

PHILOSOPHICAL RESEARCH IN LAW: THE POSSIBILITIES

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Philosophical research is an indispensable instrument in the toolbox of a legal researcher. In spite of being abstract in the higher levels of reasoning, the philosophical approach to legal research is expected to be rooted in social realities. In this paper, I seek to demonstrate that at both lower and higher levels of jurisprudence, and in specific and general research inquiries, the possible assistance that can be derived from philosophical research is substantial. By delineating its key features, and by abstracting instances through 'reverse engineering', I attempt to assert the indispensability of philosophical research in law. I also undertake an interdisciplinary analysis to demonstrate its potential for facilitating the development of the legal system through employment of tools and processes such as intuitionism, dialectical method and reflective thinking. Thus, deconstructing the philosophical research in law through the lens of adjudicative and norm-building processes has practical advantages.

I. INTRODUCTION

The journey of knowledge-generation traverses through the field of science and the realm of philosophy. The task of reasoning, especially at higher levels of research, necessitates transcendence from mere empirical evaluations to explorations of value-discourse and philosophical precepts.¹ In the words of Josef Kohler, after science has done its part through perception by the senses, the critical task of abstracting theoretical insights falls within the domain of philosophy.² John Dewey asserts that in such contexts, philosophy does not add any knowledge beyond science; but, by concerning itself with values and ends, which are supported by known facts and principles, it helps in drawing inferences.³ Isaiah Berlin observes:

“The perennial task of philosophers is to examine whatever seems insusceptible to the methods of sciences or everyday observation, e.g., categories, concepts, models, ways of

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¹ F.L. WHITNEY, ELEMENTS OF RESEARCH 5-6 (1946).

² JOSEF KOHLER, PHILOSOPHY OF LAW 3 (2010).

³ JOHN DEWEY, THE DETERMINATION OF ULTIMATE VALUES, *The Scientific Movement in Education* 473 (1938); BERTRAND RUSSELL, MY PHILOSOPHICAL DEVELOPMENT 276 (1959) (Science is what we know and philosophy is what we don't know); M.D.A. FREEMAN, LLOYD' INTRODUCTION TO JURISPRUDENCE 13-4 (8th ed., 2011).

thinking or acting, and particularly ways in which they clash with one another, with a view to constructing other, less internally contradictory, and (though this can never be fully attained) less pervertible metaphors, images, symbols and systems of categories.³⁴

By helping overcome the blind adherence to outdated notions and by involving in rational analysis and critical self-examination, philosophical inquiry helps men to transcend themselves, and to thus seek light in the wilderness of ignorance.⁵ The farther one travels in the terrain of philosophical inquiry, the more one is endowed with the capability of envisaging ideas as abstract generalisations, much akin to a giant aircraft that becomes a small moving speck in the sky as it penetrates the immeasurable vastness of space. Nevertheless, ideas are socially and factually grounded. The age-old question as to whether legal theory is independent of legal praxis, or whether law possesses such autonomy that it can be detached from values of the community in which it is found, is still hotly debated.⁶ This paper argues that both at the lower and higher levels of philosophical inquiry in legal research, as outlined above, the theoretical exercise has strong links with social realities and goals.

The role of philosophy in theory formulation and imparting coherence to intellectual pursuits is considerable. Owing to such close interplay between facts and theories, philosophical research becomes a ubiquitous element in all serious research undertakings.⁷ The love of wisdom is central to philosophy.⁸ This necessitates a logical progression, from inquiry into the values underlying the themes discussed and their practical application, to a delineation of broad overarching conclusions. The originality of the scholar's contribution, therefore, lies in building the concepts, and bridging them beyond the limitations of time and space.

⁴ ISAIAH BERLIN, *THE PURPOSE OF PHILOSOPHY, CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* 1 (H. Hardy, ed., 1999) (cited in Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 *UNIVERSITY OF TORONTO L. JOURNAL* 374 (2001)).

⁵ *Id.*

⁶ Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 *CANADIAN JOURNAL OF L. AND JURISPRUDENCE* 67 (2006).

⁷ WILLIAM J. GOODE & PAUL K. HATT, *METHODS IN SOCIAL RESEARCH* 7-16 (1952) (According to the authors, theory provides scope for, or makes it easy to do, orientation, conceptualisation, summarisation, and prediction, whereas facts enable us to initiate theory, reject or modify the existing ones and clarify or redefine it).

⁸ See Vocabulary.com, *Philosophy*, available at <https://www.vocabulary.com/dictionary/philosophy> (Last visited on May 29, 2017). Etymologically, the Greek words *philo* (love) and *sophos* (wisdom) combine to denote love of wisdom or search for wisdom or study of fundamental nature of life and the world. The award of degrees of Masters of Philosophy and Doctorate in Philosophy recognises the capability of the candidate to engage in research resulting in theorising or philosophising in the academic context.

Philosophical discourse becomes intellectually relevant, especially given the gaps in experience and uncertainties pertaining to future developments and scope for prognosis. Insofar as social sciences like law are concerned, where open-ended concepts and principles are galore, the potentiality of philosophy for achieving such ends is enormous. Law has a wide reach on various aspects of individual and collective life, human relations, transactions and institutions. Concepts like law, justice, morality, punishment, right, property, constitutionalism, welfare, human rights, multiculturalism, family, personality, obligation as well as multifarious legal policies have attracted significant philosophical discussion. A rich body of literature in jurisprudence, diversity in views on numerous controversial socio-legal issues, and ongoing debates on contemporary matters of legal reform substantiate the high output of philosophical research in law. They centre on man and culture, and deal with the conceptual understanding of legal categories. Thus, theoretical or philosophical legal research operates in the domain of jurisprudence.

Australian legal scholars have categorised such research as encompassing “research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effect of a range of rules and procedures that touch on a particular area of activity.”⁹ According to Kohler, the purpose of philosophy of law “is to examine what underlies the realm of the phenomena; and to explain to us whether there are powers, and what they are, behind what we have perceived with our senses, and what our reason has given us to understand.”¹⁰ Unearthing the basis of these powers, and examining the factors that move humanity forward, is the task undertaken by philosophical research in law.

From the preceding discussion, it can be inferred that philosophical research in law takes place in two spheres: one, at the general level, where theoretical discourse is conducted as part of the final levels of reasoning in the matter of particular law; and two, when exclusive jurisprudential inquiry probes into the deeper theoretical aspects of the nature of law, legal system, and legal concepts and approaches. Rudolf von Jhering’s distinction between lower jurisprudence and higher jurisprudence bears relevance to this approach. According to Jhering, a well-known German jurist and scholar, lower jurisprudence focuses on the interpretation of legal rules and principles; whereas higher jurisprudence, as is found in ‘juristic construction’, revolves around imparting internal order, symmetry and unity to the multifaceted and dynamic legal system.¹¹ After abstraction and concentration (combining), the researcher engages

⁹ PEARCE D., CAMPBELL E. & HARDING D., AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION 6 (1987) (cited by TERRY HUTCHINSON, RESEARCHING AND WRITING IN LAW 9 (2002).

¹⁰ KOHLER, *supra* note 2, 3.

¹¹ RUDOLF VON JHERING, UNSERE AUFGABE 7-9 (1857) (cited by Uta Bindreiter, *On Constructive Legal Science: Then and Now*, 97 (1) ARCHIVES FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 85 (2011)).

in distilling and aggregating the concept, so as to engage fully in the task of construction.¹² Jhering said that this involves a dialectic process where “the concepts are productive, they mate and beget new concepts.”¹³ The outcome of such construction stands above moral and social demands because of its enduring value.

Jhering’s predecessor, Gerber, had also spoken about the juristic method by which one could separate the unimportant, political and factual elements from legal substance.¹⁴ Vilhelm Lundstedt, another German jurist, argued that while a discourse on legal institution or concept may very well consider the historical and actual significance of legal ideology, it shall not base its arguments “except on social realities, i.e., people, as they are physically and psychologically constituted, the facts which form condition precedents for people’s relation with each other, these relations themselves, and the actual aspirations of people.”¹⁵ A contemporary German jurist, Aleksander Peczenik, believes that a constructive legal scholar should try to establish the intellectual bridge between lower and higher degrees of abstraction by looking at the whole description of legal rules, cases, travaux préparatoires, as well as scholarship in history, comparative law and philosophy.¹⁶

Uta Bindreiter lists various levels of mental activities involved in legal research, which range from lower to higher, as follows: description and analysis of cases (concrete level); technical solutions (normative consequence); historical comparative research (normative consequence); abstract representation of legal institutions and legal doctrines (normative consequence); investigations from the perspective of moral philosophy; and fundamental philosophical positions underlying general legal theory.¹⁷ She proposes that one should look at the mental processes involved in all these levels as comprising an integrated systemic chain. Terry Hutchinson, on noting the links between intellectual engagement and social reality, states that the present tendency is to reduce the gap between the theoretical and the practical, even in jurisprudential discourse, by making the philosophical rationale relevant for the real world.¹⁸

With reference to the two categories of philosophical research in law, as delineated above, instances for the general level can be found in

¹² *Id.*, 86.

¹³ *Id.*, 87.

¹⁴ CARL FRIEDRICH VON GERBER, *SYSTEM* (1891) (cited by Bindreiter, *supra* note 11, 84).

¹⁵ Vilhelm Lundstedt, *Law and Justice: A Criticism of the Method of Justice* in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHERS: ESSAYS IN HONOUR OF ROSCOE POUND* 450-483 (1947) (cited by Bindreiter, *supra* note 11, 92).

¹⁶ Aleksander Peczenik, *Värdenihilismen och den konstruktiva juridiken (Non-cognitivism and Constructive Jurisprudence)*, 10 *JURIDISK TIDSKRIFT* 462 (1998) (cited by Bindreiter, *supra* note 11, 97).

¹⁷ Bindreiter, *supra* note 11, 98.

¹⁸ HUTCHINSON, *supra* note 9, 10.

conceptual discussion or conclusions in research works, journal articles and dissertations on particular laws. Instances for the second category, which involves targeted jurisprudential inquiry, may include works such as John Rawls's 'Theory of Justice', Josef Kohler's 'Philosophy of Law', Amartya Sen's 'The Idea of Justice', Upendra Baxi's 'The Future of Human Rights', John Finnis's 'Theory of Natural Law', and the writings of Roscoe Pound, Martha Nussbaum, Julius Stone and other scholars.

This paper attempts to examine the steps involved in philosophical discourse at the level of higher jurisprudence, by resorting to reverse engineering of the underlying concepts. It seeks to explain the nature of philosophical research in the domain of law, the needs for such discourse, the processes employed and steps formulated for such research, and the possibilities imbricate in the explorative journey of philosophy. It also evaluates the place of philosophical research amongst the various methods of legal research. In Part I, I undertake a study of the key features of philosophical research in law, which facilitates the investigation into the need for such research in Part II. An exploration of the legal, jurisprudential, sociological and epistemological analyses help to render this analysis suitably holistic, and serve to highlight the intricate interconnections between philosophical research and other modes of research. In Part IV of the paper, I outline the specific processes and tools employed in the course of philosophical research; and in Part V, I seek to map the steps discernible in sample philosophical works in law, by discussing judicial and jurisprudential applications of philosophical research, through the process of 'reverse engineering'. I summarise the key conclusions and suggestions in Part VI of the paper.

II. FEATURES OF PHILOSOPHICAL RESEARCH IN LAW

Philosophy, according to the Greeks, includes all forms of serious intellectual inquiry, including science. In the course of time, theoretical philosophy began to contemplate *a priori* reasoning, so as to know the eternal truth underlying the particularities and contingencies of ordinary human life. This came to be known as praxis, and such inquiry focused on understanding the idea of 'good', and on specifying it in the form of modes of human conduct. The 'why' question dominates over questions of 'how' and 'what' in philosophical inquiry; whereas science deals equally with questions of 'how', 'what' and 'why' of particularities. At higher levels of scientific inquiry, which merges with the lower layer of philosophical thinking, the process of analysis is crucial. Here, a logical examination of the individual components and their aggregate idea, on the basis of linguistic analysis, is necessary.¹⁹

¹⁹ STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, *Bertrand Russell*, March 10, 2015, available at <https://plato.stanford.edu/entries/russell/> (Last visited on May 29, 2017) (Bertrand Russell,

Further, the propriety of law, legal procedures and legal institutions forms an important subject matter of analytical philosophy in legal research. A researcher will also have to engage in normative or speculative philosophy, that is, the intellectual exercise of finding universally acceptable solutions to questions on the nature of justice, the potentiality of law and the purpose of organised society. For instance, Gautama Buddha's observation of penance led him to articulate answers to questions such as why miseries occur and continue to haunt human beings, thus resulting in enunciation of ideals and morals that could assist in overcoming such challenges.²⁰ Similarly, Sri Shankaracharya used speculative philosophy to explain why unity between the individual soul and the universe exists.²¹ In contrast to the scientific method which seeks concrete, definable, delimited, objective and testable findings, philosophical research embraces both the actual and the possible, and has a highly inclusive approach as it even accommodates vague and convoluted ideas.²² The eagle eye of the philosopher overarches perceptions, and brings within its purview both 'is' and 'ought', value and beauty, and sound and light.²³

In order to facilitate implementation of philosophical findings, the idea of practical philosophy was developed. Practical *Vedanta*, as popularised by Swami Vivekananda, preached love, compassion and equal respect for all, which was instrumental to effectuate the concept of '*thou art that*' or '*tat tvam asi*'.²⁴ Thus, as an extended part of scientific inquiry, philosophical study raises normative debate and engages in speculation regarding possible answers. Just as law is dependent upon a theoretical base – founded on morality, utility, and goals of welfare, justice and values – legal philosophy gathers strength from legal norms.

Halpin suggests two alternative positions of what he calls 'intellectual pyramid of philosophy': first, human potentiality of social relations keeps methodology of theory up in the air; and second, methodology, being the deepest and the most basic element of human existence from which law, theory and social relations emerge, would invert the pyramid and secure it firmly on, and even embed it within, the ground.²⁵ The second situation, according to him,

a prominent philosopher who revolted against idealism and embraced rationalism, believed that philosophy needed a technical language for analysis; that inferences and knowledge add to philosophy; and that propositions with the highest degree of self-evidence include abstract logical and arithmetical principles and ethical propositions.)

²⁰ ROMILA THAPAR, A HISTORY OF INDIA 66-67 (1981).

²¹ Surendranath Bhattacharyya, *The Philosophy of Sankara* in THE CULTURAL HERITAGE OF INDIA, Vol. 3 239 (Haridas Bhattacharyya ed., 1975); Swami Ghanananda, *Indian Theism by Swami Hiranmayananda* in ASPECTS OF INDIAN CULTURE 539-40 (Swami Sarvabhadrananda ed., 2013).

²² Mary J. Reichling, *On the Question of Method in Philosophy*, 4 PHILOSOPHY OF MUSIC EDUCATION REVIEW 117 (1996).

²³ *Id.*, 117-118.

²⁴ Swami Vivekananda, *Practical Vedanta: Part I* in COMPLETE WORKS OF SWAMI VIVEKANANDA, Vol. 2 113 (1907).

²⁵ Halpin, *supra* note 6, 68.

is a marvel which expects the strength of the inverted apex to uphold the colossal mass above it. This would be possible only when the intellectual energy of the creative society is directed in an organised manner. Thus, theory is not a 'freak of imagination', but a response to the facts of life. Several schools of law agree with this proposition. Roscoe Pound writes:

“For twenty-four hundred years – from the Greek thinkers of the fifth century B.C., who asked whether right was right by nature or only by enactment and convention, to the social philosophers of today, who seek the ends, the ethical basis and the enduring principles of social control – the philosophy of law has taken a leading role in all study of human institutions.”²⁶

The very idea of social engineering and the whole body of sociological school's literature greatly emphasise on social facts in using the legal instrument for social reforms. Leon Duguit built the concept of social solidarity on the basis of facts of division of labour and mutual dependence of people. The economic school of law believed that the fundamental social cause of excesses which violate the rules of social life is the exploitation of the masses, their want and their poverty.²⁷ Karl Marx considered that the mode of production of material conditions of life, and the conditions of social, political and intellectual life-processes in general, determine the consciousness of people, and that the superstructure of law arose from such groundings.²⁸ According to him, class struggle between the capitalists and the workers was the factor that shaped the growth of society, and law assumed the responsibility of settling the conflicts.²⁹

When realists like Karl N. Llewellyn argued that society changes faster than law, and so there is a constant need to examine how law meets contemporary social problems, they based their reasoning on objective observation of realities.³⁰ Positivists are also concerned with social realities. H.L.A. Hart explains law in general as a complex social and political institution, and a theory of law is therefore a theory of social facts about beliefs, attitudes and actions that constitute a legal system.³¹ It is a morally neutral norm, amenable to linguistic analysis and folk understanding. According to him, law is combination

²⁶ ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 15 (1922); see Peter Ziegler, *A General Theory of Law as a Paradigm for Legal Research*, 51 (5) MODERN L. REV. 569 (1988).

²⁷ LENIN, STATE AND REVOLUTION 70 (1917); R.W.M. DIAS, JURISPRUDENCE 398 (1994).

²⁸ KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 1168 (1859) (cited by FREEMAN, *supra* note 3, 1134).

²⁹ DIAS, *supra* note 27, 401.

³⁰ Karl L. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARVARD L. REV. 1222 (1930-31).

³¹ See Alex Langlinais & Brian Leiter, *The Methodology of Legal Philosophy* in THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY 672 (H. Cappelen, T. Gendler & J. Hawthorne ed., 2013).

of primary rules of obligation and secondary rules of recognition; where the latter, which is a prerequisite for law's validity, is a social rule constituted by the convergent practice of its legal officials.³²

The connection between philosophical research and other historical, analytical, empirical and comparative methods is crucial to this analysis. Alex Thomson regards the philosophical method as supplementary to the historical method of research.³³ Further, history's engagement in the growth of ideas and categories has helped philosophical research in law. Schlegel believes that just as historians engage in explanations and interpretations which give insights into the philosophical understanding of social development, philosophical inquiry is similarly benefited by the study of historical practice.³⁴ Jhering has emphasised on the importance of analytical research in juridical-theory construction.³⁵ Hegel considers that thought, which is co-terminus with experience, brings unity of activity with expression, relates subject with object, and helps in the achievement of progress in philosophical research.³⁶ In order to conduct a scientific research in law, developing a general theory of law is helpful, and this can be better carried through a comparative study of statics and development of an appropriate paradigm in the law.³⁷

Thus, philosophical research lends a theoretical account of the distinctive nature of human action to a researcher engaged in 'action research', which is a type of empirical research.³⁸ Legal research, conducted by any method, inevitably raises the issues of law-morality relations. Issues relating to propriety of capital punishment, and punishment for homosexuality and abortion, require the researcher to engage in philosophical discussion, which supplements other methods of research.³⁹ Thus, mutual assistance in the course of employing various methods of research and the need for concerted use of multiple methods is clearly visible in the context of legal research.⁴⁰ This emphasises the significance of inter-disciplinary study in the area of philosophical research as well.

³² H.L.A. HART, *THE CONCEPT OF LAW* 59-62 (1961); see FREEMAN, *supra* note 3, 382-3; Martin Krygier, *The Concept of Law and Social Theory*, 2 OXFORD JOURNAL OF LEGAL STUDIES 156 (1982).

³³ Alex Thomson, *Historical and Philosophical Methods in Jurisprudence*, 7 JURID. REV. 66 (1895).

³⁴ John Henry Schlegel, *Philosophical Inquiry and Historical Practice*, 101 (4) VIRGINIA L. REV. 1197 (2015).

³⁵ Bindreiter, *supra* note 11, 86.

³⁶ Viscount Haldane, *On Philosophical Research*, 16 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 51 (1915-16).

³⁷ Ziegler, *supra* 26, 569.

³⁸ Wilfred Carr, *Philosophy, Methodology and Action Research*, 40 (4) JOURNAL OF PHILOSOPHY OF EDUCATION 421 (2006).

³⁹ *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24; *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1; *X v. Union of India*, (2016) 14 SCC 382.

⁴⁰ Christopher McCrudden, *Legal Research and the Social Sciences*, 122 LAW QUARTERLY REVIEW 636 (2006).

Jeno Szmodis exhorts use of the multidisciplinary approach to legal research, from a philosophical viewpoint, on account of the following reasons: *first*, study of human nature has an impact upon legal concepts; *second*, human ethology explains the evolutionary factors and processes whose elements vary from culture to culture; and *third*, psychology and biology help in developing scientific vision about human nature.⁴¹ He gives the example of slavery being opposed to human nature, which Aristotle thought as coming from nature, on the basis of his contemporary cultural surroundings. Roger Cotterrell opines that without a sociological perspective on legal ideas, it would be difficult to recognise and analyse the intellectual and moral power of law.⁴²

Another prominent feature of philosophical research is its penchant for bridging relations. An individual's relation with his/her fellow mates and with society, inter-class and inter-culture relations, relations of all with governments, nations, the international community and with nature, constitute a rich terrain of philosophical discussion. A holistic consideration of various methods, relations and disciplines fall within the realm of the philosophical method. Viewing the big picture, with an eagle eye, is its proverbial tower of strength.

With regard to the kinds of philosophy, it is possible to list three major categories: axiology, epistemology and ontology. Axiology is the philosophical study of value or goodness, which involves thinking, judging and willing as its mental processes; and ethics and aesthetics as its domains.⁴³ Not all values are universal. They are structured hierarchically in the following manner: sensory values, life values (vitality and health), spiritual values (truth, justice and non-violence), and values of holiness. Epistemology, or the theory of knowledge, states that knowledge is a justified true belief based on reliable evidence and coherent reasoning.⁴⁴ Perception, introspection, memory and reasoning are sources of knowledge; however, psychological factors which lead to bias may disqualify reliability.

Deontology is a science of duties, and has theorised on agent-related obligations and victim-centred rights.⁴⁵ Kant's categorical imperative, a prominent expression of deontology, demands that man as a rational moral

⁴¹ Jeno Szmodis, *On Multidisciplinary Legal Research*, 98 (4) ARCHIVES FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 491-492 (2012).

⁴² Roger Cotterrell, *Why Must Legal Ideas be Interpreted Sociologically?*, 25(2) JOURNAL OF LAW AND SOCIETY 181 (1998).

⁴³ NEW WORLD ENCYCLOPAEDIA, *Axiology*, available at <http://www.newworldencyclopedia.org/entry/Axiology> (Last visited on May 29, 2017).

⁴⁴ STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, *Epistemology*, available at <https://plato.stanford.edu/entries/epistemology/> (Last visited on May 29, 2017).

⁴⁵ Ali Shakil, *Kantian Duty Based (Deontological) Ethics*, available at <http://sevenpillarsinstitute.org/morality-101/kantian-duty-based-deontological-ethics> (Last visited on May 29, 2017).

agent should act in an ideal way that sets universal law; and that he should treat humanity not only as a means to an end, but an end in itself. Utilitarian approach, in contrast, considers that the validity of consequence determines the validity of the act. Kant's approach has a weakness in that it denounces any act that causes harm to any person, even though it brings benefit to humanity.

III. REASONS FOR ENGAGING IN PHILOSOPHICAL RESEARCH IN LAW

There are multiple reasons why a legal researcher shall engage in philosophical research, whether at the lower level or at higher level.

First, legal research delves into human transactions, which are embedded in the complex nature of human beings, their interrelated existence and the culture of the community. The historical evolution of culture and its inclination toward progress has produced numerous ideologies, as reflected in natural law and other literature. Such ideologies, as well as ideologies of political, economic and social character, can be critically understood by an insight of philosophical discourse. The core of philosophy consists of critical study of ideologies.⁴⁶ The social life of human beings, customs, and the institutions, like family and organisations, has engendered value-systems which can be understood through philosophical research. Kohler observes: "As the philosophy of mankind, the Philosophy of Law must be based on the world; for only as part of the world and as a lever of the world process can man's significance be comprehended and his activity adjudged."⁴⁷ What is the meaning of evolution, what is its direction, and what is the responsibility of humanity for dignified survival and harmony, can be analysed with the help of philosophy. Philosophy can unravel the reasons for appropriate relations of human beings with other human beings, society, nation, nature and the universe. Through philosophic inquiry, the idea of equal human worth can overarch with basic notions of dignity, justice, welfare and co-existence.

Second, law as a normative category has close ties with morality. The ethical foundation of society has roots in philosophical understanding of the ideal ways of life. The transformation of individual ethics to social morality and the continuation of morality with appropriate changes from time to time have moulded the life of law. The questions of legitimacy of law have attracted the discourse of social morality. Ethics, ethnology and ecology unravel the philosophical roots of law. Vedic notions of order (*ṛta*) and truth (*satya*) presupposed that social organisation stood on the base of mutual trustfulness and

⁴⁶ Ralph A. Smith, *Ideologies, Art Education and Philosophical Research*, 24 (3) STUDIES IN ART EDUCATION 165 (1983).

⁴⁷ KOHLER, *supra* note 2, 12.

truthful speech and conduct.⁴⁸ The belief about the relation between acts and their fruits became firm in the course of time.⁴⁹ The moral principles based on religion, caste (*varna*) and stages of life (*ashrama*) prescribing definite patterns of behaviour came into vogue.⁵⁰ Aim at perfection (*sreyas*) called for puritan path. Universal duties were prescribed by *brahmanical* morality to mitigate the evils of bad conduct (*ari shadvarga*) through self-restraint.⁵¹ It was believed that securing of happiness at home and justice in society required following of the prescriptions of right conduct, of the paths of friendliness, compassion, tolerance, cleanliness and control over mind. Moral obligations were linked to spiritual benefits. Vast literature in Hindu, Buddhist and Jain religions have extensively dealt with morals to be followed in individual and social life. Popular epics and *Bhagavadgita* have set examples of high moral conduct. With time, charity became an instrument of social justice and a great supporter of humanism and ecology. Morality emerged as part of the educational process, as evident from valedictory advice traceable in *Taittiriya Upanishad*.⁵² Subaltern culture,⁵³ supplementary religious paths paved by Bhakti movement,⁵⁴ and newly introduced religions like Islam and Christianity, built widespread and pluralist domains of morality with a tolerant note. Although social morality did not effectively address all prejudices based on caste, gender and creed, its material wisdom became intertwined with legal principles in due course. Thus, morality as a part of culture produced shared ideals that supported the structure of legal system. The *trivarga* principle substantively connected morality with law.⁵⁵ The communitarian moral foundation of law became a source of its normativity and the reason for its social acceptance.

Third, when the modern legal system introduced the concepts of freedom, equality, justice and welfare, questions arose whether law would continue to be embedded in morality, or whether it would challenge and purge morality with new standards. The Indian Constitution preferred morality over religion.⁵⁶ Owing to the extent of societal involvement in the evolution and concretisation of moral values and the pluralist base for moral norms and sensitive

⁴⁸ Haridas Bhattacharya, *Indian Ethics* in THE CULTURAL HERITAGE OF INDIA, Vol. 3 629 (Haridas Bhattacharyya ed., 1975).

⁴⁹ Bhagavadgita, Buddhism and Jainism also preached benevolent conduct for benevolent outcomes.

⁵⁰ Bhattacharya, *supra* note 48, 622.

⁵¹ The six evils included *kama* (lust), *krodha* (anger), *moha* (attachment), *lobha* (miserliness), *mada* (extreme pride), and *matsara* (jealousy).

⁵² Swami Sharvananda, *Eleventh Anuvaka* in TAITTIRIYA UPANISHAD, 40-49 (1921).

⁵³ Tribal culture, Tulu literature and folklore depict moral structure of the respective communities.

⁵⁴ The writings of Shiva Sharanas like Basavanna, Allama and Akka Mahadevi, and the songs of Kabir, Nanak, Tiruvallavar, Tukaram, Chaitanya and a host of others lay emphasis on inner and outer purity.

⁵⁵ JUSTICE M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 6 (1984). (quoting the MANUSMRTI, Chapter 4, Verse 176 – “the desire and wealth must be rejected if they are contrary to dharma”).

⁵⁶ The Constitution of India, Art. 25.

attachment to such values in the Indian context, these questions deserve a treatment different from that given to them in the West. In the West, the democratic State's competence to rule on matters relating to morality was questioned by Lord Devlin when the Wolfenden Committee recommended decriminalisation of homosexual relations amidst consenting adults in the private space.⁵⁷ He argued that the institution of marriage, built on considerations of morality, was at peril at the time as people had less inclination towards self-discipline due to the upsurge in the libertarian attitude. He reasoned that as moral ideas are part of the fabric of a society, any detriment to them threatens the very survival of the society. H.L.A. Hart, taking a utilitarian and positivist stance, argued that while some shared morality is essential to the existence of any society, this does not imply that a society is identical with its morality such that a change in morality would lead to destruction of the society.⁵⁸ Hart attacked Devlin's proposition on the ground that it could not be justified on an empirical basis, and asserted that the fear of social disintegration was only imaginary.⁵⁹ He gathered support from the views of J. S. Mill and argued that law should not interfere to uphold morality, except when a failure to do so would be disruptive to society.⁶⁰ Lord Devlin was focusing on the survival of a particular society, which was the target of dethroning of morals. On issues relating to obscene publications, abortion, passive/active euthanasia, the right to commit suicide, same sex marriage, etc., the Hart-Devlin debate has been indirectly employed in the judicial process in order to bring a deeper philosophical perspective to these issues.⁶¹ As a consequence, most of the outcomes reached by judicial decisions on these issues in the United States of America, Canada and the United Kingdom favoured libertarian arguments. The Indian cases on the right to commit suicide,⁶² legalisation of homosexuality,⁶³ discontinuance of the life support system to a terminally ill patient in a coma,⁶⁴ identification of obscene publication,⁶⁵ and exemption of woman from punishment in case of adultery (even when she abetted in the same),⁶⁶ evince that the Supreme Court has by

⁵⁷ DIAS, *supra* note 27, 114.

⁵⁸ *Id.*, 115.

⁵⁹ FREEMAN, *supra* note 3, 410-412.

⁶⁰ *Id.*

⁶¹ *Jane Roe v. Henry Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973); *Planned Parenthood v. Casey*, 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992); *Bowers v. Hardwick*, 1986 SCC OnLine US SC 165 : 92 L Ed 2d 140 : 106 S Ct 2841 : 478 US 186 (1986); *Cruzan v. Missouri Department of Health*, 1990 SCC OnLine US SC 123 : 111 L Ed 2d 224 : 110 S Ct 2841 : 497 US 261 (1990); *Washington v. Glucksberg*, 1997 SCC OnLine US SC 79 : 138 L Ed 2d 772 : 521 US 702 (1997); *Vacco v. Quill*, 1997 SCC OnLine US SC 80 : 138 L Ed 2d 834 : 521 US 793 (1997).

⁶² *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648.

⁶³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

⁶⁴ *Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454.

⁶⁵ *Sharat Babu Digumarti v. Govt. (NCT of Delhi)*, (2017) 2 SCC 18; *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, (2015) 6 SCC 1; *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600; *Samaresh Bose v. Amal Mitra*, (1985) 4 SCC 289.

⁶⁶ *Sowmithri Vishnu v. Union of India*, 1985 Supp SCC 137 : 1985 SCC (Cri) 325; *Yakub Abdul Razak Memon v. State of Maharashtra*, (2013) 13 SCC 1.

and large leaned towards upholding social morality over privacy or equality. Because of the double standards in the notion of morality *vis-à-vis* women, the potentiality of morality to influence law has been doubted in feminist thinking. It is suggested by feminist scholars that gender justice can sensitise the law-morality relation.⁶⁷ Thus, the law and morality question, and the dilemma associated with it, attract high philosophical arguments, as a consequence of which philosophical research assumes a prominent role in the debate. Lon Fuller theorised the inner morality of law, a set of values in accordance with which the worthiness of a legal system could be evaluated and its suitability for the social processes could be identified.⁶⁸ The compliance of the criteria of the inner morality of law with the legalistic approach is relevant for evaluating the efficacy of any legal system.

In the matter of legal values, professional ethics and finding the moral base for justice and human rights, philosophical research has been very significant. Terence Daintith suggests that legal research performs the greater task of dealing with formal legal values for the following reasons: one, lawyers' assimilation of formal legal values is not complete; two, these values should sensitise the power holders – governmental and economic – in their affairs and functioning; and three, conscientious pursuit of formal legal values shape the content and limits of law.⁶⁹ Delicate issues relating to professional ethics in defending criminals have called for philosophical inquiries into the role and responsibilities of a lawyer.⁷⁰ John Rawls locates justice in morality while Upendra Baxi views morality as a source of human rights.⁷¹ These intellectual efforts have emphasised on the need for linking law with morality for securing greater social acceptance for its principles.

Fourth, mingling of logical and illogical elements has posed some difficulties, the resolution of which requires philosophical inquiry.⁷² Logical elements can be found in the relation between cause and effect – benevolent consequences arising from good action and the baneful ones inflicted by evils. Space, time, chance and necessity are the illogical elements listed by Kohler, which shape the destiny of man and the contours of social and economic development of a society.⁷³ The nature of land – whether with mountains, rivers, seas, plains, minerals, forest, fertility or desert – has an impact upon social,

⁶⁷ P. Ishwara Bhat, *Restructuring the Law-Morality Discourse for Gender Justice*, 3 JOURNAL OF ACADEMY OF JURIDICAL STUDIES 1-21 (2008).

⁶⁸ LON FULLER, *THE MORALITY OF LAW* 188-189 (1969) (The values included generality, publicity, prospectivity, clarity, consistency, stability over time, practicability, and consistency through regular application.).

⁶⁹ Terence Daintith, *Legal Research and Legal Values*, 52 MODERN L. REV. 363 (1980).

⁷⁰ David Luban, *Claiming the Hearse Horse: A Philosophical Legal Research Program for Legal Ethics*, 40 MARYLAND L. REV. 451 (1981).

⁷¹ JOHN RAWLS, *A THEORY OF JUSTICE* (1971); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2013).

⁷² KOHLER, *supra* note 2, 28-9.

⁷³ *Id.*

political, cultural and economic life. Relentless flight of time is a challenge to human power.⁷⁴ The law of limitation, prescription, minority, old age, hours of labour, and determination of sequence have posed moral questions. For example, Draupadi's question whether a husband forced to be a slave, after losing in a deceitful gambling, can also render his wife a slave, is an issue related to sequence that can be resolved by the philosophical approach of causation.⁷⁵ Whether a juvenile's horrendous offence should result in reducing the age of eligibility for trial by the Juvenile Justice Board, is a question related to time, and needs to be addressed by the larger philosophy of human rights. But time is a merciless actor. In the words of Tagore: "We have no time to lose, and having no time we must scramble for our chances. We are too poor to be late."⁷⁶ It must be attempted to manipulate the factor of chance to produce more fortuitous outcomes, which are conducive to the greater social good. The chance of being rich is an opportunity to serve the unfortunate masses through charity. Similarly, moral responsibility towards disaster management gets elevated to the status of legal obligation.⁷⁷ Demands of necessity should be met by appropriate adjustments in the operation of law.⁷⁸ In light of the humanist philosophy, law cannot allow cannibalism even at the teeth of direst need.⁷⁹ Philosophy supplies the approaches to deal with the illogical elements, much as it justifies the inevitable consequences that flow from the logical ones.

Fifth, resolution of deficiencies that occur in the practice of law calls for assistance from theories. Halpin considers four situations where theoretical discourse helps in overcoming legal deficiencies.⁸⁰ One, the occurrence of a novel situation cannot be addressed by a standard norm. For example, innovation in the field of gynaecology provided information about the defective positioning of the foetus and the means for termination of pregnancy. Application of the old law may not have provided solutions regarding the choices open to a woman. Halpin says that in such a situation, one should reflect over the rationale beneath the existing practice and work out appropriate responses to the new situation. Two, limitations in the present legal system may help in seeking answers through theoretical discussions. For example, occurrence of a mass tort affecting thousands of people may challenge the existing legal norms and procedures. Halpin believes that theory can remediate, by enlightening on the connection between the actual practice and the bigger picture and by revealing

⁷⁴ D.R. Bendre's Kannada poem 'Hakki Harutide Nodidira' (1982) depicts the flight of the time (bird) changing the fates of ages, dynasties, continents and communities, blessing with transformations and cursing with punishments.

⁷⁵ KOHLER, *supra* note 2, 33.

⁷⁶ RABINDRANATH TAGORE, GITANJALI 159 (1910) (Poem 82 reads: "Time is endless in thy hands, my lord..." Tagore also wrote, "Time is wealth of change, but the clock in its parody makes it mere change and no wealth.").

⁷⁷ N.D. Jayal v. Union of India, (2004) 9 SCC 362, ¶¶ 56, 57.

⁷⁸ The principle is called *jus necessitates*.

⁷⁹ R. v. Dudley and Stephens, (1884) 14 QBD 273.

⁸⁰ Halpin, *supra* note 6, 72-73.

new dimensions of law. Three, theory, according to Halpin, can help in distinguishing healthy parts of the legal norm/system from its diseased parts, and thus provide means to remedy the diseased parts. Four, when the current practice is so diseased that it cannot be remediated, theory helps by suggesting suitable alternatives on the basis of an understanding of what is intrinsically appealing or connects with the bigger picture.

Sixth, a human being is a bundle of contradictions with good and bad propensities. Potentiality for blossoming one's personality as an equal member of the society requires well-disciplined effort towards overcoming the bad tendencies and strengthening the capacity to do the good. Legal philosophy can provide inputs for a legal system's preparatory work for creating such an atmosphere. For example, the discourse on punishment may concentrate on sensitising the community with a view to persuade good behaviour, along with reformation of the offender. Philosophical research on the ideology of the welfare state may pay attention to tapping the potentiality of concerted efforts of the state and local bodies, the corporate sector, the civil society and social institutions in effectuating a shared ideology. Rabindranath Tagore's reflections on the plague spot of civilisation that hurries towards the golden fountain of the world conquest with a loss of soul; his wholeness of vision which rejects the absolute divisions between body and mind, individual and society, community and nation, nation and humanity, and humanity and nature; and his disgust for communalism and casteism that poison the springs of national life – all are products of deep philosophical inquiry about the nature of the human and of the society.⁸¹ Radhakrishnan writes: "Human consciousness is the starting point of all philosophical inquiry. The contradictions of human life provoke the quest for truth."⁸² Gandhiji's narration of his experiments with truth and his thoughts and works on non-violence, *swadeshi*, *gram swaraj*, eradication of untouchability, communal harmony, and the welfare of labour and peasants exemplifies philosophy in both thoughts and actions.⁸³ An illuminating example of his philosophical research is the brilliant distinction he drew between just law and unjust law, and his emphasis on the duty to abide by the former and duty to disobey the latter.⁸⁴

Seventh, the group life of human beings has produced certain cultural features, whose diversity is to be addressed by philosophical inquiry into the basic principles of humanism and universalism. While conservation of culture is essential for retention of group identity and collective conscience, rectification of faults in light of humanist ideals is equally essential. Plurality

⁸¹ S. RADHAKRISHNAN, *THE PHILOSOPHY OF RABINDRANATH TAGORE*, Chapter 4 (1918).

⁸² *Id.*, 7.

⁸³ See R.K. PRABHU & U.R. RAO, *THE MIND OF MAHATMA GANDHI* 2967 (2010).

⁸⁴ Mohandas Karamchand Gandhi, *Statement in the Great Trial of 1922* (March 18, 1922), available at <http://www.gandhi-manibhavan.org/gandhicomelive/speech3.htm> (Last visited on May 29, 2017).

in religion, language, regions and ethnicity is a fact of national life. The human rights approach to cultural pluralism is based on the philosophical understanding of the essential unity of human society despite the differences. Sublime thoughts underlying the idea of peaceful co-existence of all cultural communities, advocacy of secularism, and eschewing of all biases and discriminations also have philosophical moorings. In dealing with harmful blind beliefs,⁸⁵ discriminatory customs,⁸⁶ and irksome social usages,⁸⁷ again, it is philosophical justification grounded in human rights and justice that provides dependable answers. Whether the state should interfere with the culture and choices of indigenous people in the name of development and integration, whether it should tolerate cultural faults standing at the verge of violation of human rights, and how should it balance between its competing roles in these spheres, are vexing questions that attract philosophical argumentation.⁸⁸ Similarly, philosophical inquiry becomes essential in analysing the relation between individual and collective rights, and between tradition and modernity.

Eighth, the need for protection of the victims of wrongs and imposition of punishment or burden upon the perpetrators of wrongs calls for the formulation of a specific legal policy. Initially evolved for this purpose, the concept of justice began to assume various dimensions, in addition to aiming at procedural fairness and proportionality in substantive principles.⁸⁹ The concept of justice shuns unjust enrichment and condemns undeserved loss. Its focus on fairness in social and economic relations aims at restructuring the distribution of resources and facilities in the society. The reality of limited supply of means, unlimited demands and lack of altruist approaches on part of people at large, calls for policy-making grounded in sound philosophy of distributive justice. Scholars have engaged in highly philosophic discussions on the various dimensions of justice, and have also articulated its implications. In the matter of supporting the marginalised through the concept of justice, the intellectual discourse initiated by Nozick, Rawls, Nussbaum and Sen has provided valuable direction to law in this arena.⁹⁰ Application of these ideas, along with search for new ones, calls for further discourse on justice.

Ninth, each branch of law has a distinct philosophy of its own. Unless the researcher grapples with the nuances and the core values that

⁸⁵ *Gaurav Jain v. State of Bihar*, 1991 Supp (2) SCC 133; *Moyna Murmu v. State of W.B.*, 2016 SCC OnLine Cal 4272 (*per* Joymalya Bagchi J.).

⁸⁶ *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125.

⁸⁷ *S. Mahendran v. Travancore Devaswom Board*, 1991 SCC OnLine Ker 43 (In this case, the denial of entry of women into the Sabarimala temple was upheld, but this is still a matter pending in appeal before the Supreme Court.).

⁸⁸ P. ISHWARA BHAT, *LAW AND SOCIAL TRANSFORMATION* 57 (2009).

⁸⁹ Eugene Kamenka & Alice E.S. Tay, *The Traditions of Justice*, 5 (3) L. AND PHILOSOPHY 282 (1986).

⁹⁰ ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2006); AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

undergird a branch of law, he/she may fail to see through the wood. The philosophy of family law revolves around the concern for natural love and affection, as love is the basis of family. A willingness to actualise togetherness with mutual trust and support constitutes marriage, as per Finnis.⁹¹ Criminal law harps on the security of body, mind, things and relations as well as on the maintenance of public peace.⁹² It reflects the state's policy of just distribution of benefits and burdens.⁹³ Many of its approaches revolve around the retribution theory of punishment.⁹⁴ Contract law endorses the competence of individuals and collective bodies to make promises with solemnity and goads them to keep their promises so as to create a reliable market.⁹⁵ The morally binding force of voluntarily assumed responsibilities through promises has connection with the ideas of division of labour and cooperation.⁹⁶ Labour law stands against commodification and marginalisation of labour, requires humanised treatment at workplace and assures compensation for job related losses.⁹⁷ The focus on the social side of international law is an outcome of the philosophical understanding of comity and cooperation between nations, which helps in developing international relations and consequently ensures collective human welfare.⁹⁸ The question why individual is not a subject of international law has raised philosophical questions.⁹⁹ Constitutionalism has called for rich philosophical discussions on the socio-political basis of enduring values, articulation of its substantive principles and the latter's impact on social transformation sought to be achieved through the instrument of law. Non-Profit Organisation (NPO) law relies on the philosophy of right choice of philanthropic purposes, and of ensuring compliance with these purposes in the functioning of foundations and organisations.¹⁰⁰ Without understanding the basic philosophy of the concerned branch of law, handling the complicated issues underlying it becomes rudderless and unguided.

Tenth, understanding of the legal concepts, their reach, status and potentialities requires philosophical discourse for taking the discussion to higher levels of generalisations from different perspectives. Concepts like right, duty/obligation, person, property, liability etc. have a rich terrain of thoughts nurtured by diverse ideas. Rights having additional dimensions of liberty, power and immunity have been looked from teleological, welfare

⁹¹ JOHN FINNIS, *PHILOSOPHY OF LAW*, Vol. 4 136-137 (2013).

⁹² *Id.*, 143.

⁹³ *Id.*

⁹⁴ *Id.*, 144.

⁹⁵ R.W. LEE, *THE ELEMENTS OF ROMAN LAW*, Vol. 5 217 (Roscoe Pound, 4th ed., 2000).

⁹⁶ *Id.*, 141.

⁹⁷ Horatio Specter, *Philosophical Foundations of Labour Law*, 33 FLA. ST. U. L. REV. 1119 (2006).

⁹⁸ MALCOLM N. SHAW, *INTERNATIONAL LAW* 12-5 (1998).

⁹⁹ FINNIS, *supra* note 91, 147.

¹⁰⁰ P. Ishwara Bhat, *The Jurisprudential Concept and Significance of Purpose in the Discourse and Functioning of Third Sector Organizations in India*, 52(2) JILI 189-229 (2010).

and fairness perspectives.¹⁰¹ Its influence on the democratic movement and the growth of human rights has given it relevance even in the modern discourse. Discourse on social, political and psychological forces operating behind obligations has attracted philosophical attention, especially in view of rights' basis in duties.¹⁰² The question of hierarchical structure and prioritisation amidst rights has attracted highly philosophical and political debates, determining the direction of movements in various polities. The contrast between the decisions in *Dred Scott v. Sandford*¹⁰³ and *Somerset v. Stewart*,¹⁰⁴ on the question of superiority of the personal liberty of a slave over the property rights of the master has high philosophical content. The economic substantive due process of the *Lochner* era stands in contrast with the soft dignity/liberty-based substantive due process of the present times.¹⁰⁵ The conflicts between rights arising out of their absolute positions, and the possibilities of balancing amidst competing interests have raised debates over balancing of values at the policy-making and academic levels. The multiple or alternative theoretical basis of property rights in labour, expectation, reliance, welfare, and use for other basic rights has called for philosophical discussion. The discourse on the suitability of the personality theory to a specific type of legal system has itself generated several theories. With changing socio-economic and political circumstances, changes take place in the perimeter and parameter of concepts, which a philosophical inquiry is able to plan and explain.¹⁰⁶ Convincing justification for the growth of environmental law has emerged from philosophical ideas such as inter-generational equity and the public trust doctrine.

Finally, multiple approaches to define law and its purpose have relied on philosophical inquiry, and have resulted in vast literary resource rich with sublime thoughts. Natural law ideologies, utilitarian notions, positivist analysis, historical conceptions, sociological thinking, economic interpretation, realist viewpoints, critical legal studies and feminism, with galaxies of scholars with diverse perceptions, have poured great intellectual input into an ever expanding domain of jurisprudence.¹⁰⁷ All these have allowed law to grow beyond its original framework of professional service, on account of which it has become an important discipline of social knowledge.¹⁰⁸ These schools of law have wielded great influence on the effective understanding of the implications of law. These thoughts have created a reservoir of values, which the

¹⁰¹ G.W. PATON, A TEXT BOOK OF JURISPRUDENCE (2004); P J FITZGERALD, SALMOND ON JURISPRUDENCE (2004).

¹⁰² DIAS, *supra* note 27, 232-247.

¹⁰³ *Dred Scott v. Sandford*, 15 L Ed 691 : 60 US 393 (1857).

¹⁰⁴ *Somerset v. Stewart*, (1772) Lofft 1 : 98 ER 499.

¹⁰⁵ P. ISHWARA BHAT, FUNDAMENTAL RIGHTS, Chapter 5 (2004); *Lochner v. New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905).

¹⁰⁶ See Nicola Lacey, *Analytical Jurisprudence versus Descriptive Sociology Revisited*, 84 TEXAS L. REV. 945 (2006).

¹⁰⁷ BHATT, *supra* note 105; DIAS, *supra* note 27.

¹⁰⁸ FREEMAN, *supra* note 3, 6-9.

judges and legal men would use for evolving new legal propositions and for refining the existing ones. Without philosophical research in law, no intellectual development of this sort could take place.

IV. POSSIBLE PROCESSES

It is possible to discern some of the specific processes and tools employed in the course of philosophical research. The most prominent among them are intuitionism, dialectical method and reflective thinking. Further, tools like linguistic analysis, analogical reasoning, literature review and history of ideas also add to the strength of philosophical research.

Intuition or basing one's reasoning in emotion or feeling about the sense of good and bad¹⁰⁹ or of justice and injustice, provides some pointers about the desirability of the concept itself. Holmes thought of 'the secret roots from which law draws all the juices of life' and 'the unconscious result of instinctive preferences and inarticulate convictions' which provide input for exploration in the domain of values.¹¹⁰ S. Radhakrishnan states: "Intuition enables us to penetrate beneath outward experiences studied by science and see the life in things. It is a matter of experience and insight, which is coercive and certain."¹¹¹ Intuitions generate values. Values are preferred wishes (*ishtha*), in contrast to shunned disgusts (*dvishta*).¹¹² Their links with individual and social experiences, and connection with purpose, provides them an element of coherence and reliability. Indian axiology on *trivarga* teaches the hierarchy of values; wherein *artha* and *kama* have to conform to *dharma* in order to attain *moksha*.¹¹³ Charity rather than avarice satisfies the imperatives of good desires and brings justice to the poor. The duty of maintaining good health demands a diabetic patient to eschew sweets like *rasagulla* and to consume bitter gourd. Choice of a value is appropriate depending upon the ultimate purpose or effect arising out of such choice. *Dharma* as an instrumental and an intrinsic value guides human action for promoting virtue both in self-regarding and other-regarding actions.¹¹⁴ In identifying these values and in projecting philosophical truth, knowledge of the self in relation to one's environment, both social and physical, renders great help. This position is in contradistinction with a

¹⁰⁹ See SHAKESPEARE, THE TRAGEDY OF HAMLET, Act II Scene 2 (1609). ("There is nothing either good or bad but thinking makes it so.")

¹¹⁰ O.W. HOLMES, THE COMMON LAW 35 (1881).

¹¹¹ Radhakrishnan, *supra* note 81.

¹¹² M. Hiriyanna, *Philosophy of Values* in THE CULTURAL HERITAGE OF INDIA, Vol. 3 645 (Haridas Bhattacharyya ed., 1975).

¹¹³ JOIS, *supra* note 55 (quoting the MANUSMRTI, Chapter 4, Verse 176 – "the desire and wealth must be rejected if they are contrary to *dharma*").

¹¹⁴ *Id.*, 6.

situation where value statements remain only metaphysical without being supported by facts.¹¹⁵

Rabindranath Tagore believed that the stronger the sense of the world outside, the more robust is the sense of one's own inner being.¹¹⁶ According to him, *anubhav* as a method of learning takes place by apprehending or feeling, and by becoming mature in one's own self through linking with external matter.¹¹⁷ He said: "The eyes of the imagination may discern an inner self deep within its components. The inner self is the partner of our own particular selves."¹¹⁸ In his view, the synthesis of several components of the external world, like that of smoke, water vapour, light and air, produces an illuminating scenario.¹¹⁹ The inter-links within the human society also have similar inclinations. Tagore said: "Human society is like the Milky Way in the sky. Much of it is strewn with the sprawling nebulae of detached concepts or abstractions: we call them society, state, nation, commerce and much else."¹²⁰ The individual self answers the absolute being, which amidst the mass of darkness of facts and boundless mystery of truth, sheds light.¹²¹ In brief, intuition is an innate response, which sparks as a reaction to external realities and revelation of wisdom. Philosophers only give a unified shape to them.¹²²

Natural law scholars profusely used intuition as a method of philosophising. In asserting that law is the dictate of right reason; in setting the ideal of self-perfection in human action; in theorising the origin of state in social contracts or in *matsyanyaya* principle; in laying down the categorical imperative for the commensurability of human action with equal citizenship; or in evolving the concept of justice, the application of intuition can be found.¹²³ John Rawls elaborates on intuitionism as one of the foundations of reasoning.¹²⁴ For example, in the formulation of just taxation, fair wages and equal distribution of national wealth, or in the designing of the basic structure of a just society

¹¹⁵ In fact, Hagerstrom, a German jurist, argued for excluding legal metaphysics from genuine science of law. This operates as a note of caution.

¹¹⁶ SISIR KUMAR DAS & SUKANTA CHAUDHURI, *SELECTED WRITINGS ON LITERATURE AND LANGUAGE: RABINDRANATH TAGORE* 293 (2001).

¹¹⁷ *Id.*, 294.

¹¹⁸ *Id.*, 296.

¹¹⁹ *Id.*, 299.

¹²⁰ *Id.*, 308.

¹²¹ *Id.*, 309.

¹²² *Id.*, 155 (Tagore wrote: "Philosophical questions and reflections lie unexpressed and dispersed in all human minds. When the philosopher's genius gives a group of them a certain unity, their features and principles become manifest; we view a specific manifestation of our own thoughts.")

¹²³ JOIS, *supra* note 55 (Cicero argued that law is a dictate of right reason; St. Thomas Aquinas believed in human potentiality for perfection; Kant's categorical imperative reasoned on commensurability; Hobbes, Locke and Rousseau identified origin of state in the social contract; and Kautilya referred to the concerted efforts of clusters of smaller fishes to secure themselves against the uncertainties and threats posed by big fishes.)

¹²⁴ RAWLS, *supra* note 90, 34-40.

and in equal distribution of satisfaction, intuition aids the jurist.¹²⁵ However, in light of complex moral facts and competing ideologies, intuitionism may fail to provide suitable moral criteria, especially in the matter of resolving the priority problem.¹²⁶ John Gardner in his 'Law as Leap of Faith', with an intuitionist reasoning, holds that justice is a moral virtue, which is exhibited by anything which has capacity for moral agency.¹²⁷

Dialectical method is another important approach in philosophical research, which has influenced innumerable thinking minds for generations. The Socratic method of discourse involves reasoned arguments between one or more persons for arriving at a conclusion by dealing with contradictions and inconsistencies.¹²⁸ Plato considered dialectics as the method of knowing which relies upon the combination of two ways of looking at things. Indian epistemology had developed the art of philosophical disputation as a method of acquisition of knowledge.¹²⁹ A problem (*samasya*) stated in the form of a proposition (*vipratipattivakya*) was supported by a party (*paksha*) and opposed by the contradicting party (*pratipaksha*). Reasons and examples from both the sides established (*sthapana*) the possible (*sadhya*). The counterarguments of the opponent were to be answered by the debater.¹³⁰ From smaller issues to the deeper metaphysical matters, all the problems were to be resolved by argumentation. In the West, Immanuel Kant, in the 18th century A.D., propounded the basis of the dialectical method by holding that experience combined with reason produced morality.¹³¹

G.W.F. Hegel said that dialectics aim at understanding things in their being, movement and relations, and at considering their contradictory sides as constitutive parts of the same unit.¹³² He explains that the contradiction between thesis and anti-thesis is resolved by synthesis. He gives the example of

¹²⁵ *Id.*

¹²⁶ *Id.*, 40 (Rawls writes: "The distinctive feature, then, of intuitionist views is not their being teleological or deontological, but the especially prominent place that they give to the appeal to our intuitive capacities unguided by constructive and recognizably ethical criteria. Intuitionism denies that there exists any useful and explicit solution to the priority problem.")

¹²⁷ JOHN GARDNER, *LAW AS A LEAP OF FAITH* 239 (2012).

¹²⁸ MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY* 20-41 (1997).

¹²⁹ Dharendra Mohan Dutta, *Indian Epistemology* in *THE CULTURAL HERITAGE OF INDIA*, Vol. 3 548 (Haridas Bhattacharyya ed., 1975); Yogendranath Bagchi, *The Art of Philosophical Disputation* in *THE CULTURAL HERITAGE OF INDIA*, Vol. 3 548 (Haridas Bhattacharyya ed., 1975).

¹³⁰ *Id.*, 562.

¹³¹ IMMANUEL KANT, *A CRITIQUE OF PURE REASON* xxviii (1996).

¹³² G.W.F. HEGEL, *THE LOGIC ENCYCLOPAEDIA OF PHILOSOPHICAL SCIENCES* (1874); ROTH W.M., *BEING AND BECOMING IN THE CLASSROOM* (2002) (cited in Michael H.G. Hoffman, *The Curse of the Hegelian Heritage: "Dialectic", "contradiction", and "dialectical logic" in Activity Theory* (Georgia Tech & Ivan Allen College School of Pub. Policy Working Paper Series, Paper No. 9, 2009).

‘becoming’ as a synthesis emerging from ‘being’ and ‘nothing’.¹³³ Karl Marx differs from Hegel as he believes that the emergent product is nothing else but the material world reflected by the human mind and translated into forms of thought.¹³⁴ The scholars of the economic school argue that only through a qualitative and radical change or revolution, the liberation of the working class from the exploitative acts of the capitalists is possible.¹³⁵ Karl Popper criticises the Marxist view of dialectics on the ground that the final outcome can be an assertion of either the thesis or the anti-thesis alone, or the emergence of a new factor due to the intervention of a third element.¹³⁶ Popper said: “The dialectical interpretation, even where it may be applicable, will hardly ever help to develop thoughts by its suggestion that a synthesis should be constructed out of the ideas contained in a thesis and an antithesis.”¹³⁷ The functionalist side of the dialectic method should also be noted. By raising linguistic, social and cultural questions and by trying to answer them, dialectics may unravel factors essential for achieving social equilibrium.¹³⁸ The moral dilemmas underlying the questions on the propriety of death penalty, criminalisation of suicide and euthanasia, prohibition of abortion, same sex marriages and harmful blind beliefs edging on tradition etc., have been addressed by legal systems in different jurisdictions by looking at all the pros and cons, and at all shades of the arguments.¹³⁹ Multiple sides of truth rectify the human understanding by providing clarifications. Tagore wrote: “Truth raises against itself the storm that scatters its seeds broadcast.”¹⁴⁰ This is the way in which proliferation of arguments based on reason and experience expands the domain of knowledge.

F.L. Whitney considers philosophy as a reflective thinking in the field of most general qualitative value.¹⁴¹ Hence, steps of reflective thinking become relevant in philosophical research also. He gives an example of philosophical research to make education suitable for world understanding and world friendship. After defining the research problem in the background of the objectives at hand, the researcher surveys all available literature relating

¹³³ STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, *Hegel Dialectics*, available at <https://plato.stanford.edu/entries/hegel-dialectics/> (Last visited on May 29, 2017).

¹³⁴ KARL MARX, *CAPITAL* Vol. 1 (1867) (cited by J.V. STALIN, *DIALECTICAL AND HISTORICAL MATERIALISM* (1938)).

¹³⁵ *Id.*

¹³⁶ Berry Groisman, *What is Dialectic? Some Reflections on Popper's Criticism* (2007), available at http://philsci-archive.pitt.edu/3980/1/What_is_Dialectic_110408.pdf (Last visited on May 29, 2017).

¹³⁷ KARL POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 424 (2002).

¹³⁸ Richard A. Ball, *The Dialectical Method: Its Application to Social Theory* 58 (3) *SOCIAL FORCES* 785 (1979).

¹³⁹ *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24; *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1; *X v. Union of India*, (2016) 14 SCC 382; *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648; *Aruna Ramachandra Shanbaug v. Union of India*, (2011) 4 SCC 454.

¹⁴⁰ Rabindranath Tagore, *Stray Birds* in *THE ENGLISH WRITINGS OF RABINDRANATH TAGORE* 430 (2007). (“Truth seems to come with its final word; and the final word gives birth to its next.”)

¹⁴¹ WHITNEY, *supra* note 1, 250.

to education for world understanding; collects view points from one hundred persons; formulates curriculum for world friendship; gets reaction to the same from 650 educators, professional people, and businessmen in different countries; and generalises the requirements to be satisfied in the curriculum for world friendship.¹⁴² Sowing the nucleus of an idea through a hypothesis is the strategy of innovation. Huntingdon Cairns points out the fruitful function of hypothesis in an inventive process, which has the following steps: first, awareness of need; second, reflection upon the need; third, a sudden illumination; and finally painstaking efforts to perfect the insight.¹⁴³ Previous acquaintance with the subject matter helps the researcher at all levels. In defining law, according to Kantorowicz, it is better to begin with a rough or provisional definition with intentional vagueness, to speak out what is on one's mind and to then proceed to refine it into a final definition.¹⁴⁴ Olivecrona argues that it is impossible to start with a definition. He states: "Before a definition can be reached, the facts must be analysed. The method will be simply to take up such facts as are covered by the expression rules of law. No assumption is made from the beginning concerning their nature."¹⁴⁵ He dispenses with the hypothesis. In practice, legislators and judges evolve laws in response to facts, and concentrate on arguments around issues. Judges engage in deep inquiry into questions of facts and questions of law, survey all pros and cons, estimate the worth of alternatives, and then arrive at conclusions.

Linguistic analysis enables the researcher to unearth the ideas underlying key words. Knowledge about people's understanding of the core legal or moral principles provides a social account of the law. Since language is also product of the society and provides medium of communication of legal ideas, philosophy of language serves legal philosophy as well.¹⁴⁶ Understanding the text in the social context, knowing the emotive element beneath the words, and examining the purpose of employing specific words together assist a legal philosopher in his/her task.¹⁴⁷

Reasoning by analogy has a controversial place in philosophical research. Scientists like Joseph Priestley have appreciated analogy as the best guide in philosophical investigations, and in all cases where discovery is not accidental, analogical reasoning has helped discovery.¹⁴⁸ But Jeremy Bentham considers reasoning by analogy as artificial, insufficiently scientific

¹⁴² *Id.*, 252-253.

¹⁴³ HUNTINGDON CAIRNS, *THE THEORY OF LEGAL SCIENCE* 58 (1942) (cited by DIAS, *supra* note 27, 11).

¹⁴⁴ HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* 12, 79 (1980) (cited by DIAS, *supra* note 27, 11).

¹⁴⁵ KARL OLIVECRONA, *LAW AS FACT* 25-26 (1939) (cited by DIAS, *supra* note 27, 12).

¹⁴⁶ See Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *LEGAL THEORY* 251 (1998).

¹⁴⁷ DIAS, *supra* note 27, 5-7.

¹⁴⁸ JOSEPH PRIESTLEY, *THE HISTORY AND PRESENT STATE OF ELECTRICITY*, Vols. 1 & 2 (1996).

and static.¹⁴⁹ It is also criticised as not being based on social consensus and seriously lacking in criteria formulation.¹⁵⁰ However, widely followed as law of precedent, in law, reasoning by analogy has significant acceptance. As Cass R. Sunstein points out, in a world with limited time and capacities, and with sharp disagreement on first principles, reasoning by analogy has great benefits.¹⁵¹ The limitations of this approach are that the comparative facts should match; the criteria of comparison should be relevant; the perception of similarity should be based on proper satisfaction; and the purpose of application of principles should be appropriate. A scholar should remember that reasoning by analogy contemplates inductive method of reasoning, and application of deductive or top-down thinking can be misleading or can bring ‘abductive inference’.¹⁵² Nonetheless, use of analogical reasoning with caution greatly helps philosophical research.

History of ideas unearths the evolution of ideas, their mutual links and their impact upon social structure. No single idea grows on its own. Human cultivation of thoughts around the concept build, modify and shape the ideas in course of time. As ideas grow from one level to another level, and mutually interact to beget a new one, the inquiry goes beyond narrating the trajectory of developments. How the present social ideas have genesis in earlier ones, and how the people reacted to them, have interesting aspects to divulge.

Literature review not only evaluates the level of existing knowledge but gives valuable insights into the lines of arguments and reasoning that are prevalent, which need to be addressed in order to make a breakthrough. For dialectic, intuitional and reflective thinking, an intelligent response to published or prevalent information becomes imperative, as this may have a say on the line of reasoning the researcher adopts in his philosophical query.

V. EXAMPLES BY WAY OF REVERSE ENGINEERING

This part of the paper seeks to map the steps discernible in sample philosophical works in law. After examining some of the notable works, it will also discuss judicial application of philosophical research in key cases. The approach is to re-trace the steps or processes adopted in making the product by closely looking at the features of the product. This is a kind of ‘reverse engineering’, to use the language of intellectual property law.

¹⁴⁹ JEREMY BENTHAM, *THEORY OF LEGISLATION* (1840); Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARVARD L. REV.* 768 (1993).

¹⁵⁰ *Id.*, 769, 773.

¹⁵¹ *Id.*, 749-758, 790 (the alternative approaches include top-down general theory like utilitarianism, search for reflective equilibrium, classification and means-ends rationality).

¹⁵² FINNIS, *supra* note 91, 394-395.

The first sample is John Rawls' epoch-making work on the concept of justice, which has greatly impacted legal thinking all over the globe. Rawls admits that his was an attempt "to generalize and carry to a higher degree of abstraction the traditional theory of social contract."¹⁵³ He puts forward his intuition-based and highly Kantian theory, as an alternative and superior perspective as compared to the account of justice given by utilitarianism. He focuses more on the substantive aspects of justice rather than extensively discussing the methodological part, and says: "Comparisons and contrasts with other theories, and criticisms thereof now and then, especially utilitarianism, are viewed as means to this end."¹⁵⁴ His approach is systematic, as he resorts to employing the method of reflective thinking. After a preliminary discussion, he puts forward his two theories of justice, locates it in utilitarian theories, and strongly justifies them on the basis of intuitionism. He analyses his theory by connecting to various facets of equality at the political, social and relational levels. By employing indifference curves and data from economics, he explains the implications of his theory by relating it to equality. He assumes the historical birth of his theory in the original position arising from people's preference amidst values. In referring to the past or prevalent theories, he uses historical data. In the second part of the book, he elaborates his theory by bringing constitutional liberties and duties of individuals and the civil society to the table of egalitarian distribution. The factors of just and unjust demands, justifications for civil disobedience, equal liberty of all as the basic structure of the society are explained as an extension of the logic of his theory. He convinces the readers that in the realm of constitutional democracy, equal liberty forms the basic structure of the political system and the institutional mechanism, much like the rule of law helps in ensuring its wider prevalence in various spheres. In the third and final part of the book, Rawls engages in discussing theory of the good and moral development and connects his theory of justice to it. He viewed the good as a rational plan for one's life that brings him/her self-respect and excellence. He focuses on the sense of justice as reflected in a well-ordered society, morality of association, features of moral sentiments and the basis of equality. He believes that justice combines with the ideal of social union and mitigates the propensity to envy and spite. He concludes that justice as fairness becomes stable along with the realisation of justice by a well-ordered society and individual through appropriate planning and action.¹⁵⁵

Rawls' central reliance on intuitionism as the first principle for weighing against one another, in the course of balancing, has lent immense support to his theory.¹⁵⁶ But he rationalises intuition by analysing basic concepts like 'civil disobedience' and 'good'.¹⁵⁷ Further, he does not take intuition

¹⁵³ RAWLS, *supra* note 90, viii.

¹⁵⁴ *Id.*, ix.

¹⁵⁵ *Id.*, 577.

¹⁵⁶ *Id.*, 34.

¹⁵⁷ *Id.*, 368-371, 407-415.

as final in evolving solutions. He tests the intuition-based twin principles of justice against the alternative theories under the mixed, teleological, egoistic and other conceptions.¹⁵⁸ The comparison with the principle of average utility, classical utilitarianism and mixed conceptions is elaborate.¹⁵⁹ This denotes the application of the dialectical method in identifying the propriety of the two principles of justice. Rawls goes on widening the inquiry by taking the readers to the institutional and larger societal preparedness in order to receive and realise the principles of justice. The overarching principles underlying this theoretical framework elevate the analysis to a higher level of reasoning, to build universally acceptable notions. He has handled the institutional questions – relating to the debate over the constitutional scheme, the rule of law, public distribution system, or majority-minority relation – successfully by establishing the links between the legal system and justice.¹⁶⁰ Similarly, by raising moral questions around the sense of justice, he brings justice close to the societal thinking.¹⁶¹ The approach of overarching of values is a notable strategy in this highly philosophical work.

Intuition was also the basis for Rabindranath Tagore's vision of justice as a universal duty of humanity and an imperative of truth and of the sense of right. He wrote:

“Thy rod of justice thou hast given to every man on this earth and thy command is to strike where it is due. Let me take up that harsh office from thy hand with bent head and meek heart. Where forgiveness is sickly and self indulgent give me the strength to be cruel. Let truth flash out from my tongue like a keen sword at thy signal and let me pay my best homage to thee by righting wrong with all my power. Let thy wrath burn him into ashes who does what is unjust or suffers injustice to be done.”¹⁶²

His way of intuition was by empathising with the suffering, and expressing feeling on their behalf. A drawback of intuition as source of philosophical concept is that it is unilateral, responding to specific individual/social experience, and not interrogated by alternative viewpoints. In Tagore's example itself, the approach of the poet is to curse the culprit with ‘ash’, whereas there

¹⁵⁸ *Id.*, 122-125.

¹⁵⁹ *Id.*, 161, 183, 315.

¹⁶⁰ *Id.*, (Part Two of the book).

¹⁶¹ *Id.*, 453-504.

¹⁶² Rabindranath Tagore, *Thy Rod of Justice* in THE ESSENTIAL TAGORE 258 (Fakrul Alam & Radha Chakravarty ed., 2011) (Tagore also thought about justice as a reflection of an affirmative duty towards the vulnerable: “Into the mouth of these: dumb, pale and meek, We have to infuse the language of soul into the hearts of these, weary and worn, dry and forlorn, We have to minstrel the language of humanity” as cited by Justice P.N. Bhagwati in *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161; *Harjit Singh v. Union of India*, (1994) 2 SCC 553).

could be alternative ideas about his extraordinary situation, the need for reform and any lesser penalty. The factor of anger may be disturbing objectively. But intellect-based dialectic reasoning may provide a rational reply suitable to the overall circumstances.

Martha Nussbaum continued the tradition of using intuition as the starting point of inquiry to build her capability approach to justice, but employed the dialectic reasoning more intensively.¹⁶³ She relates dignity to central human capabilities such as life, bodily health, bodily integrity, senses, thoughts, emotions, practical reason, affiliation, concern for animals, play and control over one's own environment on an equal basis.¹⁶⁴ In the matter of dealing with capabilities and disabilities, mutual advantages and global inequality, and rights of animals beyond compassion and humanity, she employs dialectical reasoning.¹⁶⁵

Unlike Rawls, Tagore and Nussbaum, Amartya Sen develops his idea of justice primarily by employing dialectical reasoning and argumentation. He views:

“Reasoning is a robust source of hope and confidence in a world darkened by murky deed – past and present. It is not hard to see why it is so. Even when we find something immediately upsetting, we can question that response and ask whether it is an appropriate reaction and whether we should really be guided by it. Reasoning can be concerned with the right way of viewing and treating other people, other cultures, other claims, and examining different grounds for respect and tolerance.”¹⁶⁶

Sen goes beyond the Rawlsian view and concentrates on social choice as a framework for reasoning and looks into a diversity of interpretations. He examines the applicability of the views of Rawls and Smith to the globalised society. He believes that equality and liberty are to be applied to the set of claims with objectivity and rationality for happiness, well-being and capabilities to meet the requirements of democracy.¹⁶⁷ The consequent resource distribution would mitigate injustice; and the question of what the claim for benefit should be – work, capability or need – is to be answered accordingly. In the process of developing his major proposition, he indulges in argumentations

¹⁶³ MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 7 (2006).

¹⁶⁴ *Id.*, 76-7.

¹⁶⁵ *Id.*, Chapters 3, 4 & 6.

¹⁶⁶ SEN, *supra* note 90, 46-47 (reasoning is an ally and not a threat that endangers).

¹⁶⁷ *Id.*, Chapters 13, 14 & 15.

about the impact of globalisation, the factors of vulnerability and the imperatives of human rights.¹⁶⁸

Upendra Baxi's 'The Future of Human Rights' gives an excellent example of conducting philosophical research in law through the dialectical method.¹⁶⁹ He is fond of using 'discursivity' for addressing multiple issues, dichotomies and binaries which abound in the world of human rights. According to Baxi, discursivity is a rights-talk, whether conducted by the lay or the erudite, attracting more than one set of principles or traditions to produce an inference.¹⁷⁰ For example, protection against torture and cruelty under the International Covenant on Civil and Political Rights¹⁷¹ has similarities with the protection against starvation provided under the International Covenant on Economic, Social and Cultural Rights.¹⁷² The tradition of modern human rights stands in contrast with the tradition of contemporary human rights. Human rights narrative becomes real only if it addresses human suffering. It is because "[h]uman suffering oriented towards, and caused by, human rights implementation is both creative and destructive of human potential."¹⁷³ Baxi's prognosis of the future is a mixed bag of the good and the bad or either of them, depending upon the polity's competence to handle globalisation-related issues appropriately. Hence, he thinks about the plurality of the future waiting for human rights and humanity. Baxi takes up the authorship-ownership discourse; the interaction between the West and the rest in the production of human rights norms; the binary between exclusion and inclusion, ascetic and carilistic rights production, and human suffering and human right in order to give an alternative narrative to the dominant view.¹⁷⁴ His dialogue with the audience on the issue of politics 'of' human rights, and politics 'for' human rights, became part of his edited work.¹⁷⁵ He engages in discussing the contribution of good non-governmental organisations ('NGOs), the need for the control of anti-human rights NGOs and the dialogue between communities of the violated and of the perpetrators for a better future of human rights.¹⁷⁶ His debate on the question of whether we have too many or too few human rights takes the readers through the 'production of politics of human rights' and the 'politics of production of human rights', the need for participative approach and for greater focus on remediating human suffering.¹⁷⁷ The genesis of human right in self-reflection, in ideology, in culture, history and movement is to be properly

¹⁶⁸ *Id.*, Chapters 17 & 18.

¹⁶⁹ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2013).

¹⁷⁰ *Id.*, 26 (it is different from the linear approach of straight narration).

¹⁷¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 16, 1966).

¹⁷² International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966).

¹⁷³ *Id.*, 31.

¹⁷⁴ *Id.*, Chapter 2.

¹⁷⁵ *Id.*, 66-67.

¹⁷⁶ *Id.*, Chapter 3.

¹⁷⁷ *Id.*, Chapter 4.

considered while giving effect to international human rights in domestic law.¹⁷⁸ His narration of shift from the societal human rights movement to the market-regulated human rights landscape points out the danger of resource depletion, of commodification of human right actors and of conflict between the investor and consumer markets in human rights.¹⁷⁹ Baxi looks at globalisation and post-modern developments and notes the paradigm shift from the Universal Declaration of Human Rights to trade-related, market-friendly human rights. He sheds light on the future of the human rights tradition, the adverse effect on the rights of workers, and the effect of the end of the nation-state concept.¹⁸⁰ His discourse on the emergence of corporate and business-related human rights and their impact on the vulnerable sections of the society is also dialectical. Effective handling of the dialectical method of narration, analysis and prediction has successfully demonstrated what Frankfurter expected from a legal researcher: the combination of the competence of a scientist, the heart of a poet and the vision of a prophet.¹⁸¹

In the above discussed works, the exposition of the research finding is done on the basis of reflection over facts and legal developments, which find mention in the footnotes and the bibliographies. Even in other philosophical research works of Roscoe Pound and Julius Stone, ample reference to case law development, statutory policies and academic writings can be found.¹⁸² The textbooks and research articles on jurisprudence contain elaborate references to case law while dealing with issues relating to possession, personality, obligation, liability, property, precedent, punishment and justice administration.¹⁸³

How judges engage in philosophical research in evolving a new doctrine or in modification of an existing one can also be seen. The unfathomable reservoir of jurisprudential values guides judges in delving into the task of norm production. It was sheer sense of humanism and morality that persuaded the great judge Lord Mansfield to say that English air is too pure to be breathed by a slave, and that the slave should be let free.¹⁸⁴ Again, the invention of the manufacturer's liability, expansion of strict liability, creation of the public trust doctrine and liberalisation of the doctrine of *locus standi* are products of philosophical research.¹⁸⁵ A grand innovation of the basic structure doctrine

¹⁷⁸ *Id.*, Chapter 5.

¹⁷⁹ *Id.*, Chapter 7.

¹⁸⁰ *Id.*, Chapter 8.

¹⁸¹ See Felix Frankfurter, Karl N. Llewellyn & Edson R. Sutherland, *The Conditions for and the Aims and Methods of Legal Research*, 6 AM. L. SCH. REV. 663 (1930).

¹⁸² POUND, *supra* note 26; JULIUS STONE, PROVINCE AND FUNCTION OF LAW (1946); JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966); JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONING (1964).

¹⁸³ See DIAS, *supra* note 27; KOHLER, *supra* note 2.

¹⁸⁴ *Somerset v. Stewart*, (1772) Lofft 1 : 98 ER 499.

¹⁸⁵ *Donoghue v. Stevenson*, 1932 AC 562; *Rylands v. Fletcher*, (1868) LR 3 HL 330 : 1868 UKHL 1; *M.C. Mehta v. Union of India*, (1987) 4 SCC 463; *S.P. Gupta v. Union of India*, 1981 Supp SCC 87.

came through the application of the philosophy of teleology, political ideology of limited government and essential morality undergirding constitutionalism.¹⁸⁶ The overarching values of life, liberty and equality laid the foundation for the decision in *Maneka Gandhi v. Union of India*.¹⁸⁷ Balancing between the first principle of equality and the second principle of substantive equality had its roots in the philosophical discussion of social justice.¹⁸⁸ The philosophical generalisations of the values of fraternity and human dignity were crucial to the ruling in *Nandini Sundar v. State of Chhattisgarh*.¹⁸⁹ The idea of the rule of good law as a prerequisite for the rule of law was developed in the dissenting view of Justice H. R. Khanna owing to the overarching philosophical considerations informing the judge's analysis.¹⁹⁰

VI. CONCLUSION

Philosophical research is an indispensable instrument in the toolbox of a legal researcher. In spite of being abstract in the higher levels of reasoning, philosophical approach to research is expected to be down-to-earth and rooted in social realities. Both at lower and higher levels of jurisprudence, and in specific and general research inquiries, the possible assistance that can be derived from philosophical research is substantial. It is not a luxury of the leisurely mind, but a necessity in every undertaking of meaningful research. In knowledge-generation, in sharpening and systematising the thought process, in bringing the required level of academic rigour in theoretical discussion, philosophical research greatly adds value to legal research. Its rational urge for going beyond the present realm and building a system beyond time and space reaffirms the proposition that there cannot be an absolute or ultimate truth. Conclusions become only tentative, and invite future hypothesis-formulation.

Further, the figurative 'inverted intellectual pyramid of philosophy' on the earth's surface rather than in the air is a risky proposition unless the strands of thoughts, reinforced by methodology, are able to embed it into the indented ground. Developing clarity of thought and bringing the elements of pragmatism and social sensitivity together, help in descending the pyramid from the air to the ground. Inter-disciplinary study and holistic use of diverse methods of research help in this task.

From the discussion on the importance of philosophical research in law, it can be inferred that it has wide variety of objectives to serve. Its indispensability is evident in light of as many as ten listed grounds of necessity. Whether it is the law-morality relation, time-space-chance factors, or multiple

¹⁸⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁸⁷ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹⁸⁸ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

¹⁸⁹ *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547.

¹⁹⁰ *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521.

facets of justice, philosophical inquiry is prone to elevate the discussion to the required heights and to render the findings viable.

After exploring the possibilities in the research process, it is found that intuitionism, intellect through dialectics and reflective thinking constitute important processes in philosophical research. Although in a particular research, the researcher may dominantly use one of them, for a better result, he should employ all the processes. Dialectics bring triangulation and points of verification, and consequently help in overarching articulation of values. Reflective thinking systematises the line of inquiry by focusing on the research question. Other tools of inquiry can also be suitably used. The recommendations delineated in this paper are not mere conjectures. They can be traced back in the steps of research underlying sample philosophical research works as well. Thus, deconstructing the philosophical research in law through the lens of adjudicative and norm-building processes has practical advantages.

