The Muddled Science of Comparative Law:

Mending Terminology and Mapping its' Benefits within Indian Constitutional Discourse

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SUMMARY

Introduction

Comparing the task of deciding cases to "brewing a compound (tea)", Benjamin N. Cardozo, argues that judges use different principles, ingredients and tools to formulate a judicial decision (a compound)[1]. The qualitative and quantitative use of these ingredients varies according to the facts and circumstances of each case and the nature of law involved therein. It may happen that while one ingredient "X" would play a strong role in a case, its' relevance in other cases would be nominal (or it may play no role at all). The influence of each ingredient may also depend upon the "taste of the judge". If a judge likes "strong tea", he will use one ingredient (which brings such strong taste to the tea) more than the other ingredients. However, if a judge likes black tea, then he will not use an ingredient (milk) at all. If he likes green tea, he most certainly will use different ingredients[2]. In legal terminology these ingredients are usually referred to as "tools of interpretation" which can be categorised as primary and secondary tools[3]. "Foreign law" and "International law" are also tools of interpretation and this paper is an attempt to scrutinize the extent and the manner in which they are used within Indian jurisprudence.

Cardozo subsequently divides these principles or ingredients as those which judges use consciously and those which they use subconsciously[4]. Keeping this in mind, it becomes pertinent to mention here that the use of foreign law and international law as tools of interpretation by constitutional courts in India falls within the former category and it is an activity in which these courts engage intentionally and on purpose[5]. Engaging "foreign law" and "international law", as

1 Cardozo, Benjamin N., *Nature of Judicial Process* 10-11 (10th Indian Reprint, 2012) [Hereinafter Cardozo 2012].

2 This philosophy can be most associated with Legal Realism, the proponents of which argue that the judges decide the cases subjectively and use different legal tools and terminologies to cover-up their subjectivity. The standard account, as put by a legal historian, is this:
"Formalist judges […] assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics […] The Legal Realists […], tutored by Holmes, Pound, and Cardozo, devastated these assumptions […] .They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values." [Wiecek, William M., 1988, *Liberty Under Law: The Supreme Court in American Life* 187, cited in Tamanaha, Brian Z., 2009, *Understanding Legal Realism*, 87 Texas Law Review 731].

3 Singh, G.P., 2010, *Principles of Statutory Interpretation* (12th ed.).

4 Cardozo, 2012, Supra 2, at 11-12.

5 Abbas, Hakim Yasir, *Domestication of International Law in India: A Connubial or a Concubine-al Indulgence? – Part 1*, SRIL Blog, available at 23 http://srilindia.org/2015/08/23/domestication-of-international-law-in-india-a-connubial-or-a-concubine-al-indulgence-part-i/, last seen on 10/12/2017 [Hereinafter Abbas SRIL]; Tripathi, P. K., 1957, *Foreign Precedents and Constitutional Law* 57 Columbia Law Review 319, 325 [Hereinafter Tripathi 1957]; Shankar, 2010, Shylashri, *The Substance of the Constitution: Engag-*

tools of interpretation, is a conscious activity, one in which Indian constitutional courts have engaged enthusiastically[6].

The process of using both "foreign law" as well as "international law" as essential ingredient in decision making is in its golden age[7]. Their use has become an essential part of the legal culture in a large number of nations, including India. Moreover, their use is also abundant within legal research [by individuals as well as governmental and private institutions]. Globalization is one essential factor which has influenced the use of non-domestic legal authorities for domestic purposes. It has shrunk the world and changed the manner in which human beings, corporations and nations interact with each other. And it has done so for legal profession[8] as well and more so in regards to the manner in which courts

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ing with Foreign Judgments in India, Sri Lanka, and South Africa 2 Drexel Law Review 373, 402 [Hereinafter Shankar 2010]; Halpérin, Jean-louis, 2010, *Western Legal Transplants and India* 2(1) Jindal Global Law Review 14, 39 [Hereinafter Halperin 2010]; Scotti, Valentina Rita, 2013, *India: A Critical Use of Foreign Precedents on Constitutional Adjudication*, 69 in *The Use of Foreign Precedents by Constitutional Judges* [Tania Groppi and Marie Claire Ponthoreau (eds.)]; Vincent, J. Cyril Mathias, 2010, *Legal Culture and Legal Transplants: The Evolution of the Indian Legal System (With Reference to Private Law)*, XVIII[th] International Congress of Comparative Law, Washington DC, available at <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/44/50>, last seen on 5/12/2017.

6 Abbas SRIL, Ibid.

7 Glensy, Rex D., 2005, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 Virginia Journal of International Law 357; Jackson, Vicki C., 2003, *Transnational Discourse, Relational Authority, and the US Court: Gender Equality*, 37 Loyola of Los Angeles Law Review 271 [While referring to the use of foreign law and international law for domestic purposes she says, "looking outward to (such) transnational legal sources to encourage domestic adoption of and compliance with gender equality rights is an obvious legal strategy", Ibid 277]; Yeh, Jiunn-Rong, and Chang, Wen-Chen, 2008, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 Penn State International Law Review 89 [Hereinafter Rong & Chang 2008]; Trubek, David M., and others, 1994, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 Case Western Reserve Law Review 407; Howard, A. E. Dick, 2009, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 Virginia Journal of International Law 3 [Hereinafter Howard 2009]; Hirschl, Ran, 2010, *Comparative Law: The Continued Renaissance of Comparative Constitutional Law*, 45 Tulane Law Review 771 [Hereinafter Hirschl 2010].

8 Mak, Elaine, 2014, *Judicial Decision-Making in a Globalized World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (1st ed.); Shah, Prakash, 2005, *Globalisation and the Challenge of Asian Legal Transplants in Europe*, in *Singapore Journal of Legal Studies 348*; Bell, John, 2014, *Researching Globalisation: Lessons from Judicial Citations*, in *Cambridge Journal of International and Comparative Law 961*; McGinnis, John O., & Somin, Ilya, 2007, *Global Constitutionalism: Global Influence on U.S. Jurisprudence: Should International Law Be Part of Our Law?* 59 Stanford Law Review 1175; Gelter, Martin, & Siems, Mathias, 2012, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts*, 8 Utrecht Law Review 88 [Stating that in a globalised world, "law", which has traditionally been the prerogative of the sovereign nation state, also seems to see some cross-border interaction Ibid 88]; Yoo, John C., 1999, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Columbia Law Review 1955, 2004; Slaughter, Anne-Marie, 2003, *A Global Community of Courts*, 44 Harvard International Law Journal 191; L'Heureux-Dube, Claire, 1998, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa Law Journal 15; Chandler, Jason, 2011, *Foreign Law – A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 Suffolk Transnational Law Journal 117; Tushnet, Mark, 2008-2009, *The Inevitable Globalisation of*

engage the jurisprudence from other jurisdictions[9]. The inevitable result has been the dilution of boundaries between "domestic law" and "foreign law" as well as between "international law" and "domestic law"[10]. Consequently, courts from across the globe have acknowledged and put to practice the use of foreign law and international law as valuable tools of interpretation[11]. The jurisprudence from countries like Ireland[12], Brazil[13], South Africa[14], Germany[15], Canada[16], Aus-

International Law, 49 Virginia Journal of International Law 985; Law, David S., 2008, *Globalization and the Future of Constitutional Rights*, 102 Northwest University Law Review 1277; Ackerman, Bruce, 1997, *The Rise of World Constitutionalism*, 83 Virginia Law Review 771, 772.

9 Cleveland, Sarah H., 2006, *Our International Constitution*, 31 Yale Journal of International Law 1 [Hereinafter Cleveland] [Referring to "globalisation" as one of the reasons which the justices of the US Supreme Court give to explain their willingness to look abroad (and towards international law) Ibid 5]; Peters, Anne, 2009, *Supremacy Lost: International Law Meets Domestic Constitution*, 3 ICL-Journal 170 [Referring to how the convergence of international law and national constitutional law also leads to internationalization of the constitutions of the states. In other words, this convergence does not work only at a national level, but possesses the tendency to seep into the constitution of the states Ibid 174]; Choudhry, Sujit, 1999, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Indiana Law Journal 819; Foster, Jacob, 2010, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 University of San Francisco Law Review 79 [Hereinafter Foster]; Slaughter, Anne-Marie, 2000, *Judicial Globalization*, 40 Virginia Journal of International Law 1103 [Hereinafter Slaughter].

10 Choudhry, Sujit, 2007, *The Migration of Constitutional Ideas*; Seipp, David J., 2006, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 Boston University Law Review 1417-1446 [Hereinafter Seipp] [Arguing the transcendence of "rule of law" into a universal principle which cannot be bottled up and applied only to one nation Ibid 1442]; Buxbaum, Hannah L., 2009, *Territority, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 American Journal of Comparative Law 631.

11 Socarras, Michael P., 2011, *International Law and the Constitution*, 4(2) Federal Court Law Review 1; Fombad, Charles Manga, 2012, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 American Journal of Comparative Law 439 [Hereinafter Fombad].

12 Carolan, Bruce, 2004, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: The Search for Coherence in the Use of Foreign Court Judgments by the Supreme Court of Ireland*, 12 Tulsa Journal Comparative & International Law 123.

13 Reis Freire, Alonso, 2007, *Evolution of Constitutional Interpretation in Brazil and the Employment of Balancing "Method" by Brazilian Supreme Court in Judicial Review*, (7th World Congress of the International Association of Constitutional Law, Athens) < http://www.academia.edu/8306512/Evolution_of_Constitutional_Interpretation_in_Brazil_and_the_Employment_of_Balancing_Method_by_Brazilian_Supreme_Court_in_Judicial_Review>, last seen 20/12/2017.

14 Lollini, Andrea, 2012, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 Utrecht Law Review 55; Fombad, Supra 12; Rautenbach, Christa, & Plessis, Lourens du, 2013, *In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges* 14 German Law Journal 1539; Foster 2010, Supra 10; Bentele, Ursula, 2008-2009, *Mining the Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law*, 37 Georgia Journal of International & Comparative Law 219; Oppong, Richard Frimpong, 2007, *Re-Imagining International law: An Examination of Recent Trends in the Reception in the Reception of International Law into National Legal Systems in Africa*, 30 Fordham International Law Journal 296.

15 Graebner, Riley J., 2011, *Dialogue and Divergence: The Vienna Convention on Consular Relations in German, American, and International Courts*' 42 Georgetown Journal of International Law 605.

16 Schneiderman, David, 2002, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 Os-

tralia[17], Hungary[18], Singapore[19], Taiwan[20], South Korea[21], Netherlands[22], Israel[23] and New Zealand[24] perfectly highlights the same.

This phenomenon of cross-border judicial dialogue and engagement with international law manifests itself within Indian jurisprudence as well[25]. The Indian constitutional jurisprudence is disseminated with the practice of using foreign (non-Indian) legal authorities and international law as essential tools of

goode Hall Law Journal 401; Lefler, Rebecca, 2001, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada, and the High Court of Australia* 11 Southern California Interdisciplinary Law Journal 165-191 [Hereinafter Lefler].

17 Lefler 2001, Ibid.; Aronery, Nicholas, 2007, *Comparative Law in Australian Constitutional Jurisprudence*, 26 University of Queensland Law Journal 317.

18 Trang, Duc. V., 1995, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 Vanderbilt Journal of Transnational Law 1.

19 Ramraj, Victor V., 2002, *Comparative Constitutional Law in Singapore*, 6 Singapore Journal of International & Comparative Law 302-334.

20 Chang, Wen-Chen, 2010, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 North Carolina Journal of International Law and Commercial Regulation 594 [Hereinafter Chang].

21 Ibid.

22 Mak, Elaine, 2012, *Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands : Explaining the Development of Judicial Practices*, 8 Utrecht Law Review 20-34.

23 Hammer, Leonard M., 1998, *Reconsidering the Israeli Courts' Application of Customary International law in the Human Rights Context*, 5 ILSA Journal International & Comparative Law 23.

24 Allan, James, Huscroft, Grant, and Lynch, Nessa, 2007, *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite*?, 11 Otago Law Review 433.

25 Vishaka v. State of Rajasthan, AIR 1997 SC 3011 [Hereinafter Vishaka] [Accepting "gender equality" to be a universally recognised basic human right, the court constructively relied on international law to frame guidelines for protection of women against sexual harassment at workplace]; Meldensohn, Oliver, 2005, "*The Indian Legal Profession, the Courts and Globalisation*" J. South Asian Studies 301; Papa, Mihaela, & Wilkins, David B., 2011, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession* 18 International Journal of Legal Profession 175-209; Smith, Adam M., 2006, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case* 24 Berkeley Journal of International Law 218 [Hereinafter Smith] [Refers to the initial reliance of the Supreme Court of India on international law and the subsequent intensification of the same since 1990s because of the fact that "the Indian Court […] amassed more power and the country [underwent] significant changes through its immersion in globalization." Ibid 259]; Khosla, Madhav, 2011, *Inclusive Constitutional Comparison: Reflections on Sodomy Decision*, 59 American Journal Comparative Law 909 [Hereinafter Khosla]; Deva, Surya, 2006, *Human Rights Realization in an Era of Globalization: The Indian Experience* 12 Buffalo Human Rights Law Review 93; Balakrishnan, K. G., "*The Role of Foreign Precedents in a Country's Legal System*" (Keynote Address Northwestern University Illinois 2008) < http://docs.manupatra.in/newsline/articles/Upload/DD0D1FD1-B18C-4240-9B41-15C5923FE819.pdf> last accessed on 20/12/2017; Balakrishnan, K. G., "*Justice in the 21st century: The challenge of Globalisation*" (Introductory Note Qatar Law Forum 2009) <http://www.delhihighcourt.nic.in/library/articles/Justice%20in%20the%20 21st%20century%20-%20The%20challenge%20of%20globalisation.pdf> last seen 20/10/ 2017.

interpretation and construction[26]. Cross-border judicial decisions, international law and other non-Indian sources have influenced a plethora of judicial opinions in India[27], ranging from right to privacy[28], freedom of press[29], restraints on foreign travel[30], custodial torture[31], constitutionality of death penalty[32], protection of women against sexual harassment at work place[33], prior restraints on publication[34] and the criminalisation of certain forms of speech and expression on the internet[35]. Unlike USA, where engaging in cross-jurisdictional constitutional dialogue has been looked upon with some scepticism[36], the constitutional courts in India have accepted/adopted this practice with a lot of enthusiasm[37]. Even though the hon'ble Supreme Court of India has from time to time cautioned

26 Scotti, Valentina Rita, 2013, *India: A Critical Use of Foreign Precedents in Constitutional Adjudication*, 69, in *The Use of Foreign Precedents by Constitutional Judges* [Tania Groppi and Marie Claire Ponthoreau (eds.)].

27 Tripathi 1957, Supra 6; Smith 2006, Supra 26; Shankar 2010, Supra 6; Halperin 2010, Supra 6; Khosla 2011, Supra 26; Abbas, Hakim Yasir, 2013, "Critical Analysis of the Role of Non-Indian Persuasive Authorities in Constitutional Interpretation" 1(II) Comparative Constitutional Law and Administrative Law Quarterly 46, available at http://www.calq.in/sites/default/files/CALQ_1_2.pdf, last seen on 20/12/2017 [Hereinafter Abbas 2013].

28 Kharak Singh v. State of Uttar Pradesh & Ors., AIR 1963 SC 1295 [Unauthorised police surveillance as considered as violative of _right to privacy'].

29 Bennett Coleman v. Union of India, AIR 1973 SC 106 [Challenge against governmental limits on import of newsprint].

30 Maneka Gandhi v. Union of India, AIR 1978 SC 597 [Hereinafter Maneka Gandhi 1978] [Challenge against government's refusal to issue passport to petitioner].

31 D. K. Basu v. State of West Bengal, AIR 1997 SC 610; Halabi, Sam F., 2013, *Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri D.K. Basu v. State of West Bengal*, 3 Notre Dame Journal International & Comparative Law 73-121.

32 Bachan Singh v. Union of India, AIR 1980 SC 898 [Majority opinion approving of death penalty in rarest of rare cases].

33 Vishaka, Supra 26.

34 R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

35 Shreya Singhal v. Union of India, (2013) 12 SCC 73.

36 Rosenkrantz, Carlos F., 2003, *Against Borrowings and Other Non-authoritative Uses of Foreign Law*, 1(2) International Journal Constitutional Law 269; Law, David S., & Chang, Wen-Chen, 2011, *The Limits of Global Judicial Dialogue*, 86 Washington Law Review 523; Saunders, Cheryl, 2006, *The Use and Misuse of Comparative Constitutional Law*, 13 Indiana Journal of Global Legal Studies 37, 39; Howard 2009, Supra 8 at 11-14; Hirschl 2010, Supra 8.

37 The evolution of Indian environmental jurisprudence by the constitutional courts is the perfect reflection of this enthusiasm. Virtually all of the Indian legal jurisprudence in relation to environmental law has been developed by the Supreme Court through the interpretation of Constitution and a major portion of this jurisprudence has relied on foreign law. The Supreme Court has developed a reputation of being an activist Court that has, since mid-1980s, transformed itself into a guardian of India's natural environment; See Baxi, Upendra, 2003, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In] Justice*, 1 in *Fifty Years of the Indian Supreme Court: Its Grasp and Reach* [S. K. Verma and Kusum (eds.)]; Bandopadhyay, Saptarishi, 2010, *Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalization of International Environmental Law*, 50 Indian Journal of International Law 204 [Hereinafter Saptarishi].

against the disproportionate and inconsiderate use of foreign authorities and international law in statutory[38] and constitutional[39] interpretation, it has failed to lay down an objective test, or guidelines or proper methodology for engaging in such practice[40].

Moreover, even though there is no doubt about the use of non-Indian persuasive authorities by constitutional courts, doubts and arguments have been raised about the manner and the extent to which the courts engage in such practice[41]. Even such practice and the doubts associated with the same manifests themselves in many forms and fold[42], the discussion on the same does not fall within the ambit of this article. This article is an endeavour to critically analyse the issue of comparative law's identity crisis and it argues how the term "jurocomparatology" provides an answer to the same. Moreover, the article also discusses the benefits of engaging in such an activity and highlights how these benefits are already reflected within Indian jurisprudence.

Part I of the article critically analyses the problem of terminology faced by so called "comparative law". It also discusses the dilemma about whether comparative law is a "science" or a "methodology" and explains how using a term like "jurocomparatology" can provide an answer to the same. Part II of the article discusses the benefits of using foreign law and international law for the purpose of constitutional interpretation and identifies how these benefits have already manifested themselves within Indian constitutional jurisprudence.

1. Jurocomparatology: a way out of comparative law's terminological quagmire

Comparative law, a misnomer, suffers from identity crisis. And the proliferation of scholarship on the same in the last two decades seems to have deeply

38 M. C. Mehta v. Union of India, (1987) 1 SCC 395 [As per Bhagwati CJ] *"We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."* Ibid at 421.

39 Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [The Hon'ble Supreme Court denied to apply the concept of "affirmative action" as it exists in U.S.A. to Indian conditions and stated that: "*under these circumstances (where the social context in which the law is made is different), judgments from the US, while entitled to respect, must be approached with great caution, for their adoption would lead to jettisoning of over half a century of our jurisprudence*." Ibid. at 307].

40 Sathe, S. P., 2003, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2nd ed.); See also Saptarishi 2010, Supra 38.

41 Frankenberg, Gunter, 1985, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harvard International Law Journal 411 [Hereinafter Frankenberg].

42 Abbas 2013, Supra 28, at 46-73.

worsened the same. Comparative law's definitional predicament is an essential contributor to this crisis, an issue which has not been adequately addressed by legal scholarship, particularly in India[43]. Often times comparative law, foreign law and international law have been used interchangeably; a practice which tends to jeopardise the qualitative value of the same[44]. Can/Should the same be done? If yes, then what do we mean by foreign law? How do we define the "foreign" in it? Should the definition be based on "territoriality" or "institutional origin" or on "authors' citizenship"? Does it include everything that does not originate in the author's country? Does it include international law as well? If yes, then does it include primary as well as secondary sources of international law?[45] And how do we define "law" for its purposes? What does it include? Does it only include legislations and judicial decisions or does it also include reports of governmental authorities, scholarly articles/books and other judicial/legislative and quasi-judicial/legislative authorities. All this signifies a much more complicated problem associated with the definitional issue than is originally raised or perceived. However, can we simply run away from this problem by preferring "comparative law" to "foreign law" because "comparative law" is broader and encompasses a lot more authorities than "foreign law"? It would be difficult to say so. "Comparative law" has difficulties of its' own, the fundamental being the dilemma about

43 Waters, Melissa A., 2007, *Creeping Monism: The Judicial Trend towards Interpretive Incorporation of Human Rights Treaties*, 107 Columbia Law Review 628 [Hereinafter Melissa]; Wigmore, John H., 1931--1932, *Jottings on Comparative Legal Ideas and Institutions*, 6 Tulane Law Review 48; See also Smith 2006, Supra 26, at 225.

44 Different authors have used different terminologies to explain this phenomenon. For example, ["comparative legalism/constitutionalism" Parrish, Austen L., 2007, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, University of Illinois Law Review 637; Kahn, Paul W., 2003, *Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 Michigan Law Review 2677; ["transnational legalism/ constitutionalism" Backer, Larry Cata, 2007-2008, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 Mississippi College Law Review 11; Yap, Po-Jen, 2005, *Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 University of San Francisco Law Review 999; ["transnational judicial conversations/dialogues" and "quasi-constitutional arrangements" Rong & Chang 2008, Supra 8; Levit, Janet Koven, 2004, *The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence: A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 Tulsa J. Comp.& Int'l L. 163]; ["legal transplants" Miller, Jonathan M., 2003, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 American Journal of Comparative Law 839; Duca, Louis Del, Duca Patrick Del, and Gentili, Gianluca, 2010, *Introduction to the IALS Conference on Comparative Constitutional Law* 28 Penn State International Law Review 293]; ["borrowing" Tushnet, Mark, 1998, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 University of Pennsylvania Journal of Constitutional Law 325]; ["trans-judicial communication/influence" Slaughter, Anne-Marie, 1994, *A Typology of Trans-judicial Communication*' 29 University of Richmond Law Review 99; Slaughter 2000, Supra 10].

45 Does it only include treaty or conventions only? Or does it include "customary international law" and the ancillary sources of international law as provided in Article 38 (1) (c) and (d) of the ICJ Statute? Chang 2010, Supra 21 [Showing how "international law" also plays a crucial role in constitutional interpretation].

whether it is a "methodology" or a "substantive law". This part considers these questions and argues that the use of a term like "jurocomparatology" can provide an answer to this definitional predicament.

1.1. Jurocomparatology: An Answer to Comparative Law's Definitional Predicament

A conversation (legal or otherwise) about comparative law cannot be same as the one on contract law. While the latter involves a statute passed by a competent legislature, containing a body of rules and regulations with the ability of creating legal rights, duties, obligations, liabilities, privileges, immunity, disability, and remedies, and capable of being enforceable in a court of law, the *corpus juris* of the former is not the same. Therefore, jurisprudentially speaking, comparative law cannot be treated as "law" in the strict sense of the term. So, why then is it called comparative "law" and what then does it deal with? If it is not a "law" in the strict sense of the term, then is it a "methodology" and should it be therefore be called "comparative analysis of law"?[46] Legal scholarship seems to lack consensus on the same and the loose (and perhaps the wrong) manner in which "comparative law", "foreign law", "international law" and "comparative analysis of law" have been used interchangeably begs appropriate consideration and elucidation[47]. Utter disregard to the distinction between these phrases has also led some scholars to state that going into such debate would be a futile activity now[48]. The term "comparative law" as including "comparative analysis of law", observes Gutteridge, "has become so firmly established that it must be accepted, even if it is misleading"[49] However, I beg to differ with this stand which uses "comparative law" and "comparative analysis of law" as synonyms or argues in favour of using them interchangeably. They represent two different domains. While "comparative law", as will be highlighted below, is a "legal science", "comparative analysis of law" reflects the application or practice of the same. In this sense we should think of "comparative analysis of law" as a "verb".

46 A large number of scholars use "comparative study of law" rather than "comparative analysis of law". I have deliberately used the term "analysis" rather than "study" because using "study" reflects that such activity is restricted only to research point of view. While as if we use the term "analysis" it will include using such activity from "judicial" point of view as well.

47 Frank, Daniel J., 2007, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 Iowa Law Review 1037; Melissa 2007, Supra 44; Msayda, Jaro, 1953, *The Value of Studying Foreign Law*, Wisconsin Law Review 635, 647; Glensy, Rex D., 2011, *The Use of International Law in U.S. Constitutional Adjudication*, 25 Emory International Law Review 197.

48 Kamba, W. J., 1974, *Comparative Law: A Theoretical Framework*, 23 International & Comparative Law Quarterly 485 [Hereinafter Kamba].

49 Gutteridge, H., 1949, *Comparative Law* in Kamba 1974, Ibid., at 487.

In this regard, a broad term like "jurocomparatology" can be used to define a subject which would cover all the above aspects generally associated with comparative law. It should be used as a term under which "comparative law" and "comparative analysis of law" (and other associated aspects) could be brought together to mean different things. Such terminology can be used as an umbrella definition to cluster various aspects of "comparative law" under one head. Keeping this in mind and speaking epistemologically, following definition of "jurocomparatology" is proposed:

> "*Jurocomparatology may be defined as the science of 'comparative law', the practice of engaging in 'comparative analysis of laws' and the practice of using 'international law for domestic purposes'. For this purpose, 'comparative law' includes (but is not be restricted to) analysis, conceptualization and theorization of reasons as to why members of legal fraternity can or cannot (or should or should not) engage in legal comparison (both for research and practical purposes), determination of who can or cannot (or should or should not) engage in such comparison, defining what can or cannot (or should or should not) be the subject-matter of such comparison, identifying jurisdiction with whom such comparison can or cannot (or should or should not) take place, identification and rationalisation of legal and philosophical problems associated with the same, identification of methodological problems associated with such activity, and the development of a standard methodology for engaging in the same. Moreover, 'comparative analysis of law' would mean the actual act of engaging in comparison*."

1.2. Jurocomparatology: Defining the Nature and Scope

The above definition of jurocomparatology can give us a way out of the confusing labyrinth in which comparative legal scholarship is wedged as far as "conceptualising and theorizing" the nature and scope of comparative law or comparative analysis of law is concerned. Therefore, jurocomparatology, which includes comparative law as well as comparative analysis of laws, qualifies both as a "legal science" as well as a "legal methodology". "Comparative law" refers to "legal science" in the same manner as jurisprudence and criminology[50] while as "comparative analysis of law" refers to the actual practice of engaging in a

50 Ewald, William, 1994-1995, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 University of Pennsylvania Law Review 1898, 1961-90; Ewald, William, 1998, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 American Journal of Comparative Law 701; Valcke,

comparative analysis. In this sense "comparative law", like jurisprudence, is concerned about "why is" rather than "what is". Like criminology, which tries to study and theorise the reasons as to "why" people commit crime, comparative law (as part of jurocomparatology) tries to study and theorise the reasons as to "why" members of legal fraternity refer to laws from other nations. The other aspects of comparative law may include (but is not limited to) understanding and explaining reasons for engaging in comparative studies, reasons as to why practitioners and judges prefer (or should prefer) referring to one jurisdiction over another while comparing, or in what circumstances can they (or should they) refer to international law, what should or should not be the subject-matter of comparison, why can engaging in comparative analysis of law be challenging, how can these challenges be overcome, and what is the best possible methodology to engage in the same[51]. Therefore, "comparative law" deals with theorising about the act and about the methodology of engaging in comparative study while as "comparative analysis of law" means the actual act of engaging in such activity using the theory and the methodology developed by comparative law. For example, "Comparative Analysis of India's Human Rights Law" means that I am engaging in a "comparative analysis of law" and not "comparative law". In this regard Prof. Kamba states that scholars like Levy-Ullman, Kohler, Arminjon, Nolde, and Wolff, Rabel, Brutau, Yntema, Hall and Rheinstein consider "comparative law" as "science" and treat it on the same line as "jurisprudence"[52]. Moreover, Rheinstein while placing comparative law in the same category as jurisprudence holds the view that comparative law belongs to the realm of the exact sciences "[because] its cultivator tries to observe, describe, classify, and investigate in their relations among themselves and to other phenomena, the phenomena of law. Comparative law in that sense is the observational and exactitude-seeking science of law in general"[53].

The meaning of "comparative law" under jurocomparatology suggests that reference to the same means indication to the domestic law (irrespective of such law being formal or informal, substantive or procedural, structural/institutional or otherwise) of a foreign country. The first question that pops up is as to whether "comparative law" and "foreign law" mean (or should mean) one and the same thing? That should not be the case. There is a structural difference between

Catherine, 2004, *Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems*, 52 American Journal of Comparative Law 713.

51 For a better idea about the nomenclature of comparative constitutional law/studies, see Tushnet, Mark, 2014, *Advanced Introduction to Comparative Constitutional Law* (1st ed.).

52 Kamba 1974, Supra 49, at 488.

53 Rheinstein, Max, 1952, *Teaching Tools in Comparative Law*, 1 American Journal of Comparative Law 95, 98.

the two. While comparative law, as highlighted above, can be classified as "legal science", foreign law seems to be the subject-matter of such science. The difference can perhaps be made clear by reference to the difference between "criminology" and "crime/criminal". While "Criminology" refers to a specific "legal science", "crime/criminal" refers to the subject-matter of the same, i.e. they refer or define the "specificity" of this legal science. In the same way, "comparative law" refers to a specific "legal science" and "foreign law" refers to the subject-matter of the same, i.e. it refers to the specificity of "comparative law". The difference is perhaps the same as between "legal theory" and "law".

1.3. Jurocomparatology: Defining the Subject-Matter

Having argued that "foreign law" reflects the subject-matter of comparative law, it becomes necessary to explain how the terms "foreign" and "law" play out for the purpose of comparative law. However, the question as to whether and why we should attempt to define these terms needs to be addressed first. Should we leave it to the individual scholars to define these terms for the purpose of their own research and to the judges to define them on the basis of the facts and circumstances of each case? Or should we have a standard definition for these terms which could be applied uniformly to all attempts which involve comparative approach? This part argues that an improper use of these terms would lead to a compromised result, both for research as well as practical purposes. Therefore, it is vital to have proper definitions of these terms. Even though this paper recognises the impossibility of having a universally accepted definition of these terms, it still considers that some degree of consensus needs to exit in relation to the meaning of these terms. In case there cannot be a universal consensus, then at least such consensus should exist at a country level. The scholars associated with jurocomparatology in India should at least discuss and decide on what should be the meaning of these terms as far as studies which originate in India should be considered. Moreover, at least for research purposes it is very important to have a certain meaning attached to these terms so as to bring a certain degree of "uniformity" in researches which involve comparative analysis of laws. If every researcher starts attaching his/her meaning to these terms, it will be difficult to have a qualitative literature regarding the same. For example, as far as using international law is concerned, some scholars consider the same as part of "foreign law" while as others put them in separate categories. In this sense if two scholars from each category decide to take up a research to see how "foreign law" has been used by Indian Supreme Court, such researches would produce conflicting results. Moreover, it is also very important to be specific as to what is "law" for the purpose of comparative research.

For example, one research may use only legislations and precedents while as others may use other legal material as well. Same is true in regards to what the courts consider as "foreign" and what they consider "law" when they engage in comparative judicial dialogue. Providing proper definition to these terms would help us to determine the nature and scope of subsequent comparative analysis, whether it be for research purpose or for the use by judges. This part would deal with the latter first. This is because the term "foreign" needs to be explained and understood in the context of the term "law".

1.3.1. Law for the Purpose of Comparative Law

How do we explain "law" for the purpose of jurocomparatology? Should it only include the conventional sources of law like legislations and precedents? Or should it also include extra-legal material like governmental reports and articles written by foreign authors? One important reason for raising this issue is that the hon'ble Supreme Court has consistently uses these extra-legal materials to formulate judicial opinions. One may refer to *Shreya Singhal v. Union of India*[54] in this regard. The counsel for the petitioner in this case referred to House of Lords Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" in order to convince the hon'ble Supreme Court to save section 66A by using the "reasonable man test" as provided within the report[55]. Moreover, the scrutiny of the 38 Indian cases[56] cited in *Shreya Sin-*

54 (2013) 12 SCC 73 (India).

55 Ibid para 48.

56 A. K. Roy & Ors. v. UOI & Ors. (1982) 2 SCR. 272; A. S. Krishna v. State of Madras (1957) SCR. 399; Arun Ghosh v. State of West Bengal (1970) 3 SCR. 288; Aveek Sarkar v. State of West Bengal (2014) 4 SCC 257; Brij Bhushan & Anr. v. State of Delhi (1950) SCR. 605; Bennett Coleman & Co. & Ors. v. Union of India & Ors. (1973) SCR. 757; Chintaman Rao v. The State of Madhya Pradesh (1950) SCR. 759; Director General, Directorate General of Doordarshan v. Anand Patwardhan (2006) 8 SCC 433; Dr. Ram Manohar Lohia v. State of Bihar & Ors. (1966) 1 SCR. 709; Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte & Ors. (1996) 1 SCC 130; Dr. N. B. Khare v. State of Delhi (1950) SCR 519; Harakchand Ratanchand Banthia & Ors. v. Union of India & Ors. (1969) 2 SCC 166; Indian Express Newspapers (Bombay) Private Limited & Ors. v. Union of India & Ors. (1985) 2 SCR. 287; K. A. Abbas v. The Union of India & Anr. (1971) 2 SCR. 446; Kameshwar Prasad & Ors. v. The State of Bihar & Anr. (1962) Supp 3 SCR. 369; Kartar Singh v. State of Punjab (1994) 3 SCC 569; Kedar Nath Singh v. State of Bihar (1962) Supp. 2 SCR. 769; Madan Singh v. State of Bihar (2004) 4 SCC 622; Mohd. Faruk v. State of Madhya Pradesh & Ors. (1970) 1 SCR. 156; R. M. D. Chamarbaugwalla v. Union of India (1957) SCR 930; R. Rajagopal v. State of Tamil Nadu (1994) 6 SCC 632; Ramji Lal Modi v. State of UP (1957) SCR. 860; Ranjit Udeshi v. State of Maharashtra (1965) 1 SCR. 65; Romesh Thappar v. State of Madras (1950) SCR. 594; S. Khushboo v. Kanniamal & Anr. (2010) 5 SCC 600; S. Rangarajan v. P. Jagjivan & Ors. (1989) 2 SCC 574; Sakal Papers (P) Ltd. & Ors. v. Union of India (1962) 3 SCR. 842; State of Bihar v. Shailabala Devi (1952) SCR. 654; State of Bombay v. F. N. Balsara (1951) SCR. 682; State of Bombay v. United Motors (India) Ltd. (1953) SCR. 1069; State of Karnataka v. Appa Balu Ingale (1995) Supp. 4 SCC 469; State of Madhya Pradesh v. Baldeo Prasad (1961) 1 SCR. 970; State of Madhya Pradesh v. Kedia Leather & Liquor Limited (2003) 7 SCC 389; State of Madras v. V. G. Row (1952) SCR. 597; Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association

ghal case also highlights the use of these non-conventional legal authorities for interpretative purposes. A proper analysis of the reference to such authorities cited in the 38 Indian cases discussed by the hon'ble Supreme Court in *Shreya Singhal* case is provided in the following table:

S.No.	Nature	Details
1.	Foreign Books/Authors Cited	Between 40 and 50
2.	Legal Classics	– Montesquieu's *Esprit De Lois* (1748). – Blackstone's *Commentaries on the Laws of England* (1765-1769). – Walter Begehot's *The English Constitution* (1867) – *Rottschaefer on Constitutional Law* (1939 edn). – *Halsbury's Law of England* (1907). – Meiklejohn's *Political Freedom* (1960). – HWR Wade's *Administrative Law* (1961).
3.	Articles Written by Foreign Authors	15
4.	Journals Referred	– *Yale Law Journal.* – *Harvard Law Review.* – *Columbia Law Review.* – *Modern Law Review.* – *International and Comparative Law Quarterly.* – *Law Quarterly Review.* – *Stanford Law Review.*

Table No. 1

It is very important and at the same time very difficult to answer the question about what should be considered "law" for the purpose of foreign law because different jurisdictions recognise different sources of law and the value or credibility of each source would vary from one jurisdiction to another. Moreover, a comparative analysis would mean different thing to a legal researcher and to a judge. The consequences of the comparative analysis done by both would also be different. For a researcher it would perhaps mean publishing a work that provides suggestions and recommendations on the basis of comparative analysis,

of Bengal (1995) 2 SCC 161; The Collector of Customs, Madras v. Nathella Sampathu Chetty & Another (1962) 3 SCR. 786; The Superintendent, Central Prison, Fategarh v. Ram Manohar Lohia AIR 1960 SC 633, (1960) 2 SCR 821; Zameer Ahmed Latifur Rehman Shiekh v. State of Maharashtra & Ors. (2010) 5 SCC 246.

but for a judge it would mean to create a new law or a new interpretation of law on the basis of the same. Therefore, while conducting a legal research involving a comparative approach, a scholar may not necessarily restrict himself/herself to conventional sources of law like a legislation or a case-law, but may very well go beyond and use other authorities like foreign governmental reports and articles written by foreign authors. Should the judges do the same as well? The above reference to *Shreya Singhal* case and the 38 Indian cases cited therein suggests that the judges do refer to these authorities for interpretative purposes.

Foreign precedents are, like foreign statutes, foreign law; they are, therefore, not binding on a court, not even conditionally. They have only persuasive value, yet in this they enjoy greater acceptability than foreign statutes[57].

1.3.2. Foreign for the Purpose of Comparative Law

"In multi-national states", argues Adam Smith, "with histories of colonialism, occupation and/or influence by others, and increasing legal inter-connectedness with other countries, the line between 'foreign' and 'domestic' for concepts as intangible as 'legal principles' has always been imprecise and is becoming more so."[58] "Moreover, does foreign truly imply extra-territorial provenance or just extra-parliamentary? Are references to tribal or indigenous law, rather than legislatively enacted codes, reliance on foreign law?"[59] The term foreign for the purpose of comparative law needs to be construed in the context of the term "law" or "legal authorities" as discussed above. This needs to be done so as to avoid use of a broad definition for the same. When defined in restricted manner, it would be content-specific and focused and would reduce the risk of ambiguity and vagueness when it will be applied to law. Therefore, what should be the criteria to categorise a particular legal authority as "foreign". Should it be something that originates outside India (extra-territorial)? Or should it be decided on the basis of "institutional origin" (extra-institutional)? The "institutional origin" approach seems to be a narrow and wrong criterion. This is because in India, like elsewhere, we do not have a single "law-making" institution. And using "institutional origin" approach as a criterion would mean that we would have to consider the laws originating from different legal institutions as foreign for the purpose of each other. The constitutional scheme in India does not authorise our Parliament to claim monopoly to "law-making". It recognises other institutions, including constitutional courts (the Supreme Court and various High Courts), as law-making bodies. Would this mean that the law made by the Legislative Assembly of one

57 Tripathi 1957, Supra 6.

58 Smith 2006, Supra 26, at 225.

59 Ibid.

state should be treated as "foreign law" for another state? Or that the decision of the High Court of Delhi would be considered as a foreign law for other states. This is not the case. Even though decisions of different High Courts only hold persuasive value before the other High Courts and the Supreme Court, these cases play a much more important role than the foreign decisions. This also brings to the question the legal status of the judicial decisions of the Privy Council. Should these be considered "foreign" as well?

The right approach in this regard would be the "extra-territorial" approach. However, using this approach would mean that "international law" may also fall within the ambit of the same. And therefore, this approach needs to be applied with a modification. It should be utilized while expressly exempting international law from its domain. And the importance and necessity of doing so is reflected in the fact that "jurocomparatology" regards the use of international law for domestic purposes as a separate category. Therefore, as far as India is concerned, "foreign law" for a comparative research or for the use by the judges should include legal authorities whose "institution of origin" is outside the territory of India. This would include foreign legislations, foreign precedents, reports of foreign governmental and non-governmental agencies, and articles/books written by foreign authors but should exclude international law.

1.4. Jurocomparatology: Justifying Use of International Law as a Separate Category

"Comparative law" as part of Jurocomparatology does not include any reference (direct or indirect) to international law (for interpretative purposes or otherwise). This is done deliberately to highlight that "comparative law" should not be used to explain the utilization of "international law" for interpretative purposes. The necessity of doing so is entrenched in the structural and operational differences between foreign law (which is the subject matter of comparative law) and international law. The analysis of these differences will show that "international law" cannot and should not be placed within the category of "comparative law". Moreover, "international law" cannot even be placed under "comparative analysis of law". This is because of the nature of "comparison" as an activity. When we say "comparative analysis of law", it means comparing "foreign law" from two different jurisdictions. And, as will be highlighted below, that is not how international law interacts with domestic law. The interaction between international law and domestic law is not a comparison *per se*.

International law, as is the common knowledge, as a matter of both principle and practice exists and works in a different manner than domestic law. Therefore, foreign law (which basically is the domestic law of a foreign nation)

and international law cannot be used for the purpose of comparison in the same sense. In fact, we cannot even say that we can use "international law" for the purpose of comparison. It therefore becomes important to clarify for the purpose of this paper that any material (empirical or otherwise) making reference to international law would mean international law in the strict sense of the term [Article 38 (1) of the ICJ Statute].

The necessity of analysing foreign law (as a subject-matter of comparative law) and international law differently is reflected in the global scholarship regarding the same and a large number of scholars have prearranged "foreign law" and "international law" into two different categories for the purpose of identifying them as non-domestic interpretative authorities[60]. The reasons for doing so have been attributed to the "structural" and "functional" differences between the two systems (as embedded in the monist/dualist debate). Due to the paucity of space, these differences can be briefly stated as follows:

a. The primary structural differences between domestic law and international law include law & policy making institutions and law enforcement mechanisms. The source of international law is different from that of domestic law. Every nation has specific legal institutions for the purpose of creating and implementing law. While as no such well defined institutional set-up exists for the purpose of international law. Therefore, a legislation passed by the US parliament or a case-law decided by a US Supreme Court would not have same legal sanctity as an international convention or an ICJ decision. The institutional similarity between India and US makes it convenient for Indian courts and scholars to refer to US law (foreign law) than making reference to international law which interacts with Indian law in a different capacity. Therefore, assuming that using an international convention (for the interpretative purposes of domestic law) would be similar to using US legislation or case-law (for the same purpose) would be illogical and would not yield qualitative results. Therefore, it cannot be said that while referring to non-domestic interpretative authorities, the "foreign law" and the "international law" could be considered, compared and used in the same way.
b. The second and much more important difference is in relation to the democratic legitimacy of domestic laws and the lack of same in international law. This in fact has raised serious concerns about using international

60 Neuman, Gerald L., 2006, *International Law as a Resource in Constitutional Interpretation*, 30 Harvard Journal of Law & Public Policy 177; Glensy, Rex D., 2010, *Constitutional Interpretation through Global Lens*, 75 Missouri Law Review 1171; Lyon, Beth, 2007-2008, *Tipping the Balance: Why Courts should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 University of Pennsylvania Journal of International Law 169; Cleveland 2006, Supra 10.

law for domestic purposes. The crux of this difference is that since the domestic law as well as foreign law originate in a democratic set-up, it is convenient to compare them than doing so with international law.

c. Another difference is in relation to the subjects and the subject-matter of both systems. While the subjects of domestic law are "individuals" and "corporations", international law governs "states" and "international organisations". Therefore, the nature or subject-matter of both these systems in relation to rights, duties, privileges, power, immunity, disability and liability will be different and cannot be used for interpretative purposes in the same manner. While domestic law uses these concepts in relation to individuals, "international law" uses it in relation to states. Of course, there are instances where international law uses these concepts in relation to individuals as well. However, the manner in which it is done is different from that of in which domestic law does the same. International law creates obligations on the States to behave or not to behave in a certain manner in relation to other states and as in some cases in relation to their citizens. This suggests that while "foreign law" creates a "horizontal authority" (persuasive), there may be instances where international law may create "vertical authority". Therefore, this similarity in relation to subjects and subject-matter between two different countries (like US and India) makes it convenient for courts to refer to "foreign law" rather than "international law".

d. This brings us to the manner of interaction of international law and foreign law with our domestic law. In this regard one may refer to the book "The Use of Foreign Precedents by Constitutional Judges", which is an empirical study of the extent and the manner in which judges use foreign precedents in constitutional cases in more than ten jurisdictions.[61] It distinguishes "international law" from "foreign law" and expressly excludes "international law" from the research. While referring to why "international law" was excluded from the ambit of the book, the authors state the following:

> "*The use of international law has also been excluded from the research:* […] *we strongly believe that reference to international case law can divert attention from the optional and purely 'voluntary horizontal dialogue' between courts, by introducing elements of 'vertical compulsory dialogue*'."[62]

61 Groppi, Tania, and Ponthoreau, Marie Claire (eds.), 2013, *The Use of Foreign Precedents by Constitutional Judges* (1st ed.).

62 Ibid 5.

Even though the term "foreign" does refer to things which originate outside one's country and in that sense international law is also foreign or alien, however, the basis of classifying international law as a non-domestic authority should not be "territory", it should be "authority". And this authority is article 38 (1) of the Statue of ICJ. Unlike "foreign law", the nature of law which falls under article 38 of the Statue of ICJ is such that it tends to interact with the domestic law and should not therefore be considered "foreign". Let us take an example. When United States of America enacted its patent law, it had no legal affect whatsoever on other countries and for these other countries this law became "foreign law". However, when TRIPS agreement came into being, an obligation was created (with certain exceptions) upon the member states to modify their domestic laws so as to bring them in tune with TRIPS agreement. In this sense, we cannot say that "TRIPS Agreement" is "foreign law" in the same sense as US patent law. This obligatory nature of "international law" as opposed to "foreign law" is also evident from state practice. An example in this regard is the Constitution of South Africa which states that the courts "*must*" use international law for the purpose of constitutional interpretation and they "*may*" use "foreign law" for such purposes[63]. All this may perhaps also explain the preferable treatment of "foreign law" over "international law" by courts in India[64].

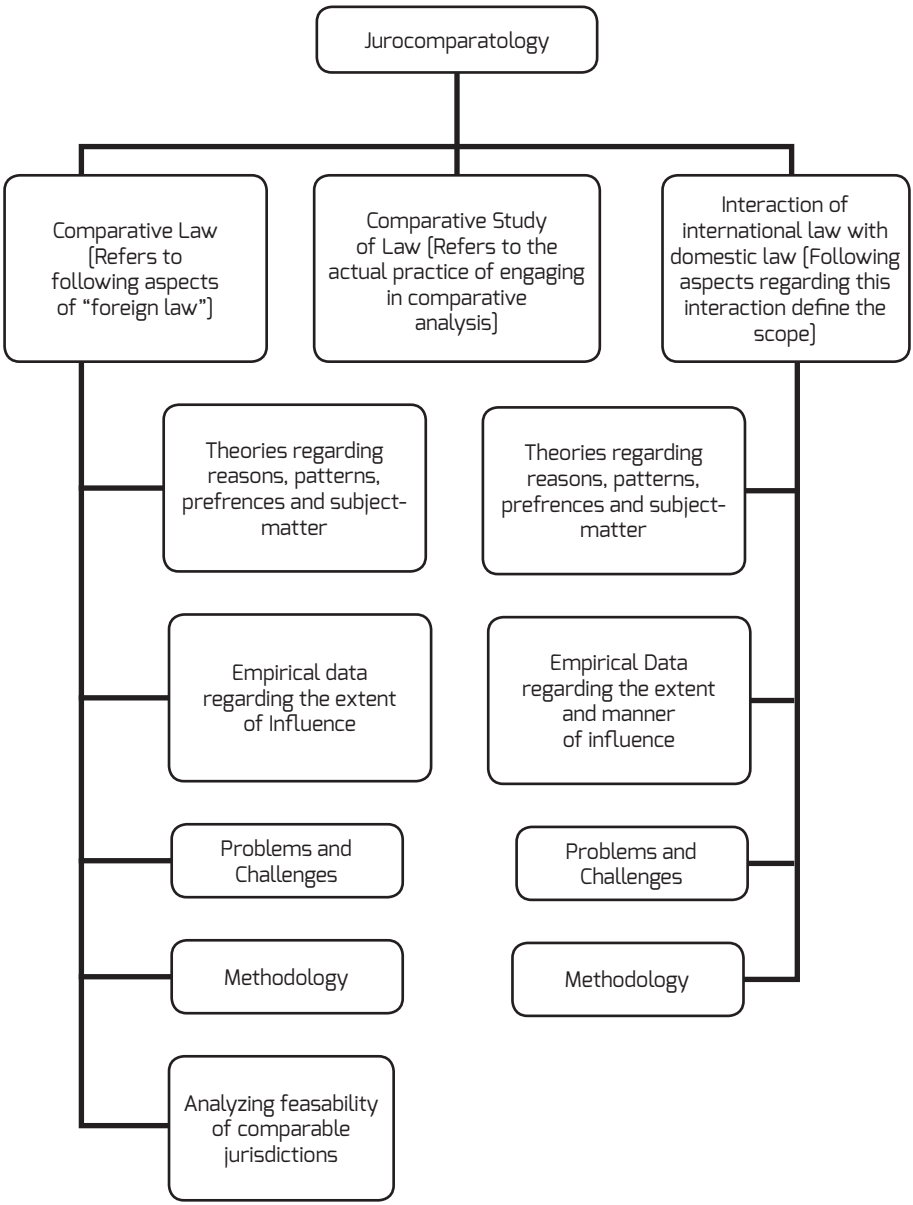
Therefore, when one looks to international law, it is more in the sense of something being obligatory or something which tends to create liability. While as, when we look at foreign law, it is persuasive for all practical purposes. Therefore, it would be correct to state that "comparison" can take place in relation to "foreign law" and not necessarily in relation to "international law". Moreover, it should be kept in mind it is not necessary that the extent and the manner in which courts rely on "international law" will be same to that of "foreign law". Both play a constructive role as important tools of interpretation but such role varies in degree and manner. It simply means that the manner in which the courts may use "international law" for interpretative purposes many not be same as the manner in which "foreign law is used"[65]. And it is for this reason that the "use of international law" is considered as a separate category under "jurocomparatology". In

63 South African Constitution, s. 39
Section 39(1) of the South African Constitution states:
(1) When interpreting the Bill of Rights, a court, tribunal or forum
(a) ……
(b) must consider international law; and
(c) may consider foreign law.

64 Smith 2006, Supra 26.

65 In order to see the relevance of the interaction between domestic legal system and international law see Waters, Melissa A., 2005, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Georgetown Law Journal 487.

this regard, the nature and scope of "Jurocomparatology" may be explained with the help of following diagram[66]



66 Comments, suggestions and criticism is invited in relation to the same. Please write to me at hakimy-asir.abbas@nludelhi.ac.in.

2. Mapping the benefits of jurocomparatology within indian jurisprudence[67]

Our knowledge (information) about our own social, geo-political and cultural milieu exceeds our familiarity with that of the foreign set-ups. Being born and having grown in a specific culture, we become familiar with its' intricate realities and lies, we appreciate some aspects of it while we dislike and criticise others, and on certain occasions, we may even assume our culture to be superior to others. For the members of the legal fraternity, this mind-set also includes similar preconceptions about legal and political set-up of their respective countries. While it is good to know ones' own culture (legal or otherwise), it has been argued that acquaintance with single culture limits our understanding about a great number of things[68]. Exposure only to a single legal system could lead to an insulated and distorted opinion about the same and could seriously jeopardise the development of one's researching, law-making, lawyering and judging dexterity. Engaging in cross-border judicial dialogue or taking up a comparative study of laws/constitutions facilitates beneficial engagement of other patterns of thought and organization different from those we are familiar with. In this sense, jurocomparatology has long been recognized as a valuable tool for interpreting and reforming domestic law internally[69], harmonizing and unifying law trans-nationally[70], and interpreting and constructing international law[71]. It also facilitates a bottomless supply of data with which to test philosophical, economic, sociological, and anthropological theories about law, to name only a few[72]. By studying different legal cultures, we are exposed to different –patterns of order that shape people, institutions, and the society in a given jurisdiction[73].

67 The benefits enlisted here are not limited to comparative constitutionalism alone. Comparative analysis in relation to ordinary statues would also attract these benefits.

68 Howard 2009, Supra 8, at 40 [He draws an analogy between language and constitutional law. Referring to Johann Wolfgang von Goethe, who said that a man who has no acquaintance with foreign languages knows nothing of his own, Howard makes a similar argument about constitutional law]; Schadbach, Kai, 1998, *The Benefits of Comparative Law: A Continental European View*, 16 Boston University International Law Journal 331, 335 [Hereinafter Schadbach].

69 Dehousse, R., 1994, *Comparing National and EC Law: The Problem of Level Analysis*, 42 American Journal of Comparative Law 761, 762-63; Tallon, 1969, *Comparative Law: Expanding Horizons*, 10 Journal of the Society of Public Teachers of Law 265, 266; Morrow, 1951, *Comparative Law in Action,* 3 Journal of Legal Education 403.

70 Gordley, J., 1995, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 American Journal of Comparative Law 555; Sacco, R., 1991, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 343.

71 Green, 1967, *Comparative Law as a Source of International Law*, 42 Tulane Law Review 52.

72 Hill, J., 1989, *Comparative Law, Law Reform and Legal Theory*, 9 Oxford Journal of Legal Studies 101, 111-13.

73 Grossfeld, Bernhard, & Eberle, Edward J., 2003, *Patterns of Order in Comparative Law: Discovering*

Prof. Kamba argues that the failure of legal fraternity to appreciate the functions and benefits of jurocomparatology (though he used "comparative law" instead of jurocomparatology) has seriously hampered its' development as an effective tool of interpretation and reform[74]. "One of the main factors", he argues, "that has impeded [the] progress [of] comparative legal studies [has been] the absence of a *systematic and comprehensive treatment and appreciation* of the functions of comparative law"[75]. He then states that "the clarification of [jurocomparatology's] function is, therefore, necessary for an appreciation of its value and importance"[76]. Keeping this in mind and for the sake of convenience, this part discusses the functions and benefits of jurocomparatology under following categories:

A. Intellectual use of jurocomparatology.
B. Gains for methodology.
C. Law reforms.
D. Judicial process.
E. Comparative method and development of international law.

2.1. Intellectual use of Jurocomparatology

The benefits of jurocomparatology begin with the attainment of knowledge of another legal system in order to enhance the understanding of one's own system[77]. The knowledge of alternative answers to common legal problems inevitably provides novel ways to understand and solve problems in one's own legal system[78]. The first achievement of comparative legal studies is the accumulation of knowledge[79]. Comparative study of law familiarizes law students, teachers, law makers, lawyers and judges with a global overview of law by introducing them to major legal families. This is true about India as well where majority of law schools engage in comparative study of legal systems like common law, civil law and so on. Unfortunately, my own experiences as a law student and now as a law teacher present a tale of ineffective use of comparative law as a teaching

and Decoding Invisible Powers, 38 Texas International Law Journal 291, 292.

74 Kamba 1974, Supra 49, at 489.

75 Ibid.

76 Ibid.

77 Schadbach 1998, Supra 69, at 335; Graziadei, Michele, 2009, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries in Law 693.

78 Schadbach 1998, Ibid.

79 Zweigert, Konard, & Kotz, Hein, 1998, *An Introduction to Comparative Law* (3rd ed.) in Schadbach, Supra 69, at 336.

tool. Kai Schadbach argues that while comparative law courses should primarily focus on teaching civil and common law system due to their dominance, the other important legal families' such as Islamic law[80], East Asian law, and African law[81] should not be ignored[82].

Learning another system not only increases the quantity of knowledge, but is a value addition qualitatively as well. Jurocomparatology challenges the lawyer's knowledge about his/her own system, forces him/her to introspect about the law under consideration as well as his/her approach and may ultimately lead to enlightenment. In analysing the underlying policies of the different systems, or the reasoning of the two approaches, the lawyer gains a more comprehensive understanding of his/her particular system[83] and the law in general. Furthermore, the simple awareness of alternatives enlarges the lawyer's intellectual stock, making him/her analytically better trained and more adept in dealing with complex legal questions within his/her own legal system. Distance from all-too-familiar legal system provides perspective, enabling the comparativist to gain a broader and more critical view from a higher vantage point[84]. In this manner, jurocomparatology enlarges the "supply of solutions" to legal problems[85].

Viskaha's case[86] can serve an example here. This case involved a matter relating to sexual harassment of women at workplace. There was no statutory law to deal with such a situation[87] and the Supreme Court of India was faced with a challenge to ensure the protection of women at workplace. The court relied upon international law while laying down guidelines for the protection of women against sexual harassment at workplace. Recognising that such a problem was common to a number of jurisdictions, the court looked towards the efforts made to deal with the same on international level. The court then framed guidelines on the basis of the international law mechanism. The court stated as follows:

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80 David, Rene, 1983, *On the concept of "Western" Law*, 52 University of Cincinnati Law Review 126, 131; Mayer, Ann Elizabeth, 1987, *Law and Religion in the Muslim Middle East*, 35 American Journal of Comparative Law 127.

81 Mattei, Ugo, 1997, *Three Patterns of Law: Taxonomy and the World's Legal Systems*, 45 American Journal of Comparative Law 5, 11.

82 Schadbach 1998, Supra 69, at 337-338.

83 Reimann, Mathias, 1996, *The End of Comparative Law as an Autonomous Subject*, 11 Tulane European & Civil Law Forum 49, 59.

84 Lepaulle, Pierre, 1921-1922, *The Function of Comparative Law – With a Critique of Sociological Jurisprudence*, 35 Harvard Law Review 838, 858.

85 Juenger, Friedrich K., 1993, *American Jurisdiction: A Story of Comparative Neglect*, 65 University of Colorado Law Review 1; Abrahamson, Shirley S., & Fischer, Michael J., 1997, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra Law Review 273, 287.

86 Vishaka, Supra 26.

87 The Indian Parliament has now passed "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (No. 14 of 2013)" and it came into force on 9th December 2013.

> "*In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee*."[88]

In this sense, it has been argued that comparative law studies in law schools would benefit the law students vocationally, juristically and politically[89]. A large number of scholars have also stated that comparative approach should be projected into the whole legal educational training, after the students have been exposed to the broad principles and backgrounds of the world's legal systems[90]. In the same vein, a report of the Organizing Committee of the International Association of Comparative Law urged in 1949 that "law students should, at the end of their studies, be aware of the diversity of legal conceptions and systems in the world"[91]. The 1950 London Conference on Comparative Law (UNESCO) suggested very seriously the establishment in law schools of special chairs for the instruction of their faculty and students in foreign law[92]. The value of comparative law as part of legal education has been very well recognised in Western countries. In this regard Cappelletti states:

> *"The interest in comparative studies in American law schools is a response to the increasing relevance of foreign law to the concerns of lawyers and their clients on a shrunken, interdependent globe. Both as professionals and as leaders in the public and private*

88 Vishaka, Supra 26, at para 7.

89 Mayda, Jaro, 1953, *The Value of Studying Foreign Law* [1953] Wisconsin Law Review 635, 647 [Hereinafter Mayda].

90 Ireland, Gordon, 1933-1934, *The Use of Decisions by United States Students of Civil Law*, 8 Tulane Law Review 358; Hazard, John N., 1951, *Comparative Law in Legal Education*, 18 University of Chicago Law Review 264; Schlesinger, Rudolf B., 1954, *Teaching Comparative Law: The Reaction of the Customer*, 3 American Journal of Comparative Law 492; Valcke, Catherine, 1995, *Legal Education in a "Mixed Jurisdiction": The Quebec Experience*, 10 Tulane European & Civil Law Forum 61; Bernabe-Riefkohl, Alberto, 1995, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 San Diego Law Review 137.

91 Mayda 1953, Supra 90, at 646.

92 Ibid.

> *sectors, lawyers in the West participate in a continual institutional reconstruction of the relevant world. Now that their relevant world embraces both the Common Law and the Civil Law . . . a familiarity with other people's law is indispensible to an adequate legal education."*[93]

In regards to the importance of jurocomparatology for legal education, Prof Kamba signifies three basic objectives of legal education and then argues that comparative legal studies in law schools would help promote these objectives[94]. The three objectives of legal education highlighted by Prof, Kamba are: (1) It must cultivate the attributes and skills which are needed by lawyers; (2) It must provide the student with a sound knowledge and proper understanding of the principles and techniques of national law; and (3) It must provide the student with a broad-based education[95]. He then states that "[jurocomparatology] is especially suited to promote these objectives. When one is confined to the study of one's own law within one's own country and, thus within one's own cultural environment, there is a strong tendency to accept without question the various aspects (norms, concepts, institutions) of one's own legal system"[96].

Jurocomparatology gives the law students an opportunity to realise that the tools and techniques that they use in studying law are not the only tools and techniques. Prof. Kamba states following in this regard:

> "*The discovery of other legal possibilities, not only stimulates the students' curiosity and imagination, but puts into question the solutions of his national law. The student is compelled to question the soundness of the solutions, norms and many other aspects of his own law, to inquire into the whys and wherefores of the institutions. He is prompted to question and investigate the inarticulate assumptions on which the institutions of his own law rest. All this must inevitably lead to reflection, to the development of a critical mind, and to new insights into his own legal system*."[97]

However, it is unfortunate to note that "comparative law" as a subject or "comparative method" as a tool of study in India is still in its nebulous stage. An

93 Cappelletti, "Preface" in J. Merryman & D. Clark, 1978, *Comparative Law: Western European and Latin American Legal Systems* vii cited in Frankenberg 1985, Supra 42.

94 Kamba 1974, Supra 49, at 491.

95 Ibid.

96 Ibid.

97 Kamba 1974, Supra 49, at 492-93.

analysis of the curriculum of various law schools in India shows that there is no law school in India which has "comparative law" as a main/compulsory subject or even as an optional one. However, a majority of law schools use comparative method as a tool of study.

S.No.	Name of the Institution	Whether Jurocomparatology is Taught As a Separate Subject?		Comments
		Under--Graduate Course	Post--graduate Course	
1.	National Law School of India University, Bangalore	No	No	• Graduate Course Comparative studies are subject-specific. It means that a comparative analysis is taught as a part of a law subject and not as a separate subject. The university website lists following subjects in which comparative technique is used. These are Constitutional Law-II [4th Tri-Semester], Constitutional Law-III [5th Tri-Semester], Family Law – I [5th Tri-Semester], Labour Law – I [11th Tri-Semester], Administrative Law [7th Tri-Semester], and Insurance Law [12th Semester][98]. One significant feature in relation to comparative law is the single credit course on International and Comparative Environmental Law[99]. This extensive program provides opportunities for students to know the contemporary developments in various fields of environmental law. • Post-graduate Course[100] The law school provides LLM in Business law and Human Rights Law. Following subjects, which involve comparative analysis and international law, are compulsory for both the groups: 1. Legal System and Democratic Governance: Comparative Perspective, and 2. Changing Conception of Justice & Globalised Legal Order. Following subjects, which involve comparative analysis and international law, are taught to Business law group: 1. International & Comparative Law of IPRs, and 2. International Trade Law. Following subjects, which involve comparative analysis and international law, are taught to Human Rights law group: 1. Refugee and International Human Rights Law, 2. International Criminal Law, and 3. International Human Rights Law.

2.	National Academy of Legal Studies and Research, Hyderabad	No	No	The university website does not provide information about the subjects taught at the undergraduate level except that all the subjects taught at this level are the ones prescribed by Bar Council of India as mandatory subjects. No reference is made as to kind of technique adopted by the teachers while teaching these subjects[101]. However, at post-graduate level Comparative Public Law/Systems of Governance and Law and Justice in a Globalising World are taught as compulsory subjects[102].
3.	National Law University, Delhi	Yes	Yes	Centre for Comparative Law, NLUD provides a Seminar Course on Comparative Law to graduate as well as undergraduate students[103]. At the post-graduate level, following subjects are taught as compulsory subjects: 1. Comparative Public Law 2. Law and Justice in a Globalizing World. The other seminar courses which involve comparative techniques and international law are as follows[104]: 1. Comparative Constitutional Law. 2. Comparative Rights Adjudication. 3. Contemporary Challenges in International Human Rights Law. 4. International Business Law. 5. International Commercial Arbitration. 6. International Commercial Law. 7. International Economic Law. 8. International Investment Law. 9. International Taxation. 10. Private International Law. 11. Regulation of International Trade in Goods. 12. Trade Remedies under International and Indian Laws.
4.	National Law University, Jodhpur	No	Yes	• Post-graduate[105] Following mandatory are provided to LL.M. students irrespective of the choice of specialization: 1. Comparative Public Laws/Systems of Governance. 2. Law and Justice in a Globalising World. The University also has an online law journal titled "Comparative Constitutional Law and Administrative Law Quarterly"[106].

5.	Dr. Ram Manohar Lohiya National Law University, Lucknow	No	No	The university provides one-year LL.M. and same involves studying following subjects/ topics: Comparative Political & Civil Rights, Comparative Administrative Law, Comparative Study of Delegated Legislation, Comparative Environmental Law, International Environmental Law, International Humanitarian Law, Comparative Judicial Process, Comparative Copyrights and Patents Law and International Perspective of Human Rights[107].
6.	Gujarat National Law University, Gandhinagar	Yes	No	• Under-graduate Level At this level, Comparative Constitution is provided as a seminar (optional) paper[108]. • Post-graduate Level[109] The university provides specialization in four areas: A) Corporate and Business Law; B) International Comparative Law; 3) Intellectual Property Laws; and 4) Constitutional and Administrative Law. Following subjects associated with jurocomparatology are mandatory for all groups: 1. Comparative Public Laws/Systems of Governance. 2. Law and Justice in a Globalising World.
7.	National University of Juridical Sciences, Kolkata	?	?	The University website does not provide any analysis of its under-graduate and post-graduate course curriculum. The website does make reference to the School of Private Laws & Comparative Jurisprudence. However, there are no details provided regarding the same[110].
8.	National Law Institute University, Bhopal	No	No	• Under-graduate level At the under-graduate level, the university provides following subjects which may be said to be connected to comparative law. These are Common Law in India, International Trade & Finance, International Trade Law, International Criminal Law, Law and Globalisation, International Environmental Law and International Taxation Law[111]. The university also provides non-credit course on Comparative Jurisprudence, International Commercial Arbitration, and Global Terrorism[112].

9.	National Law University, Odisha	No	No	At the under-graduate level, there is no reference to the comparative law or jurocomparatology. The university provides LL.M. in two subjects: 1) Corporate and Commercial Law; and 2) Constitutional and Administrative Law. Two subjects associated with jurocomparatology are compulsory to both groups: A) Comparative Public Law/Systems of Governance; and B) Law and Justice in Globalised World. Moreover, comparative constitutional law is one of the 10 optional subjects in the Constitutional and Administrative Law group[113].

98 *Undergraduate Programs*, National Law School of India University Bangalore, available at www.nls.ac.in/index.php?option=com_content&view=article&id=40&Itemid=25, last seen on 23.06.2017.

99 Ibid.

100 *Postgraduate Programmes*, National Law School of India University Bangalore, available at https://www.nls.ac.in/index.php?option=com_content&view=article&id=810&Itemid=38, last seen on 23.06.2017.

101 *Undergraduate Study*, NALSAR University of Law, available at https://www.nalsar.ac.in/undergraduate-study, last seen on 23/06/2017.

102 *Postgraduate-Study-In-Law*, NALSAR University of Law, available at https://www.nalsar.ac.in/postgraduate-study-law, last seen on 23.06.2017.

103 The details regarding the Centre are based upon author's interview with Prof. M. P. Singh who is the founding professor and the present chairperson of the Centre.

104 *Optional Seminar Courses*, NLU Delhi, available at http://www.nludelhi.ac.in/acd-osc.aspx, last seen on 23/06/2017.

105 *Admissions, National Law University Jodhpur*, available at http://www.nlujodhpur.ac.in/courses_pg.php, last seen on 23/06/2017.

106 *Home*, Comparative Constitutional Law and Administrative Law Quarterly, available at http://www.calq.in/, last seen on 23/06/2017.

107 *Curriculum*, Dr. Ram Manohar Lohiya National Law University Lucknow, available at http://www.rmlnlu.ac.in/llm.html, last seen on 23/06/2017.

108 *Undergraduate Programme*, Gujarat National Law University, available at http://www.gnlu.ac.in/ugprogramme.php, last seen on 23/06/2017.

109 *Postgraduate Programme*, Gujarat National Law University, available at http://www.gnlu.ac.in/pgprogrammellm.php, last seen on 23/06/2017.

110 *Academics*, The WB National University of Juridical Sciences, available at http://www.nujs.edu/nujs-academics-courses.html, last seen on 23/06/2017.

111 *List of Subjects – B.A.LL.B. (Hons.)*, The National Law Institute University Bhopal, available at https://www.nliu.ac.in/courses/ballb/subjects-ballb.html, last seen on 23/06/2017.

112 *Non Credit Courses*, The National Law Institute University Bhopal, available at https://www.nliu.ac.in/courses/non-credit/non-credit-main.html, last seen on 23/06/2017.

113 *LL.M. programme*, National Law University Odisha, Cuttack, available at http://nluo.ac.in/ll-m-programme/, last seen on 23/06/2017.

It becomes pertinent to make reference to Centre for Comparative Law at National Law University, Delhi. The Centre was started in 2013 under the chairpersonship of Prof. M. P. Singh, who teaches comparative constitutional law to the post-graduate students at NLUD. The Centre provides a Seminar Course on Comparative law to both graduate as well as undergraduate students. The *Indian Yearbook of Comparative Law* is a publication of the Centre which is taken up as yearly based project in collaboration with Oxford University Press.

2.2. Gains for Methodology

Research is an integral tool of legal profession. Members of legal fraternity use research to find law, to dissect it, and to ensure "constant refinement and extension of […] knowledge of law"[114]. "Jurisprudence" as a law subject has a close relationship with comparative law. All schools of jurisprudence-the historical, the sociological, the philosophical, the analytical etc. – rely on comparative research as part of their practical endeavours. It is impossible to see how jurisprudence can exist without comparative law[115]. Every member of legal profession, be it students, teachers, lawyers, judges, NGOs etc., uses research to accomplish his/her respective task/s. In the same way, jurocomparatology is equally important to a legal scholar-be he a legal historian, legal sociologist, or social scientist seeking to discover and formulate scientific "laws" of legal evolution and development or laws about-the correlation between the law and other social phenomena, i.e., the construction of generalisations modelled after those of the natural sciences[116].

2.3. Law Reforms[117]

No society is perfect. Neither are the laws which govern such societies. The dynamicity of society necessitates the enactment of new laws and the repealing or up-gradation of the old ones. New generations need new laws, which are either enacted or are simply the modified version of older laws. Moreover, in situations where the competent legislatures fail to upgrade the law, the constitutional courts step-in to fill the loopholes or vacuum created. Law reforms are one

114 Yntema, 1956, *Comparative Legal Research: Some remarks on* "*Looking out of the Cave*", 54 Michigan Law Review 899.

115 Paton, 1973, *A Textbook on Jurisprudence*, 41 (4th ed.).

116 Kamba 1974, Supra 49, at 494.

117 Whelan, Darius, 1988, *The Comparataive Method and Law Reform,* LL.M. thesis, National University of Ireland available at https://www.academia.edu/1930168/The_Comparative_Method_and_Law_Reform?auto=download, Retrieved on 10/03/2016.

area where comparative law has and continues to play a very crucial role. This is particularly evident from the manner and extent to which institutions like the Law Commission of India and the National Human Rights Commission rely on foreign law and international law in their reports[118]. Moreover, the Supreme Court of India has extensively relied on foreign and international law to bring about a large number of reforms to our legal system.

There are a number of legal problems faced by societies all around the globe. However, such problems do not arise simultaneously in all these societies. This difference in time (as to the appearance of a problem) necessitates the effective manner in which comparative legal techniques can be used. For example, the Constitution of India came into operation almost 170 years after the Constitution of America. During these 170 years the American Constitution was amended a number of times and faced a lot of challenges. So when our Constitution makers referred to American Constitution, they only borrowed those provisions which had effectively worked in America and rejected those which they felt were controversial and created problems. The inclusion of "procedure established by law" instead of "due process" within Art. 21 of our Constitution is a perfect example. It was on the advice of Justice Frankfuter of the U.S. Supreme Court that the Indian Constituent Assembly incorporated "procedure established by law" instead of "due process" within our Constitution. In this regard, Manoj Mate argues as follows[119]:

> "*Frankfurter had a lasting impression on Rau, who upon his return to India, became a forceful proponent for removing the due process clause, ultimately convincing the Drafting Committee*

118 See in particular National Human Rights Commission (NHRC) Annual Report 2002-2003, Retrieved from http://nhrc.nic.in/Documents/AR/AR02-03ENG.pdf on 10/07/2016; National Human Rights Commission Annual Report 2003-2004, Retrieved from http://nhrc.nic.in/documents/ar/ar03-04eng.pdf on 10/07/2016; National Human Rights Commission Annual Report 2004-2005, Retrieved from http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf on 10/07/2016; National Human Rights Commission Annual Report 2005-2006, Retrieved from http://nhrc.nic.in/Documents/AR/Annual%20Report%205-6.pdf on 10/07/2016; National Human Rights Commission Annual Report 2006-2007, Retrieved from http://nhrc.nic.in/Documents/AR/Annual%20Report%2006-07.pdf on 10/07/2016; National Human Rights Commission Report 2007-2008, Retrieved from http://nhrc.nic.in/Documents/AR/NHRC-AR-ENG07-08.pdf on 10/07/2016; National Human Rights Commission Report 2008-2009, Retrieved from http://nhrc.nic.in/Documents/AR/Final%20Annual%20Report-2008-2009%20in%20English.pdf on 10/07/2016; National Human Rights Commission Report 2009-2010, Retrieved from http://nhrc.nic.in/Documents/AR/NHRC_Annual_Report-09-10_Eng.pdf> 10/07/2016; National Human Rights Commission Report 2010 – 2011, Retrieved from http://nhrc.nic.in/Documents/AR/NHRC%20FINAL%20English%20Annual%20Report-2010-2011.pdf on 10/07/2016; National Human Rights Commission Report 2011-2012, Retrieved from http://nhrc.nic.in/Documents/AR/NHRC_FINAL_English_Annual_Report_2011_2012.pdf on 10/07/2016.

119 Mate, Manoj, 2010, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley Journal of International Law 216 [Hereinafter Mate].

> *to reconsider the language of draft Article 15 (now Article 21) in January 1948. In these meetings Rau apparently was able to convince Ayyar, the crucial swing vote on the committee, of the potential pitfalls associated with substantive interpretation of due process, which Frankfurter had discussed extensively with Rau. Ayyar, in ultimately upholding the new position on the floor of the Assembly in December 1948, supported removing the due process clause on the grounds that substantive due process could 'impede social legislation'. With the switch in Ayyar's vote, the Drafting Committee endorsed Rau's new preferred language- replacing the due process clause with the phrase 'according to the procedure established by law', which was apparently borrowed from the Japanese Constitution."*[120]

This clearly shows that over a period of 170 years certain issues arose in regards to the operation of "due process clause" in America. However, we subsequently saw the Supreme Court of India incorporating "due process" within Indian constitutional jurisprudence[121].

In relation to enacting new laws and modifying old ones, comparative law assists the legislators in the following ways:

- Firstly, since comparative law involves the study of another society along with its laws, same helps the legislator to look at the domestic problem from a different prospective.
- It then helps the legislator to understand how the law was used by another country as a tool to deal with the problem. In this regard, the legislator will also understand the effectiveness of law as a tool of social engineering.
- Since legal drafting is different from drafting in general and requires special skills, comparative study of laws will help the legislator in the drafting of new law as well.
- Comparative legal study will also help the legislator to understand the reaction that the law may face from ordinary public and will help them to make necessary arrangements.

Professor Kamba has classified the above into three categories: (1) Use of Comparative law in the creation of new rules and solutions or modifying or abolishing existing ones; (2) Employment of comparative legal study and research in

120 Ibid. at 222.

121 Gandhi, Maneka, 1978, Supra 31.

legislation and law reform in regard to the technique of drafting or formulation of legislation; and (3) Use of comparative technique to understand the question of practicability and enforceability of the proposed law[122]. Comparing legal systems facilitates implementation and prospects of success for legal reforms[123]. In this regard, Maine has declared: "The chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law."[124] Legislators need not base their judgment on uncertain predictions. The comparativist can communicate the experiences of other countries with similar socio-economic environments, and can decide whether and how the amended or new regulations influenced public behaviour. This approach not only lowers the risk of misplaced statutory activity (including the view that fewer regulations often lead to a better result among the people who are otherwise addressed by the statute), but also puts a minority in a legislative body in such a persuasive position that it increases its chances of gaining the majority. Comparative law cannot be only used to make or amend laws to deal with general problems. It can also be used as a tool to understand and improvise the existing legal institutions for effective administration of justice. A comparative study of the structure of Supreme Court of India and that of U.S.A, to analyse the effect of such set-ups on the outcome of dispute, by Nick Robinson is a classy example of how comparative study can help us better understand our own legal institutions[125].

2.4. Judicial Process

One of the reasons that the courts engage in comparative practices is because often times the law under consideration before them is created using comparative techniques. In such cases, it is only reasonable to use comparative interpretation methodology to interpret the law involved. Other than this, the "acquaintance with the law and practice of foreign courts to fill up gaps [….] can be of great assistance"[126]. Moreover, comparative law is an invaluable tool for the elucidation, understanding and intelligent application in domestic courts of the institutions which originated in other systems of law[127]. "[T]he problem presents itself retrospectively to the lawyer or judge", states Schlesinger, "who

122 Kamba 1974, Supra 49, at 496-497.

123 Zaphiriou, George A., 1982, *Use of Comparative Law by the Legislator*, 30 American Journal of Comparative Law 71 (Supp.).

124 Maine, *Village Communitiee,* 4 (1871) in Kamba 1974, Supra 49, at 496.

125 Robinson, Nick, 2013, *Structure Matters: The impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 American Journal of Comparative Law 173.

126 Kamba 1974, Supra 49, at 499.

127 Ibid.

in applying existing law discovers that the pertinent rule is an imported one, and who thus may be compelled to trace its foreign antecedents"[128]. One of the impacts of globalization on legal process is that the courts cannot leave out foreign law anymore. In this sense, there has been a paradigm shift, both, in the role of the courts as well as tools they use for interpretation. The role of the courts has changed from institutions that solved domestic matters to institutions that solve cross-jurisdictional matters. And in this process, the courts have moved from conventional tools of interpretation to more sophisticated tools. One of such tools is comparative interpretation-ism which has also been invaluable in matters which come before the national courts under the Conflict of Laws.

2.5. Comparative Method and Development of International Law[129]

Modern world is plagued with issues/problems which are common to majority of nations[130]. The universality of these issues makes them a matter of global concern, necessitating efforts at global level to deal with the same[131]. International law, which basically is the by-product of these efforts, is one of the important ways by which the international community tries to deal with these international issues. An essential part of this process is the employment of comparative method to understand how the nations use their domestic legal system to deal with these problems, what problems they encounter while enforcing these rules, and how these rules could be developed into universal standards/rules to deal with such issues. The creation of WTO and its many missions and treaties, such as the TRIPS agreement, can be used as an example to explain the same. Prior to this agreement different countries had different domestic IPR regimes. However, globalisation rendered these domestic IPR mechanisms useless because protection of IPRs became an international issue. This resulted in the enactment of TRIPS Agreement. Now all the members of WTO are required to upgrade their domestic laws and bring them in consonance with the minimum standards laid down in TRIPS Agreement. Comparative law plays a crucial role in finding these common rules and principles and then combing them to make international law. Another example is the codification of human rights law at the international level.

128 Schlesinger, *Comparative Law Cases-Text Materials* in Kamba 1974, Supra 49.

129 Picker, Colin B., 2008, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law 1083.

130 Issues like terrorism, corruption, poverty, environmental pollution and climate change are found in all the nations and being matters of global concern, they can only be solved when efforts are made globally. See Dibadj, Reza, *Panglossian Transnationalism*, 44 Stanford Journal of International Law 253.

131 In this regard we can refer to SAARC as a regional organization which has made a large number of efforts to identify and deal with issues specific to South Asia.

The Universal Declaration of Human Rights is a living document which is considered to be a direct source of law.[132] In this regard, Sompong Sucharitkul states:

> *"[w]e can find the notion of human rights in all societies and at all times, in Europe as well as in Asia and Africa, in antique as well as in modern Chinese philosophy, in Hinduism, Buddhism, Christianity, Judaism, and Islam. The idea of human dignity is common to all these concepts, which emphasize different values according to the different conditions and diverse societies in which the human beings happen to be living. Human dignity and tolerance constitute the basic core of human rights."*[133]

Once comparative law technique is used to formulate international law, this law is used by members of international society in the interpretation of municipal law. In *Oyama v. California*[134] the United States Supreme Court held that the Alien Land Law was contrary to the 14th Amendment, at least in so far as it forbade American born children of Japanese parents ineligible to naturalization to hold land purchased for them by parents. Four of the nine Justices experiment the opinion that the provision violated not only the 14th Amendment but also the United States obligation under the United Nations Charter. Justices Murphy and Rutledge JJ, in their concurring opinion stated as follows:

> "*This nation has recently pledged itself through the United Nations Charter to promote respect for and observation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Alien Land Law stands is barrier to that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the US, is but one more reason why the statute must be condemned*."[135]

Black and Douglas JJ, in their concurring opinion added as follows:

> "*There are additional reasons why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to*

132 Subramanya, T. R., 1984, *The Rights and Status of Individual in International Law* 121 (1st ed.).

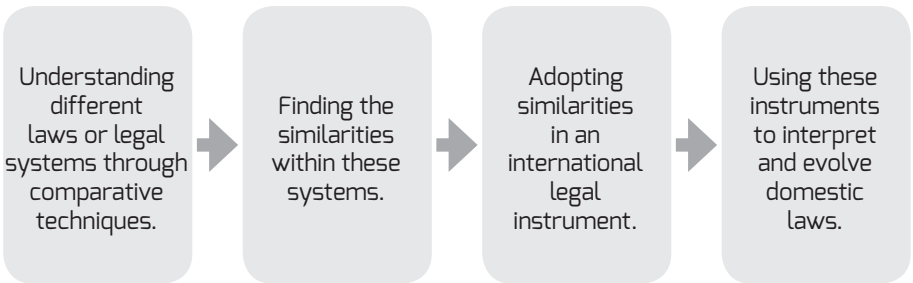
133 Sucharitkul, Sompong, 1986-1987, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 Notre Dame Law Review 305, 306.

134 Oyama v. California, 332 U.S. 633 (1948, Supreme Court of the United States).

135 Ibid 673.

> *co-operate with the United Nations to promote…..universal respect for and observation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. How can this nation be faithful to this international pledge if state laws which bar land ownership and occupation by aliens on account of race are permitted to be enforced?"*[136]

In relation to international human rights law, Justice Kirby writes, "[I]t is important to recognize that it is the overwhelming genetic commonality of the human species that stamps upon the discourse of human rights its search for universal principles"[137]. He is aware that certain areas of law "present quandaries which are common to societies at roughly the same stage of economic and social development"[138]. Similarly, the courts in Germany, Italy[139], Netherlands, Tanzania[140], Chile, Philippines and India[141] have referred to and relied upon the Universal Declaration of Human Rights. The following explanation will make this clear.



136 Ibid 649-650.

137 Kirby, Michael D., 2000, *The New Biology and International Sharing: Lessons from the Life and Work of George P. Smith II*, 7 Indiana Journal of Global Legal Studies 425, 434.

138 Kirby, Michael D., 1995, *International Commentaries: A Patient's Right of Access to Medical Records*, 12 Journal of Contemporary Health Law and Policy 93, 93.

139 Ministry of Home Affairs v. Kemali, [Judgment of 1st February 1962] (Court of Cassation, Itlay) reprinted in 40 ILR 191-95

140 Ephrahim v. Pastory and Kaizilege, (2001) AHRLR 236 (High Court of Tanzania) reprinted in 87 ILR 106-110.

141 Chairman, Railway Board and Ors. v. Mrs. Chandrimadas, (2000) 1 SCC 265 [The Supreme Court stated that the UDHR has the international recognition as the *"moral code of conduct"*, having being adopted by the General Assembly of the United Nations, the applicability of the UDHR and the principles thereof may have to be read, if need be, into the domestic jurisprudence].

Moreover, Article 38 of the Statute of ICJ recognises general principles of law recognised by civilised nations' as one of the sources of international law. Therefore in an international dispute before the ICJ, a State which relies on this source of international law to put forth an argument needs to satisfy the burden of proof that such law is a general principle of law recognised by civilised nations. However, such burden can only be discharged by engaging in a comparative study[142].

"Private law rules and analogies would seem to be destined to play a considerable part in the future development of Public International Law and in the settlement of international disputes, more particularly in view of Article 38 of the Statute of the Permanent Court of International Justice which directs that Court to apply, among other rules, 'the general principles of law recognised by civilised nations'. This means that general principles recognised by the main systems of private law may be applicable in the future to international disputes, and that such principles must be ascertained by comparative study."[143] Moreover, the international forums have also used comparative method to formulate their opinions[144]. Also, a large number of scholars have argued about globalisation of legal principles like "rule of law" and employ the same for international law purposes[145].

142 Zajtay, Imre, 1974, *Aims and Methods of Comparative Law*, 7 Comparative & International Law Journal of South Africa 321, 325 [According to the assumption in article 38 (1) (c) of the Statute of the Statute of the International Court of Justice, the aim of the application of comparative law is evident: in fact, in order to establish "the general principles of law recognised by civilised nations" it is indispensable for a judge-to go on to a comparative examination of the different national laws. It is true that the scope for the application of the said provision is limited, since article 38 only applies to the International Court of Justice, Ibid].

143 Gutteridge, H. C., 1931, *The Value of Comparative Law*, Journal of Society of Public Teachers of Law 26, 29; See also Vespaziani, Alberto, 2008, *Comparison, Translation and the Making of a Common European Constitutional Culture*, 9 German Law Journal 547, 558.

144 Kakouris, C. N., 1994, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 Pace International Law Review 267.

145 Seipp 2006, Supra 11; Phillips, Lord, "The Rule of Law in a Global Context", The Qatar Law Forum, 30 May 2009, available at <http://www.qatarconferences.org/qatarlaw2009/english/speeches/philips_en1.pdf> last seen on 20/07/2016; Kersch, Ken, 2004, *The Globalized Judiciary and the Rule of Law*, 13 The Good Society 17; Martinez, Jenny S., 2003, *Towards an International judicial System*, 56 Stanford Law Review 429.

3. Conclusion

A proper consideration of comparative law's definitional predicament requires a suitable place within any discussion on jurocomparatology. If not a universal solution, the predicament at least requires an answer at national level. Ignoring the same could seriously jeopardise the quality of research or practical application of jurocomparatology by judges and lawyers. Jurocomparatology is a legal reality and the manner in which courts, particularly constitutional courts, have engaged with the same has been haphazard, subjective, and without any proper methodology. The courts should therefore develop proper methodology to engage with jurocomparatology. The functional importance of jurocomparatology and its operation within Indian legal set-up is a factual certainty. Jurocomparatology has played an important role in the development of Indian legal jurisprudence, particularly constitutional law. However, very little research is available when it comes to determining the extent, the true nature and the methodology employed by the Indian courts while engaging in the same. The lack of such research creates ambiguity and uncertainty about the legal, philosophical and methodological issues related to cross-border judicial dialogue by Indian constitutional courts and seriously compromises the quality of such engagement.