SCOPE OF COMPARATIVE CONSTITUTIONAL LAW IN LEGAL STUDIES

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ABSTRACT:

Comparative Constitutional Law is a newly animated field in the early 21st century. Before that, this field had no such broad range of interdisciplinary interest, with lawyers, political scientists, sociologists. Now, even economists are making contributions to the collective understanding of how constitutions are formed and how they operate. Such demand has never been there from courts, lawyers and constitution-makers in a wide range of countries for comparative legal analysis and never before the field has been so entrenched, with new regional and international associations providing for the exchange of ideas and the organization of collaborative projects.

This manuscript emphasizes the broader scope of comparative constitutional law in legal field. With the maturity of the field, it is of utmost importance to know the scope of Comparative constitutional law for academic and legal debate. Such efforts will advance learning to a great level, by giving attention on outstanding questions as well as raising awareness of issues worth-pursuing in under-analyzed jurisdictions.

INTRODUCTION:

The necessity for comparative method of study has become inevitable in any study of human culture, achievements and institutions because today the scale of human existence is no longer cramped by national sub-divisions but is as wide and unencumbered as the horizon.

ISSN 2581 3382

Poet's dream in the 19th century - "the parliament of man, the Federation of the world" – is taking a realistic shape in the 20th Century.[1] The development of the League of Nations after the conclusion of the First World War and of the United Nations after the conclusion of the Second World War, has amply established that even erstwhile warring Nations are bound to join together for the resolution of common problems which are more important than the national causes for which they had been fighting.

The devastating World Wars have taught the lesson that war can be avoided if there is a better understanding and promotion of tolerance amongst the Nation states, which, undeniably, have their different individual needs. Such better understanding can develop only if mankind, inhabiting different parts of the globe, comes to appreciate that they belong to one and only family of Man and that their problems for survival are alike, if not identical.

A study of political and legal systems of different countries promotes such better international understanding. The functions to be performed by a modern political system are almost same all over the world, such as legislation, administration and adjudication. A realization that the goal of different political systems is to best perform the same functions replaces parochialism by universalism which is man's only way to survival in the face of the myriads of inexplicable problems which threatens todays' peaceful existence of the human race.

Meanwhile, the advancement of science and technology as well as of global communications through jet carriers, satellite, television and the like, it is no longer possible for any nation to survive in isolation. Men should understand that they are not self-contained parts of national units, but members of a family of nations, having common social, economic and political problems, which can be solved only by united efforts, deriving benefit from mutual experience. The happiness of man is no longer the happiness of the cave-man, rather winter wined with the happiness of the entire species.

Comparison is a natural human activity and is always an exciting experience to cross the frontiers of one's own country and to travel into other regions to improve the system of one's own country.

[1] D.D.BASU : COMPARATIVE CONSTITUTIONAL LAW, 155 (Justice G B Patnaik, Yasobant Das & Rita Das eds., 3rd Edition, LexisNexis 2014).

ISSN 2581 3382

It should be remembered that "Comparative Law" is not a principle or body of rules of law, but an approach to or method or technique of studying, law or any breach or topic of it, arising from the multiplicity of legal systems in the world and the different approaches adopted to common problems, by examining attitudes, institutions or rules on any matter of any two or more legal systems. Further, the comparative study is valuable for parting the study of any one legal system into perspective and developing the understanding of it. It is also invaluable for jurisprudential studies, of the nature, function and general ideas of and about law. Constitutional law is last resort. It is the stage of final control of elected representatives by judges, and therefore quite often hosts the most obvious clash between legislature and judiciary. Constitutional law shapes and confronts all other law. Any case arising in the constitutional field is a case of some other legal nature, and poses a constitutional question on the side.

- **DEFINITION**:

Comparative constitutional law is the study of differences and similarities between the laws of different countries. It comprises the study of different legal systems in existence in the world, including the common law, civil law, socialist law, Islamic law, Hindu law, and Chinese law and alike. It includes the description and analysis of foreign legal systems, even where no explicit comparison is undertaken.[2] In the present age of internationalism, economic globalization and democratization, the importance of comparative law has enormously increased.

- **HISTORY:**

Studies on Comparative Constitutional Law are moderately new field of research. For a long time, there has been no extensive and certainly no exhaustive writing in the era. The first studies concentrated on systems of governance and started to approach constitutional questions regarding judicial review. Such studies separate structure and form from content and based on a deemphasizing understanding of the aspects and inferences of structures on the content of a given culture. A political system might give relatively more power to elected or appointed; lifetime or term serving judges, and the selection of those judges might be interesting in terms of class, gender, race, political affiliation, educational options, and the like. The accessibility of a political system (especially by minorities) might make a remarkable difference as to the

[2] www.wikipedia.com.

ISSN 2581 3382

necessity of judicial review. The organizational reality of a political system is a political reality of power, and therefore of importance to people subjected to it.

Montesquieu:

According to the present view, ***Montesquieu*** is regarded as the 'father' of comparative law. The political and civil laws of each nation should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.[3]

They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.[4] He also advises that "to determine which of those systems i.e. the French and English systems for the punishment of false witnesses, is most agreeable to reason, we must take them each as a whole and compare them in their entirety."[5]

Further, according to him, as the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.[6]

- **PURPOSE OF COMPARATIVE CONSTITUTIONAL LAW:**

Comparative constitutional law is an intensive academic study of separate constitutions, each one examined in its constitutive elements; how they differ in the different legal systems, and

[3] http://lookandgaze.blogspot.com/2012/05/importance-of-comparative-law.html.
[4] https://www.law.utoronto.ca/documents/conferences2/Trebilcock09_Davis-K.pdf.
[5] supra note 3.
[6] http://www.renanconsulting.com/main-legal-systems-of-the-world/.

ISSN 2581 3382

how their elements can be combined into a system. Studies of comparative constitutional law may be viewed as micro or macro comparative constitutional analysis,

a) Micro comparative constitutional analysis: This refers to detailed comparisons of constitutions of two countries,

b) Macro comparative constitutional analysis: This implies broad-ranging studies of several countries.

Comparative Constitutional law studies the manner in which various principles of different constitutions are organized, interpreted and used in different systems or countries. Today it give the impression that the principal purposes of comparative constitutional law are:

- to attain a deeper knowledge of the different countries constitutions in effect to perfect implications of constitutional principles in the legal systems in effect possibly,
- to contribute to a unification of proper constitutional existence in every country, of a smaller or larger scale.[7]

Donald Kommers identifies that in comparative constitutional law, there is *"a range of models"* of constitutional justice, begin to differentiate the particularistic from the universalistic, and suggest, for American scholars and judges, that there is a world elsewhere that can enrich the study and development of U.S. constitutional law. The emergence of what one commentator has called *"a global community of courts"* where constitutional courts are borrowing and citing each other's precedents, is certainly going to help advance the field of comparative constitutional law.

Dennis Davis, who is judge in the Cape Provincial Division of the High Court of South Africa and one of the four judges contributing essays to this volume, explains how comparative constitutional ideas are being used to aid his own deliberative process.[8] With the constitutional protection of cultural rights in mind, **Judge *Davis*** writes:

[7] supra note 3.

[8] Vicki C. Jackson and Mark Tushnet, *Defining The Field of Comparative Constitutional Law*, LAWCOURTS.ORG 288 (Oct 19th 2003, 10:04AM) http://lawcourts.org/LPBR/reviews/Jackson-Tushnet1003.htm.

ISSN 2581 3382

South Africa is not alone in dealing with the problem of reconciling the right to culture with apparently contrary commitments in the constitution. The range of concern about the role of Aboriginal law in Australia that was triggered by the Mabo cases is indicative of a similar problem of recognition. And the idea that cultural autonomy is a constitutional right worth preserving finds recognition in some jurisdictions.[9]

The Canadian Supreme Court has granted a considerable level of meaningful autonomy in ***R. v. SPARROW***[10]. The rich cross-fertilization of constitutional ideas and the active dialogue judges are having with foreign precedents will be grist for other comparative constitutional law scholars to mill. The timing of this book's publication could not have been better. The international and comparative constitutional law influences two high profile cases in the Supreme Court in the year 2002.[11]

In ***LAWRENCE v. TEXAS*** [12], *Justice Kennedy* cited ***DUDGEON v. UNITED KINGDOM*** [13] , a decision of the European Court of Human Rights striking down laws that proscribed consensual homosexual conduct in Northern Ireland, as persuasive authority for the point that Western civilization has come to view anti-sodomy laws as mere prejudice and a violation of the rights of a politically unpopular group.

And in ***GRUTTER v. BOLLINGER*** [14] , *Justice Ginsburg's* concurring opinion, joined by *Justice Breyer,* cites both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women in support of the majority's insistence that affirmative action programs have an end point. Indeed, it appears that the U.S. Supreme Court will become more receptive to the constitutional experiences of other nations is beginning to be realized.[15]

Thus, the field of Comparative Constitutional Law is an important contribution to a rich tradition of public law scholarship on courts and constitutions in comparative perspective.

- **SCOPE OF COMPARATIVE CONSTITUTIONAL LAW:**

[9] ibid.
[10] R. v. Sparrow, 1 SCR 1075 (1990).
[11] Supra note 8.
[12] Lawrence v. Texas, U.S. (2003).
[13] Dudgeon v. United Kingdom, 45 Eur. Ct. H.R.(1981).
[14] Grutter v. Bollinger, U.S. (2003).
[15] Supra note 8.

ISSN 2581 3382

Civil society has always rested on the principle that *"comparisons are odious*". This principle is true in many circumstances, but has intended to prevent the work of comparative legal scholars, who often seek to explain or excuse, rather than to evaluate the differences between the legal systems that they study.

Montesquieu rightly observed that laws should be adapted to the people they are meant to rule, but did not shrink from advancing his opinion concerning which legal systems were *"les plus conformes à la raison".* This raises the question whether there are any universals in constitutional law. What does reason require of a just constitution? Or should we accept, with Thomas Hobbes, that is no justice or injustice at all, until a civil power asserts itself to tell us what justice *will* be, from now on. The proper purpose of constitutionalism has been, from the beginning, to advance the common good through law. Partisans of constitutional justice must struggle to discern *"what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance."*

The architects of law and government have divided certainly into two parties, the partisans of constitutionalism or government "*de jure*" on the one hand, and the partisans of arbitrary power, or government "*de facto*" on the other. The whole innovativeness of constitutional government rests on the premise that some legal institutions are better (than others, and that legal institutions should be constantly improved to achieve complete justice.

Modern constitutionalism achieved its greatest successes and most rapid advancement beginning in the eighteenth century with the French and American revolutions, but the constitutionalists of that period considered themselves to be part of a much longer historical continuum, going back through the English, Dutch and Italian resistance against arbitrary power to the political controversies of Greece and Rome. The Renaissance and Reformation in Europe, the English Civil War, and the "Glorious" Revolution of 1688 all encouraged the study of the principles of good government, but the basic elements of constitutional design as understood by the advocates of constitutionalism remained remarkably constant for two thousand years.

According to John Adams**,** the advantages and inconveniences of the different forms and combinations of government were as well known "at the neighing of the horse of Darius" as

ISSN 2581 3382

they are today. The eighteenth-century innovators of practical constitutionalism considered themselves as participants in the regular course of the liberal improvement of the arts and sciences, seeking the general advancement of "civilization" and "humanity." Their study of the theory and practice of government in such a way led to a growing consensus in Europe and America that even well-established autocracies found difficult to resist.

These *"checks and balances of a free government"* take account of representation in the legislature, periodic elections, and broad suffrage. Proponents of constitutional government have sought to realize justice by founding laws and institutions *"on the simple principles of nature,"* discovered *"by use of reason and the senses."*

- **What place, then, for comparisons?**

Instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights,* and the *International Covenant on Economic, Social and Cultural Rights* have established certain superior standards of law and justice that apply to all societies, such as the duty to *"act towards one another in a spirit of brotherhood,"* not to discriminate on the basis of race or color, the guarantee of personal liberty, the ban on slavery, the prohibition of torture, the right to equality before the law, the right to effective legal remedies, to impartial tribunals, to privacy, to own property, to periodic and genuine elections, to universal and equal suffrage, and so forth. These standards were explained by cross-cultural consensus, but do not depend on culture for their continuity. They are necessary effects to human nature, once the "inherent dignity" of fellow human beings is to be accepted.

The *purpose and value of comparative constitutional law* arises, then, not from *identifying* these fundamental requirements of a just legal order, which will be clear whenever human beings are free to consider and openly to discuss the requisites of justice, without any coercion. The value of comparative constitutional law arises rather from comparing the efficacy with which the many various constitutional orders in the world *realize* and advance a just legal order, in the very different political, cultural, regional, historical and other circumstances in which they find themselves. Different societies face differing situations, but the human needs and capabilities with they work do not differ very much. The benefit of comparisons is that they clarify the similarities (and dissimilarities) of the surrounding circumstances, and provide those

ISSN 2581 3382

making constitutional comparisons with inspiration to improve the institutions of their own legal order, in the light of the experience of others.[16]

The purpose of comparative constitutional law, like all legal study, is a *normative* enterprise. It establishes justice to advance the common good of the people. Many of the fundamental requirements of justice and institutional structures that will advance and protect justice best have been well known for thousands of years. Legal science is intimately connected with human nature, which does not change, and is well understood by all human beings. The comparative study of constitutional law provides those who undertake it with better comprehensions into where their own existing legal institutions fall short in realizing universal goals, and how to improve them.

- **PRACTISE OF COMPARATIVE CONSTITUTIONAL LAW:**

There is no doubt that comparative constitutional law—the systematic study of constitutional law, jurisprudence and institutions across polities—has enjoyed a certain renaissance since the mid-1980s. Constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question. This trend has been described as *"a brisk international traffic in ideas about rights,"* carried on through advanced information technologies by high court judges from different countries.[17]

Indeed, "constitution interpretation across the world is usurping associate degree more and more cosmopolitan character, as comparative jurisprudence involves a central place in constitutional assessment. This development is especially evident with regard to constitutional rights jurisprudence. In its landmark ruling determining the unconstitutionality of the death penalty, the South African Constitutional Court examined very well pertinent jurisprudence from Botswana, Canada, Germany, Hong Kong, Hungary, India, Jamaica,Tanzania, the United States, Zimbabwe, the European Court of Human Rights and therefore, the United Nations Committee on Human Rights. Even the US Supreme Court has hesitantly joined the

[16] Masnur Marzuki ,"*Prospect of Constitutionalization of the Complaint Procedure in Indonesia; an Important Lesson from South Africa:A Brief Synopsis of the Study*, ACADEMIA.EDU (MAY 28, 2019, 11:00AM) https://www.academia.edu/5111528/_Prospect_of_Constitutionalization_of_the_Complaint_Procedure_in_Indonesia_an_Important_Lesson_from_South_Africa_A_Brief_Synopsis_of_the_Study_.

[17] https://watermark.silverchair.com/.

ISSN 2581 3382

comparative reference trend. In two recent cases - *Lawrence v. Texas* and *Roper v. Simmons* - the Court's legal opinion cited foreign judgments in support of its decision.[18]

At a more ground level, constitutional practices in a given society might be improved by emulating certain constitutional mechanisms developed elsewhere. Similarly, comparative constitutional law has been offered as a guide to constructing new constitutional provisions and institutions, principally in the context of "constitution".

Most written constitutions adopted after *World War II (1939–1945)* feature *five* main elements:

(1) Provisions establishing the principal institutions of government, that define their prerogatives and the relationship among them, and establish rules and procedures for their renewal;

(2) Provisions that establish the distribution of powers of government over the polity's territory;

(3) List of protected rights and liberties of the polity's citizens and residents;

(4) An amendment formula that allows for the possibility of amending the constitution, and states the conditions to which such amendments must meet; and finally

(5) Provisions that establish an independent judiciary equipped with the authority to review executive practices, administrative decrees, and laws enacted by legislatures, and to declare these unconstitutional on the grounds that they conflict with fundamental principles protected by the constitution. Where certain written constitutions elaborate in great detail on each of these five elements, other constitutions are relatively short, and feature generic statements or broad wording.

One of the main reasons for the revitalization is the global union to constitutional supremacy; a concept that has long been a major pillar of American political order, and that is now shared, in one form or another, by over one hundred countries across the globe.[19]

[18] Ran Hirschl, *Comparative Constitution*, SCRIBD (FEB 25th, 2019, 12:05PM) https://www.scribd.com/document/45873957/Comparitive-Constitution-Ran-Hirschl.

[19] Ran Hirschl, *The Judicialization Of Mega-Politics And The Rise Of Political Courts*, SSRN (FEB 26th, 2019 11:00AM) http://ssrn.com/abstract=1138008.

ISSN 2581 3382

Finally, a controversial constitutional issue in one society may be a non-issue in another society and a certain issue may be framed differently in different polities. For example, reproductive freedom may be framed mainly as a clash of rights (e.g. in the US), as a reflection of the status of the historically influential church (e.g. in Poland), or as a conflict between national preferences and supra-national norms (e.g. the compatibility of Irish abortion laws with provisions of the European Convention of Human Rights). At any rate, the proliferation of constitutionalism and comparative constitutional law has gradually eroded the status of American constitutional law as the ultimate source for constitutional borrowing. The groundbreaking ideas of the American founding fathers are still studied widely worldwide.[20]

Brown v. Board of Education,[21] is still considered a constitutional event of near-mythical proportion. However, the prime status of American constitutionalism has given way to a more balanced, multi-source enterprise of comparative constitutional law.

- **BENEFITS OF COMPARATIVE CONSTITUTIONAL LAW:**

"Comparative Constitutional Law identifies four benefits:

1) Comparison gives exposures students to a range of models that illuminate the meaning or foundation of constitutional justice in our time;

2) Comparison enhances the power of judgment by enjoining students to differentiate the accidental, particularistic, or autobiographical elements of constitutions from their more general, inclusive, or universalistic components;

3) Comparison shows that no one is exceptional and that, with respect to human rights and democratic governance, all have much in common with other constitutional democracies, and

4) Comparison is done to observe differences, and that is how with reference to many contrasting constitutional currents, all might wish to reassess our own fundamental law.

CONCLUSION:

The constitutional law and practice of countries such as Germany, Canada, or South Africa are progressively used as a source of inspiration for jurists worldwide.

[20] ibid.
[21] (1954).

ISSN 2581 3382

Comparative Constitutional law narrates to the study, practice, interpretation and administration of laws set forth by a country's constitution. In the US, for example, the US Constitution is the foundation for all constitutional law. Any legal subjects that deal with any constitutional rights or violations become part of constitutional law.

Experts in constitutional law may take part in cases that seem to be in clear violation of the constitution. Further, constitutional law experts may also participate to change or amend existing laws if they appears to conflict with a nation's views.

The scope of Comparative Constitutional Law should be extended to embrace the relationship between constitutionalism and nationalism in multinational scenario. This will help to improve the loopholes that are present in any present form of Government of a country. Interpretation of various constitutions assists to point out the differences between two or more types of Constitutions and therefore, a proper constitutional Government will be established.

For this purpose, three steps are essential:

• The modern state need to engage in a process of nation-building, which is designed to produce a degree of common national identity across the entire territory of the state, to be shared by all of its citizens.

• Many states also consist of national minorities, whose members who formed complete, functioning societies on their territory, with a large degree of self-rule, prior to their incorporation into the larger state. Multinational states are often the legacy of conquest and empire (e.g. Russia) or voluntary federation or union (e.g. Switzerland).

• Ethno national minorities will give a back for nation-building efforts, and engage in minority nation-building as a defensive response. In many cases (e.g. Scotland), minority nationalism is a reply to the centralization of political and legal power, which had the impact of shifting power away from minorities.

In other cases (e.g. Spain), it is a answer to linguistic nation-building, which weakens the ability of linguistic minorities to fully participate in economic and political life. Moreover, the historical record shows that it is inexperienced to assume that national minorities will voluntarily assimilate.

ISSN 2581 3382