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The Role of Foreign Precedents in a Country's Legal System

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## ARTICLES

# THE ROLE OF FOREIGN PRECEDENTS IN A COUNTRY'S LEGAL SYSTEM<sup>1</sup>

Chief Justice K.G. Balakrishnan\*

*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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1 This is based on a lecture delivered by Hon'ble Mr. Justice K.G. Balakrishnan at the Northwestern University School of Law (Illinois, U.S.A.) on October 28, 2008.

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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.<sup>2</sup>

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

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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.<sup>3</sup>

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.<sup>4</sup> Anne-Marie Slaughter used the expression 'trans-judicial communication' to describe this trend. In a much-cited article published in 1994,<sup>5</sup> 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

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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*"],<sup>6</sup> *Lawrence v. Texas* [2003] [hereinafter "*Lawrence*"]<sup>7</sup> and *Roper v. Simmons* [2005] [hereinafter "*Roper*"].<sup>8</sup>

- 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],<sup>9</sup> wherein it had been held that there is no fundamental right to engage in consensual sodomy.

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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).

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- 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].<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup>

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.

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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.<sup>13</sup> This 'exceptional' status is asserted by referring to several social, economic and political features prevalent in the country – such as

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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).

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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.<sup>14</sup> There is also a distinct

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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.<sup>15</sup> 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.<sup>16</sup>

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.

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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).

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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.<sup>17</sup> 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

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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).

subsequent colloquia held in different commonwealth countries.<sup>18</sup> It may be useful to refer to the first principle which was part of the restatement and further development of the 1988 principles [hereinafter "Bangalore Principles"]:

1. Fundamental human rights and freedoms are universal. They find expression in constitutional and legal systems throughout the world; they are anchored in the international human rights codes to which all genuinely democratic states adhere; their meaning is illuminated by a rich body of case law, both international and national.

Despite considerable opposition from various quarters, the Bangalore Principles have gradually found wide acceptance with judges in many jurisdictions looking towards the growing body of international human rights law to streamline their domestic laws. This also creates compelling reasons for constitutional courts in different jurisdictions to look to each others' decisions. The growth of constitutionalism will be better served with less resistance to the increasingly important discourse of comparative constitutional law. It is through this framework of recognizing a growing international consensus on the understanding of individual as well as group rights that judges in constitutional courts can lead the way in engineering socio-political reforms in their respective countries.

It is precisely this role of precipitating social transformation which has been actively played by the Supreme Court of India. The modern Indian legal system is often described as a colonial inheritance, but some significant changes were made with the adoption of our Constitution in 1950. Our framers consciously chose to include a bill of rights under Part III of the Constitution of India and made them enforceable through the means of 'judicial review' enumerated in Art. 13 and the 'right to seek remedies for violation of Fundamental Rights' under Art. 32. However, under Art. 372(1), the pre-independence laws were persisted with to the extent that they were consistent with the fundamental rights. Art. 41(c) mandates respect for international law but does not directly mention foreign law.

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18 The subsequent Commonwealth judicial colloquia were held in Harare, Zimbabwe (1989); in Banjul, Gambia (1990); in Abuja, Nigeria (1991); in Balliol College, Oxford, England (1992); in Bloemfontein, South Africa (1993); and in Georgetown, Guyana (1996). See Lord Lester, *The Challenge of Bangalore – Making Human Rights a Practical Reality*, 3 EUR. HUM. RTS. L. R. 273 (1999).

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From the outset, courts in independent India have frequently relied on decisions from other common law jurisdictions, the most prominent among them being of the United Kingdom, United States of America, Canada and Australia. The opinions of foreign courts have been readily cited and relied on in landmark constitutional cases dealing with questions such as the ambit of the right to privacy,<sup>19</sup> freedom of press,<sup>20</sup> restraints on foreign travel,<sup>21</sup> the constitutionality of the death penalty,<sup>22</sup> broadcasting rights<sup>23</sup> and prior restraints on publication.<sup>24</sup> While reliance on foreign precedents was considerable in the early years of the Supreme Court of India, the same can be said to have subsided to an extent in recent decades with the evolution of a body of domestic precedents. However, in quantitative terms the citation of foreign cases at present is the highest ever in the history of our court. This is so on account of the continuous increase in the caseload before our higher judiciary. The experience of considerable reliance on foreign law in the early years of a Constitutional Court's existence has also been shared with the Constitutional Courts created in South Africa and Canada. In fact, the South African Constitution has an express provision which mandates the consideration of international as well as foreign law in interpreting its bill of rights.<sup>25</sup>

Since the late 1970s the higher judiciary in India has also taken on an activist role, especially to extend legal protection to the interests of the weak and underprivileged sections of society. It has fashioned two general strategies to expand access to justice and deliver effective remedies to those parties who would otherwise be unable to move the Constitutional Courts on account of lack of

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19 Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295 (Supreme Court of India) (Unauthorised police surveillance was considered violative of 'right to privacy').

20 Bennett & Coleman v. Union of India, AIR 1973 SC 106 (Supreme Court of India) (Challenge against governmental limits on import of newsprint).

21 Maneka Gandhi v. Union of India, AIR 1978 SC 597 (Supreme Court of India) (Challenge against government's refusal to issue passport to petitioner).

22 Bachan Singh v. Union of India, AIR 1980 SC 898 (Supreme Court of India) (majority opinion approving of death penalty in 'rarest of rare' cases); AIR 1982 SC 1325 (Supreme Court of India) (Justice P.N. Bhagwati's dissenting opinion).

23 Secretary, Information & Broadcasting v. Cricket Association of Bengal, AIR 1995 SC 1236 (Supreme Court of India) (Question pertained to government's authority to restrain private parties from acquiring rights to broadcast cricket matches).

24 R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264 (Supreme Court of India).

25 Chap. 2, S. 39(1), S. AFR. CONST. declares that "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law".

financial resources and limited awareness about their legal entitlements. In a society beset with poverty, illiteracy and entrenched social discrimination based on criteria such as caste, religion and gender, it was important for the Supreme Court of India to re-invent its role. The two strategies in question are the device of Public Interest Litigation [hereinafter "PIL"] and the creative expansion of the 'protection of life and liberty' enumerated under Art. 21 of the Constitution of India. Reliance on foreign law was instrumental to the unfolding of both of these 'activist' strategies. In respect of PIL, the dilution of common law requirements such as '*locus standi*' as well as the grant of innovative remedies such as a 'continuing mandamus' to executive agencies were original creations of Indian judges, but considerable reliance was also placed on the practices evolved through 'class action lawsuits' in the United States. However, it is in the expansion of the understanding of Art. 21 that comparative analysis has played a significant role.

In *Maneka Gandhi v. Union of India*,<sup>26</sup> a case concerning restrictions on the issue of a passport to the petitioner, the Supreme Court of India read the 'substantive due process guarantee' into the language of Art. 21. Prior to this decision, Indian courts had applied the lower threshold of 'procedure established by law' to evaluate the validity of governmental action that curtailed personal liberty. This decision heavily drew from U.S. decisions and laid down the position that governmental action is subject to scrutiny on multiple grounds such as fairness, reasonableness and non-arbitrariness. By enumerating the theory of 'inter-relationship between rights', a foundation was laid for the creative expansion of the ambit of Article 21.

In *M.H. Hoskot v. State of Maharashtra*,<sup>27</sup> the Supreme Court explicitly relied on American decisions to hold that indigent persons were entitled to receive free legal services. The idea of 'substantive due process' was interpreted so as to imply that free legal services are an 'imperative processual piece of criminal justice' implicit in Art. 21. A few years later, the Court reinforced this entitlement in *Khatri v. State of Bihar*,<sup>28</sup> wherein it held that the state cannot plead lack of financial resources as a ground for not extending legal services to indigent persons.

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26 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (Supreme Court of India).

27 *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 802 (Supreme Court of India).

28 *Khatri v. State of Bihar*, AIR 1981 SC 928 (Supreme Court of India).

The decision in *Sunil Batra v. Delhi Administration (II)*<sup>29</sup> prominently invoked academic Edward Corwins' writings on the Eighth Amendment ('right against cruel and unusual punishment') in order to implement reforms in prison conditions. Reliance was also placed on a British parliamentary white paper entitled "People in Prison". In the said judgment, lower court judges were directed to personally inspect their jurisdictional prisons once a week, receive complaints from individual prisoners, take remedial measures and provide grievance mechanisms that were easily accessible to all prisoners. In *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*,<sup>30</sup> the Supreme Court took cognizance of news items and directed the release of 'undertrial' prisoners who had been in custody for periods longer than the maximum permissible sentences for their alleged offences.

With regard to the extent of 'freedom of speech and expression', the Indian Courts have repeatedly cited decisions related to the First Amendment to the U.S. Constitution. In *Indian Express Newspapers v. Union of India*,<sup>31</sup> the Supreme Court held that the imposition of a tax on the publication of newspapers violated the constitutional right to freedom of expression, which also incorporates freedom of the press. In *Rangarajan v. Jagjivan Ram and Union of India*,<sup>32</sup> the Court ruled that the censorship of a film which criticised the policy of caste-based reservations in public employment is inconsistent with the principle of freedom of expression, again relying heavily on English and American case law.<sup>33</sup> Similarly, in *R. Rajagopal v. State of Tamil Nadu*,<sup>34</sup> American cases were cited to reject the constitutional validity of 'prior restraints' placed on the publication of a convict's biography which detailed relations between some politicians and criminals.

With the dilution of the requirement of '*locus standi*' in PIL, more and more voluntary sector organisations have moved the higher judiciary in India, seeking constitutional remedies to guarantee civil liberties as well as socio-economic

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29 *Sunil Batra v. Delhi Administration (II)*, AIR 1980 SC 1579 (Supreme Court of India).

30 *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*, AIR 1979 SC 1360 (Supreme Court of India).

31 *Indian Express Newspapers v. Union of India*, AIR 1986 SC 515 (Supreme Court of India).

32 *Rangarajan v. Jagjivan Ram and Union of India*, [1989] 2 SCC 574 (Supreme Court of India).

33 Particular reliance was placed on the 'clear and present danger' test for placing restraints on speech that was developed in *Schenck v. United States*, 247 U.S. 47 (1919).

34 *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 (Supreme Court of India).

entitlements such as housing,<sup>35</sup> health<sup>36</sup> and education.<sup>37</sup> Non-Governmental Organisations [hereinafter “NGOs”] have raised important questions that have also had a bearing on causes such as environmental protection, gender justice and good governance. In many cases, the focus has been on the implementation of existing rights but the Indian Supreme Court has also invoked international and comparative sources to expand the ambit of these rights. The Court has ruled that the ‘protection of life and liberty’ under Art. 21 of the Indian Constitution should be understood in conjunction with Art. 6 of the ICCPR and Art. 3 of the UDHR.

In a series of decisions invoking international legal materials, the Court has articulated and expanded the ‘right to a healthy environment’ as an extension of the right to life and personal liberty. In *Subhash Kumar v. State of Bihar*,<sup>38</sup> it was held that a slow, steady, and subtle method of extinguishment of the quality of life, *i.e.* severe pollution - is violative of the right to life. Likewise, in *Virender Gaur v. State of Haryana*,<sup>39</sup> it was reiterated that Art. 21 includes a right to a clean environment. In *M.C. Mehta v. Union of India*,<sup>40</sup> the Court discussed several provisions of the 1972 United Nations Stockholm Conference on Human Environment, even though the same was merely a declaration and did not impose any domestic obligations.

The invocation of international and comparative law has also been significant in the Indian judiciary’s efforts to improve accountability in public life. In *Vineet Narain v. Union of India*,<sup>41</sup> wherein several incumbent ministers and serving bureaucrats were alleged to be involved in money-laundering, the Court explicated seven principles of public life, and directed the establishment of the Central Vigilance Commission [hereinafter “CVC”], an institution akin to the

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35 *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 (Supreme Court of India).

36 *Parmanand Katara v. Union of India*, AIR 1989 SC 2039 (Supreme Court of India).

37 *J.P. Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178 (Supreme Court of India).

38 *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420 (Supreme Court of India).

39 *Virender Gaur v. State of Haryana*, (1995) 2 SCC 377 (Supreme Court of India).

40 *M.C. Mehta v. Union of India*, [1987] 2 SCR 530 (Supreme Court of India.); Continuing with the same trend, in *Law Society of India v. Fertilizers and Chemicals Travancore*, AIR 1994 Ker 308 (High Court of Kerala), the Court relied on a 1984 U.N. Resolution to reiterate that the right to a wholesome environment was implicit in Art. 21 of the Indian Constitution.

41 *Vineet Narain v. Union of India*, AIR 1998 SC 889 (Supreme Court of India).

English 'Director of Prosecutions' for investigating governmental corruption and wrongdoing. In *People's Union for Civil Liberties v. Union of India*<sup>42</sup> and *Association for Democratic Reforms v. Union of India*,<sup>43</sup> the Supreme Court of India directed that candidates seeking election to legislative bodies at all levels were bound to disclose their educational, financial and criminal antecedents for the information of the electorate. The voters' right to information was understood as flowing out of the 'freedom of speech and expression' on the premise that an informed choice was necessary for a meaningful exercise of 'free expression' through the act of voting. In these cases, reliance was placed on the Beijing Statement of Principles of the Independence of the Judiciary and the ICCPR.

In the realm of gender justice it is important to mention the decision in *Vishaka v. State of Rajasthan*.<sup>44</sup> This litigation originated on account of the gang-rape of a social worker and the Court proceeded to frame guidelines for the prevention of and redressal for sexual harassment at the workplace. This act of 'judicial legislation' was prompted by the absence of any statutory law on the point and extensive reliance was placed on the provisions of the Convention for Elimination of all forms of Discrimination Against Women [hereinafter "CEDAW"].

As would be evident to all of you by now, the citation of foreign precedents is a routine practice in constitutional litigation in India. However, the practice of referring to international instruments and foreign decisions cannot be carried on in an undisciplined manner. There is no doubt that due consideration of the constitutional experience in other countries adds depth to the adjudication of domestic constitutional questions. However, judges should be cautious against giving undue weightage to precedents decided in entirely different socio-political settings. In the United States there is considerable opposition to the recognition of international human rights norms when they tend to clash with popular opinions on contentious issues. However, in India the importation of international and comparative law has been part of a conscious strategy of social transformation wherein previously disadvantaged groups have been made aware of their basic rights. Hence, the arguments made against the citation of foreign precedents in India are substantially different from the debate in the United States setting. For instance, in the early years of India's constitutional experience,

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42 *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 568 (Supreme Court of India).

43 *Association for Democratic Reforms v. Union of India*, (2002) 5 SCC 294 (Supreme Court of India).

44 *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (Supreme Court of India).



a vocal minority argued against the imposition of an elitist and Western Constitution and instead made a case for restoration of indigenous laws that were largely based on religious practices. Our leaders as well as judiciary chose to ignore these calls for revivalism with the firm belief that it was the emerging language of international human rights which would transform India into a modern liberal democracy.

In recent years, India has undergone tremendous changes on account of globalisation – which has enabled a freer flow of goods, capital and ideas across national boundaries. There is no reason for restraining the free flow of ideas when it comes to the judicial system. Of course, the reliance on foreign precedents should also be shaped by the discipline expected of a common law judge in weighing the credibility and persuasive value of precedents from different legal systems. The phenomenon of ‘trans-judicial communication’ is one which needs to be studied with keen interest and further refined. It would indeed be a travesty to simplistically reduce it to a debate between liberalism and conservatism. To conclude, I would like to refer to an analogy drawn by Judge Guido Calabresi who observed that just as parents should be willing to learn from their children, the Courts in the United States should also be willing to examine decisions of foreign Constitutional Courts.<sup>45</sup> There are already concerns being expressed about the reducing influence of American decisions on foreign courts and this trend can only be changed if American Courts are willing to participate in the trans-judicial dialogue.<sup>46</sup>

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45 Observations of Judge Guido Calabresi in *U.S. v. Then*, 56 F.3d 464, 468-469 (1995).

46 See, A. Liptak, *The Waning Influence of the US Supreme Court*, INT’L HERALD TRIB. 25 (September 17, 2008).