

# Comparing Constitutions

Looking for a Constitution, from elsewhere

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The

Tamil Nadu National Law University had a stirring panel discussion titled *Constitutional Imperatives and Judicial Review: Challenges before the Courts*. The members of the panel were Professor Mark Tushnet, Justice G R Swaminathan, and Professor Arun Thiruvengadam, with Dr. Kamala Sankaran as the moderator.

Dr Kamala Sankaran started with a broad question of what could be constitutionalised. Professor Mark Tushnet responded with how one can familiarise oneself with different constitutional systems, either by a systemised study or by focusing on specific problems (and solutions). Getting down to the idiosyncratic Indian scenario, he gave explained the development of the basic structure doctrine and linked it with the distinct concepts of the constitutional replacements (of substitution) and constitutional amendments (whose constitutionality is open to question). He did admit that the doctrine itself was narrowly applied. Secondly, Tushnet talked about the Public Interest Litigations (PILs) and how it can affect the rule of law. Its compatibility with the Indian courts was necessary because judicial proprietary could get too far sometimes. Thirdly, he was concerned about the weak empirical



grounds on which the implementation of the socio-economic rights was standing on. To the question of whether comparative constitutional studies must be an agenda for growing lawyers, Tushnet reminded the panel that the comparisons must be made in the right direction and thus comparisons away from a representative democracy would always be disruptive.



Justice G R Swaminathan stressed on similar topics, mainly touching upon access to speedy justice and corruption in the judiciary. He narrated incidents from his experience in the judiciary and concluded that the discrepancies faced by the citizens are due to the system that judges flourish in and not the judges themselves.

Professor Arun resumed the realist argument of the courts being the cynosure that delivers the constitution, but with many perceptive cases. Furthermore, he reiterated the need for comparative studies, especially with reference to the Global South comparisons so that welfare rights can be given to the welfare rights through judicial affirmative actions. However, he also clarified that the constitution can never be taken away from the courts in the name of affirmative actions. He strongly feels that judges do not have the expertise to handle many problems. That, couple with a not very responsive executive, could be fatal to the state.



Prof. Kamala Sankaran highlighted the geocentric mood that India is in right now by insinuating that the river flowing by the Supreme Court need not necessarily be the Yamuna (a reference to the dicta in *Shamsher Singh v State of Punjab*). After referring to this combination of priorities as Indian exceptionism, she envisioned the expansion of political ideas as the end of political imagination, where diversity and inclusion reach an unbeatable height.