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FOREWORD

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It is a great joy to associate myself in a small yet powerful symbolic way with this issue of the Journal of Indian Law and Society, and I wish to thank the present editors for their kind invitation to write this Foreword. The past and present editors, through their imaginative hard labours, have selected many a theme, issue, and literature primarily concerning the changefully complex and contradictory inter-relations between law, power, and justice. The community of scholarly writing for this journal and editorial generations have devoted extraordinary care and great effort to sustain the journal, which is now in its tumultuous teens. Future issues will no doubt maintain the landmark presence that it enjoys and enhance its worldwide readership status, which it has attained.

I begin with the provocative article of Dr. Chhaya Bhardwaj and Mr. Anmol Agarwal concerning the Act of God doctrine, which was developed mainly in the field of tort law. Not many teachers and scholars in the field have traced and juxtaposed adjudication and legislative origins and functioning of this doctrine in colonial, contemporary juncture formed by digitalisation, COVID-19, and Anthropocene contexts and conditions. The law, mainly civil (though occasionally penal), provides liability for foreseeable negligent acts of men which the doctrine of Act of God shields and systemically, if not altogether, almost immunises these. It seems impossible to feminise this term, at least in

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monotheistic religions, since most liability disasters and harms are man 'male' made.

The concept of an Act of God has historically been employed to serve colonial capital and continues to persist in the post-industrial era, often leaving citizens and labouring classes without effective remedies, despite the legal maxim *ubi jus ibi remedium*. The authors extensively illustrate the persistence of the tendency of legislative reform to be slow-witted and dim-footed even in the post-colonial era. For example, the Railways Act of 1890 was replaced only by a corresponding Act of 1989. All this had a very adverse cumulative impact on the advent of recent disaster management laws and policy action.

The sluggish pace of legislative reform has also enabled a shift in accountability, post-Industrial Revolution. The authors, through numerous examples, observe that following the Industrial Revolution, industrialists increasingly shifted the blame for industrial accidents from divine or supernatural causes to humans, particularly workers. They argue that the Industrial Revolution marked a significant turning point, where human interference in systems became more evident. This shift was further accompanied by the industrial sector's reluctance to accept responsibility for accidents or provide adequate compensation for resulting damages. Instead, efforts were made to externalise accountability, often seeking alternative entities to bear the burden of compensation for accidents or disasters. This tendency to shift accountability may be described as an unlimited appetite to cause mass disasters, with corporate impunity, Bhopal-like.¹ Both legislation and adjudication, as unerringly shown in the paper here, mirror this unwillingness and impunity.

The paper must be read as is, but my only regret is twofold. First, the paper forfeits the advantages offered by theologian and philosopher Martin Buber, who invented a master category of 'theopolitics', which can be read in the sense of relating religion and political power, though it is persuasive to maintain that he was articulating a deeply anarchist notion.² But today, we see theopolitics everywhere in a broad sense, though missing its conceptual prowess and politics.³

¹ Upendra Baxi, *Mass Torts, Multinational Liability, and Private International Law, Recueil des Cours* (1999) (The Hague, Martinus Nijhoff 2000) 276; Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations: Learning from Bhopal Thirty Plus' (2015) 1 *Business and Human Rights Journal* 21-40.

² Samuel Hayim Brody, 'Is Theopolitics an Antipolitics? Dialogue as a Trans-disciplinary Concept: Martin Buber's Philosophy of Dialogue and its Contemporary Reception' in Paul Mendes-Flohr (ed), *Berlin, München, Boston: De Gruyter* (2015) 61-88.

³ Arloa McAlister and Valentina Napolitano, 'Political Theology/Theopolitics: Thresholds and Vulnerability of Sovereignty' (2021) 50 *Annual Review of Anthropology* 109-124. (How may 'sovereignty from below' speak to the notion of an act of God?).

Second, we fail to pursue the linkage between modernity, trust, and risk,⁴ particularly the accidents waiting to happen⁵ in the emplotment of development. Perhaps one may be forgiven for thinking that the paper ends with a precise conclusion about where it might have begun.

I warmly greet the analysis of marriage equality by Ryan Thoreson in his article titled ‘Dignity Deferred: *Supriyo v. Union of India* and LGBTQ Rights’ and concur that the expectations raised since the *Naz Foundation* and the *Navtej Singh Johar* by earlier constitutional pronouncements remain unfulfilled. Remarkably, as we are reminded with some amazement, the latter judgment referenced the value of ‘dignity’ approximately 210 times. This naturally raised great expectations because marriage equality seemed like a necessary next step, and the Court’s deferral is not readily understood. The rationalities of marriage equality are demonstrated by comparative constitutional law; it appears strange that the Indian Supreme Court now ‘defers dignity’ and seems to make it a plaything of bureaucratic scrutiny, which will be laced with perspectives of the political executive strongly convinced of the evils of same-sex marriage. Human rights as judicial inventions are very often deferred, as evidenced by the problematic division between civil and political rights on the one hand and social, political, and cultural rights on the other. This raises a critical question: Does this deferment amount to an abiding denial of dignity in the future of Indian constitutionalism?

I must confess that I have not read the judgment in *Navtej Singh Johar* as an act of personal protest, though, of course, I have welcomed the substantive outcome. This was because the concerned groups had sought to file a curative petition in *Kaushal*, which sought to overrule the *Naz Foundation*. Many worked on this review, myself included, especially on the plea that the new interpretation of equality as inclusiveness violated the basic human right to religious freedom. The Court should have heard the curative petition rather than going out of the way to hear a fresh one. To many, such a gesture may seem hyper-legal, but the wisdom of practical reason suggests that constitutional discipline is not in itself an instrumentality to be rectified. Rather, discipline serves as a safeguard against judicial despotism in framing the roster and acts as a check on judicial power, even when invoked for progressive causes. In any event, the time for personal protest has long passed, and this article accentuates the need to move beyond individual dissent and revert to the full text of the judgment.

Anamika Shukla takes through an important area of open trial in the COVID era, and one hopes that the world is not on the threshold of another

⁴ Ulrich Beck, Anthony Giddens, and Scott Lash (eds), *Reflexive Modernization* (Stanford, Stanford University Press 1994).

⁵ Charles Perrow, *Normal Accidents* (Princeton, Princeton University Press 1999, updated ed).

global pandemic. It remains important to ensure that law does not ever remain silent amidst global and local catastrophes; hence, the concept of an open trial is imperative to the basic structure of the Indian constitutional order. If it is silenced, the human rights struggle is all about the collective de-silencing of that core human right. Dr Shukla does not seem to go as far as to assert open trials as a core human right; she is more interested in an analysis of what she rightly calls a 'digital legal system'. I agree that a new legal system has emerged that increasingly employs machine learning alongside the old wisdom of administration of law and doing human justice according to the law, besides the law, and often beyond the law. I am persuaded to believe that such a system exists, even as I maintain that a Criminal Justice System ('CJS') ought to be established. The task, therefore, is to transit from the mere Administration of Justice ('ACJ') to a robust CJS within the remaining quarter century as India approaches the proud celebration of its constitutional centenary.⁶

Dr. Gayatri Nayak speaks to us with rest candour: she makes a distinction between '*just sustainability*' and '*not just sustainability*', and this leaves her to explore the era of water injustice, both its everyday manifestations and extraordinary occurrences. I think she would agree with me in addressing the issue of water rightlessness as caused by maldevelopment (or unjust development). However, injustice needs to be distinguished occasionally from a state of rightlessness because, theoretically, one may have all the normative equal rights yet may still face significant deprivation or harm in practice. As she rightly observes, it is necessary to 'unpack' injuries caused by a system of distributive justice among water users and the protection of water resources and its ecosystem.

She rightly faults a pluralistic and fragmented approach to water governance, which opens the scope for divergent interpretations. On the one hand, the judiciary upholds a rights-based approach in drinking water governance with the duty bestowed on the State, while, on the other, sustains the approaches of the executive-run administrative directions, which consider water as a public good. This leads to divergence and everyday water injustices in access and allocations, as well as causes and factors like social and economic discriminations and political choices in determining implementing areas and beneficiaries. While non-dissemination in the allocation and use of drinking water should be an aim of water governance, perhaps we need also consider: (a) how far the principled design and detail of federalism may have to be explored afresh in terms of competing needs of use and conservation of water; and (b) the characteristics of just water governance in the contexts of accelerating harm now made visible by advancing drought, desertification, and deforestation. Glimmers of what may be

⁶ Upendra Baxi, 'Human Rights in the Administration of Criminal Justice: The Concept of Fair Trial' (2000) *Journal of the National Human Rights Commission* 19:1-22.

done can be had by reading this paper, but as the learned author herself implies, more work needs to be immediately done, particularly as new environmental injuries emerge daily due to climate change and global warming.

Indian legal education and research do not give much space to sports law and jurisprudence, which is a great pity. Globally, initiatives like ‘soft affirmative programs’ play a significant role not only in combating discrimination—whether conscious or unconscious—in sports but also in addressing societal discrimination more broadly. Dr. Ishwara Singh introduces to us the ‘Rooney Rule’ adopted by the British National Football League in a research study pioneered by three academics that led to the conclusion that despite better performance records than their white counterparts, black head coaches were systematically overlooked for hiring and were dismissed earlier, revealing entrenched abuses of power and privilege. Students of racial capitalism and identity politics will scarcely be surprised at this finding.⁷ However, what interests the author and should equally impress readers is the social consciousness of the racial discrimination that led to the adoption of the Rooney rule. This rule, being process-based rather than quota-based, allows for imaginative experimentation in de-reservation as well. I find compelling the evocation of ‘inferential racism’ (common-sense assumptions and stereotypes) founded on the framework of collective memories and histories of historical power structures leading to ‘institutional racism’.⁷ We can learn a great deal in this cameo study about the constitutional policy towards reservation-based quotas, in particular about the dialectics of de-reservation.

Aaliya Kidwai commences her itineraries of disabled knowledge formations by deeply problematising the unidimensional perspective of ableism. She, alongside other notable scholars, highlights the artificial division in society between the able-bodied and the disabled using examples from theories like the crip theory, among others. She valuably examines the current ‘legal framework’ manifesting deeply ingrained ableism within academia, addressing the unique challenges faced by both students and professors with disabilities. She, rightly, wishes us all to move beyond the illusions of egalitarianism in our campuses and societies, at least, by a relentless focus on implementation, particularly if the recent Disability Act has to have any redeeming social and emancipatory force. Her *programschrift* for implementation warrants a sustained study, as does her call—often echoed by people living with disabilities—for a fundamental shift in how disability is understood. She emphasises that disability should not be seen as a uniform condition but rather as a spectrum of experiences requiring diverse and flexible solutions, a perspective well worth heeding. The representation of

⁷ Upendra Baxi, ‘The Crisis in, and of, Constitutional Identity’ in *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity: Comparative Constitutional Law and Policy* (Cambridge, Cambridge University Press 2024) 89–98.

disabled individuals in positions of authority, when may this ever happen, should not remain an occasional political hope but must become a matter of sustained struggles to remind political power of its responsibilities and the circumstances of justice. While the tasks of social inclusion have to be undertaken in each generation, Babasaheb Ambedkar's motto of insurgent constitutionalism for the depressed classes—'organise, educate, agitate'—is even more pertinent for struggles against discrimination faced by people living with disabilities.