The Critical Legal Conference 2006

The Critical Legal Conference was formed at the annual gathering of the European Conference in 1984 held at the University of Kent. The CLC has over the last decade become increasingly international – both in the concerns it addresses and in the locations of the conference. The annual conference has in the past few years been held more outside of the UK. In recent years we have gathered in Dublin, Helsinki, and Johannesburg. In 2006, the CLC is moving for the first time to South Asia, and will be held at NALSAR University of Law, Hyderabad, India in collaboration with the Central Institute of English and Foreign Languages. We also have offers on the table for future annual conferences in Paris and New York.

In terms of academic disciplines, the largest group of those attending the conference would be from Law but there has been a considerable and increasing involvement of people from the wider humanities and from the social sciences. In 2006, the CLC will also feature discussions on the sciences and the relationship between biology and empire.

Despite, or perhaps even because, of what has undoubtedly been an increasing diversity within CLC, it maintains a remarkable cohesion which, admittedly, may be more oppositional than anything else - a shared opposition to dominant orthodoxies that is tied to a shared commitment to the necessity and possibility of social transformation.

THE LAW OF THE LAW IN AN Age of Empire

The question of humanity and resistance to empires of democracy, border politics, body politics, biopolitics, nationalism, conflict, biology [not restricted to human biology alone, but encompassing the range of questions around control over other life forms as well] and globalization are written against histories of colonialism and neo-colonization. The polarization of realities – of exploitation and of resistance – between the North and the South – and the constant re-invention of this polarization have been the central focus of struggles of resistance, which have in turn attempted consistently to engage with the habits of colonization both between the North and the South and within postcolonial worlds. But globalisation undoes the finitude of North and South. Being in the world is an exposure – and now yet more devastating universals cast their shadow from many poles.

There are still colonial legal inheritances which structure interventions in different fields. The construction of the law and its application are dependent upon location, territorialisation, especially with reference to sovereignty, self-determination and dependence. The South evokes – in different sets — very specific questions that it will be fruitful to discuss — discourses on terror, war, peace, human rights, poverty, development and biology. Central to the discourse on rights, justice and the rule of law in the South have been discussions around the urgent need to de-colonize knowledge systems, notably the law, but also language, literature, traditional knowledge systems [in medicine, agriculture, industry, etc.] and ideas of development. Animating these debates have been critiques of patriarchies and gender hegemonies. One among many questions that arise here – what grounds community? What theorisation of the feminine, what politics of and by women, what transnational feminisms in an age of Empire can inform transformations in the lives of women?

The logic of the political (the problem of the *polis*, political community etc) remains theological. Is this a residue of colonial knowledge systems, evidence that Europe is far from 'modern' and *its* globalisation has constrained the juridical sense of life-worlds? Or is it a more difficult question of the relationship between the state and various instantiations of the political – of state and utopia? There is in this problem a certain colonial haunting of the postcolonial – and a postcolonial 'return' that might help to undo the Anglo-European imaginary on the political, which remains theological, leading to a productive (theoretical and political) reversal of the usual North-South hierarchy. While diversity has historically been relevant to the life worlds of the colonized, the fact of diversity/pluralism has not stemmed the eruption of violent conflict and/or entrenched discrimination along a range of specific trajectories –community, caste, religion, sect, sexual orientation, political belief, ability,

etc. In resisting multi-polar forms of discrimination, and in working towards building sustained peace and the abatement of conflict from time to time, what are the specific ways in which forms/strategies of resistance de-colonize thinking and, in the process, build counter colonial knowledge systems that purge residues of orientalism and logics of colonialism that seem to undergird postcolonial worlds?

There is in the (ex) colonial world, a rich history of resistance to colonialism as well as a history of the present resistance to forces of neo-colonial globalization, both of which inform in fundamental ways our understanding of postcoloniality and difference. Much of this resistance in much of the South has had a mass base drawing in large numbers of people who have suffered directly – witness the struggles around land rights, against apartheid, and environmental struggles. On the other side there is also a history of struggle against forces of dominance within – both state and non-state — that enjoy the partial privileges that globalization confers. These struggles center around questions of just governance, which in their most incipient stages interrogate in fundamental ways the logics of colonialism.

De-colonization of knowledge systems and governance has in an important sense been the goal of resistance struggles across [ex] colonized worlds. It is necessary to re-visit this vast body of work as also to re-locate critiques of colonialism within fields of jurisprudence, postcolonial anthropology and ethnography for instance. What is the relationship between legality and the poor and the intersections between the worlds of the law and the worlds of the poor? A question especially relevant to the global South. Law, the corporation, popular culture, the body, and poverty intersect in very specific ways congealing into deprived life-worlds for large numbers of people. What are the specific ways in which processes of de-colonization transform realities of citizenship and belonging? The second related question is that of access to the practices and institutions of law — or the place of legal literacy/street law in legal pedagogy in different sites. What are the strategies that are necessary to de-colonize learning of the law so that it is informed by a pedagogy of the oppressed?

The postcolonial in an age of globalization unravels, in the sense of destruction and movement, what can no longer be called 'the west' and *its* universalisation.

Streams

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Death is not Becoming: Postcolonialism and the Problem of the Political

Organiser:
Stewart Motha

The post-colony is haunted by the colonial and imperial fashioning of the political. The political as the space of the 'common' not only has to grapple with the imperial grounds of law and being-together, it must depart from this sovereignty and preserve it at the same time. The political space as secular democracy continues to be an onto-theology where a Greco-Christian imagining, at once Greek, Thomist, contractual, and possessive, names the political – the political as liberal democracy. But democracy harbours the becoming worldwide of a tradition, a tradition that is now engaged in a civil war with another monotheism – political 'Islam'. Postcolonial law and political organisation, instantiated as theological structures, including that of liberal democracy, continue to insist on sacrifice. It is the possibility, then, of a non-sacral law of postcolonial political community that remains to be thought. This stream invites papers that take up the possibility of thinking democracy and political community beyond its determination through the many autos by which postcolonial sovereignty and community are being experienced – auto-nomy, the civilised commonality of the bearer of human rights, the sovereign nation-state, or the people-as-one. The problem of nomos and demos is one of counting and calculation, what is to be shared, who will share, who will judge, and by what, if any, regulative ideal? In a global economy of free [sic] flows of capital, should a postcolonial sovereignty retain the capacity to interrupt these flows, lock-down capital, and re-politicise (make-common) the resources that are currently denied to the many. Post-apartheid South Africa is perhaps the exemplary catastrophe, the 'big lie', of democratic, 'constitutional revolution'. But what other sites of postcolonial liberalisation and democratisation present the possibility of overturning the sacrificial order of rights? What practices of civility and sharing can reverse the theocratic insistence that (the other's) death-is-becoming?

Forms of Resistance: Postcoloniality as Critique in/of the Time That Remains

Tawia Ansah

This paper is inspired by the abstract on the CLC webpage, entitled, "The Law of the Law in an Age of Empire," in particular the following excerpt: "Does law uphold conceptual, normative certainties? What is the place of such law in formations that do not conform to such schemas of certainty? Does law have a common language? In other words, is legal formalism, autonomy of law, an invariable universal? Or is it a peculiarity of cultural religious formations of monotheisms? Can institutions of law based on such legacies (Abraham, Moses) render justice to cultural experiences and lives heterogeneous to monotheisms? How do normative certainties of law render justice to singularities of culture?" The author then continues: "The postcolonial in an age of globalization unravels, in the sense of destruction and movement, what can no longer be called 'the west' and its universalization," suggesting that this universal invariability and autonomy of law is a "productive failure." If so, then the statement implies the productive success of postcoloniality in relation to universalizing law. In the alternative, "productive failure" could also refer to the unsuccessful attempt of postcoloniality to unravel the monolithic autonomy of law of "the west." It is a productive failure precisely because it raises the question of the critical relationship between postcoloniality and universal law.

Thus, in thinking about what a postcolonial critique of global law, or the globality of the rule of law, would look like, one might see – in answer to the above question concerning their interrelationship – the appropriation, by formal law, of postcoloniality as a critique of law. Particularly within the works of Giorgio Agamben, one finds an incorporation, within an *ontological* critique of law (or more simply, the law's ontogenesis), of the situs of postcoloniality as resistance, i.e., that which resists normative certainties, including – but how much, and to what extent? – the idea of law as a certain kind of formal, invariable universal posit. The CLC excerpt invites a reappraisal of postcoloniality that resists even this level of critical juridical appropriation. In short, if contemporary jurists and thinkers characterize "resistance" such that it includes – and, I submit, tames and attenuates – that which is the domain of the postcolonial, what role remains for the latter? And if a postcolonial critique cannot be disaggregated from the ontological critique, what consequences for global law and governance? What consequences for the postcolonial subject when her resistance itself has become part of the master narrative?

I read Agamben's *The Time That Remains* as an instance of the fusion of (potentially heterogeneous) posits of resistance without, of course, his having named them as such. Agamben's Pauline critique of law elides the time in the law of the postcolonial within the legal temporality of the subject. That is, juridical subjectivity is formed only by its resistance *as such* to the hegemony of law in its formal (material, written) guise. And yet the subject thus formed is, on the one hand, *contra* the universal but, in being named as the remnant, is always already the universal. Thus, if man as a posit is imagined only in relation to resistance, then the fruitful tension created between resistance and universality excludes, as such, any alternative (or relative) posit of the production of life. An example of this is found in the following passage from Agamben: "But if man is that which may be *infinitely* destroyed, this also means that something other than this destruction, and within this destruction, remains, and that man is this remnant.

You see why it makes no sense to speak of universalism with regard to Paul, at least when the universal is thought of as a principle above cuts and divisions, and the individual as the ultimate limit of each division. In this sense, there is neither beginning

Development, Social Citizenship and Human Rights: rethinking the political core of an emancipatory project in Africa

Michael Neocosmos

The paper begins from the axiomatic point that, despite the form it eventually took, namely that of a neo-colonial process, development was understood and fought for in Africa as [part of] an *emancipatory political* project central to the liberatory vision of the pan-African nationalism which emerged victorious at independence. Indeed independence was always seen, by radical nationalism in particular, as only the first step towards freedom and liberation from oppression, the second being economic development. It was after all Nkrumah who had noted that 'true liberation' would only finally come with national economic independence from imperial domination. Up to this day Africa is seen by many nationalists as unfree because of its economic dependence, and not so much because of its politics, as if the road to freedom, justice and equality was not necessarily a political one.

The failure of development to emancipate the people of Africa was not the result of a betrayal or a con trick, it was rather the effect of a hegemonic worldwide conception in the twentieth century, a view according to which human emancipation could only be achieved through one form or other of *state politics*. Indeed economism and statism were mirror images of each other: it was believed that only the economy could liberate humanity and that only the state could drive the economy to progress. Today, the first proposition has been retained but the second has been dropped from hegemonic discourse. Yet the two are inseparable twins; it is in fact the case that just as the latter is false so is the former, for human emancipation is and can only be a political project.

While development today is said to be guided by the (not so invisible) "hand of the market", the state has simultaneously delegated (or perhaps better sub-contracted) many of its development management functions to external bodies such as NGOs. These are frequently simply new parastatals as well as vehicles for social entrepreneurship for a 'new' middle-class of development professionals. The activists of yesterday have largely joined the state, not necessarily directly, but by becoming subsumed within the new mode of rule through 'civil society'. Activism has been replaced by professionalism. 'Feminism' and 'empowerment' for example, have often been transformed from being popular struggles and demands, to being professions. We have now a new form of state rule which forms the context for re-thinking development and politics. Central to this new form of rule is the hegemony of human rights discourse. This paper will begin by reviewing the political assumptions of the nature of citizenship underlying T.H. Marshall's argument for 'social rights'; it will provide a critique of human rights discourse and civil society from an emancipatory perspective (situating these within the new forms of imperialism and statism) and will briefly comment on the character of political parties and social movements in understanding political emancipation today. It will argue that in Africa, if one is to think an emancipatory project, citizenship must be thought as (a moral community of) active citizenship, and political subjectivity must be thought not as management or opinions but, following the work of Badiou and Lazarus, as the freedom to think new possibilities.

Formations of the Sacred in Democracy

Stewart Motha

God may be dead, but many deific substitutes are invented to replace this apparently defunct source of law, authority and common measure for social order. One need only think of the theological structure of modern sovereignty (from Hobbes's 'mortal God' to Schmitt's exceptional sovereign), the mythologies of 'people' and 'nation' (from the French Revolution and beyond), the various essentialisms of 'race' and ethnicity, or the universally 'sacred human', to understand that the need for idols that serve as the cohering force of the political order have not vanished. Notions of the *sacred* persist in modern political/secular theologies – and the recent work of Giorgio Agamben in particular has helped to bring this to light. My particular concern here is to consider how the persistence of the *sacred* structures and determines contemporary formations of law and democracy.

There are numerous challenging contexts in which the relation between the 'sacred' and democracy can be taken up. I will juxtapose two seemingly disparate contexts – the persistent negation of Islam in Europe, and the attempt to justify 'sacrificial violence' in South Africa's post-apartheid legal order. The purpose of the comparison is to set the scene for giving an account of the ambivalent place of the sacred in modern accounts of law and democracy.

Islam is regularly characterised as a threat to secular constitutional democracies or plural multicultural societies in Europe. The wearing of the *hijab* or *jilbab* have come to be regarded as undermining multiculturalism, liberal notions of equality, individual autonomy, or the secular state (consider cases such as the European Court of Human Rights decision in *Sahin v Turkey* (2005) or the House of Lords decision in *R (Begum) v Denbigh High School* (2006)). The perception of 'Islam' is that it presents sharp contrasts and acute tensions with liberal values and respect for human rights. The 'Rushdie affair' or the controversy surrounding the recent publication of cartoons depicting the Prophet are yet more examples of what is depicted as a challenge to 'Europe's modernity' from religious extremists, usually Europe's others, caught in their regular stasis of culture and tradition. The question of Islam in Europe is a telling site for considering what Derrida has termed the *auto-immune* character of democracy (Derrida, *Rogues: Two Essays on Reason* (2005)). At stake, as Talal Asad has argued, is the notion of 'Europe' itself (Asad, *Formations of the Secular* (2003)). Despite the persistent theologies of this modernity, it is Europe's foe that stands accused of failing to drive religion out of the City or into the private sphere.

The gnashing contrast is South Africa. Here the sacrificial figure is more than central to sustaining even radical notions of the public or political community. South Africa is the emblematic instance, as these stories go, of a post-racist liberal democratic order. Its 'Rolls Royce' Constitution is supposed to be second to none – and the 'rainbow nation' is often invoked when other civilising enterprises (Afghanistan and other 'failed states') need some juridico-political inspiration. But it is also the site of a neo-liberal compromise where at the very instance of a democratic transformation, a *sacerdotal* legalism was elevated above the 'people' – the Constitution, and not the people, is supreme. Furthermore, individual life can be sacrificed when necessary to sustain the post-apartheid political order. I will outline how post-apartheid legal theory, informed by poststructural accounts of law and political community, has come to endorse a mode of justifying sacrificial violence (van der Walt, *Law as Sacrifice* (2005)).

The purpose of the comparison between Europe and South Africa is to expose the seemingly oxymoronic secular theology central to modern accounts of liberal democracy – be they of the occident or the postcolony. In Europe democracy guards individual autonomy and suppresses heteronomy, but only through the deific figure of the human and certainly without any uniform adoption of secular institutions. In South Africa the individual can be sacrificed as a concomitant of being-in-common, as the sacral figure that enables the transformative democratic project (*Soobramoney v Minister for Health* (1997); and see van der Walt (2005), pp. 140-44) The two examples signal the immense task that still remains in order to inaugurate what Jean-Luc Nancy has called a mutual resistance

"Responsible Legal Choices and Decolonization of Legal Knowledge"

Organisers:
Archana Parashar
Amita Dhanda
Francesca Dominello

Stream

In an effort to enhance the authoritative character of the legal enterprise, the choice-making entailed in the enacting, interpreting and administering of law is often masked. A plausible explanation for the masked nature of legal choices could be obtained from colonial histories where the law was presented as the neutral arbitrator between rulers and ruled. Even as this representation was continually challenged it ensnared a number of votaries with unrelenting marketing. For the decolonization of legal knowledge it is necessary that the makers should be able to acknowledge the fact of making legal choices. The admission of this reality is necessary for responsive and responsible legal choices to be made. A responsive legal choice responds to the needs and aspirations of the populace for whom the law is made. Such like responsiveness could only emanate if lawmakers consciously assume the responsibility of choice making and continually reflect upon its impact both on people at large and special vulnerable groups. The Gandhian talisman of testing the impact of the choice on the most disadvantaged in a society could be a suitable standard for legal decision-makers. Illustratively it would be worthwhile to ask how family law should protect the interests of the most vulnerable members of a family. Or what concerns should inform the judges whilst deliberating on the best interest of the child. Or who is the public in the land acquisitions made in public interest. If making claims is an integral component of being human then which sections of society are dehumanized when both their claims and their ability to make them are silenced by the conventions of legal knowledge. Papers are invited on the abovementioned theme in order to foreground the reality of choice-making in all areas of law. Contributors could reflect upon the values which should inform the making of legal choices. The analyses could encompass legislative; administrative or adjudicative choices. It need not be limited to state actors and could extend to highlighting the efforts of individual citizens or citizen groups.

‘Sexualised Economics’, Divorce and the Division of Farming Property In Australia

Malcolm Voyce

Analyses of rural divorce cases clearly reveal the women have not received a fair share of rural property following divorce. The reasons for women’s exclusion from a fair share of property settlements are not always apparent from legal judgments. Some critiques of family law settlements have noted how women have been excluded from adequate property on the grounds that their contributions to the farm have been domestic rather than financial.

My purpose, in line with my genealogical approach, is to ask how family law texts, as regards rural divorce, have obtained their own particular structure and form. I concentrate on the rural divorce cases, as I believe these texts are a special branch of family law texts, which need to be examined as a separate group. My task is not to give an overview of the law as regards the division of matrimonial property, but rather to show how economic ideas on women have combined with notions of ‘sexuality’. This approach enables me to as regards family law texts to do several things.

Firstly, to analyses why some ideas in these texts have included while others have been excluded. My aim is to how legal concepts in family law texts such as ‘fault’, ‘contribution’, and ‘business assets’, include or exclude specific forms of knowledge about the family.

Secondly, this approach enables me to show how family law texts may be seen as evidence of a suppressed history concerned polarities of ‘virtue/disorder’ as against ‘heroic masculinity’. This will me to see how Family Law texts construct women as vessels or conduits through which property is transferred between men and men with the bulk of the estate passing to the male descendent.

Finally, the genealogical approach assists me to show family law texts may be seen in the light of economic discourses on socio-economic behaviour. Here I refer to the development of ‘governmentality’ and the emergence of a distinctly new form of thinking about the exercise of power in certain societies (Foucault 1991:102-104). This new form of power was bound up with the discovery of the economy as a new reality, which I argue in led to new behavioural expectations about the role of women concerning family property and the ethics of family self-support. I argue that these economic ideas were grafted with ideas of sexuality that compiled what I describe as ‘sexualised economics’.

International Laws and the Discontented: How the West Underdeveloped International Laws

Gbenga Oduntan

The paper intended to be a thought provoking submission will examine aspects of the contents of contemporary international laws that are threatening the legitimacy of public international law as well as International Commercial Law. It would seek to present evidence of the manifestation of the sectional and parochial interests of the developed western states in the corpus of international laws in a general sense. This includes an enquiry into the means and strategies that have been employed in at least the last century to make international laws serve western interests and indeed permanently work against the interests of the vast majority of developing states in order to perpetuate their subjugation. The paper will present the theory that as a result of an intricate web of strategic engagement and disengagement with the discourse, diplomacy and actual process of legislation of international laws, the specific regimes of Public international law and International commercial law are deliberately left in a state of underdevelopment. The strategies of deliberate underdevelopment of international regulatory regimes will be explored and the hypothesis to be tested include the propositions that the same methods are employed to under-develop both public international law and international commercial law and that the state of underdevelopment of international laws is indeed a permanent state. In other words, the paper will test the propositions that there has been a permanent damage to the regimes of public and private international laws which was deliberately orchestrated and that the underdevelopment of the law works to the advantage of a small clique of interests best represented by certain few privileged corporate and state interests.

The paper would consider the broad issues around the age-old controversy of whether international law does indeed qualify as law. The paper would examine the view that the foundation of international law especially the rules on the use of force did solidify into law gradually in the 19th to 20th centuries primarily for the advancement of western business. The hypothesis to be tested include whether in the last quarter part of the 20th century there was a deliberate stultification of the advancement of international law on many grounds and particularly with respect to the use of force. The proposition to be advanced is that the underdevelopment of international law by certain powerful states was achieved through deliberate actions and inactions for the protection of western interests. The continuation and manifestations of Public International Laws despite substantial and increasing strains experienced under its various sub categories and allied areas (private international law, international trade, intellectual property etc.) would be reflected upon. The paper will seek to establish the proposition that intellectual and doctrinal acrobatics engineered by the leading western states, their statesmen and the majority of writers therefrom has in recent times been accelerated through various corporate, institutional and political actors under an orchestrated agenda in order to further fine tune the use of international laws as a tool of maintaining legal and political hegemony in the international system.

The limits of tolerance and equality, or towards a 'new tolerance' and equality

Eilish Rooney

Women's Equality in Transition: Intersectionality in Northern Ireland's/ North of Ireland's Equality Legislation

Women have been invisible in mainstream analyses of the Northern Irish conflict. The prodigious literature is uninformed by gender analysis. These absences have discursive and material implications for tackling women's equality in a society in transition from armed conflict. Feminist intersectional theory aids understanding of the Northern Irish context by bringing into view issues of gender, sect, class and colonial state formation. The tentative intersectional theoretical framework developed in this paper is tested in an empirical study of women's poverty. This supports the argument that intersectional analysis is required if the approach to women's equality in Northern Ireland/ the North of Ireland is to benefit the most marginalized women and thereby improve the prospects of building a more stable and peaceable society.

Responsibility for legal knowledge: the role of the law teacher

Amita Dhanda

The necessity of assuming responsibility for role choices and to pursue the cause of justice cannot be confined to legislators, adjudicators or administrators alone. These choices as much confront the enterprise of legal education and thus to the law school and the law teacher. Should the teacher communicate or interrogate the choices of the other actors of the legal system? How she answers this foundational question would determine whether legal education reinforces or challenges the status quo. The use of law as an instrument of social change requires actors who see themselves as such agents. The manner in which legal education is structured and delivered would significantly influence the success or failure of law as an instrument of transformation. This paper examines what systemic possibilities are available to the law teacher in this enterprise? How if at all, these opportunities have been utilized? And how would law teachers need to reinvent their roles if they are to impart legal knowledge in furtherance of social justice

Power and Responsibility: The Curse of Spider-Man

Francesca Dominello

Throughout Sam Raimi's film *Spider-Man* (2002), there are two parallel plots being played out simultaneously. In the first story, Peter Parker (Tobey Maguire) is becoming Spider-Man, while in the parallel story Norman Osborn (Willem Dafoe) becomes "the Green Goblin", Spider-Man's arch rival. The becoming-Spider of Peter Parker and the becoming-Green Goblin of Norman Osbourn conform to the classic theoretical model constructed by Deleuze and Guattari insofar as the intersection of differences (in the case of Spider-Man human-insect: in the case of Green Goblin human-machine) enhanced by technological and scientific experimentation has led to the creation of new ways of being and the potential for a new world order: in this case a world without law. However, while it is to be remembered that *Spider-Man* is only a film, the issues it raises are still of concern for the world outside it. Within the ethical framework of the film created by Peter Parker's moral dilemma over the death of his Uncle Ben (Cliff Robertson) and his attempts to come to terms with his new powers, the audience, like Parker, is confronted with the difficult question of how power should be exercised responsibly.

In this paper I will explore the extent to which the film script has answered this question responsibly in terms of its implications for the world as it exists outside the film. In the world of *Spider-man*, Spider-Man is constructed as the "hero". But does that make Spider-Man's vigilante efforts to fight crime acceptable? As it is a film this may not seem to matter so much. It is when parallels are made between the film and the world outside it, particularly the parallel between Spider-Man's fight against Green Goblin in the film and the so-called fight against terror that is taking place outside it, that questions over issues of power, responsibility and restraint do become important. This raises the question of whether the world of *Spider-man* – a world without law – is as desirable to the world outside it as it seems to be within the film itself. Whether re-establishing law in the world of *Spider-Man* or in our own world is possible and can provide a better solution to vigilante justice remains to be seen.

Responsibility for legal knowledge

Archana Parashar

The aim of this project is to advance t heoretical ideas about the nature of legal knowledge. In particular I wish to argue that ideas are cultural products that are 'created' by thinkers including legal thinkers. The conventions of legal reasoning that disassociate the ideas and the thinkers' responsibility for those ideas result in theories that help maintain the status quo. All legal thinkers, whether in the mainstream or in critical strands need to accept their responsibility for such theories. I will use the example of theoretical explanations for the judicial role to illustrate the rol e of theory in legitimizing certain world views. The contemporary trend in some western legal systems to formulate strict rules is informed by the desire to restrain the judges from interpreting legal concepts including the meanings of justice and fairness (and thus of substantive equality). Judges, as part of an institution that is expected to pursue fairness and justice (and thus substantive equality) should be able to be trusted to make the right decisions. Therefore, rather than curtailing judicial discretion it is important that the conventions of legal reasoning change. Judges in performing their role of interpretation could be expected to make choices but more importantly they should carry the responsibility of explaining why the consequences flowing from those choices are fair. With this conception of judicial role it is possible to expect that substantive equality is to remain an open category, interpreted contextually. While the contemporary critical theory endorses contextual analyses it seems to have lost sight of the responsibility of the legal thinkers to pursue the possibility of justice. While the contemporary critical theory endorses contextual analyses it seems to have lost sight of the responsibility of the legal thinkers to pursue the possibility of justice. Legal theorists make choices resulting in whether law is conceptualised as maintaining the status quo or as having a transformative potential and therefore they must also carry the responsibility for the consequences flowing from those choices.

Crafting Human Rights Cultures

Organisers:
Kalpana Kannabiran
Vijay K. Nagaraj

The era of globalisation is also the period that has marked a radical shift in the politics of organizing of groups that have been subject to systematic discrimination. In the arena of the law, there has been an ascent of soft law – conventions on women's rights, declarations on racism and crimes against humanity for instance that has forced municipal legal regimes to contend with the new articulation of social realities. The era of globalisation is also the era of new social movements. In the field of new social movements, while resistance has spread through different media and has found progressively new articulations drawing in larger and larger constituencies, reflected in literature and politics/praxis, change itself is contingent on older deeply entrenched structures that are resistant to change, for instance the law – jurisprudence and practice. This is perhaps why despite constitutional safeguards social exclusion continues to throw societies into serious crisis, the resolutions coming powerfully through literature and political praxis, rarely through law. Social existence is then defined by the contradictory logics of popular consensus and legal [il]legitimacy.

Simultaneously we have witnessed mass upsurges of right wing majoritarianism that uses literature, politics and engagement with the law with violent efficacy. The era of globalisation is also the era of genocidal violence against groups at the margins. While 9/11 and 7/7 represent critical moments in the re-viewing of fundamentalism, conflict and exclusion they also seem to epitomize experiences of similar convergences in other parts of the world as well, resulting in widespread practices of exclusion based on religious belief and ethnicity.

While the renewed articulation of rights is one aspect of the new global era, a heightened violence against communities at the margins is the other side. Witness the conflagrations against Muslim peoples in Gujarat, or the violence in Europe, or even the wars we have witnessed in the recent past. Even while seeming to speak to "local" cultures, much of this violence in fact speaks of fractures in the larger public space globally, that re-invent questions and rationalizations locally. But where have legal regimes even begun to deal with these derogations?

Human rights discourses speak about issues that range from arbitrary arrest, detention without trial, extra judicial killings/disappearances and custodial violence to women's rights, dalit rights, struggles for land and survival by indigenous peoples, environment, housing, workers' rights, child rights, specific practices of violence – against women, dalits, minorities, children, persons with disabilities, sexuality minorities, detenues/prisoners, to name some. The area of criminal justice is especially significant both in the context of increasingly violent identity politics, armed conflict and political dissent. There have been very vibrant movements on each of these issues across the world, drawing in a diverse group of advocates/activists and affected peoples.

At another level, the last three decades have witnessed a dramatic expansion of the human rights discourse—inter-governmental bodies, international human rights and development organisations, governments, NGOs, social movements and a range of civil society organisations, researchers, the judiciary, the media and others have all contributed to this. There has been a great deal of interpretation, over-interpretation, reading down and reading into as to the content, core-content, minimum content, basic standards, etc. of human rights.

Is the question of operationalising and 'realising' human rights inextricably linked to those of accountability? And how clear is the sphere of obligations within which we can define accountability? Is it time to work towards a radically new definition and consciousness of being a 'duty-holder'? For civil society organisations working for the protection of human rights, the biggest challenge perhaps is engaging with a 'politics for human rights' even while navigating that difficult terrain of the 'politics of human rights'. Is it possible to shape a 'human rights common sense'? Is it possible to recognise 'human rights at risk'? Speaking of action, what of impunity? Is it just a case of systemic failure or is it a crisis of culture and society?

The human rights stream at the CLC is an invitation to dialogue and debate the past, present and future of human rights. It is an invitation to bring experiences of diversity, inclusion and the crafting of human rights cultures together while humbly recognising that those whose human rights are most at risk or indeed that the key architects of these cultures are far removed from the CLC itself!

Crafting Human Rights Cultures

This stream will consist of three panels and one film session

The four sessions are:

The Problem of Human Rights
Injustice of/and Criminal Justice
Crafting Human Rights Commonsense [film session]
The Cultures of Human Rights

Session 1

The Problem of Human Rights

Chair: Vijay K. Nagaraj

Abha Singhal Joshi

Fiona Campbell

Narnia Bohler-Muller

Session 2

Injustice of/and Criminal Justice

Chair: Prof. B.B. Pande

Pratiksha Baxi

Ujjwal Singh

Vrinda Grover

Arvind Narrain

Session 3

Crafting Human Rights Commonsense

Film screening followed by discussion on human rights activism in India

Session 4

The Cultures of Human Rights

Chair: Sagari Ramdas

Meena Radhakrishna

Preeti Nijhar

Brenna Bhandar

Paula Banerjee

An Enquiry into the Social Bases of Impunity

Vijay K. Nagaraj

Impunity is considered amongst the most pervasive maladies of the 'Indian Legal System'. However it is also clear that impunity cannot any longer be confined to realm of law as a purely legal concern. It is clear that in the context of wide social, economic and political disparities characteristic of the Indian polity, impunity will invariably work in favour of the powerful, thus denying to those on the margins the fundamental human rights guarantee of equality. Impunity therefore is a subject not only of law but also of politics, governance and social relations. It is this understanding that informs this enquiry.

The question is not just as to why despite guarantees of an autonomous judiciary, a 'professional' police and forensic force, basic civic freedoms and representational democracy at the local, provincial and national levels, a significant section of public and private actors consistently violate and abuse the law and power of office without facing due consequences. The question is also why the lack of consequences for violating the law and abusing office come to be so widely accepted amongst both the elite and the masses. This despite the work of a large number of active human rights and civil society organisations and their sustained and visible campaigns and initiatives to secure justice for victims of abuse of the law, power and/or office by both state and non-state agents.

There are questions beyond the last, and perhaps more fundamental ones at that. It is important to also ask as to what social and political factors legitimize or normalize crime without consequence.

What allows or sanctions the 'action *sans* accountability' behaviour of public officials? What are the socio-political and other factors that legitimize such officials being backed or protected and what are their origins. In other words what, if any, are the social bases of impunity?

How does the link between accountability and impunity relate to ideas of justice in the context of understanding of the State –society relationships in a democracy? How do those who are victims of impunity and lack of accountability perceive rule of law and indeed what is their understanding of justice being done? How does the law create and negotiate with people's notions of accountability? Is there space in the law to create new spaces where accountability can be articulated in different forms and actually enforced by people?

The last few decades have witnessed a spate of social and socio-political initiatives, in particular in the form of social movements, which have actively sought to alter individual and collective imaginations of State-society relationships.

The purpose of this enquiry is not just to seek to understand impunity or lack of accountability as a social phenomenon or delineate the socio-political agencies and factors that render institutional and procedural innovations in this regard largely ineffective. This enquiry is not about knowledge for the sake of knowledge, it stems from my commitment and passion to inform, contribute to and participate in, the struggle to transform personal, individual and collective action to secure for every person the most basic human right-justice.

Law and Life in the State of Nature: Reflections on the Stories of Legal Literacy

Abha Singhal Joshi

Hobbes' description of the life of man in the State of Nature, as "solitary, poor, nasty, brutish and short" could well be an apt description of the life of a commoner juxtaposed with the law of crime and the criminal justice system in our society. This paper, based on analysis of experiential accounts and responses of persons all over the country, drawn from various backgrounds over a period of 15 years, will attempt to examine the ordinary and unsung 'criminal'- which includes not only persons who have actually committed crimes, or formally been accused of crimes, but even those who, because of who they are, *raise a presumption* of being criminals. It will focus on the perception of 'law' amongst common citizens as a tool to be feared and avoided; a machine which is commanded by and therefore works best only for those who are affluent or otherwise powerful.

At the cost of inviting the frequent allegation that 'human rights deals only with the protection of criminals', the paper will first deal with the perceptions and experiences of an accused or convicted person. It will examine the typical instances of crime for which persons finds themselves pushed into the criminal justice system, the response of the system and the impact on the person's life and that of those associated with him. The system as it operates, generates a constant and living" fear and insecurity"; it sets limitations on the movements, lives and actions of people where none should rationally or legally be; it engenders a hatred for the state and all its instruments and pushes a person back into the state of nature where men live in a 'condition of war'.

The experience of the victims in terms of the apathy, disorder and lack of response from the criminal justice system matches that of the accused almost step by step. On a close examination of the working of the system in a majority of situations, the popular perception that the rights of the victims of crime are *ignored at the cost of favouring* the perpetrator of crime is displaced, as the plight of victims is in no way related to the (non-existent, in practice) protection afforded by the law to the accused. In its repetitiveness and universality, it engenders a typical mindset and a typical response to persons accused of crime, slotting them in moulds defined by their look, names, social and economic status and functions to deny citizenship to entire segments of people.

The cruelty and disdain shown by the formal justice system spills over into society and emerges in the form of fatwas, decisions by panchayats to 'punish' persons who have committed 'crime' (as defined by that particular grouping), and now, increasingly, public lynching of different hues, very often receiving tacit community approval.

Geodisability Knowledge Production and International Norms: A Sri Lankan Case Study

Fiona Kumari Campbell

Disability is representational system in the sense that its denotation is a result of how communities make sense of and mark certain bodily differences. Since the Enlightenment, genealogies of disablement point to certain historical continuities in the marking of aberrant bodies constituted as *governmental rationalities* (motivating discourses) that inform the practices of governing disability. A hegemonic governmental rationality of impairment in Western thought postures a belief in disability as *inherently* negative and thus, an outlaw ontology. In this paper I argue that United Nations norm standard setting, as a form of geodisability of knowledge which delimits and denotes the kinds of bodies known as disabled, is a technology for reining in, and thus controlling anomalous/disablized bodies. International norms also have an effect of reining in renegade nation states. UN - based international norm standard setting in the form of geodisability knowledge production, is a form of panopticonism.

The institutional strategic gaze, sited in the UN, is able to examine, normalize and condition Nation states. Without consensual international disability norms it would not be possible to disclose and make visible the dynamics of disability at a country level and for the World Health Organization to map disability globally. The seeing of disability it is argued, enables surveillance both globally (of each country) and individually (every/body is surveilled for conformity). International disability norm standard setting is represented as a system formulated by consensus, being transcultural (therefore detached) and objective.

An alternate reading of international norms is to figure the functioning of geodisability knowledge to naturalize hegemonic ways of seeing (knowing), citing (summoning and hailing) and situating (localizing) disability and thus is as an attempt to codify unruly forms of impairment differences. A discussion of geodisability knowledge production in the form of international standard setting is pursued within the context of a Sri Lankan case study.

Are we there yet ? The deferral of justice and the promise of human rights

Bohler-Muller, Narnia

I hope therefore I am

The paper to be presented is an attempt to recapture the poignant innocence of a young child embarking on a long journey. The cynical adult anticipates the arrival at a given Cartesian co-ordinate, a place name on the map; the post-pubescent juvenile imagines the discomfort that she will have to endure to get there, but the young child exists only in the moment of the journey, where each point of the road trip may be the final location, and in so doing she experiences so much more as this journey is by nature endless.

On this particular journey I explore the utopian nature of human rights and the (im) possibility of "arriving" at our destination, which is always yet-to-come. Utilizing the critical theory of Drucilla Cornell and Costas Douzinas, and looking back to the utopianism of Ernst Bloch, I offer an argument that acknowledges the limits of the law and the transcendent nature of justice with specific reference to the role of the Constitutional Court in South Africa. Principally, I seek to convince that the re-birth of the ethical in legal theory and practice could, at the very least, point us in the direction of a better future(s) both locally and globally.

Habeas Corpus: Legislating Illegal Detention, and Legality of Custody in Marriages of Choice

Pratiksha Baxi

This paper focuses on the twin notions of detention and custody in the realm of the jurisprudence on choice marriages in India. It examines the question of procedural legality, since it provides a clear illustration of how adult women's autonomy to *choose* their partners is inscribed within the adjudication of custody and illegal detention. The writ of *habeas corpus* allows us to examine what kind of protection from state power that men and women in choice marriages seek, and therefore, how may the situation of emergency be thought of, when that protection is suspended. The discussion on *habeas corpus* has ordinarily been evoked in discussions on political prisoners and illegal detention of subjects, thereby eclipsing routine use of the writ in the domestic realm. Yet procedural legality is a site where issues of substantive justice are regularly adjudicated. I suggest that analyses of procedural legality allow us to explore the relationship between state law and sexual governance. The case law on *habeas corpus* allows us to explore the contradictions that face the judiciary, when marriages of choices are broken up with the help of the police or other functionaries of the state. The embedding of law in local publics thereby finds critical address in these judgments. In this paper then I argue that the legal narratives of procedural legality allows us to explore the tensions between the socio-legal discourse of "reconciliation", which upholds the institution of marriage, and the socio-legal discourse of "recovery" of women who forge "improper" alliances. Procedural legality permits state law to actualise its legitimisation project by critiquing the use of the law to recover adult daughters and compelling parental acquiescence to acknowledge the sovereign power of the law. Courts of appeal have often rejected the discourse of recovery in favour of reckoning the legality of choice marriages. The emphasis on upholding the institution of marriage means that distinctions between arranged marriages and choice marriages must find challenge within the judiciary. It is this tension between the discourses of "recovery" and "reconciliation" that is explored in this paper.

Penal Strategies and Political Resistance in Colonial and Independent India

Ujjwal Kumar Singh

This paper will explore the discursive practices surrounding specific laws, trials, and the ideology of punishment in colonial and independent India. The purpose is to show how through this matrix of law, court and punishment, the penal system, delineated the exceptional and the extra-ordinary, and legal and penal practices commensurate with it. In the process of this examination it will attempt to formulate and examine the problematic that (a) penal strategies devised to deal with political resistance are embedded in notions of necessity, which implies suspension of ordinary laws/procedures, (b) the identification of extraordinariness is necessarily determined by reasons of state and given form through legal, juridical and penal measures (c) the extraordinary does not lie at the borders or the limit between politics and law, but the two inextricably inform each other in complex interlocking relationships (d) the process of interlocking involves a reaffirmation of state sovereignty through laws, judicial procedures, and penal structures (e) alongside the process of reaffirmation of the domain of state sovereignty through legal, juridical and penal measures, a corresponding process of de-legitimation of political resistance, struggles, and assertions of popular sovereignty, takes place, through a process of de-politicisation and criminalisation, the use of binary oppositions viz., nationalist-anti-national, violent-peaceful, and the deployment of constitutional/extra-constitutional, legal/extra-legal methods of repression including extra-judicial killings, custodial violence and rape. Integral to the examination will be an examination of the legal matrix constituted by laws, which define the exceptional circumstances that necessitate extraordinary laws and the trials by courts that affirm it. While examining this process, the paper will outline and examine another problematic pertaining to the ways in which the processes and categories used to pin down the illegitimate emerge in colonial and independent India.

The paper will examine within the above framework the trajectory of laws that define the exception, including the *Defense of India Rules*, specific sections of the *Indian Penal Code*, the *Public Safety Act*, the *Terrorist and Disruptive Activities (Prevention) Act*, and *Prevention of Terrorism Act*, as well as specific trials that give affirmation to state action. It proposes also to study the life of certain laws, which not only survived both company rule and the colonial state, but became part of the legal and penal structure of the state in independent India, like the *Bengal Regulation III of 1818*, *Madras State Prisoners Regulation II* of *1819* and *Bombay State Prisoners Regulation XXV* of *1827*.

Criminology and Communal Mass Crimes

Vrinda Grover

Communal violence is not new to India. However the rubric for the definition and adjudication of communal mass violence remains the Indian Penal Code and the attendant Criminal Procedure Code and the Indian Evidence Act. The failure to dispense justice to the victims is in no small measure due to the fact that the defining characteristics of this violence are in many respects distinct. This paper argues that the zone of mass communal crimes demands special attention from the perspective of criminology in the absence of which the victims and survivors will keep chasing the mirage of justice in the labyrinth of courts. The nature of offences, the pattern of crimes, the character, composition and shape of the aggressor, the dominance of collective violence all require scrutiny and analysis. A juridical conceptualization of mass communal violence requires the formulation of theories of joint criminal enterprise, command responsibility, conspiracy and liability for collective violence. Some of the salient issues that require urgent attention are outlined here.

The legal category of 'riot' is repeatedly employed by the investigating and prosecuting agencies to provide an inaccurate and inefficacious definition of mass violence. Judicial adjudication too uses the category of 'riot' to determine legal culpability. The legal category of 'riot' fails to encompass the scale or nature of violence nor does it uncover the range of actors responsible for the emergence and perpetration of the violence. The juridical discourse surrounding riots is deeply imbued with stereotypical and discriminatory "communal" constructs of collective violence.

The principal accused in incidents of mass communal crimes is the 'mob' the 'crowd'. In judicial discourse the image of the crowd represents a site of violence and passion. The lowering of standards for criminal culpability due to the nature of mob violence requires a critical appraisal from the standpoint of criminology.

The doctrine of 'grave and sudden provocation' as a defence has received judicial attention in different contexts. What will constitute grave and sudden provocation for collective violence and what will be the temporal and jurisdictional limits of this provocation?

Labeling and squeezing mass communal crimes into present sections of the Penal Code distorts and disaggregates the crime into disconnected isolated incidents of violence. The acts are not viewed as a part of 'a widespread or systematic attack' against a particular community. This hinders the formulation of communal violence as crimes against humanity and also conceals the genocidal intent underlying the violence. The description of mass communal violence as a manifestation of a systematic and widespread attack and affixing individual criminal responsibility for the acts remains a challenge for criminology. The ascription of culpability to the frenzy and passion of the mob disables any further investigation or inquiry into culpability and enables the State to be acquitted of all responsibility, obligations and culpability.

Despite credible and comprehensive reports of brutal and large scale sexual violence during each episode of communal mass crimes the police documents and judicial records do not mention, investigate, adjudicate or redress this violence thus in effect negating the systematic and genocidal nature of the violence. In uncovering the scale and nature of sexual violence both the gendered and the ethnic nature of the violence will have to be reviewed.

The judicial discourse surrounding mass communal violence has for long shielded and perpetuated impunity and injustice. Criminology can help unmask the nature and face of this communal violence as a step towards securing justice for the victims and survivors.

Criminology and the homosexual subject: A queer critique

Arvind Narrain

This essay will begin with an analysis of how sodomy as crime has been implanted into Indian society in the form of Sec 377 of the Indian Penal Code. The reasoning and logic of Lord Macaulay as well as the understanding of the Courts in India of the crime of sodomy will be analyzed. How well into the twenty first century the legal structure in its various manifestations continues to produce knowledge of the homosexual as criminal will be sought to be understood. Even the contemporary context with the coming into force of the Constitution has not played any significant role in disturbing the colonial continuity of Sec 377. Equally of import is the role that the constitution of the 'eunuch' as a subject of the criminal law, in fact specifically as a 'criminal tribe,' needs to be understood. How has this impacted the treatment of hijras by the criminal justice system in contemporary times needs to be explored.

While it remains a very important task to understand the role that the law has played in constituting the homosexual as criminal the queer enterprise cannot stop at that. What is the social role, which is served by the constitution of carnal intercourse as an offence? Of course the reason for criminalization can be read in the Judaeo Christian framework of morality animating the colonial administrators of the day. However the continued resilience of Sec 377 and its imperviousness to any form of social change requires us to revisit the question as to the social function served by the anti-sodomy law. In the changed context of an independent India, what is the notion of India, which it serves to uphold? What role does it play in keeping in place the 'normality' of everyday life and in keeping in place the structure of family and community? Is the idea of heterosexuality as normal really underpinned by the continued stigmatization of the homosexual as abnormal?

The other aspect which one must necessarily explore is the response of the homosexual to the criminological enterprise. Invoking Foucault, what is significant is the project of resistance to the attempt to define the homosexual. Power by is nature is never absolute and the homosexual resists the project of the 'expert knowledges' by taking on the very identity of the homosexual as a political resistance identity. It is important to understand the series of steps by which the homosexual is transformed from being a mute subject of the criminal law to a vocal participant in the discussions around the role of the criminal law.

Finally the essay will explore the implications of the emergence of the homosexual voice for the future of the criminological enterprise. Is criminology doomed to be an integral part of disciplinary power or will we see the emergence of the queer criminologist? When violence against homosexuals remains a part of the contemporary situation, what is the role of criminological theory? Can it respond by understanding the social role that violence towards queer people plays? Can criminology factor in the queer critique and move forward in its understanding of the homophobic basis of crime?

Criminal Tribes Act, 1871: The Construction of an Indian Criminal

Meena Radhakrishna

The British instituted a piece of legislation, the Criminal Tribes Act (CTA) in 1871. The purpose of the Act had been to suppress "hereditary criminal" sections of Indian society. CTA was first applied to Northern India and in 1911 a revised version was applied to the whole of British India. A total of about 200 communities were affected by this law. Today's denotified communities are the ones who were covered by this act and were later denotified by Pandit Nehru in 1952, when this Act was scrapped, being considered by Panditji to be a blot on the lawbook.

The late 19th century had been a particularly hard period for the policy maker in British India, with economic depression, unemployment, strikes and growing political radicalism. Poverty, alcoholism, illhealth (and crime) had not disappeared in England inspite of decades of social legislation. There was great temptation for believing - preferably supported with scientific proof - that crime was a hereditary trait, and called for **measures to re-engineer society on biological, rather than social or political bases.**

The pseudo-science of Eugenics seemed to provide an explanation, among many other issues, to the problem of rising crime and poverty. Indian criminality was linked to the introduction of the railways, the new forest policy, repeated famines and so on.

The administrative rationale was that with the introduction of certain policies designed to raise revenue, some communities had irrevocably lost their means of livelihood. How else could they live except by committing crime, especially if there was no property to support them?

The relationship between itinerant and sedentary communities has become increasingly problematic in modern times. The more the itinerant communities get marginalised to the main sphere of society because of transformative processes, the more they become suspect from the point of view of the sedentary society they interact with. In real terms, their increasing marginality simply compounds the already existing prejudices against them. In Europe, gypsies became gradually marginalised to the established system with the processes of industrialisation. In India, it was the colonial revenue policies which destroyed the itinerant communities' earlier trading practises.

The plethora of new legislation that the British introduced created new 'criminals' all the time. These were either people ignorant of the new laws, or those wilfully defiant of the ones which encroached on their traditional rights - for instance, forest laws. There were a number of communities who did not know the newly imposed forest laws under which they were forbidden to collect honey, bamboo leaves, or medicinal herbs which they used to barter with the villagers. They continued to do so, partly in ignorance, partly thinking this to be their hereditary right. The large number of new laws on common pastures for grazing of cattle similarly turned whole communities into criminal tribes by the British administration because they continued to graze their cattle.

It is worth pointing out here that there was the additional input into notions of criminality by the then developing discipline of anthropometry and anthropology as well. These disciplines in India addressed themselves to the study of particular sections of the Indian population, mostly indigenous 'tribal' communities and itinerant groups, and contributed in a very substantial way to the conceptual outline of a criminal in the popular mind. By focusing on bizarre or exotic ritual aspects of the social lives of such communities, and at the same time also on their differential anthropometric measurements, these disciplines managed to draw the fine line between a civilised and barbaric individual.

Hence, the many strands from science, myth, religion, official ethnography which went into a definition of a criminal need to be explored in detail and documented.

Imperial Violence: Identities and the Criminalisation of the 'Sansi' tribe in Colonial Punjab

Preeti (S.K.) Nijhar

This paper seeks to demonstrate and illustrate how 'criminal' identities were central to the constant, frantic, and schizophrenic reassertion of imperial power. The debate focuses on 'crime' and 'danger' with respect to one specific group of nomads, the Sansi, and it is also indicative of the wider application of discretionary power by the imperial criminal justice functionaries towards many castes and tribes who were labelled 'criminal' in India. Crucial to the articulation of those identities is the history of England as a colonial regime. The aim of this paper is to outline the transportation of Victorian legal definitions to imperial India.

It will be argued that Victorian definitions of 'race', and related components of eugenic theory, came to supplement the Indian caste system. This way of 'knowing' the Indian society fulfilled the needs of the imperial state. In particular, the nature of the criminal justice process in imperial India contained many of the same elements of collective discretionary legislation and of policing controls as were found in Victorian England, and these contributed to the construction of identities of both the colonial rulers and of colonial elite. Thus, the analysis of the 'criminalisation' of the Sansi, under the Criminal Tribes Act of 1871, is intended here to suggest the ways in which the 'criminalisation' of various castes and tribes took place in imperial India, and show how those identities were and still are crucial to an understanding of the wider discourses on identity, on 'dangerousness', and on law in postcolonial India.

"Culture, Identity, and Difference: the persistent problem of property in the recognition of indigenous rights"

Brenna Bhandar

Indigenous rights are increasingly being recognised in a variety of post-colonial contexts around the world. In the Canadian context, aboriginal rights were affirmed and recognised in the constitutional reforms of 1982, and since that time, a plethora of aboriginal rights cases have gone before the Supreme Court of Canada. However, the recognition of aboriginal rights, in my view, has largely failed to ameliorate the material injustices that accrued during colonial settlement and continue to impact on indigenous communities.

In this paper, I will argue that contemporary theories and practices of recognition tend to emphasise the recognition of *cultural difference*. In doing so, the 'propertied' aspect of human rights claims, and in this particular instance, indigenous rights claims, remain unconsidered. I argue that contemporary theories of recognition of the subject (of rights) fail to account for the importance of appropriation and property ownership to the formation and recognition of this subject, which is amply clear in Hegel's dialectic of recognition, from which contemporary theories of recognition largely derive.

The result is the recognition of the subject of indigenous rights who is defined on the basis of her cultural difference; and

Communities, Gender, and The Border – A Legal Narrative on the India's North East

Paula Banerjee

This study is to see how border laws impacted on the creation of hostile tribes in Northeast India and how such a construction impacted on women in northeast India. In this paper I seek to analyse both border laws and discourses on it and portray how these laws marked specific groups as recalcitrant and treated them as criminals. By marking them as criminals any violence against them was justified as an act of order. I will analyse border laws from the colonial period to the present, particularly because there is a definite linkage between the laws of the colonial period and those of the present at least vis-à-vis the border areas as they portray how laws mark groups as disorderly and then violence against those considered deviant is justified in state discourses. But this is just part of what I intend to do. The other part deals with the gender dimensions of these laws.

The impact of border laws on people in Northeast India is often considered from a male perspective. There is very little realization that these laws have a different impact on women. In most of Northeast women are marginalised in institutional politics. Electoral politics in the Northeast is completely dominated by men. They dominate the seats of power. Sometimes women are given token representations but very often they become invisible. According to Aparna Mahanta, a noted social scientist from Assam, this exclusion of women from electoral politics is a "deliberate exclusion" imposed on them by the men.

Electoral politics, it can be said, have in no way empowered women in the Northeast rather it has led to their further marginalisation. However, there are other areas in the public sphere where women have made spaces for negotiations. One of the areas where women have had a tremendous impact is in the protest against these border laws. Women of these communities are portrayed not merely as deviant but their sexuality itself is considered as threatening and so the impact of these laws on women are even more violent. Rape against these women is justified as means of controlling them. Hence rape as an instrument of coercion of women of these regions have become commonplace. It is therefore, not surprising that the most vociferous protest against these laws have come from the women who are in the forefront of any such protest movement today.

I will bring into my analysis this narrative of protest that the women have spearheaded against border laws. This will bring out the gender dimensions of the laws that are applicable in the border regions. It will portray how such laws have encouraged a definite form of gendered violence. It will also portray why women feel it imperative to protest against such laws in huge numbers. Without a narrative of the protest movement this commentary will at best be partial. Therefore, the aim of this essay in brief is to portray that when the state, with violent and suppressive laws, engages in border control it inevitably reinforces a patriarchal border regime.

Genes, Life and the Empire

Organiser:
Chitra Kannabiran

The late 20th and the 21st centuries have witnessed tremendous advances in biology. The science of biotechnology was created, with proliferation of a new range of technologies that represent powerful means of manipulating living organisms and parts thereof- whether organs, cells or molecules. The Human Genome Project, hailed as the greatest advance in modern biology, achieved the complete decoding of the human "book of life". An inherent feature of the modern developments in biology is their potential for commercial exploitation that went hand in hand with the separation and objectification of biological entities from the whole (whether organisms, cells or molecules) for the main purpose of treating them as commodities. Also inherent to the new developments is an ideology of a genocentric universe, in which the sequence of letters on the genetic code provides a framework for defining health and disease. Thus, the sequence of DNA or the genetic material in a human cell is considered to be a "transformative textbook of medicine, with insights that will give health care providers immense new powers to treat, prevent and cure disease."

Inevitably, the recognition of this as a possible gold mine for the biotech industry has been accompanied by large scale patenting of genes, as also of other biological entities. The debate around the question of patents for genes, cells, genetically modified animals/ plants has centred on a whole range of issues ranging from the basic moral/ethical question of whether a life form can be patented to the implications of such patents for human rights and public health. The interpretation and use of patent regulations to grant patents for genes, cell lines and cloned/modified animals or plants, particularly in the US

and Europe, needs to be re-examined and the idea of 'patentability' redefined. Questions that arise are: How does one re-define a creative invention in the background of existing scientific development? How does one define 'public benefit' for discovery of gene sequences and ensuing diagnostic tests, in view of the recognised risks/caveats associated with genetic information? What is the impact of patents on the freedom of scientific research? What strategies should one use to build a different framework of IPR in the context of biology? And what avenues do developing countries have in the background of

A shrinking of the public domain in agriculture: A cartography of contemporary developments in intellectual property rights in plant material

Dwijen Rangnekar

Intellectual property rights have expanded in coverage to include resources that were previously deemed to be part of the public domain. In addition, the rights themselves have been greatly strengthened and the regimes of intellectual property rights have been geographically harmonised through the TRIPs Agreement. Recent theorising in the law-economics literature, where the notion of anticommons – a property rights regime where multiple agents possess effective 'rights of exclusion' – has been developed. Models predict a scenario of underutilisation of economic resources within settings of anticommons property regimes. Thus, rather paradoxically the promotion of intellectual property rights, aimed at solving the incentive problem, might actually hinder innovation.
This paper engages with this literature by adopting an evolutionary economist's approach to the study of technologies. Here, two principles are important. First, the going beyond the knowledge/information dichotomy, evolutionary economists recognise that knowledge is a quasi public good; thus, better characterised as a club good. Second, questions concerning changes in the regimes of intellectual property rights are substantially dependent the nature of technical advance in the sector. Using these precepts, the paper explores the question of anticommons in the context of plant breeding.

The main section of the paper begins by identifying four key trends that constitute the 'shrinking of the public domain in plant breeding': patenting of genes and biological material, patenting of plant varieties, granting of broad scope patents, and patenting by the public sector. The paper addresses the question of anticommons property regime resulting in a tragic outcome from two specific angles: transaction costs and accumulating knowledge capabilities: Will the transaction costs and the complex negotiations required to access the resources and research tools to produce new varieties be too difficult, burdensome and time consuming? Will the public sector (particularly in the global south) lose out in accumulating the knowledge capabilities to assimilate, understand and exploit novel breeding material and techniques? Will we witness a scientific *apartheid*?
Recognising the quasi (and local) public good properties of knowledge and learning processes, it is suggested that transaction costs and delayed and limited access to contemporary research tools might, in a dynamic sense, lead to the lose of absorptive capacity within the public sector. These 'results' are discussed within the context of recent surveys on the use of proprietary biotechnology inputs in (national and international) public agricultural research centres (e.g. the surveys conducted by the International Service for National Agricultural Research).

Enclosure, Biocommons and Open Source: In Search of Alternatives

Krishna Ravi Srinivas

The plant germplasm and seeds have been transformed from part of the common heritage of human kind into commodities protected by intellectual property rights. The patents on genes, data base rights has resulted in private appropriation of human genome. Today as the enclosure through patents and other intellectual property rights covers a good portion of the bio-commons. This enclosure is threatening not only access but also use of these resources for non-commercial purposes like research and experimentation. The idea of use in patent law is being interpreted so expansively that farmers rights has been negated through laws and verdicts by courts. Thus the enclosure is no longer an arbitrary act but an act that is sanctified by courts. The upward harmonization through TRIPS, the TRIPS Plus provision in various bilateral and free trade agreements is resulting in the global spread of the enclosure with nation states acting as guarantors of rights of the owners of the intellectual property. In such a scenario there are searches for alternatives and counter-strategies to minimize the impact of enclosure and to negate it through creative means. This paper explores how Open Source can be a part of the alternatives and counter-strategies.

It discusses how Open Source is emerging as a potential model that can replace patents in some sectors and why Open Source is favored by the corporate sector in some areas although the corporate sector swears by patents. We examine the various initiatives in applying Open Source to the bio-commons and analyze their strengths, relevance and weaknesses. We also point out that Open Source is not a panacea and it can be applied imaginatively. At the same time Open Source will be an essential part in any strategy that opposes enclosure and Open Source is useful to resist the enclosure and in formulating counter strategies. Support for Open Source should go hand in hand with other initiatives and strategies to reclaim the bio-commons and to guard the bio-commons.

"Mediating" scientific debate: genetic information and genetic engineering in the poplar news media

P. Thirumal & Usha Raman

The mass media constitute an important determinant of the ethical and legal climate within which science is done, and scientific 'products' are constructed and received. While serious disciplinary debate no doubt occurs within academic and professional forums, those who participate in such debates, and those who make policy decisions relating to the issues of debate, are partly socialized by their exposure to the mass media. In this context, popular accounts of science do to some extent determine the direction and content of such debates, particularly in issues where a high degree of disciplinary interfacing takes place, and the participants come from a variety of specialized areas. This paper analyses the debates in the print media on genetic engineering and IPR within this realm and the construction of these issues in the popular imagination. This based on a critical textual analysis of news and feature stories on these issues in two major English language newspapers, The Hindu and The Times of India,

Protecting Indigenous Knowledge through IPRs: Patently Paradoxical

Sagari R Ramdas

The knowledge of biodiversity and its associated genetic material that is inherent in indigenous and other rural communities is much vaster than what modern science has discovered. Communities have used their knowledge of plants, animal and microbial diversity for a myriad of different purposes such as food, medicine, fiber, fuel, fodder, building material, and these have been critical for ensuring and providing multiple securities at the household and community levels. This knowledge has not been created or discovered by one individual but is the collective innovation of generations over the years. While community knowledge on biodiversity and its associated genetic materials have not necessarily always been unconditionally open, they distinguish themselves from current regimes of Intellectual Property Rights (IPR) and Patents, in that this knowledge and its associated bio-resources is not privately controlled and is characterized by multiple modes of knowledge sharing and transfer.

In this era of Empire, States and Corporations and their agencies, have put into place stringent IPR and other Patent regimes, and negotiate over international regimes for access to genetic resources and benefit sharing, ostensibly to protect and develop Indigenous knowledge and its associated genetic material. Billions of dollars are invested in research on indigenous knowledge in the hope of finding miraculous plant or animal genetic material, which will be subsequently re-introduced into new seed stock and re-sold as "novel innovations" to the very same communities from whom this knowledge was originally researched.

IPR regimes are increasingly unquestioningly championed by international and national scientific establishments as the only way forward for individuals and communities to capitalize and "benefit" from their knowledge and life-forms. Peoples knowledge is being rapidly abstracted out of a broader livelihood context, and identified as 'innovations' which have the potential to be patented, commodified, and marketed as `Indigenous Technology Knowledge products', after undergoing further scientific research.

In this paper we argue that the current international and national IPR regimes far from protecting the rights, control to and equitable use of indigenous knowledge and biodiversity by communities for their livelihoods, only enhances and "legalizes" the process of bio-piracy, monopolization or private appropriation of knowledge and its associated genetic material by National Governments in association with Corporations. It aggravates a precarious situation today where larger political and economic forces have already undermined and constrained the traditional systems of use and sharing of bio-resources by communities. It concludes with experiences of how communities are challenging the dominant model with creative modes of non-cooperation against IPR regimes.

The Killer Silence

Organiser :
Abha Singhal Joshi

The freedom of speech and expression stands head and shoulders above others as the most laudable, the most desirable and the most fiercely to be protected democratic value. It finds expression in declarations of assurance and protection in democratic Constitutions the world over. In the same breath, the statutory regime and the practice strive hard- and usually succeed- to shoot it down. The frequency and range of violations of the right bring forth responses which are confused with the de facto exercise of the right. Television coverage, analytical articles in a few editions of newspapers; in some cases, legal action and a few seminars are taken to be 'freedom of speech and expression'. The hue and cry rings out loud over the what and why.

The problem: Are the interests of the beneficiaries of such rights protected by such actions alone? Ostensibly, these actions are also growingly used to protest the violations of others less availing the benefits. It is precisely this which is the problem: Just how universal is this right? Is it at all a right or is it a privilege confined to the few who are able to whip up the hue and cry; does not this so called 'right' have all the trappings of a privilege? Its exercise is limited to the channels which few can access – those who can read and write or are glamorous and newsworthy enough to catch the eye of the audiovisual media. Its formulations and the debates have all been within the confines of the right to express through the written (or even more limited, the published) word. What of those who have never learnt to express thus?

In societies where the three Rs have not percolated down to many, freedom of speech and expression- much less dissent- have gradually succumbed to the rift in the lute and slowly silenced all. The right, as she is understood by the legal regime, gives little space for expression as she is understood by the many who are unable to express or articulate through the written word or within the within the limits of grace and etiquette drawn by a culture which presumes literacy. The natural way to express for many, is therefore- to turn out and gather in groups, to raise chants and slogans and, all failing, to restrict movement of traffic and persons- all of which acts are liable to be offences under the prevailing laws.The state's perception of these responses is tilted more towards the aspect of these offences rather than the protection of an important fundamental right. As a result, state violence is unleashed at the slightest pretext. Violence which ranges from hitting with sticks to shooting dead. These incidents are happening with too alarming a regularity to be ignored. The questions thus arise: Should there be redefinition of the right to speech and expression in keeping with the culture of expression in a society? Have states which have abdicated their roles as protector of this right and donned instead the role of a chauvinistic resistor of the right be forced to be accountable to their people and their Constitutions for providing channels of articulation such as legal awareness and open access to the broadcast media?

Theorizing Dissent

Susan D. Brophy

Justice *contra* Law

In its most basic enactment, dissent demands an audience. In this analysis, I endeavour to demonstrate that the act of dissent is a social act by highlighting its need to be heard (Adolf Reinach), its other-directed subjective meaning (Max Weber), its need to be shared (Hannah Arendt), its relation to consent and authority (Arendt and Weber), and its force as a justice claim *contra* state law (Jacques Derrida). To aid in the uncovering of the qualitative nuances of dissent, I anchor this theoretical exposition with specific examples of dissent (namely self-immolation, blockades, and rioting), helping to elucidate a curiosity in the manner in which legitimacy and legality are ascribed to certain acts of dissent. I suggest that the degree to which the act of dissent emerges and reflects a shared consciousness correlates to the perceived legitimacy and legality of the act itself. Ultimately, I aim to present the act of dissent as at once unifying and divisive as a collective expression of a singular intention; it is sometimes illegal, but often represents an answerability that does not fit within the parameters of state law's 'justice-as-calculable' approach.

Relevance of Damage in Defamation Claim: Reflections on Jameel

Mohd Altaf Hussain Ahangar

At common law, libel is actionable *per se* provided three main elements of defamation are proved to the satisfaction of the court. However, the latest judicial trend in England is not to entertain such claims unless the extent of publication is so wide that the real damage to the reputation of the claimant is discernable. With such approach, we have reached to that stage of judicial adventurism that the blame is being put on the victim rather than the perpetrator of the libelous assault. One can safely draw this conclusion from the judgment of the English Court of Appeal in *Jameel v Dow Jones & Co Inc* [2005] QB 946.Our suggestion is that the extent of publication should not generally be an issue for entertaining a libel claim. Courts should be, however, free to consider it while awarding damages. We have not to forget that the motivation for bringing libel proceedings is vindication, not damages.

The Crisis in Constitutional Systems & Silencing Mechanics

Madabhushi Sridhar

The world's most populous democracy that is governed by largest written constitution gave its people 'right to silence' under Article 20(3) against the torturous demand for criminal information. But they are otherwise silenced for raising the voice, by adopting all constitutional, legal, extra legal, social and anti social weapons. The people, who are the real media of all the media suffer for asking for their rights and branded as litigants for demanding a remedy. The state fights the ordinary citizen of the country up to the Supreme Court at cost of citizen.

Guarantees of uncertainty

The citizen's freedom of speech and expression is guaranteed under Article 19(1)(a) amidst all wide, ambiguous, catch-all restrictions under the sub-article (2) of Article 19. The liberty of thought is unlimited, the expression, though limited, was proclaimed to be a fundamental right, but these two cannot find the foundations, the education and information. The Indian Constitution has been amended to declare right to primary education as part of fundamental right under Article 21A, and Right to Information Act was passed in 2005. While the education right is yet to be realized, the government is making all efforts to further truncate the information right, which is already thinned by several exceptions and exemptions.

The Corrupt and Manipulative Executive

The political executive wields its power through corrupt bureaucracy and plays its cards to win publicity and build opinions through privately owned Media organizations. The state power graduates into absolute status with official secrecy, police muscle and dumps of black money. Along with political leadership the steel frame of bureaucracy which inherited insensitive legacy of British uses the weapon of criminal defamation and crime of disclosure of secrecy against questioning media.

Endless Debating Stage of Legislature

The legislature long back turned into a house of endless debates and countless dramatic events that distribute entertainment through live telecast while none take a serious look at the laws that are either being passed or forgotten to be. Under the shadow of powers of the political executive and behind the shield of Parliamentary privileges, the critical voices are silenced and fury of flattery alone is ensured.

The Judiciary seeking strength from Contempt Power

The Judiciary continues to play a pivotal role in dictating the executive and striking down the unconstitutional legislations, depending heavily on powers to punish the contempt, so that its supremacy is vindicated and critical voices do not rise. The Supreme Court finds it necessary to caution the High Courts not to encroach upon the arena of Executive, Investigation and Administration etc. Apart from tardy progress in clearing the pending cases, the deepening institutional weaknesses are baffling the process of administration of justice. Though every thing appears to be alright apparently, a lot need to be done to tone up the quality of justice and offer the relief to the citizen.

Ray of Hope in Opinion Building

Almost all the democratic systems in India are in crisis because of lack of sincerity, disinterest in real welfare of the people, and vested interest in continuing in power. The opposition and the ruling parties forget that they were once in each other's shoes so that they can shamelessly advance same strategies, statements and agitations. In the process the people and media suffer for writing out and speaking out. Yet the ray of hope still glitters as certain strong waves of movements and opinion building activities force the state to yield to public good and probe into corruption at high places further leading to defeat in elections to change the guard. As long as power equations between victors and vanquished (in all battles including elections) vacillate to the advantage of vested interests, the only security for democracy will be protesting, dissenting, questioning, demanding, criticizing and pressurizing by the enlightened citizenry and empowered civil society. Even as democratic values take dip towards bottom of the sea, it is for the vigilant to stop the fall.

Freedom of expression, marginality and the right to livelihood

Seema Misra

The Constitution of India guarantees equality and the right to life and livelihood to all its citizens. But there is a large section of he population whose every day existence itself is illegal. They live on land which is they do not have any legal rights over, even though they may have living on these lands for over two decades if not longer. Their access to the sources of livelihood, the forest, is also illegal and they are regularly threatened or penalized for using the forest. The adivasis and the urban slum dwellers form a large part of this group. The adivasis live and cultivate lands, which have been declared sanctuaries or national parks. For urban slum dwellers shelter is extremely precarious as they live and built houses on government land, which is not legally theirs. Both these large sections of society are extremely vulnerable and insecure on a day-to-day basis — with the threat of being evicted from their homes at anytime and the only legal protection they have is due process of law. In the eyes of the law and the government their very living is illegal.

One of the few options available to these citizens to protect their rights is to organize themselves and protest against state action, policy and law. The state has used brutal force to disperse these demonstration to ensure that there is no further attempt to raise their voices again. For the last 5-6 years there have been consistently incidents of extra judicial executions of people demanding their right to shelter an livelihood, for e.g. Orissa, Jharkhand, Madhya Pradesh.

By tracking adivasi protest movements on threat of eviction and loss of livelihood, since 2000 and situation of the urban slum dwellers in one city – Delhi and analyzing legislative and judicial responses to the questions of illegality of existence of the poor, this chapter will attempt to address several questions: How long does this section of population have to live outside the law and are there any other options available to them? What is the scope of law and the efforts made by government to tackle the situation? What has been the response of the courts when issues of right to shelter and livelihood are raised by poor and marginalized people? What has been the response of the administration when people living over the edge of illegality demonstrate for their right to livelihood and shelter? When there are instances of use of force against the demonstrators is any action taken against those who injure or kill demonstrators? What in this context is the judiciary's view of the right to freedom of expression and the right to life?

Seema Misra is a human rights lawyer based in Delhi. She has been associated with the Legal literacy programme in MARG since 1990. She is presently a consultant with MARG, Commonwealth Human Rights Initiative and Amnesty International.

Silence or Survival: The Gendering of Creative Writing

Vasanth Kannabiran
Volga

This paper looks at the more insidious and pervasive aspects of censorship as they operate in regard to women's writing. An analysis of the circumstances that govern women's writing reveals the gendered nature of that censorship and calls for an expansion of that definition. The social codes that govern women's writing coming into play to pre-censor and censor women's writing combined with the censorship of the market seldom allow sharply critical voices to emerge constituting a gender based censorship that operates without reference to the state. This gendering of censorship that emanates from the state or street, media, family and even the self is invisible and crippling of women's freedom of expression. Working over and above the overt censorships that are relatively ungendered it is shaped by patriarchal control which has implications for the manner in which the interests and articulations of the underclass, minorities, adivasis and dalits are marginalized today. It explores the gendered nature of freedom — the disconnect between what women want to say and what they write and the censorship of silence.

Drawing on the findings of a three year research project involving ten language-specific workshops across the country from 1999 to 2001 with women writers culminating in a national colloquium, The Guarded Tongue, this paper explores the insidious and indirect forms of gender based censorship that are more problematic than overt official suppression.

Law and Disability Rights

Organiser:
Marcia H. Rioux

The theme of the stream would be the investigation, from a critical legal perspective, of the social and legal construction of disability from a human rights perspective. Disability rights are a new and rapidly growing perspective within the context of human rights. They provide a basis for the redefinition of disability from the perspective of social justice and equality as an alternative to the more conventional notions of disability as a medical condition. This is a fundamental shift from a critical legal perspective. The nature of disability and the inherent systemic discrimination and social exclusion that goes together with it mandates a reconceptualization of law, policies and programs nationally, regionally and internationally. The stream will explore this new area of law beginning with an exploration of:

- The various theoretical models of disability that have emerged both temporally and thematically in the literature;
- Reading disability into the context of international instruments and agreements including civil, political, social, economic and cultural rights;
- Promotion and protection of disability rights within the context of domestic law
- Monitoring human rights in India as a collaborative effort with organizations globally, including the development of a UN Convention of Rights of Persons with Disabilities.

Specific ideas to be covered in each section:

Conceptual Framework of Disability

A. Concepts of disability: 4 models

B. Vestiges of colonial law and charity and the English Poor Laws in current concepts of disability and fromperspective of India

C. Concepts of equality and non-discrimination and inclusion

Disability in the Context of International Law

A. Civil and Political Rights

1. International Norms and Standards: ICCPR and other treaties; Standard Rules and other "soft law" instruments; Thematic Mechanisms; General comments etc.
2. Applicability to disability/ examples of specific issues for the area of disability – both general (e.g. political rights) and specific examples (e.g. right to vote, right to hold office)

B. Economic, Social and Cultural Rights

1. General discussion – general (e.g. social rights) and specific examples (right to food and water; right to education; right to health)

- International Norms and Standards: ICESCR and other treaties; Standard Rules and other "soft law" instruments, Thematic Mechanisms; General comments etc.
- Applicability to disability/examples of specific issues for the area of disability

Disability in the Context of National Law

A.National Norms and Standards – both generic and disability-specific legislation as well as constitutional standards

B. The relationship between international and national law

C. Overlaps of national and international law and policy Moving Forward: Monitoring Rights: A two-pronged approach.

A. A new UN convention on disability rights

B. Monitoring Rights under the current international instruments

- Individual violations Focus: fact-finding with respect to alleged individual rights abuses
- Systems focus: analyzing legislative frameworks, case law and government policies and programs
- Media focus: tracking disability imagery and coverage as an indicator of public attitude.
- A collaborative effort of formal monitoring bodies and human rights activists to provide an accurate picture of both the policy and praxis.

Encountering disability: The making and un-making of development categories in the Third World

Shilpaa Anand

Disability law and policy has a short history in India. Recent debates around disability laws and policies engage with the issue of their tenacity. This paper investigates the problems with discussing issues of tenacity without understanding the genealogy of disability as a legal concept in India. In doing so I will also argue that the conceptualization of disability as a legal category, entails its production as a 'development' category. In turn, the imperative of constituting categories of people for the success of development as a project constructs and produces the discourse of disability as a subject for law and policy.
International development organizations often address the matter of disability in the developing world in terms of the prime development concern, poverty. This view is also quite popular in the academic circles- 'poverty causes disability and in turn disability exacerbates poverty'.
It would be difficult to deny that what we have so far is a picture of disability in the 'third world' or 'developing world' as it appears to the West, by this I mean also the discursive tendencies of scholars viewing the notion of disability in India with a western perspective. Among the many reasons for this phenomenon one is that we have taken it for granted that 'disability' exists in every cultural context, much like food or water. This presumption has always clouded our view and will continue to do so unless we attend to studying what disability is only within the peculiarities of a particular context.
What does it look like? How does it behave?
How is it spoken of? Why does it exist in India? Though these questions might sound trivial or teasingly reductionist that is not how I intend them. I mean for them to be answered in ways that we haven't been able to so far because of our presumption that if it exists it must exist like itself. Our presumption qualifies it with certain innate qualities. However, disability scholars and my colleagues in the Ph.D program argue that nobody knows how disability looks or what it means and everybody is trying to find these answers. I would contend that what they mean is that everybody is always trying to define disability. In arguing this there is an unconscious conflation of two distinct sets of questions. The question that seeks a definition of disability is different from the one that asks what constitutes it. There is the common tendency to think that the answer to the second question like the answer to the first question will reveal that disability is not just one thing but is different things in different contexts or situations. My question however, allows for the possibility that disability may not exist if its constituting elements are absent. A new framework or a new language to discuss disability in developing world contexts would primarily require the suspension of the belief that what would emerge would be a single, universal or unified schema.

Charity to Disability Rights

Marcia Rioux

This paper will explore recent trends in disability from an international perspective providing a context and overview for the international and national law of the other papers in the Steam. The trends to be briefly explored with be: the greater incidences and shifting causes of impairment and identifiable differences in the North and the South; emerging ways of conceptualizing disability and how these models gets translated in policy and law; increasing recognition and engagement by the United Nations agencies in disability issues; and the development of the third sector and non-profit organizations and its impact of emerging developments in the field; the impact of globalization; and scientific developments in biotechnology and genetics.

The presentation will analyze the ways in which these trends have led to changes in the understanding of equality and tolerance. It will trace the move from colonial law – in particular, the English Poor Laws of charity to the rights approach law. The paper will conclude with some examples of social rights, grounded in international law, which illustrate the distinction between rights entitlements and charitable provision of service in practice.

Universal Legal Capacity and Full Personhood for Persons with Disability

Amita Dhanda

There is an integral relationship between full personhood, legal capacity and the right of self-determination. When the law inducts procedures for denying or interrogating the legal capacity of any group it causes for denial of personhood and helps generate a discourse of exclusion. An examination of disability laws across jurisdictions shows that the attribution of incapacity to persons with disability has occurred by employing the status, functional and outcome tests. All the above tests have been criticized as being over inclusive. The over inclusion happens because all the tests whether in principle or in practice operate like the status test which makes lack of capacity an inextricable attribute of disability. There have been efforts to reform these normative and implementation deficits in various countries. Unfortunately these initiatives have occurred within the regime of incompetence . This paper firstly contends that persons with disability can obtain full personhood only if their varied needs are addressed within a regime which accords recognition to the legal capacity of all of them. It then proceeds to deliberate on the substantive content of this law, by drawing upon the proposals for universal legal capacity, in the Draft UN Convention on Disability and the reforms in various national legislations.

Sovereignty and Empire

Organiser:
Sam Adelman

Stream

How do we understand power under capitalist globalisation? Hardt and Negri, amongst others, suggest that sovereignty is being decentred, deterritorialised and decoupled from the state, which no longer enjoys a monopoly over law. Is sovereignty 'disappearing' or increasingly emerging in the hands of nonstate actors such as TNCs, NGOs and transnational institutions like the WTO, the World Bank and the IMF. Are the difficulties experienced in making sovereign states accountable multiplied when law is made and power exercised by bodies which lack even the minimal accountablity of states? This raises profound questions concerning democracy, government and governance. For example, do we require stronger institutions of global governance (and how might they be accountable?) or some form of global government? Are cosmopolitan notion of global citizenship coherent and practical or a potentially dangerous extension of sovereignt from nation to (the problematic concept of) Empire?

Suggested panels:
1. How do we understand sovereignty under Empire / capitalist globalisation?
2. Is law increasingly being made and sovereignty exercised by nonstate actors? If so, what are the implications?
3. How can sovereignty be made accountable? In particular, are human rights a viable alternative basis for global order?
4. What is the relationship between sovereignty and development? Does the former facilitate or inhibit the latter? Is development itself a problematic and outdated discourse?
5. How does the deterritorialisation of sovereignty affect the state?
6. Can international law adequately respond to an international order no longer based upon state sovereignty?

Exploring State Responsibility Under Empire

Adithya Krishna Chintapanti

This paper aims to document the various processes and agencies thereof facilitating the formation of 'Empire' and its governance mechanisms. It tries to explore answers for the question "How do we understand sovereignty under Empire/capitalist globalisation?"

The sovereign state which is the basic unit of the current international order is said to enjoy the right to exercise sovereignty within a political, economic and geographical entity called "State" to the exclusion of all others. This power to exercise sovereignty is not absolute, for every state by virtue of being a member of the international community must adhere to certain rules based on *reciprocity* which would limit and regulate the exercise of sovereignty by the state. This duty to restrain the exercise of sovereignty is what is called as state responsibility in international law. The concept of *reciprocity* also imputes a presumption of equality by projecting state responsibility as a prerequisite between members inter se. However state responsibility under international law, is increasingly being defined as behaviour in opposition to that of an enemy who is not a member of the international community i.e an outsider/outlaw. The same is demonstrated in the act of creation of states or groups of states by the dominant powers which they claim act in a way detrimental to the interests of the international community as a whole (Gerry Simpson). It is here that the tool of law is utilised so as to create outlaw states, or states which are mad, bad or dangerous. Mad because they lack a reciprocating will, some by defying the dominant powers are branded as bad, some others whose behaviour is defined as instable are branded by others as dangerous (Gerry Simpson).

It is this imputation of insanity and diminished responsibility as opposed to a presumption of sanity when defining state responsibility that makes them vulnerable to unjustified interference both at a political and economic plane, hence eroding their sovereignty. In each case it is law which regulates the relationship between these deviants and the international community (Peter Fitzpatrick).

This negative constitution of subjects and creation of a class of states in opposition to which order is constituted makes these outlaw states in Patricia Tuitt's words "Law's Protagonists". These subjects /protagonists of international law are the source for the creation of international law, but do not actually get to reap the benefits of the international order to whose creation they were so integral to. Such constitution of international subjectivity in the negative takes place both at the economic and political level of international regulation. I proposed to cite examples of such constitution of subjectivity in the negative and the bio political regulation (Foucault) resulting there from.

Globalization: What kind of and on whose terms? And what for?

Ari Teerimäki

Odd creatures those human beings in all those little worlds of theirs. Far too many of them seem to continue to think that his or her tiny little well is all there is without realizing that all of them are basically in the same boat as far as the greater world outside their little wells is concerned. Well, maybe some of them are aware of such state of affairs, but it could be that many of their leaders are more than willing to keep them in all those wells, be they related to nations, religions, multinationals or whatever, so as to feel themselves Big and Important Men or Women.

After all, otherwise their games and systems would collapse and to them something like that is completely out of the question. Of course, we shouldn't generalize too much and the above-said should be understood as far as the many abuses are concerned for much can be done even within the current structures should there be al least some will (political, for instance). And in the so-called postcolonial world (as for the world we are living in these days, seems to me that someone has invented a time machine since some circles and cliques both here and there are trying to repeat the same old mistakes as, let's say, 100 years ago or even long before) something like true global citizenship is not that far-fetched as it might sound (basically it's about mental attitudes and not about the free flow of capitals) and at the same time those who so wish could keep on living happily in their little wells. As such, there is nothing bad in living in such wells provided that such mindsets don't lead to totalitarian and imperialist views of various kinds.

What's reigning supreme in such cases is normally greed together with stupidity and hate leading us up a blind alley and surely there are other roads to be taken if we so wish. For example, some more education (preferably multicultural and having to do with environmental and gender issues as well) could do small wonders beginning with our leaders, some of whom would really need something like that with a little bit of humanity, and followed by the others. With respect to funding, the good old Tobin tax (should there be al least a little of political will, it could be realized even under the wings of the United Nations as the organization is found today. For some other purposes, slight modifications are indeed needed to bring it to the third millennium), for instance, would surely be a step forward and contribute to getting things done (including, apart from education, such topics as health care, poverty reduction and the like) and maybe we could do with lesser arms trade as well. The choice is free and perhaps we would do wisely bearing in mind what Bob Dylan sang back in the 1960's, namely "don't follow the leaders, watch the parking meters." Or maybe we should watch our leaders more closely and not to believe every lie they are telling us. Besides, the leadership problem can always be solved and the Buddhist doctrine, for example, offers us some worthwhile alternatives and ideas to be taken into account. In my paper I'll dedicate some more lines to the questions mentioned here.

The Problem of Postmodern Sovereignty

Sam Adelman

What happens when sovereignty disappears but does not go away? Sovereignty is the biggest unsolved problem of modernity – witness the 'war on terror', in which the exception becomes normalised or unexceptional.

This paper analyses the conceptual problem of sovereignty, which centres on the exception. The problem arises because although sovereignty is very much a product of history, it appears to defy history. Like patriarchy, it takes many forms but appears to be ahistorical and acontextual. Drawing on the work of Schmitt and Agamben, I ask whether there is a 'pure' form of sovereignty that exists outside the constitutional order. In the decision on the exception the sovereign suspends the legal order which he has constituted and by which he is bound; the question is whether the decision is a legal or non-legal decision and hence whether sovereignty is a juridical concept.

Resolving this issue is a precondition for politics and our understanding of the (limits of) the law.

Critical Environments

Organiser:
Andreas Philippopoulos-Mihalopoulos

The environment has become plural: the definitional explosion of the term 'environment' is now a match for the plurality of materialisations of the thing itself, converting what has traditionally been treated as subjectivism ('who can say what the ideal environment is?') into a complex fusion of theoretical ebullience with tangible manifestations of indeterminacy. The environment is the sum of the unknown, and attempts to comprehension lead to a proliferation of uncertainty that reinforces rather than debilitates the boundary between the human and the natural.

This stream attempts to bring together new ways of looking at precisely this boundary, in its present state of dissolution yet solidification. The continuum/rupture between the human and the natural; the redundancy of those terms; the explosion of ignorance with regard to the environment and in its undeniable extension to the phenomenology of the self; the hybridisation of the human and the utopianism of the natural; the juridification of the connection between the two; the internalisation of the 'environment' by environmental law (locally, nationally, regionally, internationally, transnationally and supranationally) and its ensuing openness to the possibility of betraying the supposed expectations of stability that society has (or thinks it has) of the law, the 'fuzziness' of fuzziness: all these are themes that are constantly revisited in order to understand the limits and limitations of the law with regard to whatever the law thinks that lies around it.

The stream invites papers on all the above, with a view to bringing forth the new role of environmental law as the ground zero of postcolonial resemiologisation of concepts such as law, science, geography, sovereignty, ethics, development, bios, rights, corporeality, as well as epistemic tools such as judgment, causality, certainty, prediction, threshold, risk, and so on. It is the intention of this stream as a whole to throw into relief, through empirical and theoretical discussions on the 'environment', the absence of a new order that would span universal divides between geographies, cultures, technologies and generations.

State Against Democracy or State Action for General Will: Rising violent protest in tribal India vis-à-vis imperatives for development. A case study in Orissa, India

Shyama Prasad Rout

State wants forest for 'Environment Preservation', 'Ecological Balance' and 'Revenue'. To match with the imperatives for *development* State needs the virgin forests those are rich in mines and mineral resources. Eventually these forests are home to the indigenous tribes of India. The State justifies that it is acting on behalf of *General Will* (the concept of Jean Jacques Rousseau) of all. The *Actual Will* of the tribes is considered as selfish. However, Rousseau could not predict the *General Will* becoming tyrannical. The tribal people are alleged as encroachers in forests. It's again a question, who is the encroacher and who is the preserver. In India the preservation of natural resources includes within its fold the competing claims of humans on these very resources for their sustenance and livelihood. With this understanding any approach for sustainable forest management in India has to necessarily factor in the reality that a very large number of people living in and near the forests - and depending on them - are among the poorest. The forests form life support systems for them. The legal regime governing preservation and use of forests must reflect this understanding.

Different laws and its judicial interpretation have been used by the State to evict the tribal population from their land. State and its coercive apparatus act instantly. Land alienation becomes a serious blow to the tribes to natural right to survive. State tends to quantify the extent of forest crown cover whereas for the tribal people forest is the very basis of their identity and life. In opposition to this coercive action many violent movements have started taking the innocent tribes into their fold, with single focus to oppose the State namely the *Naxalite* Movement, the *Maoist* Movement etc.

In a recommendation Amicus Curiae Mr. Harish N. Salve, Senior Advocate, Supreme Court of India says that the environmental loss due to encroachments on forest land is estimated a mind boggling figure of Rs.4,59,978 crores. This sort of quantification hardly recognizes the emotional slaughter of the tribes when they are evicted from their ancestral lands.

The tribal communities of Orissa face a massive new threat from legislation for conservation and forestry and their judicial interpretations, as well as from the increasing onslaughts of globalisation. The indigenous forest dweller community (mostly the tribal people) as a whole do not get recognition as owners of land that they cultivate from generations, even though they do not possess any records, in fact they do not need to as the entire land is community owned.

Orissa possesses a mineral rich forest. About 31% of its geographical area is covered with forests. However, around 77 mining projects have diverted a major share of forests. Companies like DeBears, Utkal Alumina, Vedanta Alumina, NALCO, JINDAL, Sponge Iron Ore factories etc, are responsible for large scale land alienation and depletion of forests resources. In recent past for land acquisition of an Iron factory put up by the giant Tata Group the district administration opened fire on the protesting tribes killing 13 tribal people. Govt. of Orissa in a bid for rapid development has allowed these companies to operate surpassing all norms fixed by the Supreme Court and the Central Govt. In some cases this has resulted in violent resistance from the tribal community. In a ridiculous proposition it has been proposed that 'the tribal community be settled in non-forest lands', which itself shows that the planners still do not understand that forests can not be separated from the tribes. Both forest and the tribal population depend on each other and they have a symbiotic relationship.

Enclosing Environment: The Defining Dilemmas in Indian Regulatory Regime

L. Pushpakumar

Defining the term 'environment' for the purpose of regulation has always been a defining moment for law and policy makers in any country. Environmental conservation is not a new phenomenon for Indians. People followed an informal regulatory practice in ancient times with the help of customary norms and dicta imposed by the rulers. It was during colonial rule a legalized form of regulatory approach commenced in India. Even during colonial rule, under common law regime, environmental problems were conceived as 'public nuisance' and the problem of defining 'environment' did not necessitate. The related terms like 'forest' was also not defined in the Indian Forest Act, 1927 enacted during colonial rule. The laws made after independence too did not have an occasion to define the term 'environment'. The first opportunity came to the Environment (Protection) Act, 1986 to define what 'environment' is. Though this law is considered to be a comprehensive legislation, the definition of environment is not all comprehensive. The related term 'forest' still faces the same fate in the state books. The enactments do not define the term 'forest' and the judiciary had to fill the gap.

In the age of Information Technology and Biotechnology, global environment is undergoing a transition. New living modified and genetically modified organisms redefine the nature of nature itself. Stem cell research and cloning pose new challenges to the ecosystem. Newer forms of hazardous and e-wastes threaten the whole civilization. In this changed scenario, the concept of environment has to be redefined to address modern day problems. The ambit of law is determined by the definition adopted by the statute in its provisions. The content and intent of a definition depend on how does the legislature conceive and formulate a term and why does it want to define in such a way? This paper proposes to highlight the significance and relevance of the definition of term 'environment' and related terms in the environmental laws and policies in India vis-‡-vis the priorities of developmental paradigms. The paper also embarks upon what the definitions want to achieve in a given context and whether it fulfils what it wanted to achieve. The paper will highlight the tactic of introduction of catchall definitions in the laws and policies, treatment of the environment related terms during colonial rule and post independence period in India in comparison with other countries. The paper examines the problems created by ill drafted definitions in implementation and the changes required in the statute books in the light of the modern technological advancements.

Resource Management: Introspecting the values of Governance in India

Sairam Bhat

India today is an emerging Global economy. This growth of concrete jungles has come about at a decent pace and cost. The cities are growing in numbers, so are the slums. The Country's GDP too is on the rise and so is the poverty level. There are more Indians aboard today than ever before, still farmer's are committing suicide. The countries human resource capital has been on a rise in the field of technology; still the literacy rate is one of the lowest in the world. In the era of Globalization and Industrialization, the rich are becoming richer while the poor remain poor. While the gap between the developed and developing world is reducing, in India, the gap between the urban and rural population is getting wider. Managing conflicts in natural resource management is emerging as one of the key capabilities required for sustainable development in today's ear of liberalization, globalization and restructuring. The conservation of natural resources that supports life on earth and provide livelihoods for millions of the rural poor around is increasingly becoming a challenging task. Conflicts involving governments, their agencies, private sector and local communities generally arise because of disagreements over the use and control over natural resources. Governance of India's environment and its resources is fragmented, congested and superficial. These conflicts, if not managed, can cause severe environmental degradation, threaten livelihood and disrupt social harmony.

Integrated Natural Resource Management[1] may be the answer for overall, combined policy towards conservation, protection and resource enrichment.

[1] In line with the New Zealand Natural Resource Management Act 1991.

Deconstructing Sustainable Development

Sirish Deshpande
Nimushakavi Vasanthi

This paper proposes to examine the manner in which Sustainable development is addressed in Indian environmental legislation and adjudication. The grand theorizing that accompanies the concept either totally fails to address or inadequately addresses the life experiences of different sections of Indian Society. Te paper seeks to carry a critique of the concept of sustainable development by showing that the legislation on the theme does not give any substansive guidance on the issue of conflicting and competing interests involved. It also seeks to critique the decisions of the Indian Supreme Court wherein an institutional stance to resolve issues of competing and conflicting interests is absent. Such absence does not appear to mean that the life realities of the different sections of Indian society are actually considered in the task of adjustment of competing interests.

The authors are not aiming at any ideal state of harmony rather they intend to expose that the disharmony constituted by socio economic conditions is not adequately addressed in the process of resolving conflict.

Towards this end, the decisions of the Indian Supreme Court in the CNG Case, the Taj trapezium case, the NBA case and the displacement cases will be examined in the light of the National Environmental Policy.

Integrating sacrifice and benefit A study of Andhra Pradesh Government's efforts for subsistence farming

K. Vidyullatha Reddy

The Andhra Pradesh state government has launched irrigation projects in a big way in the name of "Jalayagnam". Government intends to harness water to substantially increase cultivable land as a measure to resolve the problems of agriculture sector. Irrigation projects undertaken by the government necessarily leads to large-scale displacement. These projects are taken up in a situation when the protests of the displaced persons are continuing in other parts of the country.

The construction of dam results in environment damage alongside social costs, which is difficult to be compensated, often reflected through protests and agitations. Construction of dams is certainly justified in a country like India where agriculture is the main occupation of the majority of the people and the cultivation is dependent upon very unpredictable monsoon. The importance to harness water is undisputed but the only consideration is the cost effectiveness of it.

The question that also needs to be addressed is who should be displaced for whose benefit. Does the argument that individual interest should pave way for larger good holds the key in this kind of situation. Attempts are made in this paper to analyze the implications of irrigation projects, cost effectiveness of the projects displacing thousands of families and the necessity to foresee that the vulnerable displaced be turned into beneficiaries.

Queer critiques of the law

Organiser:
Arvind N

Stream

The law looks very different from the point of view of those who are the receiving end of law. In these cases the law remains an instrument which stabilizes a societal status quo. Particularly when it comes to the stigmatization of sexualities which fall outside the heterosexual norm, the role of law cannot be underestimated. In a very direct way it plays a role by criminializing what the given society deems unacceptable sexual acts and behaviours. The best exemplar of this mode of policing the boundaries of sexuality is the infamous Sec 377 of the Indian Penal Code.

However what remains important to understand in this context is that one needs to understand the impact of the anti sodomy law as moving beyond the story of arbitrary arrests and prosecutions and look a little more closely at the constitutive role that the law can play. How does the anti sodomy law structure other societal institutions and how finally does it impact the constitution of the self?

While the anti sodomy law remains a key structure which keeps in place the heterosexual norm, its equally important to understand how other legal structures like the law on marriage, family , inhertiance etc are also complicit in keeping in place the heterosexaul norm, more by silence rather than speech.

While this remains a key disciplinary function of the law, its equally true that activism has invariably been structured around the use of law. Right from the petition challenging Sec 377 on constitutional grounds, queer activism has revolved around the use of a legal strategy. The recent arrests of four gay men in Lucknow is illustrative of how the law is central to any activist strategy. Due to the wider societal homophobia, the only way in which the four men finally got any measure of respite from the harsh law of Sec 377, was when they secured bail from the Sessions Judge.

While the above have been instances of the use of law by the queer community , there is still an active debate on the role that law (the very instrument of oppression) should play in queer politics. To start the debate on the role of law in queer politics we will have four speakers focusing on

1) Silences in the law: Making rights claims on behalf of unviable unsubjects
   (look a bit closely at how lesbians are constructed in the law)
2) The diverse impacts of anti-sodomy law and silences in the law: Experiences in law school
   (legal education and what you learn about queer people)
3) Law and queer emancipation: The Sec 377 campaign
   (could reflect on how the campaign and petition interface and the learnings for lawyers from interacting with the campaign)
4) Moving beyond law: Some queer reflections
   (a critique of what the law does and why one needs to move beyond law)

Representation of the Law in the Media-the Case of Section 377 of the Indian Penal Code

Siddharth Narrain

The constitutive role of the law is increasingly dependant on the manner in which it is represented in the media. The manner in which Section 377 of the Indian Penal Code (the law that criminalises homosexuality in India) is represented in the media, will determine the strategy of any attempt at changing the law.

This paper specifically examines media reportage of two incidents - a case involving the murder of two men in Delhi, and the case of the arrest of four men in Lucknow under Section 377. The paper argues that there is a dichotomy between the biased manner in which these cases were reported and the progressive editorial policy of newspapers. The paper attempts to look at the reasons behind this dichotomy, specifically how notions of "objectivity" are used in reportage related to this law. The paper will go on to examine how the campaign to read down or do away with Section 377 should keep this in mind while dealing with the media.

Feminization of Crime: A Critical Interrogation

Tapan Mohanty

The study of crimes and criminals as development of criminological thoughts have underlined provides an insight to the role of power and cultural determinants in defining crimes and criminalizing conducts. The process of criminalization of conduct, categorization of offences and fixing of penalty are largely the product cultural and social milieu and necessarily reflective of dominance of different groups. Therefore, it was not surprising the trace the development of feminist criminology and critical criminology in late twentieth century that celebrated freedom, liberalism and critical inquiry. However, these developments have not been able to completely and cogently undertake the project of bringing the marginals *and their issues into mainstream and providing a viable alternative to the dominant discourse of criminology. The attempts however, have been sporadic and piece meal requiring necessary impetus and elaboration in the current social milieu characterized by influx of information technology, globalization, economic liberalization and democratization of societies as well as re-invention and restructuring of individual and community identities.*

But the issues addressed here i.e. feminization of crime provides a vantage point in delineating the theories of crime, criminals, penology and sociology of law. If one take into account the number of crimes taking place against women of all groups irrespective of their respective socio-economic position and place of residence and the perpetrators of such crimes then the research assumes immense significance.

In the context of above narration and analysis of the intricate relationship between crime, law and gender it would be pertinent to postulate that a systematic and collective effort is required to eradicate crime against women and alleviate the sufferings of the fair sex. In order to create a just, equal and fair society which is ostensibly the ideal of human civilization we need to deal with gender disparity and discrimination in general and criminal justice system in particular. In a 'knowledge society' which has provided fabulous opportunities to women in enlightening their life through knowledge, information, education and enthuse their self with the fruits of modernity and empowerment, gender stereotyping and archetypical role allocation has neither relevance nor necessity. In fact, the economic opportunities available in the era of globalization and market capitalism requires additional trained and skilled hands and restricting the option of women in the labour market will not only hurt the economy of the nation-state but will deprive the generation from the benefits of equity and justice.

Section 377 of the Indian Penal Code and Queer Women in India

Ponni Arasu and Priya Thangarajah

Section 377 has historically been the anti-sodomy provision in the British imperial legal system. Ironically, enough the section was removed from the British code but still remains in its former colonies. It is also the only law in the Indian Penal Code that addresses child sexual abuse. We can clearly see, however, that a law that only includes penile-vaginal intercourse cannot be a comprehensive code to address child sexual abuse thus asserting the need for another law on the same. This law instituted in 1860 in British India, at the same time as in Britain itself, is common to many former colonies of Britain and thus is common to most countries in South Asia. This provision has been used mostly against gay men, men who have sex with men (MSM), hijras and male sex workers in the public sphere. It has also been used against organizations *and ground level activists working on issues of sexual rights, LGBT issues and HIV/AIDS. This section also serves as a threat against lesbian and bisexual women within families, friends, educational institutions, workplaces and so on. But as the law is patently silent on 'carnal intercourse' and it has in its execution excluded sexual acts by women, the threat that queer women face under this archaic law is different from the experience of queer men.*

How do queer women then claim rights provided by the constitution and international conventions when their identity per se is not included in the legal regime and if such an inclusion might be counterproductive would be questions that we hope to raise in this paper.

An analysis of this context based on empirical evidence is an almost impossible task in a situation where very few women are openly queer within their families/friends or at workplaces. The only source we can use to base and analyse our contentions, are testimonials of the cases of lesbian couples who have run away from home and of those who have committed suicide. This paper will be based on interviews with activists from some cities in India- Delhi, Bangalore, Trivandrum and Bombay. We hope to interview activists and lawyers who might have been involved in these cases to ascertain whether S.377 was within the parlance of the families, police and lawyers that they have interacted with. We also hope to speak to the women involved to have discussions on the perception about the law as well as what they see as the repercussions of change in the same. A discussion on questions of legal change as part of the larger struggle for non-discrimination based on sexual orientation/preference will be woven through the paper. This entire discussion of queer women, we will argue in the paper, is a case in point about the challenge of creating inclusive and holistic struggles for social change across identities of class, caste, gender etc while critically recognizing the significance of certain kinds of identity based spaces. We will also argue that the law in its very essence does delegitimise both clearly named and unnamed people and communities but at the same time is not in any sense the crux of oppression but rather a tool.

"I'm only here to do *Masti*" Sodomy Law and the Limits of Subjectivation

Mayur Suresh

Much has been said about the role of the law in the constitution of various subjectivities. Section 377 of the Indian Penal Code, as do other sodomy statutes, are said to call into being the identity of the homosexual and to construct him as inherently abject, innately criminal. Opponents of sodomy statutes, and in particular those amongst the legal community, often call upon rights to defend against the intrusive nature of these laws. Rights are envisioned as something that every human, by virtue of being a human has; that the essence of one's humanity is the ability to exercise these rights. And hence a denial of these rights is seen as a denial of that which is inherent to human beings. Therefore when one is able to exercise these rights, only then does that person come to embody true subjectivity. It is as if by becoming a rights-bearing subject, one moves from being a partially formed subject – the sodomite, the slave, the prisoner of conscience – to one that fully recognised, a complete human, the self.

I wonder, however, if we yield too much space to the Law in constructing identities. These characterisations of the law, give the law a certain omnipresence; it is present not only at every moment and at every place, but is embedded within the very persons that it criminalises or liberates, and the psychic life of homosexuals is occupied by this criminal abjection of sodomy laws or by the emancipatory potential of rights. Because in these narrations of the law, the realm of power is completely occupied by the law and it appears to operate through technologies of panoptics, there is no world that can be imagined beyond the law, since the law pervades, sees and constitutes all.

Using ethnographies of persons situated in cruising spaces, this paper argues that there are limits on the power of subjectivation that section 377 bears; that one's entry into sociality can occur through practices of pleasure and through the erotic, rather than upon being criminalised, and that power, and indeed the law, cannot be understood to be internalized by an existing subject, but that power and the law have more ambivalent effects on the formation of the subject. It further argues that often narratives provided for in 'liberatory' legal texts are, to an extent, fictitious, and often conjure the subjects that they name. Using these ethnographies, I hope to provide an account of the law as an everyday presence, but one that is limited, confined and constrained.

Think Straight: Relfections On Sexuality And Queer Issues In Indian National Law Schools

Rahul Saha & Utsav Mukherjee

"Why don't you try it and let me know how it works out."
-Reply to authors by queer student when asked why he has not come out on campus.

A law school is a strange place to deal with sexuality and queer issues. On the one hand, one is exposed to the language of rights day in and day out until one is sick of it and on the other hand one experiences a subtle homophobia as soon as one walks out the classroom, conference hall or wherever it is that "intellectual" discussions take place. This of course is not the case in all national law schools; the queer-friendly nature of NLSIU, Bangalore has been documented elsewhere and this is an excellent example to be followed by other law schools in the country. However, drops in the ocean aside, a law school remains a rather intimidating place for queer people to explore and express their sexuality, in spite of certain recent positive developments.

This paper relates the experiences of one of the authors in the National University of Juridical Sciences, Kolkata ("NUJS") and illustrates this trend of "currently homophobic but changing in the right direction" by documenting experiences of other students in different law schools.

It is our contention that law schools still remain largely homophobic spaces. However, at the same time, law schools have a number of advantages over traditional educational institutions. First, the concept of rights and equality is well ingrained in most students. This makes it difficult for students to discriminate against each other on the basis of sexuality. It also provides a tool for queer students to argue for their rights. Second, the younger generations of teachers are supportive of queer issues in almost all law schools and if approached sensibly, would be willing to extend their support to queer student movements. Third, and most importantly, in every law school there exits a group of students who see themselves as activists on queer issues.

If the culture of law schools towards sexuality is to change it is upto these students to carry out programs and activities aimed at making law schools more queer friendly spaces. At NUJS the first step has already been taken with students participating in discussion with faculty and visiting scholars, such as Dr. Upendra Baxi, in order to chart out a plan and strategy to organize the first seminar on the queer issues later this year. Efforts are also on to establish a sexuality cell under the Center for Women and Law. Other law schools are following different approaches such as sensitization programs, signed petitions against S. 377 and most effectively, the incorporation of queer issues into discussion regarding gender within the classroom. These are surely positive developments and one hopes that through collaboration, will and administrative help, in time, law school campuses will be safe and comfortable places for queer people.

Location of the Third Gender in Law

Saurav Kumar Das
Gantavya Chandra

The purpose of the paper is to focus on what is the position of the eunuchs in society today as interpreted by the law. Every section of the Indian populace gets to assert its rights at some pretext or the other, and volumes of energy and interest are generated for the recognition of such rights, be it social or constitutional. But the eunuchs find only a sympathetic mention or a blissful ignorance from every quarter, making their existence only a helpless reality. From the standpoint of being recognized as only the unfortunate third gender, we shall examine their representation or participation in education, mainstream employment, social relations, religious and cultural beliefs, power positions, and even sexual expression. The role of law in furthering the cause of the eunuchs has been highlighted frequently but development in this area has been as good as nothing. It is necessary to observe and realize the factors that obstruct the social progress of this gender, and it is even more necessary to construct a pathway through such obstructions for them to live as a legitimate and economically productive section of the Indian population. What exactly has the law done so far, and what exactly should be done by the law are the areas for serious consideration, thought and examination. Therefore, the relationship between law and the third gender shall be the highlight of this paper.

Construction of the eunuch society as the 'third gender' or the 'non-existent gender' or the 'non-productive gender' is a result of historical and social stereotype. The articulation for eunuchs to be accepted as a 'gender' has not been successful to the satisfaction of those who belong to the community, but nevertheless it has managed to engage voices on its behalf at some relevant quarter or the other.

However, nothing can be implemented unless it is the law, and how has the law been active in addressing eunuchs as a 'gender' and not the 'third gender' shall be an interesting exercise.

The paper is addressed to the legal fraternity and people in power and the social mahatmas, with the slogan that mainstreaming the third gender is not a bad idea at all…just a sincere effort is necessary.

The Judicial imagination of Homosexual Sex: S. 377 and beyond!

Alok Gupta

In early 2006, a Nigerian parliamentarian introduced the Same Sex Marriage (Prohibition) Bill in the Nigerian Parliament. Apart from criminalizing 'same sex marriage' the proposed Nigerian law also punishes any attempts at public expression of homosexual desire and rights through 'display of amorous relationships' or organising around gay rights.

I will argue that the proposed Nigerian law, despite being a clear product of present day ideology and circumstances, also represents a culmination of a long drawn legislative and judicial process of a quest for more creative ways of criminalizing 'homosexuality'. The process of 'refinement' of the offence of 'sodomy', of 'homosexual sex' and thereby 'homosexuality' began with the European colonial powers in the colonies and is now being appropriated by the post colonial nationalist governments in many countries in Asia and Africa.

The focus of this paper is the criminal codification by the British in Asia and Africa and subsequent use of the 'unnatural offences' provision. Broadly, this paper attempts to highlight:

a.) The colonial roots of the anti-sodomy provision and the present day homophobia

b.) And simultaneously investigate the real purpose and meaning behind anti-sodomy provisions

The two main British Colonial Penal Codes, that have also been the most influential Penal Codes throughout Africa and Asia, are the Indian Penal Code of 1860, and the Queensland Penal Code of 1899. The Indian Penal Code introduced the first colonial definition of sodomy, under the heading of 'unnatural offences' - distinct from the already existing English offence of Buggery, without ever using the term 'buggery' or for that matter even 'sodomy'.

The 'unnatural offence' of 'carnal intercourse against the order of nature' despite its ambivalence and vagueness became the model definition for anti-sodomy, and was adopted by the Queensland Penal Code and therafter by the Penal Codes of Nigeria, East African countries, South and South East Asia and some parts of Southern Africa. This paper/presentation will illustrate how at every step of adoption of the Penal Code, the 'unnatural offences' provision was continuously modified, re-drafted, nuanced and refined to make it more specifically applicable to homosexual sex and punish a broader range of sexual activities between men.

Therefore through a combination of legislative amendments and judicial decisions, sexual activities like oral sex, thigh sex, mutual masturbation, gross indecency between men and punishments of flogging and canning - have been introduced within the scope of the 'unnatural offences' provision. The paper/presentation will also illustrate the clear attempt made by the Malaysian and Sri Lankan authorities to amend the said provision to provide specifically for the punishment of lesbian sex- a similar attempt is being discussed in Uganda.

This paper/presentation aims at highlighting the very alive discussion and imagination of both the legislative and judicial minds, at finding creative ways in punishing homosexual sex and thereby eventually 'homosexuality' in general.

The social life of 377 – Material for a critical perspective on law related activism

Akshay Khanna

Analysis of Section 377 has largely focused on examination of its interpretation, use and impact within what may be considered the 'juridical register'. In other words, the understanding of 377 has largely been constrained by the discourse of 'legal expertise'. This paper begins by locating these analyses within the post-colonial structuring of the criminal law system and of civil society activism. The argument here is that there is a relationship between the mechanisms of exclusion in the criminal law system, and the ways in which 377 has been framed in civil society activism. Using three examples from on-going ethnographic research, this paper argues that we would do better in examining the 'social life' of 377, i.e. 'what 377 does' as well as '(who and) what does 377'. in the first instance, the paper examines the contexts within which 377 has emerged as a 'site' for activism. The focus here is on the role of 377 in enabling a sense of a 'movement', and of a 'community'. it is argued that 377 'quilts' a disparate set of queer voices in India, whereby tensions, disjunctures and differences within and between queer movements in India become secondary, or are at the very least, re-framed as negotiable. In the second instance, this paper argues that activism around 377 has given rise to reflexive practices through which queer movements themselves are being constituted. Examining activism related to the public interest litigation challenging 377, this part argues that these processes have engendered modes of making 'representative claims', thereby articulating imaginaries of a 'community' that may be consulted and represented. This is to say, activism around 377 amounts to the creation of mechanisms through which the existence of a 'queer community' may be gleaned. Finally, locating the concern with legality and constitutionality within a history of a 'civil society' self-consciousness, this paper engages the argument that 377 has been given a life through queer activism such that it impinges on negotiations between queer folk located outside of 'queer activism' and the state. Using these three examples, the paper moves to suggesting that activists need to constantly examine the socio-economic conditions under which we articulate the law in general, and 377 in particular, as the 'problem'.

Kalpana's Abstract

Kalpana Kannabiran

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Interdisciplinary and International approaches to law and feminism

Organiser :
Zoe Pearson

Stream

This proposal grows out of an emerging, interdisciplinary project at Keele University. The broader focus for this work is on interdisciplinary and international approaches to law and feminism. Group members have overlapping and specific interests in feminist scholarship in relation to law, philosophy, geography, international human rights, globalisation and regulation. A key initial focus of the work has been to reemphasise the key feminist methodologies of positionality and reflexivity. In doing so, our conversations have identified a number of common questions/issues/'spaces of interest' that are not adequately addressed by current scholarship in our disciplinary interests, and would benefit from an interdisciplinary, critical collaboration. Such an approach complicates the traditional positivist theory of law as an ordered, objective and linear system. Rather, our project seeks to ensure an acknowledgement and incorporation of the diversity of perspectives and experiences required in a process that seeks to re-imagine cartographies of international law. This roundtable conversation therefore seeks to stimulate interdisciplinary, cross-institutional and international dialogue. We seek to identify and engage with some current lacunae in feminist legal scholarship in relation to these common questions. We hope that this dialogue will inform our analysis as we progress through
this broader project. In particular, we are concerned that the geospecific focus of much contemporary scholarship on law, feminism and human rights is in danger of obscuring potentially important stories. These stories have the potential to strengthen feminist and critical tools that seek to call the law into question, locally and globally. The roundtable will provide an opportunity to make these stories visible and renew our commitment to a self-reflective awareness of the politics of difference.

In doing so, we will explore the extent to which our geospecific focus limits our vision, causing 'blind spots' in our disciplinary imagination, both in terms of gender and ethnicity. Our fear is that this geospecific focus fails to adequately engage with local stories of relevance to women, and also fails to address global stories and responses. Failure to acknowledge these stories and experiences essentially recolonises those outside the Western gaze, by constructing them as silent bystanders to international processes of globalisation. This results in scholarship that is in danger of not being inclusive of the particular social, cultural and legal contexts from which experiences are originating and evolving. We are concerned that it also results in top down approaches to international law, which create, reflect, reinforce and reconstruct marginalisation, identities and categories. Our work seeks to engage in conversation and dialogue to understand and critique how the inherent biases in our work construct such categories. We wish to build a critique from 'inside the project', arguing that law can be a critical site of regulation, but also can be a site for transformation.

Escaping The 'Radical Evil' Of 'Postcoloniality': Women's Rights And The Crises Of International Human Rights Interventions

Oishik Sircar

The growth of the women's international human rights movement and its emergence as a field of research and advocacy has led to a valuable but increasingly self-contained discourse, often cut off from developments in postcolonial conditionalities ('Postcoloniality'), on the one hand, and conceptions of the different legal contexts in which international human rights operate, on the other. Such a trajectory of 'development' in human rights standards for women have no doubt had an enormous impact on women's lives worldwide, but simultaneously it is also culpable of creating the 'woman-as-victim' subject, 'geographically captive' in the 'barbaric' cultures of the 'third world'.

Can this subjectivity of the Eastern woman be challenged through the language and practice of International Human Rights Law, or is the discourse been oblivious, even responsible for its creation and continues to be so?

This paper will map the developments that led to the integration of gender into the international human rights law discourse and examine how the language of 'violence' and 'respectable victimhood' (from Vienna 1993 to Beijing 1995) has been privileged leading to the dislocation of 'discrimination' as envisaged by CEDAW, as the primary index for measuring women's human rights violations. What has been the consequence of this dislocation? With specific reference to the historic proceedings at the Vienna Tribunal, the paper will attempt to identify the hypervisibility of 'sexual violence' caused due to cultural/ traditional sanctions in the 'third world', constructed by the international women's right movement to invisibilize the 'resistance potential' of women from the Global South.

On the whole, the paper will deal with the emerging debates and crises that the international human rights regime faces with regard to the postcolonial accusations of it being a 'civilizing-the-native' project and its creation of the third-world 'woman-as-victim' subject, to establish how such an approach essentializes both gender and cultural essentialism that adversely impacts on laws and government policies on women's rights in the Indian context, especially in the realms of sexual violence against women, trafficking and migration. In conclusion, the paper will suggest means through which a 'lens of marginalization' can be employed to bring the peripheral subjectivity of the 'woman-as-victim' to the centre – a move that will have the potential of busting the rhetoric of 'respectable victimhood' – to claim, through the apparatuses of the state, the rights to politico-cultural autonomy and 'plural' citizenship.

Discourses of Legality/Discourses of Empire: Issues in Law and Colonialism from Australia, Canada, Hawai'I and the United Kingdom

Organiser:
W. Wesley Pue

Despite increasing recognition of law's centrality in Europe 's imperial projects, the role of lawyers in imperialism and its cultures has been largely overlooked. This is true both from the perspective of students of colonialism and those who study legal professions, their histories, cultures, structures, functions, and forms. Drawing on research from several countries of the former British Empire, this paper probes relationships between legal professionalism and the collective aspirations of lawyers on the one hand, and the works of Empire or colonized peoples' nationalisms on the other

The sovereign, the law and the two British Empires

Ian Duncanson

In her monograph, *On Revolution*, Hannah Arendt contrasts the American with the French revolutions. Coming out of a tradition of a "balanced" constitution, which the Americans believed George III's ministries to be betraying, the American founders divided the supreme power of the state in a way they considered less vulnerable to the encroachment of the executive. By contrast, Arendt sees the French revolutionists as merely substituting an undivided popular supreme power for that of the Bourbon monarchy.

The precarious balance from which the Americans detached themselves was a compromise carefully woven from manners and politeness, in whose broader context the figures of law and constitution would be positioned. It was an artificial community designed to preempt and defuse the destabilizing polarities that had emerged in the 17th century civil war. 18th century Empire was in this vision, both a spreading of "free-born Englishmen" in America, and a seaborne empire of trade elsewhere. The vision overlooked, in all senses of the word, the British slave trade and the displacement of indigenous Americans; and its own condition of existence, located in the most aggressive of European states. Aggression in Bengal delivered more subjects and apparent wealth than existed in the rest of the empire, including the UK, combined, and seemed to require a patriarchal Hobbesian sovereign to govern them. Having wrung surplus labor in the form of tea, from Indians, why should such a sovereign not recompense its efforts by compelling Americans to buy it and pay a tax for the privilege?

Terminating the mannered illusion of the first empire, the specter of sovereignty – French, totalitarian in Arendt's analysis – came to dominate British thinking about, first the empire and then the metropolis. The meta-legal sovereign thus came to infect the Anglophone world, permeating the Bush United States in our era.

We are not Indians:" Legal recognition of Native Hawaiians and the problem of the other

Jon Goldberg-Hiller

Proposed American legislation that would give federal constitutional status to Native Hawaiians has met with strong indigenous resistance. This contemporary contest over the means of self-determination reveals the ways in which law and rights provide inescapable idioms for indigenous sovereignty at the same time that they form the primary obstacles that must be overcome. In this paper, I examine the uneasy analogy of American Indians deployed by Native Hawaiian opponents of recognition. I argue that this concern over identity and image should be understood as an anthropomorphism of the law, and I explore the meaning of this abjection for legal authority and for postcolonial relations among indigenous peoples.

New Holland since Dampier: Naming Colonialism as 'Ngaari, Ngaari', [Malevolent Spirit]

Judith Grbich

When Englishman William Dampier camped on the west coast of New Holland in the late seventeenth century the local peoples named the British as 'ngaari, ngaari', or malevolent spirit. Might the critique of postcolonial reason – the unravelling of the imperial episteme – be pursued by a focus upon those aspects of the perfection of Christianity by the Europeans which Kant and Hegel found so useful to their systematising of Western reason and judgment? While native title law displays in unerring accuracy the greed, violence and self-sanctimony of Australian settler colonialism in the twenty first century, it may also provide some ground for tracing that continuing mapping of complexion, 'fractal detail', appropriation and Christian faith with which the colonial state continues to claim the value of Sovereignty.

Legalities of Nature: Law, Nature, and Empire in the Canadian National Imaginary

Renisa Mawani

What is the relationship between law, nature, and empire? In what ways may law and nature work together to constitute each other and how have they figured as key symbols of Canadian-ness, both historically and in our contemporary context? In socio-legal and legal scholarship, with the exception of natural law, law and nature are often conceptualized as antithetical. More recently, few scholars have suggested that the relationship between law and nature is far more complex than these binaries allow. In this paper, I question the ways in which law and nature have conjointly figured as key symbols of Canadian-ness, both figuratively and literally. Whereas law and nature are prominent signifiers in the Canadian imagination, *real* spaces of nature – in the form of wilderness reserves and parks, for example - are legal constructs that operate figuratively to fashion national identities. In part one, I examine the ways in which law and nature as interrelated and iconic figures can be traced through Canada's national imaginary. As the "True North Strong and Free" - an epigraph from our national anthem - suggests, nature, alongside law and liberty, are key cultural signifiers of a national distinctiveness, one that is highly racialized and deeply rooted in British imperialism. In part two, I examine the role of law in the production of nature as wilderness landscape. Using Vancouver's Stanley Park as a case in point, I show how legal struggles between aboriginal peoples and various levels of government are constitutive forces in the material production of nature. Here, I argue that while law produces nature, nature's perceived naturalness erases aboriginal peoples, colonial histories, and the role of law. I conclude the paper with a brief discussion about the ways in which a critical analysis of law and nature may help to *denaturalize* (post)colonial relations in Canada.

The Businessman and His Body: Colonial encounters

Rob McQueen

With the emergence of the limited liability corporation as the principal vehicle for business organization in the mid nineteenth century the focus of responsibility for failure of businesses turned from one which focussed on the corpus of individual businessmen to a concern with the possible liabilities of an impersonal and abstract corporate person. This paper explores the way in which the depersonalisation of blame and the attribution of evil in matters of business operated in colonial settings. What difference did it make (if any) to move from a system of obligation which focused on the 'body' of the businessman, and tested individual conscience in the Smilesean sense to a form of obligation in which incorporeal abstractions were the focus of liability? Did it make any difference? Or was this abstraction of responsibility irrelevant to colonial exploitation?
The paper examines these issues in a range of contexts – principally in respect to the colonial rubber plantations in the Putamayo district of (now) modern Colombia which formed the basis of Roger Casements concerned Report as British Consul and in regard to the German colonies of the nineteenth and early twentieth century which were the focus of the 'Green Books' (a German travel series upon which Franz Kafka based such 'fictions' as In the Penal Settlement.

Lawyers' Empire II: A New History of Colonial Lawyering?

Mitra Sharafi

A resurgence in the history of the colonial legal professions is drawing attention to non-European lawyers in colonial settings. So-called "native" lawyers and judges mattered not just as future leaders of anti-colonial independence movements, but also as intellectual middlemen in the production of legal ethnography. These individuals acted as translators and interpreters of legal cultures. They crafted communal identities—of their own and other colonial communities—in the idiom of colonial law. This paper examines the potential for this new history in colonial South Asia. There are communities to follow, particularly those that bought into the myths of colonial legalism and used the legal arena as a favoured space for the resolution of "internal" community disputes. Lawyers and litigants from communities such as the Nayars of the Malabar Coast, Tamil Brahmins of Madras Presidency, and the Parsis of Bombay used the colonial legal system as a forum in which to sharpen their communities' identities. There are also individuals to track. Mohammad Ali Jinnah, Syed Ameer Ali and Dinshaw Mulla played critical roles in creating "legal India" as lawyers and judges of the Privy Council, the final court of appeal for the British empire. In the Bombay High Court, the orthodox Parsi judge Dinshaw Davar and the reformist Hindu judge N. G. Chandavarkar reformulated Parsi and Hindu law in the image of their respective communal visions. This paper treats Parsi lawyers and judges as a case study within this exciting new field of interest.

Critical Perspectives on Legal Education

Organiser:
M. Maithreyi

Stream

Thanks to the success of the autonomous deemed university model, legal education in India has come a long way down the road of 'professionalism', while claiming to retain a goal of contributing to social change. This process of transformation has led to a highlighting of the ever-present tension between theory and practice, between doctrine and technique, in every aspect of legal education. The process of selection of students, structuring of curricula, the choice of teaching methods, the method of evaluation, are all choices that place themselves at various points in this spectrum. However, the bases of these choices have not been sufficiently explored, and more often than not, the choices appear to be mechanical rather than deliberate. For instance, though experiential learning has been incorporated into the curricula of 'professional' legal education in various forms, the reasons, justifications and outcomes of this incorporation have neither been thoroughly interrogated nor completely understood. The incorporation of clinics and a requirement of internships by students has been considered as providing students with a taste of the 'practice of law', teaching the skills necessary for 'real lawyering'. These two aspects of 'learning through doing' however, are extremely different from each other, and provide opportunities for the acquisition of different skill-sets. At the same time, experiential learning has value beyond the mere learning of skills, but such value is generally either ignored or misunderstood in pedagogical discussion. Experiential learning provides an opportunity, for instance, to foreground theory; it provides opportunities for the incorporation of a feminist pedagogy, and allows for spaces where the myth of the law's objectivity can be effectively debunked. However, these facets of experiential learning, and the multiple possibilities that are opened up by such an understanding of it, are rarely, if ever, articulated in the legal education space. The lack of recognition awarded to these multiple possible roles that experience can play in legal education has resulted in a situation of an partlyarticulated dissatisfaction with the modes of experiential learning that have been incorporated into the present law school curriculum, and a questioning of the value of such learning to legal education. Thus, the choices made in legal education, pertaining to objectives, curricula and method, need to be understood with an examination of the justifications offered for them, and an exploration of possibilities beyond the traditional justifications. The time is ripe for an interrogation of legal education, including of the processes of law teaching and learning. At this round table discussion, we seek to initiate this process, with an examination of student selection procedures, curricular choices, teaching methods and pedagogical tools drawn from our experience of legal education as students and teachers of the law.

Square pegs in round slots: Dealing with Diversity in law schools

Chinmayi Arun

There is a profile that law students are expected to fit – proficient in English, assertive, capable of dancing circles around most people in terms of playing on words or logical reasoning for instance. When people who do not fit the profile enter law school, they find themselves dealing with a set-up that was not designed keeping them in mind. Persons with disability, women, people from Scheduled Castes and Scheduled Tribes, and people from socially disempowered groups are among those that tend to face this problem. The Reservation system makes a conscious attempt to bring some of these marginalised groups of people into law school but more could be done to make law school conducive for them.

The first issue that needs to be addressed is whether diversity is desirable in law school. Is the law student stereotype justified? Should logical reasoning and effective communication be the major priority for a effective lawyer?

If we decide that diversity is desirable in law school, how does one preserve and make the most of the diversity? Do we bring diversity into law school to make the marginalised resemble the dominant groups more closely? Or are there ways in which marginalised students can be integrated into law school, without having to compromise on their identity and without struggling as much.

These issues are examined primarily with respect to the five year law schools such as the National Law School of India University, NALSAR University of Law and National University of Juridical Sciences. An attempt will be made to establish that diversity in a classroom may be accommodated and may be utilized so as to be beneficial to both the marginalised and the dominant group students. Some ways in which this might be achieved will also be discussed.

Integrating Gender Into The Legal Curriculum: The Case of a 'Technical' Subject

M. Maithreyi

The legal curriculum today is required to contain at least one course on Feminist Jurisprudence. Meanwhile, strong arguments continue to be made to the effect that the introduction of feminism as a separate subject is an ineffective and fragmented method of introducing gender into the curriculum, and that feminist critique needs to be integrated into the study of every subject taught in law school. This paper seeks to examine one of the fundamental misconceptions about such an approach – that certain of the subjects taught in law school are less amenable to feminist critique than others.

In the course of transforming legal education in India into 'professional' legal education, the legal curriculum appears to have designated certain subjects as 'technical' subjects, in the study of which doctrine takes a secondary role – procedural and commercial laws come readily to mind. However, this understanding of these laws has also meant that the basic doctrinal assumptions are neither completely understood, nor examined, let alone critiqued. It is in these subjects that feminist critiques have been criticised for being contrived and artificial.

This paper seeks to show how the absence of a feminist critique in the traditional understanding of a 'technical' subject such as tax law has led to a pedagogical crisis in the subject, and how the integration of the feminist critique can be accomplished in a manner neither contrived nor artificial, but simply by using a critical method in studying the subject.

The Business of Law Schools

Sachin Malhan

An Abstract for the Critical Legal Conference

The National Law Universities have been harbingers of revolution in legal education however we need to step out of the warm afterglow of the success of these institutions and carefully study them organizationally and assess the sustainability of their business & organizational models.
My contribution will focus on the faultlines and opportunities in the National Law Schools. I will focus in particular on (a) Revenue generation and associated concerns (b) Attracting and retaining quality faculty (c) Law school management and (d) International Positioning. I will initiate the discussion with a Strengths, Weakness, Opportunities and Threats (SWOT) Analysis of the present day scenario and proceed to a list of suggested actionables.
While suggesting actionables pertaining to the abovementioned issues I will focus on the following issues: (a) fee dependence (b) balancing corporate relationships (c) involving professional bodies (d) necessary spending (e) enterprise orientation and (f) executive education.
I will not be expressing conclusions but merely providing the framework for a discussion on future of Indian law schools.
I am hopeful that we can draw up a set of clear actionables that each participant law school can take back and execute in their local environment.

Is 'the Caste System' the Legal System? Making-Over Colonial Legal Pedagogies for Indian Legal Classroom Life-Worlds

Dattathreya Subbanarasimha

This paper reflects on the challenges that a culturally reflective teacher of law in an Indian law college faces today.

British Colonialism in India has had a variety of very important consequences. One such consequence that has become salient in postcolonial times is in the domain of legal pedagogy. It is but a platitude to note that British colonial discourse is all over the Indian legal education curriculum, from Roman maxims, through Dicey on the Rule of Law, Salmond on Jurisprudence, and to (the purported civilities of) 'the conventions of British parliamentary democracy'. Not to mention, of course, the fact that many of the most significant legislations in modern Indian legal history – the Indian Penal Code 1872, the Indian Contract Act 1882, the Indian Evidence Act 1872, etc. – were all drafted by committed British colonizers in the high noon of British colonialism in India.

All of this puts us – native Indian teachers of law in contemporary India - in a rather peculiar situation. We are forced to present to our students in their original form all the principles and rules that lie in these legislations and laws inherited from British times, and yet at the same time we have also to remind our students that this was the same British colonial empire that had as its singular explicit mission the task – or 'burden', if you will, – of 'civilizing' our forebears. And in all the law that I learnt at Law School, that paradox, of the law-giving-*and-yet*-violent-*colonialism, was left unexplained and unaccounted for.*

Today, when I think seriously of conceptualizing and teaching law courses, I feel that that paradox needs to be addressed in rather explicit ways. What forms would such measures need to take? And what kinds of implications would they have for the various specific domains of the law that one engages with as a teacher.

Let us take one instantiation of this phenomenon. It was one of the great dogmas of British colonial knowledge that India was characterised by such a thing as 'the caste system'. Patrick Glenn writes in the year 2000, in Legal Traditions of the World*, in a deadpan voice:*

Castes exist because they are dictated by accumulated karma, in previous lives… They are a kind of necessary grouping or classing of the consequences of different kinds of previous lives… So far as is known, they have existed since the Vedas became known, prior to the Smriti….." A Western legal scholar continues to write as if nothing new has come to light about caste since the time that he read his earliest Indological treatises, probably during his undergraduate days. Is this colonial excuse of a knowledge of Indian social realities good enough for us law teachers in India today?

My paper will explore the most prominent places in the legal curriculum where such phenomena manifest themselves. My paper would also speculate on how each such instance may be remedied and replaced by more intimate, first-hand ('local') knowledge of Indian social realities that is readily available to all Indian law teachers.

Are we creating legal babus? Curriculum development and priorities in legal education today

Sarasu Thomas

Today, the professionalisation of legal education beginning with the National Law School model with quality control, standardization and high quality teaching inputs has as its aim the creation of the modern legal professional, well versed in law and legal tools. These institutions are seen as being successful because their products are eminently marketable. This has led to several phenomena in legal education, the understanding of which forms the core of the presentation-

1. Have priorities in legal education shifted? Is 'social engineering' a priority anymore?
2. Is there a greater focus on undergraduate teaching rather than post graduate teaching?
3. How are courses and curricula for the same determined?
4. How far are courses based on information giving rather than skill learning? Is homogeneity in thinking encouraged? Is pluralism protected?
5. What is the commitment to research that Law Universities have? Does research feed into law teaching?
6. Is a faculty member's standing determined solely by lecture delivery or are research outputs also considered?
7. Are there any processes of curricula evaluation externally or internally which are systematically carried out?
8. Who are the stakeholders in legal education today? Are their varied interests protected?

'Now what?' is a question many law schools are asking themselves. Reinventing legal education in the context of many similar institutions mushrooming in many parts of the country has become the next step. By a discussion on priorities and curricula design, this paper suggests some ways of looking towards the future of legal education in India.

Pedagogical Mergers and Interdisciplinary Acquisitions

-The need for teaching commercial laws differently-

Swethaa Ballakrishnen

Whether intended or not, the new breed of national law schools in the country have heralded a sizeable generation of students taking over advantage of the novelty option of specializing in the commercial subjects such as corporate law, banking and finance, commercial arbitration, taxation, etc. Among those who don't specialize in these commercial courses because of the love of the subjects, many continue to embrace them as the prerequisite to profitable career choices – a trend well certified by the number of final year students every year who wage (what they believe to be unprecedented) wars with their peers (both within the institution and outside) to be placed with corporate recruiters.

Either way, corporate courses in the modern law school curriculum are viewed by more and more students to be both more coveted and more relevant than ever before.

To cater fruitfully to this emerging trend of students who use their legal education differently (as contrasted with traditional law graduates who used their education to almost always, litigate), law schools require to incorporate corresponding changes to the way in which their legal education is taught. In particular, this paper argues, there is a need for a revamping of the commercial courses taught in law schools which- as these courses were neither employed substantially by nor this popular with law graduates earlier.

The reasons demanding the revamping of the commercial classroom are not limited by the already noted reasons of prospective recruitment alone. Technical subjects such as commercial and procedural laws have been traditionally taught as non-interdisciplinary courses. The paper argues that by treating commercial subjects as technical courses with no critical approaches or non-technical parallels, the lessons are taught both without a framework and with no reference points. Without such references, most corporate grounding offered from law schools is weak and their actual application, difficult.

On establishing the need for a commercial curriculums to be taught differently, the paper suggests that this need has to be satiated by multiple approaches. Illustratively, a) commercial classrooms have to extent beyond technical realms and delve critically into theory and basic concepts of the subjects taught- for example, basics of corporations when taught as concepts can be cemented well with basic, known theories of contract, b) interdisciplinary parallels need to be drawn with the courses taught and those that apply - for example, corporate laws and business transactions need to taught with parallels to labour laws, economics, banking and finance, c) by their inherent nature, most commercial courses are taught and used very differently and accordingly, approaches to commercial courses could benefit from practical usage implications being worked into the curriculum.

The paper seeks to outline how the current techniques used in commercial law teaching are ill equipped to deal with the requirements of the classroom and to suggest alternate methods to remedy this pedagogical anomaly.

Resurrecting/re-negotiating labour rights in a globalising world

Organisers:
Padmini Swaminathan
N. Vasanthi

Stream

Labour law as it has existed for a century now was a result of several workers movements towards dignity and a demand for the acknowledgement of the contributions of workers toward creation of national wealth. From the archetypal Industrial Relations laws, legislations on health and safety, remuneration, compensation, social security and others have been added to the regime of labour laws. More recent developments have seen the factoring in of concerns regarding dignity at the workplace and issues of discrimination whether by race, gender, disability or sexual harassment, indicating a shift in the perception of duty towards employees by state and employers. Lest these developments indicate that there is more regulation at the workplace than before, the unraveling of these regulatory frameworks [discernible in the increased deregulation of workplaces] is now taking place at a pace unheard of before, on the specious argument that such regulations hinder employment generation and expansion. Be it the first job contract law of France, the suspension of pension benefits or decreased spending on social security in the United States, or the issue of outsourcing of work globally, the ubiquitous term"interests of capital", uniformly underpins the reasons for such largescale dismantling of workers' rights and benefits, and even when across countries these measures have resulted in visible unemployment and rising inequalities in society. The urgency to re-assess and re-establish labour rights, as well as re-negotiate labour legislations stems from the above and would entail re-examining some or all of the following: the premises that informed the enactment of labour laws in the first place – how far do these still conform to the values that were the basis of working class movements across and within countries; the fundamental premise of the collective bargaining law – does it still hold today; the disconnect of lawmaking process from ground realities; the prioritization of 'interests of capital' over others – when and how do we go beyond such 'interests' to demand accountability from employers and enterprises; what would the institution of core labour standards entail; if democratization of the workplace is an accepted principle, what would its operationalisation translate into, legally? Historically, developing countries such as India, have never been able to operationalise the application of their labour legislations to all workers, for the simple but unpardonable reason that the system has, right from the beginning, failed to formally and mandatorily record all workers and workplaces. As of now hardly 10 percent of the workforce is entitled to benefits under existing labour laws; even so, 'capital'[national and global] blames 'rigid' labour laws for the inability of the economy to generate employment and/or employ the present labour force. While some sectors of informal workers [such as beedi-workers, handloom workers, etc] have specific legislations, there is no systemic recognition of the fact that the existing legislation as well as the methodology and politics of its implementation is completely at variance with ground realities. This stream is aimed at working towards a critical labour jurisprudence that is grounded in the lived reality of workers and their working environment while at the same time laying down core workers' rights that are non-negotiable whatever be the nature of the workplace. The reexamination of labour legislation as well the move towards core labour standards needs also to contend with conflicts of interests between different sets of workers [for example agricultural versus industrial workers] arising from macro issues such as what may be the role of legal jurisprudence in setting standards for appraisal of projects that entail use of public goods such as water, air – the environment in general – that have hitherto not been actively weaved into our understanding of standards of decent living and livelihood. The construction of a critical labour jurisprudence has been basedon a need to give a space for popular struggles to be reflected in the construction of legislations which is empowering and emancipatory rather than a regulatory framework that merely reinforces existing hierarchies of state power and economic power and towards this end it may be relevant to examine issues of labour together with women's issues, issues of marginalisation and alienation, and human rights issues.

Horizons of New Industrial Jurisprudence – A critique of the Law and reality

Durgambini A Patel

Tremendous efforts are needed to formulate, and regulate dynamically, the national industrial policies. To catch up the international bus, adequate suitable legislations need to be re-enacted from time to time to ensure industrial peace and a conductive climate in which the policy may easily thrive.
The globalization of the Indian economy, which began in 1991, lead to privatisation and liberalization of the economy and had its immediate and deep impact on the industrial world. Today, industries of infinite varieties are spring up. The State is slowly withdrawing as an entrepreneur using the process of disinvestments. The day has arrived when the legislative machinery of the State needs to respond to the industrial and market forces. There are clear signals coming from the judiciary, which now seems to be less active in evolving pro-labour jurisprudence. However, the industrial jurisprudence that developed during the 60's and 80's cannot be altogether buried to die a silent death. We need to balance between the old and new and with this intention the paper is written to included:

1) Historical aspect to show the colonial influence.
2) The dynamic pro-labour jurisprudence.
3) Slow but steady changes due to globalization.
4) Relevancy of existing laws with current market forces and need for amendments.

In this context the present Industrial Relation Laws like the ID Act, Trade Union Act and the judicial Law there in will be critically examined. The Law (Legislative and Judicial) as a product of political, international and economic influences existing in the nation in recent time will be explored. The complete theme of the research paper is intended to analyse the present scenario on the touch stone of the critical legal studies movement..

Privatization in India: The Presence of Labour laws and the absence of Privatization Law

G.Ganesh & Nalin Bharti

India had undertaken partial divestiture of its public sector enterprises since 1991. From the year 2000, however, India boldly shifted from partial divestiture to full divestiture (privatization). Admittedly, there were many difficulties in the process of implementing this shift in policy. Some of them were undervaluation, corruption, job losses, and uncertainty over survival of enterprises. In the last few judgments on divestiture of public sector Units, the Supreme Court of India came out strongly in favor of the government's policy. For instance, in one landmark judgment, the Supreme Court held that the workers had no say in the ownership of the company. Theses judgments had the effect of ignoring workers' interests in the name of competition and growth. While India's labour laws had protected workers in the past, the wave of globalization and the imperatives of economic growth had forced the Government to embark on economic reforms. These reforms have not supported by any major amendments in the labour Laws though privatization of public sector units is one of the key issues in the ongoing economic reform and India has a major workforce employed in the PSUs. International experiences in privatization appear to suggest that there should be a transparent privatization law, but till today India has not even considered enacting such a law. The presence of old labour laws and the absence of a privatization law present a complex situation at the time of the second generation economic reforms undertaken by India. This paper highlights the major trends in privatization and its impact on workers in the ongoing privatization in India and also tries to locate the emerging gaps due to the presence of labour laws and the absence of a privatization law. It is clear that if the labour laws of India are not conducive to privatization, then nothing tangible can be achieved in the attempt to privatize the public sector units. Paper suggests that the solution to this dilemma is to enact a transparent privatization law which will help achieve privatization while taking due care of workers' interests.

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Critical theory and contract labour

Nimushakavi Vasanthi

The dominant attitude of the State including the judiciary towards contract labour has undergone a sea change. From being an intolerable practice reminiscent of colonial forced labour it has become the new way of working often portrayed as efficient and flexible. As part of the global shift towards temporary employment and flexible employment contract labour in India and other developing economies remains deeply entrenched in the labour market often beyond the reach of law.

There seems to be disconnect between the reality of contract labour and the rationale offered for the existence and continuance of contract labour. The reasons for this disconnect are also connected to the processes by which such laws were made. The consultation, the review of factual positions, an open debate with various stakeholders and a realistic view of the laws has never been the hall-mark of labour law. The agenda for reform of labour laws from its colonial past has being hijacked to push for complete elimination of these statues. The contract labour law is a clear example in this regard. The reality of contract labour as revealed by empirical studies is that contract labour is largely migrant, dispriveleged and vulnerable with absolutely no access to the law. By citing the rigidity of the law there is a push for laws that permit the exploitation of this labour. The argument being that employment and higher wages do not coexist and in order for employment to rise, minimum standards at work can be sacrificed. The law regarding labour in India does not even meet the standards of ILO Fundamental Principles and Rights at Work. Most basic human rights are violated. All of this does not enter the picture as the presumption of contract labour is not based on social reality but a perceived rigidity of the law; even if that law is defunct.

This paper proposes to examine the causes for this dysfunctional thinking about the law regarding contract labour.

Renegotiating Labour Rights through Laws: Resurrecting and Bringing Back the State

Padmini Swaminathan

Nothing could be more apt than to begin the discussion on 'status' of workers and conditions of work by highlighting the findings of an official Report of the Government of Tamil Nadu, namely, The Committee on Unorganized Labour [1998]. The significance of alluding to this [as yet unpublicized] study is the official *recognition given, albeit belatedly, to not just the abysmal contractual and physical conditions of informally employed workers, but also the risks to their health associated with such employment. The Committee identified 35 occupations, a few of which are covered by some labour welfare enactments, while others are not. The full text of the paper will discuss the overall findings of the Report under three broad headings:*

- Mode of recruitment of workers
- Conditions of work, and
- Health and Safety aspects of work

A significant finding of the Committee is the active gender *discrimination practiced by the industries covered by them. Further, the Committee noted that the employees of some units were mostly girls who had been forced to drop out from schools and enter the industry to augment their family income. A point stressed by the Committee in the context of the match and fireworks industry is that large numbers of women and children were engaged as home-workers in processes that were delinked from other processes that required factory premises. In the latter, only men were employed.* Unfortunately, the Committee does not proceed beyond recording this observation. To us, this fact has tremendous implications from a gender angle. Even if, assuming that, eventually the Committee succeeds in regulating these factories, this by itself would not be sufficient to ensure regularization of those processes of the industry now carried on as home-based work by women and children.

In a refreshing departure, the Committee commented extensively on the health and safety aspects of work and work environment, even if at a general level. Its observations were based on what it encountered during field visits, plus the perception of the workers whom it interviewed. For the Committee it was a revelation that industries, such as cashew, leather tanning, etc., listed in the 'dangerous operation' category of the Tamil Nadu Factory Rules, 1950, were nonetheless carrying on, flouting all safety regulations, including employing large numbers of women and children.

The increase in and growth of non-farm employment is an important component of the transformation that has taken place in many parts of, particularly, 'developed' states such as Tamil Nadu. Simultaneously what data reveal is the increasing employment of adolescents [particularly girls] in many of the non-farm enterprises, either existing or new. Further, the increase in non-farm employment consequent to the increase in formal and informal enterprises has pitted the farm and non-farm sector against each other, largely because of the tremendous adverse impact that non-farm enterprises are having on the environment, particularly water.

The indiscriminate extraction of ground water, the pollution of existing ground and surface water, the unhygienic conditions of work – these and several such issues have immediate as well as long term impacts for which we do not seem to have comprehensive legal understanding and therefore legal frameworks to address. Through a case study of the what the booming export-oriented knitwear town of Tirupur has done to the Noyyal river and also to agriculture dependent on the river, the author hopes to illustrate how the legal system has stepped in only after considerable damage has been done. The question therefore arises, what is it about legal jurisprudence that renders it unable to provide a framework that can encompass some or all of the above issues?

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"Role of Appropriate Government in Industrial Disputes: Identification and Reform"

Sunayana Basu Mallik

The appropriate government manifests itself within the conflicting rights and interests of a worker through its several forms of dispute resolution. The researcher in the past had made an endeavour to understand the operation of the same empirically. This paper would further the past research along with new findings. The best and effective articulation of an employee's demands are hallmarks for a "just" dispute resolution. Do the current trade unions give the space and mechanisms for such articulation to take place?

The paternalistic state and the structure of the appropriate government had left strong imprints of realism and administrative impropriety. When notions of sovereignty get bifurcated within institutions post liberalization, how does the appropriate government react? Does it bring change through reform within or overthrow the current system and replace it with a new one.

The researcher while writing the paper will use a theoretical base and then analyze it through empirical findings made at the Tata Iron and Steel Company (TISCO) and Indian Iron and Steel Company (IISCO). The reason these two industries were identified was because a substantial number of formal and contract labourers found employment in basic and key sectors like steel, post independence. TISCO as a private sector unit highlighted its employee concern and responsive policies, while as IISCO a non private unit suffered, as political decisions triumphed over economic considerations and the company was referred for a BIFR. A comparative analysis would enable us to see how bipartite and tripartite resolution settlements moulded the behaviour and strategies employed by the management and the trade unions lubricating or de-framing the current role of the appropriate government

Open Knowledge Cultures – Locating the Subaltern

Prasan Dhar
Chaitanya Ramachandran

The meta-narrative of the battleground between liberals and libertarians has long been able to ignore the effect of intellectual property on cultures that are a) already invisible , and b) being made invisible by forces that are both causes and products of intellectual property regimes that we have chosen for ourselves. The debate over the free flow of information and knowledge between societies has long forgotten its linkage to the suppression of cultural products and cultural knowledge. We plan to show how different kinds of knowledge are being systematically excluded from the public space, consequently rendering cultures invisible. We shall show Intellectual Property Law is one of the prime suspects in such processes. The values then that have informed the choices in Intellectual Property Law that we have made reflect the distinct experience of that very class. The legal choice then, is very specific in its relation to maintenance of the 'upper stratum' of cultural knowledges, within the broad hegemonizing public space. Modern Intellectual Property law is, as such, indicative of the 'irresponsible legal choice' in that it refuses to align itself with its original ideal. If Intellectual Property Law was made to provide for increased knowledge to be available to people, then modern intellectual property regimes have allowed for the hegemonisation of the public space as a) a concentration of dominant cultural products, and b) a 'marketplace' of ideas. The problem that was never foreseen was the creation of monopolies which would, in turn, stifle creativity. Monopolies often, because of market power, are able to dictate the selection of cultural products (like art, music, and dance), and therefore direct and control the consequent consumption of these cultural products by consumers. The effects of this have been the dual processes of invisibilization and suppression. What monopolies have managed to do is to spatialize the 'Indian cultural domain' as a monolith of cultural knowledge rather recognizing the inherent diversities in Indian knowledge systems. Therefore, what is created is a system where there is a specific 'class of creators'. Thus, creativity is a viable option left for the few, those being the ones supported by large monopolies.

What we will try to outline in this paper are processes by which cultures are rendered invisible by modern intellectual property regimes. What we will subsequently posit are the substantial gains to be obtained by allowing for new intellectual property regimes that provide for open knowledge systems, to enable cultural invisibles to become part of the mainstream.

New models, a) remove disincentives in the old intellectual property systems, and b) provide alternate incentive structures. Specifically, in the context of India, there have been significant, albeit small efforts towards these models by trying to deflect the effect of the earlier models. It is our belief that the future of intellectual property law lies in these new models. Our study shall conclude with a brief insight into the feasibility and practicability of these models.

Law, Labour and Personhood: De-constructing Ownership Rights vis-à-vis Intellectual Property at the workplace

Anchal Dhir and Keerti Nagappa

Critical analyses of the way the jurisprudence of Employee rights has evolved within the realm of Intellectual Property (IP) would necessitate the narration and dissection of multiple stories from the pages of history. A history that begins with the concept of 'property', grows with the theories that determine the location of 'labour' within the larger context of a knowledge economy and comes to operate through the assertion of workers rights.

As Peter Drahos points out applying Marx's theory of historical materialism, one might claim that intellectual property is a super structural phenomenon corresponding to the industrial/ post industrialist phase of development of capitalist societies. There is a symbiotic relation between Intellectual Property and economic change in Capitalist economies. Capitalism is dynamically dependent on creative labour and Intellectual Property takes the task of integrating creative labour into its production systems. It's important to note here that earlier forms of inequality get reinforced in the information society through the ownership of these very productive forces. This raises vital questions that would be central to the unfolding of this paper.

The research paper would seek to assess the power asymmetry/ dichotomy that exists between the employer and the employee in employment contracts/relations through the lens of an intangible property paradigm. An assessment of the development of ownership rights jurisprudence in common law and US Intellectual Property law, projects a strong pro-employer bias.

This would require us to look at ex-ante and post-ante employment relations, the bargaining power of the employees as well as the terms of the employment contracts. Aren't the restrictive covenants more a tool to exercise control over the post- current employment/ professional life of the employee? The transition that has taken place from 'Lone-Inventor' to 'Team-Inventor' being another indirect consequence of corporatization, would further complicate the enforcement of workers rights vis-à-vis an employer/corporate. How can the Pre-Invention Assignment Agreements be justified in this context? What extent should the Judiciary factor in the implicit terms of psychological contracts in deciding who owns the employees Human Capital*?* Aren't the employee rights that spring from mental labor part of Moral Rights? Isn't the De-recognition of person-hood involved in the creation of intellectual property a violation of human rights?

The Indian Penal Code: A Contextual Analysis in an Acontextual Era

Sneha Jha
R. Niruphama

The agenda of Critical Legal Studies (C.L.S) movement involved attempts to "demystify" legal reasoning by showing its indeterminacy and its essentially political character. This deconstruction was meant to rob the legal reasoning of its apparent claims of legitimacy and obedience. Legal Semiotics had a prominent role to play in this demysification process. This paper uses Indian Penal Code (IPC) as a tool to highlight the applicability of CLS in Indian context.

Laws being made for the people must suit if not all at least the fundamental purpose of their existence. There should be concerted effort towards justiceoriented approach keeping in mind the needs of society it is to be made applicable to. However, the purpose of legislation is most often unknown or misunderstood leading to drafting of acontextuallegislations. It is essential to look at the ground level working and implementation of the laws to determine their relevance. However, people to whom these laws hardly have any pertinence and application make most of the laws. Thus, a law, which isacontextual, is liable to be misused. As J.M. Balkin fittingly states, "I believe we must shift the focus of jurisprudence from the study of the properties the legal system is thought to have (for example, its coherence or determinacy) to the nature of the legal subject who apprehends the legal system and judges it to have these properties.

In other words, to understand the nature of law, we must understand the nature of legal understanding."The prevailing penal system in India is an elucidation of this concept.

1 J.M. Balkin, BEYOND CRITIQUE: LAW, CULTURE AND THE POLITICS OF FORM,
69 Tex. L. Rev. 1831, 1840.

2 J.M. Balkin, UNDERSTANDING LEGAL UNDERSTANDING: THE LEGAL SUBJECT AND THE PROBLEM OF LEGAL COHERENCE, 103 Yale L.J. 105, 106.

IPC was one of the main legislations in the Indian criminal system; the fact that the Indian sovereign adopted it without any substantial amendment is a fact to ponder upon.

The context in which it was first framed and enforced was in contradistinction from the current situation when it is still applied. It is this acontextualapplication of the legislation, which calls for critical examination. The legislation was first framed from the point of view of a ruler giving laws to the ruled – enforcer and enforced. However, the post independence scenario is that of rule of law where there is no difference between the ruled and the ruler. In a liberalist democracy like India the adherence to the social contract is expected equally from all the citizens irrespective of the social or political strata they hail from. The application of a Code framed in the colonial era is by itself incompatible with a liberal democracy like India. The paternalistic attitude of the English has been inherited by the adoption of the IPC and the case laws relating to it, which has been done by the provisions of the Indian constitution.

The IPC has been one of the strong tools used by the English to suppress the Indian freedom struggle – it was more of a political tool than a legal one.

This being so it is all the more obligatory that every provision of the Code be revisited in the light of postcolonial India. The Code can broadly be classified to be dealing with wrongs against State, person and property.

Delving into provisions of the Code it can be clearly concluded that every section under offences against State, when viewed from the lens of the colonial ruler, was framed with intent to favour the ruler in his mission to suppress any form of agitation – violent or nonviolent. This reaffirmed by the provisions dealing with offences against property. The rigours with which property offences were penalised was reflective of the bourgeoisiedictat. Property was then the exclusive luxury of the British or the Zamindars and Princes who owed allegiance to the British. Moreover, criminalising breach of trust without defining the term "trust" underscores the fact aCartBlanchewas given to the English to arbitrarily determine what would constitute an offence under this section. 2

Thus, this paper clearly proves that the penal code was not just a means to codify criminal justice system but was also a device for the furtherance of ulterior motives of the colonial rulers. Therefore, laws cannot be seen as divorced from their context.

A Critical Look at Choices-of choosing Law Schools and Career Choices Made at Them

Nimisha Kumar

Before the advent of the 'national law schools', the profession of law was not as popular as it is today. After the success of the law school model in Bangalore, many more such schools have been instituted on similar lines. There has been a corresponding increase in the number of students appearing for the law entrance exams. On one hand, the aim of law schools is stated to be to improve the quality of the Bar. Yet we see a trend of fewer and fewer law graduates joining the Bar. Practicing at Courts is seen to be a slow and tedious process which is not lucrative enough, and which takes a long time to yield returns. The first question that arises is whether the legal profession has gained importance purely because it is seen to have immense potential in the job market where there are many lucrative opportunities (specifically law firms and companies). The next question that arises is whether getting suitable employment with a fat pay package is the sole end of a student in law school without any emphasis being paid to the intrinsic value of knowledge or interest in a subject. The first part of this paper seeks to examine these questions in the light of the elitist nature of law schools along with the teaching and curriculum methods adopted and practiced. The next portion of this paper attempts to examine the choices that are made by law school graduates, the reasons for their choices and whether the institutions can mould and influence such choices.

The Case for Inculcating a Feminist Perspective into Indian Legal Education

Shritha K.V

Today, fifty-six years after "solemnly resolving to secure to all our citizens-justice-social, economic and political', we still have laws on the Statute Book-laws that have been passed by a 'democratic' Parliament, that deny the fundamental right to equality of women and discriminate against them. This paper looks at certain provisions of the codified parts of the Personal Laws of the Hindus and the Muslims, which embody the notion of inequality inherently and seeks to suggest ways in which all law schools across the nation, whether located in the hub of things in the metros or tucked away in some remote rural corner, could question such laws and campaign for their repeal, and thus play a constructive role in truly upholding the spirit of the law among the people.

The first part of the paper will focus on how the fundamental rights of women have been denied by no less an authority than one of the sacred branches of a democracy- the Parliament, which has been constituted "by the people', "of the people' and "for the people'. The next part of this paper will bring out the unquestionable urgency on part of the Law Schools across the nation, to take affirmative action, in this regard. The ways and means of doing the same would also be suggested.

This paper also, in this context, emphasizes the need for the law schools to shift the teaching of the law away from out-dated and outmoded case laws given out by legal practitioners, who were at the prime of their respective legal careers around a hundred years ago! Thus the move, by the law schools, towards considering the political considerations involved, the social context, the contemporary relevance and necessity, and the impact on people, of legislations would be emphasized. The premise that the media attention lavished by the National Press on even a convocation ceremony at the National Law Schools could definitely be used to greater advantage by directing the focus on egalitarian debates organized by all law schools, would also be discussed.

Religious Fundamentalism: An offshoot of Modernity

Pallav Mongia

As the name suggests, this paper argues that religious fundamentalism is nothing but a natural consequence of modernity and other circumstances that came before religion and shaped its destiny.

The general theories of fundamentalism assume that religion can only articulate with modernization in either defensive (fundamentalist) or in acquiescent (liberal) modes. There is a need to be open to the possibility of religion adapting in a range of ways to modernization and post modernization processes.

Quite contrary to the common perception, fundamentalism is a completely modern phenomenon. It exists in a symbiotic relationship with an aggressive liberalism or secularism, and, under attack, invariably becomes more extreme, bitter and excessive.

Hasan Al-Banna on one hand used what is called as the 'functional role of religion without disenchantment' and on the other hand Mawdudi represented Islam in a reasoned, systematic way. The complex mythos and spirituality of Islam was turned into logos, a rationalized discourse designed to persuade and to lead to pragmatic activism. Sayyid Qutb inextricably wove the concept of liberty and the rule of law with the sovereignty of Allah.

The first quarter of twentieth century was an exemplary stage play of germination of fundamentalist seeds in modern America. The First World War showed the lethal and self – destructive tendency of the modern spirit. But it was accompanied by an unparalleled creativity in both arts and sciences, which witnessed a desire to go back to the first principles, to irreducible fundamentals. The aim was not to re-create the past but to break it asunder, to split the atom and bring forth something new. A drift towards liberalism got the protestant theologians moving and they came out with a series of pamphlets called The Fundamentals (1910-1915), which, under the editorship of A.C Dixon, aimed to establish the basic principles of Christian faith in an increasingly skeptical world.

Only an adequate understanding of the imagery of the fundamentalist mind is the recourse available to handle it. The case studies of Egypt and America for specific periods in twentieth century unfold the righteous understanding of fundamentalism, religion and the struggle with modernity. Modernization has always been a painful process for many but those who are sidelined should never be undermined.

There is enough to argue that a more empathic approach to religion (and secularization) would have avoided many catastrophes. Though post modernism gives us a sigh of relief, cultural commitment to multiculturalism should not collapse into cultural romanticism.

Discrimination of People with Disabilities with in the Employment Sector

Jessica Pekke

This paper deals with the occupationally disabled in both India and England, it highlights on the fact that all persons should be treated equally within the workforce irrespective of their physical qualities.

The culture of disability can be looked at in relation to both the individual as well as the social pathology approaches to disability from which various Human Rights laws have emanated, linking this to paying work we see that the evolving phase of employment serves as an eye opener into how far we have come and how far we can go in relation to the creation of employment opportunities for the disabled.

Indirect discrimination may occur within the employment sector at the stage of recruitment when an employer puts a criteria that may appear to be neutral but in a way puts a group of persons at a disadvantage over the others. In case of disabled persons it may be indirectly implied that the facilities that are available are not suitable for them or that the work that is to be carried out may require long hours and physical strength. Various laws are critically looked at to see how effective they are in relation to the disabled , for instance the People With Disability Act and the Disability Discrimination Act can be viewed from the Rights and Welfare - normative - points of view from which bodies endowed with the duty of implementing laws are given the obligation of coming up with successful ways of tackling stereotypes and creating incentives that can act as motivating factors for employers to recruit the disabled into the employment sector.

Evolving an Equation – Access to Justice & the Vagaries of the Reservation Debate in Post-Independence India

Rashmi Raman

In the context of intractable conflict, the terms 'justice' and 'fairness' are often used interchangeably. The belief that justice consists of rules common to all humanity that emerge out of some sort of consensus is often thought of as something higher than a society's legal system. In its narrower sense, justice is fairness. In addition, the idea that justice requires the unequal treatment of unequals is in tension with the principle of equality. This principle of egalitarianism suggests that the fairest allocation is one that distributes benefits and burdens equally among all parties. This principle, however, ignores differences in effort, talent, and productivity. Also, because people have different needs, an equal initial distribution may not result in an equal outcome.

A principle of need, on the other hand, proposes that we strive for an equal outcome in which all society or group members get what they need. Thus poor people would get more money, and richer people would get less. This principle is sometimes criticized because it does not recognize differences in productive contributions or distinguish between real needs and manifested needs.

This is where reservation policies in India become academically relevant to the scope of this paper. India's policy of reservation, or 'compensatory discrimination,' is a "daring attempt to remedy the past injustices suffered by those who are at the lower levels of India's four-tier caste-hierarchy." Before India declared independence in 1947, the British maintained separate electorates and reserved seats for these groups in Indian Parliament.

The access-to-justice-movement in India is still a fledgling movement, there are no identifiable centres for it in India, nor has any remarkable leadership arisen, except perhaps in the context of reservation, wherein India has spearheaded a movement ever since the early days of independence, when Dr. Bhim Rao Ambedkar fought for the rights of the downtrodden untouchables in the rigid caste-ridden Indian society, and brought about an emancipation of sorts for the Dalits in India, depending largely on vote-bank politics for the success of his scheme. Further additive improvisations to the movement were brought about by the Mandal Commission Report, and also, the latest Supreme Court judgement on the point serves as a happy note for this application of distributive justice in India.

This paper attempts to bring in an empirical perspective to the debate on the function of a seemingly 'evolved' justice system and its deliverance in the context of the reservation rialto in India.

Intruding the Forced Labor Fortress – Reexamining Legislations for Reviving Labor Rights

Loree Sonchhatra
Abhishek Dubey

More often than not, a stigma incarcerates, although deeply, but only a singular section of the society. Forced labor, however, has emerged as a stigma which has stigmatized every aspect of the contemporary society by deeply uprooting its cultural, economic, developmental, ethical and moral dimensions.

The prohibition of forced labor has remained a legacy of many international instruments and regional declarations. However, the list of exceptions that allows forced labor practices in highly particularized situations, is the source from where has stemmed the prodigy of retrieving ill-gotten gains from the practice. The exceptions served as the foggy smokescreen for the perpetrators which helped them escape condemnation resulting in a systematic failure of the movement against forced labor unlike the one against slavery.

As the lust for economic gains and the deplorable state of inadequate laws went hand-in-hand, forced labor remained in practice and has today spread in all continents, in almost all countries, and in every kind of economy. Forced Labor itself being a crime inadvertently consists of a severe violation of human rights and restriction of human freedom also violating at a single stretch related labor rights pertaining to *rights of fair wages, health and safety at work, standard minimum hours of work and the right to choice of employment* which are again severe violations of international law. Trafficking, social discrimination and exploitation are also seen as other vulnerable offshoots of the predicament of forced labor.

The legal tools have been proved inapt in responding to the perturbing violation of fundamental labor rights in the form of forced labor. Forced labor is neither a *jus cogens* norm and, till date, doubts persist among the jurists that whether the rule has emerged as a concrete principle of customary international law. Unfortunately, ICCPR still lists certain exceptions that allow forced labor practices in particularized situations, which has drastically restricted the positive legal growth of the principle of prohibition against forced labor. Indeed, the exception clause in the worlds most recognized legal instrument has made the elevation of rule against forced labor to the status of *jus cogens* norm unattainable. Also, Forced Labor Convention lists five exceptions that allow forced labor practices. Similarly, the American Convention on Human Rights tolerates forced labor by prisoners, military personnel, and individuals performing civil obligations. This endurance is also mirrored in the European Convention on Human Rights and the Restatement (Third) on Foreign Relations does not specifically list forced labor as either a customary international law or *jus cogens* norm. Forced labor is hidden, inhumane, widespread, and criminal and the problem thus warrants apt national and international legislations to regulate the worsening situation. This paper is an attempt to identify the loopholes in the existing set of laws and to suggest throughways to rectify the dilemma situation.

The Need to Inculcate and Harmonize Entrepreneurial Abilities/Ambitions in a Lawyer

Krishna Srikanth

Since the system of imparting skills/education in Indian Law Schools acquired its new and more suave form in the late 1980s, it has embarked on an upswing of increasing popularity. There is an impression that the students graduating from these institutions posses the skills that *the industry* values the most. This is reinforced by the new career options that are now available (law firm recruitments) that and the fact that they are oftentimes accompanied by very rewarding compensations packages (with the benchmark being the offers received by fresh undergraduates from other streams).

What is sometimes forgotten along the way, is a review of whether such factors are representative of *the industry*'s true priorities in terms of skill sets, attitudes and aptitudes in a recruit.

This paper shall deal with one such attribute – entrepreneurship. The paper will first lay out broadly what is meant by "entrepreneurial" in the context of this paper. The definition shall revolve around the ability to appreciate and understand the larger context in which the various legal intricacies of a client, be it a corporate or an individual, are placed.

Next, the paper will discuss in detail, the need to develop entrepreneurial abilities in lawyers. This shall consider not only the clash of subcultures (Richard J Goossen[1]) but also discuss other reasons that make such an outlook inherently valuable to a graduate of law. In the light of this, the author will emphasize the appropriateness of transposing the *cost-benefit analysis* concept to a lawyer's work in issues ranging from research to litigation to suggesting the most pragmatic course of action.

Further, the paper will also point out briefly, the highly liberal mindset that is inevitable if the reasonable entrepreneurial ambitions[2] are accommodated in our legal fraternity.[3] A society that gives room is given for them, is bound to witness creative expressions, which is ultimately beneficial to it.

Finally, the paper will return to the starting point, and suggest an implementable strategy of inculcating entrepreneurial abilities and ambitions through the framework of law school itself - through do's and don'ts.

1 Richard J Goossen, "What Entrepreneurs and their Lawyers Should Know about Each Other", Minnesota Journal of Business Law and Entrepreneurship, Vol 3, 2004.

2 *Entrepreneurial Ambitions* will be differentiated from plain avarice.

3 Nazar Yasin and Benjamin Rikkers, "The case for lawyers as entrepreneurs" < http://www.law.northwestern.edu/jdmba/Pleader_Feb_04.doc>

Employee Health Issues at India's Call Centers: Need for a Law

Ch. Siddhartha Sarma
Puneet Upneja
Polali Sriram

BPO is India's new sunshine sector[1] and the country is one of the most sought after electronic housekeepers of the world, taking care of a range of chores for multinational firms. Policy-makers and planners view this sector as having the potential to absorb a great deal of the educated unemployed.

Although outsourcing is now broad-based in terms of new areas, India's emergence as the world leader in outsourcing has been mainly led by information and telecommunication technology-based off shoring services in the form of call centers. One of the reasons that the sector attracts hundreds of aspirants is because of the money involved. Work is portrayed as "fun" and the workplace as "yet another campus".

It is these basic notions, along with the superior technology in the workplace, that attract potential workers. The firms, in their job advertisements, showcase the bright ambience of the workplace, including facilities such as cafeteria, Internet kiosks and recreation centers, which go a long way in attracting the youth.

However reality bites the way round. The "yet another campus" style has proved to be one of impairments. Everyday more and more call centre employees are being diagnosed with occupational diseases like Repetitive Strain Injury (RSI), Cumulative Trauma Disorder (CTD), injuries relating to voice, hearing, and visual fatigue and stress related disorders. There are no laws to regulate the practices of the call centers be it treating employees, distributing work etc resulting in unsafe practices in the industry. At a stage where India stands to gain much from the industry, it is sad that we do not have a legislation regulating it to ensure its sustained continuance. It will be a devastating blow to our economy if the outsourcers were to realise that they stand a good chance of being encumbered with tortious litigation and withdraw from our market. We are in the eleventh hour and the need cannot be more pressing – a legislation regulating the practices of call center industry.

The aim of this paper is to study the various legislations around the world regulating or prescribing practices in the call centers and propose a model Code of Practice which, if implemented, will assist the employers and employees to maintain a better work environment and to reduce exposure to the hazards posed by the nature of their occupation.

1 The BPO industry has contributed Rs. 1,13,000 Million in 2002-03 to the Indian Economy and employed a workforce of 1,71,100 in 02-03 of which the largest share of revenue and employment was generated in the customer care services such as Call Centers accounting for 38 percent of the employment and revenue share of 35 percent.. *See also*- http://www.asiaquarterly.com/content/view/155/ last visited 18-7-2006.

2 Overall, the salary structures were found rather favourable with 53 per cent of the employees receiving a monthly salary above Rs.10,000 and another 19 per cent earned a salary between Rs.8,000-Rs.10,000. *See also* "*Labour in Business Process Outsourcing: A case study of call centre agents*", prepared by Babu P. Remesh, an associate fellow at the V.V. Giri National Labour Institute (NLI)

3 *See also* http://www.deepaksharan.com/cri_intro.html last visited 18-7-2006

4 Also known as Reflex Sympathetic Dystrophy *See also h*ttp://www.expresshealthcaremgmt.com/20010630/hyderabad2.htm last visited 18-7-2006

5 http://esic.nic.in/coverage/coverage.htm last visited 18-7-2006

6 *See Supra* note 2

Judges, Environment and Dilemma of Sustainable Development

Ravi Prakash

The adjudicatory process which common law countries follow, especially India, with regard to Environmental problem under the ages of Sustainable development is at critical point. The vision of sustainable development which had been incarnated in "***Brutland Commission****" report is thwarted itself.*

The judicial impartiality is at question among one segment of the society. Sustainable development which is there for protection and preservation of environment and ecology has been used as tool for marketisation of development and corporatisation of governance. The loss of biodiversity at the cost of infrastructural economic development is irreparable.

The last decade of judicial activism in India has exposed the blinkered vision of environmentalists. While constitutional framework and human rights guarantees can build the grammar of democracy, it is always people and ethical quality of the governance that makes democracy work. In neo-liberal economic approach of 21st century often put the interest of big MNC's and their profit before the people.

Is there such a thing as a fair, just and proper balance between ecology and economy community interests, and how can it be found? As Davis points out "Judges are not usually encumbered with dogmatic ideologies." They, nonetheless, have formed opinions, based upon long experience in the law an society, as to what represents a proper balance between conflicting interest; otherwise they could not evolved the environmental jurisprudence.

The difficulty has been that, with increasing complexity of society community interests have assumed more and more complex forms and have become less and less easy to understand without factual investigation and explanation. Cardozo's well remembered postulate "judicial law making demands the legislator's wisdom" might be satisfied by the judges. However, if they are to regulate the affairs of men sensibly, they will often also need the same extensive information which a legislator would require.

More notably during the last decade or so optimism has given way to pessimism and a sense of frustration which can be noticed easily by any one who cares to see. The faith of the people in the institutions brought into existence with great fanfare under the constitution which "We, the people of India" gave to ourselves has largely been eroded.

Unless the last person can celebrate his or her sense of dignity, exercise democratic fair dissent and involve themselves in the process of development, democracy becomes an empty rhetoric.