

**DE JURE NEXUS LAW JOURNAL**

Author:

Srishti

Symbiosis Law School, Noida

2<sup>nd</sup> Year, BBA; LL.B.**STUDY ON COMPARATIVE LAW BETWEEN INDIA AND WESTERN COUNTRIES****Abstract**

*Comparative law is an educational method of studying the legal systems of different countries based on their differences and similarities. For centuries, people from different parts of the world had entered the Indian subcontinent. This led the philosophical notions of all attain legal status in India. But countries around the world have different views on their law and justice policies. This paper aims at studying the comparative Legal System between India and other Western counties like France, Germany, and the United States in order to understand the similarities and differences for better understanding of the law.*

**Introduction**

Comparative law is an educational method of studying the legal systems of different countries based on their differences and similarities. Analyzing the laws and comparing them on different basis are the parts of this method. It emphasizes on the legal mechanisms being adopted by countries and compares them on different scales. This discipline is more of a method rather than a legal text or a body of rules. It is not a particular branch of law or a subject, but a process of study of foreign law in comparison with local law<sup>1</sup>. It provides an insight into various political, economic, cultural, social and historical aspects which paves a simpler way to address trade relations or diplomatic relations with the other nations<sup>2</sup>. It also assesses the degree of

<sup>1</sup> Available at: <http://www.legalserviceindia.com/legal/article-5063-comparative-law-conceptual-study.html> [Last accessed on 20th July, 2021].

<sup>2</sup> Available at: <https://blog.ipleaders.in/importance-of-comparative-legal-studies/> [Last accessed on 20<sup>th</sup> July, 2021].

integration of legal systems and a balance in the global and country level. Studying comparative law has led to the development of various branches of law, such as constitutional law, comparative administrative law, commercial law, etc.

The term 'India' has varied implication. In modern political context, it refers to the country which gained independence in 1947 with a defined political boundary. For centuries, people from different parts of the world had entered the Indian subcontinent as invaders, traders, refugees, religious propagators, etc., and had settled down, and thereby bringing their individual culture, language and religion with them. India became the hub of all cultural and linguistic diversity creating unique principles of multiculturalism. This led the philosophical notions of all attain legal status in India. But this was not the case with all the countries in the world. Thus, it becomes very important to understand the derivation of these notions in order to understand the Indian Legal system in better way by comparing it to the other legal systems in the worlds in order to find out the reason behind laws and find justice.

This paper aims at studying the comparative law between India and other Western countries like France, Germany, and the United States.

## **INDIA**

India maintains a hybrid legal system with a mixture of civil, common law and customary; or religious law within the legal framework inherited from the colonial era and various legislation first introduced by the British Government are still in effect in modified forms today. Indian personal law is fairly complex, with each religion adhering to its own specific laws. Separate personal law codes govern Hindus including Sikhs, Jain's and Buddhist, Muslims, Christians, and followers of other religions. Judicial review in India is fairly simple. It comprises of three aspects namely Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action.

The Legal System of India is one of the distinct features of this country. The features can be distinguished in forms of punishment, legal personnel and law enforcements.

### **Punishment:**

- The penalties range from, death sentence, life imprisonment, imprisonment, forfeiture of property, and fines.

- A person under the age of 21 may be released on probation, under the circumstances in which they are convicted of an offense punishable with a fine or with imprisonment for 7 years or less.
- Death sentence can be imposed for murder and for specified offenses against the murder and for specified offenses against the state.

#### Legal Personnel:

- The India constitution leads on from the western legal traditions as well as the principles of liberal democracy.
- Parliament consists of a bicameral legislature. The President is to come together with Parliament and must agree to all parliamentary bills before they become law.
- The president has limited authority with respect to the function of the legislative branch.

#### Law Enforcements:

- India's type of police structure is Multiple Coordinated and Decentralized.
- Each State has its own force headed by a Director-General of Police (DGP) who is equivalent in rank to his counterpart in the Union Government forces.

Any Legal System is incomplete without providing rights to its citizens. The human and social rights are important to the formation of law making and justice abiding systems. One of the distinctive features of Indian law are that under the law, soldiers are provided to operate in government-designated disturbed areas, and the authority to use lethal force against any person that violates law or orders as well as to destroy property, enter and search premises without warrant and arrest in the interest of maintenance of public order. Soldiers are also protected from any legal proceedings unless it is sanctioned by the central government.

#### Features of family law are:

Children born within the territory of India, regardless of the nationality of their parents, may attain Indian citizenship. The law recognizes only Indian citizenship, which means unless the citizenship is actively applied for, the Indian government does not consider the child a citizen of India.

Considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

The minimum marriage age for males is 21. Minimum marriage age for women is 18, and the average is 20-21.

## **UNITED STATES**

The United States was primarily colonized by England in the 17th century but after Independence in 1788, the U.S. Constitution governs today. It also established an enduring federal government alongside the existing state governments.

The United States is a common-law country. Its government can best be described as a federated constitutional republic. It is governed by one federal government, organized under the Constitution, and fifty state governments, organized under fifty separate state constitutions. The federal government contains three branches with a balance of power between them. The Congress is a bicameral legislature. Judicial review in the United States holds important virtue. Supreme Court hears cases on issues of Constitutional significance as well as disputes between the states and other federal matters along with the power to to overturn or alter laws when they conflict with the Constitution.

The United States has an adversarial legal system<sup>3</sup>. Trials incorporate a judge, lawyers for both sides, and in many cases a jury. The right to a jury trial is guaranteed in both federal and state criminal proceedings. Grand juries are used federally and in some states. Juries in civil trials vary in size and usage, and there is no constitutional right to a civil trial jury. Private disputes are settled by civil litigation or alternative dispute resolution

### **Punishment:**

- Most criminal offenses are punished by confinement in prisons or by fines, though several alternatives such as electronic monitoring, home confinement, and community service are also used.

---

<sup>3</sup> Available at: [https://en.wikipedia.org/wiki/Law\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Law_of_the_United_States) [Last accessed on 20th July, 2021].

- Severe crimes such as murder, assault, or theft tend to be punished with relatively long prison terms. Most states and the federal government used capital punishment for premeditated murder, treason, and terrorism; it is prohibited for sexual assault and child offenders.

#### Legal Personnel:

- Federal judges are nominated by the President and confirmed by the Senate and serve lifetime terms with salaries that cannot be diminished.
- States vary in how they choose judges, with some having direct elections of judges. Judges do not require any additional training beyond the same legal education that lawyers receive. Some local judges may be selected even without legal background.
- Lawyers are trained in two- or three-year law schools that require an undergraduate degree for admissions.

#### Law Enforcements:

- The United States has had an uncoordinated and decentralized police structure.
- There has been a formation of a vast array of Law enforcement agencies who tend to be organized in a paramilitary fashion, with systematic hierarchies within agencies.

Rights in the U.S. are generally framed as negative rights against governmental encroachment, rather than positive rights. Federal constitutional amendments protect rights to free speech, assembly, religion; to bear arms; to be free of unreasonable searches and seizures; to compensation when governments take private property for public use; certain procedural rights in criminal trials and federal civil trials; to bail and against cruel and unusual punishments and excessive fines; to due process and equal protection of the law; against slavery; not to be denied the right to vote because of race, sex, or age (for adults over eighteen); certain reproductive rights including contraception and abortion; and to travel. These rights are secured in practice by constitutional review of criminal convictions and by private suits seeking judicial review of state and federal legislation.

There are no economic constitutional rights. Women officially have full citizenship rights and they account for the majority of voters. Minors do not have full citizenship rights and are subject to certain legal disabilities and protections.

Family law matters are governed by the individual states. Inheritances are generally governed by private wills. Forty-nine states have no-fault divorce policy. There is no Constitutional right to child-bearing, and children may be removed from their parents' care due to findings of abuse or neglect.

## **FRANCE**

France is in Europe. Considering France in its modern form after the French Revolution, On August 29, 1789, the Declaration of the Rights of Man was created. The principles of the declaration, which are, *Liberté, égalité, fraternité* (liberty, equality, fraternity) still exist today.

France is a republic and its officials are elected by French citizens. France is organized into twenty-two administrative regions, which also include ninety-six departments. There are also four overseas departments which include Guadeloupe, Martinique, French Guiana, and Reunion. The legislature is made up of a bi-cameral parliamentary body. France has been traditionally a civil law country since the French Revolution. France also has two families of law, private law which is the body of law governing individuals, and public law, which applies to public officials acting in the scope of their office. Public law uses a different court system, in which the fundamental element is the Administrative Tribunal. Judicial review in France does not have a long history as it came only in 1958. The Constitutional Council does not review laws that are already in practice, but instead judges bill from parliament that have not been signed into law. However, the Constitutional Council may review legislation that is currently law by referral.

The French judicial system is an independent body in the French government and has the power of enforcing laws. The court system in France is "a double pyramid structure."<sup>4</sup> There are two parts of the courts in France, which are the administrative and judicial courts. The administrative courts settle disputes between the government/public "authorities" and the people. The judicial courts are made up of even more courts, than the administrative courts. Judicial courts have both penal and civil sections. The specialized courts in France include the Disputes Tribunal and the Constitutional Council.

---

<sup>4</sup> Available at: [https://franceintheus.org/IMG/pdf/Justice\\_ag.pdf](https://franceintheus.org/IMG/pdf/Justice_ag.pdf) [Last accessed on 20th July, 2021].

In France, in which there is an inquisitorial system, the defendant in a trial is presumed to be innocent. The jury in France is not a largely used function in French courts. Since many French courts do not have juries, the judge plays an active role in the investigation and questioning of the defendant. The lawyer also plays a passive role in French courts.

In France, compensatory damages are sometimes given as a remedy in court cases, but never punitive damages. Punitive damages<sup>5</sup> (exemplary) are said to be against the fundamental goals of the civil law system.

#### Punishment:

- Imprisonment rates in France are low in comparison. Punishments for crimes such as theft, rape, assault, treason, and murder are imprisonment for varying lengths and and/or a fine. According to the French penal code, the punishment for murder is thirty years imprisonment, but when the murder is preceded by a felony, the punishment is life imprisonment.
- The punishment for rape and theft is fifteen and three years in prison and/ or a 45,000 euro fine, respectively. When fines are used as punishment, the fine is predetermined in the French penal code by offense.
- Capital punishment has been a large part of France's history, but has been abolished. France also refuses to extradite people to countries who use the death penalty. Corporal punishment is unlawful as a state punishment or in prisons.
- In terms of juveniles in the French criminal justice system, there are juvenile courts and prisons. France considers a person to be liable for their crimes when they are "capable of discernment."
- France has a no head scarf ban, which makes it illegal to wear a headscarf in public, which has spurred from Muslim immigration to the country.

#### Law Enforcement:

- There are two overseeing law enforcement bodies in France, which are the Police Nationale and the Gendarmerie Nationale. The Gendarmerie Nationale is a part of the Armed Forces and is under the Ministry of Defense.

---

<sup>5</sup> Available at: [https://www.researchgate.net/publication/251110362\\_Punitive\\_Damages\\_in\\_France](https://www.researchgate.net/publication/251110362_Punitive_Damages_in_France) [Last accessed on 21st July, 2021].

- On the local level and under the control of mayors is the Police Municipale.

In France, both men and women must be eighteen years old to marry, however females between age fifteen and eighteen can marry with parental consent. Both parties in a marriage must consent. Same-sex marriage is not yet legal in France. To inherit, there must be proof of heirship.

A judge of the tribunal de grande instance is able to decide in cases where the welfare of the child is at stake, to remove the child from the parents and give custody to a third party. In cases of divorce, the state will intervene with custody battles.

Both male and female citizens of France are privy to the same rights under law and discrimination is criminalized by law.

According to the Declaration of the Rights of Man and the Citizen, people have a born equal and free with equal rights. Also, every person has a right to participate in government, have punishment that is fair, and be innocent until proven guilty. Through the Declaration, people are also guaranteed freedom of speech and conscience. The French Constitution of 1946 guarantees equal rights for both men and women, the right to asylum in France, the right to employment, the right to unionize, the right to strike, the right to safe working conditions, the right to family and the State must provide means for family to develop, the right of children, mothers and the elderly to the protection of their health, maternity and rest. Also, everyone has the right to "suitable means of existence from society," the right to free education for all, the right for all under colonial French rule to have access to public office and representation.

## **GERMANY**

Germany has a federal republic government. Germany is an independent federal judiciary. Germany's legislature has powers of exclusive jurisdiction and concurrent jurisdiction with the Laender (states) in areas specified in the Basic Law.

Germany's judicial review works with the involvement of the supremacy of the constitution and the involvement of the parliament work together. In which, all constitutional matters are dealt with under the specialized Constitutional Courts with specially qualified judges, ordinary Supreme Courts, high courts, or their special chambers.

Germany follows a inquisitorial system in their court system where the courts are trying to find your innocent because you are first presumed guilty. Germany has a constitutional court ensuring constitutional provisions and protection of the fundamental rights of the citizens, a high court of justice, and courts with jurisdiction in administrative, financial, labor, and social matters. Secondly, each state has their own court as well which is below the Federal Constitutional Court. The state courts are directed to handle proceedings deal with problems disrupting the peace, genocides, state security, war crimes, and crimes against humanity. Judge's terms are for life, however, a committee may decide to set a age limit on a judge's term.

#### Punishment:

- In Germany, sentencing is determined by either a single judge or judicial panel. There has to be a two-thirds majority vote to determine a sentence. Sentences generally range from 6 months to 15 years, but murder, manslaughter, and treason impose life sentences.
- Penalties for crimes are mostly represented through incarceration or day fines. Day fines are calculated by person's income and the day rate of between 2 and 10,000 German marks. Property crimes generally carry a sentence and a small fine. Non-violent crimes are usually issued fines and probabition. Other sentences such as forfeiture to the state of proceeds of crime, suspended driver's license, probabtion, and community service.
- Rehabilitation services are offered to individual to reform themselves then being punished. Consisting of a psychiatric hospital and drugs and alcohol rehab clinic. Prison sentences only are used in the adult court system. The death penalty was outlawed in Germany.

#### Law Enforcement:

- There are police forces in each of Germany's 16 federal states. Each police force is organized differently due to the jurisdiction of each state, as outlined in the Basic Law of the Federal Republic of Germany.
- Germany has a army consisting twenty-four combat brigades include sixteen mechanized brigades, three airborne brigades, one mountain brigade, and the German component of the Franco-German Brigade.

The legal age of consent for marriage in Germany is 18 years old for both parties. The only ground for divorce recognized by German law is the breakdown of a marriage.

In Germany, for couples who wish to adopt a child there is no minimum age for a child to be adopted. Married couples must jointly adopt a child. As of 2001, same sex couples in Germany may enter into registered partnerships. Same sex couples now have basic adoption right, but do not have rights equal to married couples.

Inheritances are usually determined by decedent whom chooses a heir to take ownerships of their belongings. German surrogate court generally in the last residence of the decedent, if the decedent has no residency in Germany it is determined by the location of the assets of the estate.

All German citizens are equal before the law. Article three states "Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing present disadvantages". Also, no citizen of Germany should be discriminated his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions. Lastly, no individual should be disadvantaged because of their handicap disability.

Slave labour is illegal in Germany. Nobody is to be forced to perform work of any particular kind. Forced labour is only allowed when an individual is ordered to forced labour by a court sentence.<sup>6</sup>

In Germany, there is a law in place stating all public institutions and places that provide special services are required to report the identity of any irregular migrant to the German authorities. Through this law migrants are restricted to health care, judicial remedies, and education for their children.

## **Conclusion**

The comparative method has become very prominent in the last two decades. A comparative study of this kind is of such significant nature that it allows us as students and other professionals to explore the inner structure of any legal system. This further allows the minds to inspire and think of developing new laws and policies in a better manner by analyzing the existing legal structures of other nations and culture and learning from them. Different aspects of law are uncovered through this method and we can ask questions on various global

---

<sup>6</sup> Available at: <https://www.legislationline.org/download/id/2734/file/wcms.pdf> [Last accessed on 21st July, 2021].

level perspectives. On comparison between India and the western countries one can definitely come to the conclusion that India has a very strong legal system but also has a lot of scope in gaining more knowledge and evaluating better laws for the nation.



# De Jure Nexus

---

LAW JOURNAL