

**CONSTITUTIONAL PROVISIONS OF FUNDAMENTAL RIGHTS:
A COMPARATIVE STUDY OF NEPAL AND INDIA**

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By

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LETTER OF RECOMMENDATION

This is to certify that Mr. Dilli Raj Gautam has completed the doctoral Thesis entitled **"Constitutional Provisions of Fundamental Rights: A Comparative Study of Nepal and India"** in **Political Science** under our supervision. The researcher has fulfilled all the requirements as prescribed by the Research Committee, Faculty of Humanities and Social Sciences, Tribhuvan University. The doctoral research which Mr. Gautam accomplished is his original contribution. We, therefore, recommend this Thesis for the final evaluation to the concerned authorities.

We wish him all success in his future endeavors.

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Date: May, 2022



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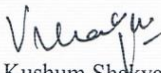
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APPROVAL LETTER

This dissertation entitled **Constitutional Provisions of Fundamental Rights: A Comparative Study of Nepal and India** was submitted by **Mr. Dilli Raj Gautam** for final examination to the Research Committee of the Faculty of Humanities and Social Sciences, Tribhuvan University, in fulfillment of the requirements for the degree of **Doctor of Philosophy in Political Science**. I, hereby, certify that the Research Committee of the Faculty has found this dissertation satisfactory in scope and quality and has therefore accepted for the degree.


Prof. Kushum Shakya, PhD
Dean and Chairperson
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Date: **June 19, 2022**

DECLARATION

I hereby declare that this PhD dissertation entitled **Constitutional Provisions of Fundamental Rights: A Comparative Study of Nepal and India** submitted to the Faculty of Humanities and Social Sciences, Tribhuvan University, is an original work prepared under the supervision of my supervisor Prof. Dr. Khadga K. C. and co supervisor Prof. Dr. Nutan Chandra Subedee. I have not used its materials for the award of any kind and any other degree or for any purposes. Wherever other authors' sources of information have been used, they have been sincerely acknowledged.

I shall be solely responsible if any evidence is found against my declaration.



Dilli Raj Gautam

May, 2022

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ABSTRACT

Constitution is a fundamental political and legal document of a nation promulgated to exercise sovereignty which determines functions and authority of the government and guarantees fundamental rights for citizens as well as provides procedures and means for protection. Beginning in modern written form in the USA in 1787, constitution now functions as a supreme law of any nation.

The fundamental rights have become almost core values of any universally adopted constitution for the development of personality of every individual and preserving human dignity. Their provisions and due practice justify the intensity of loyalty of a nation towards the welfare state. Fundamental rights along with liberal ideals and democracy can guarantee freedoms and liberties to the citizens irrespective of race, caste, religion and sex through the strong enforcement mechanism.

This study has compared two constitutions of Nepal and India based on the following questions: i) what are the provisions of fundamental rights in the present Constitution of Nepal 2015 and the Constitution of India 1950? ii) How are the constitutional provisions similar and different in terms of fundamental rights? iii) How can the strengths and weaknesses of fundamental rights of two constitutions be analyzed in the light of liberal and post-modern inclusive democratic theories?

The present constitutions of Nepal and India both adopt the principles of federalism, republicanism, secularism and inclusiveness under the philosophy of liberal democracy. The Constitution of India 1950 enshrines a bundle of fundamental rights under part III Article 14 to 32. The modern list of human rights and fundamental freedoms which prevail in India today are the outcome of a number of recommendations and resolutions adopted by the Indian National Congress during the British colonial rule such as Nehru Report (1928), the independence pledge (1930), India Governing Act (1935) and India's Charter of Freedoms 1997. The constitution drafters were also influenced by the provision of Charter of United Nations Organization (UNO) and Universal Declaration of Human Rights (UDHR), 1948. The provision of human rights and fundamental freedoms of India is the product of the total sum of national and international efforts.

Similarly, the constitution of Nepal is the product of the Second Constituent Assembly and promulgated on 20 September 2015 with the motive of strengthening democracy and the rule of law, protecting and promoting basic liberties of the people, 'leaving no one behind' and creating a just, equitable, tolerant, open and socially inclusive nation in which the needs of the most vulnerable are met. This constitution incorporates an intensive list of 31 fundamental rights related to civil, political, economic, social and cultural rights and also collective rights in part III Article 14 to 46 of the charter. It rules out all the hindrances of preceding constitutions of 1948, 1951, 1959, 1962, 1990 and 2007.

This dissertation focuses on comparative and explorative research method based on secondary data sources of the book, scholarly articles, and the literatures available on the research topic. The study also applies provision of international instruments of human rights, theories of liberalism and fundamental rights provision under both constitutions as a measuring standard to make substantial differences between two constitutions. Comparative content analysis method has been insightful thereon. The researches and literature available up to now demand more scrutiny regarding the provisions, major similarities, differences, strengths and weaknesses of fundamental rights with the due application of relevant philosophies and comparative methodology. Hence this research is oriented towards filling the gaps.

The constitution of Nepal adopts the three major elements of liberalism i.e. dignity of life, liberty and property rights. It also includes right to information, right to communication, right to privacy, right to justice, right of victims of crimes, right to clean environment, right to language and culture, right against torture, right to free legal aid, rights of women, rights of Dalit, rights of senior citizens and right to security. Contrary to this, the constitution of India allows death penalty and avoids right to property from fundamental rights to constitutional rights against the motive of liberal democracy and the provision of UDHR, International Covenant on Civil and Political Rights, 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). But again, a number of countries professing liberal democracy such as US, China, Indonesia, Pakistan, Nigeria, Bangladesh, Egypt, Saudi Arabia, Iran, Japan also have provision of death penalty.

Unlike the provision of erstwhile Nepali constitutions and concurrent Indian constitution, the present constitution of Nepal ensures right to women as fundamental right. The constitutional provision of 33 percent representation of women in Nepal's legislature is a significant breakthrough. It explicitly recognizes the property rights of the women but India still has to introduce it. Article 42 of the constitution of Nepal assures meaningful proportional representation in the state structure. It can be considered as a positive orientation. Conversely, the constitution of India limits this right up to the reservation of certain number of seats to the ethnic minorities and marginal groups for the employment under public service commission only. In Nepal the victims of environmental pollution have the right to receive compensation from the polluters. Absurdly, Indian citizens cannot claim compensation against the polluters as a fundamental right.

Indian independence judiciary deserves competency and strengthens fundamental rights by judicial interpretation where the judges are appointed from collegiums of prominent law experts and jurists and avoid unnecessary derogation of executive and politics, but unfortunately in Nepal, the constitutional council and judicial council which are liable to the appointment of chief justice of supreme court and other judges comprises with the dominant members of political background consequently influence the independence of judiciary and tend to committed judicial execution. The Nepali judicial system still within the border of constitution awaits observation.

As an important component of liberal ideals, right to property is a fundamental right in Nepal, though the constitution declares itself as a socialism oriented nation. But in India, this right deleted from fundamental rights in order to attain the goal of socialism. In this regard both the countries puzzle by adopting mutually contradictory philosophies altogether.

In a nutshell, both constitutions, though promulgated in time difference of 65 years, are largely inspired by liberal values. But, Nepali constitution is more progressive than Indian one in matter of incorporating post-modern inclusive-constitutional democratic ideals corresponding to the basic components of liberalism and major international instruments of human rights, 33 percent women's representation in every political institutions, equal right to parental property, 45 percent reservations in government employment, right to employment, and third sex rights (rights of LGBT).

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LIST OF ABBREVIATIONS/ACRONYMS

APA	American Psychological Association
CA	Constituent Assembly
CEDAW	Convention on the Elimination of All form of Discrimination against Women
CJ	Chief Justice
CJEU	Court of Justice of the European Union
CLC	Central Legislative Council
CoI	Constitution of India
CoN	Constitution of Nepal
CPA	Comprehensive Peace Accord
CPN (UML)	Communist Party of Nepal (United Marxist-Leninist)
CPN	Communist Party of Nepal
CPR	Civil and Political Rights
CRC	Convention on the Rights of the Child
DHR	Declaration of Human Rights
EIC	East India Company
EU	European Union
FR	Fundamental Rights
HR	Human Rights
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICRC	International Convention of Rights of Child
LBGT	Lesbian, Gay, Bisexual and Transgender
LBMB	Law Books Management Board
LN	League of Nations
NC	Nepali Congress
RPP-N	Rastriya Prajatantra Party – Nepal
SC	Supreme Court

SCs	Scheduled Castes
STs	Scheduled Tribes
UCPN	United Communist Party of Nepal
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
ULF	United Leftist Front
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commission for Refugee
UNO	United Nations Organization
UNPM	United National People's Movement
UPM	United People's Movement
US	United States
USA	United States of America