ISBN: 978-81-946587-2-6

5. Influence of Foreign Judgments: on the Judicial Process of Supreme Court of India

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5.1 Introduction:

In words of the Alexander Hamilton, one of America's first constitutionallawyers," *The judiciary was the least dangerous branch of government, with no influence overeither the sword or the purse*." And the Supreme Court of India when established in the year 1950, same thought and question arose in the minds of the people and jurists. However, over the years it has become that strongest body in the Indian governmental organ.

After the enactment of the present Constitution of India, in these 72 years of judicial process, Indian judiciary has borrowed various principles from the foreign courts. In constitutional cases the Indian judicial system, has at appropriate places referred foreign precedents to settle the concepts and principles.

Foreign precedents may be necessary in certain categories of appellate litigation, conflict of Laws and in litigation pertaining to cross-border business dealings as well as family-related disputes, wherein parties are in different jurisdictions and it may be necessary to cite and discuss foreign statutory laws and decisions.

The courts some time look into international instruments to settle specific issues out of necessity. The constitutional systems in several countries, especially those belonging to the Common-law tradition have been routinely borrowing doctrine and precedents from each other.

In the years of decolonization, the countries in Asia and Africa, incorporated mutually similar provisions in their constitutions by drawing from ideas embedded in international instruments such as the United Nations Charter and the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) etc.,

The transplantation of constitutional doctrines was predominant in the case of most newly liberated countries in Asia and Africa, with several countries adopting written constitutions that provide for basic civil-political rights enforceable through judicial means.

In recent years, the decisions of Constitutional Courts in common law jurisdictions such as United States of America, United Kingdom, Australia, Canada, New Zealand and India have become the primary means behind the growing importance of comparative constitutional law,wherein foreign precedents have become commonplace in public law litigation.

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.

The Constitutional Courts set up in Canada and South Africa has frequently cited foreign precedents to interpret the bill of rights in their respective legal systems. The domestic courts may cite the decision of a foreign court on the interpretation of obligations applicable to both jurisdictions under an international instrument.

The legislature is free to borrow from foreign statutes and precedents in shaping domestic laws, but the questions is, does the judiciary have authority to incorporate 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. In this regard it is a pertinent question to explore, analyze and formulate the position of the Supreme Court of India in referring Foreign Judgment with particular reference to the judgments of the Supreme Court of United States of America in the judicial process.

In the concept of due process of law, "Regina Vs Paty", 1704, for Queen's Bench, *Justice Powys* view is source and remains authentic meaning or definition and the same were subsequently used in the judgments of USA, "Dred Scott Vs Sandford" (1857)[1].

5.2 Interpretations:

The general rule applied before interpretation of a statute is that prima facie the statutes mustbe given an ordinary meaning. But if the meaning of the provisions in the statutes is unclear, ambiguous, or cannot be understood in its plain reading then the tools or aids of interpretationare resorted. There are various tools or aids that are used to interpret the statues. These aids ofinterpretation are broadly classified into external aid and internal aid.

Internal aids are the aids that are found within the Act or Statute. For instance, the title of an Act, headings or the titles prefixed to the provisions in the Acts, punctuations, marginal notes,illustrations, the definition section or any other tool that is within the Act itself constitutes an internal aid. When the internal aid is inadequate to define a meaning or could not put forth an appropriate and convincing connotation the external aids are sought. The external aids are theones that are found outside the Act, i.e foreign judgments, international treaties,parliamentary history, historical facts, etc. The Supreme Court opined that, where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation[2].

5.3 Foreign Judgments - An external aid:

In the era of globalization and with the growing inter-connectedness of the laws and treaties, nations are familiarizing themselves within the international platform by mutually agreeing principles to follow.

The text and interpretations of various international instruments like the UDHR, Geneva Conventions, European Conventions, etc. are being referred and borrowedby countries around the world. In the process the judiciary of one country borrows foreign judicial decisions of other nations or international adjudicatory bodies to understand and interpret the laws, doctrines, principles etc.

Further for the foreign decision to be relevantmust bare a close resemblance between the facts of the case in the foreign judicial decisions with that of the case or dispute before the domestic judge and the concept or idea of justice should be similar or equivalent in the foreign jurisdiction to that of the domestic Court.

5.4 Trans-Judicial Communication:

Trans Judicial communication[3] can be understood as the communication between the judicial organs of different nations and organizations across the globe.

The author "Anne Slaughter" described the three different approaches that a Court can consider to use foreign precedents that is (i) Vertical means, when the courts refer to the decisions given by the international institutions that adjudicate like the ICC, ICJ, etc. (ii) Horizontal means, wherein the domestic courts use the judicial decisions given by other nations to interpret its own laws, such as borrowing of constitutional cases between the nations. (iii) Mixed horizontal and vertical means, wherein the domestic courts may cite foreign decisions from other nations with respect to the interpretation of obligations applicable to both the jurisdiction under international instruments or law.

To understand this in an easier way we can say that the judges directly refer to the applicable international obligations and are also free to refer to the decisions of the courts of the foreign nations to understand how those nations interpreting andimplementing the obligations are created by such international instruments.

These are the three means of trans-judicial communication, by examining these three means one can notice and understand how the reference to foreign law is contemplated both in international and national law. More seeds are being sown for more trans-judicial communication because of the growing trend of internationalization of legal education. One more reason that is attributing to this communication is the increase in the easy accessibilityof foreign legal material for the judges to refer to.

The Supreme Court of India's three landmark judgments of the year 2018, namely (1). **Justice K. S. Puttaswamy[4] v. Union of India,** (2) **Indian Young Lawyers' Association v. State of Kerala[5]**, (3) **Navtej Singh Johar v. Union of India[6],** all the cases confront and settle critical issues around the Indian Constitution relating to fundamental rights. In all three judgments, the most cited foreign judgments was from United States of America. The court favours to look for the judgments of USA because of having shared legal system of common law and legal traditions and principles are similar in the legal systems.

5.5 Uniformity In Human Rights Law:

Generally, law intents to promote peace and harmony in the society by regulating and controlling the human behavior. It prohibits any action detrimental to the society. The law is the tool to achieve and implement justice in the society. And throughout the world intentionof the legal system and law is the wellbeing of the individual and the society. The core ideology of any legal system is one and the same. In the contemporary world and after the formation of UNO, law has become universal and common to the extent that a global law is being promoted.

It should not be understood that a "global law"[7] is the ultimate goal of the society. The 1948 Universal Declaration of Human Rights (UDHR) is the starting point of modern international human rights law and most nations are adhering to the same. The adherence has created a commonality of the human rights in all legal system.

5.6 Conclusion:

The socio political nature of every country is different from one another. However, the modern era has promoted common principles of law in most of the nations. The growing complexity of human endeavor in many areas of activity has promoted intricate laws, leading the Judiciary to engage and exchange the methods and principles to solve an issue before the court.

Ever increasing complex situation and cases comples the judiciary look for international opinions and the recognition of some rights and legal aspects by nations is enabling the Judiciary to engage and exchange the methods applied to solve an issue before the court. This accumulation of wisdom through the system of borrowing judicial decisions to interpret law is one of the best ways to solve the issue.

The Indian Courts were open towards accepting or using foreign judicial decisions while interpreting statues. It is important to remember that the foreign judgments have an influential value and are not obligatory or binding decisions in India, they can act as important guideposts to interpret in India. The Constitutional Courts in the countries such as India, United Kingdom, Canada, following common law legal system are the most important promoters of the comparative constit*utional law. In these countries, the reliance on foreign precedents is becoming a common place in the public litigation.

This trans-judicial communication among nations is encouraging the Nations to rely upon such precedents and laws and the same is a positive step towards healthy legal system and legal order.

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Footnotes:

[1] In this ruling, the U.S. Supreme Court stated that enslaved people were not citizens of the United States and, therefore, could not expect any protection from the federal government or the courts.

The opinion also stated that Congress had no authority to ban slavery from a Federal territory. The Due Process Clause of the Fifth Amendment prohibits the federal government from freeing slaves brought into federal territories.

[2] B. Prabhakar Rao v. State of Andhra Pradesh

[3] Anne Slaughter an international lawyer, political analyst and a political scientist wrote an article on trans-judicial communication in 1994

[4] In this case, a nine-judge bench established that the right to privacy is a fundamental right flowing from Articles 19 and 21

[5] Chief Justice Dipak Misra's five-judge bench declared unconstitutional the Sabarimala Temple's custom of prohibiting women in their 'menstruating years' from entering its inner sanctum

[6] In a historic judgment for the LGBT community, a five-judge Bench unanimously struck down Section 377 of the Indian Penal Code, 1860, to the extent that it criminalised same-sex relations between consenting adults.

[7] In 1988 Ernst Zitelmann advanced the notion that domestic laws in all the legal systems in the world should be replaced by one uniform 'global law'