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Persuasive Role of Foreign Judgements: An Indian Context

Burhan Majid[1]

Abstract

The incumbent era is marked as an era of globalization of legal standards featured by the judicial dialogue between different legal systems build on similar values and principles. It has been observed that constitutional systems in several countries, especially those belonging to the common law tradition, have routinely been borrowing doctrines and precedents from each other. This paper is an attempt to evaluate the persuasive role of foreign judgments on the Indian Judiciary. In fact, the Supreme Court of India has time and again relied on the decisions of foreign Courts in a wide range of areas from protection of life and personnel liberty to the freedom of speech and expression and yet many more.

Introduction

At the very outset it is desirable to mention that judicial decisions may be distinguished as authoritative and persuasive. An authoritative is one which judges must follow whether they approve of it or not. On the other hand, a persuasive is one which the judges are under no obligation to follow and which they will take into consideration and to which they will attach such weight as it seem to them to deserve. Foreign judgments come under the latter.

There is no principle of law which seeks to restrict a constitutional Court from referring to foreign judgments, yet the law itself demands that this exercise must proceed with caution, and carefully examine the structural similarities before applying the decision of a foreign Court to a domestic question. It has been observed that constitutional systems in several countries, especially those belonging to the common law tradition, have routinely been borrowing doctrines and precedents from each other. To this phenomenon India is no different. There are myriad instances when the Indian Courts have relied on the judgments of foreign Courts. Anne Marie Slaughter, a Professor of Politics and International Affairs at Princeton University describes this trend by the expression "trans judicial communication".[2]

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1 LL.M 2nd year student at faculty of Law, University of Kashmir-190006

2 Anne-Marie Slaughter, 'The typology of transjudicial communication,' 29 University of Richmond Law Review 99-137 (1994)

Pertinent to mention here, the modern Indian legal system is often described as a colonial inheritance, however, some significant changes were made with the adoption of the Constitution in 1950. A number of factors can be held responsible as to the reliance by the Supreme Court of India on the judgments of foreign Courts.

Possible Reasons for Reliance

The primary reason for the reliance is the similarities in the jurisprudence of Indian law with that of other countries, for example, England, U.S.A, Canada etc. the judicial decisions of which are usually relied upon by the Indian Courts. This factor owes its existence to the fact that most of the Indian law has been borrowed from these countries, though India adopted it with some modifications. However the Supreme Court of India has in a catena of cases, for example in State of west Bengal v. B.K. Mondal and Sons,[3] maintained that the assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and more importantly the Indian conditions.

Another factor is the increasing internationalization of legal education. For instance, 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-fertilization 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.[4]

One more factor which contributes to the growing trend of - what I am convinced to call - judicial globalization is the access to foreign legal materials which has now 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.

Apart from the link of English common law and the similarity in jurisprudence and political thought, the use of English language as authoritative text of Indian statutes is another factor which obliges the Indian courts in taking recourse to foreign judgements of English speaking countries. For example in Ram Avatar

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3 AIR 1962 SC 779

4 "The Role of Foreign Precedents in a Country's Legal System" Lecture delivered by Chief Justice K.G. Balakrishnan at Northwestern University, Illinois (October 28, 2008)

Badhaiprasad v. Assistant sales Tax officer, Akola,[5] even in construing a common place word 'Vegetable' in a taxing statute reference was made to a Canadian decision interpreting that word in a similar statute.

Furthermore, in cases where there is no domestic law on the point, the Supreme Court of India has most often relied upon the foreign judgments. However, the Courts have maintained that, in every case, a foreign precedent should only be assigned a persuasive value and cannot be relied on when it clearly runs contrary to existing domestic law.

The Case of Aruna Ramchandra Shaunbag v. Union of India 2011

The recent case of Aruna Shaunbag v. Union of India decided by the Supreme Court of India epitomizes the whole point. The Supreme Court of India responded to the plea for euthanasia filed by Aruna Shaunbag's friend journalist Pinki Virani, by setting up a medical panel to examine her. The court turned down the mercy killing petition on 7 March, 2011. However in its landmark judgment, it allowed passive euthanasia in India. In fact what the Court did in this case, it relied on the judgments of foreign Courts as there was no law on the point in India. The Court said, "There is a plethora of case law on the subject of the courts all over the world relating to both active and passive euthanasia. It is not necessary to refer in detail to all the decisions of the Courts in the world on the subject of euthanasia or physically assisted death but we think it appropriate to refer in detail to certain landmark decisions, which have laid down the law on the subject". Then they quoted a case decided by the House of Lords commonly known as THE AIREDALE CASE: (Airedale NHS Trust v. Bland[6] in which it has been ruled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime. However, the Court didn't clarify a number of issues in the instant case, say for example the question as to "who would give the consent".

Reliance in Some Landmark Cases

From the beginning, Courts in independent India have repeatedly relied on decisions from other common law jurisdictions, mostly 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 –

5 AIR 1961 SC

6 (1993) All E.R. 82) (H.L.)

i. Ambit of the right to privacy (Kharak Singh v. State of Uttar Pradesh)[7]

ii. Freedom of press (Bennett & Coleman v. Union of India)[8]

iii. Restraints on foreign travel (Maneka Gandhi v. Union of India)[9]

iv. Constitutionality of the death penalty (Bachan Singh v. Union of India)[10]

Importantly since the late 1970s the higher judiciary in India, in order to cope with the widespread poverty, illiteracy and entrenched social discrimination, has fashioned out two general strategies to expand access to justice and deliver effective remedies. The two strategies in question are the device of Public Interest Litigation and the creative expansion of the 'protection of life and personal liberty' enumerated under Art. 21 of the Constitution of India. Though some of the dimensions with respect to these strategies viz., the dilution of 'locus standi' and the grant of innovative remedies such as a 'continuing mandamus' are the original creations of Indian Judges, reliance on foreign law was instrumental to the unfolding of both of these activist strategies.

In Maneka Gandhi v. Union of India,[11] 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 'interrelationship between rights', a foundation was laid for the creative expansion of the ambit of Article 21.

In M.H. Hoskot v. State of Maharashtra[12] 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

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7 AIR 1963 SC 1295
8 AIR 1973 SC 106
9 AIR 1978 SC 597
10 AIR 1980 SC 898
11 Ibid. at 8.
12 AIR 1978 SC 802

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v. State of Bihar[13] wherein it held that the state cannot plead lack of financial resources as a ground for not extending legal services to indigent persons.

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,[14] 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,[15] the Court ruled that the censorship of a film which criticized the policy of caste-based reservations in public employment is inconsistent with the principle of freedom of expression. In this case reliance was placed on the 'clear and present danger' test for placing restraints on speech that was developed in Schenck v. United States.[16]

Again, while deciding the question of doctrine of Basic Structure in Kesavananda Bharati v. State Of Kerala And Anr.,[17] the Supreme Court of India said that the criticism of the doctrine cannot be justified on the ground that it lays down a vague and uncertain test. The fact that a complete list of the essential elements constituting the basic structure cannot be enumerated is no ground that these do not exist. Quoting Lord Ried in Ridge v. Baldvin,[18] Sikri C.J., observed,

"in modern times opinions have sometimes been expressed that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more defined than that". (Emphasis Supplied)

Conclusions

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. Yet presently, in quantitative terms, the citation of foreign cases is the highest ever in the history of Indian Judiciary. I argue there is no problem in relying on the foreign precedents in

13 AIR 1981 SC 928
14 AIR 1986 SC 515
15 (1989) 2 SCC 574
16 247 U.S. 4 (1919)
17 AIR 1973 SC 1420
18 [1964] AC 40

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the present era of judicial globalisation, however, the judges should be cautious against giving undue weightage to precedents decided in entirely different socio-political settings for two main reasons (i) that if Judges are allowed to freely rely upon the foreign decisions, there is a tendency to arbitrarily cite decisions favorable to their view points. In such a scenario, Judges would be free to indulge into "cherry picking" for justifying their decisions rather than engaging in a rigorous enquiry into domestic precedents and (ii) there is also a danger of constitutional transplantation if the exercise of reliance is not met with care and caution.

Thus I conclude that, 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. But, undoubtedly, none of these decisions are binding upon the Indian Supreme Court but they are authorities of high persuasive value to which Courts may legitimately turn for assistance. However, they must be judged in the context of India's own laws and legal procedure and the practical realities of litigation in India.