

Special Issue: India & the World Economic Order

EDITORIALS

Shashank P. Kumar, Meghana Sharafudeen & Yogesh
Pai, *A Bittersweet Celebration*

Raj Bhala, *First Generation Indian External Sector Reforms
in Context*

ARTICLES

Aditya Bhattacharjea, *Trade, Development and
Competition Law: India and Canada Compared*

James J. Nedumpara, *'Naming, Shaming and Filing':
Harnessing Indian Capacity for WTO Dispute Settlement*

Vyoma Jha, *India's Twin Concerns over Energy Security
and Climate Change: Revisiting India's Investment Treaties
through a Sustainable Development Lens*

Swaraj Paul Barooah, *India's Pharmaceutical Innovation
Policy: Developing Strategies for Developing Country Needs*

NOTES AND
COMMENTS

Prabhash Ranjan, *FDI in Multi-Brand Retail Trading and
India's Bilateral Investment Treaties*

TL
&D

Trade, Law *and* Development

Vol. 5, No. 1

2013

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS

Aswin A
Dishi Bhomawat
Sagar Gupta
Nakul Nayak
Shivangi Tyagi

Ali Amerjee
Sagnik Das
Pranjal Mehta
Neha Reddy
Thomas J. Vallianeth

Prakhar Bhardwaj
Arpit Gupta
Prianka Mohan
Roban Tigadi
Vatsal Vasudev

CONSULTING EDITORS

Aman
Gopalakrishnan R.

Prateek Bhattacharya
Jayant Raghu Ram

Shashank P. Kumar
Meghana Sharafudeen

BOARD OF ADVISORS

Raj Bhala
Daniel Magraw
Ricardo Ramírez Hernández

Glenn Wiser
B. S. Chimni
Vaughan Lowe

Jagdish Bhagwati
M. Sornarajah
W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Shashank P. Kumar, Meghana Sharafudeen
& Yogesh Pai, *A Bittersweet Celebration*
5(1) TRADE L. & DEV. 1 (2013)

Anniversary Editorial

A BITTERSWEET CELEBRATION

SHASHANK P. KUMAR^{*}, MEGHANA SHARAFUDEEN^{**} AND YOGESH PAI[†]

*Whatever you do will be insignificant, but it is very important that you do it.*¹

It may seem paradoxical to begin this Special Issue with an apology. Indeed, this Special Issue celebrates five years of *Trade, Law and Development's* existence. In this short span of time, the Journal has risen to become one of the best law journals in India and even enjoys some international recognition in its field. While we should certainly celebrate the Journal's successful journey, we must not stop here. The publication of this Special Issue gives us a moment to reflect upon the difficulties the Journal has encountered hitherto and the challenges that lie ahead.

The Journal has managed to steer clear of many hurdles, as evidenced by the publication of this very issue, but our journey through the ever-present shadows of failure has been far from easy. The Journal's closest encounter with failure is, in fact, this very Special Issue. Originally scheduled for publication in early 2013, its publication has been delayed by almost a year. As a journal that describes its publication frequency as "biannual", such a delay is inexcusable and embarrassing. We extend our unconditional apology to our contributing authors and readers, and thank them for their understanding and continued support. We sincerely hope that this situation does not repeat itself, and will do our best to ensure that it does not devolve into common practice.

^{*} Consulting Editor and Founding Editor-in-Chief, *Trade, Law and Development*.

^{**} Consulting Editor and Founding Editor, *Trade, Law and Development*.

[†] Consulting Editor and Faculty-in-Charge (Special Issue), *Trade, Law and Development*.

¹ Although commonly attributed to Mahatma Gandhi, according to Wikiquote, "the earliest attribution of this quote to Mahatma Gandhi yet located is in a T-shirt advertisement in *Mother Jones*, Vol. 8, No. 5 (June 1983), p. 46". See http://en.wikiquote.org/wiki/Mahatma_Gandhi.

Despite the delay, however, the publication of this Issue is also a significant achievement. As the editorial of our inaugural issue observed,² *continuity*, or, more precisely, the lack thereof, remains a major obstacle for student-run law journals in India. Several journals have been started by motivated and enthusiastic students, only to suffer after the graduation of their founders or soon thereafter. Some student-run journals have been discontinued after the publication of one or two volumes; while others have suffered a visible decline in the frequency of publications and the quality of their content.

The publication of this Special Issue is tangible proof that TL&D has successfully overcome the challenge of ensuring continuity – for the first five years of its existence, at least. More than that, however, we believe that the quality of TL&D's content has only improved over these years. While we admittedly may be a bit biased, one impartial indicator of the quality of content is citation to a journal in other scholarly publications. The Washington & Lee University School of Law, for example, publishes rankings of law journals based on their citation counts.³ In these rankings, *TL&D* has been ranked as the best law journal in India for two straight years now (2011 and 2012), and the tenth best law journal in the field of international trade worldwide in 2012. Additionally, a number of articles first published in the Journal have been republished as part of edited volumes and reading materials for courses the world over. The Journal has also received recognition from international organisations such as the International Centre for Settlement of Investment Disputes (ICSID) and the World Trade Organization (WTO). These accolades and achievements represent at least a modicum of success in the achievement of the Journal's stated objective of sustaining and promoting a democratic debate on issues of international economic law. They also recognize the efforts of the past and present editors of the Journal to change the landscape of legal writing in India.

In this context, it is important to situate the plight of student-run law journals in India against the backdrop of the systemic problems with legal writing and scholarship – mainly, the widespread apathy towards the subject in the country generally, and in Indian law schools in particular. It is difficult to institutionalize the idea of a law journal in the absence of an environment that recognizes and promotes legal scholarship. Before we turn to address the specifics of this deeper malaise, however, it is necessary to understand the systemic significance that scholarly journals and legal scholarship play in a democratic society – a significance that stems from the centrality of informed choice and consent. As Fiss explains,

[d]emocracy is a system of collective self-governance in which the

² Shashank P. Kumar, *A Yearful of Thoughts*, 2(1) TRADE L. & DEV. 1, 6 (2010).

³ *Ranking Methodology*, available at: <http://lawlib.wlu.edu/LJ/method.asp#methodology>.

people shape their public life. The leaders of government are chosen by citizens and then held accountable for their actions through a series of periodic elections. In this way, democracy exalts popular choice. It also presumes, however, that this choice is enlightened. Citizens need to understand the nature of the choices that they face, and must possess the capacity to evaluate the policies and practices of the government and its leaders. Although unenlightened choice is still a choice, that kind of choice and the democratic character of the political system that it supports are not especially inspiring or worthy of our admiration.⁴

A democracy should be judged not just by the institutions that formally exist but also by the extent to which different voices from diverse sections of the people can actually be heard.⁵ Amidst the rich cacophony of voices that exist in a democracy, academic writing in general and legal writing in particular provide an outlet for rational inquiry and independent thinking – especially on issues that have a direct bearing on public policy. It is an outlet that cannot be provided by other sources, such as popular press or the news media.⁶ Echoing this sentiment, at the inauguration of the Indian Law Institute (ILI), the country's first and premier institution for legal research, India's first President, Dr. Rajendra Prasad, observed that

[i]t is necessary that there should be a body which works quietly in an atmosphere which is free from the din of courts and also away from the controversy of the legislatures, where attention is paid to the various implications of a particular kind of legislation and where legislation which has already been adopted is studied for the objects it has achieved and for the way in which it has been worked. This can be done by an Institute like this.⁷

As issues of (mal-)governance take center-stage in the country, these observations are perhaps more relevant than ever for Indian democracy. At this delicate moment in the nation's history, scholarly analysis can and should play a

⁴ Owen Fiss, *The Democratic Mission of the University*, 76 ALBANY L. REV. 543, (2012/13) [hereinafter Fiss].

⁵ AMARTYA SEN, *THE IDEA OF JUSTICE* xiii (2009). This is a concept the Journal has visited in the past – for example, in the context of fostering a democratic debate through a Special Issue on Third World Approaches to International Law. See Meghana Sharafudeen, *2010-2011: Taking the Road Less Travelled*, 3(1) TRADE L. & DEV. 6, 8 (2011).

⁶ See also Fiss, *supra* note 4, at 550.

⁷ As quoted in Rajeev Kadambi, *One Such Pattern in the Indian Legal Academy*, 20 EDUC. & LJ 129 (2010), available at: <http://ssrn.com/abstract=1635186>.

crucial role in ensuring that the power of democratic choice and the desire for change are not squandered away due to a lack of credible information, or worse, misinformation. Legal scholarship, in particular, can help us better understand the proper role and limits of law, and the structures of the State when it comes to social regulation and construction in the Indian society. In this regard, we only need to look back at the prominent role that lawyers, through their written and spoken words, played in the struggle for India's independence.⁸

From the pedagogical perspective, legal writing has many benefits too, which can be easily overlooked. As Keene explains,

[t]he act of writing affords the writer an opportunity to think through a legal problem, engage deeply with the law and facts, and expand her knowledge of the law and practice. By analyzing legal problems and developing her ideas through the writing process, a student better understands the substantive law and procedure relevant to an assignment. In discussions with the professor on writing assignments and from feedback received, a student learns to make professional decisions and gains confidence about the prospect of practicing law. Work on writing assignments offers a student an opportunity to apply her knowledge of the law in a practical context, with the benefit of expert guidance.⁹

Unfortunately, in most Indian law schools the emphasis on legal writing and scholarship takes the form of curricular "requirements" that value quantity over quality. The norm is that students are required to write one substantial research paper for every course they study. This translates into five or more compulsory research papers every semester. As Gingerich and Singh note, when students are asked to write papers of 5000 or more words for every course of study in a semester, they feel that it is impossible to do original work in every subject.¹⁰ The situation is made worse because most students receive little or no feedback on what they write from their professors. Just as it is difficult for students to faithfully comply with the quantitative writing requirements, a single teacher working in the

⁸ See LAW COMMISSION OF INDIA, ONE HUNDRED THIRTY-FIRST REPORT ON ROLE OF THE LEGAL PROFESSION IN ADMINISTRATION OF JUSTICE 3 (1988); Bar Council of India, *Lawyers in the Indian Freedom Movement*, available at: <http://www.barcouncilofindia.org/about/about-the-legal-profession/lawyers-in-the-indian-freedom-movement/>.

⁹ Sherri Lee Keene, *Law Schools: Get Back to Basics*, NAT'L IJ (June 17, 2013), <http://www.nationallawjournal.com/id=1202604174462>.

¹⁰ Jonathan Gingerich & Aditya Singh, *Writing Requirements, Student Assessment and Plagiarism in Indian Law Schools*, INDIA LAW NEWS (Fall 2010), at 13, available at: http://www.law.harvard.edu/programs/plp/pdf/Gingerich_India_Law_News_Article.pdf

aforementioned circumstances cannot meaningfully engage with the work of a class of fifty students or more. The stated objective of legal writing requirements may be to improve research and writing skills and increase academic rigour, but without any meaningful feedback from professors, their pedagogic significance is often reduced to the percentage of marks they carry for the semesterly evaluation. In such conditions, it is not surprising that plagiarism is endemic, with students often “recycling” the writings of their seniors.

The situation with respect to teachers in Indian law schools is no better. In any society, academicians and scholars are primarily responsible for rational inquiry and the discovery and production of knowledge.¹¹ Law professors, in particular, play an important role in analyzing and assessing public policies. This role often finds tangible expression through the medium of legal scholarship. While some members of the Indian legal academy are notable for their contributions in this regard, the general situation leaves much to be desired. In a report on Indian legal education for the Ford Foundation published in 1963, Arthur von Mehren, a professor at Harvard and a visiting professor at the Indian Law Institute, observed:

[t]here is no established tradition of legal scholarship being an integral part of a teacher’s life and duties. Indeed, with the heavy teaching load and the inadequate library facilities, such a tradition could hardly be supported.¹²

Although the structure and institutions of legal education in India may have changed for the better since von Mehren made those remarks, his damning observations still hold true for a multitude of reasons. As with students, the emphasis on legal scholarship for teachers retains a quantitative focus. University recruitment and promotions are mostly concerned with the number of publications by a scholar, rather than their quality and content. The heavy teaching load for most teachers leaves them with very little time for research and writing. Written dialogue and exchange between scholars is rare and research facilities are pitiable. All these issues combine to ensure that most teachers are unable to contribute to the exercise of democratic nation building. They also condemn the next generation of legal scholars by creating circumstances where inspiring students and inculcating in them a love for incisive, critical legal writing and scholarship is nearly impossible.

Student-run law journals cannot be a panacea for the “self-defeating mechanization of scholarship” which encourages scholars to “sacrifice integrity

¹¹ Fiss, *supra* note 4, at 544.

¹² ARTHUR TAYLOR VON MEHREN, ASPECTS OF LEGAL SCHOLARSHIP AND EDUCATION IN INDIA: A REPORT 15 (1963).

and ingenuity to careerism that does not [really] reward them with a career”,¹³ but they can certainly represent an attempt to break bad habits and a viable starting point for catalysing change. Although waging war on the pervasive indifference towards legal writing is a complex endeavour that will require multiple fundamental systemic changes, all wars are merely a series of battles. It is incumbent upon each of us to select our battles based upon what we believe to be necessary and right – and to see them through to the best of our abilities in the hope that, seemingly insignificant though our efforts may be, they will combine with the efforts of others to gradually create a more intellectually stimulating and nourishing environment for incisive legal writing and scholarship in India.

TL&D was founded on a set of beliefs on what was necessary and right, but as we have learned over these past five years, to steer it through an obstacle course of systemic hurdles and ensure its survival will take hard work, dedication, a focus on quality and rigorous standards, and strategic thinking born of a not inconsiderable amount of introspection. We thank all of our authors, readers, and advisors for the invaluable role they have played in our past successes, and extend a solemn promise to see our task through to the best of our abilities in the future.

¹³ Sarah Kendzior, *What's the Point of Academic Publishing?*, 24 January 2014, <https://chroniclevitae.com/news/291-what-s-the-point-of-academic-publishing>