

SWARAJ IN IDEAS: COMPARING CONSTITUTIONS FROM A SOUTH ASIAN PERSPECTIVE

*ANAM RAIS KHAN

*“Winds of the World, give answer! They are whimpering to and fro- And what should they know of England who only England know?”*²

Rudyard Kipling, in these lines tries to convey that if one wishes to know England one should know what is ‘NOT’ England and one who knows ‘ONLY’ England doesn’t know England at all. This is very true in our context of comparative constitutional studies as well and an analogy can be drawn. The basic premise of indulging in a comparative constitutional exercise in my opinion emanates from the very principle of **“inevitability”** and also that of **“necessity”**. The fact that we live in a globalized world and cannot literally *afford* to remain oblivious of other developments around the world drives us to look beyond our own territories, our own cocoons and shells and hence reflect, introspect and finally implement for the betterment of our society at large.

Ran Hirschl calls Comparative constitutional encounters as much a humanist and socio-political phenomenon as they are a juridical one. Hirschl says that, convergence, resistance, and selective engagement with the constitutive laws of others, past and present, reflect broader tensions between particularism and universalism, and mirror struggles over **competing visions of who “we” are, and who we wish to be as a political community.**³ He identifies this exercise as an interplay between the core factors of **necessity, inquisitiveness, and politics** in advancing comparative engagement with the constitutive laws of others through the ages. The question of “Who we are” is more or less settled, but “who we wish to become” as a political community is a highly subjective and driven by various factors of history, subjugation, polity, social challenges and compulsions in a State.

South Asia has its own distinct history, culture, politics and sociology, different from the West, but still, this Eastern part of the globe like the rest has usually been identified as a *passive consumer* of Western ideas, concepts and models, as if surviving the white man’s burden as legal heirs. The tendency in South Asia has always been of borrowing from the West rather than looking for something from within. This may probably be an outcome of the colonialisation of these countries and that they still suffer from that ‘*Colonial Hangover*’ wherein their own ideas are still hegemonized by the so called ‘superior’ Western Thought pushing their own ideas and beliefs to a back seat. This is nothing but an inferiority complex idealised, institutionalised, legalised and normalised.

Krishna Chandra Bhattacharya rightly calls this as a *cultural subjection* and puts the situation as follows-

*“Cultural subjection is ordinarily of an unconscious character and it implies slavery from the very start. There is cultural subjection only when one’s traditional cast of ideas and sentiments is superseded without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. This subjection is slavery of the spirit: when a person can shake himself free from it, he feels as though the scales fell from his eyes. He experiences a rebirth and that is what I call Swaraj in Ideas.”*⁴

It is this ‘*swaraj in Ideas*’ that should drive us to break the shackles of the age old practice of taking and glorifying West as the only model for reference and hence move towards self-determination and self-realization. For instance, India cannot be imagined without British Colonial Intervention, but on the other hand ideas based on British experiences and history cannot be replicated exactly in our Indian

Context. We have got something to learn from different constitutions of the world, their experiences and challenges and apply them in the Indian context in the Indian way. Exact legal transplants have never been fruitful, and modifications to suit the needs of importing jurisdiction and requirements of the time shall always have an edge. So it is probably always better to harp upon a better alternative to compare constitutions with similar history, cultures, issues and challenges based upon the “**similar situation logic**”. And hence I believe that undertaking comparative constitutional law studies from a South Asian perspective shall always yield more as compared to a universal approach to comparative constitutional studies.

A South Asian perspective to comparative constitutional studies narrows down the scope to delve into a deeper research whereby we are able to analyse concepts with a micro approach rather than a macro approach. It also provides better opportunities to learn from each other’s experiences in the past and challenges for the future. The society in South-Asia is a multi-cultural, multi lingual and multi religious one. It is not as homogenous and individualistic as in most of the countries in the West. Heterogeneity is the hallmark of South Asia and hence the constitutions of the South Asian countries make special provisions for accommodating their diversities such as of language, religion, social and economic exclusion, etc. of different communities within the society. Each of these countries has moulded their inclusion policies to suit their respective conditions. Some may be actually inclusive in true sense of the term and others might remain a paper tiger with negligible implementation at the grass root level. Most of the South Asian countries like India, Pakistan, Bangladesh, and Nepal etc. have had a common history of colonization, and are still developing countries, which further backs the argument of analyzing them comparatively. These countries being developing ones, have similar issues of tackling with unemployment, poverty, environment, health, population, illiteracy, female foeticide, malnutrition, food security, inflation etc. For instance if one considers the implementation of Uniform Civil Code in India then, of course, looking at the constitutions of U.S. or Germany won’t yield much good. We ought to look at nations with similar diversities and what can be the possible implications of such an implementation. Similarly, the society of United States may be ready to accept the legalization of same sex marriages but Indian society is probably not and hence the principle that- “**comparable should be compared**” has to be paid due heed for you cannot compare apples and oranges as they belong to entirely different species of fruits.

But a counter argument to this approach can be that, there can never be a complete foreclosure on whom to compare and whom not to. For “**All cases are unique and very similar to others.**”⁵ The fact the apples and oranges belong to a common family called ‘fruits’ may be enough justification to compare them. And since, ‘self’ cannot be understood in abstract sense or in absence of the ‘other’, therefore to account for western models is not a sin and one must not altogether shun each and every possibility of comparison with the West. To be precise, what needs to be shunned is not the comparison with western models and ideas but their unnecessary glorification. Indians may look into the Western insights and concepts and apply them the Indian way in the Indian context.

For example, The Constitution of Nepal, 1948 had fundamental duties but they disappeared from the future Constitutions of 1951 (Interim), 1959, 1962, 1990 and the Interim Constitution of 2007. There are many Constitutions like Japan and Veitnam, Netherlands which lay down fundamental duties and which also inspired the Swaran Singh Committee Report recommending the inclusion of Fundamental Duties in Indian Constitution as well.

From the lens of Secularism, it is again imperative to understand that the Western notion of

complete separation of church and State cannot be applied truly in south Asian context, and owing to the religious diversities here, the **'equidistance'** model seems to be more apt. To elucidate I wish to put forward the example of India and Bangladesh. Since these were inherently religious societies, it was not a question of liberty but one of compulsion that de-capacitated their Constituent Assemblies from keeping itself oblivious of religion. Thus, the question was not whether religion was to be touched, but it was how it was to be touched. Having followers of multiple faiths within its populace, both nations adopted different approaches to this relation. While India adopted the **equal respect approach**⁶, Bangladesh which initially adopted an approach of **state neutrality towards religion** (which is not to be confused with an anti-religious approach)⁷ toppled midway and retracted secularism,⁸ finally coming to adopt something new which may be called to be a hybrid of **Indian 'Sarvadharmā Sambhav'** approach and **religious state approach** as it recognized secularism but made Islam the state religion. The 'national identity' of Bangladesh in the form of its 'high ideals' was formally introduced as a vision by the Father of the nation, **Bangabandhu Sheikh Mujibur Rehman** in 1971 when the Awami League was elected to power. These high ideals, namely; **nationalism, democracy, socialism and secularism** formed the core constitutional values on which the later constitutional developments as well as the parliamentary system of governance of the country were to be based. These ideals were later incorporated in the Preamble of the Constitution which stated:

"Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution".

The basic idea behind the introduction of these high ideals was that the lessons learnt from the liberation war should inform the constitution and form its backbone. The 'high ideals' formed the fundamental principles of state policy under **Article 8 of the Constitution of Bangladesh**.

Similar was the situation in India. After the bloody partition we faced, we tried to instil a sense of security in our citizens and hence drafted a balanced Constitution that protected the rights of marginalised sections of society like- minorities, women, children, Dalits, etc. We also made explicit, what was already implicit by the remarkable 42nd Constitutional Amendment, 1976 when we inserted the terms **Secular** and **Socialist** to the Preamble of our Constitution, just like the concept of **'High Ideals'** in Bangladesh.

The fact that both the nations learnt from the experiences of the other and implemented the 'secularism' and 'socialism' that suited to their interests and interest of their citizens instead of directly transplanting the Western concepts, elucidates the fact that we need to look around in South Asia before reaching far off to other regions of the world for we may find in the next door neighbours what we may not in the distant ones.

By and large it can be fairly said that, there are not much demerits of this approach of undertaking comparative constitutional studies from a South Asian perspective vis-à-vis a universal approach to comparative constitutional studies. The only limitation (which can also be seen as a merit, as stated above) is that the scope of study gets limited and confined to only this region and one may remain devoid of something fruitful and beneficial which it could have borrowed from rest of the globe, had it been a universal approach to comparative constitutional studies.

Hence, at the end of the day it's all about priorities, but priorities must entail a positive rationale of relevance, feasibility and applicability, which in the present scenario, gets well served with a South

Asian perspective of Comparative Constitutional Studies over a Universal Approach. So, probably, it is time now, to revert back to the *Swaraj in Ideas* and rejoice our Indian and South Asian identity.

(Endnotes)

- 1 * Advocate The High Court of Delhi, LL.M (Competition Law & Market Regulation), National Law University, Delhi.
- 2 Rudyard Kipling, The English Flag, 1891. Accessed on December 18, 2015 from- <http://www.telelib.com/authors/K/KiplingRudyard/verse/volumeXI/englishflag.html>
- 3 Ran Hirschl, Comparative Matters, The Renaissance of Comparative Constitutional Law, Oxford University Press, 1st Edition, 2014, Pg. 19.
- 4 Swaraj in Ideas, Visvabharati Quarterly 20, 103-114 (1954).
- 5 T. S. Eliot (The Cocktail Party)
- 6 Nalini Rajan, Secularism Revisited, 38 ECONOMIC AND POLITICAL WEEKLY 246,(2003)
- 7 Riaz, Ali (2004) God Willing: The Politics of Islamization in Bangladesh. Lanham: Rowman and Littlefield Pub.
- 8 Ollapally, Deepa, The Politics of Extremism in South Asia (Cambridge University Press, 2008)