

EDITORIAL NOTE

I. INTRODUCTION

Through the field of interdisciplinary studies, scholars have attempted to identify a nexus between the law and other areas of research. This is largely an endeavour which seeks to tangibly connect different aspects of human life and society to that which governs them - the law. This has been exemplified by the rise of 'law ands', which in turn has significantly contributed to the manner in which legal research and academia is conducted. This interdisciplinary approach has extended to interpreting the law and legal institutions in light of the most unlikely of themes; this being evidenced by 'legal history', 'law and economics', 'film and law' and the subject of this note, 'law and literature'. This growing interest in 'law and' is premised on the notion that "the legal world is not to be understood on its own terms, but requires the application of some method or substance provided by other disciplines".¹ However, this is distinct from the notion that law, in combination with another discipline, may form the basis for a new discipline altogether. The very basis of interdisciplinary approaches to law rests on the ability of each separate discipline to effectively contribute to the other in academic as well as non-academic circles.

The reading of law and literature together is not a recent phenomenon. Albeit largely concentrated in British and American academia, it has been examined in a plethora of works. From the late nineteenth century, legal practitioners have been analysing the variegated legal frameworks and institutions in the works of Shakespeare and Dickens,² to the more contemporary assessment of judicial opinions by Cardozo,³ there has definitely been significant discussion on the joining of law and literature over the last century. This discussion has led to a bifurcation of views as to how law and literature are considered to complement each other. In this note, we will first overview the two main points of view regarding the role of literature and literary analysis in the legal world. Then, we will address some critiques of the law and literature movement. Finally, we will offer concluding remarks.

¹ Marc Galanter & Mark A. Edwards, *Introduction: The Part of Law Ands*, WIS. L. REV. 375, 376 (1997).

² See, e.g., C. DAVIS, *THE LAW IN SHAKESPEARE* (1883); Stephen, *The License of Modern Novelists*, 106 EDINBURGH REV. 124, 128 (1857).

³ B. CARDOZO, *LAW AND LITERATURE*, IN *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 339 (M. Hall, 1st ed., 1947).

II. APPROACHES TO LAW AND LITERATURE

A. *LAW IN LITERATURE*

This approach focuses on identifying and assessing the manner in which laws and legal institutions are depicted in literary works, largely through the lens of justice and fairness, as they have been conceptualised in different time periods.⁴ This is, first, a useful exercise from the perspective of legal history as it facilitates an evaluation of how ancient or medieval justice systems functioned. Second, this furthers an understanding how the modern system of laws and justice (broadly defined) came about. For instance, in the short stories of Nikolai Gogol such as ‘The Government Inspector’, and ‘The Tale of how Ivan Ivanovich Quarrelled with Ivan Nikiforovich’, the ordinary lives of common citizens affected by the legal and administrative systems are portrayed as satire. Gogol uses sardonic, tongue-in-cheek comments to show how corruption, the gruelling court proceedings and hierarchy in positions of authority affect the legal and political climate of society.

One of the foremost contributors to the movement, Richard Weisberg, advanced this school of thought by arguing that a close analysis of law in literary works can provide significant ‘structural insights’ into the law and its execution. He contends that such an analysis can bring to the fore aspects of the law that are usually disregarded, not emphasised, wrongly interpreted or are inaccessible by solely examining legal texts.⁵ Specifically, he focuses on four aspects of law which are not found in statutes: the manner in which lawyers communicate, how their thought processes and reasoning work, how they treat individuals outside of the dominant power structure, and how lawyers feel.⁶ This is probably most greatly exemplified in Harper Lee’s most famous work, ‘To Kill a Mockingbird’.⁷ Through a story which juxtaposes racial and legal tension in southern America, the protagonist of Lee’s novel, Atticus Finch, provides ample evidence of how the ideal lawyer ought to operate. It is therefore no surprise that a close study of Finch’s character is mandated at centres of legal education.

In ‘Poethics’, Weisberg urges that this ‘vacuum’ can also be addressed by considering the moral implications of laws and legal systems (encompassing governance structures and courts). Weisberg’s contribution is closely linked to others who have asserted that the study of law in literature

⁴ Gary Minda, *Law and Literature at Century’s End*, 9(22) *CARDOZO STUD. L & LIT.* 245, 255 (1997).

⁵ RICHARD H. WEISBERG, *POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE* 4, 35 (1st ed., 1992).

⁶ *Id.*

⁷ *Id.*

may illustrate the possibilities of abuse of legal power,⁸ and that it can be used to assess the viability of a law through a fictional narrative.⁹ In Rohinton Mistry's celebrated work, 'A Fine Balance', this facet of governance is brought out succinctly. Set in the Emergency period in India in the 1970s, it tells the tale of how the laws and policies enacted and implemented at the time adversely affected the middle class and the urban impoverished in Mumbai. Through a heart-wrenching narration of events, Mistry manages to capture the horror of the Emergency, replete with references to censorship, compulsory sterilisation, forced labour, and the anti-Sikh riots of 1984, among other things. The novel demonstrates the massive power abuses that took place in urban India and demolishes the dominant narrative of development that was present.

B. LAW AS LITERATURE

While the 'law in literature' discourse provides interesting interdisciplinary insights, another strand of thought began to develop in American academic circles in the late 1970s. This newer approach, defined as 'law as literature', brought the discourse closer towards real life laws and judgments. The mainstay of this approach lay in a literary analysis of legal texts or in using popular techniques of literary criticism to interpret legal texts, which include legislation, policy, and court decrees or judgments. No longer was literature being studied as an extension of dominant legal practises, exemplified by the likes of Harper Lee, Franz Kafka and Charles Dickens.¹⁰ It treated the law as a separate 'genre' of literature itself, with Derrida and Foucault's works¹¹ focussing on the language of law possessing cultural and social effects.¹² This approach is distinct from the 'law in literature' school of thought as it proposes an alternate method by including theories of language and storytelling in its domain. This kind of analysis is already central to legal analysis, particularly in that which is rendered in case law but it goes a step further so as to challenge the very foundations of seemingly settled legal questions and answers.¹³ As stated by J.B. White, the law as literature approach seeks to "look at the literature of the law as if it really were literature, as though it defined speakers and a world, a set of possibilities for expression and community."¹⁴

⁸ B.L. Rockwood, *On Doing Law and Literature* in LAW AND LITERATURE: A MISUNDERSTOOD RELATION (2nd ed., 1998).

⁹ A. Julius, *Introduction* in LAW AND LITERATURE: A MISUNDERSTOOD RELATION 27 (2nd ed., 1998).

¹⁰ See HARPER L. WHITE, *TO KILL A MOCKINGBIRD* (1960); FRANZ KAFKA, *THE TRIAL* (1925); CHARLES DICKENS, *BLEAK HOUSE* (1853).

¹¹ IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 121 (1995).

¹² MINDA, *supra* note 4.

¹³ John Morison & Christine Bell, *Introduction* in TALL STORIES? READING LAW AND LITERATURE 2 (1st ed., 1996).

¹⁴ JAMES B. WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 17 (1990).

One of the most popular schools of literary criticism as applicable to legal texts is that of deconstructionism. As distinct from the traditional,¹⁵ structuralist,¹⁶ and post-structuralist¹⁷ approaches to literary criticism, the deconstructionist approach seeks to derive meaning from a text by assessing that which is absent from it as much as what is present.¹⁸ There are two primary deconstructive practises which have been used to critique literary texts as well: separating or liberating the text from its creator or author and inverting the hierarchies within the text.¹⁹ The first, that the text ought to be liberated from the author, challenges the predominant notion that any text should be read keeping the worldview of the author in mind. It opposes a creator-centric approach to interpreting texts by largely disregarding the original intent with which it was written and posits a context-specific approach. Importing this to analysis of legal texts, this contradicts the age-old dicta that courts should take the ‘intent of the legislature’ into consideration whilst interpreting legislation which is particularly ambiguous. In light of the fact that much of Indian legislation is over a century old,²⁰ this approach may bring the judiciary and case law closer towards reaching a fair and equitable decision on certain points of law. It may even be said that this approach has already been utilised by Indian courts, particularly, the Delhi High Court in *Naz Foundation v. NCT of Delhi*.²¹ In this case, the Court read down the term “carnal intercourse against the order of nature”²² in §377 of the Indian Penal Code to exclude consenting homosexual adults. The Court thereby liberated the text from what would have been the original intent of Lord Macaulay, and then granted equal rights to an entire community of people in India.

The second method, inverting the hierarchies in the legal text, refers to reversing the order in which the dominant and the submissive elements of a text are organised. In a legal text or legislation, this may be best characterised by a rule and its exception. This method of deconstruction can be used to first establish that each opposing or contradictory stance within a text is based on a form of prioritisation of values within that text. By deconstructing such a text to invert hierarchies, its logical conclusion reveals that this prioritisation is of one value over another equally acceptable one. Through deconstruction, our notions of what is moral and ethical is changed dynamically.²³ To place this in

¹⁵ See Mark Poster, *Interpreting Texts: Some New Directions*, 58 S. CAL. L. REV. (1985) (Traditional method, which focuses on the author’s intent and asserts that a unitary, ascertainable meaning is implanted in the text by the author).

¹⁶ *Id* (Structuralism, which asserts that meaning can be derived more from the structure of the text than from the author’s intent).

¹⁷ *Id* (Post-structuralism, which asserts that the meaning of a text is not unitary and is a product of the interaction of reader and text).

¹⁸ *Id*, 15.

¹⁹ Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

²⁰ See the Indian Penal Code, 1860; the Code of Civil Procedure, 1908; the Indian Contract Act, 1872; the General Clauses Act, 1879.

²¹ *Naz Foundation v. NCT of Delhi*, (2009) 160 DLT 277.

²² The Indian Penal Code, 1860, §377.

²³ BALKIN, *supra* note 19, 762.

context, let us consider the law on abortion in India. It currently states that an expecting mother may abort her foetus up to twelve weeks into her pregnancy.²⁴ After the expiry of this period, abortions are prohibited unless it is proven that the mother will suffer great injury or even death if the pregnancy were to continue. The dominant rule is that following the twelve week period, the life of the foetus becomes a greater priority than the choice that its mother is allowed to make up until that period. However, the ability to make this choice is returned to the mother once it is established that she may be adversely affected by the pregnancy. There are two values that the law seeks to bring out: the protection of the life of the foetus and the protection of the freedom of choice of the mother. When the hierarchy in which these values are placed is deconstructed and inverted, it reveals the very crux of the global and domestic abortion debate – life versus choice. The realisation that a legislation has placed one value at a higher pedestal than another opens the legislation up for further scrutiny and reform, with the eventual hope that there will be consensus on which value is to be ultimately prioritised.

III. ADDRESSING CRITIQUES OF LAW AND LITERATURE

Regardless of the abovementioned views on how to join two separate disciplines together, there has been significant critique on the nature and object of this movement. Of these critiques, given by eminent jurist and judge Richard A. Posner has been widely acknowledged.

In his landmark treatise, ‘Law and Literature: A Misunderstood Relation’, he has attempted to defend ‘legal liberalism’ from literary analysis by denying that the latter adds any substance to the understanding of the law.²⁵ Extremely critical of the significance given to literature by propagators of the movement, he believes that these academics have taken literature ‘too seriously’ and thereby, placed upon the field an unnecessary level of relevance in the advancement of the law, legal knowledge, and legal or philosophical arguments.²⁶

He builds upon this view in ‘Law and Literature: A Relation Reargued’,²⁷ where he further emphasises that the study of literature has nothing to add to the understanding of the law, what he defines as, “the interpretations of statutes and constitutions”.²⁸ However, despite raising this major critique of the law and literature approach, he argues that literature still has the ability to contribute enormously to the way we perceive and improve judicial opinions.²⁹ At this juncture, it is pertinent to note that the leeway given by Posner for litera-

²⁴ The Medical Termination of Pregnancy Act, 1971, §3.

²⁵ See R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

²⁶ *Id.*

²⁷ See R. Posner, *Law and Literature: A Relation Reargued*, 72(8) VA. L. REV. 1351 (1986).

²⁸ *Id.*, 1351.

²⁹ *Id.*, 1388.

ture to be able the influence the law is not as wide as it seems. While he states that literature may indeed assist in the understanding of judicial opinions, he urges the reader to note the source of such analysis. He argues that as most judicial opinions today are written by newly graduated law students with minimal knowledge of literature, there may not be a high possibility of strong literary analysis. At its core, Posner's argument is predicated on a fundamental difference in the manner in which law and literature operate in society. His essential contention is that while literature persuades, law coerces.³⁰ As he succinctly points out, a critical interpretation of an 'ambiguous work of literature' does not necessarily affect anyone else but a court that interprets an ambiguous provision will affect a wide range of people.³¹ In this manner, he seeks to separate the two disciplines and render them completely independent of each other save for the way in which literature can 'influence' judicial opinion.

The major response to Posner's critique has come from the likes of Stanley Fish and Martha Nussbaum. Fish's counter to Posner lies in an argument which concedes to the distinction between the two disciplines, but he contends that these are distinctions which have been created by historical debate - which can be undone as quickly as they were made,³² due to which the distinction based on the coercive nature of law and the persuasive nature of literature may be reversed. He substantiates this by asserting that all acts are subject to interpretation; since interpretation itself is an inherently subjective act, the idea that judicial acts may be anything but merely persuasive is rendered impossible.³³ He, therefore, paves the way for a case to be made that since everything is only persuasive, joining law with literature could provide a case for greater study due to the manner in which each discipline may persuade the other. Nussbaum, on the other hand, sees literature as possessing a social function in that it allows us to "imagine one another with empathy and compassion".³⁴ She sees the connection between the two disciplines as one which allows a reader judge to place themselves in the shoes of another and understand the impact of the law on individual lives. Her hypothesis rests on the presumption that literature constantly enables us to experience alternate lives and alternate realities - creating in us a sense of connection to the world of the protagonist. She sees literature as what may be termed a 'normative social force' which controls our attitudes towards justice, morality and the like.³⁵

The major flaw in Posner's critique of the movement lies in the fact that he seems to disapprove of the reasons for its development, rather than the

³⁰ Kenji Yoshina, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

³¹ POSNER, *supra* note 27, 1351.

³² STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY & LEGAL STUDIES 28 (1989).

³³ *Id.*, 302.

³⁴ MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 18 (1996).

³⁵ *Id.*, 7.

movement itself. In ‘Law and Literature: A Relation Reargued’,³⁶ he elucidates upon how the lack of professional opportunities in humanities led to a coalition of the two disciplines in the 1970s, which finally led to the movement we see today.³⁷ He also considers the increasingly specialised branches arising in the study of the law to be a major facilitator of such a movement.³⁸ With these undertones, he moves on to elaborating the substantive reasons for his critique. This in itself is severely problematic, as while Posner’s argument rests on the nascent stages of a movement being a reason for its dismissal itself. Most movements we see are based on a need or disenchantment. This, however, does not make them redundant in themselves. For instance, an example can be drawn from John Locke’s ‘Theory of Property’. It is imperative to analyse the history of his work, and social conditions at the time that prompted Locke to propound what is considered as scholarly work today. Land acquisitions by the sovereign, and a strong climate of colonisation, led Locke to analyse the reasons behind what qualifies as ownership and property. The incessant and arbitrary acquisitions coaxed Locke to reflect upon how only when value is added to property, can one truly call it its own.

With regard to what he addresses as the more substantive reasons for his critique, Posner employs a three-pronged attack. First, he contends that by ‘deconstructing’ rather than ‘constructing’ the literary texts, scholars launch an attack on not only the text, but the objectivity of law itself. Second, Posner believes that the reason for the surge in the study of this interdisciplinary field has been the increased focus on areas of law that explicitly deal with literature. He uses examples such as defamation laws, copyright law, and laws governing sexually explicit expression that have come under the lens of legal analysis of late, and hence created a spiral of theories forming part of the law and literature movement.³⁹ However, this seems to be quite counterproductive to the argument that he is seeking to make. We believe that the increased focus on such laws, in fact, warrants for the study of law and literature, rather than its admonition. Third, Posner states that the movement only evolved as a counter-current to major scientific and technological bearings on the law, so as to give the law a more humanising effect.⁴⁰ This again, is an attack on the reasons behind the movement’s rise, and not the movement itself. Hence, we do not believe it to be a strong argument against the theories pertaining to law and literature.

Robin West, argues for Posner’s treatise to be read mainly as what he terms, “an impressionistic and impassioned celebration of legalism”.⁴¹ According to West, Posner places much emphasis on the authority of law;⁴² es-

³⁶ POSNER, *supra* note 27.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ ROBIN WEST, LAW, LITERATURE AND THE CELEBRATION OF AUTHORITY (1988).

⁴² *Id.*

pecially, on how legal actors must obey the authoritative meanings of the words laid down.⁴³ West believes that Posner does not ‘sentimentalise’ the law, and throughout his work, maintains distance between the law and moral convictions.⁴⁴ Yet another scholar, James Seaton has argued that Posner goes too far as to be completely dismissive of the law and literature movement, while acceding to Posner’s persuasiveness in argumentation.⁴⁵ Seaton’s primary problem with Posner’s analysis rests in the fact that Posner attaches no regard for the ‘moral guidance’ of literature.⁴⁶ He states that literature makes absolutely no contribution to moral awareness, and hence, the understanding of justice and the law. Seaton, in fact, accepts Posner’s argument, in so far as his dismissal of the relationship between the law and contemporary literary theorists are concerned. Seaton also allies with Posner on his rejection of the aligning of literature by Weisberg and Nussbaum with their individual moral principles.⁴⁷

IV. CONCLUSION

Despite its sole apparent emphasis on analysing the representation of the legal world in literary texts, the law and literature movement seeks to offer much more than a superficial assessment of representations. The movement and its ideals may be used in developing and modifying judgments, legislation and policy to better suit the interests and rights of the people. While the movement has faced its share of critique, even major critics such as Posner advocate for the use of literature in the understanding of certain legal texts, like judicial opinions. By attempting to displace the law from its often unreachable position, law and literature approaches provide an opportunity to place the law within publicly accessed spaces and to place literature within the domain of elite legal structures. By placing significant emphasis on the ‘social’ aspect of the law, the movement brings it closer to being interpreted fairly and equitably. The spread of the law and literature movement is evident even in Indian academic circles, with certain universities having a compulsory law and literature course,⁴⁸ and others offering them as elective courses,⁴⁹ thereby making this field of study more accessible. Given that the present legal climate in India is conducive to accepting academic critique, juxtaposed with major social movements making their way into literary text, the law and literature movement should be used to propel a more holistic and all-encompassing construction of the law.

⁴³ *Id.*, 987.

⁴⁴ *Id.*, 989.

⁴⁵ See James Seaton, *Law & Literature: Works, Criticism, and Theory*, 11(2) *YALE J. LAW & HUMANITIES* 479 (1999).

⁴⁶ *Id.*, 504.

⁴⁷ *Id.*, 504.

⁴⁸ The West Bengal National University of Juridical Sciences, Kolkata, the National Academy of Legal Studies and Research, Hyderabad, and Jindal Global Law School, Sonapat, have introductory ‘law and literature courses’ in the first year of study.

⁴⁹ The West Bengal National University of Juridical Sciences, Kolkata, offered a course on ‘law and justice in Shakespearean works’, and the National Law School of India University, Bangalore, offered an elementary ‘law and literature’ course.