

Course Name – B.A.LLB 6th sem

Subject – Jurisprudence

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Concept - Origin and development of
Comparative Law

What is Comparative Law?

Comparative law is the systematic application of the comparative technique, a discipline and a method by which the values of human life are known and evaluated. It is not a law in itself but a method of looking at legal problem, a comparative approach to the study of laws and legal Institutions of two or more countries. It is not a particular branch of law nor a subject but a process of study of foreign laws in comparison with local laws .

It is a technique of looking one's own law through the mirror of analogous laws of other countries. It is a process of gaining from the laws as they obtain in foreign countries. It ascertains the differences and similarities in the legal rules, principles and Institutions of two or more countries with a view to finding solutions for local problems. It helps in establishing harmonious relations with other countries.

Comparative law is the study of differences and similarities between the law (legal systems) of different countries. More specifically, it involves the study of the different legal "systems" (or "families") in existence in the world, including the common law, the civil law, socialist law, Canon law, Jewish Law, Islamic law, Hindu law, and Chinese law. It includes the description and analysis of foreign legal systems, even where no explicit comparison is undertaken. The importance of comparative law has increased enormously in the present age of internationalism, economic globalization, and democratization.

Definition of Comparative Law

According to Professor Gutteridge ,

"Comparative law is an unfortunate but Generally Accepted label for the comparative method of legal study and research which has come to be recognized as the best means of promoting community of thought and interest between the lawyers of different nations and as an invaluable auxiliary to the development and Reform of our own and other system of law "

The Vocabularie Juridique defines -

Comparative law as a branch of Legal Science whose object is to bring about systematically the establishment of closer relations between the legal Institutions of the different countries.

Origin of Comparative law :

According to Gutteridge, "The phrase 'Comparative law' which we are employing is essentially modern in character, although there have been many efforts to trace its origin back into the mists of the past. The supposition --- for it is little more---is that the comparative method of legal study has been evolved from a spirit of inquiry into foreign law which existed among the jurist of antiquity.

Comparative law, as it is understood in the modern sense , was treated with disfavor by jurist of antiquity. The Roman law itself did not provide any incentive or stimulus to the development of comparative law because the former was not the result of any process of comparison with foreign law. "The corpus juris Civilis" which represented the roman law , contained law utterance of the emperors and also the edicta issued directly by them as head of the State, or the rescripta, viz., answers returned by the parties in a suit or by magistrates.

The Romans described their legal system as consisting of two ingredients. " All nations", says that the 'Institutional Treaties' who are ruled by laws and customs , are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enact is called the Civil Law of that people , but that that which natural reasons appoints for all mankind is called the law of Nations because all nations used it. "the part of the law" which natural reason appoints for all mankind" was the element which the edict of the praetor was supposed to have worked into Roman Jurisprudence. Elsewhere it is styled more simply jus natural , or the law of nature and its ordinances are set to be detected by natural equity (naturalize aquitas) as well as by natural reason. the dominating influence in the development of medieval law on the continent of Europe was influence of Roman laws as also the influence emanating from the juristic school of Italy.

Purpose

Comparative law is an academic discipline that involves the study of legal systems, including their constitutive elements and how they differ, and how their elements combine into a system.

Several disciplines have developed as separate branches of comparative law, including comparative constitutional law, comparative administrative law,

comparative civil law (in the sense of the law of torts, contracts, property and obligations), comparative commercial law (in the sense of business organizations and trade), and comparative criminal law. Studies of these specific areas may be viewed as micro- or macro-comparative legal analysis, i.e. detailed comparisons of two countries, or broad-ranging studies of several countries. Comparative civil law studies, for instance, show how the law of private relations is organized, interpreted and used in different systems or countries.

The purposes of comparative law are:

- To attain a deeper knowledge of the legal systems in effect
- To perfect the legal systems in effect
- Possibly, to contribute to a unification of legal systems, of a smaller or larger scale (cf. for instance, the UNIDROIT initiative)

Relationship with other legal subjects

Comparative law is different from general jurisprudence (i.e. legal theory) and from public and private international law. However, it helps inform all of these areas of normativity.

For example, comparative law can help international legal institutions, such as those of the United Nations System, in analyzing the laws of different countries regarding their treaty obligations. Comparative law would be applicable to private international law when developing an approach to interpretation in a conflicts analysis. Comparative law may contribute to legal theory by creating categories and concepts of general application. Comparative law may also provide insights into the question of legal transplants, i.e. the transplanting of law and legal institutions from one system to another. The notion of legal transplants was coined by Alan Watson, one of the world's renowned legal scholars specializing in comparative law.

Also, the usefulness of comparative law for sociology of law and law and economics (and vice versa) is very large. The comparative study of the various legal systems may show how different legal regulations for the same problem function in practice. Conversely, sociology of law and law & economics may help comparative law answer questions, such as:

How do regulations in different legal systems really function in the respective societies?

Are legal rules comparable?

How do the similarities and differences between legal systems get explained?

Development Of Comparative Law :

A) Development of Comparative Law in Nineteenth Century :

The origin of Comparative law may at the earliest be traced from the middle of the 19th Century. The historical school of thought did not encourage development or study of Comparative Law. The era of codification also did not improve matters. However, some work was done in Germany by Feuerbach, Gans and Thibaut. In 1829 Mittermaier and Zachariah started the legal review devoted to the study of foreign law.

A Chair of Comparative Law was established in France at the college de France, in 1832 ; a Chair of Comparative criminal Law was also established in the University of Paris in 1846.

In America there was hostility to anything which was associated with English Law. Accordingly natural law prevailed and was taken inspiration from the writings of the French Jurists.

Much of the pioneering work in regards to comparative was done in England. Brarcton in his writing drew largely from Roman law . Still , however,we do not find any advanced or "critical investigation of the foreign rules or any real attempt to construct a synthesis." There was no attempt to integrate the foreign law into English jurisprudence.

We find a mention of Comparative Law by Bacon at the beginning of the seventeenth century. King James I was to unify the rules of Scots law and for this purpose he sought Bacons Advice .
New Institute of the Imperial or Civil Law published in 1707, Thomas Wood employed comparative method of legal research.

Lord Mansfield carried on studies in commercial laws of other countries with a view of evolving English commercial law.

The great work of John Ayliffe entitled the New Pandects of the Roman Civil Law, was published posthumously, he having Died in 1792. It made comparisons between English law and civil and common law.

John Austin also made a passing reference to comparative jurisprudence in his great work.

In England the great achievement towards the development of comparative was the publication of Maine's Ancient Law in 1861.

Maine introduced a correlative method into the history of Institutions. He confined his views to the in the Indo-European stocks of the races of mankind. He was learned in English, Roman and Hindu law and also had knowledge of Celtic systems, and this inculcated a scientific urge to unify, classify and generalize evolution of different legal systems. He, thus, as Dias has said, and rightly so, inaugurated both the Comparative and anthropological approaches to the study of law, and the history in particular which was destined to bear abundant fruit in the years to come.

In 1876 the French government established A committee on foreign legislation attracted to the Ministry of Justice.

In 1894 the Quaint Professorship of Comparative Law was established at University College London. The in Fe Droit International founded in 1873, also employed the comparative method in its investigation of the problems connected with the private International Law.

The English Society of Comparative Legislation was founded in 1895. in France the society de Legislation compare announced publication of its Bulletin in 1869.

B) Considerations for Development of Comparative Law :

The development of Comparative Law hitherto were motivated by different Considerations. For some, its value lay in the practical aspect, viz in the utilization of the knowledge of acquired in the Reform and development of the law in the country. This accounts for the growth of comparative legislation as opposed to comparative law. for others, the underlying objective was the building up of a common system of jurisprudence and discovery of the Abstract notions of law ; and yet for others its value lay in a historical sense. There was also a current view that the Comparative Law was based on " certain common principles which constitute the natural law with variable content ".

C) Movement Towards Unification of Private Law :

A movement towards unification of private Law was first mooted by the first Congress of comparative law held in Paris in 1900. The idea of unification received the great encouragement from the efforts of the league of

Nations. The various Government departments working under the aegis of the league of nations accumulated a large quantity of material which is of permanent value to comparative lawyers. In Rome, a subsidiary organ of the league of Nations, the International Institute for the unification of private law was established at the initiative of the italians Government.

The International Academy of Comparative Law was established at the Hague.

D) Development in the Twentieth Century :

The 20th century marks the realization that the policy of legal isolation is not good policy and is not conducive to the growth of a unified law.

Various institutes have been established for the purpose of carrying on researches in comparative studies. some of these institutes are attached to the universities, while others are working independently.

The American foreign law Association was established in 1925. and published a number of papers on foreign law and monograph on comparative topics.

There has not been any marked development of comparative law in Great Britain. The Chair of historical and comparative jurisprudence was however, founded at Oxford in 1869. A Chair of Comparative Law was, established at Cambridge. There is also the Quaint professorship of comparative and historical law at University College, London. Research on the subject has also been undertaken in the University of Manchester under the guidance of Dr. Wortle . A brief resume of the origin and development of Comparative Law will show that the position is not discouraging and its utility is being increasingly realized. The atmosphere of indifference or suspicion found at its Inception is gradually diminishing . Comparative Law is now now regarded as a branch of a legal technique and learning.