

JOURNAL OF INDIAN LAW AND SOCIETY

Volume XIII (1)

Monsoon

FOREWORD

My association with the Journal of Indian Law and Society ('JILS') is since its inception, and when I was a faculty at the WB National University of Juridical Sciences. In its first issue I had authored an essay on the pedagogies of teaching sociology in law school. Years later, along with a colleague, I co-edited a special issue on 'Indian Feminisms, Law Reform and the Law Commission of India: Special Issue in Honour of Lotika Sarkar' for JILS. This time, when I was approached by the Editorial Board to write the Foreword, I was delighted. The most important aspect of JILS is that it is so effectively student-led, engaging with emergent questions of socio-legal relevance. The interconnection between law and society is well established in both legal and sociological scholarship by now, even in the Indian context. The need for creating space for interdisciplinary legal research has been felt by JILS and hence it has consistently and systematically published young scholars as well as the stalwarts in this discourse, engaging with all aspects of law and its inter-connection with the social. This issue is no different with themes ranging from sex worker rights, right to education act, gender budgeting, FDI policy or mental health jurisprudence.

In the article titled, Justice For Children: With Special Reference To Education, Dr. Krishna Kumar attempts to bring into focus the various aspects of childhood that have remained neglected in India. He believes that the main cause for this is the lack of academic scholarship and sustained discourse. The article argues that the impact of this neglect can be traced to various spheres of life, including social, cultural and economic life. Elements of this neglect can also be found in various cases pronounced by the Court. The paper narrows its focus to Right to Education in India, in the context of social-historical conditions and

the state of schooling in India. To provide the necessary context in the paper, the author discusses how the concept of rights have evolved in the context of children and the social origins of misfortunes suffered by children. The paper goes on to discuss the Right to Education ('RTE') and the various challenges and difficulties that RTE faced. Subsequently, the author discusses the problem of judicial intervention in the context of children's rights. In the end, the author concludes that RTE is far from becoming a social reality. The author notes that much of the problem with the enactment of the right is rooted in the conceptual issues involved in the application of the idea of rights in the context of children. The author concludes by saying that there should be a concerted effort on behalf of all the branches of the state, to break the stalemate on fulfillment of various rights in relation to children.

RégisLanneau, in the article titled *Online Platforms and the Future of Regulation*, explores the contours of how disruptive technology of online platforms operate in and even regulate certain industries, sometimes even more efficiently than a legal regulation as well. Further, the author then use this analysis to introduce their argument of how this model of reduction of costs allows them to perform welfare and market functions, and how that qualifies as the same regulatory function that a legal regulation performs. After this comparative analysis, the author introduces the question of their relative efficiency, and continues the comparison by viewing how the costs, adaptability, fairness and reliability, all point to how online platforms are more efficient in certain industries. To balance the efficiency analysis, the author then points to the faults that platform regulation suffers from, including manipulation of ratings, and their lack of reliability. Ultimately, the author tries to encourage regulators to view this potential of online platforms in performing a regulatory function, and striking a balance between use of these and legal regulations, since the inclusion of the same can tremendously benefit certain industries.

In their paper titled *Sector Specific Effectiveness of Gender Budgeting on Gender Equality and Fiscal Space*, Lekha Chakraborty along with Mairan Ingrams, Yadawendra Singh and Komal Jain present a unique analysis on the impact of a fiscal policy that employs gender budgeting in its effectiveness in reducing gender inequality, relying on empirical data from various Asian Countries. The paper makes for an interesting study on the efficiency and determinative equity of gender budgeting on actual reduction of gender inequality, using indicators and data of public spending and budgeting from policy spaces such as Education and Health. The paper finds an encouraging impact of gender budgeting in reducing gender inequality with its relative economic analysis of gender-budgeting and non-gender-budgeting countries, except for women labour

force participation, and also underlines the importance of sectoral allocation as opposed to growth-based budgeting.

Professor Rachna Chaudhury, in her paper titled *Sex Worker as a Juridical Subject: Interrogating the violence of Legal Interpretation*, has provided a discursive analysis of the prisms through which sex workers and their work has been dealt with and perceived by the judiciary and its allied functionaries, particularly from a feminist perspective. The paper initially provides a compelling glance into the existing legal system regulating prostitution in India, following which it traces judgements of the Supreme Court and various High Courts concerning sex workers, from 1950s onwards, attempting to highlight and analyze the manner in which the language used by the court, amongst other things, is indicative of the approach adopted. The analysis presents insightful and revealing glimpse as to the inherent biases that has outlaid judicial outlook with respect to sex work, and the changes that it has perceivably undergone.

Vanya Kumar in her paper intends to elaborate that the interpretation of law can be improved by supplementing it with interpretation of other streams of knowledge, such as literature. Even the most carefully designed and negotiated treaties may yield possibilities not restricted by the primary understanding of the drafters, and such possibilities are not necessarily incorrect. Reliance on drafting history can limit the good-faith interpretation of treaty terms in light of its object and purpose. Even the VCLT acknowledges this performative ambit of language, democratizing treaty text from strict intentionality. The ‘constitutive ambiguity’ in literature also poses problems in legal interpretation, leading to multiple meanings of the same term. The dilemma of multiplicity of meaning is resolved by viewing terms in context of where they occur. But this is not the absolute rule, and if ambiguity remains then recourse is to be taken to the *travaux préparatoires* for a final determination. Textual ambiguity need not necessarily be seen as an obstacle to be entangled. The analytical and interpretive tools also lead to the creation of new meaning in the text. The true ideal behind treaty interpretation is not an authentic set of its meaning, but rather the good-faith implementation of its terms. This is also the literary description of “unity of destination” of the text. There also exists the possibility where a strict liberal interpretation of the text could defeat the object and purpose of the treaty. This highlights the idea of the living document— as if authored almost at the time of interpretation and thus capable of accommodating a meaning aligned with the identified purpose and also fitting the particular circumstance.

Arun Sagar in the case comment discusses the legal discourse of mental illness and competence and highlights the significance of *Bhavya Nain vs High Court of Delhi* in this context. This article highlights incoherence in Indian

courts' jurisprudence dealing with bipolar disease in three contexts: criminal cases, family-law and disability benefits cases. The nature of bipolar disease poses several problems of interpretation and thus, the courts seem to decide each case of facts and make it difficult to formulate certain guidelines. This has implications on the law as the law requires certainty. In Bhavya Nain, the court discusses the nature of bipolar disease and provides important insights into the legal discourse of mental illness and competence. The court, while rejecting 'common sense' association of the disease with incompetence, takes a rights-based approach in a disability benefits case with respect to employment. The court has shown a strong stance against social exclusion and discrimination of persons with mental illness in employment opportunities by taking a rights-based approach. Further, by rejecting the 'episodic approach', the court brings the legal interpretation of the law in line with the scientific opinion of the disease as being of permanent nature and will provide a consistent precedent.

In her article titled, *When law defeats its purpose: How anti-dowry legislations (fail to) address the norms that motivate dowry payments in India*, Shubhangi Roy examines the impact of anti-dowry legislations on prevalent social norms and their inability to positively influence the same. While considering the extant legislative framework addressing the practice of dowry, reference is made to empirical evidence and judicial observations as to the shortcomings of such legislations in curbing dowry related violence. The article posits that, regardless of effective implementation, such legislations will continue to be unsuccessful because they misidentify the social norms motivating the payment of dowry. It argues for the viewing of dowry within the larger social structure governing marriage rather than a stand-alone societal harm. Specifically, the article identifies the two normative expectations that incentivise dowry payments—first, that of financing a daughter's wedding and second, payment by the bride's family against marital violence, including dowry related violence. The article analyzes how anti-dowry legislations influence these notions and often even have an exacerbating effect on them, with the symbolic authority of the legislations being inadequate in itself. The article thus argues for reframing the issue by giving due regard to relevant social and governance structures while framing and strengthening dowry-centric legislations.

The paper titled *'Impact of FDI Policy on Animal Husbandry Sector in India: A Post COVID-19 Scenario'* discusses the impact of intensive animal farming on the living conditions of animals and farmers in India after the introduction of hundred percent Foreign Direct Investment ('FDI') in animal husbandry in 2016 and the impact of Covid-19 thereafter. The author discusses the consequences of the hundred percent FDI policy which have been argued to be exacerbated by the pandemic. The author argued that the painful living

conditions of animals in the animal husbandry sector has worsened due to competitive cost-cutting measures. Further, the policy has resulted in the worsening of the farmers' working conditions due to centralised supply chains and fluctuating demand-supply equilibrium. In addition, the author argues that the intensive farming undertaken by foreign investors leads to adverse ecological consequences. In light of this, the author suggests measures to make the livestock sector less exploitative for small scale farmers by undoing the centralising and monopolising effects of intensive farming and the hundred percent FDI policy.

The article co-authored by Professor Mariana Valverde and Anirudh Goel states that in order to better understand federalism or any other multi-level governance situation (focusing on municipal-state relations), it is necessary to abandon the static organizational-chart approach, which is usually encapsulated in lists of competencies assigned to one or more levels of government. Researchers aiming to understand the perpetual conflicts for power and authority that constitute the "game" of the jurisdiction in practice can use a dynamic approach that sees jurisdiction as interactive rather than static, according to the paper. The first section introduces a new, multidisciplinary theory of jurisdiction. The second chapter describes the sorry state of municipal autonomy in Ontario, Canada, and adds a comparative perspective by examining the situation in India, particularly the proven flaws in the execution of the Constitution's 73rd and 74th amendments. Finally it considers the authority of entities in India and Canada. The conclusion suggests that the vast powers of such corporations is one reason why Canadian civic activists should reconsider if their drive for municipalities, or at least major cities, being granted constitutional status is the best approach to local democracy. Another reason to be doubtful about dedicating much effort to achieve constitutional status for cities is the Indian experience with the 74th Amendment.

JyothsnaGurumurthy conducts a review of the book titled, *Intellectual Property And Immorality: Against Protecting Harmful Creations of the Mind* by Ned Snow, which argues against the grant of intellectual property protection to creations of the mind considered immoral. Pursuant to detailing the structure and contents of the book, the review conducts a comprehensive critique, noting its strengths as well as those arguments warranting further scrutiny. The author commends the use of the autonomy theory—a theory inherent in intellectual property law and often employed to justify stronger intellectual property protection—to consequently validate the denial of property rights to harmful creations. Moreover, the review notes the author's acknowledgement of counter arguments (such as that of free speech), the use of extensive examples, statutory interpretation, and sound contextualisation, which together make for legally valid and rational argumentation. The review additionally provides potential areas for

further analysis. Specifically, it suggests a cross-jurisdictional analysis as well as reference to international instruments such as TRIPS and the European Patents Convention, in respect of which the interplay between morality and intellectual property has often been considered. The review acknowledges the pertinent issue of subjectivity present in the morality debate and questions its role in denying intellectual property rights, in the context of existing mechanisms of denial of property rights and the discretionary standard applied to deem a creation immoral. While appreciating the proposal of a hypothetical model to determine immorality, the review poses nuanced questions as to its applicability, with reference to the example of pornography vis-à-vis obscenity.

The diversity of the articles in this volume is enriching and yet the common flow on justice—to access, to be delivered, as imagined or as pronounced is present in all the papers. The meticulousness of the Editorial Board along with the Faculty Advisor is commendable. I would congratulate all the authors whose essays are published in this issue of the journal. I wish that the Editorial Board continue to keep the academic rigor and interdisciplinary knowledge production as their priority in all future issues of the journal. My best wishes and support to this journal, both for academic as well as personal reasons, JILS will always remain special to me and I would hope that the readership broadens outside of the legal community.

Rukmini Sen

Professor School of Liberal Studies and
Dean School of Heritage Research and Management at
Dr B R Ambedkar University Delhi