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Towards a human rights mechanism in South Asia

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SOUTH Asian countries share cultural, political, economic and legal commonalities. Except Afghanistan and Nepal, all south Asian countries share a common history of colonial exploitation. South Asia has a rich diversity of cultures, religions and ethnicities and nurtured pluralist societies. However, the South Asian States also share commonalities in human rights violation. In South Asia, the vast majority of people live under conditions of extreme poverty. Disappearances, extra-judicial killings, custodial torture, cross-fire and preventive detention as counter-terrorism strategies of states, suppression of freedom of expression, and freedom of association are common human rights problems in the South Asian region. Human trafficking, problems of refugees and internally displaced persons, border killing pose great challenges to the South Asian nations. Terrorism, religious extremism and communal violence are also major threats to peace, democratic development and security in South Asia. In numerous instances, states have allowed impunity for law-enforcing agencies for human rights violations. Discriminatory state laws and policies have marginalized minorities in many South Asian countries. Conflicts within countries have led to vast numbers of internally displaced persons and refugees.

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All these above factors underpin the necessity of finding of a regional approach and framework through which these common human rights problems can be addressed and remedied. Given the cultural homogeneity and commonalities in human rights problems, time cannot be more ripe for the establishment of a regional mechanism for protection and promotion of human rights in South Asia.

The formation of SAARC in 1985 raised strong hopes among people that it would lead to greater unity, economic development and loosening of artificial boundaries. But SAARC have miserably failed to achieve its objectives in 25 years of its journey. The SAARC is yet to rise above the 'statist' perspective and grow itself as a strong and dynamic regional model for economic development. SAARC remains dysfunctional due to regional mistrusts, primacy of political and security issues over social and human rights issues and long-standing dispute between India and Pakistan. One may wonder about the relevance of establishment human rights mechanism in South Asia, which is deeply divided on many political issues that makes greater economic integration a far cry. However, it should be remembered that a regional mechanism on human rights can exist independent of regional organizations of economic integration. Success of European system of human rights, Inter-American system of human rights, and African system of human rights bears testimony to the assertion of this fact.

Human rights implementation mechanisms can be conveniently grouped into three categories: national, regional and international. It is often, but rightly said that it is the national protection system that is most important when it comes to human rights protection. But the establishment of regional human rights mechanism is often justified by the need to give greater attention to the specific problems of human rights in different regions of the world, and to take adequate measures to address them. Regional instruments are felt to be an appropriate complement to the international and national human rights systems. A regional mechanism is needed to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds. The regional framework of human rights can help overcome procedural and institutional weaknesses of national mechanisms, and build a regional jurisprudence on human rights.

As mentioned above, the regional mechanisms have been established in Europe, America and Africa and are contributing to protection and promotion of human rights, albeit, in varying degree. The common feature of these regional mechanisms is that they review the human rights situation in States within the region and allow individuals, who are victims of human rights violation, to seek redress in human rights court and other mechanisms. They afford remedies in the absence of national remedies or where the national mechanisms are inadequate or do not provide the necessary redress.

But there is no such mechanism in the Asian region. Lack of political will, lack of homogeneity, the geographical complexity and vastness of the region, different historical backgrounds of states hindered the progress in the quest for a human rights mechanism in Asia. The difficulty of creating a single regional human rights mechanism across such an expansive and varied geographical region may be the primary reason why human rights mechanism is possible only at the sub-regional level. Such sub-regional mechanisms of human rights already exist in the framework of the ASEAN and Arab League.

A similar sub-regional mechanism on human rights can be established for the South Asian States. In fact, most of the constitutions of South Asian countries have incorporated human rights as fundamental rights. There is a well developed and growing body of jurisprudence on constitutional rights in South Asia. Many South Asian countries have ratified or acceded to human rights treaties, though the present state of compliance by South Asian countries with such international human rights standards is far from satisfactory. Implementation of human rights norms in South Asian states is half-hearted as some South Asian countries have not ratified optional protocols to human rights treaties. Furthermore, most of the South Asian nations made reservations to all most every instrument of human rights they have ratified in one form or another, which effectively excludes accountability of states to implement human rights at the international level. At the national level, many South Asian countries have established national human rights commission. Among eight South Asian counties, five countries have National Human Rights Institutions, namely Afghanistan, Bangladesh, India, Nepal, Maldives and Sri Lanka. However, due to lack of political willingness, many of these National Human Rights Institutions are not performing well.

The SAARC Charter does not mention about human rights. But, in 2002, SAARC has adopted two regional treaties which have many implications on enjoyment of human rights: the SAARC Convention on Preventing and Combating Trafficking in Women and Children and the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. In 2004, SAARC adopted the SAARC Social Charter, which impacts on many economic, social and cultural rights. Social development remains a central element in the SAARC Social Charter. It is committed to eradicate poverty, improve health services, foster educational access, and promote the status of women and children. SAARC Food Security Reserve is important initiative to address the specific problem of food security. In 2011, the SAARC countries have adopted the SAARC Charter of Democracy with a view to protecting the democracies in the region from extra-constitutional takeovers. The SAARC Convention on Cooperation on Environment addresses the issue of climate change impacting on human rights and sustainable development. Adoption of these regional instruments and initiatives clearly underscore the necessity of moving towards processes that would facilitate the establishment of a sub-regional human rights mechanism in South Asia. There are many initiatives and consultations at the civil society level about the establishment of sub-regional mechanism in South Asia.

A specific Charter on human rights should be elaborated and adopted at the inter-governmental level to create a regional mechanism in South Asia. Such Charter should recognize and incorporate human rights standards enshrined in global human rights treaties. As an institutional mechanism, a South Asian Human Rights Commission can be proposed and included in the Charter. The proposed South Asian Human Rights Commission should have both protective and promotional mandate on human rights. The functions of the proposed Commission should be: to promote human rights, to collect information about human rights violation, undertake studies and research, to cooperate with national institutions of human rights of South Asian countries, ensure the protection of human rights, monitor adherence and compliance of South Asian countries with human rights treaties and interpret the provisions of the proposed Charter.

The proposed South Commission should be equipped with complaint mechanism like other regional mechanisms so that it can deliver concrete remedies to the individual victim of violation of human rights. It should also have advisory and investigation power. While the proposed Charter on human rights should address the specific needs and concerns of South Asian region, it should be consistent with international standard. It should not deviate from universal human rights norm in the pretext of cultural relativism and regional peculiarities.

A regional mechanism in South Asia can address common human rights issues and concerns and provide remedies for cross-border human rights violation. Question may arise about usefulness of such mechanism in South Asia where national mechanisms are still ill-equipped. It should be remembered that a regional mechanism will play the role of subsidiary in addressing existing gaps and can create certain norm and procedure on human rights. While regional mechanism can not be substitute of national mechanism, it can act as an additional means of protecting human rights in the region. Establishment of such a mechanism can lead to greater harmonization and unification of human rights laws of the region, which can eventually contribute much towards the goal of South Asian cooperation. A strong political will and commitment is essential to develop such a sub-regional mechanism that can facilitate monitoring adherence and implementation of human rights treaties, enhance accountability of the States and promote human rights in South Asia.

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LEGAL EDUCATION

Critical approach to legal study: The phases and fusion(s)

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THIS process of furnishing suggestion connected by "reasoned conviction" relates intrinsically to the idea of legal interpretation. Passing the phase of legal analysis alongside factual analysis involves the learners to carefully read the legislation and logically work to understand the hidden assumption of it. Thus at this stage, it may be unnecessary to talk of the development of interpretative capacity in addition to or in isolation from the required thesis of these two phases.

For the purpose of critical legal learning, it will rather be important to emphasize another independent phase which we would call "micro-issue analysis." Using it as a slightly modified taxonomy, we practically envision the cultivation of "interpretative ethics" into the essence of legal learning. The jurisprudential discourse of interpretative ethics differs virtually from the mere interpretative technique (which we think to be exercised in the previous two phases) in view of the fact that the former takes us a long way beyond the discipline of law, legal method and studying law.

"The life of law has not been logic; it has been experience"-says the great judge, Oliver W. Holmes. It is since the truth, legal education cannot be confined to address the theoretical or logical study of law alone. Practical life is much more complicated than the theoretical orientation of law in society and state. Thus in addition to mere logical study, the critical legal education requires another dimension, that is, the "reflection" of legal knowledge to the fragmented contexts of real life dynamics. By subjecting the learning to analysis based on comparing it with the experience of practice, the critical learners should go for micro-issue analysis.

The micro-issue analysis, which we would like to use as a corollary concept of interpretative ethics, is the final, and perhaps the more crucial phase of critical legal learning. "Law has long been thought worth studying", as Cotterrell goes to say, "for its intrinsic philosophic or social interest and importance, which relates to but extends beyond its immediate instrumental value or professional relevance." (The Politics of Jurisprudence, p, 1-2) Here the point lies that the legal learners should critically address micro-issue relating to the law as an institution, evaluating law in the light of reforming goals, underpinning ideologies and prevailing attitude towards legal philosophy.

The micro-issue analysis requires the learners always asking the sociological, moral or religious contention in regard to particular legal relation. At this phase, the critical legal learners thus need to be aware of the diversity of values and behavior. In addition, they need to be capable of envisioning alternative and more productive ways of organizing the legal thoughts in order to make them fit with current notions of social reality. The appreciation of unfolding political narratives, what Brookfield described as "becoming politically literate" (Developing Critical Thinkers, 1987, p, 14) must also come under the concern of critical legal learners.

Law's interaction with morals, religion,


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justice and ethics is thought to be concentrated in this phase. Thus it provides an "infinite enterprise" for the law students to go for searching the truth of legal text in the time. Going beyond the linguistic (text-based) approach, the critical learner should seek to develop new ways of reading law in a "democracy and right-oriented genre." Or in other words, they should always search for a "normative coherence to explain how laws interact, in pursuit of the key to reasoning." This lesson will serve the major purpose of micro-issue analysis by keeping its faith with the spirit of interpretative ethics.

In concluding this write-up, we will now turn into a more radical consideration by examining what critical approach to legal learning actually offers for the learners. In the foregoing discussion, we have identified three interlocking phases legal analysis, factual analysis and the micro-issue analysis as vital to develop critical approach to the legal study. It is almost clear that by passing through all these phases, the learners of law will be supposed not to confine his understanding only within the sphere of particular law and legal assumption; they will rather need to wander into the infinite structure of the legal enterprise as a whole.

Putting the study of law at the focal point, the critical approach to legal study offers a "peripheral prospect/project" on the way of looking at the law. It [critical legal learning] is therefore, not a misnomer so far as it matters more as an analytical attitudean attitude of how we should determine the dream of law in the dominion of lifeor an attitude of how we should think of law and life alike

Law being the medium of social construction requires its learners to continue what Roscoe Pound calls "efficacious social engineering" (Introduction to the Philosophy of Law, 47) On the other hand, law being the artefact (what Hegel wants to see) requires the learners' reflection on the sense of humanity and modern rationality. So the learning of law should naturally be complexas complex as understanding the layers Sophocles' Oedipus; should it be necessarily mysterious as mysterious as searching for the "holy grail."

In reality such complexity or mystery cannot, however, create a "roadblock in the run way" of legal education. There is, of course, a hope which Sharon Hanson makes us recall:

"Legal study and intellectual discipline come with a cost. It is often a costly struggle to reach a place of understanding. However, to demonstrate a good level of competency in legal study is within the grasp of everyone." ENDED.

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