ABHANDLUNGEN / ARTICLES

Still Asking for the Moon? Opening Windows of Opportunity for Better Justice in India

By Werner Menski*

A. Abstract-cum-Introduction

This introductory article picks up the key themes developed by the three articles in this Special Issue and wraps them into a wider discussion about creating new opportunities for productive use of the internal pluralities of 'law', especially concerning the complex relationships arising from 'law and society', 'law and development' and 'law and governance' debates. That is of course a tall order. To do this properly, ideally without losing focus, one needs to be aware, first of all, that law itself is internally so deeply plural that it is necessarily subject to interdisciplinary enquiry, not only while analysing foreign jurisdictions or examining state laws in today's context of globalisation, as the pluralities go much deeper and are ancient. One could extensively theorise this rich plurality of pluralities, as I tend to call it these days, to bring out the internally plural scenario of legal pluralism in relation to the three subject areas discussed. However, legal pluralism is today increasingly acknowledged as a fact and is 'no longer viewed as an arcane area of study',[1] especially when we include within our radar the legal systems of Asia and Africa.[2] Hence we might proceed swiftly towards related problematics of implementation, or lack of it, as the case may be, since all three articles presented here identify and critique perceptions of lack of progress and search for remedies.

In that context, I return to one particular image used earlier,[3] when it struck me that reform-oriented activists tend to ask for the moon,[4] in other words, to lobby fiercely for or simply demand an ideal scenario of development, progress and rational order, not to speak of justice, only to be irritated and disappointed when reality yields merely a mirror image of what was desired. Maybe one even finds unforeseen, unintended elements in the mirror im-

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1 *Anne Griffiths*, Reviewing Legal Pluralism, in Reza Banakar / Max Travers (eds.), Law and Social Theory, Oxford 2013, p. 269.

2 *Werner Menski*, Comparative Law in a Global Context: The Legal Systems of Asia and Africa, Cambridge 2006; *William Twining*, Globalisation and Legal Theory, London 2000, p. 55.

3 *Werner Menski*, Asking for the Moon: Legal Uniformity in India from a Kerala Perspective, Kerala Law Times, Journal Section, 2006 (2), pp. 52-78.

4 The famous background story is easily told: Little Krishna demands the moon as a toy and his mother, Yashoda, cleverly holds up a mirror, so the game can begin and life goes on.

age. I suggest here that Mother Yashoda's ancient trick is much more than the loving kindness of the Mother Cow (*vātsalya*) for her offspring. It is also a non-verbal strategy of diversity management, deeply relevant for the global rhetoric of justice. It allows life to continue harmoniously, bypasses the petty impatient irritants of demands and desire, and opens windows of opportunity for better clarity of visions. In that regard, it is pertinent to note here that the overall assessment of Indian legal and other developments remains today generally clouded by remarkable negativities. Often derogatorily bad-tempered and unconstructive, it is frequently motivated by certain political and even personal agenda that underpin partial, hostile rhetorical dismissals of anything India attempts to survive in dignity. Reading of scholarly work, as of judicial decisions, may actually benefit from awareness of the writer's biography, to understand better why particular perspectives are taken, certain lenses are chosen and specific outcomes are presented.

Apart from being informed by the three articles that constitute the main body of this Special Issue, the present introduction is particularly inspired by *Sen*, a massive study that identifies early on that '[i]mportance must be attached to the starting point, in particular the selection of some questions to be answered….rather than others'.[5] This wide-ranging post-Rawlsian analysis of justice as reasoned fairness, a form of equity rather than an idolised moon-like image of equality, realistically observes that 'global justice is not a viable subject for discussion, since the elaborate institutional demands needed for a just world cannot be met at the global level at this time'.[6] This sobering health warning implies that any globally uniformising analysis of justice risks being little else than rhetoric asking for the moon. More productive, as the three present contributions exemplify, are efforts to think about and strive for more and better local justice. By definition, as the little words 'more' and 'better' indicate, the aim is not selfish possession of the full ideal shining end-result in the sky of hope, as the research effort represents agitation 'merely for the elimination of some outrageously unjust arrangements'.[7] What precisely is 'outrageously unjust' would, however, remain subject to often highly subjective assessment and situation-specific scrutiny, as outrage can be easily manipulated or may be (ab)used strategically as a bargaining tool. Similarly, *Twining* found in conversations with leading Southern voices of human rights protection that their pluralist desire to account for different perspectives always risked 'tolerating the intolerable'.[8] Both these methods, identifying what is 'outrageously unjust' or 'intolerable', will indeed be subject to unending reasoning. While we may readily agree that it is intolerable or outrageously unjust in today's world that some people die of starvation, deficiencies in securing a specific extent of development, basic education for young people or

5 *Amartya Sen*, The Idea of Justice, Cambridge 2009, p. 9.

6 *Sen*, note 5, p. 25; *Twining*, note 2, p. 9 similarly advises that 'anything approaching world government is not likely to be on the agenda for the foreseeable future'.

7 *Sen*, note 5, p. 26.

8 *William Twining* (ed.), Human Rights, Southern Voices, Cambridge 2009, p. 218.

gender equity in family laws are much more difficult to assess in light of the respective actors' value judgements.

So what can we do if some participants in these ongoing debates stubbornly continue to insist that their perspective is correct and everyone else's is misguided? *Sen* observes in this context that 'many acts of nastiness are committed by people who are deluded, in one way or another, about the subject'.[9] Since humans cannot find a globally agreed definition of 'law', this indicates that we will forever struggle with universally binding agreements about justice. Hence, given that 'a diagnosis of perfectly just social arrangements is incurably problematic',[10] justice is never really an identifiable final or permanent state of perfection, but rather a momentary glimpse of the moon of bliss. *Sen* suggests:

> *Resistance to injustice typically draws on both indignation and argument. Frustration and ire can help to motivate us, and yet ultimately we have to rely, both for assessment and for effectiveness, on reasoned scrutiny to obtain a plausible and sustainable understanding of the basis of those complaints (if any) and what can be done to address the underlying problems.*[11]

Thus, *Sen* advises: 'The challenge today is the strengthening of this already functioning participatory process, on which the pursuit of global justice will to a great extent depend. It is not a negligible cause'.[12]

Picking up this challenge, I seek to demonstrate how, in a scenario of ever more intensive pluralisms of people, communities and states, as well as concepts and methods of justice-conscious activism, even if we only focus here on Indian basic rights problems, the complexities in this field are growing rather than being reduced. There is a cacophony of comment and critique, and we find much anger and disappointment about what looks like significant failures. And yet, it seems, considerable progress is being made in establishing greater clarity about relevant parameters, particularly in identifying more sophisticated benchmarks for assessing and promoting plausible, realistic forms of justice. The elaborate performance of academic discourse is thus not a futile exercise, even if it is full of irritants. It can bring increasing awareness, first of all, about the inherently plural nature of law, its multidisciplinary uses, and at the same time its limits, too. Aware of such limitations and volatile liquidities, we may then proceed to further discussions about ambitious ideals like justice. Asking for the moon of perfect justice remains also today a tempting short-cut strategy, succumbing to almost childish desire to have a desirable toy. The hard labour of reasoning over the contours of the resulting mirror image of this ideal is never going to end. This introduction therefore also tests to what extent the three energetic young contributors

9 *Sen*, note 5, p. 32.
10 *Ibid.*, p. 11.
11 *Ibid.*, p. 390.
12 *Ibid.*, p. 410.

to this Special Issue are aware of such limitations and are prepared to engage constructively in further reasoning.

B. Progress in Socio-Cultural Research and Management of Pluralist Scenarios

I was impressed by the fact that the three articles presented here basically take a critical, yet positively constructive approach. Searching for ways to make legal and other developments in India clearer to a wider readership, these contributions certainly do not fall short on critical appraisal or simply endorse status quoist positions, an accusation often faced instantaneously if one indicates any understanding for the limits of law. All three articles also acknowledge implicitly that development – and law – in India is a different kettle of fish than we are used to from Eurocentric perspectives. For me, therefore, this Special Issue raised also intriguing questions about why and how young Germans these days are now more visibly engaging in South Asian law-related studies. It is indeed a matter of considerable importance that young German authors should be coming forward, and are being encouraged, even if they have to write in English as a result, to contribute to the global debates on Indian legal developments. For me, someone who studied Indology and Geography in Germany during the 1970s, but was then pulled away to work abroad in the postcolonial British environment for decades, because there would have been no space within the German academic framework for a Chair on South Asian laws, to see now that German universities are realising the importance of Indian laws is almost like seeing a New Moon, if not a complete miracle. We hear much about the 21st century becoming the New Age of Asia, and major global law firms indeed report huge rises in profits relating from engagement with Asian and African markets. Hence it would make sense if such investment-related themes[13] were raised, also by German authors. However, I do not see that happen as yet. Again, it seems, research is lagging behind actual development.

Focus on the major jurisdictions of Asia, Africa and Latin America – in short, the Global South – is however not just a matter of economic benefits in transnational legal and economic transactions, or in academic enterprise, possibly today with an eye on the global student market. It would also be a step in the right direction to teach us about the complexities and internal diversities of virtually every single academic subject. For not only is Europe no longer the power centre of the world, we need to acknowledge more explicitly that many Eurocentric academic perspectives have been misleading us and continue to misdirect us into forms of partial theorising that lose global validity the moment we cross the Bosporus or Gibraltar.[14] Other authors argue that any discourse about the Oriental 'other' these days,

13 *Kwang W. Jun / Harinder Singh*, The Determinants of Foreign Direct Investment in Developing Countries, Transnational Corporations 5(2) 1996, pp. 67-105; *Pravakar Sahoo*, Determinants of FDI in South Asia: Role of Infrastructure, Trade Openness and Reforms, Journal of World Investment and Trade 13(2) 2012, pp. 256-278.

14 *Werner Menski*, Beyond Europe, in: Esin Örücü / David Nelken (eds.), Comparative Law. A Handbook, Oxford 2007, pp. 189-216.

following the intervention of *Edward Said*, can only be conducted through Eurocentric categories. However, if the follow-up rhetoric concludes that 'a genuine scientific scholarship about Indian culture will not be allowed to emerge in the West and, more tragically, even in India'[15], this seems to go too far, as it privileges a colonialism-dominated, Anglocentric perspective, which may be powerful, but is not the only voice in the chorus of global cultural history. We somehow know as Europeans that India is not Europe, even though we might be ancient distant cousins. We are aware of other cultures and laws on the globe than our own, know that Indic cultures are ancient and richly diverse, that Enlightenment was a culture-specific advance not shared in the same way by the whole world, and that colonial civilising efforts and effects were never complete, or are actually being reversed today, as one sees so prominently in many parts of Latin America. Many European observers may not like such thoughts, and of course time is always short and one has to specialise and focus. What I am trying to say here, in a nutshell, is that non-Anglocentric writing may tell us more about recent Indian developments these days than work by those who are - or feel - somewhat overpowered by the reverberations of lingering pride about the achievements of colonialism.

Picking up such complex global challenges as the right to development, to basic education and to gender justice in the realm of family law, the three articles in this Special Issue begin to highlight, and I suggest this is not by accident, that in the field of constitutional arrangements and governance, too, new developments are today manifesting in Asia and Africa that feed as much on older local notions and concepts as on more recent imported or imposed ideas and patterns. As noted, this happens also in Latin America and is certainly worth studying further, as ongoing Italian-Spanish research co-operations reinforce.[16] Notably, such new developments in India seem to be avidly picked up by scholars in Italy now[17] rather than in the anglophone world or by other European scholarship. In this context, it helps to realise that Italy, like the UK and Germany, has become an important immigration country for various people of South Asian origin, with significant impacts on how that country's scholars then think about all kinds of legal issues.[18] More interconnections and resulting glocalities become quickly visible if one adopts such new plurality-conscious lenses. As this Special Issue confirms, the world is your oyster these days if you are a comparative constitutional law academic, willing to open your eyes and enterprising enough to engage with highly complex issues in distant local contexts. Access to internet sources

15 *Prakash Shah,* Against Caste in British Law, Basingstoke (UK) 2015, p. 3.

16 I am thinking here of an excellent research enterprise in this regard in Bologna and Ravenna. Readers may in addition benefit from using the six volumes of the 'Oxford International Encyclopedia of Legal History', Stanley N. Katz (ed.), New York 2009.

17 See *Domenico Amirante*, Lo Stato Multiculturale. Contributo alla Teoria dello Stato dalla Prospettiva dell'Unione Indiana, Bologna 2014.

18 *Werner Menski*, Rethinking Legal Theory in Light of South-North Migration, in: Prakash Shah / Werner Menski (eds.), Migration, Diasporas and Legal Systems in Europe, London 2006, pp. 13-28.

helps in this regard, and there can be no doubt that many more such studies are needed. As I shall conclude further below, what we are reading here indicates much unfinished work in progress, which of course is the life story of law anyway. Law never really solves any problems; rather, it is engaged everywhere in complex processes of interaction and development. Activist legal scholarship, thus, is often a form of asking for the moon, making demands that require the further effort of skilful responses.[19] There is nothing wrong with that, provided we understand that this activism merely replenishes the energy for further playful dialectics, though the themes discussed may be a matter of life and death. Hopefully, this leads to more good development.

While the management of legal pluralisms is not an explicit theme of the current Special Issue, it is clearly one of the huge elephants in the room of discussions today about the multiple various (un)fulfilled promises of the law. At the end of the day, moreover, someone has to foot the bills for all the wonderful things that the bright moon in the sky promises or that legal activists dream up as desirable items on developmental agenda. That, of course, does not mean that the concerned governments should simply get away with tightening various purse strings in response, sit back and do nothing, or simply make some formal law and claim that the job is done and/or further progress is not possible. Apart from asking questions about what actually is 'progress', and whether the expected aims are sensible and sustainable, we also need to remember that vast amounts of money and resources are being wasted on superfluous, trivial and unnecessary things, at all levels, so that the excuse of resource scarcity often does not seem plausible. This goes for all South Asian countries, too, today, which may strategically cultivate an image of poverty, but are overall certainly not desperately poor nations. If India has money for nuclear and space-related experiments, why can it not spend more resources on basic education, for example? It seems a matter of agenda-setting and priorities. Indeed, it is well-known that more attention seems to have been given in India to higher education sectors than to issues of basic education.[20] Lack of development is, therefore, frequently related to deficiencies of basic resources, but also appears to persist as a consequence of lack of agreement over policy directions and desirable aims, or simply a deficit of activist engagement and goodwill by various parties.

Ambitious aims voiced by certain stakeholders who are not legal actors in the narrower sense, and yet are law-related agents and participants, may provide further irritants in such scenarios of multiple voices and significant scarcities. Activists may want to see development, such as progress in basic education. But what if some people do not want to be 'developed'? While many rationally sound actors are demanding universal education as a human right, some individuals do not see or realise its relevance, as recent local field research

19 *Menski*, note 3.

20 *Pawan Agarwal* (ed.), A Half-Century of Indian Higher Education. Essays by Philip G. Altbach. New Delhi 2012.

strongly confirms.[21] This raises further questions over the role of formal legal structures that demand people's participation in developmental agenda. Similarly, many gender-focused activists would prefer uniform laws for all Indians and may still dream today about this strategy as a device to achieve equality. But many common people in India seem unconvinced that this is the right way forward, and even many activists these days, as *Tanja Herklotz* confirms, no longer endorse plans for a Uniform Civil Code. In all respects examined here, we see not only diversities of opinions which may demand respect, but also notable leaks in the oil can of developmental activism that no reasonable amount of legal enforcement can fully plug.

Unsurprisingly, given the 'breathtaking heterogeneity of the Indian subcontinent',[22] in regard to India it is abundantly clear that a plurality of perceptions and preferences can be the practical result of reasoning. *Sen* thus very appropriately identifies 'a need for reasoned argument, with oneself and with others, in dealing with conflicting claims'.[23] This indicates also, however, that shoulder-shrugging nihilism is not a viable, sustainable or indeed acceptable option in contexts of largely unfulfilled promises. This admonishment goes not only for activists and academics, but binds every individual into the new formal structures, in a different and yet related way than older patterns of ordering, which sought to achieve and cultivate a kind of *karmic* sense of responsibility. Intriguingly, this is today reflected in the Indian Constitution which, since 1976, contains a catalogue of Fundamental Duties in Article 51-A. These are highly pertinent to the present debate, for they seem to put every single individual under an obligation to do the best possible to participate in and contribute to the nation and its progress. Most evidently, this is found in Article 51-A (j) which explicitly makes it the duty of every citizen of India 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement'.

Here again, we see an ancient glimpse of the ideal of the bright moon, albeit in new light and new shape. It is a reflection of an ideal that seems within reach, if only everyone did their bit, of course itself an unrealistic expectation. Constant efforts in negotiation and skilful balancing acts thus remain the main name of the games of law at all levels of engagement, earlier as well as today. This potentially onerous duty challenges at the same time individuals, various social groups and societies, states and today also the international community as a whole to contribute towards 'good law' and justice. All of these legal actors face constant, often highly intense internal struggles over competing perceptions, desires and agendas.[24] This relates conceptually to what so-called Oriental cultures seem to

21 *Ramdas Rupavath*, Tribal Education: A Perspective from Below, South Asia Research 36(2) 2016, pp. 206-228 (forthcoming).

22 *Alan T. Wood*, Asian Democracy in World History, New York/London 2004, p. 39.

23 *Sen*, note 5, p. x.

24 This is for example reflected in the ancient admission that the ultimate source of *dharma* is the individual conscience (*Menski*, note 2, pp. 209-222).

mean by the hard labouring effort which Muslims call *ijtihad*, the effort to understand and follow God's will, to strive for the 'right law', maintain order and avoid chaos. Hindus will identify this struggle of finding the right law and avoiding chaos (for which there is the highly significant term *mātsyanyāya*, 'shark rule' in plain English) by reference to various terms connected to *dharma* (the duty to do the right thing at any one point of one's life), aware of the scope for perennial conflict. I raise these concepts here not as 'religious' signposts, but as indicators of different cultural contexts that play a key role, also today, in identity construction. Highlighting the crucial role of identity-based perspectives of law, which he collectively called 'legal postulates', Professor *Chiba* from Japan taught us, decades ago, that law is everywhere culture-specific and dynamic.[25]

Since we fail to operate such flexible perceptions of what 'the good life' and 'the right law' may be in different cultural contexts, some well-meaning humans will always feel justified to tell others how to live their lives, because they perceive terrible injustice or something that is simply not tolerable. As a result, there are even more temptations today for various kinds of activists to devise methods for 'others' to 'help them' improve their lives. The million dollar question would be, though, whether one has even paused to reflect or ask what these 'others' may be thinking, from their respective perspective. In the huge jurisdictions of the Global South, moreover, as already indicated in passing, we are faced with proportions and dimensions that in Europe we simply cannot imagine. For example, aiming to provide a right to basic education in India, a country of 1.2 billion people, most of whom are young, as *Florian Matthey-Prakash* confirms in his contribution, immediately calls upon activation of massive resources and facilities of various kinds that just do not readily exist, or are simply not functioning properly.

That then sharply calls into question to what extent even most basic expectations, like the right to development or children's right to an education, may be realistically raised or promised by any legal actors or systems worth their name, more so in a democracy where non-implementation of promises may result in negative voter reactions. While the present contributions do not seriously question that India is a democracy, doubts are in order over what kind of democratic fiction is a state that promises its people the moon, and then delivers only a hazy mirror image of that desirable item? Yet before sinking into accusatory despair, let us remember that contrary to many predictions, Indian democracy has survived and actually continues to thrive, even when it elects a Hindu nationalist government, for as many observers fail to mention, that kind of government is then still bound by the Constitution as the basic law, the famous 'cornerstone of the nation'.[26] Notably, such democratic developments happen in India despite - or maybe because of - the mindboggling diversities

25 See *Masaji Chiba* (ed.), Asian Indigenous Law in Interaction with Received Law, London/New York 1986, excerpted in *Menski*, note 2.

26 *Granville Austin*, The Indian Constitution. Cornerstone of a Nation, New Delhi 1966.

that continue to exist.[27] Indian policies and their implementation have certainly not been trouble-free, but they have overall been more plurality-conscious and constructive than we observe among its immediate neighbours to the West, Pakistan,[28] and also to the East, since 1971 in Bangladesh. The latter, still fairly new country has been making significant, if rocky, democratic progress, compared to Pakistan.[29] It has recently developed a surprisingly sophisticated approach to plurality management also in constitutional law.[30] South Asian jurisdictions, especially the three massive countries identified here, are all far off from complying with ambitious global development targets, but there is also much notable progress.[31]

Whether the various governmental promises that foreground such progress in India came in the form of fundamental rights guarantees (Part III, Articles 12-35) or merely as what is called Directive Principles of State Policy (Part IV, Articles 36-51-A) may make a formal difference, but in terms of substance the two sets of provisions certainly must be read together these days. For example, as the addition of Article 21-A to India's Constitution of 1950 in 2002 confirms, it was realised that children's basic right to life might mean little if there is no basic right to free education for the most disadvantaged.[32] Similarly, there is well-established Indian jurisprudence on the connection between the right to life and clean drinking water or unpolluted air.[33] Such connections have long been known and activating them is entirely appropriate in a rights-conscious scenario of making such paper rights deliver the desired elementary ingredients of basic justice. Yet, in light of *Amartya Sen's* cautious guidance about the permanence of nastiness,[34] it should not be forgotten that law is everywhere still to some extent an 'ought' rather than a definite 'is'. One can of course formally claim that the fundamental rights guarantees in India's Constitution of 1950 are a legal fact, a guaranteed 'is'. And yet, since so many of these fundamental rights remain systematically violated and infringed, one also has to admit that such basic laws, at the very same time, retain strong characteristics of fiction, of an 'ought'. This does not mean that Indian law is inherently bad or deficient. It is itself engaged in asking for the

27 *Bipan Chandra / Sucheta Mahajan* (eds.), Composite Culture in a Multicultural Society, New Delhi 2007.

28 *Werner Menski / Rafay A. Alam / Mehreen K. Raza*, Public Interest Litigation in Pakistan, London/Karachi 2000.

29 *Wood*, note 22, p. 98.

30 *Werner Menski*, Bangladesh in 2015: Challenges of the Iccher Ghuri for Learning to Live Together, Journal of Law and Politics, University of Asia-Pacific, Dacca (September), 9-32 2015.

31 See *Moazzem Hossain*, Building Responsible Social Protection in South Asia: India's Food Security Act as a New Direction, South Asia Research 34(2) 2014, pp. 133-153; *Ashok K. Pankaj* (ed.), Right to Work and Rural India, New Delhi 2012; and *Florian Matthey-Prakash* in this Special Issue.

32 Bangladesh, notably, now provides free school books to all primary school children.

33 *Sangeeta Ahuja*, People, Law and Justice. Casebook on Public Interest Litigation, Vol. I-II, London 1997, esp. Volume 2, chapter 9.

34 *Sen*, note 5, p. 32.

moon, while in reality it delivers various mirror images of the moon, often simply confirming that the challenges of massive demands are of an entirely different order and scale than we are used to. Theoretically speaking, as a by-product of law's liquidity and situation-specificity, non-implementation of what reasoned observation may suggest to us as desirable becomes a reflection of the intrinsically dynamic nature of all law in its situation-specificity. Such tensions and leakages are no excuse for non-action, but they are actually manifested everywhere in the world in various discrepancies between is and ought, certainty and flexibility, fixed rule and exception, and so on.

How far can one take such acknowledgements of the in-built flexibilities and limitations of law if one wants to assess reasonable progress in development and implementation of basic rights? Or rather, how elitist and selfish are we allowed to be if we remain aware that hundreds of millions of people on this globe still suffer hunger every day? In several recent multi-institutional doctoral training seminars in Europe, we have been joking that there is no fundamental right to a Postdoctoral Fellowship. Quite, but such self-critical cynicism in elite classrooms apart, is it even reasonable to make claims for a basic right to work which a rights-conscious state should implement for all its able-bodied citizens, as India's Constituent Assembly already indicated in the 1940s, and maybe even desires and implements for others today?[35] Or is it sufficient and maybe preferable to dole out handouts to all those who need such support, without the state expecting anything in return, other than votes? The huge fierce current debates over this particular issue in India have not even been touched upon by the current set of articles. The discussions in *Pankaj* (2012) identify the problematic that a right to work, which easily ends up as unpleasant drudgery, may quickly become a paradox,[36] so what about a right to leisure? Or what about a corresponding right to play for children? The challenge, here too, is to find appropriate balances and tolerable limits. Engaging with such issues would raise more difficult questions about what should happen if so many people do not want to develop in accordance of state-directed guidance, if they simply do not wish to work, or if children or their parents have no interest in attending school and may even hate it.[37] Should development-conscious and rights-focused states start criminalising all those individuals (maybe in line with Article 51-A (j) of India's Constitution, as cited above) who refuse to be part of the supposedly desirable legal, social and economic development programmes? Do we incarcerate the lazy, and maybe even pull them into lunatic asylums, as seems to have occurred to some extent under colonial rule?[38] More troubling questions arise.

35 *R. K. Reddy Kummitha*, Social Entrepreneurship as a Tool to Remedy Social Exclusion: A Win-Win Scenario?, South Asia Research 36(1) 2016, pp. 61-79.

36 *Pankaj*, note 31, p. 73.

37 *Rupavath*, note 21.

38 *Shilpi Rajpal*, Colonial Psychiatry in Mid-Nineteenth Century India: The James Clarke Enquiry, South Asia Research 36(2) 2015, pp. 61-80.

If there is undoubtedly a strong case for a right to development, as *Anna-Lena Wolf* endorses in her article, is there then also a case for formalising and juridifying this, and consequently expecting all stakeholders to contribute their bit? The debates in *Pankaj*[39] refer to earlier work of *Amartya Sen*[40] and come up with the concept of 'decent work' as a basic right, raising also the important question whether regulating this domain is only or mainly a task of the state and its various agents? Closely related questions about the extent of formal legal regulation are being asked by the contributors to this Special Issue. *Florian Matthey-Prakash* argues that further organisational fine-tuning in educational structures by stronger involvement of parents is advisable. Similarly, *Tanja Herklotz* observes that people's private law affairs are not completely subjectable to uniformising, state-centric regulation which leaves no space for consideration of individual needs and situation-specificity.

Overall, all three contributors find significant deficiencies of implementation in the field they examine, but also locate remarkable progress. Since there is progress, and yet lack of it, too, the developmental activist is faced with mixed messages and hence is bound to be dissatisfied. But is the glass half empty, or half full? Notably, rather than engaging in destructive and negative critique of the various manifest failures, all three contributors are concerned to make the reader understand that while there is only limited progress, there are also inherent limits of the law itself. Despite various nuances, the joint key message appears to be that law can be a useful tool, but also that formal juridification may not necessarily result in the expected or desired outcome. State-centric formal top-down regulation is therefore potentially not the correct approach, or the only reasonable methodology, as illustrated especially clearly by the now virtually aborted and abandoned efforts to aim for what appeared for many observers to be a good model, a Uniform Civil Code in India. Law as a social science depends in all scenarios on the social context,[41] people's involvement as legal actors, not just in a restricted *Hartian* sense bureaucrats, lawmakers and judges, but as noted everyone as a connected citizen in various capacities and roles.

At this point, let me slip in that many Muslims, not only in South Asia, are still struggling today with the realisation that God's law as a blueprint for life needs to be operationalised by human action and interpretation and is not just a given, hence also critically depends on where you live, so that 'law', here too, is actually more than just God's law. The same pluralising realisations are critically relevant for the most modern and sophisticated, supposedly rational conventions and regulations. Skilled humans can formulate and formalise such rational edifices and prescriptions, but they have to be turned into living reality and need to be applied in socio-cultural and socio-economic contexts by common people to make them work, ideally in a sustainable and tolerable manner, ideally self-managed by people who have to live with the respective results. For, self-controlled ordering, especially in South Asian jurisdictions, remains an immensely powerful and practice-relevant

39 *Pankaj*, note 31, pp. 73-76.

40 *Amartya Sen*, Development as Freedom, Oxford 1999.

41 *Twining*, note 2, p. 30.

key concept. Making top-down laws is neither ideal nor ever enough. Meanwhile, the industries of law making and of doctrinal and other legal scholarship thrive, while still far too many people in the world are faced with basic rights deprivations, often not of their own making.

Yet we are making some progress, also in theorising this mess. For example, *Tamanaha*, *Sage* and *Woolcock*, finally recognising the urgent need for lawyers and development practitioners to work together rather than be each other's main critics, have noted:

> *In the early decades of the twenty-first century, the development community finds itself confronted with an array of serious challenges pertaining to the reform of institutional mechanisms for mediating relations between peoples, firms, states, and international actors, and doing so in ways that are broadly perceived to be legitimate, equitable, and effective.*[42]

However, what is 'legitimate, equitable, and effective'? Again we are faced with subjective value-based criteria as yardsticks for measuring development, while the quote itself does not explicitly identify that the main struggles will continue to be over value judgments rather than rules or processes. Today, both lawyers and development specialists know and acknowledge more openly, as the above quote and the study from which it is taken confirm, that it still remains easy just to call for reforms and to make new laws. The realisation that law is actually as much about rules as it is about values and processes has not really completely sunk in, so that analyses of legal plurality still do not reach deep enough and remain subject to the risks of partial legal theorising. Having formulated a new law that purports to take account of some aspects of plurality, one cannot sit back and just expect progress and 'development'. Yet it remains a major legal trick in the legal and political toolbox, today also in the toolkit of international relations and the human rights industry, to engage in selective activist imagination and dreams of a better world, to simply promise desirable development in well-sounding speeches, on paper or today even on-line. At the same time, it remains a starkly present global fact that far too many people, many of whom happen to be Indians, continue to be hungry, uneducated and undeveloped.[43] So a shifting of emphasis towards the needs of the undeveloped would appear to be desirable, much more important as an agenda than prescribing uniform laws to all people in any given jurisdiction, least of all in a huge jurisdiction like India.

Indeed, the vast majority of the world's people remain also today subject to culture-specific forms of legal plurality, especially in the field of personal laws, and we need to be aware that they largely choose to remain subject to such more or less 'traditional' laws, often because this is closely linked to patterns of identity formation and construction. While this does not preclude the possibility of intolerable discrimination, and sparks off debates

42 *Brian Z. Tamanaha / C. Sage / M. Woolcock* (eds.), Legal Pluralism and Development. Scholars and Practitioners in Dialogue, Cambridge 2012, p. 14.

43 *Hossain*, note 31.

about necessarily piecemeal reforms, many 'modern' stakeholders are still constantly tempted to identify, name and blame such basic socio-legal structures. These need not be 'religious', but are often rhetorically blamed as such and portrayed as the main culprit for lack of development and deprivation of basic rights, especially when it comes to gender issues. For India, this is strongly evident from the earlier writing of *Dhagamwar*,[44] *Parashar*[45] and *Sangari*[46]. If only it was so easy to make good laws for all situations and to satisfy all expectations! A major underlying problem here is still that many family lawyers and development specialists are elite actors who fail to reflect in sufficient depth about the role of values and competing forms of morality and ethics connected to their desired structural artefacts. In other words, such reformists have simply remained positivism-focused and their state-centric reasoning presumes that so-called secular laws will be somehow value-neutral. As noted especially by *Tanja Herklotz*, we are making some progress today, because cherished traditional progressive perceptions that have meanwhile proven to be pipe dreams in specific social conditions are being identified more clearly as befuddling rhetoric that is dragging us back into dreamland territory, rather than offering sound rational guidance for future policies. Such largely ideological struggles often concern matters of basic values and ethics, often even quite personalised manifestations of such preconceptions. The eternal internal fights among feminist organisations in India, researched and described so well by *Tanja Herklotz*, serve as one major example to illustrate that the moon looks not the same for everyone who views it. Even if they do not explicitly talk about values and ethics, activists will often disagree over the extent of progress and the need for further interventions and reforms. Frequently, as is their right, they do not share the ethical assessments of 'the other', either their activist companions, or indeed the people for whose supposed benefit the engagement purports to take place. In that respect, though, I cannot warn enough about the precarious effects of activist elitism, which seems particularly rampant among South Asian scholars writing on various aspects of gender issues. For where is the right boundary between wanting to impose on others what activists think is right, and listening to the voices of those others one seeks to empower? Self-centred individualising tendencies in rights argumentations fail to identify the basic legal condition of connectivity, which theories of legal pluralism so clearly identify as the lifeblood of balanced compromises, indeed equity rather than absolute equality. I thus find a lot of progress in socio-cultural research on Indian themes, which is also reflected in the present contributions, but also remain sceptical about the still widespread inability of even the most prominent scholars in some fields

44 *Vasuda Dhagamwar*, Towards the Uniform Civil Code, New Delhi 1989; *id.*, Law, Power and Justice. The Protection of Personal Rights in the Indian Penal Code, New Delhi 1992.

45 *Archana Parashar*, Women and Family Law Reform in India: Uniform Civil Code and Gender Equality, New Delhi 1992.

46 *Kumkum Sangari*, Politics of Diversity. Religious Communities and Multiple Patriarchies, Economic and Political Weekly 30(50), 23 December 1995, pp. 3287-3310, and 30(51), 30 December 1995, pp. 3381-3389.

to put themselves in the shoes (if indeed they have any) of those for whose rights they purport to argue with such conviction.

C. The Activist Advantage of Pluralist Engagement by Listening to Multiple Voices

In lived experience, as legal structures are everywhere plural entities, this means that none of us can or should reasonably dictate to others, especially in foreign jurisdictions, how they should lead their lives without asking the recipients of such advice for their views. Indeed the three articles in this Special Issue, confidently confirming the growing global recognition of legal pluralism as a fact, seem to respect that basic stance, albeit to different degrees. This in itself is significant and instructive, as far too many activist lawyers do not realise the limits of tolerability of their own activism in the current scenarios of deep legal pluralism. Further questions need to be asked, then, about how far and deep this pluralist consciousness extends. It is somewhat banal to stress that the various structures of internally plural laws are also mechanisms of power and thus potentially tools of suppression and disempowerment, rather than just one-sidedly empowering tools for development. It is equally self-evident that most laws also have various ambivalent economic implications. Awareness that law is never just law in the sense of some state-centric isolated entity, that it is interconnected with everything else, takes us always firmly back into the central realm of legal pluralism. By now there is wider agreement that this liquid legal pluralism of the law can indeed be a problem, but it may also offer a solution to problems. Globally, we are presently learning to be more aware of the methodologies of management of legal diversity and plurality. Again it is prominently some exciting Italian-led scholarship that promotes this kind of message,[47] while in the background there are always elements of ambiguity and the lurking risk of precariousness.[48] As law potentially constrains some actions while it enables others, we will never escape the important obligation to evaluate, in the spirit of *Sen*[49] as rationally as possible, what is the more desirable element of connectivity or consequence. Since one stakeholder's or claimant's right almost inevitably becomes perceived as an infringement of the rights and entitlements of others, easy answers are not available in many cases, especially where traditional values and ethics clash and/or compete with more modern ones. In the search for 'good' living laws, it seems that such value clashes are systemic and inevitable.[50] This then implies that 'give and take' or reasoned interaction, as *Sen* (2009) so wisely suggests, is the name of this game, not just mere tolerance of 'the other'. Sophisticated listening and engagement, even with stakeholders and views that one hates or

47 See the Special Issue of *Jura Gentium*, Vol. XI: *Pluralismo Giuridico*. Annuale 2014 edited by Mariano Croce [ISSN 1826-8269] [http://www.juragentium.org].

48 *Loïc Wacquant*, Marginality, Ethnicity and Penality in the Neo-Liberal City: An Analytic Cartography, Ethnic and Racial Studies 37(10) 2014, pp. 1687-1711.

49 *Sen*, note 5.

50 *Werner Menski*, Plural Worlds of Law and the Search for Living Law, in: Werner Gephart (ed.), Rechtsanalyse als Kulturforschung, Frankfurt a. M. 2012, pp. 71-88.

despises, and would ideally rather not engage with, is needed. This is often tricky, but I suggest that non-engagement is itself an intolerable form of epistemic as well as directly experienced violence. Exploring those complex pluralist methodologies for navigation and handling such challenges would clearly go too far here, but we find that in many practice-related fields it makes good sense to engage in such plurality-conscious navigation.[51] Disagreements, fights and even wars, right up to the global 'War on Terror', which after all has had enormous reverberations in South Asia that we hear far too little about**,** may erupt at all levels or scales within the pluralist structures of law. Such conflicts arise, it appears, with more force in scenarios where insistence on rights is not balanced with an awareness of duties – a kind of cultural awareness and sensitivity that 'traditional' people might not have completely lost yet, while 'modern' contract-based selfishness seems to empower and unduly favour those who are already empowered.[52] Again, nothing is really new here, but the point needs to be made in a context where one searches for equitable balances and reasonable compromises.

While it may also be a kind of truism today to insist that law is not just state law, the teaching of law in far too many law schools, all over the world, remains still too focused, and depressingly so,[53] on what is sometimes called 'black-letter law'. This does not facilitate acquiring skills in plurality management through the law. Hence there continues to be vigorous criticism that studying and 'doing' law cultivates myopia[54] and may even be harmful in itself, as it prevents individuals from perceiving various forms of harm. At the same time, we live today in rights-conscious times, where specific forms of harm are alleged and asserted by concerned activists simply on the basis of their, often highly subjective assessments. Aggressive 'progressive' writers like *Sangari*[55] thus strongly benefit from freedom of expression, but in the long run, such sharp rhetoric would appear to pollute the academic climate of reasoned argument. If supposedly progressive interpretations even go as far as using factually wrong legal details to construct the key arguments used, as has so manifestly happened in relation to the Shah Bano case in India and its aftermath,[56] related

51 See *Werner Menski*, Legal Simulation: Law as a Navigation Tool for Decision-making, Report of Japan Coast Guard Academy 59(2.1) 2014, pp. 1-22, http://harp.lib.hiroshima-u.ac.jp/jcga/metadata/12172?l=en (last accessed on 25 April 2016).

52 To that extent, Political Islam, we may note in passing, is actually quite modern.

53 See earlier *Allan C. Hutchinson*, Beyond Black-Letterism: Ethics in Law and Legal Education, Law Teacher 33(3) 1991, p. 301.

54 *Joanne Conaghan*, Law, Harm and Redress: A Feminist Perspective, Legal Studies 22(3) 2002, pp. 319-339.

55 See note 46.

56 *Werner Menski*, The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda, German Law Journal 9(3) 2008, pp. 211-250.

chains of rights-based argumentations may need to be revised,[57] often drastically, also by prominent human rights organisations.[58]

The contribution by *Tanja Herklotz* pinpoints that such law as may be produced in conditions of more or less severe myopia may then actually be a 'dead letter' to some extent. In short, it ignores the fact that law is actually applied ethics and a form of applied politics.[59] In fact, all three contributors to this Special Issue use a sophisticated methodology in their concern to follow a socio-legal approach that distinguishes between the law in the books and on paper and the lived experience of the concerned people, always with an eye on Indian realities. We also find a welcome and appropriately close look at the reported cases coming out of India, which are thankfully now available on several websites. After all, India is one of the major jurisdictions of the world, with a super-busy Supreme Court that faces many more challenges than, for example, the much more distant and less stressed counterpart in the USA. The reason for this more relaxed approach is certainly not that in the USA all problems of poverty, lack of development, access to education or rights protection through the personal law sphere, have been solved for good. Fairly recent fierce debates about 'Obamacare', particularly the extent of state protection for those who struggle to survive and lead good lives and may need state support, but have never contributed anything to those welfare coffers, demonstrates that also in the most advanced nations of the world basic problems of rights protection are not off the agenda or have been resolved. Maybe simply in places like India the dimensions and proportions of such problems are much more dramatic than elsewhere; after all, India still has more than 350 million poor people among its citizens.[60] It needs to be remembered, too, however, that India's population is four times as large as that of the entire USA. Even the smaller countries in the region of South Asia, Pakistan and Bangladesh, are still several times as large as Germany or the UK. It is just not reasonable or realistic to imagine that in such massive jurisdictions the same kinds of legal processes as in old-established, much smaller countries can be maintained. One further significant difference has also been that the Indian Supreme Court actually realised that it is part of its most elementary brief to listen to rightless, unrepresented common people, provided they bring *bona fide* cases to the attention of the Court.[61] As a result, in the ac-

57 This would also appear to be necessary for *Sathe*, see *S. P. Sathe*, Uniform Civil Code. Implications of Supreme Court Intervention, Economic and Political Weekly 30(35), 2 September 1995, pp. 2165-2166, a highly respected Indian constitutional law professor, who was evidently aware of the potential for pluralism and acknowledged this, as I also found in personal discussions. But he was too focused on secular preconceptions to realise the critical importance of religion and culture in identity formation.

58 A careful reading of the intriguingly rich socio-legal writing of *Flavia Agnes* illustrates the potential for activist scholars in India to revise, however reluctantly, earlier pre-conceived notions and pick up new signals that can take the debates further in a constructive manner.

59 *Hutchinson*, note 53.

60 *Hossain*, note 31, p. 145.

61 See especially chapter 4 (pp. 106-132) in *Menski / Alam / Raza*, note 28.

tivist context of public interest litigation, this enabled Indian courts, in appropriate cases, to protect such victimised individuals or groups of people against excessive infringements of basic rights.[62] Other new forms of affirmative action on behalf of the disadvantaged can be identified today when Family Courts, as we learnt on a fieldtrip to Majlis in Bombay at the end of 2015, are today much more carefully listening to the claims for maintenance by destitute women than they were doing ten years ago. Again, there is a message of hope here, but still not the full moon of 'complete justice'.

In current efforts to understand better how plurality-conscious management of entitlements and expectations works in lived reality, especially in judicial fora, it may help to focus more attention on sequences of decision-making, in a sense examining judicial choreography, which may be more like improvisation, and yet shows some signs of methodology. Taking this practice-focused approach, one quickly realises that the positioning of the respective decision-maker is a crucial element, as it influences or determines the starting point for a chain of sub-decisions that ideally follow each other in a logical sequence. To illustrate, a constitution may authoritatively stipulate an ideal of perfect justice, but needs to remain aware that achieving this ideal will remain fiction. Since the law as formulated has not, then, actually created justice,[63] but merely the foundations for its more secure enjoyment, another state agent, most likely the courts, would have to ascertain in any given stress scenario what should be done if violations of the ideal occur or continue. Judges, clearly, see themselves as spokespersons and agents of the state, and their ideally rational decision-making processes will reflect this if they take their tasks seriously and are not unduly influenced or swayed by their own social connectivities and/or ethical commitments. In research exercises and training scenarios one finds that alert judges will, starting from their position as agents of the state, consider the concerns and voices of other elements of the law. In many European jurisdictions, judges as agents of the state will prominently turn to human rights considerations, particularly if these are a formally integrated part of the respective national legal order. But a sophisticated and rights-conscious judge will also seek to ascertain whether the ethical concerns of the scenario and its socio-cultural dimensions are reasonably factored in. Ignoring those 'other' law-related elements would lead to a deficient outcome of the decision-making process. One could say a lot more about this, but space restrictions prevent this. Good judges, in fact, professionally enact and perform legal pluralism.

In the same way, human rights activists and international law actors would do well to be conscious of their own positioning, often as idealists with a vision. If they in turn either deny a role for states and their jurisdiction, or they ignore people's customs and traditions

62 A hugely instructive insight into the psychology of leading Indian activist judges is found in the numerous writings of the former Supreme Court Justice *V.R. Krishna Iyer*, who lived long enough after retirement to tell a fuller story of why and how the Indian courts became as active as they are. See V. R. Krishna Iyer, Leaves from My Personal Life, New Delhi 2004.

63 Proof of this is Article 32 in the Indian Constitution, which guarantees access rights as part of fundamental rights.

and/or argue that the age of religion is over, they would commit, as noted, a form of violence. This would show that such legal actors delude themselves about the extent of their own power and conviction. Similarly, any spokesperson of 'custom' or 'religion' as decision-maker cannot deny a legitimate place at the table of global debate today for the other two already named representatives of different kinds of law. This realisation means, in practice, that no one separate kind of law, whether we think (1) of the plurality of traditional natural laws and ethics, (2) socio-legal approaches and their multiple normativities, (3) the various agents, representatives and manifestations of state law, or (4) international law and human rights activists and perspectives can operate without the active engagement of the others. In practice, whatever our particular perspective and starting point, we always start from one position as an anchored perspective, and then need to listen to and engage with the other voices of law.

This is why just making a formal law, assuming that the job is done, leads to incomplete justice. It similarly identifies it as unsatisfactory to merely complain that a particular aim of any particular law has not been achieved, or that a policy, however important and central, has not been implemented. There will be reasons for that, identifiable as a result of deficient legal communication and interaction processes. Complete justice, a concept found in Article 142 of the Indian Constitution, and in Bangladeshi law as well, is indeed an ideal, an 'ought', and cannot be just decreed on paper. Hence we cannot expect that the struggles over any particular legal issue, especially if they concern broader rights for many millions of people, are ever completed or closed. Law, indeed, has many fuzzy boundaries and formal laws have many limits. For those who still doubt that, taking up another almost forgotten older study may be beneficial, as *Allott*[64] offers many intriguing examples of deficient communication between different voices in the wide arenas of the law. The key to success in balancing, then, is skilful listening to all concerned voices and, as *Sen*[65] advised, a rational attempt to get as close as possible to the desirable ideal.

D. The three articles

Focusing on India, the three articles in this Special Issue, each in its own way, raise serious broad questions about what is the nature of a good law, while also narrowing this down with specific reference to certain issues in Indian law today. The broader theoretical approach chosen is remarkably akin to that of a largely-forgotten German legal scholar, a philosopher by the name of *Rudolf Stammler* (1856-1938), who in his time highlighted the need to think about 'the right law'.[66] Aware of the writings of modern Indian scholars like *Amartya Sen* and *Upendra Baxi*, the three authors presented here examine broadly the cen-

64 *Antony Allott*, The Limits of Law, London 1980.

65 See note 5.

66 In several conversations with *Upendra Baxi*, I became aware that he knows about the work of *Stammler* and appreciated its basic messages about the changing nature of law.

tral question whether, in today's highly sophisticated world, even the most basic rights can actually just be created and/or strengthened by legislative fiat or judicial determination. Does law in its various forms have the power to promote and even generate a new reality? Does a formally formulated law have added strength and validity, so to say, more effectively than a policy declaration or a pious wish expressed in some politician's programmatic speech? Or is it rather an uncomfortable, maybe even intolerable, reality that there remain significant limits to the potential of all kinds of law and law-making for grounding and promoting what not just private engagement but even public support, has identified and endorsed as good development? Do we just make an industry out of talking about such matters, and maybe benefit in the process, but nothing really changes? None of the authors takes such a cynical approach. All three, seriously engaged in their respective debate, see to various extents the potential for positive change and they stress, therefore, the need for continued vigilance and further hard work to achieve the desired outcomes.

This kind of debate appropriately problematizes the key question to what extent important legal aims and expectations, these days, still remain unrealistic pipe dreams, mere pious hopes, or meaningless pieces of paper, indeed dead letters, as *Tanja Herklotz* so pointedly suggests. This particular deficiency and problematic issue, however, is certainly not unique to India, the jurisdiction on which this Special Issue focuses. As problems over access to basic rights remain an issue everywhere, though normally not on the scales experienced in India, it would be wrong or inadequate to point accusing fingers at India in ways that suggest that this particular jurisdiction systematically fails to implement its constitutional promises. No country in the world can claim to protect justice at all times to perfection. Disruptions of ideals, failures and disturbances in the achievement of full guarantees of basic rights occur not only because of wilful human or institutional obstruction, but also because of natural disasters and dramatic events that nobody could predict and that may strike at any moment.

In some of my most recent work I refer to this scenario of actual and potential chaos – and/or the fear of it - as an ancient phenomenon that all human cultures seem to be familiar with and often seek to alleviate, aware that ultimate control over such matters is not actually in human hands. Hindus have in their cultural archive and their present vocabulary the notion of *kaliyuga*, the bad age, in which self-controlled ordering is out of order, and may not be recovered until an ideal point far away in the distance. Again we see a moon, albeit in a very far distance. Muslims, as some insightful writing (prominently *Hallaq*[67]) tells us, aware that the Prophet, after all a mortal human, died in 632 and with him Revelation ceased, and that then all his companions gradually died out as well, labour with further fears of chaos. These losses of the early guiding figures left the successor generations to struggle with making sense of God's will by painstaking examination and interpretation (*ijtihad*) of Qur'an and Sunnah, leading to fears that even properly trained Muslim scholars

67 *Wael B. Hallaq*, On the Origins of the Controversy About the Existence of Mujtahids and the Gate of Ijtihad, Studia Islamica 63 1986, pp. 129-141.

will at some point die out. Other cultures and religions have their own concerns about lack of insurance and deficiencies in authoritative guidance. The media certainly make a lot of hay out of reporting the global chaos we humans constantly perpetuate by fights over religion today, even though history should have taught us collectively and individually how not to do certain things. But are we faring any better if we take recourse to law?

The three articles presented here are written by young scholars who grew up in an academic environment where human rights arguments and international law perspectives and state laws, rather than religious concerns and customary norms have become dominant legal forces and phenomena. Their research clearly reflects such dominant trends, in arguments from the outset that a particular constitutional guarantee has not fully been implemented and thus there is a serious human rights deficiency that needs to be addressed. But what if the promised development is based on a net of false expectations or misguided perceptions, constructed by skilful manipulators of governance and development who may have their own agenda for arguing what they proclaim to be 'the right law'? Can we trust activist voices to be progressive and good, or are they just as partial, only in their own, different ways, than the forces of 'tradition', whether 'religion' or 'custom', and/or state-centric perspectives?

The problem with raising such questions in this way is, of course, that a perspective of pluralist realism or of sophisticated consciousness of interconnectivity or, as *Tanja Herklotz* identifies among feminist activists, of intersectionality, immediately dashes the hopes and claims of all those who impatiently want to see one particular kind of development. Activist progressive individuals and organisations may have put a lot of energy into arguing for a particular step to be taken, or a particular programme to be implemented. There may be a sense of urgency, even of despair, if the much-wanted reforms do not materialise.[68]

Turning specifically to the three contributions, *Anna-Lena Wolf* observes and discusses how the right to development, which she perceives as a normally non-binding right under international law, has recently become an integral part of Indian jurisprudence. She shows how Indian judges have integrated this right into the national legal system in a process identifiable as juridification, a formalising process that gives added weight to claims brought before and processed by the Supreme Court. The Indian judges not only affirm the existence of a human right to development, but have also creatively elaborated and applied this to a range of issues that have come before the Court. While this is seen as positive, the irritated author's worry and fear is that this strategy can also be used be restrict and deny certain claims and rights, especially in the context of infrastructural development. This ap-

68 An example can be found from the 1980s, when *Dhagamwar* (1989, note 44), who perceived the personal law system as deleterious to human rights protection, desperately urged for introduction of a Uniform Civil Code in India, lambasted the 'barren controversy' (p. 71) and demanded urgent action. At the same time, this wise author and experienced fieldworker also suggested that 'if and when the Uniform Civil Code is introduced, there is a strong possibility of a period of deep social unrest taking place' (p. 76). So why this urgency of activism? We later found that there were very personal reasons.

propriately pinpoints a major ongoing conflict over this issue in Indian law today but represents, in my view, a deficit of trust in the potential for good development.

The analysis correctly confirms that law as a tool of governance has ambivalent potential and may thus restrict certain rights in the process of allowing others. A larger study could evidently theorise this more elaborately and would benefit from applying pluralist methodologies. The tempting thought that legal decisions, one way or the other, could 'solve' a problem, would need to be revisited. The writer overlooks that the discourse of development itself manifestly inspires the Indian electorate, though what risks this may bring in practice for some people may not have been realised by many voters. Also, in light of my comments about Article 51-A, it could be argued that there is a legal obligation built into Indian laws, not only since 1976 I would suggest, to partake in development, as much for the public good as for private gain in every possible respect. This may well shatter, at least it questions, the initial presumption that the right to develop originates from international law.

At this well-advanced stage of Indian jurisprudence, as is clearly identified, the concept of 'sustainable development' has become increasingly prominent. The reasoned assessment of what should count as sustainable and what not faces exactly the kind of prolonged debates that *Sen*[69] identifies as crucial for getting closer to 'justice'. This article therefore illustrates very well the enormous challenges for Indian decision-makers, and for India as a nation, in balancing the various competing interests. Whether the right to development comes from international law, national provisions or people's dreams and desires to claim the moon, no swift, agreed, easy solutions can be expected in this realm.

Florian Matthey-Prakash provides an insightful study of the basic right to education in India for children up to the age of 14, introduced as a fundamental right in Article 21-A of the Constitution in 2002 and then strengthened by the so-called Right to Education Act in 2009. The writer argues, in effect, for more and better justice, noting the significant recent progress in the reduction of illiteracy among India's young people. This article also provides excellent insights into the techniques and limitations of India's public interest litigation and reports on the significant absence of cases on primary education in the higher courts. While this, too, highlights India's preferential attention to higher education, the key element of unfulfilled rights is not actually denial of basic education, but failure to provide good education.

This definite failure to provide an adequate mirror image of the moon leads the author to the constructive approach of considering alternative legal empowerment through parental self-help. He develops the argument that under the existing legislation, School Management Committees have a legitimate and important role, but need to be activated by parents. Some local examples of success in this respect, especially from *Himachal Pradesh*, suggest the viability of this route. The author notes that many parents may be unaware of the existing provisions and remain unable to exert pressure for improving their children's basic educa-

69 See note 5.

tion. This is confirmed in recent studies that provide a bottom-up perspective. For a tribal hamlet in Telangana, *Rupavath* shows that almost two thirds of guardians were unaware of such Committees and confirms that illiterate parents are overlooked or silenced.[70] Other relevant considerations for improving the quality of basic education may thus be considered, relating not only to more parental diligence and involvement, but also to teaching styles and the choice of appropriate languages for teaching. It may further be useful to examine what is being taught, as there is no reason why children should not be told about their unfulfilled rights. *Rupavath* reports that many tribal children dislike school, records high drop-out rates, non-enrolment and erratic attendances and warns of a vicious circle of illiteracy unless urgent action is taken. In this field, clearly, the formal law is in place, while securing better quality of justice remains largely in the hands of society now, involving many different stakeholders.[71]

Another complex scenario is discussed by *Tanja Herklotz*, already referred to several times. Based on her research about the interaction of India's women's movement and the Supreme Court, she argues that the gender-focused agenda of a Uniform Civil Code for India, whose introduction is envisaged among the Directive Principles of State Policy (Article 44), have meanwhile been significantly changed through remarkable revisions of rhetoric. Both major stakeholders she examines have now accepted legal pluralism, though for different reasons. While *Allott*[72] already argued that India's Uniform Civil Code was 'no more than a distant mirage', *Herklotz* shows that while the project has taken a different form than envisaged by its proponents, this does not make it a 'dead letter'. Instead, its new incarnation as a harmonised hybrid structure produces another type of compromise between people's claims, activist expectations and actual legal reality. In reality, this chameleon of law takes different shapes and colours according to its environment, with the courts engaged in step-by-step activism to achieve more and better gender justice while retaining the personal law system. This article therefore already looks at the mirror image of the moon and lays exciting foundations for further reform efforts.

E. Conclusions

Development, education and uniformisation of laws pose huge challenges to rights protection and, as ongoing processes, generate never-ending demands for action to achieve better justice. The need for rational multi-dimensional engagement and constant assessments of viability and limits has been illustrated here in multiple ways. Further advances regarding the right to development and better provision of basic education for all Indian children are definitely needed, while the ongoing process of harmonisation of Indian personal laws will need to be further fine-tuned. The key questions raised by the present contributions relate to

70 See note 21.

71 Ibid.

72 See note 64, p. 216.

various modalities of implementation, rather than considering whether a particular law arises from the international law arena or national law, or whether a particular provision in formally entrenched or more informally laid down. In all situations of insufficient or incomplete justice, the question is not whether further reforms and improvements are needed, but how they can be better managed. In light of *Amartya Sen's*[73] advice, we see that unproductive expressions of protest, disgust, contempt or disapproval are not warranted, as much has been achieved, while more still needs to be done.

The present joint efforts in academic discourse on such important topics have identified throughout a scenario of legal pluralism, which offers a varied repertoire of methods and a well-stocked toolbox. This Special Issue clarifies that each of the issues debated relates to a legal sub-system that needs to be perceived as overlapping with and partly integrated into other sub-systems of law, especially the Indian Constitution. As everything is so evidently dynamic and liquid, and the Constitution itself may be further amended or supplemented, serious thinking about possible further reforms is entirely warranted. While the articles presented here have sharpened our perceptions of what has been achieved, they have also identified the need for further vigilance and strengthened the desire to keep asking for the moon. But the moon as perceived at the start of this reasoning process is no longer the same now, as our perceptions have meanwhile changed. Subject to dynamism, we perceive the moon in a different light. That itself is an important aspect of development and education, also among ourselves, as concerned observers of the complex developments in Indian law and governance.

The key arguments here seem to confirm the thesis that law is internally plural. Hence a formal legal system may make any number of rules, but that is not per se sufficient to improve the justice situation on the ground. As law always remains partially an 'ought', the ambition to provide better justice will need to be turned into suitable processes of implementation. This may generate further systems of rules, but these, too, will never function completely fairly from the respective perspectives of various stakeholders. This, then, always inevitably generates new processes of negotiation or modifies existing ones, dynamically re-balancing a plurality of competing interests and perspectives, always connected to specific sets of values and subjective assessments, and always dependent on social contexts,[74] seen here in abundance. Our contributions, while asking for the moon, can offer no ready answers, but open windows for further rational engagement by all concerned. That, it seems, is all we could do here in assessing the rate of progress in securing better laws for India and demonstrating the central role of plurality-conscious reason in strengthening justice. These open windows help to preserve the hope that there is a moon worth demanding and indicate no reason to succumb to frustrated despair in discussing matters of justice in relation to India.

73 See note 5.

74 *Twining*, note 2, p. 30.