SUPREME COURT’S RELIANCE ON FOREIGN PRECEDENTS: WAVING AND MINDLESS

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All of us know about the heavy reliance of the Supreme Court of India on foreign precedents on vital questions that have arisen before it for constitutional adjudication. The evidence of the reliance on foreign judgments stares at us in the Supreme Court’s judgments on fundamental rights, trade commerce and intercourse, religion and freedom of speech and expression provisions of the Constitution of India. This raises the question as to the consequences of such reliance on foreign judgments.¹ The question that faces us is as to what are the consequences of such reliance on foreign precedents.

**Cautionary Sting: Actual Enforcement**

Before we set out on this journey a note of caution is given herein. Since 1950 Central and State Government’s unconstitutional economics² of the kind and manner of making cities out of village India has scarred the common man into hopeless helplessness. Hence when the Supreme Court in several key constitutional cases uses constitutional language to reiterate the official promises of constitutional justice promised to the common man since 1950, the print, electronic and social media resonate with an institution that revives hope. A middle class on the edge of its tolerance but again helpless, resonates in applause to the language of freedom and dignity flowing from the highest court on the basis of foreign precedents.

But the sting lies in the implementation of such judgments just as it lay in the execution of the mandatory constitutional justice by successive ruling politicians who used the Constitution and the law to create a de facto political economy that in reality wrecked constitutional values. Therefore, we must distinguish between the grand statements of the Supreme Court purporting to grant relief in roseate language and the manner in which it has arrived at that relief, by using foreign precedents. The use of foreign precedents is a reality of judicial practice in India.

¹Cases like that of coal block allocation 1993-2010, Manohar Lal Sharma v Union of India, judgment dated August 25, 2014 in CWP 462/2012 shows that the Supreme Court can decide vital issues concerning distribution of natural resources without any reference to foreign judgments.

precedents ignores the local police, governance and business culture, wholly alien to that foreign precedent.

Lawyering: Take Interim Relief and Scoot

The net result has been an increasing interim applications practice at the Supreme Court leaving the major issues that may be raised by a petition to an unknown future. When that future of a final hearing comes, the reliance on foreign judgments, without context or cause, gives us judgments that have singularly remained unenforced. The Supreme Court seems to forget that its jurisdiction of fundamental rights is specifically for the “enforcement of these rights in terms of Art. 32(1) and 32(2). There is no foreign precedent that the highest court of a country should pay none or little attention to the enforcement of its own writ in the designing of its judgments which impact the present and future of millions in Public Interest Litigation, the high point of media accolade of the Supreme Court. In an exceptional judgment, Indian Council for Enviro-Legal Action v Union of India (the HI Acid case of Bichhri village in Udaipur district) the Supreme Court pointed out on July 18, 2011, that even after fifteen years the final judgment dated February 13, 1996, “the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. ...This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half. This is indeed a very serious matter, concerning the sanctity and credibility of the judicial system in general and the apex court in particular.”

The judgment after noting all the Indian decisions on the issue that the judgment of the apex court can be reviewed and recalled only in extremely exceptional circumstances, went on a foreign tour of Commonwealth

3Art 32(1): The right to move The Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

4Art 32 (2): The Supreme Court shall have power to issue directions orders or writs...for the enforcement of any of the rights conferred by this Part.

courts for “corroboration” England: Regina v Gough\(^6\); Canada: Wewaykum Indian Band v Canada;\(^7\) Australia: State Rail Authority of New South Wales v Codelfa Constructions Propriety Limited\(^8\); U.S.A: United States v Ohio Power Co.\(^9\) and then to Fiji. The profits made by this clutch of factories manufacturing inherently hazardous H+ acid over this decade and a half of delay were nowhere calculated in the judgment. The financial data and returns were not called for. Hence the principle of our own and the foreign judgments, that such profits must be disgorged could not be inherently applied, because you cannot apply a principle, if you do not know to what it is to be applied.

**Legal Businessmen and Constitutional Indiscipline**

Those Senior advocates and advocates-on-record who control most of the legal business at the Supreme Court join the media in pouring praise for the judgments, while forgetting that constitutional questions which the Constitution mandates to be decided by a bench of at least five judges,\(^10\) have been decided by three and two judges benches. There is no foreign precedent, that the highest court can so disregard or violate the very Constitution under which it is constituted.\(^11\)

**Verbal- Actual Gap: Unconstitutional Economics**

It is probably a part of chic international judicial diplomacy to be applauded at several international forums, by those whose judgments the Supreme Court of India relies upon. But such applause generally does not take into account the Supreme Court’s silence for about seventy years

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\(^6\) [1993] AC 646.
\(^7\) [2003] 2 SCR 259.
\(^8\) (1982) 150 CLR 29.
\(^10\) Art. 145(3).
since independence on the political economy of unconstitutional economics, even while verbally showering fundamental rights of nutrition, clothing, shelter, medi-care and literacy by simply picking up Directive Principles and putting them under the fundamental right to life in Art. 21,\textsuperscript{12} that defeats its judgments from the outset. This tragic gap between the verbal and the actual arises because the political economy entrenched in unconstitutional economics, makes the implementation of Supreme Court judgments and schemes possible only to the extent that the political economy’s wealth generation process of equally entrenched corruption permits, under a constitutionally blessed system of continued British legal governance through the British administrative, police and revenue machinery that continues in post-independent India,\textsuperscript{13} unaccountable governance, while having the constitutional forms of accountability. Francis Coralie Mullin relied on three United States judgments.\textsuperscript{14} While these three foreign precedents led to the verbal blossoming of converting, without giving any reason, unenforceable Directive Principles into enforceable fundamental rights, there was nothing in the judgment to hold any specific officer responsible or accountable for its actual delivery or implementation. This contradiction developed because the Supreme Court did not examine the verbal fundamental rights it was creating in the context of the political economy within which these rights have to be realized.

This was despite the Supreme Court having held three years before the 1981 Francis Coralie judgment that “The controversy before the court may be political in character, but so long as it involves determination of a constitutional question the court cannot decline to entertain it. Where the question relates to the interpretation of the Constitution of India, it is the duty of the Supreme Court to interpret it regardless of the fact that it would have a political effect.”\textsuperscript{15}

\textsuperscript{12} \textit{Francis Coralie Mullin v Administrator, U.T., Delhi}, AIR 1981 SC 746.
\textsuperscript{13} Arts. 374-378, 312(2), 277, 294, 118(2).
\textsuperscript{15} \textit{State of Rajasthan v UOI} AIR 1977 SC 1361.
The Supreme Court to actualize the judgment was required to interpret the words in Directive Principle, Art.41, “within the limits of its economic capacity and development.” for protecting citizens against “undeserved want”, and ask the Union of India to explain how to operationalise the Francis Coralie judgment in this context. The consequence would have placed the annual budget for an examination by the Supreme Court as to whether the country’s money allocation priorities are according to the Directive Principles-right to work, education and public assistance in cases of unemployment. Today there is about seven percent per annum economic growth which goes into the hands of a small percent of the 1.25 billion population and job growth is nil.\textsuperscript{16} The entire pyramid of unconstitutional economics\textsuperscript{17} that lies in official planning and budgeting would have been placed under judicial scrutiny for a possible judicial correction. It would have reshaped the existing political economy. But then this legal thinking in the context of our Constitution is short circuited by the reliance on foreign judgments belonging to an entirely different context of political cum socio-economic evolution, culture and the making of a Constitution.

**Sustainable and Shared Development**

This contradiction results in the sting that makes the entire concept of sustainable development, borrowed by the Supreme Court from abroad, unsustainable because of the missing constitutional value of shared development. That sustainable development can only be shared development or development with justice, is shown by the constitutional credo of justice that is social, economic and political for all. The three words social economic and political march together even when translated into economic planning, as shown by Entry 20 in List III which speaks of

\textsuperscript{16}Economic Survey, 2015: During 2001-11, the growth rate of the labour force (2.23%) was much higher than the growth rate of employment (1.4%). Census 2011 states that the growth rate of the economy was 7.7% per annum, while it was only 1.8% for jobs. Govt. jobs were 19.5 million in 1996-97 but are about 17 million in 2015. Last quarterly survey of the Labour Bureau states that in 2011 more than 9 lakh jobs were created in India, in 2013 only 4.19 lakh and in 2015 only 1.35 lakh jobs in 8 labour intensive industries.

\textsuperscript{17}Supra note 2.
“Economic and Social Planning” and not only of economic planning. An outstanding judicial example of ignoring the constitutional credo is the acute anaemia in which Parliament funded, but judge controlled official legal aid is, from poverty to disaster management justice under the respective notifications of schemes and statutes.\(^\text{18}\) The Supreme Court has not used the national legal aid network under it, to ensure the fundamental rights of potable drinking water and free primary education, declared by it. Till 2015 the National Legal Services Authority (NALSA) had no legal aid scheme to ensure legal entitlements to the destitute under the GOI’s Poverty Alleviation Schemes. Under earlier schemes one hears hardly of any push by NALSA for legislative, administrative and / or judicial justice to the destitute. This implies that if there are no foreign judgments on use of legal aid for ensuring the legal due of ‘constitutional consumers’,\(^\text{19}\) that is those who are conferred the minimum for survival by the State’s Schemes / laws, then such consumers will get nothing from the Supreme Court, regardless of their fundamental rights.

An interpretation in the context of our country and Constitution, in the context of foreign judgments of different countries and Constitutions, would mean reversing the equation: Unshared development= Unsustainable development= Unconstitutional economics, to Shared Development= Sustainable Development= Constitutional Economics. But once again the entire discourse of sustainable development in the judgments of the Supreme Court relied on foreign judgments/reports, including British common law,\(^\text{20}\) without any mention of shared development required by our Constitution and the country. There cannot be a future of sustainable development by ignoring present development when present development is the basis of sustainable development.

\(^\text{18}\) Second Report, 2016, of the Supreme Court Committee on Consumer Courts states that there is lack of awareness in tribal and semi-urban areas and the condition of the district forums and State Commissions is pathetic.


\(^\text{20}\) Our legal system having been founded on the British common law the right of a person to pollution free environment is a part of the basic jurisprudence of the land. see *Vellore Citizens Welfare forum* v *UOI* AIR 1996 SC 2715.
Sustainable is unsustainable if used for masking the consequences and causes of present development.

This explains the complete negation of Supreme Court judgments on sustainable development. The question of sustainable development as shared development was never asked in the coal allocation\textsuperscript{21} and spectrum\textsuperscript{22} allocation cases before the Supreme Court, despite this being the declared constitutional basis of allocation of natural and man-made resources. There is no foreign precedent for ignoring the Constitution in development and allocation of natural resources. Yet foreign judgments have been used by the Supreme Court to put across sustainable development without the constitutional component of shared development, which implies the shared suffering of development. American, Canadian, Australian or British judgments need not talk of shared development because these countries have politically crossed the hump of a development that ensures everyone the minimum essentials of life without the need to act illegally or be corrupt, at a time when environment was no one’s concern. Hence the judgments of those countries on sustainable development have a context entirely different from the Indian, where the right to a minimum food stands legislatively\textsuperscript{23} secured but unavailable without corruption and legal aid nowhere in sight for enforcing this right.

**Foreign Precedents: Supreme Court’s Ambivalence**

It seems that these differences of context, culture and creed have resulted in various implicit and explicit stances, sometimes ambivalent and at other times direct, of the Supreme Court concerning the use of foreign judgments.

**Separation of Powers: U.K. v U.S**

In Re Delhi Laws Act,\textsuperscript{24} the court declared that since we have adopted the Cabinet system of government of the British model, an application of the doctrine of separation of powers in the American sense would be out of

\textsuperscript{21}Supra note 1.

\textsuperscript{22}Centre for Public Interest Litigation v UOI (2012) 1 SCC 1.

\textsuperscript{23}National Food Security Act, 2013.

\textsuperscript{24}1951 SCR 747.
question. Instead of doing our own judicial thinking from our Constitution, the Supreme Court has adopted the lazy way of simply adopting a foreign system.

**Job of Jurists**

In Dwarkadass v Sholapur Spg. & Wvg. Mills Co.\(^{25}\), Justice Vivian Bose declared: “it was for jurists and students of law, not for judges, to determine how far the provisions of the Indian Constitution resembled or differed from the comparable provisions of the Constitutions of other countries.”

**India’s Religion: From Australia**

In The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,\(^{26}\) the question of the meaning of the word ‘religion’ in Art.26(b) came up for decision. In an India having five thousand years of cultural heritage and internationally renowned philosophers like Dr. S. Radhakrishnan; Justice Mukherjea for the court searched first among the U.S decisions. He picked out Davis v Benson\(^{27}\) and declared “we do not think that the above definition can be regarded as either precise or adequate.” He went further to state that Articles 25 and 26 of our Constitution are for the most part based on Art. 44(2) of the Éire Constitution, he held that "we have great doubt whether a definition of religion as given above could have been in the minds of our Constitution makers when they framed the Constitution." Having delivered a judgment on the foreign judgment, then without any reference to the Constituent Assembly Debates or the substance of Art.44(2) of the Eire Constitution, he held that. After distinguishing between religions in India which have or do not have an Intelligent First Cause, he settled for a definition given by the Australian High Court in Adelaide Company Jehovah’s Witnesses Inc. v The Commonwealth,\(^{28}\) under Section 116 of the Australian Constitution, followed by a detailed discussion of American and Australian cases on Jehovah’s Witnesses. Then on page 1028 he held

\(^{25}\)(1954) 1 SCR 674.
\(^{26}\)1954 SCR 1005.
\(^{27}\)133 U.S. 333 (1890).
\(^{28}\)(1943) 67 C.L.R. 116.
inter alia: “…the language of Articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not.” This rendered the entire discussion on foreign precedents meaningless and shows how judicial time is wasted.

The court created a new category called “essential rites and ceremonies according to the tenets of a religion”, which a religious denomination or organization will have complete autonomy to decide. It held that, “No outside authority has any jurisdiction to interfere with their decision in such matters.” It forgot the doctrine of separation of powers of the British kind adopted by it in Re Delhi Laws Act\(^\text{29}\) and also the historically evolved British doctrine of separation of State and religion.

**Justice Bhagwati’s Crusade: Rely on Foreign Precedents**

After this in a few judgments the Supreme Court warned against the use of foreign precedents. But in an act of deliberate judicial indiscipline, Justice Bhagwati, in Express Newspapers v UOI, \(^\text{30}\) stated: “It is trite to observe that the fundamental right to the freedom of speech and expression, enshrined in Art.19(1) (a) of our Constitution is based on …Amendment 1 of the Constitution of USA and it would therefore be legitimate and proper to refer to those decisions of the Supreme Court of USA….in order to appreciate the true nature, scope and extent of this right, inspite of the warning administered by this Court against the use of American and other cases.”

**Ivor Jennings: The Social Context**

But the ambivalence in the use of foreign precedents continued even as the use of such judgments increased. What W. Ivor Jennings had stated in the Law & the Constitution\(^\text{31}\) was not even referred to by the Supreme Court. He had stated “The mere study of the constitutional text obscures fundamental changes taking place, confining the constitutional lawyer to the explanation of a political system which exists on paper and not in

\(^{29}\) *Supra* note 25.
\(^{30}\) AIR 1958 SC 578.
\(^{31}\) W. Ivor Jennings, Law and the Constitution (1956).
practice. A public lawyer will fail to understand a constitution apart from the social conditions that produce it and its consequences for the people who are governed by it.”

**SC’s Earlier Use as Justification**

In Atiabari Tea Co. v State of Assam, Justice Gajendragadkar speaking for the majority justified the use of foreign precedents because the SC had been doing it earlier. He stated “It is common place to say that the political, historical background of the federal polity adopted by the Australian Commonwealth, the setting of the Constitution itself, the distribution of powers and the general scheme of the Constitution are different, and so it would not be safe to seek guidance or assistance from the Australian decisions when we are called upon to construe the provisions of our Constitution. Even so reported decisions of this court show that in dealing with constitutional problems reference has not infrequently been made to Australian and American decisions; and that we think, brings out the characteristic feature of the working of judicial review. When you are dealing with the problem of construing a constitutional provision which is none too clear or lucid, you feel inclined to inquire how other judicial minds have responded to the challenge represented by similar provisions in other sister Constitutions.” But he did not point out what was unclear about the Indian provisions in the Trade, Commerce and Intercourse chapter of the Constitution of India.

**Subba Rao J: Redoing the Work of the Founding Fathers**

Subba Rao J in Automobile Transport Ltd. v State of Rajasthan unnecessarily opened the whole debate once again.

>*He stated “our Constitution was not written on a clean slate. Many of the concepts were borrowed from the GOI Act, 1935 or from other Constitutions and adopted to suit the conditions of our country. We cannot ignore the fact that the Constitution was drafted by persons some of whom have had a deep knowledge of the interpretation put upon certain legal concepts by the highest*

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32 AIR 1961 SC 232.
33 AIR 1962 SC 1406.
tribunals of those countries. At the same time, it can be reasonably assumed that they have made a sincere attempt to accept the good and avoid the defects found by experience in the other Constitutions, and also to mould them to suit our conditions. Further a brief survey of the relevant provisions of those Constitutions, which form the background of this Article 301, the interpretation put on them by the highest tribunals of the respective countries would not only be relevant, but also be necessary for appreciating the correct scope of Art. 301 of the Constitution of India.

The question which begs to be answered is that if the careful selection and moulding to suit our conditions has already been done, then why the judges should start doing this work again by once more referring to foreign judgments, admittedly already perused with care, by our Constitution makers. This question is not raised and not answered by the judgment.

**Foreign Precedents: Safe or Unsafe**

In Kesvananda Bharati v State of Kerala,\(^{34}\) which saw a free use of foreign precedents, the judgment of Justices Jaganmohan Reddy and Dwivedi, pulls us back to the Constitution of India. They held that “it was unsafe to rely on cases which arise under other Constitutions.

> Law varies according to the requirements of time and place and justice becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein... Decisions of foreign courts and articles written on various Constitutions by foreign authors, would not be a safe guide in construing the Indian Constitution.

**Import Relevant British Conventions**

In Samsher Singh v State of Punjab,\(^{35}\) the question arose about the cabinet system conventions. The court held that reference to British precedents is not necessary where the Constitution of India has codified the conventions

\(^{34}\)AIR 1973 SC 1661.

\(^{35}\)AIR 1974 SC 2192.
of the unwritten Constitution of England. But since it was not physically possible for the framers of the Indian Constitution to codify all the numerous unwritten conventions upon which the Cabinet system of Govt. stands, on matters on which the Indian Constitution is silent----there being no express provision either adopting or rejecting the British Convention ---the British convention should be imported in interpreting the codified provisions insofar as they are relevant. In a sweeping generalization that our legal system having been founded on British common law, the Supreme Court in Vellore Citizens Forum v UOI,\(^{36}\) derived the right of a person to a pollution free environment from the British law of nuisance as given in Blackstone’s Commentaries on the Laws of England,\(^{37}\) even though since 1977 the Constitution of India carried specific provisions in the Directive Principles and Fundamental Duties concerning the environment as also the Supreme Court had already declared hygienic environment as a fundamental right in Subhash Kumar v State of Bihar.\(^{38}\)

**Understand and Shut the Mind**

Repeating these variations from country to country, in Fatehchand Himmatlal v Maharashtra\(^{39}\) the Supreme Court held that “...although lexico graphic aids and understanding in alien jurisdictions may also be looked into for light, but not beyond that.” Remarkably, the suggestion is to see the light and then shut your mind.

**The Back Swing and Justice Bhagwati**

In a swing back, Pathumma v State of Kerala (bench of seven),\(^{40}\) now stated that the “Court need not rely on the American Constitution for the purpose of examining the freedoms contained under Art.19, because of the social conditions and habits of the people of our country.” However, in Maneka Gandhi v UOI,\(^ {41}\) after deciding the question of whether the liberty of free speech and expression can be exercised outside India, the Court

\(^{36}\)(1996) 5 SCC 647.


\(^{38}\)(1991) 1 SCC 598.

\(^{39}\)AIR 1977 SC 1825.

\(^{40}\)AIR 1978 SC 771.

\(^{41}\)(1978) 1 SCC 248.
declared in Para 26; “This view which we are taking is completely in accord with the thinking on the subject in the United States.” This was new test for Indian judgments. Then in 1979 Justice P. N. Bhagwati, carrying on his rebellious crusade against what his own court was saying about use of foreign precedents since 1958, in the Express Newspapers case, relied on U.S. decisions while determining what are instrumentalities or agencies of the Government for purposes of Art.12 of the Constitution. He did this in the case of Ramannanv Indian Airport Authority.42

**Judge to Judge v Institutional Approach**

In Indian Express Newspapers v UOI,43 while considering the fundamental right of free speech and expression, the Supreme Court held that our interpretation of this right should not be solely guided by the decisions of the Supreme Court of USA; but to understand the basic principles of freedom of speech and expression and need for that freedom in a democratic country, decisions therein may be taken into consideration. This leaves the matter in the hands of each judge of the Supreme Court of India. Hence there is no institutional approach.

The same ambivalent approach is visible in Christian Medical College Hospital Employees Union v Christian Medical College Association, Vellore;44 The Court observed that the courts in India need not be guided always by what the Supreme Court USA says about its own Constitution. Though our courts may refer to the relevant aspects of the constitutional law of USA, but whatever may be the similarities between the Constitutions of other countries with similar federal structures as this country, such as, USA, Canada, Australia, as a general rule, the opinion expressed by the courts of those countries may not be helpful in construing the allocation of legislative heads in our Constitution, although there may be some relevance in determining the true character of a particular legislation. It is deemed sufficient to restrict our opinion, based on views expressed by the Indian Supreme Court.

42 AIR 1979 SC 1628.
43 AIR 1986 SC 515.
44 AIR 1988 SC 37.
In Sub-Committee on Judicial Accountability v Union of India, the judgment declared that since in India, the written Constitution itself acts as a limitation upon the powers of the legislature, any talk about the sovereignty or omnipotence of Parliament in the Dicean sense or any reliance on British precedents, founded upon an absence of separation of functions between the legislatures vis-à-vis the judiciary, cannot be of any avail.

First Consequence

The first consequence of these approaches to foreign precedents is the loss of reason. From Justice Bhagwati’s rebellious reliance on foreign precedents to the outright rejection of their use by other benches of the Supreme Court, with a middle group of judges wanting to see the light through such precedents while shutting their eyes, there is nowhere a reasoned discourse in the judgments so delivered, as to the reason for these positions. If any reason is given it is in terms of generalities like social milieu, economic conditions for rejecting the use of foreign precedents or that the Supreme Court has been using such precedents and so the same can be used.

The best example of this is the much acclaimed “due process” related to the case of Maneka Gandhi. While importing this from the United States Constitution, despite the Constituent Assembly having specifically rejected its incorporation in the Constitution of India, it was forgotten that the Fifth and Fourteenth Amendments to the U.S. Constitution showed that the due process clause was a battle of federal relations in the USA. It was not a battle for the content of due process, as was the case in Maneka Gandhi’s case. In this case the Attorney General’s statement granting the reliefs sought, including that of a time bound decision on a representation or an appeal, was accepted by the Supreme Court. The reliefs having been obtained, the case ought to have ended there. But Justice Bhagwati led the

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46 Supra note 31.
47 Supra note 39.
48 Supra notes 33 and 35.
49 Supra note 41.
discussion into the constitutionality of Section 10(3)(c) of the Passports Act. The precedent of Hurdut Roy Moti Jute Mills,\textsuperscript{50} was forgotten, wherein it had been laid down that the Court will not enter into the constitutionality of a law if it is possible to dispose of the case and determine the rights of the parties before it on other grounds.

Justice Bhagwati upheld the constitutionality of the impugned provision of the Act and thereafter without any reason went into an abstract discussion of several pages of the approach to the constitutionality of a law when it is challenged on the ground of fundamental rights, referring to R.C. Cooper v UOI\textsuperscript{51} and Bennett Coleman v UOI\textsuperscript{52} cases. After this, admitting that the issue whether Art.19(1)(a) was confined to the territory of India was not an issue in the case, yet he examined and decided this.

Then while admitting that the petitioner had not pressed her right to go abroad, he examined this. The process reached its zenith by taking hypothetical examples of a pilot, a musician, a scholar or a journalist wanting to go abroad. In Para 37 the judgment moved one step more to a possible future situation if the petitioner actually wanted to go abroad. After an extensive discussion of A. K. Gopalan,\textsuperscript{53} R. C. Cooper,\textsuperscript{54} Shambhu Nath Sarkar\textsuperscript{55} and Haradhan Saha,\textsuperscript{56} the judgment held that the challenge to the Union Government action of impounding the passport under the Passports Act failed on the grounds of Arts.19(1)(a) and 19(1)(g). Even though Naresh Shridhar Mirajkar v State of Maharashtra\textsuperscript{57} was cited in the judgment, yet its relevant caution at page seven was ignored, that is, that the court should not cover grounds or make observations on points not directly involved in the proceedings. It is in this context of a complete lack of judicial discipline that one can

\textsuperscript{50} AIR 1960 SC 378.
\textsuperscript{51} AIR 1970 SC 1318.
\textsuperscript{52}(1972) 2 SCC 788.
\textsuperscript{53} AIR 1950 SC 27.
\textsuperscript{54} (1970) 2 SCC 298.
\textsuperscript{55}(1973) 1 SCC 856.
\textsuperscript{56}(1975) 3 SCC 198.
\textsuperscript{57} AIR 1967 SC 1.
understand the freewheeling use of foreign precedents in the Maneka Gandhi judgment. No reason whatsoever is given for such use.

Second Consequence: Intra–Bench Discipline Broken

In Tata Press Ltd. v MTNL a three judge bench of the Supreme Court exhibited in full measure the damage that a mechanical following of U.S precedents can cause. In question was the earlier Constitution bench(5 judges) judgment in Hamdard Dawakhana v UOI, which had held that commercial speech cannot be a fundamental right since it depends upon the object of each advertisement. Hamdard had relied on the U.S. Supreme Court judgment in Valentine v Chrestensen. In 1985, Indian Express Newspapers v Union of India was decided by a three judge bench on the issue of import duty on newsprint. The three judge bench broke the discipline of smaller benches not considering and pronouncing upon the judgments of a larger bench. It referred to the Five judge bench decision in Hamdard Dawakhana and after showing how the U.S. decision in Valentine’s case had been practically overruled by subsequent decisions, it held that the decision in Hamdard Dawakhana was ‘too broadly stated’. In the Tata Press case a third U.S Supreme Court case in Virginia State Board of Pharmacy v Virginia Citizens Consumer Council was cited to hold that Valentine’s case was no longer a good law on commercial speech and the U.S First Amendment. Hence Hamdard Dawakhana could no longer be good law. Advertising was stated to be the lifeline of democracy and the life blood of the media. But on this basis, the decision was given without balancing this right with the need to fasten on advertisers in India the responsibility of stating the nature of the product, its energy and environmental load, traditional products that would as effectively meet the need that the advertised product claims to meet and the side-effects, if any of using the advertised product. The direct and inevitable effect of conferring a free speech right on business advertising was not considered by the Supreme Court in the context of the illiteracy, lack of product

59(1960) (2) SCR 671.
60316 U.S. 52(1942).
61(1985) 1 SCC 641.
62425 US 748.
information and virtual absence of legal aid for consumer protection that prevails in India. In its fervent enthusiasm to follow U.S. Supreme Court judgments, the Supreme Court of India forgot India and Indians, to balance the grant of the status of a fundamental right to business advertising by balancing it with responsible public interest advertising. Pursuing foreign precedents in this manner puts at risk the credibility of the Supreme Court as an institution.

Third Consequence

The third consequence is that reliance on foreign precedents in constitutional decision making by the Supreme Court acts as a short cut to thinking out the problem before it in terms of Indian conditions. In the alternative foreign judgments are used to lay down a constitutional counter culture to the existing culture. But this does not succeed even where no foreign judgments are used. An example of this is the Supreme Court judgment of Sept 22, 2006, in Prakash Singh v UOI giving specific directions on police reforms which sought to change the entire police structure as inherited since British colonial times. About a decade later, till today, the judgment remains unimplemented and the Supreme Court is silent about it. The directions in the judgment came almost ten years after the petition was filed as civil writ petition - CWP 310 of 1996. We are back to the problem of “enforcement” in Art. 32. The Supreme Court of India has to decide whether it is an enforcer of fundamental rights or simply an institution for declaring such rights from case to case with interim compensation where necessary.

Conclusion

63 The judgment had been directed to be complied with by December 31, 2006 and affidavits of compliance were to be filed by January 3, 2007. On January 11, 2007 the court was faced with affidavits objecting to the directions or showing partial compliance. The Court rejected the plea of a review of its September 22, 2006 orders. It directed that the three self-executory directions be complied within 4 weeks and gave 3 months for compliance with the four other directions. States were to file affidavits of compliance by April 10, 2007. The case rests here.
More examples can be added to show a constant repetition of the process of using foreign precedents by the Supreme Court of India. The basic point remains that the use of foreign precedents in a factual vacuum concerning Bharat (India) and how it daily deals with the political unaccountability and corruption, only ensures the continuation of this system which retards constitutionalism. Free speech about the Constitution of India is meaningful only if the Supreme Court of India cares to speak to its own constituency of consumers of justice -the people of Bharat-in their own language/s. The Supreme Court had not even endeavoured such a step though the technology and manpower of simultaneous translations is available for the past many years in India and is used in international conferences. Only the Supreme Court can answer as to why it has chosen to do nothing about this. Independence of the judiciary surely cannot mean freeing yourself intellectually from the reality of the fate of Indians.