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COMPARATIVE METHOD OF LEGAL RESEARCH: NATURE, PROCESS AND POTENTIALITY

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Abstract

Amidst various methods of legal research, the comparative method is growing in importance due to increased interaction of experiences among the legal systems. Plurality inside and outside the nation has called for comparing and evaluating. Better understanding, wider choice of reform and harmonization are the objectives of comparative legal research (CLR). In order that CLR traverses a systematic path, definite procedural steps shall be followed prudently. Unless care is taken to properly identify the criterion of comparison and selection of comparative elements, CLR faces the danger of being reduced to a dry juxtapositional statement. A sound theoretical base, immersion in cross-cultural discourse and critical insight of sociology make CLR strong. CLR supplies varieties, analogies and contradictions that help in building the comparative jurisprudence.

I Introduction

COMPARISON IS a logical and inductive method of reasoning that enables objective identification of merits and demerits of any norm, practice, system, procedure or institution as compared to that of others. Even in ordinary reflections and estimations in day to day transactions - whether purchase of goods, making of investments, or choice of learning, vocation, policy, leader or relations - people tend to compare and contrast. Comparative study is a tool employed in various disciplines, both in natural and social sciences. Its relevance for legal research consists in comparative evaluation of human experience occurring in legal domains of different situations and jurisdictions. While a tunnel vision seriously narrows down the object of scrutiny, looking out of the caves in a free roaming world embraces universal humanistic outlook not limited by political frontiers.[1] From the times of Aristotle to

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1 Hessel E. Yntema, "Comparative Legal Research: Some Remarks on Looking Out of the Cave" 54 *Michigan Law Review* 903 (1956).

the present day, comparisons of laws, legal systems, governance, and polities have enriched the realms of knowledge and enabled the development of various legal systems. Since ideas are as free as air, and nobody has monopoly on them, benefiting from the experience of others in avoiding errors and searching for alternatives should not have objections except that care shall be taken about suitability of the lesson to the ambience of the system. In the globalized world, the role of comparative research is growing with great potentialities. This paper aims to understand the nature, development, importance, purposes, process, contributions, opportunities and difficulties relating to comparative legal research (CLR). It argues that while there are wide potentiality and justification for CLR, it is a means or resource not adequately tapped.

II Meaning and features

Basically, comparison is a process in which two things are measured by each other.[2] Nils Jansen views, "[c]omparison is the construction of relations of similarity or dissimilarity between different matters of fact."[3] Search for common or dissimilar properties is the essence of comparison. It is with reference to specific factor or criterion that similarity or difference comes to the forefront in the course of comparative analysis. For example, comparison of apple with orange (which are proverbially regarded as un-comparables) will be possible by applying the criteria of taste, nutritional value, shape, colour, or price. The criteria of differentiation or similarity can be called *tertium comparationis*.[4] Choice of relevant criterion and its objective application forms the *sine qua non* of comparative research. Comparison is indispensable for progress of knowledge, as Yves Chevrel puts it.[5] Etymologically, 'compare' consists of putting together (*com*) several objects or elements in order to examine the degree of similarity (*parare*) so that conclusions can be drawn which would not have been possible by analyzing one element alone.[6] Whether comparison shall start with

2 T. S. Eliot, *The Sacred Wood* (1921), *available at*: http://www.bartleby.com/200/sw4.html (last visited on June 1, 2014).

3 Nils Jansen, "Comparative Law and Comparative Knowledge" in Mathias Reimann and Reinhard Zimmerman (eds.), *The Oxford Handbook of Comparative Law* 310 (Oxford University Press, Oxford, 2006). Oxford dictionary defines "comparison" as "consideration or estimate of similarities and differences between two people or things", *available at*: http://www.oxforddictionaries.com/definition/english/comparison (last visited on July 1, 2014).

4 Nil Jansen, *supra* note 3.

5 Yves Chevrel, *La literature compar'e* 3 (Pres Universitaires de France, 5th edn., 2006) cited by Geoffrey Samuel, "Comparative Law and its Methodology" in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* 101 (Routlege, London, 2013).

6 *Ibid.*

presumption in favour of similarity or with that of difference is a debatable point amidst legal scholars.[7]

CLR is a systematic exposition of the rules, institutions and procedures or their application prevalent in one or more legal systems or their sub-systems with a comparative evaluation after objective estimation of their similarities and differences and their implications. CLR may be doctrinal or non-doctrinal, theoretical or fundamental, historical or contemporary, qualitative or quantitative. CLR is also known as comparative law. But there is controversy whether comparative law is only a method or includes a perspective.[8] According to Zweigert and Kotz, it suggests an intellectual activity with law as its objects and comparison as its process.[9] H.C. Gutteridge regards comparative law as denoting a method of study and research and not a distinct branch of law.[10] It contemplates comparison of systems rather than mere legal precepts, writes Roscoe Pound.[11] This perception has substantive social dimension as it looks to the whole comprehension of traditions underlying the systems and the socio-economic factors that constitute their parts. It is the totality of the system to be compared, not its fragments.[12] In the course of CLR the researcher resorts to not mere juxtaposition presentation of information, but seeks insight about the process of growth, functioning and habits of thoughts; and evaluating the social purpose of law. It is not mere professional tool or an academic toy, but it takes us beyond the compared factors and gives insight to the underlying ideas.[13] CLR enables building theory on the basis of varieties of experience, and has sound phenomenological background in bottom-up approach or inductive reasoning. It can deal with, what Sujit Choudhry and other scholars call, migration of ideas.[14]

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7 While Zweigert and Kotz view that nations generally answer the needs of the legal business in the same or similar way and hence *presumptio similitudinis* is appropriate, Legrand argues that comparison involves identification of diversity in law and hence stands on presumption of difference (*dans la difference*). K. Zweigert and H. Kotz, *Introduction to Comparative Law* 40 (Oxford: Clarendon Press, 3rd edn., 1998); Pierre Legrand, *Le droit compare'* 101 (Presses Universitaires de France, 3rd edn., 2009) cited in Geoffrey Samuel, *supra* note 5 at 104-5.

8 Gutteridge, Zweigert and Kotz consider it only as a method whereas Legrand regards that it presents a new perspective, allowing one to critically illuminate the legal system like critical legal studies or feminism. O. Kahn-Freund, "Comparative Law as Academic Subject" 82 *LQR* 41 (1966); Pierre Legrand, "Comparative Legal Studies and Commitment to Theory" 58 *Modern Law Review* 264 (1995).

9 K. Zweigert and H. Kotz, *supra* note 7 at 2.

10 H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* 2 (Cambridge University Press, Cambridge, 1946).

11 Roscoe Pound, "What we may expect from Comparative Law?" 22 *ABAJ* 56 (1936).

12 Pierre Lepaulle, "The Functions of Comparative Study of Law for Policy Purposes" 1 *Am J Comp L* 34 (1952).

13 O. Kahn-Freund, *supra* note 8 at 45.

14 Sujit Choudhry, "Migration as a new metaphor in comparative constitutional law" in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* 1 (Cambridge University Press, Cambridge, 2006).

CLR flourishes with diversity of legal systems and patterns. Looking to the distinct principles, procedures, approaches and institutions, legal systems can be grouped into four major legal families in the world: common law, civil law, socialist law and religion based law. There are mixed legal systems owing to superimposition of different colonial laws upon the same community or because of co-existence of diverse indigenous laws and customs along with state law. The presence of international law and regional arrangement amidst nations has also added to diversity. In federal states, plurality of laws based on multiple regional choice has become imperative. When state recognizes religion based personal laws, it leads to plurality. They are products of traditions and cultures. Legal tradition reflects deeply rooted and historically conditioned attitudes about the institution of law, and it puts the legal system into cultural perspective.[15] It provides conceptual understanding of normative information.[16] Patrick Glenn recognizes multiple inner traditions within the major traditions.[17] For example, Mitakshara and Dayabhaga and their sub-schools and practices under Hindu law, and Hanafi, Maliki, Shafi and Hanbali amidst the Sunnis and Shias under Muslim law have produced diversity. In such a heterogeneous world, scope for comparison is enormous. Gathering the diverse character of legal systems, Peter De Cruz defines comparative law to describe the systematic study of particular legal traditions and legal rules on a comparative basis. Necessarily it involves comparison and contrast of two or more legal systems.[18]

K. Zweigert and H. Kotz point out, "the method of comparative law can provide a much richer range of model solutions than a legal science devoted to single nation, simply because the different system of the world can offer a greater variety of solutions than could be thought up in a life time by even the most imaginative jurist who was corralled in his own system… it extends and enriches the 'supply of solutions' and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place."[19] In brief, it augments knowledge by discovering different models for preventing or resolving social conflicts. It widens the dimensions of critical legal research by comparing, contrasting, and exposing to larger social experiences about law and legal system. It enables better understanding of legal data.[20] Since

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15 Merryman cited by Peter De Cruz, *Comparative Law in Changing World* 4 (Routlege, Cavendish, 2007).

16 H. Patrick Glenn, "Comparative Legal Families and Comparative Legal Traditions" in Reimann and Zimmerman, *supra* note 3 at 439.

17 H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 319 (Oxford University Press, Oxford, 2000).

18 Peter De Cruz, *Comparative Law in Changing World* 3 (Routlege, Cavendish, 2007).

19 K. Zweigert and H. Kotz, *supra* note 7.

20 Elisabetta Gande, "Development of Comparative Law in Italy" in Reimann and Zimmerman, *supra* note 3 at 118.

different human communities in different parts of the globe approach the values of human rights, democracy, cultural pluralism, development, welfare and democracy through their own distinct models and institutions, the valuable lessons about the success and failure, problems and solutions and ease and the difficulties provide input for critical evaluation.[21] For knowing the value and use of quinine, it is not necessary that it should be grown in one's own backyard.[22]

CLR operates, according to Wigmore, in three forms: comparative *nomo scopy* – description of other systems of law; comparative *nomo ethics* – assessment of relative merit; comparative *nomo genetics* – study of development of the system of law in relation to one another.[23] For conducting such study, broad historical grounding in the socio-cultural contexts of the legal systems is vital.

Descriptive analysis by observation of different systems is the primordial task involved in CLR. It goes beyond satisfying idle curiosity; it goes deep into the doctrinal rationales behind divergent legal systems; analyses traditions as storehouse of information and resource for reliance. Since law is also a cultural phenomenon and manifestation of tradition, true understanding of the historical, social and cultural background of the different systems is essential for evaluation of their comparative merits and demerits. The pattern of comparison may take any of the following approaches: parallel studies, looking to one's own system through foreign eyes, looking to foreign system through one's own culture, and applying foreign theories or ideas. Contrasting insider's estimations of all systems, mapping the institutional structures of diverse concepts and interpreting the diverse legal rules in that light are the implications of CLR, as John Bell views.[24]

Inter-disciplinary study adds to the worth and efficacy of CLR. Historical, socio-legal and economic dimensions of legal regimes provide rich input, and the understanding of the law in that light makes CLR more meaningful. Since law of a country is an amalgam of solutions to problems faced in the past; since each legal concept is tied to a certain conception of social order which determines the functioning of law; and since historical critique of the concepts of legal systems and legal families joins hands with functionalist comparison, relation of mutual assistance between CLR

21 John Bell views that CLR demonstrates that the goals of law can be achieved by different rules and institutions in different social contexts. See John Bell, "Legal Research and Distinctiveness of Comparative Law" in Mark Van Hoecke (ed.), *Methodologies of Legal Research* 158 (Hart Publishing, Oxford and Portland, 2013).

22 Rudolf von Ihering cited in K. Zweigert and H. Kotz, *supra* note 7.

23 Wigmore, "A New Way of Teaching Comparative Law" 6 *Journal of the Society of Public Teachers of Law* (1926) cited in Rahamatullah Khan, *An Introduction to the Study of Comparative Law* 4 (Indian Law Institute, New Delhi and N.M. Tripathi, Bombay 1971) .

24 John Bell, *supra* note 21 at 167.

and historical method of legal research can be found.[25] In view of widened recognition of law-society relations and law-development dimensions in legal study, empirical studies of the culture and functioning of laws and legal systems in different jurisdictions provide synergy between the works of CLR scholars and socio-legal scholars.[26] The issues of legal pluralism, tradition, religion, community and family bring socio-legal and CLR studies together. The interaction between comparative law and economic analysis of law can happen in such a way that each is the subject matter of the other, as per Florian Faust.[27] For example, comparative economic analysis of contract law can unravel economic benefits or burdens of contract law operating in multiple systems. The comparative economic analysis of strict liability may address the issue of legal relations between pesticide factory and neighbours and their economic implications. While scholars like Legrand emphasize complex cultural and interdisciplinary comparison, its practical viability is questioned by other scholars.[28] They regard that interdisciplinary approach requires a homogenous and unique field of investigation, which cannot be availed in comparative study.[29] It is true that empirical comparative study is prohibitively expensive. But use of data from non-law social sciences and secondary materials for interdisciplinary research can help in CLR.

The relations amidst diverse legal systems form another important matter, which is addressed by comparative law. Legal transplant, reception, borrowing, adoption, export, import, repatriating, cross fertilization and migration are some of the types of such relations. The relation is either genealogical or analogical. Each prototype has raised interesting debate about legitimacy of the process of transfer/influence, and extent of its acceptability. From the angle of national interest and autochthony, such debate is lively in the context of globalization and efforts of harmonization of law. Historical and anthropological studies focus on development of the legal system through these relations.[30]

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25 See for discussion, James Gordley, "Comparative Law and Legal History" in Reimann and Zimmerman, *supra* note 3 at 762.

26 Annelise Riles, "Comparative Law and Socio-Legal Studies" in Reimann and Zimmerman, *supra* note 3 at 809.

27 Florian Faust, "Comparative Law and Economic Analysis of Law" in Reimann and Zimmerman, *supra* note 3 at 856.

28 P. Legrand, *Le droit compare* (Presses Universistaires de France, Paris, 3rd edn., 2009) and in contrast, Favaraque–Cosson, "Development of Comparative Law in France" in Reimann and Zimmerman, *supra* note 3 at 61.

29 Heidmann, *Epistemologie atpratique de la comparaison differentelle* 146 (2006) cited by Geoffrey Samuel, "Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law" in Mark Van Hoecke (ed.), *Methodologies of Legal Research* 178-180 (Hart Publishing, Oxford and Portland, 2013).

30 Watson 1974 cited in Peter De Cruz, *supra* note 18 at 4.

III History and development of comparative legal research

The genesis of CLR is traceable to Aristotle's *Politics* which is a treatise raising high level of generalizations based on information gathering efforts from different systems of governance, and could safely be regarded as the first piece of comparative law.[31] Roman law gathered support from *jus gentium*, which Gaius calls 'the law that natural reason establishes among all mankind and is followed by all people alike.'[32] While in the early middle ages, the bringing of awareness of different sources of law and occasional attempts to juxtapose them for choice or better appreciation continued, in the middle ages, scholars like John Fortescue engaged in extensive comparison of the French and English legal systems. Jean Bodin projected the idea of supremacy of commonwealth upon other systems by extensive comparison.[33] Montesquieu produced his monumental work on law and power by resorting to comparative study not only of the systems of governance but also of the geographical, institutional and social forces that shaped them.[34] These works had impact upon the French Civil code. With the ups and downs, CLR continued its tradition in various parts of Europe. In Germany, Switzerland and Austria, CLR flourished in the 19th century with good amount of study of law on trade and industry prevalent in various countries. Ernst Rabel propounded functionalist approach of CLR. He regarded that instead of using foreign legal system as a quarry, CLR should analyze not only individual rules, but also the problems which they refer to and solutions that they give.[35] It should consider everything that affects the law, such as geography, climate, race, developments and events shaping the course of country's history. Real life problems are to be addressed in light of shared experience of various countries and communities. In the 20th century Max Planck Institute of comparative law became a hub of comparative study in the fields of public law and commercial law. With the efforts of harmonization of law of sales under United Nations Commission on International Trade Law (UNCITRAL) and Hague-Visby rules and increased application of conflicts of law, CLR attained great significance.

Italian legal scholarship has anchored on strong tradition of CLR in the background of unification of Italy and reception of legal innovations abroad.[36] German Civil Code

31 Charles Donahue, "Comparative Law before the Code Napoleon" in Reimann and Zimmerman *supra* note 3 at 4- 5.

32 *Id*. at 6.

33 *Id*. at 15.

34 *Id*. at 31; Fauvraque–Cosson, "Development of Comparative Law in France" in Reimann and Zimmerman, *supra* note 3 at 39-41.

35 Ingeborg Schwenzer, "Development of Comparative Law in Germany, Switzerland and Austria" in Reimann and Zimmerman, *supra* note 3 at 78.

36 Elisabetta Grande, "Development of Comparative Law in Italy" in Reimann and Zimmerman, *supra* note 3 at 109.

and Anglo-American model produced layers of influence to which Italian reception was prone. Mauro Cappeletti is a notable comparatist of constitutional law. University of Trento theorized about CLR that mere cultural excursion to or parallel exposition of certain field does not amount to CLR, but finding the differences and similarities do; that historical study is essential for CLR; and that CLR shall test the coherence of the various elements present in each system.[37]

CLR in Britain made a big contribution owing to the efforts of eminent comparatists and challenges of interactions with different legal systems across the globe.[38] Henry Maine regarded the chief function of comparative jurisprudence to facilitate legislation and practical improvement of the law. Knowledge of commercial law of other countries became essential for conducting trade. Society of Comparative Legislation was also established for its encouragement. According to H.C. Gutteridge, the pioneer of CLR in Britain, the function of comparative lawyer included ascertainment of conflicting rules of law emerging from differences in conceptions of rights and duties.[39] He emphasized the vitality of CLR for private international law, for promotion of trade, and for national law reform. Walton involved in extensive CLR on French and British law on obligations and court procedures which attained substantive significance in Canada and Egypt. He expressed dissatisfaction against wholesale transplantation of legislation as amounting to acts of errant thieves, and believed that uniformity is not only unnecessary but detrimental to diversity which can creatively influence each other.[40]

In the United States (US), CLR got impetus because of diversity of laws and procedures amidst states within the US. But it has suffered a set back in the context of Supreme Court's task of interpreting the federal Constitution because the court is generally averse to refer to foreign precedents. Unlike the Canadian and South African Supreme Courts, which act under express provisions in the Constitution to consider the practices "demonstrably justified in free democratic societies"[41] and hence refer to Indian and non-European cases,[42] the American Supreme Court resisted the influence of foreign precedents by declaring "comparative analysis inappropriate to the task of interpreting a constitution."[43] The minority view of Stephen Breyer J[44] that

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37 *Id.* at 118.

38 John W Cairns, "Development of Comparative Law in Britain" in Reimann and Zimmerman, *supra* note 3 at 131-137.

39 *id.* at 142-3.

40 *id.* at 146.

41 Canadian Charter of Rights and Freedoms 1982, s. 1; Constitution of the Republic of South Africa, s. 39(1).

42 *Soobramoney* v. *Minister of Health, Kwazul Natal,* 1997 (12) BCLR 1696 (CC).

43 *Printz* v. *United States,* 521 US 898 (1997).

44 *Knight* v. *Florida,* 528 US 990 (1990); *Foster* v. *Florida,* 537 US 990 (2002).

foreign source is relevant, informative and helpful in guiding the process of interpretation in the matter of delay in death penalty executions influenced the majority of the court in a 2005 case to regard that the foreign sources "while not controlling the outcome… provide respected and significant confirmation for our own conclusions."[45] Breyer J, in his dissent, criticizes the selective approach in the matter of foreign precedents. The American judges' approach of exclusively referring to the standards of decency of American society rather than that of other countries is based upon the distinctive culture and morality of America. When the judicial appointments in other countries have a different pattern, and other constitutional arrangements for inter-organ control provide for different mores, Roberts and Kennedy JJ took conservative stance towards expansion of foreign law's influence.[46]

In India, legal research has grown with comparative study from the days of enactment of Indian Penal Code. The Law Commission of India's extensive deliberation on different models and policies relating to criminal liability in common law, continent and American states in addition to the existing indigenous law during the formulation of the code is a pioneering example of comparative legal research. Along with growth of the legal system with codification of laws, absorption of common law and continuation of pluralistic personal laws, which were handled by the judges under the British system, practice of looking to the English experience developed.[47] Making of the Constitution provided a grand opportunity for comparative research both at the drafting and discussion stage. Relating to core values, institutions, models and control mechanisms or power equations in the Constitution the influence of other leading Constitutions of the world was kept open. However, the factor of influence cannot be exaggerated as the mature wishes of popular sovereignty were exploring choices suitable to Indian socio-economic and political circumstances. There was no question of apish imitation or senseless borrowing. The element of autochthony was strongly built by the Indian vision formed through freedom movement and cultural ethos; response to people's problems like poverty, illiteracy, social backwardness and communal disharmony and aspiration for democratic governance, multiculturalism and national unity. But models or strategies for putting them liberal framework was something searched in the constitutional experience of other jurisdictions. The drafting of,and discussion on preamble, fundamental rights, directive principles of state policy, parliamentary form of government, federalism, separation of powers, judicial review and amendments got great amount of input from comparative constitutional law

45 *Ropert* v. *Simmons,* 543 US 551 (2005).

46 See for discussion, Sujit Choudhry, *supra* note 14.

47 See for discussion, P. Ishwara Bhat, *Law and Social Transformation* (Eastern Book Co., Lucknow, 2009).

spread over US, UK, Canada, Ireland, Australia and others. Subsequent constitutional development through judicial decisions and academic research made use of foreign precedents and comparative constitutional literature. The search for optimal constitutional design by the nascent democracies is a general practice. According to Upendra Baxi, "[c]onstitution-makers everywhere remain concerned with the best constitutional design; however, that 'best' consists in 'shopping' around available models and adapting these to their needs and aspirations. The eventual mix, or more picturesquely put, the 'bricolage', is constrained by history interlaced with future-looking aspirations for social transformation."[48] A perusal of law commission's research, study, and recommendations, which constitute massive literature, gives a glimpse of extensive survey of comparative legal literature. In the field of environmental law, business and trade law, consumer protection and corporate law comparative study of domestic and international legal systems has greatly contributed towards concretization and refinement of legal policies. The commissions on centre-state relations and the National Commission to Review the Working of the Constitution made use of comparative study along with other methods. Intellectual property law and information technology law have been developed by extensively borrowing from international agreements and conventions as in other countries. The treatises on constitutional law by D.D. Basu and H.M. Seervai have made extensive use of CLR. In number of landmark judgments of the Supreme Court relating to equality, expressional freedom, business, property right, right to life and personal liberty, death penalty, right to privacy, religious freedom and minority rights one can find reference to foreign judgments in the course of interpretation of constitution and laws.[49] The Naz Foundation judgment of the Delhi High Court has greatly used foreign judgments.[50]

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48 Upendra Baxi, "Modelling 'Optimal' Constitutional Design for Government Structures: Some Debutant Remarks" in Sunil Khilnani, Vikram Raghavan *et.al.* (eds.), *Comparative Constitutionalism in South Asia* 23 (Oxford University Press, New Delhi, 2013).

49 *State of West Bengal* v. *Anwar Ali Sarkar,* AIR 1952 SC75; *State of West Bengal* v. *Subodh Gopal Bose,* AIR 1954 SC 92; *Saghir Ahmad* v. *State of UP,* 1954 SC 728; *Kharak Singh* v. *State of UP,* AIR 1963 SC 1295; *Govind* v. *State of MP* (1975) 2 SCC 148; *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27; *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *Bachan Singh* v. *State of Punjab,* AIR 1980 SC 898; *Kesavananda Bharati* v. *State of Kerala,* AIR 1974 SC 1461. Also see, P. K. Tripathi, *Spotlights on Constitutional Interpretation* 245-247 (NM Tripathi, Bombay, 1972).

50 See for extensive discussion, Sujit Choudhry, "How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation" in Sunil Khilnani, *supra* note 48 at 45.

IV Aims and purposes

Firstly, CLR provides clarification of the perspectives, the conditions, and alternatives for all communities for securing and enhancing democratic values.[51] It aims to know how universally the premises of justice and other values are shared[52] and what moral assumptions, cultural traditions, historical experiences and economic considerations are reflected in a given society's attitude towards the problem of social control.[53] By providing functionalist insight and doctrinal input, and by engaging in law-society discourse, it aims to add to the quality of research.[54] Legal education becomes more robust with increased application of CLR as it enriches supply of solutions.

Secondly, by pooling of variety experiences and best contemporary wisdom, CLR can promote critical understanding of one's own legal system. As Geoffrey Wilson points out, "[c]omparative studies have been largely justified in terms of the benefit they bring to the national legal system."[55] When legal doctrine is a prominent factor in the functioning of law, knowledge of its growth in other jurisdictions will throw light on its efficacy in dealing with the problem in specific social and economic context and factors responsible for its success or failure.[56] Both the empirical study and CLR have strong links with the legal doctrine, and also establish mutual relation within themselves.[57] The eclectic approach broadens the analysis of individual study. It helps in solving particular problems by providing alternative models for legislative draftsman or legislator and by helping interpretation of national rule of law. Law commissions and courts find CLR as extremely useful tool for their problem solving function.[58] In legal research for law reform, comparative study is the most common component of multimodal research.[59]

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51 Myers S. McDougal, "The Comparative Study of Law for Policy Purposes" 1 *Am. J. Comp. L* 34 (1952).

52 A.T. von Mehren, "Roscoe Pound and Comparative Law" 13 *Am. J of Comp. L* 515 (1964); John Bell, *supra* note 21 at 158.

53 Rahamatullah Khan, *supra* note 23 at 6.

54 Ralf Michaels, "The Functional Method of Comparative Law" in Reimann and Zimmerman, *supra* note 3 at 341-2.

55 Geoffrey Wilson, "Comparative Legal Scholarship" in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* 87 (Edinburgh University Press, 2007).

56 *Ibid*.

57 Geoffrey Samuel, *supra* note 28 at 187. Also see, A Riles, "Comparative Law and Socio-Legal Studies" in Reimann and Zimmermann, *supra* note 3 at 801.

58 Grehard Dannemann, "Comparative Law: Study of Similarities or Differences?" in Reimann and Zimmerman, *supra* note 3 at 403. Also see, Geoffrey Wilson, *supra* note 55.

59 P.M. Baxi, "Legal research and Law Reform" in S.K. Verma and Afzal Wani (eds.), *Legal Research and Methodology* (Indian Law Institute, New Delhi, 2nd edn., 2001).

Thirdly, CLR enables promotion of understating between different communities and nations with a view to reduce world's tension. Comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or temporary or contingent circumstances.[60] Unification of law in the area of the law of obligations, intellectual property law, and conflict of laws will be possible through CLR by looking to the common elements in different legal systems. After the emergence of TRIPS, TRIMS and GATS under WTO formulation of legal policies presupposes study of the approaches of other legal systems on vital aspects of trade and commercial law.

Fourthly, harmonization of law and bringing uniformity or reducing the differences will be possible through CLR. At the international level, Hague-Visby rules and UNCITRAL were products of harmonization. Cross-fertilization and transplantation of legal norms, institutions and approaches and mutual influence amidst different systems can be traced and examined from social transformation perspective. In the Indian context, the policy of uniform civil code (UCC) contemplated in the Constitution can be worked out on the basis of extensive comparative study of diverse personal laws and customs. However, unification of law at the cost of identity of individual component is not favoured in many discourses including the debate on UCC.

Fifthly, when the domestic courts apply the foreign law or foreign judgments, study of foreign law becomes inevitable. "The process of rule finding can function properly only if the judge is ready to look for both similarity and difference without giving priority to either."[61]

Finally, CLR facilitates choice between legal systems. The regulatory regime governing property, environment, tax, investment and the procedural laws of different legal systems are often compared before invoking the jurisdiction of the most convenient system or before launching a new venture. As H.M. Watt observes, "[t]he strategic importance of comparative law appears in the evaluation of the economic attraction of given regulations and their institutional setting: Doing business abroad means choosing the most efficient, but also the least costly, legal system."[62] The idea of *forum non convenience* can be set into service on the basis of CLR. In the matter of

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60 E. Lambert and J.H. Wigmore, "An International Congress of Comparative Law" 23 *Illinois L Rev.* 665 (1930).

61 Gerhard Dannemann, *supra* note 58 at 404.

62 Horatia Muir Watt, "Globalization and Comparative Law" in Reimann and Zimmerman, *supra* note 3 at 601.

liability issue relating to Bhopal gas leak tragedy when the jurisdiction of New York court was invoked in 1980s, analysis of the *forum non convenience* issue made the court to comparatively assess the competence and efficacy of the American and Indian legal systems to resolve the matter.

V The method and steps of comparative legal research

Once the researcher decides that he should go for CLR because of the need to survey diversity of experiences in relation to felt difficulty in a chosen field, he shall plan his CLR carefully. This section explains various steps of CLR, but it does not suggest rigid sequential order as the spontaneity of circumstances call for flexibility.

Statement of the problem

In the background of felt difficulties and unsatisfactory position relating to law, fact or solution, the researcher has to state the problem. As Geoffrey Samuel writes, "the researcher who is embarking on comparative work must first be very clear about his or her research question, for it is this question that will largely determine what might be called the model and programme to be adopted."[63] The researcher shall clarify the need for comparative study by relating it to any of the purposes that are mentioned above. Once he is clear about what he wants to compare, he can streamline the subsequent steps, *viz*., define the basis of comparison, select the comparative elements or legal systems, and fine tune the CLR process by looking to the systems and contexts and going beyond the texts. For example, a research work involving comparative overview of six South Asian legal systems about governance of non-profit organizations (NPOs) may clarify at the outset about the core research questions about subjection of the NPOs to legal regulation, compulsion for good governance and efficacy of law in ensuring the same.[64] A research on constitutional protection of ethnic minorities in India and Japan will focus on the issues of security, self-governance and social justice as the means to be traced in the two systems.[65]

Choice of *tertium comparationis*

It is in relation to element 'T', the *tertium comparationis*, that similarity or difference is searched in the course of comparative study.[66] 'T' is not an

63 Geoffrey Samuel, *supra* note 5 at 110.

64 P. Ishwara Bhat and Samiul Hasan, "Legal Environment for TSO Governance: A Comparative Overview of Six Asian Countries" in Samiul Hasan and Jenny Onix (eds.), *Comparative Third Sector Governance in Asia* 39 (Springer, New York, 2008).

65 P. Ishwara Bhat, "Constitutional Pluralism in response to Multi-cultural Reality: A Comparative reflection on the Indian and Japanese Approaches to Ethnic Minorities" in P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism* 297 (Lexis Nexis, New Delhi, 2013).

66 "S *ab* T" (similarity between *a* and *b* in relation to T) and "D *ab* T" (difference between *a* and *b* in relation to T) arise from such analysis according to Nils Jansen, *supra* note 3.

objectively available yardstick in most of the circumstances, but it descends from a choice about 'what matters', or which aspect of the law are relevant for comparatist. Hence, CLR scholar has to be obsessed with common denominators and harmonization factors.[67] Legal arrangement for democratic functioning of NPOs or effective protection to ethnic minority is the broad theme of 'T' in the above examples. The sub themes of 'T' may touch upon impact of imposition of colonial rule, competence of indigenous law, efficacy of control mechanisms in the above example of NPOs; or upon ethnic self governance system or legal security measures in the example of ethnic minorities. In comparing the German road traffic law with English law of negligence, the focus could be on whether law treats the driver with lenience or sternness in shouldering the blame rather than on differentiating mechanically between strict liability and fault-based liability.

Emphasis in comparison: Similarity or difference?

Comparatist aims at drawing lessons from the approaches of different jurisdictions to the same or similar problem. There is a general belief that the problems of life are met with same or similar solutions of law as law is regulator of social factors in any of jurisdictions and legal issues are similar. The presumption that practical results are similar (*presumption similitudinis*) in relation to similar social facts motivated the comparative lawyers like Gutteridge to start with search for minimum similarity in order to avoid illusionary or absurd comparison.[68] But the subsequent scholars like Ancel and Legrand who contest this presumption, view that the purpose of comparative law is identification of diversity of law, and give prominence to differences or oppositions for contrasting in course of comparison (*comparaison contrastee*).[69] Even the transplanted law has different consequences as it grows in different social economic and cultural conditions as per Legrand.[70] He views difference as more fundamental than similarity.[71] Macro comparison and comparison of social atmospheres bring forth the differences even though the legal text might be the same or similar.

Selection of comparative elements

The selection of laws, countries or legal systems for comparison is a crucial step for CLR. While presence of minimum similarity avoids absurdity in comparison, prevalence of differences avoids monotony and repetition. Hence, the choice should

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67 Geoffrey Samuel, *supra* note 28 at 207.

68 H.C. Gutteridge, *Comparative Law* 8-9 (1946); K. Zweigert and H. Kotz, *supra* note 7 at 40.

69 Marc Ancel cited in Grehard Dannemann, *supra* note 58 at 389; P. Legrand, "The Same and the Different" in P. Legrand and Munday, *Comparative Legal Studies: Traditions and Transitions* 240 (Cambridge University Press, 2003).

70 Pierre Legrand, "The Impossibility of 'Legal Transplants'" *Maastricht Journal of European and Comparative Law* 120 (1997) cited by Geoffrey Samuel, *supra* note 5 at 107.

accommodate diversity of features amidst systems having at least some common traits or dealing with same or similar problem. Differences are good points for comparison. The chosen countries or geographical areas might be neighbours or distant ones; developed countries or developing countries or least developed countries; democratic or totalitarian systems; those with high human right tradition or those without it; those with high Human Development Index (HDI) or with low ones; countries in the same continent or in different continent. Considerations in choice of sample survey may also help here. Further, availability of legal literature, especially reliable primary source, on the subject in different countries and choice of appropriate material shall also be considered.

The purpose of comparative study guides the selection of jurisdictions for comparison. If the purpose is unification or harmonization, all the components coming within the scheme shall be included. For example, harmonization of international trade law shall be on the basis of comparative study of all the participating legal systems. When the purpose is to know the comparative advantages and disadvantages of different systems and bring reforms in home-law in their light, the choice of comparative elements shall reflect relevant diversities. About the form of government the contest and contrast might be between a presidential, parliamentary, semi-presidential and collegiate models. Comparison between ordinary courts procedure and tribunal's procedure satisfies the factor of similarity, as both will be on adjudicative system but with radical differences.

In developing the principles of selection in inference-oriented comparative study, Ran Hirschl uses J.S. Mill's canons of experimental research. By using the method of agreement, the researcher shall select 'most similar cases' that have similar characteristics that are matched on all variables or potential explanations that are not central to the study, but vary in the values of the key independent and dependent variables.[72] Hirschl gives the example of comparative study of constitutional courts in Asian countries to illustrate this canon. Alternatively, the *second* canon *viz*., the 'most different cases' approach requires the researcher to compare cases that are different in all variables that are not central to the study but match in terms that have consistency on the key independent variables.[73] When three counties have different approaches in the matter

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71 "To accord difference priority is the only way for comparative law to take cognizance of what is the case". Pierre Legrand, in Legrand and Munday, *supra* note 69 at 263.

72 Ran Hirschl, "On the blurred methodological matrix of comparative constitutional law" *in* Sujit Choudhry, *supra* note 14 at 48; if two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause (or effect) of the given phenomenon. J.S. Mill, *A System of Logic* (1843).

73 *Id*. at 51-52.

of state's recognition of religion but exhibit similar tendency of popular support to theocratic movement, the selection of them for comparison is appropriate. Application of the *third* canon, *viz.*, 'joint method of agreement and difference' contemplates that when the researcher wishes to draw upon limited number of observations to test the validity of a theory, the observations shall feature as many key characteristics that are akin to those found in as many cases as possible.[74] Comparison of the judicial process in civil law and common law systems involves use of mixed methods. The *fourth* canon *i.e.*, the method of residue helps in selection of jurisdictions or cases by searching for the most probable cause or the most difficult case.[75] For example, in examining the effectiveness of constitutional bill of rights in initiating social change, the study of rights revolution in US, Canada and India becomes appropriate. The 'none of the above' category can help in selecting those jurisdictions, which through the process of exclusion, can suggest a newly identified explanation.

When in the matter of forming and performing treaty obligations, state practices differ in UK, US, Australia, Canada and India, the differences invite for a critical estimate of different approaches and their comparative merits and weaknesses. Selecting Hindu law and Mohammedan law for comparing the approaches about succession, maintenance or marriage provides scope for contrasting the differences and identifying the similarities. The limits on testamentary succession in Mohammedan law and women's equal rights in Hindu law can be comparatively assessed from the angle of compliance with gender justice. Marginalization of ethnic minority's right in Japan and special protection to tribes through security, self governance and social justice in India stand for good comparison. Within the federal system, the extent of efficacy in implementation of centrally sponsored schemes like food security law or rural employment guarantee law can be studied by selecting the states which have good achievement in HDI and those which lag behind. The working of panchayat raj in a district having more literacy rate or political consciousness can be compared with that district which has lesser rate of performance. In sample selection of village panchayats within a district, a village which is adjacent to main city and that which is in far flung hilly area may be selected for contrasting. In a state where crime rates relating to trafficking in women and children varies from district to district because of the factor of international border and cross-border trafficking or difference in the acuteness of impoverishment, selection of samples should enable contrasting the differences.[76] Thus, selection of comparative elements should come from proper perception of similarities and differences. Preliminary study of their history, and social, economic and cultural factors related to the legal realms enables such selection.

74 *Id.* at 55.

75 *Id.* at 57.

76 CLR enters into socio-legal research or *vice versa* in such events.

Functionalist study

Linking comparison with the function of legal system widens the dimensions of CLR as it brings sociological discourse into action. The applied CLR resorts to functional comparison for the purpose of law reform and unification of divergent laws. This consists of ascertaining the essentials from accidental, the causes from differences, and examining their operation in the context of social environment in which legal system operates. "Functionalist comparative law", according to Ralf Michaels, "is factual; it focuses not on rules but on their effects, not on doctrines or structural arguments, but on events."[77] Further, it combines factual approach with the theory that its objects must be understood in the light of their functional relation to society. It believes in social engineering instrumentality of law. In this approach, function itself serves as *tertium comparationis* and functionality can serve as an evaluative criterion. It provides tool to understand the law effectively; it gives clues of comparability; in the context of universality of social problems, it justifies presumption of similarity; it systematizes the building process.[78] It helps both synthesis and eclecticism of legal rules. According to Mark Tushnet, "[t]he functionalist approach to comparative constitutional law is similar to the universalist one to the extent that it tries to identify things that happen in every constitutional system that is the object of study….Functionalists believe that examining the different ways in which democratic nations organize the processes of going to war and deciding emergencies can help us determine which are better and which are worse processes."[79] Functionalist comparison aids in critiquing foreign law and gives a cultural perspective to understanding of the legal order. Jaakko Husa states that a functional approach continues to be the basis of mainstream methodology of CLR, despite the criticisms.[80]

Cultural immersion

As law is embedded in culture, understanding of it will be effective only if the scholar has a kind of 'immersion' in culture.[81] Roger Cotterrell views culture as fundamental - "a kind of lens through which all aspects of law must be perceived, or a gateway of understanding through which every comparatist must pass so as to have

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77 Ralf Michaels, "The Functional Method of Comparative Law" in Reimann and Zimmerman, *supra* note 3 at 342.

78 *Id*. at 363.

79 Mark Tushnet, "Some Reflections on Method in Comparative Constitutional Law" in Sujit Choudhry, *supra* note 14 at 72.

80 Jaakko Husa, "Comparative Law, Legal Linguistics and Methodology of Legal Doctrine" in Mark Van Hoecke, *supra* note 28 at 214.

81 V.G. Curran, "Cultural Immersion, Difference and Categories in US Comparative Law" 46 *AJCL* 43 (1998).

any genuine access to the meaning of foreign law."[82] Legrand regards culture as "the framework of intangibles within which an interpretive community operates' and as 'ways of organizing one's place in the moral universe through commitments to standards of reference and rationality."[83] Legal cultures supply fields of similarity to a considerable extent, but also exhibit differences in power processes in initiating and persuading change. Culture should be seen as the basis of participant's moral and cognitive experience and give input for thorough understanding. Parts of law cannot be studied outside their organic context.[84] Legrand calls for looking into the epistemological foundation of the cognitive structure which he names 'legal mentalite' and understand the legal texts in that light.[85] "Legal texts are not to be treated as objects in themselves – things capable for example of being transplanted from one system to another – but as signifiers of something culturally more profound about the 'other'"[86] Cultural study flows both in the sphere of macro and micro comparisons.

Macro comparison

This involves the study of legal families or engagement in grand systems debate. The examples of legal family are: civil law, common law, religion based laws (Hindu Law, Islamic Law, Talmudic law), regional laws (Japanese law, African law and Chinese Law). Differences prevail amidst legal families whereas similarities prevail amidst member legal systems of each legal family. Hence, macro-comparison may bring out differences or similarities depending upon affinity or non-affinity of the systems to legal family. Five factors central to the legal family – background, predominant characteristic, distinctive legal institution, kinds of sources and ideology – are to be looked in a holistic manner. Study of non-legal materials – geography, history, sociology, economy, politics and culture – provides valuable input for macro-comparison. For example, a glimpse of differential positions on these matters in India and Japan in the matter of ethnic minorities clarifies the reasons and justifications for different legal approaches. The aim to realize human rights and the working of democratic structure may provide factors of similarities. Ignoring of these aspects weakens CLR.

Micro comparison

Comparison of specific rules to resolve a particular problem can be called micro-comparison. The focus is on smaller units for manageable comparison. The focus may be on positive laws; on specific legal doctrine or precedent; on legal institution;

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82 Roger Cotterrell, "Comparative Law and Legal Culture" in Reimann and Zimmerman, *supra* note 3 at 711.

83 Pierre Legrand, *Fragments on Law-as-Culture* (1999) 11 cited by R. Cotterrell, *supra* note 82.

84 John Bell, *supra* note 21 at 164.

85 Pierre Legrand, "European Legal Systems are Not Converging" 45 *ICLQ* 60 (1996).

86 Geoffrey Samuel, *supra* note 5 at 103.

or on description. Its task is analysis and explanation rather than evaluation. It is concerned with identification of similarities and differences and working on them. Examples: comparative study of the guarantee of freedom of speech and expression in the US and India; or of interrelationship of fundamental rights in India, US and UK; or of forming and performing treaty obligation in US, Australia, Canada and India. While hard lines of distinction between macro-comparison and micro-comparison do not practically exist, their mutually complementary character shall be perceived.

Paradigms for comparison

Use of paradigms like human rights, social justice, feminism, welfare, social transformation, multiculturalism and post modernism provides thematic unity and analytical tool for comparison. Developing appropriate criteria for evaluation becomes important task of the researcher. Success of CLR depends much upon the suitability of the paradigm developed. Absent proper paradigm, CLR becomes rudderless and gets reduced to the position of water tight juxtaposition statement or dry listing of similarities and differences without much gain. Searching for values beyond the comparative position adds to CLR's success. The comparatist ventures suggestion of new point of view and consideration of all the different solutions from such perspective. Freeing the solution from the context of its own system and using it as a free roaming proposition helps the process of migration of ideas.

Suggestions for effective CLR

Legrand emphasizes four major points which shall be invariably considered for effective CLR: (i) commitment to theory; (ii) commitment to inter-disciplinarity; (iii) readiness to acknowledge the difference rather than seeking to operate on the basis of assimilationist approach; and (iv) being critical at all times. Raising fundamental questions, appreciating the true nature of foreign system and comparing rather than mere contrasting go a long way towards the success of CLR. Werner Menski finds faults with the deviation from this: "[c]omparative research and analysis is often undertaken with a myopic, narrow view that is, in essence, simply limited to the staid and dry juxtaposition of the regulations of one legal system with those of another, with little or no critical analysis."[87]

Analytical comparison

Analysis of the legal policy, provisions, their different components and relationships *inter se* provides a good understanding of the law. Relating it to the Constitution

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87 Werner Menski, *Comparative Law in Global Context* 66 (Cambridge University Press, Cambridge, 2006).

either to identify the source of power or policy authorization gives coherent view within the national legal system whereas relating it to international policy gives global basis for the legal policy. The components of the legal principles, causal scheme of intelligibility amidst them and procedure of their application are to be examined from the angle of comparison. For example, analytical comparison of the laws of governmental liability for torts committed by its servants would demand analysis of the areas of liability and immunity, the basis of distinction between them, identification of the burden holder and approaches about joint liability (cumul). The most striking factor at this level of analysis is the focus on differences and similarities.[88] This helps in building up creative and normative interpretation, which is the greatest contribution of CLR.[89]

Agreement-disagreement analysis

The methods of agreement, disagreement, joint method of both, residue and concomitant variables as suggested by J. S. Mill help in the process of evaluation or drawing inferences. These being essentially tools of experimental research become relevant and handy in view of the fact that different legal systems are social laboratories producing distinct experiences. According to Rabel, "[t]he inner relationship between the legal systems is only discernible if in our comparative portrayal of the institutions we take the similarities and differences together." Being regarded as the most difficult part of CLR, this process is deeply affected by peculiarities of the particular problems and their solutions in the different systems and defies normative categorization. When a comparative study of language right in education in SAARC (South Asian Association of Regional Cooperation) countries has to address the issue of loss of indigenous languages in the context of globalization, the similarities and differences and aggregation of them shall enter into the reasoning process and form part of the CLR map. The mapping method in CLR takes into consideration the purpose, level of comparison, units of comparison, and differentiation, and constructs the total picture. The search for similarities and differences many a times unearths the blind spots of our understanding of our own law. As Dannemann points out, "[c]omparative law is particularly useful for observing gaps in the law of one country which – almost like blind spot in our eyes – can be difficult to detect from within."[90] Mill's canons are helpful in learning the distinctions between the legal systems in the context of harmonization and unification of law.

Description

Description of different legal rules, doctrines, legal institutions, legal systems and their working in practice is inevitable for CLR. It begins with depicting comparative

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88 Geoffrey Samuel, *supra* note 5 at 108.

89 John Bell, *supra* note 21 at 175.

90 Grehard Dannemann, *supra* note 58 at 416.

picture of non-legal context in which the comparative elements prevail. Demographic, geographic, social, historic, economic and cultural atmosphere in which they exist and work provide a good backdrop for comparison. They hint about justifications for similarities and differences. The non-legal context analysis shall be followed by description of legal context. In the course of exposition of legal contexts, differential comparison shall deal with features of the system and analyze the differences in specific legal principle or institution. Analytical comparison is essential part of CLR. In relation to the research questions, the relations of various components of the legal doctrine, institution or system shall be analyzed in this process. For example, while making a comparative study of jury system in England and France, how the relationships amidst witnesses, lawyers, judges and other players affect the institution of jury shall be analyzed with reference to both the systems.[91] If the CLR is on legal institutions, mechanisms or procedures, the description shall deal with the similarities and differences in different systems. For example, in the comparison of the institution of judiciary in US and France, the description shall cover the aspects relating to jurisdiction, composition, powers and functions of law and actual practice in both the systems. As in other methods of research, the result of CLR should reflect upon initial hypothetical proposition and answer the question. Each legal system is product of distinct social circumstances and unique culture, venturing about sweeping statements about superiority or inferiority of any system shall be avoided unless strong supporting reasons are behind them.[92]

VI Scope and potentiality

CLR thrives in the context of diversities. Three sources of diversities can be identified here. *First*, diversity may lie within the country. Federalism produces diverse legal systems at the level of federating units and hence provides vast scope for comparison. Land laws, agrarian laws, local variation of central laws under concurrent list with President's assent, laws on local self governance, service conditions of state employees, laws on registered societies and cooperative societies, laws on charities, trusts and endowments vary from state to state. States have become laboratories for experimenting legal policies within the constitutional framework. Further, multiculturality also produces diversity. There are not only religion based personal laws like Hindu Law, Muslim law, Christian law. Within such laws also there are different schools and local variations owing to distinct customs and usages. Moreover, laws relating to welfare of tribal communities are also diversely developed. A rich field for CLR emerges even within the country.

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91 Geoffrey Samuel, *supra* note 5 at 108.

92 For example, Henry Maine's statement that success of Roman law is the measure of failure of Hindu law is not supported by convincing reasons.

Second, diversity of approaches amidst various countries, whether free democratic nations or otherwise, gives scope for CLR. Constitutional laws of different countries offer opportunities for comparison. Such comparison may be about the values, institutions, precepts and provisions; about control mechanisms and their functioning; or about trends of development as emerged in judicial and other constitutional practice. Various spheres of public law – criminal law, torts, contracts, consumer protection, environmental law, taxation, prison reforms, third sector laws and administrative law – provide scope for fruitful comparison. About diverse traditions like common law, civil law, Asiatic law (including Hindu, Islamic, Chinese, Thai, Japanese, Indonesian, Malayan etc), there is scope for CLR.

Third, experiences and positions of domestic legal systems can be compared to the international standards and benchmarks set by the international law. Regarding human rights, gender justice, development, promotion of social harmony and peace, resolution of international conflicts, norms of international trade, and protection of environment comparison of the domestic position with the international standards could be made. With the mammoth growth of the World Trade Organization (WTO) law and international human rights law there is expansion of the potentiality for CLR.

Globalization has also triggered the necessity of CLR because of close interaction of different countries and legal systems because of trade and other relations. While in the past Asiatic law was ignored by the western scholars, there is development of interest and inclination to study the laws of third world countries in modern times. Transnational uniform law emerging in the field of trade-related regulations under WTO touching upon areas of intellectual property, investment, services *etc.* is product of extensive preparatory study of comparative jurisdictions systematically undertaken at the diplomatic and private levels.[93] It is said that because of emphasis on uniformity, globalization has threatened legal diversity and thereby reduced the importance of comparative law. While this is partially true, the heightened exchange of ideas about alternative legal strategies across countries due to information technology revolution has exhibited ascendance in the importance of CLR.[94]

VII Limitations of CLR

There are several limitations and constraints for CLR. *Firstly*, lack of understanding or inadequate knowledge about the social, cultural, historical and other factors that influence the legal system is a serious handicap in comparison. Failure to have effective macro-comparison and cultural immersion with functionalist study has reduced the

93 Horatia Muir Watt, "Globalization and Comparative Law" in Reimann and Zimmerman, *supra* note 3 at 606.

94 *Id.* at 587.

quality of CLR. The solution consists in more systematic, meticulous and deeper study.

Secondly, language in which the knowledge system of law was developed abroad might not be familiar to the comparer. Language barrier is a serious issue in the matter of access to foreign law. Translation also may not provide full solution. As Bankim Chandra Chatterji said, "[y]ou can translate a word by a word, but behind the word is an idea, the thing which the word denotes, and this idea you cannot translate if it does not exist among the people in whose language you are translating."[95] Even in shared language base, crossing the linguistic border to understand the nuances of interpretation due to distinct language practice has become essential.[96] Because of historic reasons and as a matter of convenience, the imperial and dominant position of English language has become a reality. V.G. Curran points out, "[e]fforts to reverse or even halt the trend to use English seem to be as ineffective as efforts to defend any one language from foreign importations within it."[97] Relaxation of the exclusive French language rule in France signifies the futility of posing language hurdle in access to the knowledge of legal regulation. The translation of laws from other languages to English or other international language for the purpose of CLR has not only avoided the pitfalls of miscommunication but also made CLR as the bridge of mutual understanding of the legal systems. Jaakko Husa argues for discarding the camouflage of language and go beyond to unearth the concept which is encased in social reason.[98]

Thirdly, culture specific experiences cannot be generalized as universally valid. Transplantation shall be taken with pinch of salt and not as major component of daily diet. Inclination not to disturb home grown law has resisted apish imitation or thoughtless importing of foreign law. In the battlefield of influence of layers of foreign law, a high degree of eclecticism should emerge as a striking feature.[99] The approach on the part of legislators and judges that "we are servants of our own peoples, sworn to apply our law, and not some international priests to impose upon our free and independent citizens *supra*-national values that contradict them"[100] speaks about the love for autochthony. In fact, the extent to which different legal systems are open to foreign influence is different. The resistance in the newly liberated countries after the fall

95 Cited in T.N. Madan, "Secularism in its place" in Rajeev Bhargava (ed.) *Secularism and its Critics* 308 (Oxford University Press, New Delhi,1998).

96 *Id*. at 604.

97 V.G. Curran, "Comparative Law and Language" in Reimann and Zimmerman, *supra* note 3 at 694.

98 Jaakko Husa, *supra* note 80 at 217.

99 Jan Kleinheisterkamp, "Comparative Law in Latin America" in Reimann and Zimmerman, *supra* note 3 at 293.

100 Antonin Scalia, "Commentary" 40 *St Louis University LJ* 1122 (1996).

of the Soviet Union against unilateral imposition of western law and the basic inclination of Canadians to be free from the influence of the British or neighbouring big brother reflect the dominance of national culture. The transnational law explosion experienced in Europe is primarily due to the high receptivity of international human rights jurisprudence and accommodation of international trade.

Fourthly, choice of improper paradigm or wrong premise for comparison defeats the efficacy of study. In contrast, coherence in analysis by scanning the relevant legal regimes rescues the researcher. For example, comparative study of common Asian problems relating to bigamy, conversion, hate speech, personal law reform, secularism and the same sex marriage do become effective with a backbone of nucleus of ideas flowing from right paradigm.[101]

Fifthly, mere engagement in juxtaposition statement or placement of comparative materials fails to provide satisfactory analytical pay off. Mark Tushnet warns: "[i]ndeed, enumeration of provisions and summaries of court decisions may sometimes obscure more than they illuminate. Scholarship in comparative constitutional law is perhaps too often insufficiently sensitive to national differences that generate differences in domestic constitutional law."[102] The warning holds good in other spheres of CLR.

Finally, difficulty may arise with regard to availability of data, primary and secondary resources. Although information technology has partly solved the problem, the issue still persists. In practice, strong intellectual tradition of CLR is lacking; dull and dry juxtaposition of the legal regulation of one system with that of another with little or no critical analysis does not serve purpose.

VIII Contributions and attainments

In India, at the law-making level, in judicial process, in academic research, in book writing, and in law practitioners' works, CLR has assumed great role and made considerable contribution. Law Commission of India has used the CLR tool quite extensively and beneficially. Criminal law reforms of procedural law, alternative dispute resolution, plea bargain, governmental liability, judicial commission, intellectual property rights, reforms of personal law terrorism and other important topics have been

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101 Deepika Udagama, "The Democratic State and Religious Pluralism: Comparative Constitutionalism and Constitutional Experience of Sri Lanka"; Gary Jacobson and Shylashri Shankar, "Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity"; John H Mansfield, "Religious Freedom in India and Pakistan: The Matter of Conversion"; Mathew J Nelson, "Inheritance Unbound: The Politics of Personal Law Reform in Pakistan and India" in Sunil Khilnani, *supra* note 48.

102 Mark Tushnet, "Comparative Constitutional Law" in Reimann and Zimmerman, *supra* note 3 at 1225-1256.

discussed by the law commission by making extensive reference to comparative law. Institutional research conducted for the purpose has relied on comparative study as a significant part of multi-modal research.

Specific commissions like commission on centre-state relations (Sarkaria Commission), National Commission to review working of the Constitution (M.N. Venkatachaliah Commission), administrative reforms commission, and committee on criminal law reforms (Malimath Committee) have used the method of CLR.

While CLR was a major tool in the making of the Constitution, courts have carried the comparative constitutional discourse in good number of cases during the early formative period of the new republic. Judgments on procedural due process, quality, expressional freedom, death penalty, suicide, religious freedom, minority right, federalism, interpretation of legislative entries, inter-state water dispute and amendment have made reference to foreign precedents. This does not mean that they have been invariably followed. After the *Kesavananda* case[103] judicial decisions on constitutional matters have relied more upon the Indian material and the practice of CLR has been found to be not that helpful especially in the context of public interest litigation and positive right to life cases. Unparalleled judicial activism in India broke away from the western tradition, and either kept a low key profile of CLR or gathered slender support from CLR whenever suitable. Indian Constitution's emphatic focus on social justice and social inclusive policy makes CLR only subordinately useful. But when new path is to be tread in dealing with modern problem by evolving novel concept, CLR has greatly helped by supplying sophisticated interpretive input. The commentaries on the Constitution written by D.D. Basu and H.M. Seervai provide useful comparative materials. Books on comparative federalism, constitutionalism and constitutional pluralism are also pieces of comparative constitutional law.[104] Comparative constitutional law engages in dialogical interpretation in constitutional adjudication.[105] For effective conducting of research in comparative constitutional law, comparison of the socio-economic and cultural profile of each system; macro comparison of the broad constitutional scheme; and micro comparison of specific principle, policy or mechanism constitute systematic steps.[106]

In the field of administrative law, CLR has extensively contributed in shaping the law relating to extent of delegation of legislative power, identification of nature of

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103 AIR 1973 SC 1461.

104 D.D. Basu, *Comparative Federalism* (Lexis Nexis, 2007); P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism* (Lexis Nexis, New Delhi, 2013); Sunil Khilnani, *supra* note 48.

105 *Supra* note 14 at 22.

106 See for the application of these steps, *supra* note 65.

power, principles of natural justice, control of discretion, administrative liability, promissory estoppels, right to information, ombudsman and control of public undertakings. Comparative administrative law may weight the efficacy of the systems in the matter of values (rule of law, human rights, separation of powers) served by administrative law; compare the organization of powers and procedures; and compare the legal redress system.[107]

Comparative labour law may engage in international labour policy discourse, philosophy of labour law to save the workers from the onslaught of exploitative capitalist practices, and efficacy in resolving disputes and bringing welfare.[108] Comparative sales law, contract law, property law and torts law may address the issues of economic dimensions of law and social security in keeping of promises.[109] Comparative family law and succession law may address the issues of gender justice, family harmony and child protection in different jurisdictions.[110] Comparative criminal law may analyze the different systems from the angle of historical basis, punishment theories, victimology, social harmony and human rights.[111]

In the course of drafting legislation like Companies Act 1956, Monopalistic and Restrictive Trade Practice Act 1969, Competition Act 2002, Consumer Protection Act 2002, and intellectual property laws, CLR has been extensively made use of. A glimpse of law commission reports would exhibit the extent of use of CLR in legislative drafting. The law commission report on plea bargaining has extensively referred to the experiences of other jurisdictions on the subject.

Academic research in recent times has shown lesser use of CLR as the major research tool.[112] Along with historical, analytical and philosophical

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107 John S. Bell, "Comparative Administrative Law" in Reimann and Zimmerman, *supra* note 3 at 1259.

108 Mathew W. Finkin, "Comparative Labour Law" in Reimann and Zimmerman, *supra* note 3 at 1131.

109 E. Allan Earnsworth, "Comparative Contract Law"; Gerhard Wagner, "Comparative Tort Law"; Sien Van Erp, "Comparative Property Law"; Peter Huber, "Comparative Sales Law" in Reimann and Zimmerman, *supra* note 3.

110 Harry D. Krause, "Comparative Family Law" in Reimann and Zimmerman, *supra* note 3 at 1099; Maurius J De Waal, "Comparative Succession Law" in Reimann and Zimmerman, *supra* note 3 at 1071; Brenda Cossman, "Migrating marriage and comparative constitutionalism" in Sujit Choudhry, *supra* note 14 at 209

111 Markus Dirk Dubber, "Comparative Criminal Law" in Reimann and Zimmerman, *supra* note 3 at 1287.

112 Geoffrey Wilson views that national legal system still dominates the agenda of legal scholarsand law school curriculum. Geoffrey Wilson, *supra* note 55.

discussion, CLR is applied as a supplement but not as a major component of research tool. The need for more focused study of Indian scenario, lack of access to comparative material and the hard work involved in reference discourage the present day researchers from plunging into comparative study. Doctoral works by Indian researchers, now-a-days, give lesser role to CLR whereas standard legal journals still carry research articles with strong CLR component. At the global level, CLR is still a prominent tool. Geoffrey Wilson observed, "[l]ooking at law from a comparative point of view has made major strides since the beginning of the century."[113]

IX Conclusion

Human experiences of specific problems or issues in different contexts and countries can be better appreciated and evaluated when they are compared. CLR provides valuable tool for legal research as it widely spreads the canvas of community experience. Understanding of the basic insights under different schemes fills the gap of knowledge. As Geoffrey Samuel writes, "[t]he type of knowledge that emerges from a comparison will equally be dependent upon the programme and model in play in turn informed by the scheme or schemes of intelligibility adopted."[114] The danger of reducing CLR into a juxtaposition statement with superficial contrasting shall be avoided by making a methodic use of CLR. Comparison of social profile, cultural immersion, macro comparison and micro comparison together bring coherence and efficiency in comparative study. While CLR has served the growth of the Indian legal system, the absence of strong comparative tradition and dwindling interest in CLR amidst academic scholars and in the rungs of higher legal education are reasons of concern. Nevertheless, globalization and universal human rights principles demand an augmented role for systematic CLR.

113 *Id*. at 100.

114 Geoffrey Samuel, *supra* note 5 at 114.