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**TEXT, CONTEXT, AND HUMAN RIGHTS-BASED INTERPRETATIONS BY
DOMESTIC COURTS**

Deepa Kansra & Rabindra Kr Pathak

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TEXT, CONTEXT, AND HUMAN RIGHTS-BASED INTERPRETATIONS BY DOMESTIC COURTS

Deepa Kansra & Rabindra Kr Pathak***

[Abstract: Domestic courts have attained prominent status in the international human rights system. While adjudicating individual claims and interpreting legal provisions, domestic courts have conveyed meanings that are integral to the working of the international human rights system. The dynamism of domestic courts is an undeniable quality, through which they incorporate diverse perspectives based on principles linked to individual sovereignty, justice, peace, etc. In this paper, the role of the Indian Supreme Court has been discussed in light of three landmark decisions where the court applies international and domestic human rights standards to substantiate its interpretations. In light of the cases of Navtej Singh v. Union of India, Joseph Shine v. Union of India, and KS Puttaswamy v. Union of India, the paper examines the approach of the court under five broad headings: (a) the domestic context, (b) autonomy and determination, (c) constitutional parameters and validity of laws (d) vulnerability, and (e) other courts and other contexts. On the role of domestic courts in general, the paper outlines a list of the contributions that domestic courts are making in the field of human rights.]

I

Introduction

The idea of human rights having acquired uniqueness and strength over the years overwhelmingly influences deliberations on human rights at the domestic and international levels.¹ Human rights, with the characteristic of conveying a multiplicity of meanings based upon the diversity of perspectives accorded to them, engage with situations of individual, societal and international importance. For that reason, they are

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¹ See, Beth A. Simmons, MOBILIZING FOR HUMAN RIGHTS INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Koldo Casla, POLITICS OF INTERNATIONAL HUMAN RIGHTS LAW PROMOTION IN WESTERN EUROPE: ORDER VERSUS JUSTICE (2020); Sharyn Roach Anleu, *Sociologists confront human rights: the problem of universalism*, 35(2) JOURNAL OF SOCIOLOGY 198 (1999).

well-referred to as comprising 'a whole variety of normative texts concerned with values, principles, norms, standards, rules, and practices/conduct.'² It goes without saying that since the adoption of the Universal Declaration of Human Rights (1948),³ the popularity of human rights has been intense owing to the process of juridification, making legal and political instruments such as constitutions and international human rights treaties appear as the unifying force and the most credible ways for determining the content and scope of human rights. The proliferation of legal and political instruments has also been pursued to keep human rights from being controlled or monopolized politically or socially. Under these instruments, human rights have undergone a process of refinement or metamorphosis due to contexts and changes at the domestic and international levels. The context can be reflected as the 'international-statist legal framework under which human rights are subjected to international, national, religious, and local interpretation and compliance'.⁴

In practice, human rights empower states, citizens, communities, minorities, corporations, organizations, etc. The UN Declaration on Human Rights Defenders (1995),⁵ for instance, provides protections and rights to human rights defenders. Human rights defenders are 'individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.'⁶ The rights recognized include the right (1) to seek the protection and realization of human rights at the national and international levels, (2) to conduct human rights work individually and in association with others, (3) to form associations and non-governmental organizations, (4) to make complaints about official policies and acts relating to human rights and to have such complaints reviewed, and (5) to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may impede the realization of human rights, etc.⁷

Whether acting individually or collectively, each entity has the potential and stature to influence matters of significance while raising newer questions about vulnerabilities and responsibilities.⁸ In the case of transnational corporations and international

² Upendra Baxi, *Changing Paradigms of Human Rights*, in *LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAW'S TRANSFORMATIONS*, (Julia Eckert, Brian Donahoe, Christian, Zerrin Ozlem Biner (eds.) 2012), at 274.

³ Universal Declaration of Human Rights (UDHR), 1948, U.N.G.A. RES. 217A, Dec. 08, 1948.

⁴ Ellen Messer, *Anthropology and Human Rights*, 22 *ANNUAL REVIEW OF ANTHROPOLOGY* 223 (1993).

⁵ The Declaration on Human Rights Defenders, U.N.G.A. RES. A/RES/53/144, (Mar. 8, 1999).

⁶ *Id.*

⁷ *Id.*

⁸ See Alex Newton, *THE BUSINESS OF HUMAN RIGHTS: BEST PRACTICE AND THE UN GUIDING PRINCIPLES* (2019); José Parra, *The Role of Domestic Courts in International Human Rights Law: The Constitutional Court of Colombia and Free, Prior and Informed Consent*, 23 *INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS* 355 (2016); Howard B. Tolley, *THE INTERNATIONAL COMMISSION OF JURISTS GLOBAL ADVOCATES FOR HUMAN RIGHTS* (1994).

government organizations, Goodhart writes, it is a lapse in human rights understanding when it fails to consider human beings' vulnerability at the hands of the State and the non-state.⁹In this manner, public and private institutions (states, corporations, organizations, etc.) have been included within the overall mandate of human rights.

Talking about the role of domestic courts, their verdicts and interpretations have ushered in a rights consciousness that has permeated into the workings of institutions and the resolution of conflicts.¹⁰ And court interpretations of human rights have led to several prescriptions, highly critical and relevant to the political systems.¹¹ Rights have been expanded and functionally serve as a premise to judge, adjudicate, or initiate practice/conduct, legal or otherwise. For that reason and more, a few questions become necessary, including the role of domestic courts in the development of human rights. How do domestic courts apply international human rights standards? How are competing rights reconciled? The case of *Olivia Road v. City of Johannesburg*¹² of the South African Constitutional Court is a notable example of the role of a domestic court in the field of human rights. The court, in the *Olivia* Case, discussed the concept of 'meaningful engagement' in light of the right to housing under the South African Constitution. The case concerned a decision of the city of Johannesburg to eject four hundred occupiers from buildings considered to be unsafe and unhygienic. The occupiers resisted removal on the basis of their right to adequate housing protected under Article 26 of the Constitution. Article 26 of the South African Constitution provides:¹³

- a. Everyone has the right to have access to adequate housing.
- b. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- c. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

On hearing the occupiers, the court passed an interim order designed to ensure that the parties engaged with each other meaningfully on certain issues. The court held that the State is under a duty to engage meaningfully with the persons who are likely to be evicted. Engagement, in the words of the court:¹⁴

⁹ Michael Goodhart, *Human Rights and Global Democracy*, CARNEGIE COUNCIL FOR ETHICS IN INTERNATIONAL AFFAIRS 395 (2008) at 404.

¹⁰ See, Murat Erdogan, *The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts*, 70 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBU 91 (2021); Deepa Kansra, *Contemporary Democratic Theory: A Critique Of Rights, Governance And Constitutionalism*, Ph.D. Thesis (Unpublished), FACULTY OF LAW, JAMIA MILLIA ISLAMIA (2013).

¹¹ Deepa Kansra, *The Age of Democratic Reforms: Establishing Legal Rights in India*, 61(4) SOCIAL ACTION JOURNAL 382 (2011).

¹² *Olivia Road v. City of Johannesburg* 2008 (3) S.A. 208 (CC).

¹³ Constitution of the Republic of South Africa (1996).

¹⁴ *Supra* note 12, *Olivia Road v. City of Johannesburg*, at para 14.

'...is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—(a) what the consequences of the eviction might be;(b) whether the city could help in alleviating those dire consequences;(c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations'.

Further, the court found 'engagement' as having the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care.¹⁵In a Case Comment on the *Olivia* Case, Pillay writes:¹⁶

'...the South African Court's jurisprudence shows that meaningful engagement maybe a useful tool in adjudicating social and economic rights. Courts may use the concept to great effect in facilitating real participation by right holders, providing them with immediate relief and prompting substantive changes to government policy over time. Meaningful engagement also has the huge advantage of preserving respect for the democratic legitimacy of legislative bodies'.

Bringing the focus to India, the path between rights and the realization of those rights has been explored by the domestic courts.¹⁷ Important factors have facilitated the courts' involvement in the development of human rights. The first factor concerns the capacity of courts to interpret the law. Through the tool of interpretation, important judgments have contributed to the scheme of rights-based governance in India. As expressed in *Francis Coralie v. Union Territory of Delhi*:¹⁸

'...interpretation means that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force about a fundamental right enacted by the Constitution'.

The second factor is related to the capacity of courts in applying international human rights standards. On this point, Bantekas and Oette write:¹⁹

'the judiciary plays a particularly important role in the protection of all sets of rights and in ensuring that states and their organs adhere to international obligations. Traditionally, courts were often seen to show a preference for relying primarily on

¹⁵ *Supra* note 12, *Olivia Road v. City of Johannesburg*, at para 15.

¹⁶ Anashri Pillay, *Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement*, 10(3) INT'L J. OF CONST. L. 732-755, 753-754 (2012).

¹⁷ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18(2) J. DEMOCRACY 70 (2007).

¹⁸ A.I.R. 1981 S.C. 746.

¹⁹ Ilias Bantekas, LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE 224 (2020).

national law in their jurisprudence. However, national courts have developed a growing awareness of their role in applying relevant international standards, though practice differs considerably’.

With this capacity, courts enable the proper allocation of human rights obligations.²⁰ They also facilitate greater interaction and dialogue amidst changing domestic and global conditions. And with this capacity, there ‘is evidence of a rights consciousness unique to courts of law.’²¹ It is well-settled that the international context of human rights conveys several meanings. And the employment of the international context, while discussing human rights, is commonplace. Taking the domestic courts as an example, the application of international human rights standards has facilitated the role of the courts in the development of human rights and the resolution of conflicts in domestic settings.

II

Text, Context, and the Supreme Court of India

The year 2018 was in many ways a significant year for human rights across the world, as the year marked the 70th anniversary of the Universal Declaration of Human Rights (1948).²² In India, the Supreme Court delivered voluminous yet crafty judgments paving the way for revisiting the text and context of human rights in India. The score of decisions has contributed to and enriched the corpus on human rights protection and preservation. A curtain-raiser of these judgments showcases the epochal contribution that the judiciary in India has made in this respect, notably in *Navtej Singh v. Union of India*²³ (*Navtej Singh* hereinafter), *KS Puttaswamy v. Union of India*²⁴ (*KS Puttaswamy* hereinafter), and *Joseph Shine v. Union of India*²⁵ (*Joseph Shine* hereinafter). The cases illustrate how the unity of international and domestic standards is situated in the working Indian courts, notably the Supreme Court of India.

About Section 377 IPC, *Navtej Singh* challenged the constitutional validity of a part of this provision due to which consensual sex among adult homosexuals in private was also penalized was challenged. Section 377 criminalized ‘carnal intercourse against the order of nature with any man, woman or animal’ irrespective of voluntary or involuntary conduct. The Court concluded that Section 377 insofar as it

²⁰ Roland Robertson, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992).

²¹ *Id.*, Roland Robertson, at 11.

²² *Supra* note 3.

²³ (2018) 10 S.C.C. 1

²⁴ (2017) 10 S.C.C. 1

²⁵ (2019) 3 S.C.C. 39.

criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.²⁶

In the case of *KS Puttaswamy*, the matter before the Court was whether privacy constitutes an integral part of fundamental rights under the Constitution of India. On the status of privacy under the Constitution, the court has had the occasion to address the following dimensions:²⁷

- a. Whether there is a constitutionally protected right to privacy?
- b. If there is a constitutionally protected right, does this have the character of an independent fundamental right or arise from within the existing guarantees of protected rights such as life and personal liberty?
- c. What are the doctrinal foundations of the privacy claim?
- d. What constitutes the content of privacy?
- e. What is the nature of the State's regulatory power *vis-à-vis* the right?

In the findings of the Court, privacy is a constitutionally protected right emerging from the life and liberty guaranteed under Article 21 of the Constitution.²⁸ Also, 'privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, and procreation, the home, and sexual orientation.'²⁹

In the *Joseph Shine* case, the constitutional validity of section 497 of the Indian Penal Code was in question.³⁰ Section 497 deals with adultery punishable under Indian law. Section 497 reads:³¹

'whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor'.

According to the court, Section 497 'lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. ...[that] making adultery a criminal offense would offend Article 21- the dignity of both the husband and the wife and the privacy attached to the relationship'³².

A comprehensive reading of *Navtej Singh*, *Joseph Shine*, and *KS Puttaswamy* reflects on the practice of applying domestic and international human rights standards to

²⁶ *Supra* 23, *Navtej Singh v. Union of India*, at para 97.

²⁷ *Supra* note 24, *KS Puttaswamy v. Union of India*, at para 7.

²⁸ Article 21, Constitution of India, 1950 provides: 'No person shall be deprived of his life and personal liberty except according to procedure established by law'.

²⁹ *Supra* note 24, *KS Puttaswamy v. Union of India*, at para 3 (F).

³⁰ The Indian Penal Code, 1860.

³¹ *Id.*, at S. 497.

³² *Supra* note 25, *Joseph Shine v. Union of India*, at para 64.

determine the individual, social, and international dimensions of human rights. In the following paragraphs, the approach and interpretations of the court have been examined in the light of five broad themes, including (a) the domestic context, (b) autonomy and determination, (c) constitutional parameters and validity of laws, (d) vulnerability, and (e) other courts and other contexts.

The Domestic Context

The expression the ‘context of human rights’ may be given a narrow meaning by citing the local or domestic situations. It also includes awareness of the beliefs and practices of any legal system. The importance of the domestic context has been captured in several international human rights instruments.³³ For example, Article 2 clause (2) of the International Covenant on Civil and Political Rights reads:³⁴

‘Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant’.

In comparison to a narrow meaning, a broader meaning of the expression context of human rights would include the prevailing international processes, consensus, and obligations. Both the contexts, domestic and international, are the basis for human rights reform, resistance, contestation, and progress.

In the cases of *Navtej Singh* and *Joseph Shine*, the domestic context manifests in light of the laws and legal texts that were scrutinized by the court. These included Sections 377 and 497 of the IPC in the cases of *Navtej Singh* and *Joseph Shine* respectively. In the two decisions, the legal provisions were found to be no longer in sync with the constitutional philosophy and the societal realities. As stated by the court in *Joseph Shine*, ‘the progression in statute and the perceptual shift compels the present to have a penetrating look at the past’.³⁵ In *KS Puttaswamy*, the court considers the vulnerabilities of society and persons in the global digital age, wherein State and non-state are both capable of detrimentally affecting rights and freedoms. In the opinion of the court, the matter warrants a revisit of constitutional liberty in a new light.

Autonomy and Determination: Individual and Relational

Under the theme of ‘autonomy and determination’, *Navtej Singh* confers importance on the individual right to self-determination. The right to self-determination is essentially

³³ See, International Convention on the Elimination of All Forms of Racial Discrimination, U.N.G.A. RES. 2106 (XX), Dec. 21, 1965; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), U.N.G.A. Dec. 18, 1979.

³⁴ International Covenant on Civil and Political Rights ICCPR), U.N.G.A. RES. 2200A (XXI), Dec. 16, 1966.

³⁵ *Supra* note 25, *Joseph Shine v. Union of India*, at para 2.

defined as being manifested in the exercise of overt acts of self-expression. In the words of the Court, the expression of the self may manifest as 'a rejection of external views, the realization of one's own abilities visualizing the opportunities, following one's pattern of life'.³⁶ *Navtej Singh* asserts two independent yet interrelated dimensions on that which is being recognized and protected; the realization of the self, and the expression of the same.

Navtej Singh can also be read in light of (a) theories of 'transitional justice' in which normal requirements of social justice should be combined with those of justice for the victims of past injustice or gross human rights violations. Transitional justice has been extended demands for reparations and/ or apologies for such past evils as colonialism and slavery,³⁷ (b) the natural law tradition, wherein the court talks of what is *natural*, what is given by nature, nature within, inherent nature and natural impulses, the diversity and variegated hues created by nature,³⁸ and (c) the notion of human dignity as also provided for under the Universal Declaration of Human Rights (UDHR- 1948). In the words of the court, the concept of dignity urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the 'full blossoming of the natural and constitutional rights of individuals'.³⁹

The above interpretations resonate with the notion of individual sovereignty, which confers power on an individual in light of principles namely freedom of action, voluntary engagement in every kind of social (interpersonal) relation that produces some effect, and non-interference of other individuals or group of individuals with coercive methods and the threat of using coercive methods.⁴⁰ In *Joseph Shine*, the Court directs the attention to freedom of choice but in a different legal context. While dealing with the constitutional validity of Section 497 of the Indian Penal Code,⁴¹ the Court, while discussing the sanctity of marital relations, expressed that in case of infidelity in marital relations, the married parties have the choice to continue with the marriage or seek a divorce. The decision to exonerate the same is well within the determining capacity of the couple. Quoting *Joseph Shine*, 'when the parties to a marriage lose their moral commitment to the relationship, it creates a dent in the marriage and will depend on the parties how they deal with the situation. Some may exonerate and live together, and some may seek divorce.'⁴² The same can be evaluated based on the principles quoted above. In effect of pertinent international human rights provisions, the Court

³⁶ *Supra* note 23, *Navtej Singh v. Union of India*, at para 9.

³⁷ Micheal Freeman, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH 80 (2012).

³⁸ *Supra* note 23, *Navtej Singh v. Union of India*, at para 4.

³⁹ *Id.*, at para 132.

⁴⁰ Nikola Lj. Ilijevski, *The Individual Sovereignty: Conceptualization and Manifestation*, 1(2) J. LIBERTY AND INT'L AFFAIRS 1 (2015).

⁴¹ *Supra* note 31.

⁴² *Supra* note 25, *Joseph Shine v. Union of India*, at para 54.

stated that ‘marriage in a constitutional regime is founded on the equality of and between spouses’.

Likewise, *Puttaswamy* emphasizes the autonomy that privacy entails. In light of the human rights provisions within international human rights laws, the Court incorporates the sanctity of the preservation of personal intimacies and partnerships within the home.⁴³

Constitutional Parameters and Validity of Laws

Navtej Singh identifies the four corners of the Constitution as: ‘individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings’.⁴⁴ The four, according to the court, act as constitutional morality which is embodied in the text and principles and assists in (a) testing and determining the validity of existing laws, and the sanctity of societal morality, (b) acting as the basis to expand and evolve within the text of the Constitution, and (c) to deliver to all persons and citizens as opposed to cater to majority citizens.⁴⁵ These principles are also reflected in other important judgments of the court.

In the present case, the court struck down the part of Section 377 as being the source of retaining a culture of stereotypes wherein the community’s treatment of the another is influenced deeply. In the words of the court, ‘377 is seen to promote perpetuating homophobic attitudes and make it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces, and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of equal citizenship’.⁴⁶

A historic view on the subject matter of discussion i.e. criminalization of homosexuality is given by Kohert. The author writes, ‘homophobia is a result of the missionary colonialization wherein the British exported their homophobic laws to the majority of their colonies. And the ramifications can still be felt today because homosexual acts are penalized in 36 of the 53 commonwealth countries.’⁴⁷ The process of decriminalization

⁴³ *Id.*, at para 3 (F).

⁴⁴ *Supra* note 23, *Navtej Singh v. Union of India*, at para 3.

⁴⁵ *Id.*, at 170.

⁴⁶ *Id.*, at para 51.

⁴⁷ Sarah Kohert, *The Yogyakarta Alliance: A Postcolonial League*, THE GREEN POLITICAL FOUNDATION (2018) available at: <https://www.boell.de/en/2018/12/17/yogyakarta-alliance-postcolonial-league> (last visited on Dec.04, 2019).

has been examined also by other scholars. While discussing the validity of laws in Rwanda, Binagwaho, Freeman, and Sarriera write:⁴⁸

‘... a post-colonial nation can only restore its full sovereignty once it frees its legal system from undemocratic colonial remnants, now outdated, that hinder progress... Further, laws imposed by foreign sovereigns, which were designed to promote oppressive policy objectives, and which are not the product of the Rwandan democratic process, reflect an unconstitutional infringement on the Republic’s sovereignty by a past colonial power. And, even if a law is not unconstitutional on its face, because it was designed to advance a discriminatory colonial scheme, its underlying public policy is tainted by an unconstitutional objective...’.

In *Joseph Shine*, the court writes⁴⁹:

‘... when the test is whether to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution...’.

The thrust on revisiting colonial laws or provisions is an important theme in many other jurisdictions. The decriminalization of legal provisions, in particular, has been pursued by the courts as a tool to give a progressive meaning to rights.

Vulnerability

The element of vulnerability forms an essential component in human rights cases. It may include vulnerability to the treatment of a certain kind, the denial of access and provision to goods, or both, or of another kind. According to Rittossa, ‘what is common to all vulnerability scenarios is the susceptibility to different forms of harm, i.e. bodily, psychological, moral, economic, financial, and institutional.’⁵⁰ Vulnerability, according to Fineman, ‘is a concept around which social policy and law can be built. The concept can also be used to redefine and expand current ideas about state responsibility toward individuals and institutions.’⁵¹

In this regard, *Navtej Singh* makes a meaningful contribution by including conduct and treatment meted out to vulnerable communities by the family and political institutions.

⁴⁸ Agnes Binagwaho, Richard Freeman, and Gabriela Sarriera, *The Persistence of Colonial Laws: Why Rwanda is Ready to Remove Outdated Legal Barriers to Health, Human Rights, and Development*, 59 HARV. INT’L L. J.S(2018).

⁴⁹ *Supra* note 25, *Joseph Shine v. Union of India*, at para 3.

⁵⁰ Dalida Rittossa, *The Institute Of Vulnerability In The Time Of Covid-19 Pandemic – All Shades Of The Human Rights Spectrum*, 5 EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (2021).

⁵¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20(1) YALE JOURNAL OF LAW AND FEMINISM (2008).

The court can be seen to have enlarged the scope of what constitutes a threat in the context of rights. *KS Puttaswamy* refers to the vulnerabilities enhanced with the expansion of the digital footprint, with important personal information being subjected to use by the state and non-state players. Vulnerability, as spelled out by the courts, informs the making and implementation of statutory laws. In the works of the Supreme Court, the concept of vulnerability is an integral part of the courts' interpretations of rights.

Other Courts and Other Texts

All three cases i.e. *Navtej Singh*, *Joseph Shine*, and *KS Puttaswamy* recognize the unity of purpose of domestic and international human rights standards. While citing international standards and occasionally also the standards applied in other domestic jurisdictions, the court qualifies the meaning of rights under the Indian Constitution to be in sync with developments across the world.

Navtej Singh, in particular, makes a reference to the Supreme Court of Canada⁵², the Supreme Court of the United States⁵³, the South African Constitutional Court⁵⁴, the regional court i.e. European Court of Human Rights,⁵⁵ etc. The court also cites the international principles called the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.⁵⁶ On the Yogyakarta Principles,⁵⁷ the court states, 'these principles give further content to the fundamental rights contained in Articles 14, 15, 19 and 21, and viewed in the light of these principles also, Section 377 will have to be declared to be unconstitutional'. The court also cites the Statement of the American Psychological Association on Homosexuality (1994)⁵⁸, the Report prepared by the International Commission of Jurists on Section 377, etc.⁵⁹

In *Joseph Shine*, while determining the validity of Section 497 of the IPC,⁶⁰ the Court states that 'we may also usefully note here that adultery as a crime is no more prevalent in People's Republic of China, Japan, Australia, Brazil, and many Western European countries.'⁶¹ The court takes into account the attempts across the globe to decriminalize adultery, particularly referring to measures taken by United Nations and other human

⁵² *Supra* note 23, *Navtej Singh v. Union of India*, at para 197-199.

⁵³ *Id.* at para 191-196.

⁵⁴ *Id.* at para 200.

⁵⁵ *Id.* at para 204.

⁵⁶ The Yogyakarta Principles, available at: <https://yogyakartaprinciples.org/> (last visited on Apr. 20, 2020).

⁵⁷ *Supra* note 23, *Navtej Singh v. Union of India*, at para 141.

⁵⁸ *Id.* at para. 142.

⁵⁹ *Id.* at para 48.

⁶⁰ *Supra* note 31.

⁶¹ *Supra* note 25, *Joseph Shine v. Union of India*, at para 54(H).

rights organizations highlighting that ‘gender-neutral provisions criminalizing adultery cast an unequal burden on women’.⁶² Other references include decisions of the South Korean Constitutional Court,⁶³ Constitutional Court of Uganda,⁶⁴ Constitutional Court of South Africa,⁶⁵ Supreme Court of the United States,⁶⁶ and Constitutional Court of Turkey⁶⁷, etc.

In *KS Puttuswamy*, the Court refers to India’s commitment to a global human rights regime and the Universal Declaration of Human Rights (Article 12)⁶⁸ the International Covenant on Civil and Political Rights (Article 17),⁶⁹ foreign case law including that of the United Kingdom,⁷⁰ United States (Supreme Court decisions),⁷¹ South Africa, etc.⁷² In addition, it refers to the decisions of regional courts, including the European Court of Human Rights,⁷³ Inter-American Court of Human Rights, etc.⁷⁴

In light of the above-mentioned five themes, one can see that the three cases i.e. *Navtej Singh*, *Joseph Shine*, and *KS Puttaswamy* have been decided to bear in mind the unity of purpose of domestic and international human rights standards. In terms of impact, the three cases contribute to the development of the constitutional jurisprudence of rights in India, and towards the international human rights jurisprudence. In human rights scholarship, the decisions of domestic courts, including that of the Supreme Court of India, have been viewed as integral to the human rights project while making courts an active site for the realization of several human rights objectives.

III

Conclusion

On the role of domestic courts, their jurisprudence, in general, has been designated as ‘state practice which is expected to play an important role with the increasing awareness

⁶² *Supra* note 25, *Joseph Shine v. Union of India*, at para 26.

⁶³ *Id.* at para 27.

⁶⁴ *Id.*, at para 28.

⁶⁵ *Id.*, at para 29.

⁶⁶ *Id.*, at para. 19.

⁶⁷ *Id.*, at para 7.1.

⁶⁸ *Supra* note 24, *KS Puttaswamy v. Union of India*, at para 27.

⁶⁹ *Id.*, at para 31.

⁷⁰ *Id.*, at para 28.

⁷¹ *Id.*, at para 121.

⁷² *Id.*, at para 80.

⁷³ *Id.*, at para 134 (v).

⁷⁴ *Id.*, at Para 134 (vi).

of international standards.⁷⁵In this regard, Ammann writes, ‘domestic courts enable States to respect their international obligations. They do so by enforcing international law domestically. Further, domestic judicial courts contribute to shaping and ascertaining international law.’⁷⁶ Even when the universality of several international standards has been open to question, the reasoning of the domestic courts has been found decisive on whether those standards should be taken into consideration and applied in domestic matters. In the case of the Yogyakarta Principles, for instance, that the Indian Supreme Court has cited, there has been a question posed to their universality and normative character on the grounds of being vague and non-binding.⁷⁷

Today, domestic courts are evaluated also in terms of their impact, both at the domestic and international levels. On the impact at the domestic level, Lisitsyna makes an interesting observation that ‘domestic courts are often better placed than their international counterparts to address several aspects of human rights litigation and protection of victims’ rights and in some circumstances can have a broader impact.’⁷⁸ The author, in the context of the human right against torture, supports this view for the reasons that, domestic courts can be bolder in highlighting systemic problems. To quote:⁷⁹

‘They are more familiar with a nation’s problems, and they are part of the apparatus that defines state policies. Even if courts are formally limited by the legal standards promulgated by legislatures, their role extends beyond the mere application of the law’.

Before domestic courts, victims and litigators have a broader choice of legal avenues to pursue i.e.:⁸⁰

‘In international human rights litigation the range of available forums is typically quite limited. In contrast, litigators and activists in domestic courts generally have a wider array of choice when it comes to deciding which legal avenues to pursue’.

At the domestic level, cases can be filed in the public interest to intended to have broader impact:⁸¹

‘In most cases, victims and their representatives turn to litigation to seek protection, reparations, and accountability for specific human rights violations. But in some

⁷⁵ *Supra* note 19, Ilias Bantekas, at 223.

⁷⁶ Odile Ammann, DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW METHODS AND REASONING BASED ON THE SWISS EXAMPLE 133-134 (2019).

⁷⁷ Piero A. Tozzi, *Six Problems with the ‘Yogyakarta Principles’* in CATHOLIC FAMILY AND HUMAN RIGHTS INSTITUTE (2007).

⁷⁸ Masha Lisitsyna, *Strategic litigation against torture: Why domestic courts matter*, 32(1-2) TORTURE JOURNAL: JOURNAL OF REHABILITATION OF TORTURE VICTIMS AND PREVENTION OF TORTURE 201 (2022)..

⁷⁹ *Id.*, at 203.

⁸⁰ *Id.*, at 204.

⁸¹ *Id.* at 208.

jurisdictions, lawsuits can be filed in the public interest and, if successful, can have broader impact’.

In terms of the broader impact or the impact at the international level, domestic courts can be seen (1) ‘advancing the universalistic characteristics of human rights standards, (2) contributing towards the international human rights jurisprudence, (3) elevating several human rights standards to a position of being influential and backed by consensus, and (4) bringing awareness of new rights, like the right against criminal sanctions or criminalization as seen in the *Navtej Singh* case.’⁸²

In the matter of the Supreme Court of India, the court’s decisions have introduced a unique and powerful lens to view and examine the meaning of human rights and human rights obligations. While imagining and employing the context of human rights as both domestic and international, the court has enlarged the field of what can be taken into account while dealing with constitutional matters. The role of the Indian court can also be examined in light of the following parameters that have been spoken of in relation to the contributions of domestic courts in general:

Domestication of International Standards

Domestic courts actively negotiate the demands of the international human rights order and the domestic obligations provided therein. Courts allow for the smooth domestication of international human rights standards. The process includes ‘integrating international human rights as a means of developing, expanding and transforming the content and meaning of human rights jurisprudence.’⁸³

The domestication of human rights obligations, in the traditional sense, implies the ratification of international human rights treaties through statutory measures. The courts, in this regard, have expanded the scope of what constitutes the ‘domestication’ of human rights standards. While doing so, they also fill the gaps created by legislative inaction. The most notable example of domestication can be seen in the light of the Indian constitutional jurisprudence on the right to compensation. In light of various judgments of the court, the right has been referred to as a public law remedy for the redressal of violations of human rights.⁸⁴ In specific cases, compensation has been granted by the court in cases of torture, in regard to India’s commitment under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

⁸² Deepa Kansra, *Human Rights and the Practice of Cross-referencing of Domestic Courts*, 4 KAMKUS LAW JOURNAL 117 (2020) at 124.

⁸³ Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996).

⁸⁴ *SR. Wangla v. Union of India* 1998 SCALE 118; *Khatari v. State of Bihar* A.I.R. 1981 S.C. 928.

(1984),⁸⁵ the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966), etc.

The State and Non-State Distinctions

In terms of human rights obligations, domestic courts have diluted the lines that once separated the State and non-state entities. Whether under constitutional texts or legislative provisions, domestic courts have upheld the human rights obligations of both.

Cross-cultural dialogue: Domestic courts momentum to the cross-cultural dialogues on human rights. The decisions of the Indian Supreme Court, for instance, have also been cited in numerous foreign case laws.⁸⁶

Multidisciplinary Approaches: Domestic courts accept the multidisciplinary character of human rights by acknowledging and recognizing evidence and perspectives from disciplines including science, psychology, etc. In *Navtej Singh*, for instance, the court refers to the developments in the field of biological and psychological science.⁸⁷

Balance of Power or Power Sharing: Domestic courts emphasize the role of other institutional mechanisms, including legislative bodies, police, and other governance mechanisms. In terms of international human rights obligations, domestic courts are seen as constraining governments through litigation and imposition of costs of human rights violations. As pointed out by Conrad and Ritter, ‘international human rights treaties constrain government repression through domestic courts, increasing the extent to which leaders expect to face litigation costs for violating human rights. We assume that the domestic probability of litigation costs—often a function of domestic judicial effectiveness—increases a small amount when countries obligate themselves to international human rights law.’⁸⁸

Interactions with International Bodies: International human rights bodies (for example, treaty monitoring bodies) rely on domestic courts for the endorsement of international human rights standards. International bodies assess the receptivity levels of domestic courts by examining consistent interpretations and judicial comity ‘which allows judges to refer, selectively, to non-ratified treaties, unincorporated treaties, the recommendations of international organizations, and the judgments of foreign courts. The resulting accommodation and contestation by domestic courts have normative

⁸⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. RES. 39/46, Dec. 10, 1984.

⁸⁶ See *Ricky Nathanson v. Farai Mtsho* (2019) Z.W.B.H.C. 135.

⁸⁷ *Supra* note 23, *Navtej Singh v. Union of India*, at para 144.

⁸⁸ Courtenay R. Conrad, Emily Hencken Ritter, CONTENTIOUS COMPLIANCE DISSENT AND REPRESSION UNDER INTERNATIONAL HUMAN RIGHTS LAW 218 (2019).

effects at the international level.⁸⁹ The growing interest in domestic courts has led international bodies to adopt approaches for enhancing the receptivity levels of domestic courts. In this regard, 'judicial avoidance and contestation are seen as undermining the overall influence' of the UN human rights bodies.⁹⁰ In other words, judicial avoidance can potentially dampen the international processes aimed at the promotion and protection of human rights in the world.

In conclusion, the recognition of the decisions of the domestic courts as an integral part of the growing and evolving human rights jurisprudence makes room for a better understanding of the diversity of ways to protect human rights and address human rights violations. And by enriching the meaning of the context of human rights, the courts accept the unity of purpose in international and domestic human rights standards. By doing so, they support the purpose of the international and domestic human rights systems.

⁸⁹ Machiko Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, ICLQ Vol. 67 (January 2018).

⁹⁰ *Id.*, at 232.