

Globalization, Asia and Emerging Challenges of Law

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INTRODUCTION:

Globalization today is viewed as a '21st Century phenomenon' and again viewed as one that of 'trade and commerce'. It is also read as the 'legal regime' required by 'international treaties' signed by sovereign Nation States. Hence, it is treated as a contemporary 'concept' with 'futuristic implications'. The other facets of the legal regimes of 'Nation States' of the world including Asia are taken for granted as part of the 'governance process'. If one takes a different view and analysis the above premise is questionable in its fundamental construct. I would argue that the first wave of Globalization is that of the construct of the law itself and its working in the Asian countries. -It is a construct, which was exported as part of the colonial design and implemented, in various colonized societies. The fundamentals were taken from Roman and Greek philosophers, developed by the jurists of the western powers and inserted in to the body politic of various Asian societies. It also decimated the indigenous jurisprudence of justice on the name of civilizing the 'uncivilized' societies. With the phenomenon of independence, many Asian societies, which have emerged as new 'Nation States', adopted them as their 'legal systems' as they had limited choice. Hence, what is stated as 'Globalization' is a second wave of modifying or re-modeling the existing legal regimes in the facets of trade and commerce, human rights, environmentalism, feminism and so on and so forth.

THE TWO WAVES OF GLOBALIZATION OF LAW:

What are the implications of the two waves of globalization - one which has rooted itself as a 'superior paradigm' which is fundamental to the 'democracy' as advocated by the west --of which United States spearheads the movement and the second impending one requiring changes for future international governance based on the first model or wave as the correct construct.

In the first place the existing 'legal structures' modeled on 'common law' principles in the spheres of commerce, criminal justice, rule of law, international contracts, banking, have been adopted by many Asian countries and worked with in the 'Sovereign' principle. The history of colonialism and its impact on the economy, politics, society and culture has been relegated to 'history books'. Along with that the entire 'jurisprudence' of law and practice in the Asian societies has also been given a farewell over the import of the 'western jurisprudence' of law. What is prescribed today as of fair competition, objective standards and equal share on global concerns of the future are based on such jurisprudence. The modern notion of 'rule of law' and the impending 'globalized legal regime' is thus justified as a fair one to be adopted by all 'sovereign nations' for future governance and to move forward to the second stage. It sounds sensible if one does not question the first wave of 'globalization' - colonization and its framework through the legal structure. If one questions such premise the logic of the second wave of 'globalization' will have different *story* to tell.

The modern legal structure imported from the west at the core has a development agenda, which is in conflict with the cultural ethos of the Asian societies. It has the 'individual' at the centre, 'private property' as a corner stone and 'western secularism' as fundamental principles. It is in variance with the Asian societies. Asian societies have 'community' at the center, 'commons' as a corner stone and 'religion as a 'way of life' as its fundamental principles. This has brought the conflicts in working of the 'legal structure'. In fact the many failures of the working of the 'legal system' in Asian societies have to do with this fundamental flaw of the structure which is quite alien to the ethos of these societies.

To illustrate, in the Indian context, the society always believed and still believes '*dharma*' as a higher concept than the 'Law', which regulates human behaviour. In such context, the 'legal system' moulded in the western jurisprudence is quite alien in its construct, operation and outcome to the common man. To quote Justice Krishna Iyer, an eminent jurist of India,

if we ask the lawmen, 'what is law?' the answer could be 'not justice' and if we ask 'what is justice?' radical humanists answer: 'not law', This shows the crisis that grips our times and makes many groups-the angry young, the neglected old, the exploited many and the thinking few -question: what is law, if it is not justice? why is law not

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dead if it upholds injustice?' From these basic interrogations flames forth, as from the burning embers of the Old Order, a New Order based on a New Jurisprudence-socially relevant and purposive.

THE INDIGENOUS AND IMPORTED LEGAL REGIMES:

The Asian societies have their traditional justice delivery systems, the Panchayat system in India, the Adat laws of Indonesia, the Confucian tradition of justice delivery system in China etc. were there for centuries and governed these societies. Yet their efficacy and suitability were never researched and compared to the existing 'legal systems'. The second wave of globalization advocated is based on the first wave to guarantee market economics and individual right to property to further International Trade and Commerce.

Any critical analysis of the globalization of legal regime of the 21st century will not be possible if one takes it for granted the first wave of globalization as suitable one. It is complex and one may argue what is the need that we have already adopted the common law system in many Asian countries. The adoption of these systems has a lot to do with situations of 'freedom of these societies' and is not immune from audit. History is not a linear path of evolution. It needs to be corrected and if necessary to be rewritten, if the prescription does not cure the disease, or at times if the prescription worsens the malaise. We have to cut the shoe to fit the feet and not the other way.

AUDITING THE GLOBALIZATION OF LEGAL REGIMES:

In such context, one need to audit the logic of the 'first wave of globalization' which I would like to call it as the 'Constitutionalism' or 'principle of rule of law' and the 'second wave of globalization' which I would call 'emerging International legal regimes'.

A. On the first wave of globalization the following broad issues need to be answered:

1. What should be the spirit and dynamics of 'Constitutionalism' in addressing the issues of 'social justice'?
2. What is the spirit and dynamics of 'Constitutionalism' on the issues of 'rights of the communities'?
3. How does the issue of 'economic redistribution' treated in the dynamics of 'Modern constitutionalism'?

B. On the 'second wave of globalization' the following issues need to be addressed:

1. Are all sovereign States to considered 'equal' players in the new game of world economics and politics?
2. Should the past (colonialism and economic depravity) be conveniently detached from the 'future agenda' and take the current *status quo* as 'given' to move forward the international regimes on trade/commerce/environment and other issues?
3. What is the answer to future issues- globalization or harmonization or amelioration?

I wish to place the following personal propositions on the above issues for current and future deliberations:

A.I. On the issue of spirit and dynamics of 'Constitutionalism' in addressing the issues of 'social justice':

The common law system and civil law system places its premium on meritocracy and does not address issues of stratified communities of various sociological orders/disorders of the past Also compounded are the issues of multiethnic communities who have not found justice in the dispensation of the 'modern constitutional-rule of law' dispensation. There are attempts like in the Indian context to redress the issues yet it is far from satisfactory results. The moot point here is the inability of the 'meritocracy' driven 'rule of law' to correct imbalances within the societies.

A.2. On the spirit and dynamics of Constitutionalism on the 'rights of the communities':

It does not have constructive models of community ownership and tends to lead to the concept of 'Law' as superior to all and which comes into action by adult franchise and majority led governance. This conceptually chokes the space for the 'indigenous communities' and at the best places them in the mercy of the 'majority principle'. This issue needs serious debate in the existing paradigm of 'modern democracy and electoral process'.

A3. On the issue of economic redistribution:

The existing paradigm of 'Constitutionalism' with meritocracy as its instrument places a lopsided importance on safeguard of property and economic value creation of individuals and will place the marginalized at subsistence. As the noted economist Amartya Sen points out- *"the model of a development, which is equitable in, a fair way is sidelined by a model of growth which boasts of more millionaires in a society and positioned as a developed society"*. The issue of economic redistribution will find a stumbling block in the current 'rule of law' paradigm,

which is aimed at consolidating the *status quo* and as instrument assuring the investors with in the society as well as those who want to invest from abroad. This economic redistribution assumes critical importance for Asian societies with huge population and high poverty index.

B.1. On the second wave of globalization of 'new trade and economic order':

As discussed earlier the second wave of Globalization which has manifested itself in WTO and other trade related discussions, extends the earlier 'rule of law' justification from national to international relations. It presumes that rules of the game are transparent and equal to be played by various nation states. It presumes that nation-states are equal in the concept of 'sovereignty' are also equal in their capacities to adopt the emerging trade regimes. The reality is for all to assess. This is a race where the rules are common for the 'disabled' as well as those who are 'enabled'. Many Asian nation states are moving in the direction without much choice or without any informed debate or consent. This needs a serious debate and correction and a dialogue with the votaries of Globalization.

B.2. On the 'future agenda' without the 'baggage of the past':

The developed and underdeveloped debate is detached from the past. Those who are 'enabled' need to retrospect, how it came about and at whose cost. One may argue enough water has flown to discuss the past. But the reality is - failure of socialist experiments is not the victory of capitalist adventures. The issues remain the same and the past cannot be wished away. Even a cardinal who is in the race for the 'new Pope' calls for the write off of the third world debt. Even on the 'environmental regimes' debated it has been an established fact that there is a refusal to take responsibility to clean up the past acts by the developed nations. Yet an agenda of 'Globalization' is pursued without taking the past into account. It is convenient to the 'enabled societies'. Not so for the 'underdeveloped societies' where the past is the root of the 'underdevelopment' and needs to be mitigated which is a moral responsibility on the part of the developed countries.

B.3. On the question of Globalization:

Globalization is often viewed as a model thrust upon other models. Any Globalization agenda can backfire after a temporary illusion of stability. We, in India, believe in the concept of **Unity in Diversity**. The same applies to the World too. If not Globalization, what could be the alternatives? One is 'Harmonization', -where common concerns could be addressed by harmonizing the legal regimes to work together. Issues of criminal acts like terrorism, white collar crimes like money laundering, social ills like trafficking of women and children, International contracts enabling e-commerce, telecommunication, aviation, tourism etc. Other alternative being 'Amelioration' of issues like the third world debt, promoting environmental issues where compensation and development agenda of poorer nations to be taken into account.

CONCLUSION:

Asia, a vibrant diaspora of societies, never indulged in colonization, has been the seat of philosophy, religion, culture and tradition. Yet it was a victim to colonization and its attendant problems. The legal system and governance is a borrowed one and yet worked to solve the issues. In this context, the Globalization advocated and promoted today lacks the understanding of the core values of these societies. Whether it is deliberate or myopic, the results and the problems will be the same. This needs serious and sustained dialogue among the jurists of Asia and its outcome to be starting point of a dialogue with other votaries of the 'Globalization' of the coming years. Let me conclude with the thoughts of Mahatma Gandhi, who said that "*let us keep our doors and windows open for all the winds to come in and at the same time keep our feet firm from being swept away*".