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Foreword

Justice Ruma Pal (Retd.)*

JILS is a student-run, peer-reviewed interdisciplinary journal, which publishes work that analyses legal issues through the prism of other social sciences and broadly engages with social issues and social facts. In doing so, it takes a welcome step in the direction of rejecting compartmentalised legal discussions as the norm, by recognising the explicit link between law and society, which legal practitioners and professionals are often wont to forget. It is this engagement with social facts and allied social sciences that caught my attention when I was approached by the Editorial Board to write the foreword for Volume 11(2).

It is my belief that this cross-disciplinary intellectual endeavour not only enhances the understanding of social issues, but also that of legal issues that emanate therefrom. As those in the legal profession, we must encourage such scholarship that provides multifaceted views on legal and social problems. Very often we underestimate the need for understanding the social, political, and economic backgrounds in which laws are passed. We also tend to diminish the importance of resolving or at least attempting to resolve the philosophical and ethical questions that arise in the course of interpreting the law. As such, it is good to be reminded that laws do not exist in a vacuum, and that laws are being constantly shaped and reshaped by their surrounding contexts.

* Supreme Court of India.

This volume of the journal contains several pieces which offer us kaleidoscopic views on various legal questions. In the article titled, *Addressing the Roadblocks to Gender Neutrality in Sexual and Domestic Violence Laws: A South Asian Perspective,* Anupama Sharma investigates the role of social constructs in shaping the law – which continues to view domestic and sexual violence through a gendered lens – as well as the law's role in reinforcing gender constructs. The author addresses and provides counters to the traditional arguments made against introducing gender neutrality in laws dealing with sexual and domestic violence. Specifically, she argues that concerns regarding the dilution of the unique nature of violence faced by women are misplaced; that gender specific laws that fail to acknowledge that men and non-binary genders are also victims of sexual crimes and domestic violence, perpetuate stereotypical notions regarding masculinity, as does the idea that construing women as 'aggressors' and perpetrators of sexual and domestic violence is a biological impossibility; and that potential misuse of laws by men cannot justify denying them redressal and the scope for misuse would have to be ameliorated in other ways. The author also provides an overview of the laws relating to sexual and domestic violence that apply in South Asian jurisdictions such as Afghanistan, Nepal, Bangladesh, Pakistan, Sri Lanka and Bhutan. Specifically, the author highlights that Bhutan is the only South Asian country where these laws are completely gender neutral and in light of the same, argues for the adoption of a similar framework in the Indian context, which accommodates special mechanisms and protections that are needed to cater to the gendered aspects of sexual crimes and domestic violence, without denying legal remedy to all victims, irrespective of their gender.

Anuradha Maheshwari, in the article titled *IP-Based Financing: Scoping Hypothecation of Trademarks* discusses IP-backed financing as a leveraging strategy, i.e., the use of IP assets to gain access to market credit and funding. She argues that in India, IP-backed financing is increasingly being resorted to, especially, funding and lending involving the use of trademarks as security. She identifies trademarks as being an effective option for collateral security in IP financing, given that they are less complex, have longevity, greater visibility and portability. At the same time, she argues that hypothecation is the preferred option for securing properties in trademarks since it does not involve delivery of possession or title to the lender. Despite being the preferred option, the hypothecation of trademarks as a financing strategy is not without its problems, especially considering that it is not governed by statute or law, and is largely regulated on the basis of the hypothecation contract. The author discusses the possible issues that can arise in using trademarks as security for lending/financing, with a special focus on the assignment of trademarks and the valuation of IP assets. Ultimately, the author concludes that registered marks and brands make for competent IP

contenders as effective assets for financing, with the caveat that the success of trademark-based financing depends on hypothecation contracts being carefully and comprehensively drafted, accurately capturing the intention of the parties.

In her article on *Horizontality and Non-discrimination Rights,* Shweta Sivaram looks at the extent to which constitutional rights that can be enforced against the state have been, and should be, allowed to be enforced against private actors. Using comparative analysis, she reviews the approach of courts in various jurisdictions with respect to claims of enforcement of non-discrimination rights against private actors. The paper also studies in detail the various mechanisms adopted for horizontal application of constitutional rights, beginning from legitimising direct horizontal enforcement like that in South Africa to indirect enforcement through contextualisation in terms of the intent of the Constitution, or reading constitutional rights into public policy exceptions, specifically in countries like Germany and Canada. With respect to India, the *Zoroastrian Cooperative Housing Society* case in which this issue was dealt with, is criticised by the author for not taking into account the constitutional prerogative of making a commitment to a social democracy, and not just a liberal democracy. The author also explains why courts and legal systems in certain countries with greater commitment towards social welfare and intervention as opposed to individual liberty and minimal state intervention, are more conducive to allowing the horizontal application of non-discrimination rights guaranteed against the state in Constitutions. This becomes all the more pertinent in countries like India, with seeded discrimination towards minorities and other stratifications within the folds of religious communities, and the additional lack of a specific anti-discrimination legislation that would provide the aggrieved a recourse against private actors who practise discrimination.

Hans Tijo and Kenneth Khoo, in their article titled *Facilitating the Optimal Mechanism in Mergers & Acquisitions: A Comparative Perspective from the Commonwealth and United States*, talk about the essential attributes of an M&A transaction, that become relevant insofar as regulating the takeover of public companies is concerned. The authors compare the Revlon Duties and the Delaware Takeover Law, and try to establish the problems with allocative efficiency in takeover bidding taking precedence over social efficiency, and the consequent lack of consideration towards various sections of shareholders and their interests. Further, the authors pitch for a regulatory model with adequate stakeholder regulation, where ex ante investors and bidders are given due opportunity in the process. Ultimately, the objective is to determine an optimal mechanism that balances shareholder interests with that of maximisation of efficiency in bidding. They argue in favour of the Singapore-model of takeover regulation, which merges the best of both the US and UK Laws, requiring the

recognition of a proper-purpose rule. They conclude by highlighting how the focus is to be the "reasonable shareholder", while the administration of the soft law and the ensuing flexibility should be by a market regulator as opposed to a court. Thus, the underlying benchmark of economic efficiency is also catered to and accounted for in the takeover process.

In the article titled *What's in A Name? Locating the Constitution as a Signifier*, Dikshit Sarma Bhagabati explores the semantic and affective perception of the Constitution of India. He argues that while in line with Saul Kripke's Anti-Descriptivist theory, and Slavoj Zizek's engagement with the Lacanian Tradition, the Constitution of India in legal parlance may broadly refer to constitutionalism (ideas of balancing arbitrary exercise of state power, a system of checks and balances. etc.), the relationship between the two may not be one to one. He goes on to analyse how the word Constitution has been treated in popular expression and judicial pronouncements, and further argues that as per Lacanian traditions, the Constitution is nothing but 'Das Ding', the kernel of desire which is nothing but hollow, and thus, posing a need to sublimate it by continuously proclaiming the document to be an affirmation of rights, promoter of justice and the rule of law, or more broadly, the fabric of an imagined Indian society. He forcefully makes the case for public engagement with the Constitution, and how the same might find significance by encompassing and exceeding modern constitutionalism.

Shehnaz Ahmed explores the credit scoring ecosystem, the rise of alternative credit scoring methods and their potential pitfalls in the article titled *Alternative Credit Scoring - A Double Edged Sword*. She maps the alternative data sets (non-traditional and non-financial) that Credit Scoring Agencies today use to assess the creditworthiness of an individual, such as messaging content, social media footprints, digital payments history, online browsing behaviour, etc., which the machine learning revolution has enabled these agencies to use. She notes that the use of such data points may lead to class labelling and further notes that the use of an alternative data point, which is heavily correlated with sensitive characteristics such as race or gender, could lead to severe financial impacts on certain communities. After highlighting such pertinent issues, she goes on to explore whether the current legal framework can effectively regulate such a novel development in this area. Identifying the complexities and challenges with the current regulatory framework, she goes on to propose some suggestions that India could employ to regulate the activities of the Credit Scoring Agencies.

Dr John Winterdyk, in his article titled *Reimagining Youth Justice in Canada: Envisioning a Responsive Regulatory Model within a Human Rights Framework – A potential lesson for India*? engages with the evolving nature of

human rights and restorative justice, particularly in the Canadian context. The author talks about the transition of Canada from a crime control model of justice to a restorative model. In the effort to properly engage with the issue, the author traces the development of the Canadian model of justice from its very first statute for juveniles, i.e. the *Juvenile Delinquents Act.* Subsequently, the author breaks down the *Youth Justice Criminal Act of Canada* and explains in depth, the shortcomings of the Act. The author concludes that there is a need for much reform before Canada is in line with the responsive regulatory model of restorative justice. This assumes importance, particularly because this approach is in line with the United Nations Convention on the Rights of the Child. The author also talks about the Indian juvenile justice system and how Indian lawmakers can learn from the Canadian experience.

All of the articles in this Volume are indeed fascinating to read and having said that, I must congratulate the Editorial Board and the Faculty Advisor of the journal on the publication of this Volume. I would also commend the authors and the reviewers, as their brilliant efforts have culminated in the curation of such a diverse and stimulating set of articles that comprise this Volume. The quality of the academic output produced under the aegis of the journal is praiseworthy and I hope that future issues are also as enlightening as this one. I wish the Editorial Board the very best of luck for their future issues.