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APPLICABILITY OF COMPARATIVE LAW TO PUBLIC LAW: METHODS, PROBLEMS, ADVANTAGES AND DIS-ADVANTAGES

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ABSTRACT

The field of Comparative law is of immense significance, especially when seen in the present context. With the entire paradigm of Government and Governance in transition, the importance of understanding it in more detail can hardly be overemphasized. This research paper examines the various dimensions and depths associated with the field of comparative law, it's varied types and along with this, it equally measures its scope and applicability in the field of public law. Along with this, there has been an attempt to explore the varied ways in which this field of study has equally facilitated the growth of Public Law with Constitutions of various countries adopting the best practices from around the world.

Keywords - *Administrative Law, Constitution, Separation Of Rights, Sovereignty, Jurisprudence.*

INTRODUCTION

In common parlance, the subject matter of Law is defined as a general rule of human action, taking cognizance only of external acts enforced by a determinate sovereign authority which is human and which is paramount in a political society. Likewise, many theorists especially hailing from the positivist school of thought like Austin, Holland, etc., have gone further and have preferred to classify it on the basis of types of functions which it performs namely private law, public law, general law, special law, et al. Furthermore, new developments like Comparative law have further added to the knowledge base of this particular subject. This chapter primarily investigates the interdependence of various specialized forms of law like Public Law and the ways in which comparative law has added to its substance.

Now, Public Law as an area of study holds special significance as such it deals with the relationship between citizens and the state. It’s two very important branches being Constitutional Law and Administrative Law. While the former has been defined by Hibbert as a “body of rules governing the relations between the sovereign and his subjects and the different parts of the sovereign body”, the latter has been defined by Sir Ivor Jennings as “the law relating to the administration, it determines the organisation, powers and duties of administrative authorities. Further, Holland has

remarked that constitutional law deals with various organs of sovereign power as at rest while administrative law deals with those organs in motion. Thus, in the abstract, the first deals with structure while the second deals with the functions of the state.

COMPARATIVE LAW

While establishing its identity in the Jurisprudential galaxy still remains a contentious issue, the majority refer to Comparative Law as means of studying different laws of states or nations with a view to make use of it in amending or modifying the law of one's own country so as to make it more pragmatic and effective. To put it more in perspective, it is primarily an analytical method of comparing a specific law or law of different countries or law in different phases of civilizational history and adopt the best available in them for the improvement of laws in one's own country. For instance, our constitutional forefathers imported the concept of Fundamental Rights from the United States Constitution without adopting the Presidential system of governance in practice there as also the Westminster model of parliamentary democracy with multiple parties contesting the election, unlike the British model which permits a two-party system. The Directive Principles of State Policy[1] enshrined in Part IV [2]of the Indian Constitution, provisions of trade and commerce were equally taken from the Irish and the Australian Constitution respectively.

To quote Prof. Guttridge "Comparative Law is an unfortunate but generally accepted, label for the comparative method of legal study and research, which has come to be recognised as the best means of promoting a community of thought and interest between the lawyers of different nations and as an invaluable auxiliary for the development and reform of our own system of law."

Thus, revision or amendment of Law to be in tune with the times is the sine qua non for a society to be in order. The comparative study of Law in this regard proves to be of much use.

CLASSIFICATION OF COMPARATIVE LAWS[3]

[1] M P Jain "Indian Constitutional Law" 1465 LexisNexis2018 edn.

[3] Dr. N V Pranjape "Studies in Jurisprudence & Legal Theory" 252 Central Law Agency, 9th edn, 2019

As an area of study which has garnered a lot of attention and interest over a period of time, the subject matter of Comparative Law has been attempted to be classified under various subdivisions.

According to Prof. Roble, Comparative Law as a method of study can be divided into 3 major categories namely,

1) **Ethnological Jurisprudence**
   It deals with what should be the nature of the law to meet the basic needs of individuals in society.
2) **Historical Comparison**
   The focus of the study under this branch continues to remain the reasons or factors which have to lead to the formulation of a particular law in a particular country and how it has evolved over the years.
3) **Synthetic Diagnostic Comparative Law**
   It includes a relative comparison of laws of different countries so that the necessary amendments and changes can be brought forth in the laws.

Prof. Kantorowiez reiterates that comparative law should include the following,

1. **Geographical Comparison**
   Referring to the topographical and physical circumstances leading to the formation of a particular law.
2. **Material Comparison**
   Focussing on laws of specific subjects and find their respective advantages and drawbacks
3. **Methodological Comparison**
   It refers to undertaking a comparative study of principles underlying the laws on different subjects and suggestions for the improvement of those laws in the future.

Apart from the aforementioned classification, academicians like Prof. Guttridge have emphasized undertaking a descriptive study of law thereby focussing on the important provisions of the prevailing law understudy along with making use of the data at hand to making the necessary changes in the provisions of domestic law under Applied comparative Law.

As can be inferred, what is important for undertaking a comparative study of laws are primarily the following,

- A clear understanding of the socio-physical conditions in which the law operates,
- Customs in vogue,
- The codified provisions of the law in consideration,
- The extent to which various judicial decisions have influenced in shaping various legal principles.

The utility of such a classification equally facilitates categorising the various methodologies put to use in the field of comparative law. It is pertinent to discuss them in detail.

COMPARATIVE METHODOLOGIES

As has been mentioned earlier devising a sound methodology that can be applied to be the field of comparative law so that it can rightfully serve as a critical legal science is all but necessary.

According to Eberele from the Roger Williams University School of Law, there are 4 critical parts to comparative methodology.

First, acquiring the important skill sets of a comparativist in order to evaluate the law in focus more clearly. Then comes the evaluation part which emanates after deeply scrutinising the provision as they are expressed concretely, in words, action, or orality. This he calls “external law”. The third aspect deals with understanding the law how it actually operates within a culture, typically called "Internal Law". The last and penultimate rule comes after having evaluated the law as stated and the law in action wherein the data is assembled and concluded with comparative observations that can shed light on both the facets of foreign and domestic laws.[4]

The Same methodology seems to have been improvised upon by the adviser to the constituent assembly of India, Shri. B.N Ray who undertook field surveys in countries like Canada, the United

[4] Eberle, Edward J. (2011) "The Methodology of Comparative Law," Roger Williams University Law Review: Vol. 16: Iss. 1, Article 2.

States, the United Kingdom, etc., and carried out an in-depth study of the constitution of these countries to pick up the best out of them, to be incorporated in the new Constitution of India which would be in the best interest of its people.

Looking at its usage, a more detailed analysis of the various comparative methodologies seems necessary

a) Inculcating the skills of a comparativist

As Reitz observes, a comparativist must understand the forms of reasoning and value judgments that are reflected in the general pattern of legal systems. To do this effectively, one needs to understand a country's history and "philosophical and religious traditions". They also require strong linguistic skills and maybe even put to use the skills of an anthropological field study which anthropologists employ in order to collect information about the foreign legal system at first hand[5].

Similarly, Vivian Curran has stressed upon the need to have "cultural immersions". This he says requires immersion into the political, historical, economic and linguistic contexts that moulded the legal system and in which the legal system operates. It requires an explanation of various cultural mentalities...

To understand the law more clearly, it is thus necessary to employ the tools of acute observation, linguistic skill and immersion in the milieu when the whole idea of its development was taking shape. For example:- In the case of the American Constitution, it would be unwise to ignore the philosophies like liberty, freedom, etc., which had developed in the backdrop of enlightenment years and which eventually paved way for the United States of America’s independence. In the case of India too, one cannot ignore the learnings from our freedom struggle which have helped profoundly in shaping our constitution. The all-important virtue to possess this skill is neutrality and a healthy scepticism so that the traditions of a foreign culture are observed honestly and objectively.

[5] Nomita Aggarwal “Jurisprudence (Legal Theory)” 10th edn 2016

Thus in the words of Demleitner, "it is necessary to free oneself of cultural bias, both with respect to our own culture and the one under review. However, a complete cultural immersion might not be possible, but it is necessary to do the best one can.

After this sort of an investigation is complete a comparativist should make use of his abilities to translate one world view into another. This calls for understanding the multiple semiotec systems and linguistic contexts that situate ideas and then determining how to adjust and transfer over that particular world view into that of another. If one does this well, translation can be a bridge to connect cultures.

b) Identifying the similarities and evaluating their stated provisions of the law in their type settings

Comparative law wouldn't have any meaning unless the same is done with careful consideration of the similarities and differences between what has been explicitly stated. Commonly referred to as what has been mentioned as "external law" it refers to understanding what the words seek to convey especially in the context of the case, statute or other legal norms. That is, how does the legal rule fit within the broader framework of the legal system? The emphasis needs to be on familiarizing oneself with words and norms in their setting. Having done this, then one needs to compare and contrast the findings so that one can arrive at a fully considered and understood conception of the object under study.

c) Understanding the driving force behind the law

It is well acknowledged that local customs, history, religion, philosophy, ethics, etc. have a profound influence on giving any law its true shape. This has been adjudged by many as the "invisible" dimension of law. Although having been considered as less relevant, these aspects endow the stated provisions with "patterns" that can be best understood only when the comparativist is totally consumed by them. One would certainly find a great degree of solace when comparing law with language. But as with a foreign language in order to best understand it, one must also persevere to understand the cultural context on which it sits and which helped form it. Only then it is possible to import the real meaning from one legal system to another.

d) Determining the end results of our findings

In the last and penultimate step, the comparativist needs to properly assemble the results of their finding and seek to answer important questions relating to the data's findings, it's applicability as also the overall understanding one has developed with respect to a foreign system. This last step is also known as the 3 C's approach which refers to sound Collection, diligent Collation and an articulate Comprehension. It needs to be highlighted that comparative observations are likely to be our windows to a foreign culture. Just as importantly, a look at a foreign culture is just as likely to shed light on our own legal culture. Therefore, one must be diligent while coming out with the eventual results.

ADVANTAGES, PROBLEMS AND DISADVANTAGES: AN EVALUATION

This said Comparative law has helped immensely in enriching the field of public law. As has been said by Holland "Just as similarities and differences in the growth of different languages are collected and arranged by comparative philology and the facts so collected provide a foundation of abstract grammar, similarly, the comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of Jurisprudence is set forth and formulated." Further, the advantages emanating from the applicability of comparative law to public law is also quite diverse.

Firstly, it not only enables a country to improve and develop its law on a particular subject or subjects by amending or revising it but also helps in enacting new laws on a subject for which there is no adequate law in force. For instance, though India had enacted it's Information Technology Act. in 2000, but that being a newly emerging field, the principal act did not provide solutions for all the problems emanating from I.T. violations[6]. Therefore the law was completely amended in 2008 so as to remove the lacunae and deficiencies in the principal act after a thorough study of cyber laws of UK, USA, Canada, Australia, Japan, China etc. As result, an effective

[6] Dr. N V Pranjape "Studies in Jurisprudence and Legal Theory" 254 Central Law Agency 9th edn. 2019

mechanism has now been devised in the amended IT act by providing for setting up a National Nodal Agency to combat cybercrimes. Similarly, in the field of academia, Comparative Law especially when seen with respect to Public Law presents a kind of perspective to students not found in legal history or in Jurisprudence. These help in provoking the students of law to engage in examining the premises of legal rules and, indeed, of the legal institution.

But in the present times, when the law is under constant pressure to adapt to rapid social and economic change, and when the basic assumptions of the system are constantly being challenged and tested, there is also a need for new and alternative models of solutions to social problems. Because comparative law is a source of such models, it can be rightly said that if comparative law did not exist, it would have to have been invented. The said means of comparative law also equips the professors of public law with a wide array of materials and case laws on emerging issues like Environment, Artificial Intelligence, Development administration, etc. Likewise, when talking about Public Law and more specifically Administrative Law, a comparative approach has infused a new lease of live in the said subject. For example, Dicey's conception of Rule Of Law has become the much sought after doctrines especially in countries which have emerged from the shackles of colonialism and dictatorship. Further, in a world where interdependence and interconnectedness have become the norm, a comparative study of some of the best practices in the world regarding governance and administration is one of the essential contributions of comparative law to public law. Also, attuning a country's system with the norms of international law equally calls for the use of comparative law to public law and thus ensure a country's adherence to the standard norms being practiced in the Comity of Nations.

But terming Comparative Law as a 'magic wand' capable enough to universalize the applicability of laws, I.e. Public laws from one country to another would certainly be a far-fetched statement. As such it too has its shortcomings and disadvantages. Blind transplantation of legal systems found suitable for a particular society does not guarantee peace, progress and stability. For instance, the American designed Afghanistan Constitution which creates multiple centers of power in the form of the President and the Chief Executive Officer has only further pushed the war-torn, landlocked country into turmoil. Along with this, societies which had hitherto experienced stability while being under dictatorial regimes have been unable to emulate the democratic practices prevalent in

the western world. This holds true for countries of the middle east which still seem to be enmeshed with wars, conflicts and disorder. A noble truth about academicians and professors teaching law is the fact that their recognition of the need for their additional information precedes the availability of results of social scientists. And even when results of such investigations are available, problems remain of "translating" them into a form which can be best understood by law students. This is exactly the case with the usage of Comparative Law especially in the field of Public Law wherein the lack of prolific research on the subject limits its applicability.

Finally, administrative restructuring to fulfill the larger objectives of Global Governance creates institutions which fail to meet the required purpose as such they do not fit into the cultural and historical context of a nation-state in which they are applied.

CONCLUSION

As such the dynamism behind comparative law itself makes space for discovering its inadequacy, one must not be compelled to finally proscribe it's relevance altogether. The subject matter of law consists of those legal principles which are ultimately transformed into laws for regulating the conduct of individuals in society. For example, Jural concepts like rights, duties, possession, ownership, property, juristic personality etc. which constitute an indispensable part of Jurisprudence, provide source material for framing laws, which regulate human relationships on these vital aspects of human life. The application and interpretation of the principles underlying these concepts are of vital importance for the study of Jurisprudence which is facilitated by the process of the comparative method of approach to law and more specifically Public Law. Therefore, most writers agree that comparative law serves a useful purpose in the development of sound principles on which Public Law is made.