

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Globalisation, Judges and New Trends of Constitutional Interpretation

SHIVAM KUMAR¹ AND KUMAR SATYAM²

ABSTRACT

Law and society both are dynamic in nature, both shares an inherent characteristic to change with respect of time. Law and society do not exist independently, in fact law operates for and in the society; and it is influenced by the mores and attitudes of the society. Emerging perspectives in constitutional interpretation may include a focus on protecting individual rights, the role of international law and human rights standards, or a more holistic and contextual approach to interpreting constitutional provisions. Today, we are here from textualist approach to broad and liberal interpretation, from A.K. Gopalan case (1950) to Maneka Gandhi case (1973) to K.S. Puttaswamy case (2017). The last six to seven decades have seen a tremendous proliferation in the constitutional interpretation. As per Roscoe Pound's observation, legal science should use comparative method as the "richest source of discovery in every empirical science." The constitutional courts in India have used various means to figure out various issues into the Indian constitutional jurisprudence and developed the same in manifolds. Such means of constitutional interpretations are foreign laws, foreign judgements, international laws and etc. Apart from abovementioned means, globalisation opens new doors in pandora's box of constitutional interpretations. Globalization has had a significant impact on the interpretation of the Indian Constitution. This article is going to sketches a typology of approaches to constitutional interpretation in the parlance of globalisation and its effects on the interpretation of constitution by the constitutional courts and also figure out new developments in constitutional interpretations.

Keywords: Globalisation, Judges, Constitutional Interpretation, institution.

I. INTRODUCTION

“In a globalized world, constitutional interpretation must be informed by a deep appreciation of the values and principles that underlie the international human rights regime.”

- Ruth Rubio Marin, Spanish legal scholar

The 21st century is century of unique and diverse inventions, discoveries, evolution of new concepts, doctrines and of course new trends in constitutional interpretation. The globalisation

¹ Author is a student at Central University of South Bihar, India.

² Author is a student at Central University of South Bihar, India.

makes world more interdependence 'Anthony Giddens', defines globalisation as a process of intensification of worldwide social relations. The local events shaped by world events, that is 'glocalism', the localism + globalism = glocalism³. It has brought changes in ideology, ethics, politics, and society. 'William Twining' refers to globalisation as those "processes which tend to create and consolidate a unified world economy, a single ecological system, and complex network of communications that covers the whole globe, even if it doesn't penetrate to every part of it"⁴. Correspondingly law is an instrument of social change. Due to demand of any society a law comes into existence and by to control behaviour of society or group of individuals, a law framed (Robin D. Owens said that "[T]he law is not a tool to punish, it is a tool to change behaviour."). As society and legal system evolve, new perspectives and methods of constitutional interpretation arises.

In recent years, the interpretation of constitution has greatly focus on individuals' rights and beneficial interpretation to upheld the rule of law. The trend in constitutional interpretation is in India toward greater judicial activism, a focus on human rights, and a recognition of the importance of international and regional law in constitutional adjudication. Due to liberal interpretation of trade and commerce, market liberalisation has greatly enhanced the free flow of goods and services across state borders e.g., the Supreme Court has also been called upon to interpret the Constitution's provisions on interstate trade and commerce, particularly with respect to the movement of goods across state borders. The Court held that state governments could not impose arbitrary taxes or levies on goods entering their territory, as this would violate the Constitution's guarantee of free trade and commerce⁵.

The effect of globalisation is on society *per se*, every sector and segment of society is adopting the culture, morality and other related acts from another part of globe and the approach of the Supreme Court towards constitutional interpretation, *inter alia*, is guided by the principle of "constitutional morality." This principle emphasizes the need for judges to interpret the Constitution in a manner that reflects the values and aspirations of the people and promotes their welfare and progress. Emerging new perspective in constitutional interpretation have touch and fill of effect of globalisation. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilisations across the spectrum of a

³ Srikrishna Deva Rao, LAW, JUSTICE AND GLOBALISATION, 4 GLS LJ. 5, 11 (2021).

⁴ Srikrishna Deva Rao, LAW, JUSTICE AND GLOBALISATION, 4 GLS LJ. 5, 12 (2021).

⁵ Jindal Stainless Steel Ltd. v. State of Haryana, (2017) 12 SCC 1

compassionate global order, India cannot be left behind⁶.

In recent years, the Supreme Court has adopted a broad and liberal approach towards interpreting fundamental rights enshrined in the Constitution. This approach is evident in the Court's judgments on issues such as privacy⁷, LGBTQ+ rights⁸, and the right to dissent⁹. As Justice DY Chandarchud observed in the case of Navtej Singh Johar (2018):

“The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril”¹⁰.

The Supreme Court has also shown a willingness to engage with contemporary social and political issues and to interpret the Constitution in light of changing societal norms and values. This is reflected in the Court's decisions on issues such as the right to protest, the right to access the internet, and the rights of marginalized communities.

II. GLOBALISATION AND EMERGING INTREPRETATION OF CONSTITUTION WITH RESPECT OF INDIVIDUAL RIGHTS

Globalisation is a social phenomenon, by the virtue of this, every institution (social, economic, political and etc) developed/ developing international influence on their modus-operandi and development of new doctrines. The adaptation of international legal origin concept is not new to Indian Judiciary; however, it was used by the judiciary in limited sense but after the impact of globalisation, the road more becomes smooth in implementation of concepts and doctrines due to congruency of facts. Globalisation reflect a growing recognition of the importance of protecting individual rights and freedoms in a rapidly changing world¹¹. As countries become increasingly interconnected, it is important to develop new approaches to constitutional

⁶ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

⁷ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

⁸ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

⁹ Amit Sahni (Shaheen Bagh, In re) v. State, (2020) 10 SCC 439

¹⁰ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

¹¹ Forum Pandya & Bharad, Bhavesh, *IMPACT OF GLOBALIZATION ON HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION*, 3 Gap Inter. 191, 192 (2019).

interpretation that can effectively address the challenges and opportunities presented by globalization. Post globalisation, it is frequently in practise of Indian constitutional courts to adopt new theories and idea of justice for securing individuals rights.

Constitution is a legal organic document Comparative constitutionalism is now using by Constitutional courts as a tool for interpreting constitutional provisions and resolving legal disputes. When faced with a difficult constitutional question, courts may look to the practices and decisions of other countries to gain insights into how similar issues have been addressed in different contexts. In the landmark case of *Naz Foundation v. State (NCT of Delhi)*¹², which decriminalized homosexuality in India, the court referred to legal precedents from several countries, including the United States, Canada, and South Africa, in its reasoning. Courts use comparative constitutionalism to help balance competing rights or interests. By examining how other countries have resolved similar conflicts, courts can develop a more nuanced and informed understanding of the issues at stake and the potential consequences of different outcomes. Some other methods for interpretation of constitution that is emerging are: -

- **Evaluating Policy Choices:** Courts are slightly using this method to evaluate the policy choices underlying constitutional provisions. By examining how other countries have addressed similar policy questions, courts can develop a deeper understanding of the potential benefits and drawbacks of different approaches.
- **Identifying Best Practices:** By examining the practices of other countries, courts can identify new and effective ways of addressing constitutional questions that may not have been considered in the past.

Overall, comparative constitutionalism can be a valuable tool for courts in interpreting and applying constitutional provisions. By drawing on the experiences of other countries, courts can develop a deeper understanding of constitutional issues and identify innovative solutions that may not have been considered before.

III. JUDGING THE JUDGE AND THEIR JUDGEMET

As per Cambridge Dictionary, Judge is a person who is qualified to form or give an opinion about something¹³. Looking for the definition of Judge in legal sense it is a subjective nomenclature, it connotes the thoughts, the research over the facts and applicable laws, legal understanding and the ability to arrive at a decision for which they are authorized. The Realist School of jurisprudence concentrates over the scientific observation and real working of law

¹² *Naz Foundation v. State (NCT of Delhi)*, (2016) 15 SCC 619

¹³ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/judge> (last visited Feb. 3, 2013).

that can only be defined by the judges' decisions. Oliver Wendell Holmes, one of the realist school philosophers, put emphasis upon "a judgment made by judges as the essence of law". Apart from this, he emphasized on the duty of the judges to do justice in absence of any well settled laws by using their own discretion based on the principles of equity, justice and good conscience¹⁴.

What we have seen is the diverse function of judges, but at the same time we have to observe the means upon which discretions are exercised and factors that influence judicial decisions during interpreting and redefining the laws. Charles G. Haines an American realist, enumerated various factors that directly influences judges' decisions are legal and political experiences; political affiliations and opinions; and intellectual and temperamental traits. Apart from this, he also enumerated various factors which indirectly influence the opinions and decision of judges are legal and general education; and family and personal associations, including wealth and social status.¹⁵

Moving toward another factor i.e., Globalization, which is in today's world has impacted, inter alia, every social entity. Result of globalization is also influencing judges' opinion and functioning of courts. It cannot be denied that the comparative method plays a significant role in study of social sciences, and it is a similarly crucial instrument for legal science. In the Indian scenario, the Supreme Court has seen to be always influenced by the dynamics of contemporary political forces, dominant economic relationships, international policies, changing dimensions of human rights and landmark social events. The social dimension of globalization refers to how it affects people's daily lives and jobs, as well as their families and societies. This has always been the concern of judges while interpreting the statutes. For instance, Hon'ble Supreme Court in an epoch-making judgement in *Vishaka v. State of Rajasthan*¹⁶ made a significant contribution upholding the increasing awareness and emphasis on gender justice. Another judgement of *M.K. Sharma v. Bharat Electronics Ltd.*¹⁷ under which scope of Article 21 of the Indian Constitution has been extended to include right to health so as to make life meaningful and not a mere vegetative existence. These are the examples of expanding horizons of Globalization and its impact on decision making process of the judiciary.

Globalization has grown beyond the simple occurrence of cross-border trade to include the cross-national flow of culture, way of life, customs, and information. Migration of constitutional

¹⁴ Legal Aims, <https://www.legalaims.com/realist-school-of-jurisprudence> (last visited Feb. 8, 2013).

¹⁵ Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 *University of Baltimore L. Forum* 5, 6-7 (1998).

¹⁶ *Vishaka and Ors. vs. State of Rajasthan and Ors.*, (1997) 6 SCC 241

¹⁷ *M.K. Sharma v. Bharat Electronics Ltd.*, (1987) 3 SCC 231

idea is not a very new concept but, due to globalization, world has witnessed an increase in the study of comparative constitutional law and interpretation of same accordingly. For instance, supreme court in while interpreting commercial laws upheld various internationally recognized principles such as John Doe order, Anton Pillar order, Bolar Provisions etc.

Justice Sanjay Kishan Kaul, while addressing the gathering the celebration of 73rd anniversary of the establishment of Supreme Court of India, asserted that like other institutions supreme court cannot be immune and remain mute spectators to the globalization¹⁸. He further emphasized upon the fact that the global events have a greater impact on domestic legislation, and progressive judicial decisions in other nations might have a resonating effect in other jurisdictions, requiring a review of one's own norms and procedures. He further added “nature of the challenge was global; our response could not be local.”¹⁹

The expertise and various mechanisms through which judges determine the actual meaning, its objective and purpose involves various factors such as the judge's life-long series of previous experiences, with their resultant integration in emotional tone which unconsciously attach themselves in considering and analysing the facts of the case.

IV. ROLE OF PERSUASIVE AUTHORITY: SPECIAL REFERENCE TO NON-INDIAN PERSUASIVE AUTHORITY

Indian constitutional courts largely rely upon two kinds of authorities while interpreting the constitutional provisions, they are binding authorities and persuasive authorities. As far as binding authority is concerned, it includes well settled principles of law, judgements delivered by the higher courts etc. However, persuasive authorities mean non-binding authorities that includes, judgements of similarly placed High Courts, various canons of interpretation laid down under various judgments, and various non-Indian authorities like judgments of foreign courts and international law. Globalization have brought Indian constitutional law in contact with foreign law and played a significant role in manifolds such as developing a new dimension of jurisprudence and also in identification of normative and factual assumptions in similarly

¹⁸ Editor_4, *Supreme Court cannot be immune to globalisation. Since the nature of challenge is global, our response cannot afford to be local*: Justice Sanjay Kishan Kaul, SCC online Blog (Mar. 02, 2023, 10:35 AM), <https://www.scconline.com/blog/post/2023/02/07/justice-kishan-kaul-asserts-that-supreme-court-cannot-be-immune-to-process-of-globalisation-legal-news-legal-research-updates-73-anniversary-supreme-court-india-justice-sundresh-menon-chief-justice-si/>

¹⁹ Editor_4, *Supreme Court cannot be immune to globalisation. Since the nature of challenge is global, our response cannot afford to be local*: Justice Sanjay Kishan Kaul, SCC online Blog (Mar. 02, 2023, 10:35 AM), <https://www.scconline.com/blog/post/2023/02/07/justice-kishan-kaul-asserts-that-supreme-court-cannot-be-immune-to-process-of-globalisation-legal-news-legal-research-updates-73-anniversary-supreme-court-india-justice-sundresh-menon-chief-justice-si/>

placed cases.

The Supreme Court in *Aruna Ramchandra Shaunbag v. Union of India*, relied upon the worldwide recognized principles relating to active and passive euthanasia and quoted various cases decided by some foreign courts like *Airedale NHS Trust v. Bland*²⁰ (THE AIREDALE CASE) to reach at a conclusion. Apart from that, there are various cases which has been decided by relying upon foreign judgments, supreme court in *Maneka Gandhi v. Union of India*²¹ case relied upon various principles laid down by US courts, and overruled such judgements which followed lower threshold of 'procedure established by law' to evaluate the validity of governmental action that curtailed personal liberty.²² The Supreme Court explicitly relied on American decisions to hold that indigent persons were entitled to receive free legal services in *M.H. Hoskot v. State of Maharashtra*²³ diversified the interpretation of 'substantive due process' by including free legal services entitlements as an 'imperative processual piece of criminal justice' implicit in Art. 21.

Globalization have enhanced the domestic legal system to a certain extent while putting reliance upon the non-Indian persuasive authorities in recent decades. In past decade quantitative terms of the citation of foreign cases is the highest ever in the history of Indian Judiciary. But it is also important to envisage the side effects of the same and at the same time the precautions that a judge should carry against giving undue weightage to precedents. The main reasoning behind such precautions and cautions, if Judges are allowed to freely rely upon the non-Indian persuasive authorities, there is tendency that Judges will freely indulge into the matters and they will justify their decisions rather than engage themselves into a rigorous enquiry into domestic precedents resulted into constitutional transplantation. Thus, globalization has fundamentally impacted judicial institution of the worlds and has manifolds positive impacts upon them. In other words, there is no reasons to suppress the impacts of globalization rather, they must be judged in domestic context taking care of its own social, pollical, cultural identities, domestic laws and legal procedure and the practical realities of litigation in India.

V. CONCLUSION

Constitution is an organic and dynamic document and the principles and morality of the same cannot be interpreted in vacuum. New principals of interpretation emerge by the emergence of

²⁰ *Airedale NHS Trust v. Bland*, (1993) All E.R. 82 (H.L.)

²¹ *Maneka Gandhi v. Union of India*, AIR 1973 SC 106

²² Burhan Majid, *Persuasive Role of Foreign Judgements: An Indian Context*, JAY KAY L. REPORTER PVT. LTD, 1, 3-6 (2018), https://www.jklaws.in/admin_panel/files/9201711035450.pdf

²³ *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 802

society and development of legal principals. Due to effect of globalisation, the world is coming together and mixing of culture, economy and other aspects of living, it is inevitable that, the way of constitutional interpretation changes too and the decision in various case, the apex court of India has been instrumental in ensuring that India's legal system keeps pace with the changes brought about by globalisation by using new trends of constitutional interpretation, while also upholding the Constitution and protecting the rights of its citizens.

Today, Supreme Court of India reach from textualist interpretation to Comparative Constitutionalism, in mid of this, the court used different types of methods to interpretation. Emergence of new perspective in constitutional interpretation is running through constitutional interpretation and the recognition of the importance of diversity and inclusion in constitutional interpretation. This perspective takes into account the experiences and perspectives of marginalized groups, such as women, ethnic and racial minorities, and members of the LGBTQ+ community. It emphasizes the need to ensure that constitutional principles are applied in a way that is inclusive and respectful of diversity.
