

ARTICLES

THE ROLE OF FOREIGN PRECEDENTS IN A COUNTRY'S LEGAL SYSTEM¹

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The use of foreign judgments in domestic constitutional adjudication has proved to be contentious in both the USA and India. Chief Justice Balakrishnan argues that there is no principle of law that constrains a constitutional court from referring to these judgments, and specifically addresses possible differences in the constitutional scheme in the United States and India in this respect. Chief Justice Balakrishnan emphasises, however, that this exercise must proceed with caution, and carefully examine structural similarities before applying the decision of a foreign court to a domestic question. He offers several examples in the jurisprudence of the Supreme Court of India that could serve as a model for the use of foreign judgments in constitutional adjudication.

The topic that I am addressing has been very contentious amongst the legal community in the United States. Sitting justices of the United States Supreme Court as well as eminent academics have taken strong positions to justify or oppose the citation of foreign precedents in constitutional cases. As a representative of the Indian judicial system, the most appropriate thing for me to do is to present an 'outsider's view' of this debate and then briefly comment on how foreign precedents have been treated by the higher judiciary in India.

At the outset, it must be clarified that reliance on foreign precedents is necessary in certain categories of appellate litigation and adjudication. For instance, in litigation pertaining to cross-border business dealings as well as family-related disputes, the actual location of the parties in different jurisdictions makes it necessary to cite and discuss foreign statutory laws and decisions. Hence, domestic

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courts are called on to engage with foreign precedents in fields such as the 'Conflict of Laws'. Furthermore, courts are also required to look into the text and interpretations of international instruments (*i.e.* treaties, conventions, declarations) if their respective countries are party to the same. However, the room for debate arises in respect of the citation of foreign precedents to decide on questions pertaining to domestic constitutional law. It is in this regard that some leading American judges and academics have expressed their opposition to the reliance on foreign law, especially when this has been done to interpret constitutional provisions in a liberal manner.

All of us will readily agree with the observation that constitutional systems in several countries, especially those belonging to the common law tradition, have routinely been borrowing doctrine and precedents from each other. In the early years of the United Nations system, a period which saw decolonisation in most parts of Asia and Africa, many new Constitutions incorporated mutually similar provisions by drawing from ideas embedded in international instruments such as the United Nations Charter and the Universal Declaration of Human Rights [hereinafter "UDHR"]. The European Convention on the Protection of Human Rights and Fundamental Freedoms [hereinafter "ECHR"], which was adopted in 1953, also became a source for doctrinal borrowing by emerging constitutional systems. In later years the provisions of the International Covenant on Civil Political Rights [hereinafter "ICCPR"] and the International Covenant on Economic, Social and Cultural Rights [hereinafter "ICESCR"] have also emerged as reference-points for such constitutional borrowing.²

Much of this constitutional transplantation that has taken place by means of international instruments has also exported certain distinct features of the United States Constitution – such as a Bill of Rights, 'judicial review' over legislation and limits placed on governmental power through principles such as 'equal protection before the law' and 'substantive due process'. It is only natural that the newly created constitutional systems have sought to learn from long-established ones such as those of the United States of America. While this transplantation of constitutional doctrines was predominant in the case of most newly liberated countries in Asia and Africa, the Soviet-led bloc followed a divergent path by prioritizing collective socio-economic objectives over basic individual rights. Since the 1990s, the dismantling of communist rule in the former

2 See generally, B. Ackerman, *The Rise of World Constitutionalism*, 83 U. VA. L. R. 771 (1997).

USSR and Eastern Europe has prompted a new wave of constitutionalism, with several countries adopting written constitutions that provide for basic civil-political rights enforceable through judicial means.³

In recent years, the decisions of Constitutional Courts in common law jurisdictions such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law. In these jurisdictions, reliance on foreign precedents has become commonplace in public law litigation.⁴ Anne-Marie Slaughter used the expression 'trans-judicial communication' to describe this trend. In a much-cited article published in 1994,⁵ she described three different ways through which foreign precedents are considered, namely:

- *First, through vertical means, i.e.,* when domestic courts refer to the decisions of international adjudicatory institutions, irrespective of whether their countries are parties to the international instrument under which the said adjudicatory institution functions. For example, the decisions of the European Court of Human Rights [hereinafter "ECHR"] and European Court of Justice [hereinafter "ECJ"] have been extensively cited by courts in several non-European Union [hereinafter "EU"] countries as well. This also opens up the possibility of domestic courts relying on the decisions of other supranational bodies in the future.
- *Secondly, through horizontal means, i.e.* when a domestic court looks to precedents from other national jurisdictions to interpret its own laws. In common law jurisdictions where the doctrine of *stare decisis* is followed, such comparative analysis is considered especially useful in relatively newer constitutional systems which are yet to develop a substantial body of case-law. For example, the Constitutional Courts set up in Canada and South Africa have frequently cited foreign precedents to interpret the bill of rights

3 See generally, C. L'Hereux-Dube, *Human Rights: A Worldwide Dialogue*, in, SUPREME BUT NOT INFALLIBLE- ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 214 (B.N. Kirpal *et al* ed., 2000).

4 See generally, M. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999); S. Chaudhary, *Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819 (1999); M. Nussbaum, *Introduction to Comparative Constitutionalism*, 3 CHI. J. INT'L L. 429 (2002).

5 See generally, A. Slaughter, *The Typology of Transjudicial Communication*, 29 U. RICHMOND L. R. 99 (1994).

in their respective legal systems. Comparative analysis is also a useful strategy to decide hard constitutional cases, where insights from foreign jurisdictions may insert a fresh line of thinking.

- *Thirdly*, through *mixed vertical-horizontal* means, *i.e.* when a domestic court may cite the decision of a foreign court on the interpretation of obligations applicable to both jurisdictions under an international instrument. For example, courts in several European countries freely cite each other's decisions that deal with the interpretation of the growing body of European Community [hereinafter "EC"] law. It is reasoned that if judges can directly refer to applicable international obligations, they should also be free to refer to the understanding and application of the same in other national jurisdictions.

In examining these three means of 'trans-judicial communication' one can easily discern that references to foreign law contemplate both international and comparative law. While reference to evolving international human rights norms and decisions of international adjudicatory institutions is accorded a certain degree of legitimacy in most liberal constitutional systems, there has been considerable opposition to comparative analysis in constitutional cases in the United States. In recent years, much of this resistance has been expressed in respect of the United States Supreme Court's decisions in *Atkins v. Virginia* [2002] [hereinafter "*Atkins*"],⁶ *Lawrence v. Texas* [2003] [hereinafter "*Lawrence*"]⁷ and *Roper v. Simmons* [2005] [hereinafter "*Roper*"].⁸

- In *Atkins*, the majority opinion ruled against the constitutionality of the death penalty for mentally-retarded offenders, and pointed to the international disapproval of the same.
- In *Lawrence*, the majority opinion held that the criminalisation of consensual homosexual conduct violated the 'due process' clause enshrined in the Fourteenth Amendment. In the process the Court overruled a previous decision given in *Bowers v. Hardwick* [1986],⁹ wherein it had been held that there is no fundamental right to engage in consensual sodomy.

6 *Atkins v. Virginia*, 536 U.S. 304 (2002).

7 *Lawrence v. Texas*, 539 U.S. 558 (2003).

8 *Roper v. Simmons*, 543 U.S. 551 (2005).

9 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

- In *Roper*, the majority ruled against the constitutionality of administering the death penalty to juvenile offenders, while overruling a previous decision on the point given in *Stanford v. Kentucky* [1989].¹⁰ For several years, there has been a prominent dissonance over the citation of foreign precedents between liberally inclined judges such as Justice Stephen Breyer, and Justice Antonin Scalia who is known to hold conservative positions. For instance, in *Stanford v. Kentucky* [1989], the majority had ruled in favour of the death penalty for juveniles and Justice Scalia had rejected arguments pointing to the abolition of the same in several Western European countries. With the overruling of this case in *Roper*, Justice Scalia reiterated his opposition to the citation of foreign precedents in his dissenting opinion,¹¹ since the majority opinion delivered by Justice Anthony Kennedy referred to several international instruments as well as foreign decisions to rule against the constitutionality of the death penalty for juvenile offenders. In the said opinion the right against cruel and unusual punishment enumerated in the Eighth Amendment of the U.S. Constitution was read expansively by way of reliance on foreign materials.

Since the delivery of that opinion, the balance in the US Supreme Court has tilted in favour of conservatism. With the passing away of Chief Justice Rehnquist and the retirement of Justice Sandra Day O'Connor, the Bush administration preferred to replace them with judges holding conservative inclinations. Justice Scalia's viewpoint has found more support with the appointment of Chief Justice John Roberts Jr. and Justice Samuel Alito Jr., both of whom indicated their opposition to the citation of foreign precedents during the U.S. Senate hearings for the confirmation of their appointments.¹²

As per my understanding there have been three distinct objections made against the citation of foreign precedents in constitutional cases. The first objection is derived from the 'separation of powers' doctrine, the second one invokes the 'exceptionalism' of the constitutional system of the United States and the third criticism is based on the idea that reliance on foreign precedents expands judicial discretion.

10 *Stanford v. Kentucky*, 492 U.S. 361 (1989).

11 For an academic opinion surveying the use of foreign law by the U.S. Supreme Court, see, S.G. Calabresi & S.D. Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WILLIAM & MARY L.R. 743 (2005).

12 Cited in, M.C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. R. 553 (2007).

The first objection is based on the reasoning that since foreign judges are not accountable to the electorate or any public agency, reliance on their decisions amounts to an anti-democratic exercise. It is argued that under the doctrine of 'separation of powers', the incorporation of foreign law by way of entering into treaties or international diplomacy is a function that clearly lies in the executive domain. The enforcement of these international obligations is subject to a further check by way of legislative approval. The legislature is also free to borrow from foreign statutes and precedents in shaping domestic laws, since it is a body constituted by the electoral process. The 'unelected' judiciary does not have a role to play in incorporating legal prescriptions which have originated abroad. In this regard, Justice Scalia has argued that while it is acceptable to discuss and rely on foreign law in a legislative process such as the framing of a Constitution, the same should not be done by the judiciary. He has also invoked the 'originalist' approach to constitutional interpretation by observing that the framers did not intend any reliance on foreign sources, since there is no mention of this idea in the constitutional text. Arguments have also been made to the effect that reliance on foreign precedents is an example of 'judicial elitism' which is often at odds with the opinions of the majority of the common people. This argument based on the principle of 'separation of powers' does not appear to hold too much water since one of the principal functions of judges in a Constitutional Court is to protect the counter-majoritarian safeguards enumerated in the Constitution – for instance, the rights of religious minorities, indigenous groups and affirmative action for historically disadvantaged communities. Very often, the understanding of these safeguards can benefit from an evaluation of how similar provisions have been interpreted and applied in other jurisdictions.

The second criticism draws from the idea of 'exceptionalism' or the unique status of the United States amongst the comity of nations. It is vehemently asserted that the framers of the United States Constitution aimed to establish a polity which was a radical departure from the political institutions of the 'Old World' and that the American system is meant to lead the way for other countries and not vice versa.¹³ This 'exceptional' status is asserted by referring to several social, economic and political features prevalent in the country – such as

13 Arguments based on the 'exceptionalism' of the American society and polity have been put forward in the following article: S.G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U.L.R. 1335 (December 2006).

constitutionalism, rule of law, a democratic tradition, individual liberties, respect for private property and a popular culture which promotes enterprise, respect for morals and progress. This line of reasoning is rather rhetorical since any country in the world can claim such an 'exceptional' status for itself. A much better formulation of this idea is that different countries face different socio-political circumstances and the resolution of constitutional questions must address the local conditions rather than relying on foreign law.

The most credible objection pertains to the expansion of 'judicial discretion'. Chief Justice John Roberts Jr. has observed that if judges are allowed to freely rely on foreign precedents, there is a tendency to arbitrarily cite decisions favourable to their personal viewpoints. In such a scenario, judges would be free to indulge in 'cherry-picking' for justifying their decisions rather than engaging in a rigorous inquiry into domestic precedents. Such a consequentialist approach to decision-making is considered to be one which dilutes the discipline and rigour expected of a common law judge who should give due regard to the doctrine of '*stare decisis*'. Furthermore, the decisions in *Atkins*, *Lawrence* and *Roper* have raised apprehensions of a distinct liberal bias in the invocation of international and comparative law. We should be careful not to confuse the debate on the citation of foreign precedents as one which corresponds to a political divide between conservative and liberals. Instead, it should be viewed from the standpoint of ensuring the integrity of the judicial process. Another significant question is whether it is acceptable to rely on foreign decisions as 'tie-breakers' in hard constitutional cases. This is of course linked to the argument that foreign decisions should not be discussed while confronting the unique socio-political conditions in each country. If foreign precedents are indeed considered, a practical question arises as to the relative weightage to be assigned to decisions from different foreign jurisdictions.

It is at once surprising and disappointing to learn of the extent of distrust of foreign precedents amongst some prominent members of the legal community in the United States. American constitutional law has been a source of inspiration and doctrinal borrowing for many liberal constitutional systems that were created after it. Judges in India routinely cite precedents from United States Courts besides other foreign jurisdictions and international law.¹⁴ There is also a distinct

14 See, A.M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence – The Indian Case*, 24 BERKELEY J. INT'L L. 218 (2006).

tendency on part of Indian Courts to refer to academic writings, especially those from law reviews published by American Universities.¹⁵ It is obvious that the mere citation of a foreign decision does not imply that a domestic court is bound to follow the former. A domestic court's citation of a foreign precedent may result in an approval or distinction from the fact situation before it. In any case, a foreign precedent should only be assigned persuasive value and cannot be relied on when it clearly runs contrary to existing domestic law. It is true that the socio-political conditions prevailing in different jurisdictions will pose legal problems particular to them, but there is no reason why constitutional courts in these countries should not benefit from each other's experiences in tackling them.

As I will proceed to illustrate later, Indian courts have looked to international as well as comparative sources as part of creative strategies to read in previously unenumerated norms into the 'protection of life and liberty' guaranteed under Art. 21 of the Indian Constitution. Reliance on foreign precedents has been a vital instrumentality for the Indian Supreme Court's decisions which have extended constitutional protection to several socio-economic entitlements and advanced causes such as environmental protection, gender justice and good governance among others. Before describing this trend in further detail, it will be useful to examine the various structural factors that encourage 'trans-judicial communication'.

With the ever-expanding scope of international human rights norms and international institutions dealing with disparate issues such as trade liberalisation, climate change, war crimes, law of the sea and cross-border investment disputes among others, there is a concomitant trend towards convergence in the domestic constitutional law of different countries. In this era of globalization of legal standards, there is no reason to suppress the judicial dialogue between different legal systems which build on similar values and principles.¹⁶

Another factor which sows the seeds for more 'trans-judicial communication' is the increasing internationalisation of legal education. For instance, I am given to understand that the leading law schools in Europe as well as the United States are increasingly drawing students from more and more countries, especially for postgraduate and research courses. The diversity in the classroom contributes to cross-fertilisation of ideas between individuals belonging to different jurisdictions. When students who have benefited from foreign education take up careers in their respective country's bar and judiciary, they bring in the ideas imbibed during their education.

15 See, R. Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33(3) AM. J. COMP. L. 505 (1985).

16 See, V. Jackson, *Constitutions as 'Living Trees?': Comparative Constitutional Law and Interpretive Metaphors*, 75 FORDHAM L. R. 921 (2006).

Access to foreign legal materials has become much easier on account of the development of information and communication technology. To take the example of India, until a few years ago subscriptions to foreign law reports and law reviews was quite expensive and often beyond the reach of many practitioners and judges as well. However, the growth of the internet has radically changed the picture. The decisions of most Constitutional Courts are uploaded on freely accessible websites, hence enabling easy access all over the world. Furthermore, commercial online databases such as the LexisNexis and Westlaw, among others, have ensured that judges, practitioners and law students all over the world can readily browse through materials from several jurisdictions. Such easy access to international and comparative materials has also been the key factor behind the emergence of internationally competitive commercial law firms and Legal Process Outsourcing [hereinafter "LPO"] operations in India.

The ever-increasing person-to-person contacts between judges, lawyers and academics from different jurisdictions have been the most important catalyst for 'trans-judicial communication'. This takes place in the form of personal meetings, judicial colloquia and conferences devoted to practice areas as well as academic discussions.

While there are numerous examples of such person-to-person interaction, a notable example is that of an initiative taken by the Commonwealth Secretariat in association with INTERIGHTS (International Centre for the Legal Protection of Human Rights). In February 1988, the first Commonwealth judicial colloquium held in Bangalore was attended by several eminent judges from different countries – among them being Justice P.N. Bhagwati, Justice Michael Kirby, Lord Lester, Justice Mohammed Haleem and Justice Ruth Bader Ginsburg. That colloquium resulted in the declaration of the Bangalore Principles which deal with how national courts should absorb international law to fill existing gaps and address uncertainties in domestic law.¹⁷ Special emphasis was laid on handling unenumerated norms so as to strengthen the 'rule of law' and constitutional governance. In December 1998, the Commonwealth Judicial Colloquium on the 'Domestic Application of International Human Rights Norms' was again held in Bangalore. The participants affirmed their commitment to the principles that had been declared in the 1988 colloquium as well as the deliberations in

17 The text of the principles has been reproduced in: M. Kirby, *Domestic Implementation of International Human Rights Norms*, AUS. J. HUM. RTS. 27 (1999).