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An Agenda for Teaching International Economic Law in Indian Law Schools

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An Agenda for Teaching International Economic Law in Indian Law Schools

Seema Sapra*

ABSTRACT

At this time of India's ongoing 'Great Transformation,' legal educators and researchers in India need to pay greater attention to international economic law (IEL). New agendas for IEL teaching in India must derive from and support domestic 'reform' objectives. An important conceptual links between broad issues of reform in India and IEL teaching in the classroom relates to what reform means or should mean. It is suggested that IEL teaching in India more actively engage with domestic issues arising on account of the liberalisation of India's external trade as well as the liberalisation of its domestic economy, and also bigger questions about reform of governance in India, with corresponding implications for constitutional law, federalism, reconstructions of meanings and structures of governance, and in their broadest sense become questions about negotiating and defining the social purpose of domestic governance and of providing adequate delivery systems for such governance.

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I. Introduction

‘Revolutions are rare. Reform, perhaps, is even rarer’
‘The way of the reformer is hard. ... his problems are more difficult than those of the revolutionary.’¹

This Article argues that at this time of India’s ongoing ‘Great Transformation,’ legal educators and researchers in India need to pay greater attention to international economic law (IEL), and that a renewal and perhaps some re-orientation of the approach to teaching IEL (along with the research and discourse this would generate), could provide significant contributions to and shape and support both the objectives and outcomes of ‘reform’ in India. New agendas for IEL teaching in India (and indeed for other developing countries also engaged in their own processes of reform and reconstruction), must it is suggested, derive from and support domestic ‘reform’ objectives. Throughout, this Article, the term ‘reform’ is used as shorthand to refer to the wide range of processes and interventions undertaken by actors and institutions in developing countries (including India) and which are directed at bringing about the social, economic and political transformation required for development.

This Article presents some initial thoughts on how we could begin to draw conceptual links between broad issues of reform in India and IEL teaching in the classroom. An important link relates to what reform means or should mean. The reform agenda for India is neither self-evident, nor given. It is likely to be and indeed is increasingly the object of contestation and political struggle over acceptable outcomes and structures. This Article suggests that the ideas first developed by Karl Polanyi in his book titled *The Great Transformation*² and subsequently elaborated by John Ruggie in his work on embedded liberalism³ are useful in imagining, defining and mapping the

¹ SP HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 344 (1968).

² K POLANYI, THE GREAT TRANSFORMATION (1957).

³ See JG Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, (1982) 36 INTERNATIONAL ORGANISATION 379.

meaning of 'reform' for India. These ideas which were developed in IEL discourse in the context of the regulation of the international and domestic economic orders, not only provide language and concepts that are useful to contestation and debate over substantive meanings and outcomes of 'reform', but they also embrace notions of meaningful societal participation in the processes of both the definition and implementation of 'reform'. Indeed, the concept of *The Great Transformation* is already being applied to the Indian context, and not only in respect of reform of economic governance but also in relation to the significant changes to the social, political and cultural fabric of the country.⁴

It is suggested that IEL teaching in India more actively engage with domestic issues arising on account of the liberalisation of India's external trade as well as the liberalisation of its domestic economy. While being relatively 'new' agendas for Indian law schools, especially in relation to an emphasis on the liberalisation of the country's domestic economy, such agendas would nevertheless still fall within conventional approaches to teaching IEL. This Article goes further to suggest that IEL teaching in India consider adopting even broader agendas. These can be found within reform discourses that extend beyond economic reforms into bigger questions about reform of governance in India, with corresponding implications for constitutional law, federalism, reconstructions of meanings and structures of governance, and in their broadest sense become questions about negotiating and defining the social purpose of domestic governance and of providing adequate delivery systems for such governance. IEL teaching in India cannot remain unresponsive to and outside of these wider reform discourses.

Specifically, this Article makes a few initial and tentative forays into imagining more concrete implications of this discussion for IEL teaching in India. First, there is a need to consider teaching IEL as part of different discourses to serve the different agendas of the broad governance reform process. This would contribute towards the creation of a mega-discourse or a

⁴ See N Kumar, *The Great Transformation: Education as the KEY to India's Split Development*, available at www.idpad.org/pdf/Nita_Kumar-Paper%2013.pdf; A. Vanaik, *The Great Transformation: The Old Congress has Changed Unrecognizably*, available at http://www.tniarchives.org/detail_page.phtml?page=archives_vanaik_transformation; PB Mehta, *India: Reform and the Politics of Gradual Accommodation*, available at www.carnegieendowment.org/files/Mehta.pdf.

network of linked discourses that would be crucial to the appropriate framing, designing and execution of the broad reform process and agenda for the country. By packaging different reform discourses together, IEL courses could enable the creation of new knowledge, the development of new discourses, and the creation of new capacity as well as space for useful social, political, constitutional, and legal activity. Second, as part of the case for more IEL teaching, efforts are required to broaden the audience or market for IEL knowledge, and increasing 'demand' for IEL would be an important component. IEL teaching would thus facilitate stakeholder participation by making more strongly the case for its own relevance. Third, IEL teaching in India might usefully develop an inward looking focus, by engaging more with issues and problems confronting the domestic political economy. And fourth, IEL teaching and research must develop new issue linkages between competing substantive values, competing interests, and substantive outcomes and procedural mechanisms. In doing so, IEL teaching would contribute towards constructing a more inclusive redefinition of the 'problem-space' of reform in India.⁵ This would, it is hoped, result in fairer and more efficient reform outcomes. (These ideas are further developed in this Article later. However, a more comprehensive exploration of such linkages would form part of a curriculum development program).

Also, as an initial matter, some other points need to be stated. First, any thinking about IEL teaching in India would necessarily have to take place in the larger context of an understanding of legal education in India generally, and of the constraints (but also un-explored and under-utilised possibilities) that determine the role and provision of legal education in a poor developing country like India. Second, though this Article addresses the 'teaching' of IEL, its arguments are based upon a broader concept of 'knowledge creation, dissemination, and use' which would, in addition to teaching, also include research, discourse, scholarship as well as the practice and application of such knowledge. Also, the suggestions made here are not made with a view to advance the cause of the discipline of IEL, but instead with the expectation that the creation, dissemination and utilisation of such disciplinary knowledge

⁵ I borrow the concept of 'problem-space' from D. SCOTT, *CONSCRIPTS OF MODERNITY: THE TRAGEDY OF COLONIAL ENLIGHTENMENT* 2–6 (2002). He questions the limitations that a concept of problem-space brings into the context of intervention. A defined problem-space fails to question how problems get defined in the first place, why certain questions get asked and others do not.

would advance other causes of national interest. Arguments for increasing the relevance of IEL teaching in India and for creating discourses that feed IEL knowledge into broader reform discourses are not narrowly conceived in the sense of ensuring that domestic law and structures remain or become compliant with IEL. Instead, it is hoped that IEL teaching would facilitate a more interactive engagement between the international regime and domestic political economy structures, so that domestic actors can more effectively use and respond to, as well as influence IEL, in order to achieve broader domestic and international objectives for India.

II. Teaching IEL in India

Without going into a detailed account of the present state of and future prospects for legal education in India, it is nevertheless relevant to recall the constraints that any effort directed at improvement of the system must address. The more obvious constraints are inadequate financial and academic resources which limit opportunities for both teaching and research.⁶ Further, the resources that do exist, tend to be located in elite institutions leading to huge differences in quality between law schools.⁷ Despite difficulties, current events in India provide an opportunity for academia to reflect upon new agendas for the teaching of IEL in India. Structural changes in India have led to the development of a strong discourse on 'reform' in India in addition to the more traditional discourse on 'development.' One strand of this reform discourse extends to the reform of higher education in India and includes a sub-discourse on reform of legal education in India.⁸ There is now a significant

⁶ The problems include under-funded libraries; non-availability of electronic resources and in some cases even computers; and non-availability of suitable study materials including text books. In addition, inadequate remuneration fails to attract qualified and committed faculty to teaching careers, leading to low standards. See R DHAWAN, *Means, Motives and Opportunities: Reflecting on Legal Research in India*, (1987) 50 MODERN LAW REVIEW 725. The situation described by Dhawan by and large continues to persist today in the majority of Indian law schools.

⁷ See brief discussion on qualitative differences between the premier institutions including the new National Law Schools and the majority of the other old regional and local law schools below in this section.

⁸ The Government of India had created a National Knowledge Commission, whose mandate included the study and the making of specific recommendations for the improvement of higher education. A separate working group was established for legal education. See their website at <http://knowledgecommission.gov.in/>. See also P Agarwal, *Higher Education in India: The Need for Change*, ICRIER Working Paper No 180, 2006; S Kaul, *Higher Education in India: Seizing the Opportunity*, ICRIER Working Paper No 179, 2006.

momentum in India behind efforts for the improvement of legal education. There are almost 695 law colleges in India which offer an LLB degree approved by the Bar Council of India. These 949 separate law colleges/schools in India. Out of these, only 44 are stand-alone universities or the sole law school of the affiliating university. The remaining 905 law colleges are affiliated to 94 different Universities. Thus in these Universities with multiple law colleges, the number of law colleges per university ranges from 2 to 44.⁹ A revolution of sorts in Indian legal education commenced in 1987 with the creation of the first National Law School in Bangalore which developed a new five-year integrated LLB curriculum for students fresh from high school.¹⁰ Since then, this highly successful model has been replicated across the country.¹¹ Such new and better resourced law schools are attracting more qualified and competent teaching and research faculty. Admission to the new premier institutions is extremely competitive with national-level entrance exams.¹² The emergence of these new law schools has coincided with a booming market for corporate legal practice. Well-paying corporate law firms have made law practice an attractive career prospect for young people. To a large extent,

⁹ The latest figures available are as of 1 October, 2008. See <http://www.barcouncilofindia.org/>. At present, the Bar Council of India (acting through its Legal Education Committee) constituted under the Advocates Act, 1961 is by statute responsible for the promotion of legal education and for setting standards for such education in consultation with Universities. It is also required to undertake inspections of all universities imparting the LLB degree, and 'recognize' those universities whose LLB degree will be accepted as qualification for enrolment as an advocate. The Bar Council of India Rules on Standards of Legal Education available online at <http://lawmin.nic.in/la/subord/bcpart4.htm> set out very minimal requirements for recognition. These rules also list the subjects/modules that are taught for the LLB. International Economic Law is an optional module for final year students. The University with the largest number of affiliated law colleges is Ch. Charan Singh University in Meerut (44 colleges).

¹⁰ The traditional LLB route was (and still is) a 3 year post-graduate course for students who have already acquired a 3 year graduate degree in another academic discipline. This format is still being followed at the older law schools including at the law department of the University of Delhi.

¹¹ Some of the prominent National Law Schools are: National Law School of India University, Bangalore (1987); National Law Institute University, Bhopal (1998); National Academy of Legal Studies and Research, Hyderabad (1998); Hidayatullah National Law University, Raipur; Gujarat National Law University, Gandhi Nagar; National Law University, Jodhpur (1999); West Bengal National University of Juridical Sciences, Kolkata (1999); National Law School University, Delhi (2008). The latest entrant on the list of the new prestigious Indian law schools is the Jindal Global Law School being launched this year (2009) at Sonapat, Haryana about 50 km to the north of Delhi within the National Capital region of Delhi.

¹² The NALSAR LLB entrance exam in 2002 was taken by 5,145 students out of which 50 were granted admission, giving a student conversion ratio of 1:103. See http://www.rccnalsar.org/admission_process.htm. Applicants use coaching institutes to prepare for these exams.

¹³ The course description for this module, available on the school's website, reads: 'International

the momentum for legal education reform is elite-driven. This is because the lucrative opportunities for law graduates that are creating this demand for high quality legal education exist mostly in the corporate sector. As a result, legal education standards are now quite high in the new 5-year national law schools and also (though to a lesser extent) within the traditional premier national institutions. On the other hand, standards in many of the non-elite law colleges spread across India remain low. These function essentially as degree granting institutions but with little value added in terms of legal education or enhancement of career prospects.

I now turn to the specific background of IEL teaching in Indian law schools. As recently as ten years ago, teaching of international law in most law schools extended only to a general course on public international law. A few law schools offered other courses like private international law or international environmental law. Even though the Uruguay Round had been in its final stages during the author's three year LLB course (1992–1995), there was no classroom discussion on any aspect of it. No discussion on TRIPS ever entered our discussions in the course on intellectual property. This position has changed. Today, law schools in India are teaching a wide range of international law courses with an increasing emphasis on IEL. The National Law School of India University at Bangalore for instance offers the following international law courses as part of its LLB program: International Trade Law;¹³ Conflict of Laws; Public International Law (in two parts); International Taxation; International Commercial Arbitration; Fundamentals of Corporate Finance; International Criminal Tribunals; European Law; International Aspects of Corporate Tax; and Dispute Settlement in International Trade and Investment.¹⁴ Research centres with a focus on IEL are also being established in India.¹⁵ International intellectual property law is another area where teaching and research in India is rapidly gaining ground.

sales, transportation with reference to shipping and aviation, financing and settlement of commercial disputes will be the major components of the course. Apart from the relevant Indian laws, the focus will be mainly upon the international legal conventions and Indian legal system in these four areas. In addition, the international trade regime, as reflected in the Foreign Trade (Development and Regulation) Act and other related enactments will also be discussed in detail.'

¹⁴ For details of course outlines see http://www.nls.ac.in/ademic_programmes_undergraduate_courses.html.

¹⁵ WTO related legal research institutes and initiatives in India include the following: Ministry of Commerce Chair in WTO at the National Law School at Bangalore; Centre for WTO Studies at the Indian Institute of Foreign Trade in New Delhi; Centre for WTO Studies at National Law University, Jodhpur; and Centre for Studies in WTO Laws at West Bengal National University of Juridical Sciences.

Even though IEL can be quite broadly defined, this Article's suggestions mainly draw upon teaching and research on trade (WTO) and investment law issues in India. Today all the new national law schools as well as most other leading law schools offer (usually) an elective masters level course on international trade law (ITL) that covers the WTO. The curricula of these courses tend to reflect a combination of two broad approaches to teaching ITL. The first is a basic introduction to the WTO, and the law of the WTO agreements. Thus the topics covered include institutional issues, dispute settlement, GATT, TRIPS, services, the WTO agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, anti-dumping remedies and the regulation of subsidies. Foreign textbooks are usually used and the materials looked at are the WTO agreements and DSU reports, as well as commentaries. The second approach focuses on development and developing countries in the WTO generally. There is some discussion of the history of the developing countries association with the GATT. Topics covered include UNCTAD, the UN debates on the New International Economic Order, the right to development, Special & Differential Treatment for Developing Countries, the Generalised System of Preferences for developing countries, and perhaps a discussion of the Doha 'development' trade round at the WTO. While the first approach is doctrinal or legalistic, the second tends to be descriptive and historical. IEL courses on offer in Indian law schools are popular, but less than 0.1 per cent of all law students in India who take a course on IEL probably go on to use their knowledge in future careers.¹⁶ This small percentage includes students who go on to join law firms and work either on intellectual property issues or on trade remedy litigation (safeguards, antidumping and CVD). Governance positions in India (including positions specifically charged with making trade policy and advising on WTO matters) are still largely filled by candidates who are recruited as civil servants at the start of their careers, and not from among law students who study IEL or lawyers who practice IEL. Finally, a few students might go on to teach law and some might decide to work for an NGO. For the most part, IEL courses are thus not seen as being particularly career-friendly. They do, however, get valued for the topicality of the issues, for their perceived elitism, and for

¹⁶ This is an estimate by the author based upon her experience in India. The actual figure is likely to be much less than 0.1%.

their possible usefulness as a base for further study abroad. Besides the law schools offering LLB and postgraduate degrees, another institution with a long history of teaching IEL is the Centre for International Legal Studies at the School of International Studies of the Jawaharlal Nehru University in Delhi. It does not, however, offer professional law degrees but rather offers non professional masters degrees.¹⁷ Most doctoral research on the GATT or the WTO in India has traditionally been carried out here.

While making the case for more, as well as more relevant, teaching of IEL in India, it should be acknowledged that law graduates when looking for work have the impression that there is a lack of demand for IEL knowledge among prospective employers in India. Indeed, during a short research visit to India for this Article, I asked some lawyers that were involved in WTO related legal work whether in their opinion Indian law schools were teaching enough IEL and whether there was sufficient capacity building occurring. A response received from more than one lawyer (and these were people who ought to know) was that the issue was not the availability of expertise but the availability of work. There just was not enough IEL related work going around for Indian lawyers, and that the work that there was, did not pay well either. Leaving aside anti-dumping cases in India (which pay well as the clients tend to be private industry), the number of Indian lawyers engaged in other IEL related work is miniscule. Further, these few lawyers do not work exclusively on IEL issues. Their WTO work forms a small part of their overall practice

¹⁷ The MPhil/PhD in international law program has a course on IEL (that covers definition and history of international economic law; new international economic order; charter of economic rights and duties of states; 'soft law' and 'hard law'; permanent sovereignty over natural resources; transnational watercourses law; intellectual property rights; draft code of conduct on transfer of technology; draft code of conduct on transnational corporations; multilateral investment guarantee agency; trade related investment measures; international centre for settlement of investment disputes; bilateral investment protection agreements; international monetary law (IMF/World Bank); right to development), as well as a course on International Trade Law (that covers origin and history of GATT; MNF clause; national treatment clause; prohibition of quantitative restrictions; general exceptions; security exceptions; art XVIII B; code on anti-dumping; code on subsidies; agreement on agriculture; dispute settlement understanding; India and WTO dispute settlement mechanisms; trade and environment; social clause; competition policy; international commodity agreements; the common fund for commodities; international sales of goods; *lex mercatoria*; international commercial arbitration). For information on topics covered by IEL courses in US law schools, see K BRAVO, *International Economic Law in US Law Schools: Evaluating Its Pedagogy and Identifying Future Challenges*, in C. B. Picker *et al* (eds.), *INTERNATIONAL ECONOMIC LAW - THE STATE & FUTURE OF THE DISCIPLINE*, (2008).

and they make their money mainly from their non-WTO practice. Given this perception of the lack of opportunities to practice trade or WTO law in India, shared by law students as well as law teachers, there does not exist in India a general sense that law schools ought to be teaching more IEL or perhaps teaching it differently.

III. New Agendas for Teaching IEL in India

This Article argues that despite the perception that there is enough IEL teaching in India to meet the 'limited demand' for capacity in this area, there is a need not only to teach more of IEL, but more importantly to rethink why and how IEL should be taught in India. This Article has already suggested that new agendas for IEL teaching and indeed for legal education in general must support the national project of 'reform' and 'development'. How can IEL teaching contribute to this project of national transformation? This and the following section will explore the linkages that exist or could be constructed between the IEL classroom and IEL research activity and the Indian reform project. An important link relates to the beneficial effects of the exchange of knowledge and ideas. Indian reform discourses could gain from importing concepts, ideas and knowledge developed within IEL discourses. In particular, the ideas in *The Great Transformation* and the idea of embedded liberalism could be imported from IEL and used to challenge and redefine the meaning and objectives of governance reform in India. In order to further explore what I mean by this and why this is necessary, a brief introductory discussion of these ideas and their relevance for projects of national reform follows.

The Great Transformation is Karl Polanyi's alternative narrative of the history of the economic and political order in Europe in the 19th and the 20th centuries as an account 'of the rise and fall of market society'.¹⁸ Polanyi describes two great transformations of state-society relations over this period, with the first inevitably leading to the second (the double movement).

¹⁸ F BLOCK AND M SOMERS, *Beyond the Economistic Fallacy: The Holistic Social Science of Karl Polanyi*, in T SKOCPOL (ed.), *VISION AND METHOD IN HISTORICAL SOCIOLOGY* 47, 53 (1994). See also F BLOCK, *Introduction*, in *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* xxii (2000).

The first transformation was ‘the emergence of market society out of mercantilism’¹⁹ (1815–1914) and required the commodification of labour. The second was ‘the collapse of market society into fascism and world war’²⁰ and was the result of an unplanned but inevitable protectionist counter-movement to the first, as all sections of society including land, labour and capital reacted to protect ‘society’ itself from the ravages of an unregulated market. What is the significance of Polanyi’s Great Transformation for the Indian national reform project? Commentators on The Great Transformation note that Polanyi’s account demonstrated fundamental flaws and contradictions in the idea of self-regulating markets.²¹ Polanyi’s message was that ‘a society that elevated economic motivation to absolute priority could not survive’.²² As Joseph Stiglitz explains, the ‘market’ is only a part of the broader economy and that the broader economy is part of a still broader society. Economic systems or reforms ‘can affect how individuals relate to one another’²³ and can sometimes have adverse consequences for ‘social capital’ or the social order. The lesson for Indian reformers would thus be that the establishment of a market economy must not be seen as an end in itself, but as the means to more fundamental ends.²⁴

Building upon Polanyi, John Ruggie used the term embedded liberalism to describe the economic order established under the global economic regimes that emerged after the second world war. As used by international economic lawyers, this term conveys the normative agreement among developed country governments about the substantive manner in which trade liberalisation under the GATT would be balanced by attention to domestic economic security and stability by these governments, through a series of protectionist and welfare measures. The embedded liberalism model of managing the global economic order worked well from 1945 till the 1970s. It was: a grand social

¹⁹ F Block and M Somers, *id.* at 53.

²⁰ F Block and M Somers, *supra* note 18 at 20.

²¹ F Block and M Somers, *supra* note 18. For Polanyi, the goal of establishing unregulated markets was a utopian experiment that was destined to fail.

²² F Block and M Somers, *supra* note 18 at 64.

²³ J STIGLITZ, *Forward*, in GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY x (2000).

²⁴ *Id.* at xv.

bargain whereby all sectors of society agreed to open markets, ... but also to contain and share the social adjustment costs that open markets inevitably produce.²⁵ It must be pointed out that the embedded liberalism compromise described by Ruggie worked only to sustain the social order within the developed economies of that time, who he described as the regime-givers. Ruggie, noted that the compromise of embedded liberalism was never fully extended to the developing countries.²⁶ Despite its usual application to describe actualised or aspirational economic orders in developed societies, the idea of embedded liberalism can be usefully imported into reform debates in developing country contexts. This is because this idea speaks directly to issues of governance reform. At its core, embedded liberalism is concerned with 'governance' and its roots or embeddedness in a given political, social and economic context. Thus, for Ruggie, the social purpose of governance including economic governance must be compatible with the 'collective reality' of the times as to the proper scope of governmental or political authority.²⁷ Objectives of governance must reflect popular and democratic understandings of appropriate 'state-society relations' relevant to the time's social context. Ruggie explains that the social purpose of governance for a state is forged by the balancing between 'authority' and 'market' in that polity. This balance then defines the 'legitimate social purposes' for which state power can be employed in the domestic economy.²⁸ In other words, it is through political and social processes in a site for governance, that social compacts are formed or consensus is reached on how far the State ought to interfere with the market in the domestic economy and for what reasons. Embedded liberalism thus denotes a state of affairs where economic governance is properly embedded in the social and political order. This Article suggests that this idea of

²⁵ JG RUGGIE, *Taking Embedded Liberalism Global: The Corporate Connection*, in D Held and M Koenig-Archibugi (eds), *TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE* 94 (2003).

²⁶ JG Ruggie, *supra* note 3. See also S SAPRA, *Ideas of Embedded Liberalism and Current and Future Challenges for the WTO*, in *WTO LAW AND PROCESS: PROCEEDINGS OF THE 2005 AND 2006 ANNUAL WTO CONFERENCES* (2007); and S SAPRA *Domestic Politics and the Search for a New Social Purpose of Governance for the WTO: A Proposal for a Declaration on Domestic Consultation*, in DEBRA STEGER (ed.) *REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY*, forthcoming in 2009.

²⁷ This sense of 'embedded liberalism' is relevant for the current debates about governance, constitutionalisation, and legitimacy that are taking place as part of the larger debates about the future of the WTO.

²⁸ JG Ruggie, *supra* note 3 at 386.

identifying the legitimate social purpose of governance for the state in accordance with a society's collective reality, holds much significance for reform projects in developing countries, and in particular, for democracies like India.

The significance of the idea of embedded liberalism for reform in India, becomes clearer once we clarify what reform means. Lewis and Litai define the concept of reform as a 'deliberate and managed process of change'.²⁹ Samuel Huntington differentiates between reform and what he calls 'consolidation'.³⁰ The difference between the two lies in the direction of change. For Huntington, a reform is a change 'in the direction of greater social, economic, or political equality, a broadening of participation in society and polity'.³¹ Similarly, Hirschman emphasises that in reform the: power of hitherto privileged groups is curbed and the economic position and social status of underprivileged groups is correspondingly improved.³² Thus there are two kinds of changes in reform, an increase in substantive equality and an improvement in procedural or participatory equality. Since the early 1990s, Indian society has commenced on its own Great Transformation. India's high economic growth rate and growing economic clout are the most visible aspects of this transformation for the outside world. There is however, a dark side to this ongoing transformation.

A common theme in commentary upon Indian growth tells a story of 'two Indias'.³³ This story seeks to remind both Indian reformers and outside observers that Indian economic reforms and growth are not necessarily

²⁹ JW LEWIS and L XUE, *Social Change and Political Reform in China: Meeting the Challenge of Success*, (2003) 176 THE CHINA QUARTERLY 926, 926.

³⁰ Huntington, *supra* note 1 at 344; Huntington also distinguishes between reform and revolution. While the former refers to changes to leadership, policy, and political institutions, which are 'limited in scope and moderate in speed'; the latter involves 'rapid, complete, and violent change in values, social structure, political institutions, governmental policies, and social-political leadership'.

³¹ Huntington, *supra* note 1 at 344.

³² See AO HIRSCHMAN, *Journeys Towards Progress* 267 (1963).

³³ See S ACHARYA, *CAN INDIA GROW WITHOUT BHARAT?* (2007). A Google search of 'two Indias' brings up countless stories on the growing disparity between the winners and the losers of economic reforms in India. See *A Tale of Two Indias*, available at <http://www.guardian.co.uk/india/story/0,,1746948,00.html>; *Do not Reinforce Two Indias*, available at http://www.businessweek.com/globalbiz/content/nov2006/gb20061102_285971.htm; *A Tale of Two Indias*, available at <http://www.time.com/time/asia/covers/501041206/story.html>.

benefiting the vast majority of poor Indians who might become the 'losers' of economic reform programs and globalisation led growth.³⁴ It is suggested that the ideas of the Great Transformation and embedded liberalism can be useful in generating a discourse about whether the changes being wrought by Indian reforms, are resulting in true 'reform' in the sense in which Huntington and Hirschman define this concept.

In a poor democracy like India, growing economic inequality between social groups not only threatens the future of the economic reform programs,³⁵ but also provides seed for social conflict and possible violent disruption of the emerging new order. Indian reformers therefore need to ensure that growth and its benefits are more fairly distributed across society. The Article suggests that IEL discourse can help conceptualise the objectives of the Indian reform project in a more inclusive manner. For instance, the conceptualisation of reform and development in India as a Great Transformation, positions us at the top of the objectives pyramid and provides an overarching perspective downwards to more specific objectives and agendas. More specifically, it forces agents guiding India's economic reforms programs to acknowledge, respond to and include alternative values from the wider reform discourses in reform agendas. These alternative values of equity, social justice, human rights, solidarity, constitutional guarantees, democracy, pluralism, and egalitarianism can be found in various other existing discourses. Similarly, Indian reformers could more consciously adopt the goal of forging an embedded liberalism compromise for India that embeds economic governance in India within a fair and just social and political order. As part of its Great Transformation, India too must arrive at an embedded liberalism bargain that creates a stable, balanced, and socially legitimate and just order. Indeed, the very negotiation of this social compromise is a crucial part of the embedding process and requires an inclusive and participatory discourse which not only serves to legitimate outcomes (as a strategy of political mobilisation) but helps craft socially acceptable outcomes in the first place. State–society

³⁴ According to the latest census of the Government of India conducted in 2001, 300 million Indians subsist on less than \$1 a day and are unable to access the opportunities offered by economic growth.

³⁵ A recent example is the defeat of the BJP in the 2004 Indian parliamentary elections which they sought to fight on a slogan of 'India Shining'.

relations in India are in a state of flux. New objectives of reform and governance in India must themselves be negotiated through participatory political, social and economic processes. An appropriate balance between the market and political authority that respects politically legitimate values and objectives for the social purpose of governance in India must be crafted. Crafting such a compromise will require mediation through the politico-legal structures and values embodied in the Indian Constitution.³⁶ In using the term embedding liberalism, this Article does not imply a greater orientation towards market determined outcomes. Instead, the idea of embedded liberalism is useful because it enables a discourse on how 'governance' or political authority acquires 'purpose' and thereby 'legitimacy' by virtue of its being embedded in the political, social and economic fabric of the site for governance. All stable and legitimate forms of economic governance must necessarily be well embedded in a democratic society. Embedding liberalism in India would require that the scope of economic governance that is eventually negotiated democratically, satisfies social and political constituencies and reflects and accommodates substantive objectives of social justice. An important contribution of IEL teaching and research to reform in India would therefore be to provide concepts which could frame the domestic discourse on reforms, and provide avenues for contestability of reform objectives and the governance structures that are being installed to deliver these objectives. Besides the ideas of The Great Transformation and embedded liberalism, the IEL epistemic community has been a fertile ground for the development of other ideas. Many of these (for example collective preferences, multi-functionality, subsidiarity, direct effect etc) would also have resonance for Indian reform discourses, concerned as they are with issues of allocation of power, and the negotiation and legitimation of substantive values for multi-layered governance projects. There are also other ways in which IEL teaching or research could contribute to reform. Broadly, we could consider the agendas

³⁶ These constitutional principles include substantive guarantees like the fundamental rights of all citizens and the Directive Principles of State Policy. The latter can be seen as a constitutional statement reflecting the constituent assembly's consensus on the social purpose of governance in India. Drafted in 1948, this statement on the social purpose of governance in India might require some updating. Reform of Indian governance must also respect procedural and substantive constitutional guarantees that include respect for Indian federalism, local self governance, and allocation of power between the executive, the legislature and the judiciary.

for IEL teaching in this regard under four functional but interconnected heads. These would be (i) the facilitation of appropriate discourses; (ii) the facilitation of stakeholder participation; (iii) the development of an inward looking focus; and (iv) the creation of appropriate issue linkages. Each of these is discussed further in the following section.

IV. Specific Implications for IEL Teaching

This Article has suggested that in order to define its new agendas, IEL teaching reflect upon its potential contribution to reform in India. In this final section, this Article attempts to identify the specific agendas that this might raise for IEL teaching in India. The four specific objectives discussed in this section are not unconnected.

A. Enabling a Mega-Discourse on Reform

IEL teaching could contribute towards creating a mega-discourse or a network of linked discourses on governance reform. Such discourse networks are required to frame, design and execute the Indian reform project. Why is such a mega-discourse necessary? The literature on the political economy of reform in India is instructive in this regard. It unequivocally underlines the urgent need for a broad-based and inclusive discourse in India that would support the case for economic reforms and help legitimate them.³⁷ The lack of broad-based support for liberalisation in India has been attributed to the government's failure to communicate the need for liberalisation.³⁸ It has been suggested that the market has not yet become ideologically embedded in India and that in fact the market is competing with other powerful political formations—lower caste assertiveness, Hindu nationalism, and issue-based social activism.³⁹ Commentators have accused the government of having

³⁷ See R JENKINS, *DEMOCRATIC POLITICS AND ECONOMIC REFORM IN INDIA* (1999); B DEBROY and R MUKHERJI, *INDIA: THE POLITICAL ECONOMY OF REFORMS* (2004); P BARDHAN, *THE POLITICAL ECONOMY OF REFORM IN INDIA* (1999); FR FRANKEL, *INDIA'S POLITICAL ECONOMY 1947–2004: THE GRADUAL REVOLUTION* (2005).

³⁸ B Debroy and R Mukherji, *id.* at 6.

³⁹ R JENKINS, *The Ideologically Embedded Market: Political Legitimation and Economic Reform in India*, in *MARKETS IN HISTORICAL CONTEXTS: IDEAS AND POLITICS IN THE MODERN WORLD* 206 (2004). He regrets that Indian reformers have failed to find 'an idiom through which to "normalize"', through political discourse, market orientated policies'.

implemented the first generation of Indian reforms by 'stealth'.⁴⁰ Jenkins describes how in implementing the first generation of reforms, political leaders sought to relegate reforms to a secondary political status, and failed to promote, 'at the levels of rhetoric and conviction, the democratic possibilities of various market principles - for instance, the market's ability to threaten status hierarchies.'⁴¹ Others have criticised the Indian reform program for being ad-hoc and for lacking a clear framework.⁴² Sachs et al note that: though Indian governments since 1991 have demonstrated a pragmatic, 'one-step-here and two-steps-there' approach towards economic reforms, a full-blown, systematic rationale for why India needs reforms has not been boldly articulated in politics.⁴³ They argue that: [a] discourse and language that can turn ideas about the economic consequences of markets into a political rhetoric of mass welfare are crying out for serious attention in India.⁴⁴ Commentators have argued that the absence of a clear and explicit written statement of a framework for the reforms has limited debate.⁴⁵ Further, the changing nature of the Indian state, also calls for new discourses within India's federal government structures that re-conceptualise the role and purpose of governance itself.⁴⁶ Weiner notes: The pursuit of market friendly policies by state governments requires a change in the mindset of state politicians, new skills within state bureaucracies, and a different kind of politics. Most fundamentally, it requires rethinking on the part of state politicians, activists in non-governmental organizations, journalists, and politically engaged citizens as to what is the proper role of government, and how and to what end

⁴⁰ P Bardhan, *supra* note 37 at 7; 'Like the stealth bomber, reform in India has largely avoided the political radar screen'. The literature differentiates between those reforms which were made early on and were relatively easy to implement (called the first generation reforms) and those still needed to complete the project, which will be more difficult to implement (the second generation reforms).

⁴¹ R Jenkins, *supra* note 39 at 206.

⁴² See D Nayar, *Democracy and Development: The Indian Experience*, Prem Bhatia Memorial Lecture at University of Delhi (2001).

⁴³ JD SACHS, A VARSHNEY and N BAJPAI, *Introduction*, in *INDIA IN THE ERA OF ECONOMIC REFORMS* 14 (1999).

⁴⁴ *Id.* at 24.

⁴⁵ See A Virmani, *A New Development Paradigm: Employment, Entitlement and Empowerment*, in B Debroy and R Mukherji, *supra* note 37 at 81.

⁴⁶ See M WEINER, *The Regionalization of Indian Politics and Its Implications for Economic Reform*, in JD Sachs, A Varshney and N Bajpai, *supra* note 43 at 292-3.

these limited resources should be employed.⁴⁷ These critiques of the manner in which economic reforms have been introduced by the Indian state and the linkages that exist between Indian democracy, federalism, and the changing Indian political economy explain why more discourses on reform are needed. The study of the interaction between the Indian political economy and IEL is only one of these multiple discourses. It is suggested that the IEL epistemic community in India is well placed to reach out to other discourses, and to identify the need for new (presently absent) discourses on reform. This Article is not suggesting that IEL teaching can step in and fill these lacunae by itself. However IEL scholarship is one of many discourses and social processes where interventions to this end could be initiated by interested actors, in this case, by IEL academics, researchers, and practitioners. Three specific contributions could be made. IEL teaching could generate new knowledge and discourses by fostering an inward looking focus on the curricula. It could create new issue linkages. And it could empower stakeholders by making available to them the relevant knowledge and new ideas to critically analyse the reform project and devise better solutions to problems. All this would engender more inclusive debates, which are necessary to build consensus on reform and to create legitimacy for actual programs.

B. Facilitation of Stakeholder Participation

India needs more IEL knowledge despite the perception that studying IEL or trade law in law school does not seem to offer increased career opportunities. Academics of course are not responsible for a lack of adequate opportunity to use particular knowledge and skill, yet they must, as part of their social teaching and research functions, help 'create' the space for the use of the knowledge they impart by drawing the necessary connections between such knowledge and the future career of the student, which in most cases would be located in the domestic Indian context. IEL courses in India must not be oriented towards preparing a student for a possible though extremely unlikely career at the WTO, or in a Brussels or Washington trade law firm, or at UNCTAD. Neither must they be directed only at preparing a student for a career at an Indian anti-dumping firm or IP firm, or in the handful of NGOs

⁴⁷ *Id.*

in India that are beginning to work on trade matters. Instead, IEL teaching in India must be made relevant for many more students who will end up working for the central, state or local governments, become entrepreneurs, join private business or industry as lawyers or managers, enter politics, or work for the media. Thus, teaching IEL in India should address not only issues pertaining to the supply of legal knowledge and capacity building, but it should also make the arguments for the usefulness of and demand for such knowledge. Accordingly, IEL educators will need to consider whether they are defining the 'demand' for IEL knowledge in sufficiently broad terms. Thus, the demand part of the argument would not only have to list the possible uses and benefits of such knowledge (for the student and for structural improvements to the domestic political economy), but would also have to engage in a critique of existing systems that govern the economy. Such critiques would need to establish that reform of existing governance systems and political economy structures would gain from perspectives provided by knowledge of IEL, both in making stronger the case for reform but also in imagining new systems and structures that are better able to deliver domestic policy goals. Indeed, the need for IEL knowledge will be increasingly felt within state government structures and within new institutions where it will become necessary to debate, create and implement trade policy at the state levels. More specifically, by broadening the availability of IEL knowledge and demonstrating its usefulness, IEL teaching and research will also contribute towards improvement of the trade policy making process in India by involving greater numbers of stakeholders.⁴⁸ Future planning for IEL teaching in India should thus consider a broader target audience than LLB students. IEL courses could be specifically designed for existing legal practitioners, policy makers (including legislators and bureaucrats), and other stakeholders drawn from business, journalists, consumers, industry associations, civil society, and non-governmental organisations.⁴⁹

⁴⁸ For discussion of the issues involving trade policy making reform in India, see J Sen, *The Importance of Institutionalizing? Structured Consultations in Evaluating Trade Proposals: Lessons from India's Experience and their Wider Relevance*, IPPG Briefing Paper No 11, March 2007, available at <http://www.ippg.org.uk/PDF/Importance%20of%20Institutionalising%2011.pdf>; J Sen, *Trade Policy Making in India: The Reality Below the Waterline*, available at <http://www.lse.ac.uk/collections/internationalTradePolicyUnit/events.htm>.

⁴⁹ A number of governance schools are being established in India. These schools could also offer IEL courses. The MIT School of Government (MIT-SOG), Pune-India, has demonstrated some initiative in this direction. See their website at <http://www.mitsog.com/index.htm>.

C. Development of an Inward Looking Focus

Courses on IEL in India must draw the necessary connections between IEL and its future evolution, and the current and future challenges for the political economy within India and Asia in general. Thus, while IEL courses in India will need to introduce the student to the WTO, ie what goes on in Geneva, they must lay an equal if not greater emphasis on IEL issues originating in Delhi, in other state capitals and in various institutions, structures and processes across the country, as well as in the broader region surrounding India. There exists a strong case for an inward looking focus for IEL courses. At present, IEL courses in India often do not consider the domestic and international issues that IEL raises from the perspective of the domestic and regional political economy. An inward focus would be useful not only because the domestic environment is where most students will locate their careers, but also because in not doing so, these courses miss out on big substantive questions of how IEL interacts with the domestic political economy of India and on the many fascinating research projects that these questions would offer. In addition, the study of IEL in its interaction with the domestic political economy would also generate the most useful kinds of research, discourse and knowledge-creation in the Indian context, which could contribute in a significant way to the overall national agenda and efforts for reform and development. A focus on domestic issues in the IEL classroom and research agenda will help in better identification of IEL related concerns for India. Thus, rather than treating the international treaties as their foundational material, and then going on to interpret and respond to Indian problems, the analysis would begin first with the definition of the problem in the light of Indian reform agendas and then move on to consider how IEL contributes to the solution. Looking inwards will enable Indian scholars to externalize and place Indian issues and concerns within the international discourse. Adoption of a deliberate inward looking stance will also result in bringing new issues into the IEL classroom. Many of these issues are not part of IEL curricula in India at present. This is because IEL courses focus on teaching the international law to students. I suggest that new IEL curricula be created that make the study of domestic reform the central concern of these courses. This will call for a more in-depth study of IEL than at present. After gaining familiarity with IEL, such courses will go on to analyse Indian reform issues in the light of this knowledge. Some examples of where this might

lead can be mentioned. IEL teaching could facilitate the study of comparative trade law (ie, internal trade law discourse from other jurisdictions) to identify and respond to Indian problems.⁵⁰ An inward looking focus would also help create momentum for the adoption of new reform projects like the creation of an internal market in India.⁵¹

D. Creation of Appropriate Issue Linkages

IEL teaching and research must also draw much needed issue linkages to facilitate more inclusive reform discourses. These linkages need to bring in substantive values and interests other than those of efficiency and growth into the discourse on economic reforms. These linkages must also highlight the link between reform of procedural mechanisms and the delivery of substantive reform outcomes. As Huntington notes, the reformer has to: balance changes in social-economic structure against changes in political institutions and to marry the one to the other in such a way that neither is hampered.⁵² Such new linkages between issues, discourses, delivery structures, and stakeholders are the first step towards the generation of new norms. Issue linkages are important to counter a myopic vision of the problem-space of reform. Once again we can find support for the need for issue linkages in the literature on economic reform in India. Economic reforms have speeded up changes to other constitutional, political, and social structures and institutions in India. In turn, the economic reform process is shaped by changes to these other structures. Thus, economic reform intensifies the need for faster reform of these other structures in order that these other structures can guide the economic reform process and agenda.⁵³ The official consensus in Indian policy circles that 'gradualism' is the acceptable model of economic reforms in India

⁵⁰ For instance, what lessons can Indian legal reformers learn from the study of non-direct effect of WTO treaties in the US and EC legal systems?

⁵¹ So far, the domestic market integration project has not moved on to the active reform agenda. For the need for such a project see A Virmani and S Mittal, *Domestic Market Integration*, ICRIER Working Paper No 183, July 2006.

⁵² SP Huntington, *supra* note 1 at 346; see also JW Lewis and L Xue, *supra* note 29 (arguing that similar linkage issues arise in the context of reform in China).

⁵³ On linkages between reform and Indian democracy, see PB Mehta, *The Burden of Democracy* 134 (2003); 'Indian democracy is extraordinarily non-deliberative, especially about policy implications that have a long-run impact,' also see A Varshney, *India's Democratic Challenge*, (2007) 86 FOREIGN AFFAIRS 93; on linkages between Indian federalism and reform, see *infra* note 54.

is also concerned with the need for these multiple and linked reform agendas to develop and evolve in tandem, with different structures and institutions both exerting restraint on the others and pulling along the others when necessary. The ability of the Indian executive to implement reforms is dependent upon the allocation of power within India's federal structures. Thus, reform of the external interface of the Indian economy has been relatively easier than the domestic reform agenda. The reform literature is increasingly focusing on the evolving relationship between Indian federal governance structures as a result of economic reforms and globalisation.⁵⁴ There is a clear trend towards devolution of power as well as functional governance autonomy from the centre towards the states. These changes to Indian governance structures and institutions call for new development strategies and the creation of new institutional links between Indian federal structures. Such changes also create new arenas for the interaction between domestic actors and processes with IEL. Thus, the attainment of substantive reform outcomes depends upon the creation of new institutions, which are necessary to negotiate as well as implement the reforms. IEL discourse, and other law reform discourse can play a role in these projects by creating issue linkages between the competing interests and values of stakeholders and between the establishment and reform of institutions and these substantive outcomes. It is suggested that IEL teaching and research help link the dissemination and development of IEL knowledge with broader reform issues. This will require development of new curricula that both examines and creates such links. This could involve developing curricula that package different reform discourses alongside the study of IEL.⁵⁵ As mentioned before, this might create new and useful knowledge and new discourses. Such packages would for instance, combine the teaching of Indian constitutional law with IEL; or teach the legal and policy issues of law and governance in the Indian context with IEL; or teach the constitutional and

⁵⁴ See M Weiner, *supra* note 46; R Jenkins, *supra* note 37; L BHANDARI AND A KHARE, *The Geography of the Post-1991 Indian Economy*, in B Debroy and R Mukherji, *supra* note 37; R Jenkins, *How Federalism Influences India's Domestic Politics of WTO Engagement (And is Itself Affected in the Process)*, (2003) 43 *ASIAN SURVEY* 598, 598–621.

⁵⁵ A somewhat similar suggestion is made by FA Gevurtz, *Teaching International Economic Law from a Corporate Perspective*, Ch 12 in this volume, where he suggests that that domestic corporate law be considered part of international economic law.

legal basis of federalism in India along with IEL. All of these packages would emphasise particular issue linkages. Another useful approach would be to teach a particular issue area of IEL in conjunction with domestic law on the same topic. Thus WTO law on subsidies could be taught along with the constitutional and legal regulation of subsidies in India with an emphasis on the allocation of power and responsibility between India's federal structures. The international regime for agricultural trade could be taught along with the law and regulation of agricultural production and trade in India. Links could also be made to domestic legal regimes for food security, public provision of nutrition, public procurement regimes, public distribution systems and their links to eradication of child labour and to the promotion of education for children including the girl child. The list could go on. The point being made is that curriculum design can play an important role in determining what gets defined as the problem-space and thus as the context for intervention in classroom discourse.⁵⁶ This discourse will then filter out from the classroom into other discourses including research discourses, political discourses, media discourses and eventually policy discourses. Such packaging or grouping of IEL knowledge with other discourses will introduce new issues onto the IEL teaching agenda. Thus the issue of how trade policy is or ought to be made in India will raise constitutional law issues. For example, issues relating to the allocation and exercise of trade policy making power, would include discussion of federal structures, parliamentary oversight of treaty making and implementation, and the judicial review of trade policy. Substantive issues concerning the impact of trade policy making on the fundamental rights guaranteed under the Constitution and the social contract embedded in the Constitution in the Directive Principles of State Policy would also arise. Discussions on reform of trade policy making could also take place in a law and governance reform context. The creation of issue linkages might require new IEL courses aimed at different constituencies. Doctoral and other research on such new issue linkages could be encouraged. This section presents very preliminary thoughts on the kinds of issue linkages that could be explored in new IEL curricula. As stated before, these ideas would need to find their concrete shape in specific contexts of curricula design projects.

⁵⁶ See D Scott, *supra* note 5.

V. Conclusion

In asking what would be new agendas for IEL teaching, this Article asks the question: Why teach more IEL in India? An answer must address how IEL courses can be made more useful, not only for the students themselves, but also for their contribution towards the role that academics, lawyers and other epistemic communities need to play in the political, economic and social evolution that is accelerating in India. This Article suggests that IEL academics look for their future agendas with an eye on the broader discourses on reform in India. This will require drawing connections between the international law governing economic order and the project of creating a new domestic economic order. The project of domestic economic reform cannot be divorced from social and political reform. This Article suggests that IEL discourse in India can help to connect these projects as the Indian polity attempts to negotiate a new social purpose of governance in India in its quest for a domestic compromise of embedded liberalism. This Article has described a very ambitious future agenda for IEL teaching in India. It would be valid to question to what extent are these ideas feasible given the squeeze on resources and that other branches of law would no doubt present their own claims for a greater presence on law degree courses. Nevertheless, it is important for academic disciplines to reflect upon their social and political role in a developing society. All the suggestions made in this Article will require time and commitment by academics to the development of new courses, curricula and textbooks that use Indian problems, examples, statistics, case-studies, and that incorporate the terms of the reform debates in India. And finally, it is important to note that the new agendas for IEL teaching that this Article describes as relevant for India, would also be relevant for other similarly situated countries. Building capacity in IEL knowledge is important for many other developing and least-developed economies. These countries too face similar challenges of development, growth, and reform, and they too must pay much more attention to IEL teaching.