

The Heard, the Lived, the Negotiated and the Enforced: Normative Reflections on Undercurrents in South Asian Judicial Systems

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The present paper examines the dynamics of undercurrents that are decisive both in formulating and implementing legal rules in the South Asian context, identifies possible intersystemic interactions that might generate crosscurrents, vindicates the problem of normative vacuum presently existing in judicial systems, and justifies the necessity of normative adjudication procedure. The major undercurrents discussed are: 1) the heard, which denotes oral and written traditions that involve sruti, smriti, and sabda, 2) the lived that signifies traditionally followed unique patterns of living that significantly determine the identity of a specific society, 3) politically negotiated policies that claim democratic justifications, and 4) legally enforced rules that guide judicial systems. South Asian democratic societies, which are collectivist in nature, are much swayed by these undercurrents and judicial systems are not resistant to this force. Given that legal rules are largely derived from oral and written traditions that represent the idea of good conceived by the dominant group, it is hard to presume that the rules will safeguard everyone's interests. Likewise, a major share of the laws that are enforced is the offshoot of political negotiations which may not necessarily take any recourse to truth contents and normative justifications. Some of these laws might introduce prescriptions that are counterintuitive and morally blameworthy. Keeping the generic and holistic frame aside, at times the laws adopt an intrusive strategy which dictates on almost all matters such as what one should eat, what to wear, and what faith one should follow. The paper takes this problem quite seriously in analyzing the normative concerns over disputed judicial rules that are recently enacted. Furthermore, paying attention to ethnic, political, and religious foundations of law and morality, the paper discusses three modes of interaction, such as, competition, coercion and collaboration (Wallace, 1966), and identifies the emergence of judicial and ethnic activism when collaboration is absent. Among other things, the paper argues that a major reason for pendency of legal suits and poor performance of judiciary is the unavailability of a collaborative environment, and it inevitably causes a huge cost. Performance of judiciary may be measured in consideration to its (1) independence, (2) efficiency, viz. explicitly referring to unreasonable delays and case backlogs (3) accessibility, (4) accountability, and (5) effectiveness, i.e. the degree to which both legislation and judicial decisions are actually enforced (Staats et al, 2005) and, as the paper vindicates, these virtues take us to normative considerations. Finally, the paper suggests that the turn to substantive normative foundations appears to be the only available means to improve performance of judicial systems and to ensure fairness in enforcing justice.

References

Feldman, S. (ed.) 2000. *Law and Religion: A Critical Anthology*. New York University Press
Staats, J., et al. (2005). Measuring judicial performance in Latin America. *Latin American Politics and Societies* 47(4): 77-106

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Wallace, J.E. (1966). Law and Religion: Patterns of Intersystem Relationships, Review of Religious Research 7(3): 146-157