Towards a ‘South-Asian’ Approach to International Law - Part II

By:

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September 18, 2020

Part II

Introduction

In the first part of this post, we had discussed the nine compulsory courses being taught in the LL.M. programme of the South Asian University. We continue our analysis here with the ten optional subjects offered by SAU. We follow the same four parameters we used in the first part.

Conflict of Laws Recommended books for the course of Conflict of Laws include a few works by South-Asian scholars. These are Lakshmi Jhambolkar’s *Select Essays on Private International Law*, V.C. Govindaraj’s, *The Conflict of Laws in India , Inter-Territorial and Inter-Personal Conflict*, Atul M Setalvad’s *Conflict of Laws* and Paras & Peeyushi Diwan, *Private International Law*. Perhaps the most South Asia centric book of the course is *Private International Law and South*

Asian States Practice by Sai Ramani and Stellina Jolly. One module of the course deals with the issues of jurisdiction and focuses specially on IPR related disputes. Readings of this module include one by Abdul Razak which is focused on Bangladesh (Judicial Interpretation of "Foreign Jurisdiction Clause" in Contract-Calls for Review: A Study in the Context of Bangladesh).

In the module on matrimonial issues, readings focused on South Asia are Prakash Shah's Inconvenient Marriages or What Happens When Ethnic Minorities Marry Trans Jurisdictionally according to their self-chosen norms, and Lakshmi Jhambolakr's Recognition of Foreign Divorce Decrees in India. In the module on children and family, South Asia centric works include Stellina Jolly's Inter-Country Child Abduction: An Explorative Analysis of Legal Standards and Judicial Construal's of India, Rose Wijeyesekera's chapter on Sri Lankan state practice and Sarmad Ali's chapter on Pakistan's state practice in the book *Private International Law and South Asian States Practice*.

In the module on commercial transactions, Islamic practices are discussed. Reading on this issue is Elana Levi-Tawil's, East Meets West: Introducing Sharia Into the Rules Governing International Arbitrations the BCDR-AAA. Leading South-Asian cases like *Surya Vadanan v State of Tamil Nadu* and *Sabina Pandey v Pushkarraj Pandey* (2011) 3 NKP 387 (SC) are also discussed in this course.

International Criminal Law The penultimate module of this course deals with individual criminal responsibility in South Asia. Here, the discussion is primarily focused on South Asian experiences in dealing with grave crimes. Crimes committed during the civil war in Sri Lanka, the International Crimes Tribunal in Bangladesh, Truth and Reconciliation Commission in Nepal are discussed under this module. The last module of the course critically evaluates the International Criminal Justice System. South Asia centric readings of the course includes Reynolds and Xavier (The Dark Corners of the World: TWAIL and International Criminal Justice), and Latha Varadarajan (The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal).

Law of the Sea In the Module on 'Maritime Delimitation of Boundaries', South Asian cases like 'Bangladesh-Myanmar case ITLOS 2012', 'Bangladesh-India PCA Case 2014' etc. are discussed. The South Asia specific readings under this

module include reports of these two cases by D. H. Anderson (here and here). Similarly, under the Module on 'Deep Seabed Mining', SAARC countries' maritime legislation on deep seabed mining are discussed.

One of the Books recommended for the LOS course is R. P. Anand's *Origin and Development of the Law of the Sea*. While R. P. Anand is a well-known name in the field of general international law and particularly in LOS, most of the world is not aware of other writings by South Asians on LOS. Few such readings include ones by S. P. Jagota (Developments in the Law of the Sea between 1970 and 1998: A Historical Perspective), Satya N. Nandan (The Provisions on Straits Used for International Navigation in the 1982 United Nations Convention on the Law of the Sea).

Further, the readings on the module on history of LOS focus on the colonial origins of the subject. Readings under this module include C. H. Alexandrowicz (Freitas versus Grotius), Karl Zemanek (Was Hugo Grotius Really in Favour of the Freedom of the Seas?), Ileana M. Porras (Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *de Iure Praedae* - The Law of Prize and Booty, or on How to Distinguish Merchants from Pirates), Peter Borschberg (The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-ca. 1616), and Mark Somos Selden (*Mare Clausum - The*Secularisation of International Law and the Rise of Soft Imperialism).

International Refugee Law The introductory week of IRL has three readings by South Asian scholars. These are B. S. Chimni's International Refugee Law: A Reader and The Birth of a Discipline: From Refugee to Forced Migration Studies; and An Introduction to International Refugee Law by M. Rafiqul Islam and Md. Jahid Hossain Bhuiyan.

One week specifically discusses 'Regional Refugee Protection and Forced Migration Frameworks'. The Asian IRL instruments like AALCO 1966 Bangkok Principles on Status and Treatment of Refugees and 2006 AALCO Resolution on "Legal Identity and Statelessness" are also discussed.

Perhaps the most South Asia centric module of the course is 'Refugee

Protection in SAARC Region and TWAILERS and Refugees in the Global South and Asian Approach to International Refugee Law'. The module discusses the 2004 South Asia Declaration on Refugees. Recommended readings for this module include Balakrishnan Rajagopal (*International Law from Below. Development, Social Movements and Third World Resistance*), Nour Mohammad (*Protection of International Refugee under the Constitution of Bangladesh*), and Omprakash Mishra (ed.) (*Forced Migration in South Asia – Displacement, Human Rights, and Conflict Resolution*).

Other critical readings on IRL include Makau Mutua (*Standard Setting in Human Rights: Critique and Prognosis*), B. S. Chimni (Globalization, Humanitarianism, and the Erosion of Refugee Protection), Sandesh Sivakumaran (Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention), and Jolly & Ahmad (*Climate Refugees in South Asia, Protection Under International Legal Standards and State Practices in South Asia*).

Law and Justice in Globalising World This course looks at core international law concepts in a critical manner. It discusses the colonial past of IL. Most of the modules of this course are specific to third world. These modules are titled international law from a colonized past to a globalizing present; Global South, globalization and international law; old concepts in new contexts: permanent sovereignty over natural resources and the right to self-determination. Recommended books for the course includeCatherine Dauvergne (*Making People Illegal: What Globalization Means for Migration and Law*) and Santos, Boaventura de Sousa and Rodrıguez-Garavito (*Law and Globalization from Below: Towards a Cosmopolitan Legality*).

The course is introduced through works by B. S. Chimni (A Just World under Law: A View from the South), and David Kennedy (Turning to Market Democracy: A Tale of Two Architectures). Module on International law from a colonized past to a globalizing present includes reading by M. Koskenniemi (*The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960*), Mohsen Al Attar (Reframing the "Universality" of International Law in a Globalizing World), B. S. Chimni (Asian Civilisations and international Law), Matthew Craven (What Happened to Unequal Treaties? The Continuities of

Informal Empire), and Sundhya Pahuja (The Postcoloniality of International Law).

Module on Global South, globalization and international law has readings by Georges Abi-Saab (The Third World intellectual in praxis: confrontation, participation, or operation behind enemy lines?), and Walter D. Mignolo (The Global South and World Dis/Order). Module on old concepts in new contexts: permanent sovereignty over natural resources and the right to self-determination has readings by B. S. Chimni, (1998,) "The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation" *Indian Journal of International Law*, vol. 38, no. pp. 213-14, Yogesh Tyagi, (Permanent Sovereignty over Natural Resources), Vasuki Nesiah, (Placing International Law: White Spaces on a Map).

Other South Asia centric readings include Upendra Baxi (Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?), Seth Gordon (Indigenous rights in modern international law from a critical third world perspective), Ratna Kapur (The Tragedy of Victimisation Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics) and (Multi-Tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law), and Vasuki Nesiah (The Ground Beneath her Feet: Third World Feminisms).

International Investment Law The subject is introduced through the readings of Ranjan and Raju (Bilateral Investment Treaties and Indian Judiciary) and Prabhash Ranjan (India and Bilateral Investment Treaties – A Changing Landscape). Books on the course include M Sornarajah (The International Law on Foreign Investment).

Other South Asian readings of the course include Prabhash Ranjan (Most Favoured Nation Treatment Principle in Indian Bilateral Investment Treaties: A Case for Reform), Amit Kumar Sinha (Non Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries), and Prabhash Ranjan and Pushkar Anand (Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal).

South Asian cases like *Saipem Spa v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07 (Decision on Jurisdiction) and *White Industries Australia Limited v Republic of India*, Final Award UNCITRAL (30 November 2011) are discussed.

Law on Transnational Contract and Commercial Arbitration Week 5 of the course is titled 'The architecture of International Arbitration in South Asian nations'. This module discusses the arbitration legislations of the South Asian nations—Bangladesh, India, Nepal, Pakistan and Sri Lanka. Within week 8 of the Course, Applicable Substantive Law issues in the UNCITRAL Model Law are discussed. Article 27 of the Model Law and its presence within the arbitration laws of the South Asian region are discussed through analysis of Nepal Arbitration Act, 2055 (1999) and Pakistan Arbitration law.

Books for the course include P. C. Markanda (*Law Relating to Arbitration and Conciliation*). Readings focused on South Asia include Sai Ramani Garimella (Seat-Centric Arbitration – Decoding the Indian Law on the Choice of a Foreign Seat), Sai Ramani Garimella & Nizamuddin Siddiqui (Enforcement of Multi-tier Dispute Resolution Clauses: Contemporary Judicial Opinion), Justice Mian Saqib Nisar (International Arbitration in the Context of Globalization: A Pakistani Perspective). Cases like *Union of India v Videocon Industries Ltd.*, *Enercon (India) Limited & Ors. v Enercon GmbH & Anr.*, *C v D*, *Light Industries (Pvt.) Limited, through Chief Executive v Messrs ZSK STICKMASCHINEN GmbH through Attorney* (2009) CLD [Karachi] are discussed.

International Dispute Settlement The reading materials for IDS include books, articles, treaties, agreements and judgments. Almost every module has readings focused on South Asia. Due to the nature of this work (a blog-post), we have highlighted only a few of the above-mentioned readings. The reading reflected in this post have been selected on the basis of their relative invisibility in general international law textbooks. Further, cases already mentioned in other courses have been left out so as to make this blog more inclusive.

The course is introduced through the readings focused on South Asia, like Rodman R Bundy (Asian Perspective on Inter-State Litigation), and Emma Condon et al (*Resource Disputes in South Asia: Water Scarcity and the Potential*

for Interstate Conflict).

International instruments between or related to the South Asian states, like the Agreement on South Asian Free Trade Area, SAARC Arbitration Rules, The Indus Waters Treaty, Agreement between Sri Lanka and India on the Boundary in the Gulf of Mannar and the Bay of Bengal between the two Countries and Related Matters, 1976, Treaty Between the Government of the People's Republic of Bangladesh and the Government of the Republic of India on Sharing of the Ganga/Ganges Waters at Farakka, 1996, Agreement Between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of India for the Promotion and Protection of Investment, 1997, Agreement between the Government of India and the Government of the Islamic Republic of Pakistan on Bilateral Relations (Simla Agreement), 1972, Treaty of Commerce Between the Republic of India and the Royal Kingdom of Afghanistan, 1950, Treaty between His Majesty's Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali Barrage Including Sarada Barage, Tanakpur Barage, and Pancheshwar Project, Barrage, 1996, UN SC Resolution 1740 (United Nations Political Mission in Nepal), Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process, 28 April 2010, UNGA Res. 2790 (XXVI), United Nations assistance to East Pakistan refugees through the United Nations focal point and the United Nations humanitarian assistance to East Pakistan, 6 December 1971

Books and Articles on South Asia include Niranjan D Gulhati *Indus Water Treaty: An Exercise in International Mediation*, K V Raman (ed) (*Dispute Settlement Through the United Nations*), Rahmatullah Khan (eds) (*The International Tribunal for the Law of the Sea: Law and Practice*), Rama Mani (Peaceful Settlement of Disputes and Conflict Prevention), B G Ramcharan (*Humanitarian Good Offices in International Law*) Chapter VI: Case study: Humanitarian good offices in East Pakistan (Bangladesh), C F Amerasinghe (The Prawn Farm (AAPL) Arbitration), Ravindra Pratap (Provisional Measures and the *Enrica Lexie* Case), Anees Jillani (Recognition and Enforcement of Foreign Arbitral Awards in Pakistan), Aniruddha Rajput (The Necessity of "objective awareness" for "the existence of dispute"), K Savitri (The United Nations Charter Framework for Conflict Resolution: Procedures and Practices of Pacific Settlement of Disputes).

Cases discussed in the course include *Tethyan Copper v Pakistan Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, and *India – Anti-dumping Measures on Batteries from Bangladesh, Notification of Mutually Satisfactory Solution*.

Legal Interpretation The course on legal interpretation include a lot of South Asian judgments and legislations. Recommended books for the course include Ravindra Pratap, (*Interpretation of Statutes — A Reader*). South Asian legislations include Bangladesh's Right to Information Ordinance 2008, Constitution of India, Constitution of Sri Lanka, Doha Declaration on the TRIPS Agreement and Public Health, 2001, Annexes I to IV of Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), The 1951 agreement between the civil servants of India and Pakistan for the purposes of interpretation of the Radcliffe Award.

Judgment from South Asian courts or related to South Asian countries include *Kesavananda Bharati* v *State of Kerala*,*M. Azath S. Salley* v *Colombo Municipal Council and Others*, *The Municipal Council of Moratuwa and Others* v *Weerahennadige Shian Hiresh Fernando*, *Prof. Nurul Islam and Ors.* v *Government of the People's Republic of Bangladesh and Ors.*, Bangladesh Supreme Court Judgment of 7 February 2000, CONSTITUTION PETITION NO.1, 7,8, 10 and 12/2002, Judgment of the Supreme Court of Pakistan, dated 10 April 2002, and *Marshall Islands v India*, ICJ Judgment of 5 October 2016.

Conclusion

Much like our conclusion on the compulsory subjects, we conclude that the optional subjects being offered at SAU also have considerable number of readings that focus on South Asia. They also include the works of South Asian scholars and Third World scholars. All the optional courses offered at SAU address international issues of relevance to South Asia, in varying degrees. Discussions on general topics include special reference to South Asia in most of the courses. Thus, the LL.M. course at SAU is heralding in a South Asian approach to IL.

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