

Teaching Comparative Constitutional Law in Commonwealth Countries and Non-Commonwealth Countries with Reference to South Asian Countries

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1. Introduction

Constitution is the supreme and fundamental law of all nations. The constitution lays down powers and functions of state organizations, rights and duties of the citizens and demarcates the relations between state and citizens. Constitution is also considered as legal, political, economic and socio-cultural document of all nations. A constitution is the most important document to maintain smooth relations between state and citizens and interstate organs. The constitution is also considered as living document. The human rights and fundamental rights are safeguarded by the constitutions and day-to-day business of the government is guided by the constitution. If a constitution does not accommodate the aspirations of the peoples that cannot be survive and could not be a living document.

There are 197 sovereign countries in the world, of these 173 States have written constitutions. The four countries, which have no codified constitutions, are: United Kingdom, New Zealand, Saudi Arabia and Israel.¹ A sovereign country can determine it's own system of government including foreign relations. We can see different types of constitutions across the world, i.e.,

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¹ *WORLD ATLAS*, <http://www.worldatlas.com/articles/countries-withuncodified-constitutions.html>, (Feb 5, 2019, 8:30 AM).

written, unwritten, rigid, flexible, codified, non-codified, republican, monarchical, federal, unitary, presidential, parliamentary, and confederate constitution.²

Comparative constitutional law is a kind of mirror of many constitutions. A reader or researcher compares the provisions of at least two or more constitutional provisions as well as judicial decisions in the same study. Constitutions are deeply rooted in the history of a country and its society. Comparative constitutional law can explain the linkage of different constitutions in a historical influence between different constitutions.

Teaching comparative constitutional law has been proliferated across the world after the World War II. However, teaching comparative constitutional law is not an easy task. As being a legal, political, economic and socio-cultural document the teacher should have in-depth knowledge of the said aspects of the nations. The author in this paper has attempted to explore the teaching methodology of comparative constitutional law in Nepal in comparison with Commonwealth Nations.

2. Concept of Comparative Constitutional Law and Constitutionalism

Generally, comparison of any provision between two constitutions and/or among many constitutions is known as comparative constitutional law. Comparing judicial decisions is also integral part of comparative constitutional law. “Comparative constitutional law is a kind of mirror of the competition vision of who we are and who we wish to be as a political community.”³ “Comparative constitutional law is the intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies.”⁴ Andrew and John observe:

“The idea of constitutionalism is the ideas of state, government, democracy, power, and law to which it is very closely related—goes right to the heart of some of the very biggest questions about how we can live together. Where individuals coexist in any social group—a family, tribe, or nation state, or as citizens in a wider global order—there are all sorts of issues about the terms on which they come together and stay together, how rules are made

² Onkarabile Osiele, *Types of Constitutions, their advantages and disadvantages*. https://www.academia.edu/32911869/Types_of_Constitutions_their_advantages_and_disadvantages, (Feb 5, 2019, 9:30 AM).

³ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW*, Oxford University Press, Oxford, 304, (2014).

⁴ <https://www.cambridge.org/core/series/comparative-constitutional-law-and-policy/404DE60077766094115007C1E361A897>, (Feb 7, 2019, 8:30 AM).

to keep order within the group, and how the group will react to outsiders and adapt to change.”⁵

According to Antonia Baraggia, comparative constitutional law is essentially a relationship with someone who is different and unknown and who is the object of the comparative inquiry. Not only is comparative constitutional law per se a matter of relationship, but the method of comparative law also has at its very heart a ‘relational nature’.⁶ Comparative constitutional law aims at studying the fundamental rights and duties of the citizens, relationships between the organs of the states, directive principles and state policies, foreign policies, structure of the governments, powers and functions of constitutional bodies, approaches to protecting minority groups, emergency powers, different forms of constitutional federalism and amendment process. It also examines selected problems of both constitutional design and constitutional adjudication.

Comparative constitutional law is not a new approach. Plato’s conception of ideal government paved the way for comparison. Aristotle had remarkably compared abstract forms of government and had compiled a collection of the constitutions of 158 Greek city-states and developed his **theory of government** in his book Politics.⁷

The study of comparative constitutional law greatly increased after the World War II because of many Asian and African countries became free from colonial regime and promulgated their new constitution as sovereign state.⁸ Likewise, all most all universities across the world started teaching comparative constitutional law and constitutionalism.

Constitutionalism unfolds constitutional ideas all over the world through time showing how different constitutions influence each other.⁹ Constitutionalism

⁵ ANDREW GODDEN & JOHN MORISON, CONSTITUTIONALISMS IN MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW, Oxford University Press, Oxford, (2017).

⁶ Antonia Baraggia, *Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition*, SPECIAL ISSUE-COMPARATIVE LAW, <http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2017/10/lawandmethod-D-17-00009>, (Feb 8, 2019, 9:00AM).

⁷ Mody University, *Concept Note: Conference 2018 on Comparative Constitutional Law: Development and its Teaching Techniques in Commonwealth Nations*, SOUVENIR, School of Legal Studies, Mody University, Rajasthan, 2-3, (2018).

⁸ *id.*

⁹ Menon Institute of Legal Advocacy Training (MILAT) in association with CIJER, Lloyd Law College, *Draft Working Paper on Commonwealth Comparative Constitution and Public Law, presented in the Fourth Prof. N.R. Madava Menon SAARCLAW Mooting Competition, Law Students Conference and South Asian Colloquium 2018-19*, Greater Noida, 19, (16-17, February 2019).

is a political philosophy that limits the powers of State and favors to peoples and society. It advocates that government should be limited within the given powers by the constitution. The *Magna Carta of 1213 AD* and the *Bill of Rights 1689 AD* are the best examples of constitutionalism.¹⁰

The great Italian political philosopher Niccolo Machiavelli's percepts and observations re-emerged comparative approach of study in constitutional law and constitutionalism. English Political theorist John Locke played a great role in cementing the philosophy of constitutionalism by promoting *Social Contract Theory*.¹¹ According to Social Contract Theory, the powers of government are derived from the people for the protection of their interest. The state cannot curtail certain powers of the people for the interest of government. The relation between natural and legal rights is often a topic of social contract theory. In several countries the constitution making process were sensitive, complicated and time consuming. Constitution must be drafted in simple, clear and unambiguous language so that the rights and interest of the people cannot be curtailed by means of interpretation.

"Constitutionalism is the idea, often associated with the political theories of John Locke and the "founders" of the American republic, and equated with the concept of *regula iuris*, the "Rule of Law", that government can and should be legally limited in its powers, and that is authority depends on enforcing these limitations."¹²

Another great French political philosopher Charles de Montesquieu in his book *Spirit of Laws* (1748) proposed a division of power within the government between the legislative, the executive and the judiciary.¹³ Montesquieu's *The Spirit of Laws* is considered a masterpiece of constitutionalism.

3. Objectives and Goals of Comparative Constitutional Law Study

Each and every task has certain objectives or goals. Comparative constitutional law has global dimension. To acquire in-depth knowledge of constitutions of several countries and to identify similarities and differences among the constitutions so compared are the objectives of comparative constitutional law study. The main objectives of the comparative constitutional law study are to develop better understanding the basic features, fundamental

¹⁰ *id.*

¹¹ Gaba, Jeffery "John Locke and Meaning of the Taking Clause" MISSOURI REVIEW, Vol. 72(2), (Spring 2007).

¹² <http://www.constitution.org/constitutionalism.htm>, (8 Feb 8, 2019, 10:30 AM).

¹³ <http://www.google.com/search?q=montesquieu+spirit+of+the+laws&oq=montesque&aqs=chrome.5.69i57j0l5.19808j0j4&sourceid=chrome&ie=UTF-8>, (June 8, 2019, 12:20 PM).

rights and duties, directives principles and state policies, state's organs, structure of the government, political parties, separation of powers and check and balance, constitutional bodies, judiciary, constitution making process, amendment process of the constitutions so compared. According to Sacco, the aim of comparative law is to acquire knowledge of the different rules and institutions that are compared. Comparative constitutional law is vested with a particular task: to acquire knowledge of the fundamental principles that forge the relationship between sovereign power citizen's freedom in different constitutional system.¹⁴ Prof. Vicki Jackson has suggested four goals of comparative constitutional study, these include:

- Developing a better understanding of other system;
- Enhancing the capacity for self-reflection on ones' own system;
- Developing a normative understanding of best practices; and
- Responding to domestic questions that are comparative in nature.¹⁵

Thus, the objectives or goals of the comparative constitutional law study are clear.

4. Methods of Teaching Comparative Constitutional Law in Commonwealth Nations

Legal education system has already globalized. Constitution making process has been heavily influenced by international legal system that is "Rule of Law" and "Human Rights". "Globalized legal education system has adapted a great shift from traditional teaching methodologies to modern approach of teaching. The changing dimension of comparative constitutional study sets forth different goals and challenges to achieve and overcome."¹⁶ Teaching pedagogy, techniques, tools, challenges and best practice through comparative approach is needed to be analyzed.¹⁷ The contextual approach or contextualism is a method of comparative constitutional law (CCL). Mark Tushnet observes:

"contextualism is the third method of CCL, the first and the second being, respectively: normative universalism, which seeks to study a wide variety of approaches to constitutional issues in order to identify best practices that

¹⁴ Sacco, R, *Legal Formats: A Dynamic Approach to Comparative Law*, AMERICAN JOURNAL OF COMPARATIVE LAW, Vol. 39(6), 1-34, 3, (1991).

¹⁵ Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, PEN STATE INTERNATIONAL LAW REVIEW, Vol. 28, 132, (2010).

¹⁶ MILAT, supra 9, at 1.

¹⁷ *id.*

can be adopted everywhere; and functionalism, which emphasizes similarities rather than differences, making no reference to context.”¹⁸

The Commonwealth is a voluntary political association of 53 independent states: in Africa: Botswana, Cameroon, Gambia, The Ghana, Kenya, Kingdom of Swatini, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leon, South Africa, Uganda, United Republic of Tanzania, Zambia. In Asia: Bangladesh, Brunei Darussalam, India, Malaysia, Pakistan, Singapore, and Sri Lanka, in Caribbean and Americas: Antigua and Barbuda, Bahamas, The Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, St Kitts and Nevis, St. Vincent and the Grenadines, Trinidad and Tonga, in Europe: Cyprus, Malta, and the United Kingdom and in Pacific are Australia, Fiji, Kiribati, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

Many members of the Commonwealth, though not all, are former British territories and were part of Britain’s colonial Empire.¹⁹ The purpose of the Commonwealth is for international cooperation and to advance economics, social development, and human rights in member countries. However, the decisions of the various Commonwealth councils are non-binding.²⁰

United Kingdom is the mother of common law system. Common law is primarily based on precedents that are set by prior court cases with similar circumstances. Common law system has three basic features. First it represents law of the courts as expressed in judicial decisions, second trial by jury and the third is doctrine of the supremacy of the law. Common law system has guided to the commonwealth nations. The law of the court is based on the doctrine of *stare decisis*, which applies both vertical and horizontal order.²¹ But jury system is not adopted in all commonwealth nations. Common Law System interacts with other legal systems.

¹⁸ Irene Spigno, *Methodologies of Comparative Constitutional Law: Contextual Approach*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW [MPECCOL], (2010) <https://n.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e47?prd=MPECCOL/oxco>, (Feb 10, 2019, 11:00 AM).

¹⁹ Commonwealth Countries: Commonwealth, <http://libguides.ials.sas.ac.uk/commonwealth>, (Feb 10, 2019, 12:30 PM)

²⁰ What is Commonwealth Nations? <http://www.google.com/search?q=what+is+a+commonwealth+nation&aq=chrome.5.69i57j0i5.18710j0j8&sourceid=chrome&ie=UTF-8>, (Feb 10, 2019, 2:30 PM).

²¹ Common Law: Characteristic Features of Common Law, <https://www.infoplease.com/encyclopedia/social-science/law/divisions-codes/common-law/characteristic-features-of-common-law>, (Feb 12, 2019, 4:00 PM).

“Common law also interacts with Constitutional law when a court makes important decisions. Common law mostly affects decisions that are made in State courts, and all of these decisions must be made within the scope of the Constitution. Constitutional law does not grant State courts the power to declare a law as unconstitutional. However, they do have the power to create new law to a certain extent.”²²

Almost all academic institutions have developed syllabus of each subject they have offered. Some academic institutions have developed comprehensive syllabus and other have developed an outline, which is known as **module**. Comprehensive syllabus provides from concept to recent trends. Some landmark decisions decided by the courts of the different countries are also provided in the syllabus, for example, *William Marbury versus James Madison* case of USA, which was decided on 24 February 1803 AD. Like wise, the *Keshavananda Bharati* case of Indian Supreme Court is being suggested to study the constitutionalism.²³ *The Godavari Marble* case of Nepal has been taught in many universities of UK and USA.²⁴ The decisions established judicial review the ability of the Supreme Court to limit Congressional power by declaring legislation unconstitutional—in the new nation.²⁵

In module system, the class teacher provides to the students the contents of teaching and mentions textbook and/or reference material to be consulted. Most of the academic institutions refer the cases of own Supreme Courts and or High Courts. Therefore, syllabus may not be the same and may not be same standard. There are also opportunities to collect reference materials by different sources, i.e., Internet, email, e-library, social media, and affiliation with professional associations. However, teaching comparative constitutional law in commonwealth nations is not similar and same standard. The professors those who are involving comparative constitutional law teaching and research since long time have suggested to develop advanced legal education methodologies, these include:

- Student-oriented teaching²⁶

²² Discover How Common Laws Interacts with Constitutional Law, <https://common.laws.com/principles-of-common-law/interaction-w-constitutional-law>, (Feb 12, 2019, 8:30 PM).

²³ His Holiness Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Anr, AIR, 1461, (1977).

²⁴ Surya Prasad Sharma Dhungel v. Godavari Marble Industries and others, WP 35/1992, (1995).

²⁵ <https://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review>, (Feb 12, 2019, 7:30 AM).

²⁶ Jennifer D Arcy Maher, *AALS Panel-Global Legal Education Maximizing the Internationalization of U.S. Students' Legal Education: Ideas for Making the Most of your Resources*, GERMAN LAW JOURNAL, Vol. 5, 329-34, (2004).

- Competence-oriented learning²⁷
- Problems and case based learning²⁸
- Interdisciplinary approach²⁹
- Humboldtian ideal³⁰

5. Influence of Commonwealth Countries to Non-commonwealth Countries

Liberal democracy, rule of law, human rights are the basic values of commonwealth nations. Many countries, specially, UK, Canada, Australia, India, New Zealand, South Africa, Nigeria, Malaysia, Singapore, and Sri Lanka have established the basic values of the commonwealth system. These nations have been promoting the values of commonwealth and influencing the neighboring countries. The judiciaries of these nations have been promoting jurisprudence in all subjects, i.e., constitutional, civil, criminal, election laws, etc. Therefore, many countries across the world have been adopting democratic political system, respecting rule of law and human rights due to impacts of commonwealth nations. The universities of these countries are receiving foreign students from different countries and continents. UK is the model for democracy, rule of law, human rights, parliamentary system of government, independent judiciary, separation of powers and check and balance. Many of the politicians of Africa, Asia have obtained higher education from UK and thereby influenced themselves. It is easy to get information on political, legal, economical and cultural fields from neighboring countries. In South Asia, Nepal and Bhutan are not commonwealth member countries, however, both the countries are heavily influenced by the system of India.

Teachers, students, lawyers, guest lecturer, researchers, media and literatures are the agents for influencing one country's legal system to another country. Generally, teachers and lawyers are educated in different universities of different countries. They compare the legal, political, economical system and influence the students and peoples at large. For example, Indian

²⁷ Gunter Frankenberg, *Comparing Constitutions: Ideals and Ideology Toward a Layered Narrative*, Vol.4, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 439-59, (2006).

²⁸ Vicki C., *Comparative Constitutional: Methodologies*, in Rosenfield, Micheland Sajo Andras, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, Oxford University Press, Oxford, 54-74, 62-66, (2012).

²⁹ Otto Pfersmann, *Five Theses about the Foundations of Constitutional Law*, in Pabblo Riberi (ed), FOUNDATIONS OF CONSTITUTIONAL LAW, (2002).

³⁰ Frank P. Albritton, *Humboldt's Unity of Research and Teaching: Influence on the Philosophy and Development of U.S. Higher Education*, <http://ssrn.com/abstract=939811>, (Feb 12, 2019, 9:00 AM).

Constitution 1947 has adopted the reservation system in public service for scheduled castes or *Dalits and* indigenous nationalities. Nepalese peoples also influenced by that system and demanded for reservation in public service and political representation. The Interim Constitution 2007 adopted the reservation system and women, *Dalits*, Indigenous nationalities, *Madhesi*, *Tharu*, Muslim, and peoples of backward areas have reservation in public service. There was no reservation system prior to the Interim Constitution, 2007. Both the Interim Constitution and the Constitution of Nepal 2015 have made reservation for the said groups. The lawyers in Nepal often show and submit the landmark judgments of the Supreme Court of India, UK, USA, etc. to the Supreme Court of Nepal for reference. Despite that there are several challenges teaching comparative constitutional law in many commonwealth nations. These are analyzed in the following sub-section.

6. Methods of Teaching Comparative Constitutional Law in Nepal

Currently Nepal has 11 Universities and all the universities except the Forestry and Agriculture University have offering humanities and social sciences subjects. Under the humanities and social sciences, political science subjects are being offered from bachelor level to PhD levels. Constitutions of major countries are being taught under the humanities and social science faculties. There are 12 law campuses/colleges in the country under four universities and constitutional law is compulsory subject for Bachelor level and an elective subject for LL.M level. B.A.LL.B and LL.M programs are conducted in Semester system in the Campuses/Colleges of TU but in other colleges out of TU have annual system. There are three colleges under Purbanchal University and one constituent campus under Kathmandu University, School of Law. Teaching constitutional law at 3-year LL.B is based on lecture methods but for B.A.LL.B and LL.M levels different methods such as lecture, questions and answers, discussion, seminar, case analysis, court observation and research are being applied. All the universities have developed comprehensive courses for all subjects including constitutional law.

Tribhuvan University is the oldest and largest university in Nepal. The Faculty of Law of Tribhuvan University has designed comprehensive syllabus for all programs-LL.B, LL.M, and B.A. LL.B. The LL.B and B.A.LL.B programs have designed to provide basic knowledge, whereas LL.M syllabus has designed to provide specialized knowledge to the students. The undergraduate and post graduate LL.B course intends to have comparative knowledge of

UK, USA and India on rule of law, constitutionalism, fundamental rights, directive principles and policies, formations and functions of legislature, executive and judiciary, interpretation of constitution and judicial activism, separation of powers, government accountability and State responsibility. The LL.M syllabus of constitutional law has been focusing on constitution and constitutionalism, government structure and judicial review, civil liberties and civil rights, and federalism. However, there are several challenges teaching comparative constitutional law in Nepal. The challenges are analyzed in the following section.

7. Challenges in Teaching Comparative Constitutional Law in Commonwealth Nations and Non-Commonwealth Nations

Teaching comparative constitutional law is not an easy task. Moreover, Commonwealth is a very big voluntary forum with diversified political, legal, economical and socio-cultural system. Covering all the aspects of these countries in one subject is quite challenging. There are varieties of political system adopted by the sovereign countries. Formation of judiciary is also different in different nations. There are several challenges teaching comparative constitutional law in many commonwealth nations, especially, lack of standard syllabus, lack of well-trained teachers, lack of specialized textbooks, journals, court judgments, etc.

Teaching comparative constitutional law depends on the availability of textbook, efficient teachers, infrastructures, and adoption of modern technology. All academic institutions are not equally equipped with resources, i.e., human, financial, physical infrastructures and modern technologies. Developed countries have provided required resources for academic institutions and imparting better knowledge and skills. Most of the academic institutions of Africa and South Asia's commonwealth nations are not well funded and thereby teaching comparative constitutional law is not adequate. Most of the academic institutions have adopted lecture method, which is less effective compared to other methods like discussions, seminar, questions and answers, case studies, project work, mooted practices and court observation.

In many countries libraries are not adequate because of funding problems. Many libraries have not collected recent publications and e-libraries are not sufficient enough. However, e-libraries are established in some academic institutions and public libraries in non-commonwealth nations. Many

universities are making available Wi-Fi in the libraries/classrooms and the use of electronic media and social media is being hugely increased.

Teaching comparative constitutional law in non-commonwealth nations is more challenging. The universities in Nepal are suffering from resources, i.e., human, financial, physical infrastructures and modern technologies. The tuition fees collected from the students is nominal and the government budget allocated for higher education is not sufficient. The government does not provide budgets except salary and allowances of government-approved positions even to the government-funded universities. Of the total budget about 60% goes for salary and allowances of the faculties and administrative staffs and remaining 40% budget should be collected from internal sources. The student unions do not allow increasing tuition fees. Despite those funding constraints, e-libraries are established in some academic institutions of Nepal. Wi-Fi is available in the classrooms and the use of electronic media and social media are being hugely increased.

8. Concluding Remarks

Constitutional law is one of the most important subjects for the study of law and humanities and social sciences as well for being a supreme and fundamental law of the nation. It is equally important for both nations-commonwealth and non-commonwealth. All most all-academic institutions especially universities that have faculties and/or departments of humanities and social science and law have provided constitution subject in their syllabuses in both Commonwealth and non-Commonwealth nations. Law faculties/Schools have designed syllabus of constitutional law comprehensively aiming to give in depth knowledge of constitutional law including comparative constitutional law. Most of the reference materials are also same.

Despite that teaching methodologies are not same and depending upon the availability of resources. However, such hurdles can be overcome by means of exchange of faculties and students program within the commonwealth nations. Exchange of syllabus within and outside the Commonwealth nations, conducting refreshment trainings for constitutional law teachers, conferences, seminars, workshops, mooted competitions and role play can be conducted in the commonwealth nations. A Forum for constitutional law teachers in Commonwealth and non-Commonwealth nations can be constituted and *The Commonwealth Legal Education Association* can be instrumental for establishing forums and other activities. If we initiate these activities then

teaching comparative constitutional law in commonwealth nations will be definitely enhanced. Thereby Non-Commonwealth nations including Nepal and Bhutan will also be influenced to enhance their capacity. Capacity building is the most required to the developing countries universities like Nepal. The government should allocate sufficient budget to maintain required cost for imparting quality education. The universities should be capable to collect more funding from internal sources to meet the needs for developing well equipped libraries and conducting extra-curricular activities like refreshment trainings for faculties, international conferences, seminars, workshops, mooted competitions, role plays and faculty and students exchange programs.

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