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Comparative Constitutionalism in South Asia (2012)

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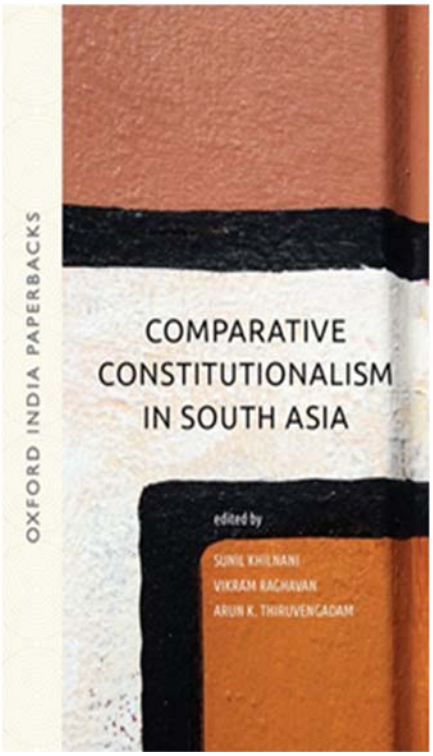

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About the Editors, Sunil Khilnani is a Professor of Politics and Director, King's India Institute, London. Vikram Raghavan is a Senior Counsel in the World Banks Legal Vice-Presidency, World Bank. And, Arun Thiruvengadam, Associate Professor, School of Policy and Governance, Azim Premji University, Bengaluru, India.

In this book, Sunil Khilnani, Vikram Raghavan, and Arun Thiruvengadam gather essays relating to the constitution and the concept of the constitution from academics who are interested about the constitutionalism specifically in South Asia from two conferences held in London 2006. In the past, most textbooks on constitutional matters generally, most often limited to describe the content of each edition of the constitution or solely discussed about the history of the constitution by giving priority to linking the political development of the country. This book, however, seeks to demonstrate the kinship of constitutional law by comparing written constitution and constitutional developments across the constitutional jurisdictions of South Asian countries including in Bangladesh, Bhutan, India, Nepal, Pakistan, and Sri Lanka.

Editors pointed out that the status of the region, in particular, Asia has become increasingly and considerably more important to the West. In the post-Cold War era Asia is often considered as one of the region's dynamism both in terms of security and the economy. Another concrete supporting evidence is that Asia has been the focal point of interest of US foreign policy in the past several years. Nevertheless, when talking about the Constitution, we tend to think of the West statutory modelling regardless of differences in various aspects namely politic, histories, culture, or diverse in their outlook and experience and so on. However, editors suggest that South Asian countries has contoured its own distinct constitutionalism style which is more acquainted to their unique cultural habits.

Chapter 1

Modelling ‘Optimal’ Constitutional Design for Government Structures: Some Debutant Remarks by Upendra Baxi.

Professor Upendra Baxi is a professor of law at the University of Warwick, United Kingdom. He has been the vice-chancellor of University of Delhi (1990–1994) and previously held the position of professor of law at the same university for 23 years (1973–1996). He has also served as the vice-chancellor of the University of South Gujarat, Surat, India (1982–1985).

In the beginning of this chapter, author lays out principles and general ideas about the constitution as well as constitutionalism specifically in South Asian Countries (SACs). Author points out that the most common practice number of constitution-makers routinely do is trying to gather up all available resources namely, constitutional models ever exist in the world especially from the West, and strive to tailor the constitution as desire. By ignoring the history and individual country’s norm, author raises some concerns whether this will likely be the most suitable approach

for every country's constitutional design or not. Author believes that the country's transformation process toward its future aspiration of each country should be shaped by its own unique constitutionalism not universally. Conversely, the creation of the supreme law in each country should be based on each country's dialogues and experiences not by others' norms. Author states that SACs past history were predominantly influenced by colonial constitutionalism. The thorough understanding of such history and background shall lead to more rational choice of the constitutional design and subsequent development. In conclusion of this chapter, author further discusses two other interesting key issues: 1) the possible confliction of four keywords: governance, development, justice, and human rights among SACs constitution, and 2) author's proposal of 'Optimal Constitutional Design' (OCD) for SACs through organization of public discussion of diversified group of people throughout SACs as OCD is deemed critical to future prospect of the region.

Chapter 2

How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation by Sujit Choudhry

Sujit Choudhry was Dean of the UC Berkeley School of Law from 2014 until March 2016. Choudhry is an expert in comparative constitutional law. He is a recipient of the Trudeau Fellowship, one of the four Canadians to receive the fellowship in 2010.

Author points out that there are many questions raised when designing constitution in India to constitution-makers and the main question in this chapter author attempts to answer is "how to do comparative constitutional law in India?" Author uses the judgment of the Delhi High Court in Naz Foundation v. Union of India to answer the question. In this case, the use of comparative constitutional law has significantly contributed the court to render its judgement and eventually laid down some useful legal principles. Author further discusses that lessons learned from this case are constitutional interpretation can be derived from comparing each dialogue of one edition of constitution to another, dialogic interpretation of constitution is more versatile comparing to broad translation, and this approach is considerably best suited with India and should be commonly adopted in the future.

Furthermore, other key questions being discussed in this chapter includes: What content or element should be vital for precise interpretation of the Indian Constitution? Is Indian constitutional adjudication is in line with the relationship between rights, democracy, courts, the

rule of law and globalization? Is the Indian Constitution a medium to implement rights that exist independently as well as not in the Indian constitutional order? Or can comparative analysis of Indian constitution be used to interpret 'first real exercise of political self-determination'?

Chapter 3

Constitutional Developments in a Himalayan Kingdom: The Experience of Nepal by Mara Malagodi

Mara is a comparative constitutional lawyer with a specialization in South Asian law and politics (in particular Nepal, India, and Pakistan), human rights law, and legal history. She has previously taught Public Law and Comparative Constitutional Law at London School of Economics and Political Science (LSE), London and Law & Society in South Asia; Law & Development; Cultural Studies Theories in Asia, Africa & the Middle East; South Asian Culture; and Society, Culture & Identity in Nepal at School of Oriental and African Studies (SOAS), London. Currently, she is a Lecturer in Law at The City Law School, London.

In this chapter, author points out the extant transition in Nepal's constitutional design which coexist with the political transformations in Nepal over the years. Author discusses that the transformational interrelationship between the autochthonous law and the transplanted law is likely to be influenced by some external factors such as the shift in political concepts regionally as well as domestically illustrated through the constitutional history of Nepal. Author's hypothesis is based on examination of the 1990 edition of the constitution in Nepal, from beginning to end, and the political transformation in Nepal from 1990 to 2007. Author argues that the promulgation of the 2007 Interim constitution, which led to the rise of the concept of 'New Nepal', is because of the autochthonous 1990 edition of the constitution was no longer in tune with people of Nepal's needs in coalition with political shift in Nepal. Author further argues that the politically driven Nepal's new constitution establishes the stronger sense of citizenship and fosters more rights comparing to its previously less participatory eccentric edition. Author concludes that Nepal's constitutional-decision making from now on, that will lead to peace and stability of the nation, will be ultimately based upon consensus and political process.

Chapter 4

Separating Religion and Politics? Buddhism and the Bhutanese Constitution by Richard W. Whitecross

Richard W. Whitecross is an Honorary Fellow in Social Anthropology and a faculty member at Center for South Asian Studies, School of Social and Political Science, University of Edinburgh.

In this chapter, author investigates Bhutan's constitutional history up to the 2008 Constitution. Author points out the uniqueness of Bhutan's constitution which is the close linkage between the people of Bhutan, Buddhism, public acceptance of living harmoniously with nature, and the new Bhutan's constitution. In Bhutanese State, the Central Monk Body, which contains Central Monastic Body and the District Monastic Bodies has been the highlight of Bhutan's constitution ever since the first enactment of its first written constitution. Despite the inclining trend of heterogeneous in population in Bhutan over the past few decades, there has been little to no influence to the relationship between Central Monastic Body and the District Bodies. However, author believes that the transformation in the role of Central Monk Body found in 2008 constitution may have been the result of the transformed political landscape and possible societal development shift where majority of Bhutanese have higher level of education, university education from India and Thailand. While abroad, these new young generations are exposed to the new constitutional design in India and Thailand, and willing to adopt some of these new principles as alternatives to Bhutan's constitution as well.

Chapter 5

The Democratic State and Religious Pluralism: Comparative Constitutionalism and Constitutional Experiences of Sri Lanka by Deepika Udagama

Deepika Udagama is the Head of Department of Law, University of Peradeniya and a specialist in international Human Rights law.

The main topic being discussed in this chapter is pertaining to religious pluralism in Sri Lanka and its inconsistency jurisprudence on protection of heterogeneous of religion in the country. Author uses the jurisprudence of the Supreme Court of Sri Lanka in relevance to religion in the Independence Constitution, and the two Republican Constitutions of 1972 and 1978, to explain how religious pluralism is not properly protected under the constitution despite differences

in ethnicities and language groups. Author further uses the jurisprudence to support his argument that the two possible troublesome republican constitutions cause a serious consequence politically in Sri Lanka. As a result, the multicultural aspects and societal pluralism of Sri Lanka need not to be neglected when designing Constitution in Sri Lanka. In conclusion, author points out that apart from generic interpretation of law, comparative jurisprudence method is a very powerful tool to pinpoint the problem and enlighten of a solution to solve problem especially in the case of Sri Lanka.

Chapter 6

Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity by Gary J. Jacobsohn and Shylashri Shankar

Gary J. Jacobsohn is a Professor in Constitutional and Comparative Law at Department of Government, University of Texas at Austin, who is interested in Constitutional Theory, Comparative Constitutionalism.

In this chapter, authors first explain about the cooperative like between the court of India and Sri Lanka to give audiences a broad picture of judicial system resemblance of the two courts. Authors then further explain about the concept of 'judicial borrowing' which simply refers method commonly used among constitution-makers in order to apply one constitutional idea to another with or without interlinking between lender and borrower. By comparing existing SACs constitution, authors argue that Indian constitution is a possible source (lender) of Sri Lanka's constitution (borrower). Authors further argue that constitutional design is very sophisticated. It is so complex that implanting (borrowing) one constitutional idea to another without considering differences such as cultural aspects may lead to a tragic result. By saying so, authors explain through the use of empirical evidence of judicial borrowing from India in the case of Sri Lanka and its disastrous consequences through the analysis of Sri Lankan Supreme Court's judgment in the case of 'Sisters of Saint Francis of Menzingen'. This case lays down some classic examples where careful comparative constitutional on critical subjects: basic structure, federalism, and popular sovereignty, should be thoroughly reviewed prior to cross-cultural judicial borrowing of constitution idea takes place. In conclusion, authors suggest that judicial borrowing is a useful tool in constitutionalism process when it is not predominantly dominated by neither executive nor

judiciary. The key success to the benefit most from judicial borrowing is by appropriately maintaining functional balance between institutions.

Chapter 7

Inheritance Unbound: The Politics of Personal Law Reform in Pakistan and India by Matthew J. Nelson

Matthew J. Nelson is an Academic Staff at SOAS South Asia Institute who is interested in the comparative and international politics of South Asia, with an emphasis on non-elite politics, comparative political thought, the politics of Islamic institutions, and democracy.

In this chapter, author examines the politically driven Pakistani and Indian legal transformation, from transcendent to ordinary, which author believes that such transformation has consequently shaped new political and constitutional dimension in Pakistan and India. Author further describes that the process of change arises from the change in constitutional and political conditions under which the content of such laws can change so much that might intervene the nature of Islamic state like Pakistan and India. As most people know, the nature of islamic state constrain legal change in religious personal law. However, author discusses that utilization of the different set of norms by legislature can lead to different result. Author explains that there are constitutional provisions in each country comprises two elements; the point of view or the unique issues of inheritance in each country, and ability to putting provisions outlined in the constitution to practice. In the case of Pakistan and India, despite efforts to structurally redesign their constitution by transforming the old idea of 'god-given' law to the more ordinary one, which is often seen in the western society, both countries still find it hard to putting the legal reform into practice. The author argues that Pakistan is only able to implement the 'substantive religious-cum-legal' reform in two practice in two areas: military/non-military authoritarianism and one-party dominant regimes. In the case of India, despite its government effort to addresses the task of 'substantive' religious-cum-legal reform as a matter of routine civil society engagement and is often impeded by the pressures of coalition politics. The author concludes that hardest thing to do when pursuing major constitutional reforms in every country is not what allowed or not allowed. To bring about personal law reforms in the case of Pakistan and India, it is still difficult to bring about reforms even though the constitutions allow them to do so yet other components such as political as well vital the the success or failure of the transformation also.

Chapter 8

Religious Freedom in India and Pakistan: The Matter of Conversion by John H. Mansfield

John H. Mansfield (1928–2014) joined the faculty of Harvard Law School in 1958 and was known for his scholarship in constitutional law, evidence, and issues of church and state. His research interests were in the areas of comparative and constitutional law, as well as the law of evidence.

In this chapter, author examines the two judgments of the Indian Supreme Court and the Pakistan Federal Shariat Court. In India, in 1995, in a case of Sarla Mudgal v. Union of India, the Supreme Court of India. By comparing the two cases, author points out that despite religion conversion is avowed in constitution of both Pakistan and India, in reality the level of freedom to practice religion of religious minorities in Pakistan and India still relies upon the ability to convince others to their faiths. In the case of Sarla Mudgal v. Union of India, a Hindu man marries to a Hindu woman under Hindu law, then he intends to legally marry to a second wife. Unlike Hindu law, Islamic law permits marriage to a second Muslim wife. Therefore, in order to achieve this, the Hindu man converts to become a Muslim. Despite Muslim law in India permits Muslim to legally marry to a second wife, in this particular case the man's conversion to Islam does not entitle him to marry a second Muslim wife. And even if his conversion is successful, his first marriage to a Hindu woman will not be automatically dissolved by his conversion. Conversely, in the case of Mst. Zarina v. State, in Pakistan, Mst. Zarina, who converted to Islam, was criminally charged with a criminal complaint of sexual intercourse outside lawful marriage (the crime of zina) by her own husband. After realizing that Islamic law constitute right of a husband to file criminal complaint to indict his wife with the crime of zina, the Christian husband converted himself to become Muslim to be eligible to file such criminal complaint which court has accepted it as a lawful conversion. From the two judgments, author concludes that religious minorities in Pakistan are substantially worse off than religious minorities in India. He further concludes that application and acceptance of law are not only driven by provisions outlined in the constitution but religious or political aspect plays significant role in setting the tone of constitution is these two countries especially when it comes to the minority rights.

Chapter 9

Pilate's Paramount Duty: Constitutional Reasonableness and the Restriction of Freedom of Expression and Assembly by T. John O'Dowd

T. John O'Dowd is a lecturer in the School of Law at University College Dublin with specialization in Contract Law, Constitutional Law, Administrative Law, Media Law and the Law of the European Convention on Human Rights.

Using own experience in India, author uses the ideas of two nineteenth-century thinkers—John Stuart Mill and James Fitzjames Stephen, to analyze these following issues: the legacy of the Indian Penal Code and the Code of Criminal Procedure; how the Supreme Court of India interpret the Indian Penal Code and the Code of Criminal Procedure in accordance with the extant constitution; and assesses how much the Indian Penal Code and the Code of Criminal Procedure comply to the concept of a 'democratic society' within the scope of European human rights law. John Stuart Mill, the most influential English-speaking philosopher of the 19th century, whose philosophical work is primarily focused on the defense of the importance of the rights of individuals. James Fitzjames Stephen, appointed a judge of the High Court and a legal member of the Colonial Council in India, Stephen once attacked the thesis of J S Mill's essay 'On Liberty' by arguing that the work of J S Mill is in the interests of morality and religion which rather result in legal compulsion than freedom. The disagreement between Mill and Stephen concepts leads to author's conclusion to whether the Supreme Court of India uses Mill or Stephen's idea to interpret laws and base its decision.

Chapter 10

Constitutionalism and the Judiciary in Bangladesh by Ridwanul Hoque

Ridwanul Hoque is an Associate Professor of Law at the University of Dhaka, Bangladesh. His field of interests fall upon constitutional law and theories, public law, and judicial behavior.

Author uses historical background of Bangladeshi constitutionalism as a mean to discuss the role of judiciary, specifically the Supreme Court of Bangladesh, in enforcing the underlying principles in the constitution. Author explains that despite Supreme Court of Bangladesh has declared that it is a duty of the Supreme Court itself to protect of the constitution. Author discusses that the constitutional position of Bangladeshi judiciary is dependable on regime and period. For example, history shows that the duty of the Bangladeshi Supreme Court to protecting the rule of

law principle during martial law may be varied to the role of protecting the rule of law during the democratic period. Author further discusses that there are also other influential elements that affect judiciary constitutional position to protecting the constitution in Bangladesh, for instance, globalization and global trend of human rights jurisprudence movement. This phenomenon strongly supports author's conclusion that not only does regime and period of of Bangladesh that have significant impact of the role of judiciary, external factors such as structural and political factors too can impair the responses of the judicial role in protecting the underlying principles in the constitution. Therefore, if the constitution-designer would like to achieve the goal of obtaining justice while preserving the constitutionalist tradition, these pivotal elements should as well be included in the equation.

Chapter 11

Revisiting The Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South

by Arun K. Thiruvengadam

Arun Thiruvengadam is a lawyer and faculty member at School of Policy and Governance at Azim Premji University. His focus is primarily in constitutionalism in Asia and the comparative public law and Law and Development.

In this chapter, author begins by pointing out that India has experienced countless unevent judiciary throughout civil society groups in the past 25 years due to its multicultural and pluralism. The growing resentment has erupted into attempts to make Indian democracy more participatory, inclusive, and effective through series of social actions and activism in India with aim to bring back a just judiciary to India. The country has made significant progress by adding new constitutional values to its constitution. The new value emphasizes on narrowing the judiciary gaps for those societies previously exclusive by law. Furthermore, the new value introduces public interest law (PIL), which gives judiciaries a new role by aiding public interest law movements rather solely serving interest of the politically dominated societal group. The PIL under the new constitutional values entirely reshape the role of judiciary in India. Author uses number of papers gathered from couple of two academic workshops held in India and Kenya in August 1983 and February 1985 respectively to support his argument. Author concludes that the new role of judiciary in India under the new constitution values should be working for the public interest of all civil society groups as well as pay close attention to increase satisfaction of the society. Lastly,

author propose that judiciary should always take into account the interests of the public and giving up the old ways of trying to 'command-and-control' the society which often lead to bad consequences.

This book is one of its kind for audiences with an interest in South Asian countries and remarkably a useful source of the study of this nature. For those who are interested in the study of South Asian constitutional laws and to learn about the regional constitutional culture, this is potentially be a suitable introduction. This book will be immensely useful to everyone not limited to only scholars and teachers of law. It is the book you must read if you would like to become a policymakers and bring about change to the society.

Reference

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