

COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA (2013). Edited by Sunil Khilnani, Vikram Raghavan and Aun K. Thiruvengadam. Oxford University Press, YMCA Library Building, 1 Jai Singh Road, New Delhi, India. Pp. xxii+401. Price Rs: 950/-.

IN ANY comparative analysis of law there is more emphasis on method than on a subject. This being true, comparative constitutional law is a process or a practice or rather a method used to explore different concepts of different constitutions. The increasing interest among the scholars in comparative constitutional law may be attributed to several factors such as the breakup of the Soviet Union, transformation of non-democratic regimes into proto-democratic or democratic nation-states particularly in Eastern and Central Europe. The resurgence of such comparison may also be ascribed to rapid globalization and international standardization of municipal law at least in the commercial arena.¹

While comparative law at large, in many areas, is still focusing on the study of different legal systems and rules, studies in comparative constitutional law lead to recognizing a body of international constitutional law. In this age of liberalization and globalization, several international standards have been evolved by synchronization of constitutional provisions of other countries. Though newer constitutions are largely influenced by other existing constitutions worldwide by borrowing or what Mark Tushnet describes 'Bricolage', many feel that the comparative constitutional law is only an academic exercise.

Some of the eminent philosophers were highly critical of the practice of borrowing. For example, Montesquieu and Hegel argued that a constitution represents a socio-economic and political system that is deeply embedded in a society. Montesquieu argued that the legal system of a particular country is a product of what suits to that nation and not what is a best law in another country.² Hegel in his book *Philosophy of Rights* states that constitution is a result of work of centuries developed by consciousness of the people of a particular country.³ Therefore, comparative study of constitutional law is of little value as the experience of one nation could not be used for other country which has its own culture and socio-

1 Sujit Choudhry, "Rethinking Comparative Constitutional Law: Multinational Democracies, Constitutional Amendment, and Secession" Available at: <http://www.enlsyn.gr/papers/w7/paper%20by%20sujit%20choudhry.pdf> (last visited on 28th Sep. 2013)

2 See, Anne M. Cohler *et al.* (trans. & eds.), Charles de Secondat, baron de Montesquieu, *The Spirit of The Laws* (1989).

3 See, T.M. Knox (trans.), Georg Wilhelm Friedrich Hegel, *The Philosophy of Right* (Oxford Univ. Press 1967).

economic and political problems peculiar to that nation.

However, the comparison of constitutions is not a new idea. Aristotle compared the constitutions by classifying them in his book *Politics* as early as 330 B.C. Thereafter, several attempts were made in this regard. The book under review *Comparative Constitutionalism in South Asia* is one such attempt. The editors in the introduction showcase various earlier efforts of comparative study on South Asian laws.

As the editors opine, economic integration of South Asia is crucial for the development of this region. However, apart from creation of SAARC in 1985 there have not been many notable efforts in exploring this region. This kind of neglect is also widely noticeable in the area of legal scholarship in developing comparative studies on the legal systems of the various countries in South Asia. This is ironic despite the fact that several constitutional similarities exist in this region in addition to having the colonial legacy of the common law system.

Comparison of constitutional law invariably involves comparison of constitutionalism. In a rudimentary sense, concept of constitutionalism is an idea of limited government. The political theories of John Locke explored this concept, which states that the power of the government can and should be limited. Therefore, the premise of constitutionalism is how to compel state authorities to observe limitations. This idea of limiting government power generates contradictions such as how a law which is created by the state could limit its power? Would it be possible to impose a self-regulation? If not, is it a vexatious attempt to have such a concept at all?

Many jurists think the idea of constitutionalism is embedded in constitution itself as constitution is described as the apex law. Meaningful limitation on the power of the government is possible if such constrains find favour in the constitution itself. But the notion of a living constitution may pose serious threats to such constitutional constrains as their interpretations may change in tandem with changing values and principles.

Though the title of book suggests the comparison of constitutionalism, discussion on what is constitutionalism, how to understand constitutionalism and the various aspects of constitutionalism are hardly discussed. Baxi briefly ignites such a debate in his chapter titled “Modeling Optimal Constitutional Design” by describing constitution as physics of power and domination and the constitutionalism as metaphysics of power and domination. He further argues that the colonial constitutionalism denotes a composite domain of power and accountability and continuing this legacy, he argues the present constitutionalism is restricted to governance machines. He concerns himself with the new discourse which he calls as ‘constitutional economics’ – dealing with the relation between the state and the market, and he feels there is a need to revisit constitutionalism in view of such relation.

The introduction

The book consists of eleven articles in addition to the introduction on reviving South Asian comparative constitutionalism by the editors. The book ends with “After Word” by Michael Kirby, Justice of High Court of Australia. The contributors are well known in legal scholarship both nationally and internationally. They have explored the contemporary developments in the field of constitutional law in India, Bangladesh, Nepal, Pakistan, Sri Lanka, Bhutan and Pakistan.

In the “Introduction” the editors painstakingly explained the constraints involved in comparative legal scholarship in South Asia and have given accounts of various attempts made both regionally and internationally. They draw the attention of the readers to the reasons why South Asian constitutionalism did not receive its due. They rightly argue that most of the legal scholarship particularly from the region is either restricted to their national constitutions or when they did venture a comparative exercise it was more often than not with the constitutions of the west. Ignoring regional constitutions and over reliance on western constitutions seems to be due to a colonial hangover. In this juncture this part of the book gives an account of both individual and institutional attempts, which made some significant strides in comparative constitutional law in South Asia.

The editors have also deliberated on the purpose and function of comparison of constitutions. There may be several reasons for such comparison but Mark Tushnet recognizes three important views.⁴ The majority of the scholars endorse the functionalist approach. ‘Functionalism’ claims the comparative study could be able to help in identifying various provisions of the constitutions addressing the same problem in different methods. Therefore, the purpose of the comparison is not only to understand and agree that a problem could be addressed in different ways but also to consider whether those systems developed by other constitutions could be used to address the problems in one’s own nation. The ‘expressivist’ views the value of comparison to look at one’s own practices in altogether a different way and be able to help the court in reaching a decision.

In contrast to functionalism and ‘expressivist’, the ‘bricolage’, (which Baxi described in this book as shopping around available models), values comparison for the purpose of assembly of something new from the other constitutions available and adapting these to their needs and aspirations. This kind of function of comparative constitutional law is more suited when a new constitution is in the offing. The editors have also endorsed the criticism of Sujit Choudhry regarding excessive concentration of comparative approaches limiting to the human rights.

⁴ See, Mark Tushnet, “The Possibilities of Comparative Constitutional Law” 108 *Yale LJ* 1225 (1999).

The themes

The first essay “Modeling ‘Optimal’ Constitutional Design for Government Structures: Some Debutant Remarks”, by Upendra Baxi, raises several serious questions regarding South Asian constitutionalism. Baxi challenges the very idea of South Asia and to him the idea of South Asia is nothing but continuing the colonial legacy. In his thought provoking essay he raises the perplexity of South Asian constitutionalism. His major contribution is on how to understand constitutionalism in the light of a new discourse called ‘constitutional economics’. He insists that there is a need for revisiting the constitutionalism in the era of market driven economy particularly when the constitutional choices are subjected to the languages of ‘efficient governance’. He argues that constitutionalism is redefined in neoliberal market economy standards from the ideology to “myriad ways of processing information for designing projects of efficient government”.

The second essay “How to Do Comparative Constitutional Law in India” by Sujit Choudhry initially concentrates on the fundamental issues of comparative constitutions such as the methods, meaning, and purpose of comparison? He has also deliberated on issues like how Indian courts do comparative constitutional law and how they are useful in interpretation of Indian Constitution? However, to answer these questions he used the Delhi High Court’s judgment in *Naz Foundation v. Union of India*.⁵ Section 377 of Indian Penal Code deals with unnatural sex as a punishable offence and the question whether application of such provision to consensual sexual acts between two adults violate constitutional provisions was answered in affirmative by Delhi High Court after a thorough analysis of several foreign judgments. He asserts that the judges in *Naz Foundation* case used dialogic model of comparative constitutional interpretation. The dialogical model of comparison rests on a premise that each constitution will have something unique and hence different from other constitutions. However, recognizing such differences or incompatibility of constitutional systems in fact would help in understanding one’s own constitution. He identifies use of comparative constitutional law in two stages: one in the process of constitution making and the second interpretation of constitutional provisions. While at the stage of making the constitution, using some features of other constitutional principles may not have much problem but using comparative constitutional law in constitutional interpretation may require justification. There could be several reasons for such a requirement. Prominent among them are first, interpretation of written provisions of constitution by an unelected court and the second, to avoid ‘cherry picking’.

Sujit Chaudhary is of the opinion that “the use of comparative jurisprudence in the correct way, far from being in tension with a commitment to constitutional

difference may in fact both acknowledge it and even enhance an awareness of it". He explains, in little detail, how dialogical interpretation, which involves three interpretive steps, achieves this goal. He asserts that though the court seems to be using the dialogical method but failed to justify expressly the reason of using comparative constitutional materials in *Naz Foundation* case. He concludes that by using dialogical model, premises of Indian Constitution could be legitimately revisited by using comparative materials.

Third essay "Constitutional developments in a Himalayan Kingdom: the experience of Nepal" by Mara Malgodi explores the external legal concepts that were imported to Nepal. She examines these changes in the backdrop of failed constitution in Nepal and the new constitution which is in the offing. She gives an account of constitutional development in Nepal and explains the interface between local law and borrowed law. She skillfully analyses these interfaces in the light of political instability in Nepal since 1990s.

The fourth, fifth, sixth and eighth essays focus on secularism and freedom of religion in Bhutan, Sri Lanka, India and Pakistan. Richard W. Whitecross focuses on Bhutan which recently shifted from theocracy to monarchy. He examines the new Constitution of Bhutan which adopted secularism. Bhutan without any colonial legacy had its own indigenous legal system mostly influenced by the Tibetan religious and political structures. He critically articulates the relationship between Buddhism and new constitutional principle of secularism. In the first part his essay outlines the transformation of Bhutan from a religious state to secular state. In the second part he focuses on drafting of the new constitution and in the last part he explains the constitutional framework and its implications on secularism. The Bhutanese Constitution though recognizes "Buddhism is the spiritual heritage of Bhutan"⁶, it does not recognize Buddhism as official religion of State. Further, the constitution expressly spells out the separation of religion from politics⁷ nevertheless Buddhism is intrinsically mixed with state affairs. Therefore, this essay gives very significant insights into new type of secularism in Bhutan.

Deepika Udagama writing on Sri Lanka expresses her concerns on selective application of comparative constitutional principles (cherry picking) in the area of religious minorities causing a greater confusion. She believes that a systematic and transparent approach to comparison by the apex court would be able to underpin

6 Bhutan Constitution, art.3 (1).

7 *Id.*, art.3 (3).

the confusion, unpredictability and whimsical application of comparative constitutional norms.

Garry Jeffrey Jacobsohn and Shylashri Shankar while continuing the discussion explore the constitutional comparison and cross connections between India and Sri Lanka. They warn that special care needs to be taken when borrowing the secularism principles from Indian Constitution to Sri Lanka which is predominantly Buddhist. They focus on the landmark thirteenth amendment case as an example to depict how the judges use the structural features of Indian Constitution to advance their argument both in majority and minority judgment.

Comparison of personal laws is special as they illustrate cultural and religious differences. However, personal laws in India had been a bone of contention for their constitutional validity in the wake of right to equality. Matthew J Nelson gives an insightful account of comparison of personal laws between secular Indian and Islamic Pakistan. He observes that over a period of time Pakistan moved away from equal status in personal laws. In both the countries it is permissible to have secular personal laws and opportunity to reform the existing personal laws. In his essay he explains the politics of personal law reforms both in Pakistan and India.

John H. Mansfield looks at freedom of religion in matters of conversion both in India and Pakistan with the help of two leading judgments of Indian Supreme Court and Pakistan Federal Shariat Court.⁸ At the outset it seems the comparison is a mismatch as one being representing liberal democracy and the other conservative pro Islamic. But it is to showcase the general trend in Pakistan which is moving towards Islamization and making it a fundamental law of the land whereas, on the other hand, the Supreme Court of India is trying to protect the vulnerable women from the hostility of religious laws.

International human rights always is a part of any comparative constitutional study particularly in interpretation of fundamental rights. T. John O'Dowd makes a comparison between South Asia and United State of America in matters of freedom of speech and expression. His comparison of freedom of expression as envisaged by J. S. Mill and Stephen provides contrasting opinions. In the opinion of the author, Stephen's view of social, religious and cultural realities influenced India in recognizing restrictions on the freedom of speech. He then tried to explain Supreme Court of India's reluctance in adopting American concept of clear and present danger test and also American abhorrence of prior restraints.

The last two essays focus on the judiciary of Bangladesh and India. Ridwanul Hoque examines the role of Bangladesh judiciary in promoting and enforcing principles of constitutionalism. His observation that judicial vigilance for the

⁸ The two leading cases are *Sarla Mudgal v. Union of India* (1995) 3 SCC 635 and *Mst. Zarina v. State*, 40 PLD(1988) Federal Shariat Court 105.

protection of justice and good governance particularly in the wake of imbalance state powers in Bangladesh is a necessary reminder of Indian situation, where the judiciary is looked upon in case of failures by the legislature and executive. Arun K. Tiruvengadam revisits the “Role of the Judiciary in Plural Societies”. He probes the abuse of public interest litigation in India and how once the hailers of PIL have now turned critics.

There is no iota of doubt that this book contains a rich collection on comparative constitutional law on wide range of topics. The essays are critical, provocative, and thoughtful and must read for constitutional law teachers, judges, students and practitioners. Understandably religion got more attention in this book. On the other hand various essays address the judicial trends in using comparative constitutional law materials more frequently albeit with a criticism of cherry picking. There is a general neglect on constitutional materials of South Asia which is regrettable as it has a lot to contribute significantly to the range of debates that are central to many developed countries. Though the book covers diverse fields of constitutionalism, there are many other issues requiring greater attention and the editors hoped this may inspire legal scholars to explore the other areas of constitutional principles in South Asia.

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Constitutional foundations in south asia. Kevin YL Tan Adjunct Professor. 9.30 am (30 mins). PROGRAMME. Registration Venue: NUS Law (Bukit Timah Campus), Eu Tong Sen Building Level 1 Lee Sheridan Conference Room. 10.00 am (15 mins). He has published in the area of theocratic constitutionalism, Islamic constitutionalism, and human rights adjudication in the Maldives, most notably, with the Oxford Constitutions of the World. He is an Advocate of the Supreme Court of the Maldives, and has also served in the Maldivian Government as the Legal Affairs Secretary at the President's Office, as a Commissioner of the Judicial Service Commission, Legal Adviser to the Defence Minister, and drafted several bills pertaining to human rights and defense sector.