Concept Note: Objectives and Justifications

TWO WEEK WORKSHOP ON CAPACITY BUILDING PROGRAMME

Main Theme

Comparative Public Law and Hindu Philosophy: Research and Teaching Dimensions in 21st Century India

(Organized by: *The Centre for Comparative Public Law,* **the Himachal Pradesh National Law University, Shimla)**

July 06 to July18, 2020

General:

Comparativism or comparative methods of understanding (*i.e.,* law, and legal institutions) has become new academic canon in a globalizing world, where institutional arrangements as well as normative /theoretical entities, are increasingly seen to be universalizable. Frequent examples are found in the discussions on important public problems, policy statements, and decisions of the courts. Prof. Ludwig Ehrlich observed, in 1921, that, "...it (is) indispensable to utilize the experience of mankind in various states and at various times, it would appear even more important to adopt the same procedure on a scientific basis now that developments in every country reflect immediately upon Conditions in other countries".

The basic underlying assumptions include the object of gaining from the experiences of other legal systems, so as to tackle the practical problems at home. In that sense, comparative studies have a long history. In ancient Greece, Aristotle carried out a comparative study of 158 constitutions of City States, to theorize and arrive at the general constitutional norms in his 'Politics', 'Nicomachean Ethics', and other works.

During early middle ages, the discovery of the ancient Justinian Code at Bologna (Italy) attracted scholars of the whole of Europe for study. It is said that in the 11th Century, after the discovery of Code of Justinian, (*Codex Justinianus* or Corpus Juris Civilis), Bologna had more than 10000 scholars from different legal systems of Europe. The comparative study of the Code, it is believed, helped usher Europe into the age of enlightenment and modernity. The Major legal systems of the continental Europe and the United Kingdoms were rebuilt thereafter.

The history of comparativism in ancient and medieval India has a different story. In Ancient India, Nalanda and Takshashila were great Centres of learning. Greek, Chinees and Prussian/Arabian scholars such as Fa-Hien, Huien Tsang, Ibn Batuta, Megasthenes, Al-Masudi, and many others travelled to India to study Indian political and social systems. However,

instances of similar voyages from India to the other part of the world is not known and perceptible in the graveyard of history. Within Indian traditions of philosophy, there were several streams amongst whom the comparative influences are visible: *Dharmsastras, Nyaya, Mimansa, Baudh, Jain,* etc. These traditions, though benefiting from each other, prospered and matured in the same land, culture, and amongst the same set of people, which were tempered by the invasions of Turks and Mughals from the 11th Century onwards. Thus, comparative tradition and academic habitude were largely absent during ancient and medieval periods in India. This fact (whether) can be seen as the chief reason for languishing of the idea of law, legal system, and political institutions or the branch of knowledge call jurisprudence, during first fifteen centuries of the Christian calendar! One of the great students of Hindu Law, Robert Lingat (1973) declared that India could not develop something like Jurisprudence!

During the British period, scores of European scholars and administrators studied existing and ancient Hindu systems of law, governance, and philosophy: Asiatic society, Bhandarkar Institute, Max Muller, Henry Maine, Max Weber, Sir William Jones, Robert Lingat, Ludwik, Sternbach, Colebrooke.

Almost all eminent scholars of the modern India, who rebuilt modern Indian intellectual and political systems were educated or had spent significant time in Europe and USA. Prominent names includes, K.P. Jaiswal, Mahatma Gandhi, J.L. Nehru, Ballabh Bhai Patel, B. R. Ambedker, B. N. Rau, Syama Prasad Mukherjee, Vinayak Damodar Savarkar, Rajkumari Amrit Kaur, Hansa Mehta, S.C. Bose, Asaf Ali, Jaipal Singh Munda, John Matthai, Sarvepalli Radhakrishnan, Sir Hari Singh Gour.

The Constitution of India is a beautiful product of studies and comparative assessment of working of principles/rules on a subject in different legal systems of the World. The Advisor of the Drafting Committee of the Constituent Assembly travelled extensively around the World to study different Constitutions. Constitutionalization of the imposed Common Law, for instance, has created a monopoly in favor of positive law of the state. This had been a general feature of the Western legal and political theories or philosophies. Though state has exclusive propriety of law and justice, all of them are located in the social order away from the historical and cultural roots. Interestingly, P.V. Kane, the great sanskritist, had warned the Constituent Assembly that provisions which are based on ignorance of Indian philosophical and historical traditions were bound to prove counterproductive.

A distinctive and indisputable feature of *Dharmsastra* tradition of philosophy can be discerned from the authorities about the *sources of law. Manusmriti* observes, "The whole Veda is the first source of the sacred law, next the tradition and virtuous conduct of those who know the Veda, further, customs of holy men, and finally, self-satisfaction". (LAWS OF MANU, Ch. II, Verse-6). It is enlightening to note that, almost all of these four sources are *internal* to the man or society. As opposed to it, the established sources of modern liberal law and legal system are entirely external to the individual and the community.

After the globalization in the 20th and 21st Centuries, however, the need as well as the importance of comparative study of constitutional systems, law, political institutions and processes have acquired new dimensions and enormous volumes. The University Grants Commission (UGC), therefore, has prescribed the subject of "Comparative Public Law/government System" to be the Mandatory/Foundational subject for the master degree (LL.M.), programmes in universities.

Public Law and Philosophy:

There is a general agreement on the classical division of law into public and private, though hardly a consensus in academic discourses, on the idea/concept of law, much less on the relationship between law and philosophy. Law, that is, and law, that might be or ought to be, are easy to be confused in research and teaching. For research and teaching have always some normative dimensions. Where law or legal institutions of different systems are to be compared, the problem of identification of the subject in two or more jurisdictions comes down to the problem of the concepts/definitions of law. The exercise becomes more deceptive when we count the fact that the two rules or institutions are the product of, and exist amongst the specific people, culture, and history. This unique problem is especially relevant for the countries, such as India, where a major part of the positive law is received from Europe.

The challenge (definition of law) is aggravated in a unique way when comparative studies of legal institutions and processes are undertaken relating to two countries, both of them having, transplanted legal systems: for example, India, Brazil, Japan, or South Africa.

Competing theoretical definitions of law, therefore, are of little help. The conceptual frameworks of law as command, law with refence to interests, as normative order, or as social rules; neither can account for diverse rules or propositions that are actually, directly or indirectly, taken into considerations by officials of the state for enforcement. For instances, one can see some of the court decisions, in the last one decade, such as, LGBT, Naz Foundation, Sabarimala, triple talaq, reservation, prohibition of alcohol, Privacy, data protection, collegium system for the appointment in the Constitutional courts, standards of judicial review, constitutional amendment and constitutional identity, specific socio-economic rights, school and higher education, legal concepts and identity of state, Electoral and representative democracy, etc. A teacher or researcher of the subject of comparative public law may have to run through the maze of propositions qualifying through one or the other theoretical paradigms, to be law or otherwise. Further the Semantical and Epistemological requirements of study and in research pose daunting tasks. Yet, starting point for law, to be safe, may be identified, in the form of statute law-rules and procedures, declaration of laws by constitutional courts contained in multiplicity of judgements on a specific rule/law, as enforced, relating to the subject matter of study.

The exercise of demarcation of public law, too, is not a simple task. Law in general divided into Public Law and Private Law. The classical distinction was not based upon some exclusive

characteristics and common nature amongst the set of laws. Rather, the division was made in the interest of convenience of study. It is well accepted that even in cases of private laws, considerations of public benefit and public interests arise frequently. HLA Hart regards the division to be arbitrary. Modern public discourses, activism and social science academic debates show an inimitable feature. The feature consists in the two opposite but accompanying streams of arguments. On the one side, for socio economic entitlement, or legitimate sphere of state intervention and enterprises, there is demand and tendency that state should restrict itself, and the state has little business with. On the other hand, in the context of liberal rights state is frequently invited in the bedroom and kitchen of the individual and family.

This is an unprecedented situation wherein the Indian state finds itself today. This is a momentous yet precarious occasion where the government, court and the legal academics have to steer the country and the legal system. It is abundantly clear, in the sense, that the traditional division and the current understanding of public law put focus on the constitutional or administrative laws and related policies, rules and procedure.

Methods and Methodology:

The method and methodology of study of a subject are determined, to a great extent, by the sources to which the subject is traced. In fact, the task of an elaborate and definite determination of the sources of public law itself constitute an important subject matter in the interest of the discipline. A less elaborate catalogue would refer to the formal sources, such as the fundamental law/constitution, court decisions, written laws and the similar collections of rules. This list, however, needs to be expanded by including authoritative writings of eminent writers and attempts to derive and incorporate the epistemological insights from other disciplines as well, for a constructive comparative study.

The methodological problems have to grapple not only with the divergent character of laws in two or more different countries but also with that of distinct nature of legal processes. Essentially then, the study of courts, nature, character of judicial process, and the court judgements form an important aspect of the comparative public law. There, of late, has taken place, through court decisions, 'migration of the constitutional ideas across the judicial systems. For example, the Supreme Court of India has referred, borrowed and utilized rules, legal and philosophical concepts and percepts from the diverse legal systems of the world, in its decision on privacy, personal law, data protection and constitutional rights, constitutional amendments.

There is no one single method to accomplish such a varied field of comparative public law. The general division of the research/study methods into doctrinal and empirical, though important, may not be sufficient. A constructive comparative study would require an investigation and the determination of the law, rule or doctrine, about its historical evolution, socio- cultural progression and philosophical backgrounds of the laws under comparison. The traditional logical or analytical methods of study are to be supplemented and fortified by developing and utilizing advancements made under what we refer by epistemology, that is advancement made

in other cognate disciplines of knowledge. The subject, then, is inherently interdisciplinary in nature.

Tools of Study:

The academic tools in general, and in particular, applicable to the study of common law have been developed in the West. Judicial process, standards, and techniques utilized therein, the interpretation of the specific constitutional provision and rules/principles therefor, are some of examples entirely, representing the historical and cultural achievements made in the West. This problem can amply be illustrated with the help of two traditionally regarded, social goods: access to justice and laws occurring on that subject. The second is access to education, economic policies and legal rules regulating that access. Within the liberal legal paradigm, the academic arsenals may simply be found to be inadequate. Thus, specific tools of empirical or doctrinal research have little potential to facilitate and to produce meaningful comparative studies. Carl Schmitt characterizes this Western academic habitude in a beautiful sentence, "The central concepts of modern state theory are all secularized theological concepts" (1922).

The aspect of study of comparative public law can be understood easily, if we consider two dynamics of the study on a subject. That is, on a given subject there certainly had been some institution and rules for time immemorial, for example, the subject of forests and allocation of benefits arising out of it. The forest had existed for millenniums and so had been the rules on it, stated or unstated, with details of position of the State/King. These rules and relationships between rules and local inhabitants and state/king, had have quite diverse nature in two or more different countries, and were necessarily product of respective history and culture of the land. A similar problematization are called for the relationships and mutual location of the individual and the community represented by the state. These kinds of real comparison are hardly possible with the popular research approaches: empirical/quantitative involving tolls of observation, interview, sampling, or ethnography. Difficulty is not of lesser degree when we employ the prevalent types of research in qualitative or doctrinal, for the reasons that it starts with given categories and concepts in law and adjudication.

After the emergence of realist approaches and critical school in jurisprudence, the focus of studies in public law has been on case studies. There have been a very few scholarly books written, on the Hindu public law and legal systems, during the post-independence period. The studies in comparative public law are entirely undertaken within the paradigm of liberal law and legal systems. The most of them, in law, are bent upon proving that Ancient and largely medieval India had no (ordered) legal system and could not develop studies, something, similar to Jurisprudence. (Lingat, 1097). Recently, one of the doyens of Indian Legal Education has produced similar study asserting that the ancient India had no legal system (Nariman, 2006). Nariman asserts that, "Dharmsastras did not visualize an ordered legal system, but they did conceptualize an aspiration-*nyaya*- which we now call *'justice'. Yajnavalkya* emphasizes equity, reason and conscience in the process of justice".

A somewhat similar view is taken by Prof. M.P. Singh, (2019). It is interesting that, the High Court of Australia has overruled Rechard Blackburn's doctrine of *terra nullis*, (*Millirrpum* v. *Nabalco*, 1972) established in as late as in 1972. The High Court definitely laid down, by rejecting the *terra nullis* theory that the aboriginals had a legal system as well as a social order, and the area/land of the Australian continent was not no mans land (Mabo Case 2, *Mabo* v. *Queensland* 1992).

The politics of teaching and research, therefore, sometimes appears to be a strange phenomenon. This politics, however, has long lasting consequences for the existent social order and for its continuance. An impartial and more authentic study and teaching would, necessarily require new tools and methodology for the task at hand.

Need and Relevance of the Theme of proposed CBP

The need for the kind of training and study proposed, here, is especially, relevant in view of the reasons and explanations produced above. There is a clear realization by the regulatory bodies on the higher education (UGC) and policies of the Ministry of Human Resource. These bodies have prescribed the study of Comparative Public Law as one of the foundational/compulsory courses for the UG or Master Degree program in Law.

The contemporary political and social systems of India are witnessing and experiencing great energy for transformation, revision, and constructive reform of the central conceptions of the Indian Socio-Legal Order. The public and governmental discourse on diverse aspect of the Constitution, law, government, and the economic arrangements are certainly formative in nature, in similar manner in which they transpired during the first half of the twentieth Century in India. Though, the Indian Constitution and legal system are regarded as one of the most successful post-war constitutions, several of its alleged failures may easily be traced to its absence/failures and the insufficiency of academic advancements made during the formative period of the 'modern Indian law and Constitution'. The most of these inordinate difficulties and controversies, today, are challenging the policy makers and courts, have their roots in scarcity of research and general academic understanding of Hindu (legal) philosophy in the context of its people, history, culture, and social systems.

The conception of state and legitimate acts of state, national unity and integrity, democratic representation, Citizenship and individual and group identities, acceptable economic and social policy, separation of powers, Judicial review and activism, access to justice, socio-economic rights and applicability-uniformity of laws to diverse groups, structure and powers of private/public economic institutions, are some of the examples, where studies in comparative public law has potential to contribute reminiscently. The Indian Council of Social Science Research (ICSSR) has been promoting similar studies in the past. In the new current scenario, the Council needs to be pro-active in encouraging and facilitating the proposed kind of research and training. A whole new generation of young scholars is required to be produced and

prepared in the field of comparative public law discourse, who are, and whose studies are, not disconnected from India's own tradition and achievements in law and legal philosophy.

Focus Areas of the CBP

The emphasis of the proposed two weeks programme, is, intended to ignite and initiate the serious academic interests and to prepare young faculties and researchers for the study of Indian legal philosophy and the public law. It is our belief and confidence behind the initiative that the Constitution of India and the constitutional percepts may appropriately be understood in the context of and sufficient background knowledge of Indian philosophy.

Proposed by

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