraphs, an attempt has been made to highlight some of the problems that exist in answering the grand question.

Scholars from Indian, Egypt, Greek, Rome, England, Germany, France, Americas, Arabs, Scandinavia; and other places tried to do answer the grand question. But nobody could produce a grand answer to the grand question. As noted above, there are many Schools of Jurisprudence and Legal Theory: Natural Law School, Positive School, Analytical School, Sociological School, Historical School, Realist

School, Law and . . . Schools, Postmodern Schools including Critical Legal Study Schools. However, they could produce varying and differing answers only. These Schools gave birth to variations within the schools. There is a difference between and within every school of thought. They produced and are producing different answers. Answer to the grand question is lost in the plenty of answers. The basic problem in answering the grand question is not the absence or scarcity of answers. Rather it is the presence of plenty of answers. The plenty is so overcrowded that the identity is lost. A related problem is that the answers also vary from time to time, from place to place, from system to system and from ideology to ideology. The challenge is to combine and integrate these varied answers in such a way which can produce a grand answer to the grand question. The question therefore is: whether such a combination or integration of all varied answers possible?

Conceptualization of a concept requires clarity, lucidity, integration of all the elements that constitute the said. Concept of law. Similarly, construction of a theory of law or any concept thereof requires generality and completeness in such a way that the said theory could subsume every conceivable situation. In other words, a concept or a theory should not neglect any characteristics, any function, any element, any point of connection between and among elements of law. Constructing a grand concept or a grand theory of law is more than Herculean. Can we have a grand concept and grand theory of law which can fully and completely explain each and every aspect of law both in

part and in whole at once. Existence of such a concept and such a theory, however, is present by absence. Such an absence is not a monopoly of law. No secular discipline including Physics – generally considered to be the most perfect science of all sciences – lacks a grand theory. Stephen William Hawking during his life decided to abandon the idea of developing the grand theory of physics. It does not follow from here that we should also abandon the enterprise of developing the grand theory about law. For whatever has not been achieved so far does not necessarily mean that it cannot or can never be achieved. Possibility of achieving the objective of developing a grand theory of law must take into account the known reality of law. Some of known reality of law are described as follows.

Firstly, reality of law is largely (though not solely and exclusively) defined by the law itself. Law itself tells what it is. In law a word means what the law chooses it to mean. Law may make different and conflicting choices as the meaning of a legal term. Every Statute states the objects and reasons of it. It has a definition clause. It creates a mechanism of realizing its objects. If there is a disconnect between the mechanism and the object or the object itself seems to be unfair and unreasonable the courts resolve the issue with interpretation-construction devices by adversarial method in the common law system. The adversarial method in its course produces at least two versions of reality of law. Finally, the judge determines the reality of law on the basis of her ideology and the arguments of the lawyers (adversaries).

Reality of law whether determined by the Statute or declared by the court is a reality for the time being in force.

Secondly, law is considered to be dynamic. This view neglects the fact that law is also constant for the time being till it is in force. Further, it is a fundamental principle of law that every constitutional provision and every statutory provision is presumed to be valid. This presumption is a strong presumption (though rebuttable) and one who challenges the validity thereof has a heavy burden to establish the invalidity thereof. Further, adherence to precedent is the rule and overruling is an exception. Both these principles of presumption of validity or adherence to precedent establish that for all practical purposes law is constant. Dynamism of law is an exception. Both these features together accommodate the demand of certainty in law as matter of rule and flexibility in law as matter of exception. This idea is integral to the idea of common law that at common law rules and exceptions are born together as twins.

Thirdly, subject of the grand question is law made by humans for humans. Hence, reality of law is man-made, therefore, artificial. Genetic material of artificial law comprises facts, human experience, fiction, and norms. To a non-lawyer it may be hard to accept how legal fiction can be real. Nevertheless, legal fiction is a reality of law. Lord Halsbury in *Salomon v Salomon* declared a company to be a 'real thing'. It is a real thing only in the eyes of law. A company exists only in the legal world not in the physical world. Reality of law is institutionally

determined. The institution of legislature makes the law. The institution of judiciary declares what the law is. In other words, courts determine the reality of law. Scholars discover the reality of law in the light of legislation, precedent, and social practices.

Fourthly, 'is' of law generally comprises of 'ought'. Where an 'is' is 'is' the 'is' (fact) thereof may not be self-evident. For example, if the thing under consideration is tangible, non-human and nonliving, e.g., a chair, a table, a cup, or a pen; an image gets formed in our brain and we recognize such things with the given names. In other cultures, these things may have other names. Wherever, the same name is used to identify the same thing, the thing referred to by that name is understood by the participants. But if we ask: what is the reality of chair? Understanding explain the reality of chair does not remain that easy for there are several types of chairs meant for different purposes. Whether arm rest is an essence of a chair? Or only backrest, seat, and leg(s) are essential parts of a chair. The problem gets heightened when "ought" – an intangible – is to be described as "is". Law as such is 'ought' and an intangible. Brain is incapable of forming an image of intangible. Tangible is perceptible through senses. Intangible is not perceptible but can be conceived. Text of law is perceptible. But text of law is not law. After perception and conception, description may begin. Description is expression of conception and/or perception.

Fifthly, law is prescriptive. Answer to the grand question, however, is descriptive. Description of reality of law is multidimensional,

multifaceted, and multilayered. This multi-ness of the reality of law exists at least for three reasons. One, it is a product of the multiple and varied vantage point and focus that each describer chooses to describe the reality of law with. If the describer focuses on the “nature” or “features” the description will of the intrinsic quality of law. If the describer focuses on the “results” or “consequences” the description will of realization of objectives of law. If the describer focuses on the “structure” or “functions” the description will of the working of law. If the describer focuses on “actors” or “participants” the description will of actors’ role orientation, or role expectation, or role behavior (or role performance). These descriptions will vary according to the vantage point the describer has chosen to focus. Two, reality of law may vary from individual to individual: philosophers, jurists, judges, lawyers, other legal actors and officials, laymen, and criminals may have different notions of reality about the same law. Even two lawyers or two judges, those who are trained in law, may have different realities of the same law. Three, reality of law per se may be inchoate in the absence of the realities of society, justice, power, morality, and ideology for reality of law is fundamentally and inseparably related with these.

The above given paragraphs make out a case that reality of law or ‘is’ of law is problematic by and in itself. Problematic nature of the reality of law comes in the way of the grand answer to the grand question for following reasons.

One, problem of meaning is an ancient, persistent, perennial and global problem particularly in legal discourse. Problem of meaning of statutory provisions and other legal instruments are decided by the Courts with the help of interpretation-construction processes. However, in some landmark cases the real problem of meaning begins after decision of the Court. Courts are expected to clarify the meaning of statutory provisions while deciding cases. However, some landmark decisions of the Supreme Court of India demonstrate otherwise.

Two, problem of answering the grand question exists at different levels: conceptual level, definitional level, drafting level, level of judgment writing, level of notification of law, level of implementation of law, level of enforcement of law, level of relief granted or not granted as per law, level of behavior of: citizens, witnesses, experts, public servants, politicians, legislators, judges, and other legal actors.

Three, problem of plenty of answers is exacerbated by the abstract language used by the scholars. Scholars generally write for scholars. They rarely write for students or beginners. Abstract writings assume existence of knowledge of prior literature on the part of the reader which is generally not the case with at least undergraduate law students. Abstract writings necessarily give birth to the problems of ambiguity and vagueness. Words derive their meanings from people, i.e., the sense or senses people use a particular word. People at the same place or at different places use the same word in different senses. Some of such meanings get recorded in dictionaries. It is known that words are

polysemous. Any dictionary of any language has several entries of meaning of a word. At the dictionary level, the problem is that dictionaries do not tell which of the dictionary meanings a word has in any given text or context. At best dictionary meanings may be only be used to begin with. Then comes the text in which a word is used. Other words in the text may help find the meaning of the word in question provided the meaning of other words in the text are not ambiguous, vague, or contested. So far as text of a constitution or statute is concerned, every definition/interpretation clause thereof has the caveat “unless the context otherwise requires”. Even if the context does not require otherwise, even then the same word may have different meanings in the same statute. This method is generally described as intrinsic or internal aids of meaning, i.e., context within the text. The context of the text may be without or outside the text. This method is generally described as extrinsic or external aids to meaning. Ambiguity presents the problem of two or more meanings at the core. Whereas, vagueness presents the problem of inclusion or exclusion generally at the level of penumbra and fringes. This is how both ambiguity and vagueness come in the way of clear meaning. Further, the answers to the grand question are couched in difficult language and their structures are complex, prolix, and obese. It would have been better had legal scholars should have first stated the answer to the grand question and then developed the said answer. In the alternative, they could have summarized the answer to the grand question in the conclusion. But they do neither. They write big and obese tomes or articles and leave it

to the wisdom of readers to cull out the answer to the grand question on their own by reading their writings.

Four, the largeness and opacity of answers make the answers opaque. One may easily miss the tree in the dense forest. In addition to academic writings, there are judicial writings, too many statutes, too many rules and regulations, too many bye laws, too many orders, too many notifications, too many customs, and too many precedents. Neither a lawman nor a layman can claim to know all the laws for the time being in force. The obesity is not merely a problem of numbers. Law is obese at least four dimensional: number, size, repetition and conflict. There are too many laws dealing with the similar subject matters.¹⁰ Operating in different fields in theory at least. Sometimes they are overlapping and even conflicting. Both obesity and opacity are problematic. Be it the obesity of human body or that of the legal system. Obesity is a fertile mother of many diseases. Opacity does not allow one to see at all or at the least block a clear view.

Part – III: Conclusion

There are problems in answering the grand question. Problems are of different types and of different layers. However, there seems to be a way out. The way out is that if we know the purpose of knowing before

¹⁰ Statutes relating to labour and environment are leading examples.

trying to know, the problem of knowing may be solved to a great extent. For example, if the object of knowing is a rose, the same rose will smell the same to everyone having the ability to perceive smell. But the reality of the rose for: a botanist, a physicist, a chemist, a pharmacist, a druggist, a gardener, a florist, a microbiologist, a biochemist, a biotechnologist, a nanotechnologist, a geneticist, an historian, a poet, or a lover will be different, for, each of them have a purpose different from one another. A poet may describe his love as a rose. A jilted lover may hate roses, for, roses remind him of bad memories. Same seems to be true about the grand question.

I conclude this essay with a personal story. During my school days, I asked my father about something – a thing I do not remember now. My father responded by saying, “*Sawal aisa ho, jis par na phir jawab chaley*” (Question (demand) is such which must be accepted without any demur). I responded by saying, “*Ki agar aisa ho ki jawab aisa ho, jis par na phir sawal chaley*” (What if the answer is such which must not raise any further question). With this, the dialogue between the father and the son concluded. I felt triumphant. Neither my father nor I realized then that though I appeared to disagree with my father but in reality, I was in agreement with him because my opening words were “what if”. I also asked a question in response to an answer. Now I think that my father was right. Had my father been asked the grand question what is law. He would have responded by saying, “*Sawal aisa hai, jis par na kuch jawab chaley*”.

The question is: whether or not is it possible to find denominators common to all the answers? I leave this question with the readers and rest my case, if there is one, for the time being.