Südasien-Chronik - South Asia Chronicle 6/2016, S. 3-10 © Südasien-Seminar der Humboldt-Universität zu Berlin ISBN: 978-3-86004-324-0

Law in Context: Case Studies from India

TANJA HERKLOTZ & SARAH HOLZ
tanja.herklotz@rewi.hu-berlin.de
holz@bgsmcs.fu-berlin.de

An engagement with "the law" in India provides a very mixed picture. In terms of size, population and religious, cultural and linguistic diversity India resembles a continent much more than a single state. Indeed, scholars have questioned whether conventional categories such as the nation state are applicable, need to be adapted or need to be redrafted altogether (Stepan, Linz & Yadav 2011). Hence, this diversity has conceptual and practical bearings on any inquiry into India's legal landscape.

On the one hand, international indices and rankings regarding the rule of law, media portrayals and public protests in India present a bleak picture of the Indian legal system: Particularly, access to justice, the malfunctioning of the judicial apparatus, long court procedures as well as a lack of knowledge about individual rights have been subject to criticism. Honour killings, female feticide or child marriages happen under the eyes of a state, which seems incapable of curbing them. The reports about the aggravated rape of a student on a bus in Delhi in December 2012, the following protests and the discussion about the reform of the Indian penal law featured prominently in international media and provoked domestic and international debates about the law in India.

On the other hand, scholarship, especially in comparative law, has pointed out the positive aspects of the Indian legal system. For over half a century, India has been a rather stable democracy. India's constitution—arguably the longest in the world—not only provides for civil and political rights, but also lists social and economic rights. India's Supreme Court, known for its activism, has strengthened the rights of the poor and the marginalised in a series of important cases and has

been hailed by some scholars as "the most powerful court in the world" (Jaising 2011: 257; Sathe 2002: 249). Many areas of law are governed by a detailed set of rules and regulations.

So is the problem merely that the laws in place are not implemented? Indeed, there is a wide gap between the law in the books and the law as practised on the ground (Menski 2000: 143). Does this mean that India simply needs to work on its law enforcement to close this gap? It is obviously not that easy. We believe that an engagement with the law in India has to take the complexities and ambiguities of the context into account; it cannot stop at a simple juxtaposition of the law on paper and the malfunctioning practices on the ground. Such a black and white picture draws on (Western) understandings of law and uses models and benchmarks to assess the "proper" functioning of the legal system, which functions differently in the Indian context. It also draws on binaries that might not suffice to describe the full picture: The west vs. "the rest", modernity vs. tradition, universalism vs. cultural relativism. In fact, state law cannot remain the only research focus.

This FOCUS provides a differentiated analysis of diverse legal contexts in India. The authors move away from a narrow understanding of law as including only written norms enacted by a state authority. The FOCUS thus aims to contribute to a growing body of literature that centres on showcasing diversity, through different approaches: legal pluralism, interdisciplinarity and law in context. To us, these approaches function like a kaleidoscope. Looking through a kaleidoscope makes everything that seemed simple and clearly defined suddenly appear more complex. Forms, shapes and colours lose their rigid contours, they blur and overlap and thereby create something new. In a similar vein, gazing at law in India through the kaleidoscope shows that different spheres of law coexist, clash, overlap and intertwine, and through their entanglement might create something new.

Why are these approaches fruitful for the Indian context? Legal pluralism refers to the presence of multiple legal orders within one social field (Griffith 1986), such as state law, customary law based on culture or religion or other value systems. Werner Menski has illustrated the interplay of different law or value systems with a kite model. According to this model, law "needs to be navigated between four competing corners, namely natural law and positivism and socio-legal norms and international norms. Law, being internally plural, is then its own 'other' all the time, causing constant conflicts and tensions" (Menski 2011: 13). A holistic engagement with law must take all four corners into

account: "Legal navigation strategies require constant rethinking to produce appropriate and sustainable solutions. One wrong movement, and the kite might crash" (ibid.: 19). So, what could those tensions and conflicts between the four corners of the kite be? Surely, non-state legal systems—whether based on culture or religion—might clash with international human rights standards or with constitutional provisions, such as the right to equality. But scholarship must go further than merely pointing to the conflicts and also take into account how different spheres of law overlap and intertwine and how people navigate between the spheres, how they define law according to a specific context or how they chose state or non-state forums to settle their disputes.

Legal pluralism is certainly not a particularly Indian phenomenon, but it plays out in India in a particular way because of the country's high degree of heterogeneity. The Indian constitution reflects this heterogeneity by emphasising respect for cultural and religious diversity as well as for regional identities. Furthermore, we witness in India a phenomenon of "cumulative domination" wherein caste, class, gender, religion, age and rural–urban variations conjointly render a small part of the population absolutely dominant and large parts of the
5 population utterly dominated (Oommen 2004: 520). How can the law accommodate these diversities and ambiguities? Certainly a one-law-fits-all approach does not work. Instead, the Indian state seems to uphold a model that tolerates different sets of non-state law, rather than prohibiting and replacing them with state law. This can lead to interesting amalgams of value systems, rules and laws and interplays of tradition and modernities. The contributions in this FOCUS illustrate these constellations, while at the same time the authors are cautious not to explain the different legal systems in terms of simple binaries such as tradition vs. modernity or the universality of (human) rights vs. cultural relativism, but rather point out the interplay between these systems.

A related topic, when thinking about legal pluralism, is the particular Indian understanding of secularism, which has been described as one of "principled distance."[1] It "contrasts sharply" with a US-American or European understanding of secularism as the separation of church and state and the assumption that religion can be "distilled" from the public sphere (Jacobsohn 2003: xii, xiii). Indian secularism has to meet the needs of a society with "deep religious diversity" while complying with the principle of equality.[2] It rests upon a distinction between equal treatment and treating everyone as an equal. The latter entails

that every person or group is treated not equally but with equal concern and respect. Rather than erecting a "wall of separation", it allows the state to intervene in religions in specific situations, both in a supporting way (i.e. exempting Sikhs from mandatory helmet laws to accommodate the wearing of turbans) and in a restricting manner (i.e. forbidding practices that deny equal dignity such as "untouchability" in Hinduism).[3] This understanding of secularism also allows for the coexistence of different religion-based "personal" laws in the area of family law. Putting this principled distance into practice surely bears its own pitfalls and discontents as the question arises as to whether the state keeps the same distance with regard to each religion.

Drawing on an interdisciplinary approach, the contributions in this FOCUS are placed at the interface of law and South Asian studies. They examine law in the contexts of society, culture, religion and community and point to the manifold ways in which law is being practised and understood in India. The articles engage with different layers of law, such as religion-based laws and laws about religion (Jean-Philippe Dequen; Tanja Herklotz), non-state justice systems (Michael Dusche) and international law (Chiara Correndo; Rajshree Chandra). The contributions identify various actors and locales where law and legal discourses are shaped, for instance state courts (Dequen; Herklotz), or non-state actors like NGOs, interest groups and civil society (Correndo; Chandra; Herklotz) or religious and other communities (Dequen; Dusche). The topics range from local to global—from an engagement with the ways in which a specific community in the Indian periphery settles its disputes by drawing on spirits (Dusche) to the impact of international laws and global discourses on women's rights (Correndo) or farmers' rights (Chandra) in India.

In the first contribution, "Butas and Daivas as justices in Tulu Nadu: implications for the philosophy of law", Michael Dusche examines spirit-based justice systems in a community in Tulu Nadu (Karnataka) and compares such systems with a modern state-based legal system. Dusche shows that spirit-based justice systems are not necessarily tied to romantic and orientalised ideas of ancient society. Like law-based justice systems, they rely on a particular ethical background consensus. When evaluating the efficaciousness of spirit-based justice-systems, Dusche argues that we can leave aside the question of whether these spirits are "real" in the objective sense. Rather, it suffices to show that their existence is an intersubjectively shared reality for the believers. Drawing on Habermas, Dusche points out that such beliefs, as part of the social imaginary, are efficacious just like any other social

institution whose reality is grounded in the intersubjective "social world" rather than in the "objective world" of science or the "subjective world" of experience.

From an engagement with a specific local community, we move to religious communities and their legal frameworks. The contributions, by Jean-Philippe Dequen and Tanja Herklotz engage with the fact that India—like other post-colonial states—maintains a system of religion-based "personal" laws, according to which certain family matters (such as marriage, divorce and maintenance) are governed by the religious laws of a community. They are based on religious precepts that were partially codified in the colonial era. Their administration remains contentious because some of these laws are seen as patriarchal. Indeed, they are a primary example of the tension between conflicting constitutional guarantees, such as the right to equality and religious freedom. Both authors discuss the shifts in legal argumentation and claim-making that have shaped the debate and practice around Muslim Personal Law and the Uniform Civil Code, respectively.

In "Reflections on the Shayara Bano petition, a symbol of the Indian judiciary's own evolution on the issue of Triple Talak and the place of Muslim Personal Law within the Indian constitutional frame?" Jean-Philippe Dequen traces the shifts in legal reasoning, argumentation and rationale in Indian court debates on the pronouncement of divorce in one sitting initiated by the husband (triple talak). Although Muslim Personal Law is not codified, Shayara Bano petitioned in early 2016 before the Indian Supreme Court seeking to declare this practice unconstitutional and illegal. Her petition raised the question of which legal grounds religion-based personal laws should be administered. Taking a legal historical perspective, Dequen elucidates factors that have shaped legal reasoning concerning Muslim Personal Law and in doing so, he reconstructs the shifting legal argumentation leading up to the Shayara Bano case. Looking at India's periphery and examining rulings of the High Court in Jammu and Kashmir (J&K), Dequen observes a new trend that might shape future discussions. As a Muslim majority state, J&K has acquired a symbolic status for India's Muslim minority, and consequently, judgments taken at the state level in J&K might be regarded as more influential and authoritative by the Muslim minority in India than decisions taken at the centre where pressures of majoritarianism persist. Recent judgments in J&K hinge upon the judges' interpretation of religious texts rather than external sources. In this scenario, the Supreme Court is no longer the vanguard, but new

and creative approaches to controversial issues are found at the state level where the cases are negotiated in context.

In her article entitled "Dead letters? The Uniform Civil Code through the eyes of the Indian women's movement and the Indian Supreme Court", Tanja Herklotz engages with the proposal for a Uniform Civil Code (UCC) for India to replace the existing religious personal law system. She assesses the topic by analysing the discourses around the UCC within the Indian women's movement and the Indian Supreme Court—two actors that are believed to be avant-garde and striving to achieve an expansion of rights for vulnerable groups. She points out that while the rhetoric and argumentation of the two entities is astonishingly different, both entities have in actual fact accepted legal pluralism with regard to religion based personal laws. While the women's movement has turned away from its initial call for a UCC and now openly questions the feasibility of such a project, the Supreme Court pays lip service to the constitution in its rhetorical call for the Code while demonstrating no real action to push the project further. However, this does not mean that article 44 is a "dead letter." Its essence—uniformity and equality—is gradually being carried out through other means: not through an all-encompassing legislative top-down reform, but through a gradual step-by-step approach at the level of high court decisions and through tentative legislative reforms.

Women's rights are not only relevant when dealing with religion. Rather, they have many other facets that are worthy of discussing. The contribution by Chiara Correndo entitled "Of women and myths: revising analytical approaches to gender issues in India", engages with discourses on gendered violence in India, in particular dowry-related crimes. Correndo's main point of critique is the common European recourse to "cultural explanations" for gender-related crimes in India which causes a misrepresentation of such practices as pathological to a "static" Indian culture and tradition. Such explanations do not investigate the causes of violence. Instead, this exoticisation places discourses on gender-based violence within narrow confines that do not allow for development and change. Correndo advocates a grounded, thoroughly researched perspective on the operationalisation of the laws and realities in which women live. This encompasses taking into account various normative spheres, as well as social fabrics, economic shifts and historical trajectories. For instance, the persistence of dowry-giving is not only a matter of "traditional" practices but might also be a "fast track" to wealth and status, two aspects that are related to the emergence of new forms of consumerism and also impact

gender-relations. Correndo advocates a re-examination of the interplay tradition and culture to understand the plurality of issues that women in India face on various societal levels.

The last contribution in the FOCUS links the debates on law in India to global discourses and points to the tensions and ambivalences between global legal regimes and their context-specific implementation and negotiation. In "Farmers' rights in India: 'globally sui generis'" Rajshree Chandra shows how the activities of international biotechnology organisations impose notions of intellectual property, bio cultures and innovation on Indian farmers that differ significantly from the existing Indian conceptions. This necessitates farmers, NGOs and the Indian government to frame demands, claims and protection measures in a fashion that fits with global discourses but that often clashes with traditional knowledge and conceptions of land, property and agriculture. Similar to Dusche, Chandra touches upon a central aspect for the effective functioning, acceptance and legitimacy of a legal system: participation necessitates understanding the system and the normative order upon which the system is based. In this context, the farmers' capability to access and inhabit the content of claims to seeds is a precondition for activism and successful petitions.

Other than providing a brief glance through the kaleidoscope at the law in India, with this FOCUS we would also like to foster interdisciplinary work at the intersection of law and area studies. So far, European legal scholarship still seems to be shaped by a certain fixation on the global North. As Werner Menski remarks: "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" (2016: 128). In legal academic work the global South has only recently begun to feature more prominently. On the other hand, in area studies law has been historicised or non-state systems have been looked at in the local context, and the interplay between state law and non-state law has largely been neglected. The spheres of state and society often seem to exist in parallel. With this FOCUS we want to make a contribution to filling this gap between the different disciplines and provide for a fruitful dialogue between scholars of law and South Asian Studies.

Endnotes

[1] Bhargava, Rajeev. 2011. Should Europe learn from Indian secularism?. *Seminar*, 621 (May 2011). http://www.india-seminar.com/2011/621/621_rajeev_bhargava.htm [retrieved 30.09.16].

[2] Bhargava 2011.

[3] Bhargava 2011.

Bibliography

Griffith, John. 1986. What is legal pluralism?. *Journal of Legal Pluralism*, 24, pp. 1-55.

Jacobsohn, Gary Jeffrey. 2003. *The wheel of law: India's secularism in comparative constitutional context.* Princeton and Oxford: Princeton University Press.

Jaising, Indira. 2011. An outsider, inside. In: Ritu Menon, ed. *Making a difference: memories from the women's movement in India*. New Delhi: Women Unlimited, pp. 347-69.

Menski, Werner. 2016. Still asking for the moon?: opening windows of opportunity for better justice in India. *Verfassung und Recht in Übersee*, 49 (2), pp. 125-47.

_____. 2014. Remembering and applying legal pluralism : law as kite flying. In: Seán Patrick Donland & Lukas Heckendorn Urscheler, eds. *Concepts of law : comparative, jurisprudential, and social science perspectives*. London: Routledge, pp. 91–108.

_____. 2011. Flying kites in a global sky: new models of jurisprudence. *Socio-Legal Review,* 7, pp. 1-22.

_____. 2000. *Comparative law in a global context: the legal systems of Asia and Africa*. Cambridge: Cambridge University Press.

Oommen, Tharailath Koshy. 2004. Socio-political transition in the Indian Republic and the European Union. *European Journal of Social Theory*, 7 (4), pp. 519-37.

Sathe, S.P. 2002. *Judicial activism in India: transgressing border and enforcing limits*, 2nd edn. New Delhi: Oxford University Press.

Stepan, Alfred, Juan J. Linz & Yogendra Yadav. 2011. *Crafting state-nations: Indian and other multinational democracies.* Baltimore: The Johns Hopkins University Press.