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BEYOND BORDERS: THE USE OF COMPARATIVE LAW IN CONSTITUTIONAL INTERPRETATION

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ABSTRACT

This article delves into the application of comparative law in the interpretation of constitutions, with a particular focus on the legal system of India. The historical evolution of comparative law and the principles of dualism and monism in Indian law are examined. The article highlights various examples of how Indian courts have utilized international law, including the use of international conventions and norms in the interpretation of the Constitution of India. Furthermore, it discusses the recent trends in constitutional interpretation in India, such as the use of comparative law, the significance of international and regional conventions in the interpretation of the Constitution, and innovative interpretations concerning same-sex marriage and dignified death. However, it also acknowledges the potential drawbacks of the application of comparative law in constitutional interpretation, such as undermining the uniqueness of a country's legal system and generating inconsistencies in judicial decisions. As a result, it proposes that judges should exercise discretion and caution in employing comparative law, balancing the benefits with the need to preserve the integrity and sovereignty of their own legal system. The article concludes that comparative law is an essential tool in constitutional interpretation, which plays a vital role in preserving the fundamental principles and values enshrined in the Constitution, guaranteeing that justice is served equitably.

Keywords: *Constitution, Interpretation, Comparative, Conventions, International.*

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I. INTRODUCTION

Constitutional interpretation is a crucial part of constitutional law that has a significant impact on shaping the legal system of a country. It involves "examining and analyzing" the provisions of a constitution and applying them to particular legal issues or cases. It helps Judges in ensuring that the fundamental principles and values enshrined in the Constitution are maintained and that justice is served properly. One of the essential functions of constitutional interpretation is to enable judges to gain a clear understanding of the meaning of a constitutional provision and to find out the original intent of the constitution's drafters when framing the provision. However, constitutional interpretation is a dynamic process that is constantly evolving with the changing needs of society.

There are numerous emerging trends in constitutional interpretation, one of which is the use of comparative law. Comparative law involves examining the provisions of other countries, including international and regional conventions, and using these insights to interpret the constitution. In the Indian context, judges have time and again referred to comparative law to understand the provisions of the constitution. The role of foreign law in constitutional interpretation has emerged as a contentious issue in the legal community. While some legal scholars argue that foreign law can provide valuable insights and perspectives for judges to interpret their constitutions, others contend that it undermines the sovereignty of the country's legal system.

The use of comparative law has both positive and negative effects on constitutional interpretation. On one hand, it allows judges to draw on the experiences and perspectives of other legal systems to gain a more comprehensive understanding of constitutional principles and values. On the other hand, the use of comparative law in constitutional interpretation can also have negative effects. For instance, it can be argued that it dilutes the distinctiveness of a country's legal system and can lead to an erosion of national sovereignty. Therefore, judges must use comparative law carefully and judiciously. They must consider the unique circumstances and context of their legal system while drawing on the experiences of other countries. The challenge for judges is to balance the benefits of comparative law with the need to maintain the integrity and sovereignty of their legal system.

This article aims to investigate how looking at laws from different countries can help judges better understand and apply their own country's constitution. By examining the positives and potential drawbacks of using this approach, the article intends to provide insights into how judges can balance the benefits of learning from other legal systems while preserving the integrity of their own.

II. HISTORICAL DEVELOPMENT

In the middle of the 19th century, Comparative law first appeared in Gottfried Wilhelm Leibniz's Latin-language book *"Nova Methodus Discendae Docendaeque Jurisprudential" in 1667.* While relative law was not developed or studied extensively in the 19th century, Feuerbach, Gans, and Thibaut did produce some work in Germany. A legal scholar from the US who was being persecuted in Germany introduced comparative law there. In France, a comparative law chair was founded in 1832, and due to American opposition to anything related to English law, natural law predominated there.

In India, during the early 20th century, the British Parliament passed the Government of India Acts in 1919 and 1935, which aimed to increase native participation in governance. These Acts included the creation of a high commissioner with a residence in London to represent India in the UK and a dual system of government with restricted powers for the major provinces. To discuss the grant of independence to India, the Constituent Assembly of 1948 and the Constitution of 1950 was established.

While the Indian judiciary does not have the authority to pass laws, it interprets India's obligations under international law by ruling on domestic disputes involving such matters. The Indian judiciary has been active in upholding India's obligations under international treaties, particularly in the areas of environmental law and human rights. The Supreme Court has reflected the dualist philosophy of the Indian legal system in several cases. For example, in the case of *Jolly George Verghese v. Bank of Cochin,*[1] it was held that the treaty would bind the court, not the municipal law unless the latter was changed to account for the treaty.

In the landmark case of *Vishaka v. State of Rajasthan*[2], the court made reference to various international conventions and norms when formulating guidelines on the sexual harassment of women in the workplace. These conventions and norms were crucial for ensuring gender equality, the right to work with dignity, and the observance of Articles 14, 15, 19(1)(g), and 21 of the Constitution.[3]

III. METHODS OF COMPARATIVE LAW

The Functional Method

It was made popular by Hein Kotz and Konrad Zweigert, who compared how well existing laws serve their intended purposes. According to this approach, laws can be compared

1 1980 AIR 470.

2 (1997) 6 SCC 241.

3 The Constitution of India.

despite having different structures as long as they serve the same purposes.

The Structural Method

This technique compares and contrasts the legal systems' structural similarities and differences. It is primarily concerned with the internal organization of the legal system and its fundamentals

The Analytical Method

This approach is most frequently used for comparative research. This approach focuses on interpreting the significance of various legal provisions. It examines the various ways that the same idea can be understood.

The Cultural and Legal Comparison Method

This approach compares the nations' cultural aspects. Every law and legal system, especially civil and common law, is based on cultural and traditional elements.[4]

IV. INDIAN CASE LAWS ON COMPARATIVE LAW IN CONSTITUTIONAL INTERPRETATION

The Lok Sabha recently received an important report on "India and international law" from the parliamentary committee on external affairs. The report discusses, among other things, how Indian courts have approached international law. The committee noted that India adheres to the "dualism" principle, which states that domestic legal systems do not always automatically incorporate international law. Article 253[5] of the Indian Constitution recognizes that to convert international law into local law, a parliamentary act is required. The Supreme Court's ruling that customary international law (CIL), unless it conflicts with domestic law, is a part of the Indian legal system even in the absence of enabling legislation passed by Parliament, according to the committee, has deviated from the principle of dualism and moved in the direction of monism. The term "Customary International law" (CIL) refers to standards of international law that are derived from a formal source of international law.

The Supreme Court reiterated that India adheres to the dualism doctrine in the case of *State*

4 Vishruti Chauhan, Importance of Comparative Legal Studies, Ipleaders *available at* https://blog.ipleaders.in/importance-of-comparative-legal-studies/?amp=1#Functional_method (Last visited Mar. 14, 2023)

5 The Constitution of India, art.253.

of West Bengal v. Kesoram Industries (2004)[6] and ruled that no treaty that India has signed can become a law of the land unless the parliament passes a law as required by article 253 of the Indian constitution.

In *Gramophone Co of India v. Birendra Bahadur Pandey*[7], the Hon'ble Supreme Court adopted a liberal stance and ruled that the comity of nations required that the rules of international law be accommodated in municipal law even without express legislative sanctions as long as they did not conflict with parliamentary acts. The doctrine of incorporation also acknowledges the position that the rules of international law are incorporated into it.

As in the case of *Chairman Railway Board v. Chandrima Das*[8] by extending the reach of Article 21 of the constitution to include rape victims of foreign nationals, the court in Chandrima Das (2000) applied the principles of the Universal Declaration of Human Rights.

In *Neelabati Behera v. State of Orissa*[9], the court awarded compensation to the victim for the case of custodial death by citing Article 9(5) of the Covenant on Civil and Political Rights (1966).

The Right to Health Convention i.e., "International Convention on Civil, Economic and Social Rights" states that every person has the right to access medical assistance. As seen in *Parmananda Katara v. Union of India*[10], The Supreme Court using the ICESCR has very specifically stated that life preservation is of the utmost importance. Once life is lost, the status quo ante cannot be restored, according to the Supreme Court. It was decided that all doctors, whether public or private, have a duty to extend medical care to the injured as soon as possible to preserve life, without waiting for legal requirements to be fulfilled with the police. The state is required by Article 21[11] to protect life.

V. ROLE OF INTERNATIONAL AND REGIONAL CONVENTIONS IN THE INTERPRETATION OF THE CONSTITUTION

International and regional conventions have played a significant role in the interpretation of the Constitution in India. These conventions provide a framework for understanding

6 AIR 2005 SC 1646.
7 AIR 1984 SC 667.
8 AIR 2000 SC 98.
9 1993 AIR 1960.
10 1989 AIR 2039.
11 The Constitution of India, art. 21.

and implementing fundamental rights, especially in the absence of domestic laws. The Indian judiciary has successfully integrated international standards into domestic law while upholding the Constitution's supremacy.

The landmark case of *Vishaka vs. the State of Rajasthan*[12] highlighted the importance of international conventions and norms in the interpretation of fundamental rights. The Supreme Court referred to the *Convention on the Elimination of All Forms of Discrimination against Women* and held that any international convention that is not inconsistent with the fundamental rights guaranteed in the Constitution must be read into these provisions. This enlarges the meaning and content of the fundamental rights and promotes the object of the constitutional guarantee.

In addition to the Vishaka case, many other instances have shown the importance of international and regional conventions in interpreting the Constitution. *The Vellore Citizens Welfare Forum v. Union of India & Others*[13] case saw the Supreme Court rely on environmental conventions and declarations to formulate effective measures for the protection of the environment. *The PUCL vs. Union of India*[14] case relied on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to interpret Article 21 of the Constitution, guaranteeing the right to life and personal liberty.

In conclusion, international and regional conventions play a crucial role in the interpretation of the Constitution in India. By relying on these conventions, the judiciary enlarges the meaning and content of fundamental rights, ensures their effective implementation, and promotes the object of the constitutional guarantee.

VI. RECENT DEVELOPMENTS IN CONSTITUTIONAL INTERPRETATION

Recently several petitions have been filed in the Supreme Court of India, calling for the legal recognition of same-sex marriage. In response, the Supreme Court directed that all the petitions related to legalizing same-sex marriage would be referred to a constitutional bench. The question that arises now is whether the court will take a progressive interpretation and allow same-sex marriage.[15]

12 *Supra* note 2. at 3.

13 *Vellore Citizen Welfare Forum v. Union of India* AIR 1996(5) SCC 647.

14 AIR 1997 SC 568.

15 Bastian Steuwer, Thulasi K. Raj, Same Sex Marriage: All that is needed in a small change in the Special Marriage Act, The Indian Express *available at* https://indianexpress.com/article/opinion/columns/same-sex-marriage-small-change-special-marriage-act-8498683/ (Last Visited March 17th 2023).

When considering the legal recognition of same-sex marriage, it is essential to understand the legal landscape around the world. The US Supreme Court, in 2015, ruled that limiting marriage to heterosexual couples violates the equal protection of the law. Similarly, the Constitutional Court of Costa Rica, in 2020, and the Constitutional Court of Slovenia, in 2022, ruled that banning same-sex marriage is unconstitutional.

In the case of India, the Supreme Court invoked Article 145(3)[16] in the petition for legal recognition of same-sex marriage, as the issue involves substantial questions and interpretation of the constitution. The court's interpretation will play a vital role in deciding whether same-sex marriage will be considered a part of the fundamental right to life and dignity under Article 21. It is up to the judges of the Supreme Court to determine how they take the help of comparative law in constitutional interpretation and which approach they follow in the interpretation of the Constitution in legalizing marriage.

The Supreme Court may take guidance from the comparative laws of other countries that have taken a liberal approach while interpreting the fundamental right to life and dignity of the LGBTQ+ community. However, in its reply to the petition, the Center argued that Western decisions cannot be applied to India's constitutional jurisprudence. The Center also added that marriage is a holy union between a man and a woman. It remains to be seen how the Supreme Court of India will interpret the Constitution in the context of legalizing same-sex marriage. Nonetheless, comparative law can play a crucial role in shaping the interpretation of constitutional provisions.

When it comes to the issue of legalizing same-sex marriage in India, judges must consider the country's complex legal, cultural, and religious factors. While comparative law can be helpful, it's important to remember that the Western approach may not be suitable for India. The country has its unique legal and cultural context that must be taken into account. Judges should approach the issue with sensitivity and understand India's history and culture, including the impact of colonialism and the country's religious traditions. They should work towards developing an interpretation of the constitution that aligns with Indian values while still upholding principles of equality and non-discrimination. This will require a nuanced approach that is mindful of the specific legal and cultural context of India.

Right To Life- *"No person shall be deprived of his life or personal liberty except by the procedure established by law*," states Article 21[17] of the Indian Constitution. The right to death is not a part of the right to life under Article 21. A fundamental human right is a right

16 The Constitution of India, art. 145, cl. 3.

17 The Constitution of India, art. 21.

to life. The Bombay High Court in the *State of Maharashtra v. Maruti Sripati Dubal*[18]. In this instance, the court ruled that Section 309 of the Indian Penal Code, 1860, which classifies suicide attempt as a crime, is unconstitutional because it violates the right to life and the right to die.

However, the Supreme Court ruled in *Gian Kaur v. State of Punjab*[19] The right to life does not include the "right to die" or the "right to be killed,". No one has the right to end their life unnaturally; the right to life is a natural right, while the right to die is not. Even though a petition for euthanasia was filed, the Supreme Court ruled in *Aruna Ramchandra Shanbaug v. Union of India*[20] that only passive euthanasia is permitted in India; in other words, only when a patient is receiving ventilation can the patient be taken off of it. Even in India, euthanasia—whether voluntary, involuntary, or non-voluntary—is not permitted and is punishable by law, except for passive euthanasia, which is permitted under Indian law.

VII. CRITICISM

The utilization of comparative law in constitutional interpretation has been a subject of contention within the legal community. While it can provide valuable insights, several criticisms must be acknowledged, including:

a) Impact on national identity and sovereignty: Comparative law can create tensions between legal systems and potentially undermine a country's national identity and sovereignty.

b) Challenges arising from religious diversity: The interplay between comparative law and religion faces unprecedented challenges in diverse societies. While it aids in understanding different religious perspectives, it may also lead to clashes of values and beliefs that are hard to reconcile.

c) Variations in politics and government: Politics and government are intricately tied to a nation's unique circumstances. Differing situations make finding comparable conditions for comparison challenging. Moreover, diverse ideologies within politics and government hinder effective comparisons.

d) Objectivity in comparison: Conducting an unbiased comparison is complex, as intellectual biases towards ideology or nation can come into play. To compare

18 1986 Mah LJ 913.

19 1996 2 SCC 648.

20 2011 4 SCC 454.

politics and government objectively, empirical research is necessary, which demands skilled labor, time, and financial resources.

e) Claims of governmental superiority: Governments often assert the superiority of their systems, resulting in disagreements among stakeholders over the criteria used for comparison.

f) Restrictions on studying government systems: Governments may restrict external study of their systems, leading to limited access to data and potential biases among researchers conducting comparisons.

g) Consistency with Indian values and customs: The Indian Constitution is rooted in unique Indian values and customs. The use of comparative law can occasionally clash with these values and customs, introducing inconsistencies in the interpretation.

VIII. CONCLUSION

In the previous two decades, the comparative method has drawn a lot of attention. Its importance is demonstrated by the analysis of the legal systems and a deeper comprehension of international private and public law. A comparative study is so important that it enables both professionals and students to examine the inner workings of any legal system. Examining the existing legal systems of other countries and cultures also enables the minds to create new laws and policies in a better way. Comparative law develops and promotes various legal aspects globally and poses inquiries about various national and international perspectives. While these tools can provide valuable insights and perspectives to judges, they must be used carefully to maintain the sovereignty and integrity of the legal system. The Indian judiciary has successfully integrated international standards into domestic law while upholding the Constitution's supremacy, ensuring that fundamental rights are interpreted and implemented in a manner that is in line with the Constitution's objectives. As the legal landscape evolves, it is imperative that constitutional interpretation also adapts to reflect changing societal needs and values, while remaining faithful to the Constitution's original intent.