Human Rights and the Practice of Cross-referencing by Domestic Courts

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Abstract

Domestic courts are often quoting foreign case law on human rights. The conversation pursued through cross-referencing across jurisdictions has added to the globalization of international human rights standards. As the practice is gaining ground and becoming a more permanent feature of domestic judgments, its relevance needs to be examined. A closer look at the practice will bring forth a more realistic understanding of the approaches of domestic courts and the advantages which they offer to the institution. This paper raises few questions on the value and influence of cross-referencing in the area of human rights. Questions in this regard can be posed as to (a) whether cross-referencing is reflective of an emerging consensus on the subject matter? (b) Is it strategic for domestic courts to quote foreign case law? (c) Is the practice of cross-referencing simply a trend or an urge to belong to a community of courts? (d) Is the practice of relevance towards the implementation and advancement of international human rights standards?

The topic can shed light on broader themes including the *universality* of human rights, *contestations/disagreements* over human rights standards, and the measure of *acceptability* of international human rights standards within domestic settings. This paper discusses the practice, its role and influence in relation to international human rights standards. Three judgments [of the courts of Nepal, India and Singapore] addressing the *human rights and homosexuality* agenda have been illustrated for discussion.

I. Introduction

Human rights have acquired considerable strength since 1948. With the adoption of the Universal Declaration of Human Rights in 1948, the process of juridification in particular has contributed to the popularity of human rights, the process leading to the adoption of authoritative instruments like constitutions, constitutional amendments and human rights multilateral treaties.

Human rights as *standards* are placed in domestic, regional and international instruments. And human rights as *frameworks* can include a larger field of mechanisms and practices which further produce, monitor and enforce the standards adopted. Thus, the frameworks and specific standards can be international, regional or domestic. The application of the standards and the vibrancy of their use comes from the sites invested in the human rights cause. These sites, including social movements, organizations, or courts, consistently facilitate the application as well as union of the international, regional and domestic human rights standards.[1] The

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[1] In this paper, the expression cross-referencing is being used to refer to the practice of referring to foreign case law while deciding a matter. The expression *global, regional & domestic standards* is being used to categorise human rights norms as adopted within (a) UN human rights instruments and the decisions of international bodies while interpreting and enforcing the

numerous sites involving multiple actors are linked to the utilisation of the available standards to attain human rights claims or objectives. In case of courts for instance, tasks such as adjudication—interpretation, and in case of social movements mobilization—assertion of demands etc. Occasionally, it becomes a researcher's quest to ascertain *who is producing* or what is *the source* of the human rights standards?

The paper in particular views *domestic courts* as an active field wherein the interaction and integration occurs. While pursuing their adjudicatory and interpretive functions, courts through the practice of cross-referencing facilitate the infusion of foreign standards [international–regional–domestic] into domestic situations.

II. Why Look at Cross-referencing?

Cross-referencing involves the practice of referring to global–regional–domestic human rights standards while deciding a matter. It is also referred to as the movement of legal norms and interpretations between different legal systems or a *global conversation* on human rights between courts across borders.[2] The practice can be viewed as giving *universal appeal* to domestic court judgments, making them an indispensable part of the common pool of jurisprudence on human rights.

While looking at the large field of case law on human rights, cross- referencing can be seen to occurs as follows:

> Situation 1: Domestic case/court: *Cross-referencing*—case decided by foreign domestic court.
>
> Situation 2: Domestic case/court: *Cross-referencing*—case decided by regional human rights court.
>
> Situation 3: Domestic case/court: *Cross-referencing*—decisions of international human rights treaty bodies.
>
> Situation 4: All of the above, situations 1,2, 3. [3]

instrument, (b) norms as provided under the regional human rights instruments and decisions of the regional human rights courts while interpreting the same, and (c) the judicial decisions of domestic courts while interpreting domestic laws. The interface and relationship between the three categories is complex and the subject matter of many debates and theories. In the paper, cross-referencing is being referred to as the practice of a domestic court referring to the decision of a foreign court (international, regional and domestic).

[2] See Antje Wiener and Philip Liste, "Lost Without Translation?: Cross-referencing and a New Global Community of Courts", Vol. 21 Issue 1 *Indiana Journal of Global Legal Studies*, 263–296 (2014).

[3] *Situation 5* can further be contemplated including non-judicial forums. For example, Investment Arbitration Tribunals and the practice of referencing regional human rights courts decisions. See Luis Gonzalez Garcia, "The Role of Human Rights in International Investment Law", 2013. Available at https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/The-role-of-human-rights-in-international-investment-law.pdf

To come to finer conclusions on the role and influence of cross-referencing, a study of the case laws would be useful, providing an in-depth analysis and categorization based on parameters including (a) stature of the deciding court (lower or higher court), (b) nature of the legal system (monist or dualist), (c) available precedents on the issue being decided by the court referring to foreign case law,[4] (d) the nature of obligations under human rights treaties of the state in whose jurisdiction the deciding court is situated, and (e) the human rights standard/s being referred to in the case. However, at this juncture, a plain and non-analytical reference to selected domestic cases will be worthwhile to introduce the topic.

The paper, in the sections that follow, discusses three cases from different domestic courts. The cases have been selected for the reason that they shed light on the trend of referencing, and the extent of reliance and receptivity of foreign material.[5] The cases include *Sunil Babu Pant* v. *Nepal Govt*.[6] (Nepal), *Navtej Singh* v. *Union of India*[7] (India), and *Ong Ming Johnson* v *Attorney-General* [8] (Singapore).

The above cases have been selected because they encompass (a) the agenda of human rights and homosexuality (*Sunil Babu Pant* covers homosexuals and the third gender), (b) the use of international–regional–domestic human rights standards, and (c) express acknowledgement indicating the influence of the foreign decisions or existing human rights jurisprudence in the final decision of the court.

III. Selected Cases

Sunil Babu Pant v. *Nepal Govt.*

In the case of *Sunil Babu* v. *Nepal Govt.*, a Writ Petition was filed under Article 32 and Article 107 (2) of the Interim Constitution of Nepal 2063 VS (2007 AD).[9] The petitioners alleged violence and humiliation at the hands of society, state and organizations faced by LGBT persons.

The petitioners sought (a) issuance of an order directing the state for granting the citizenship certificate and to make the laws based on the equality of all persons , (b) repeal of other discriminatory laws, (c) provision for necessary legal and institutional arrangements immediately by drafting new laws with the appropriate participation of concerned people to

[4] Occasionally domestic courts decline to agree to the decision of a foreign court, if the latter conflicts with a precedent available on the matter. See *Kavanagh* v. *Governor of Mountjoy Prison* (Irish Supreme Court, 2002). The views of the Human Rights Committee were not adopted, against the decision of a domestic court. [2002] 3 IR 97.
[5] Caveat- the cases are being referred to only for academic purposes and to the extent needed for the paper. They are amenable to review and being overruled in accordance with the laws and processes of the state of origin.
[6] Writ No. 917, 2007.
[7] (2018) 10 SCC 1.
[8] [2020] SGHC 63.
[9] In the words of the court; Article 107(2) has also granted the extraordinary power to this Court. Under this Article, this Court imparts full justice by exercising its extraordinary power in situations given below: for the enforcement of rights conferred by the Constitution; or for the enforcement of any other legal right for which no other remedies have been provided or such remedies appeared inadequate or ineffective; or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern. Under the provision of Article 107 (2)… this court may issue the appropriate orders and writs including habeas corpus, mandamus, certiorari, prohibition and quo warranto for the enforcement of the rights infringed. [See judgment]

protect the rights of those people who have suffered due to discrimination and violence, (d) appropriate compensation for those who suffer as a result of discriminatory activities and violence, and (e) the issuance of an order of mandamus and other appropriate order for the protection and acquisition of rights on the basis of the *constitution and laws, international law, precedents propounded by the Supreme Court in regard to the right to life of every person and other precedents, principles and values established by the United Nations in regard to human rights.*[10]

The present case is a detailed representation of the core issues pertaining to the *homosexuality and human rights agenda*. The court in clear and express terms cast a *duty on the state* as emanating from both international human rights law and the developments in other state jurisdictions. The court writes: *international practices should be gradually* internalized *in regard to the enjoyment of the right of an individual in the context of changing global society and practices of respecting the rights of minority. If we continue to ignore the rights of such people only on the ground that it...might cause social pollution, our commitment towards respecting human rights will be questioned internationally.*

The court makes a reference to several foreign courts and studies. On the question of discrimination based on sexual orientation, the Nepal court refers to the South African Constitutional Court, stating *the interpretation made by the South African Constitutional Court ensuring such human rights to the third sexes also may be taken into consideration in our context. The Constitutional Court has construed that no person can be subjected to discrimination on the ground of sexual orientation which includes the third genders as well.* Further, in the judgment, the court writes: *the interpretation made by the Constitutional Court of South Africa on equal protection of the homosexuals and the people of third gender seems significant in this regard* [on the issue being decided by the Nepal court]. Also, on the discussion on gender identity, reference is made to the High Court of the United Kingdom, Supreme Court of the United States and the regional European Court of Human Rights.

On the issue whether the petition before the court falls in the category of Public Interest Litigation, the Nepal court refers to the Indian Supreme Court case of *S.P. Gupta* v. *Union of India*. The Nepal court writes, *SP Gupta is significant in regard to the issue of public interest litigation where the constitutional or legal questions are involved for settlement. The judgment in this case should be considered as a model for the concept of public interest litigation.*[11] In

[10] On the applicability of international human rights law, the court responded as follows; *Nepal has shown its commitment towards the universal norms of the human rights by ratifying a significant number of international conventions for the protection of human rights. Nepal has already ratified the International Convention on Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on Elimination on all Forms of Discrimination against Women, 1979 and the Convention on the Rights of the Child, 1989. The provisions such as protection and promotion of human rights of the individual and elimination of all forms of discriminations have been accepted in these conventions. Being a party to these international treaties and conventions, the responsibility to implement the obligations created by instruments to which state is a party rests on the Government of Nepal according to the Vienna Convention on International Treaties, 1969 and the Nepal Treaty Act, 2047 (1991 AD).*

[11] The following paragraph from *SP Gupta Case* is cited "...where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of helplessness or disability or socially or economically

reference to the S.P. Gupta case, the Nepal Court writes, *this writ petition, which is filed for the rights and interest of their group which represents the homosexuals and third genders on the issues of gender identity and sexual orientation by protesting the behavior of the state and the society towards them, seems within the scope of public interest litigation.* [12]

Other references include the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; the Report of the High Commissioner for Human Rights on Gender Minorities in Colombia; and the Report on Sexual Orientation and Gender Identity in Human Rights Law, published by the International Commission of Jurists.

In its decision, the court set up a Committee to study the legal provisions and practices of other countries regarding gay and lesbian marriage. The committee's mandate was to propose recommendations to the Government of Nepal to make appropriate legal provisions on the matter. [13]

Navtej Singh v. *Union of India*

In the case of *Navtej Singh* v. *Union of India*[14] in question before the Indian Supreme Court was Section 377 of the Indian Penal Code (IPC). The constitutional validity of a part of the provision due to which consensual sex among adult homosexuals in private was also penalized was subject to challenge. Section 377 criminalised carnal intercourse against the order of nature with any man, woman or animal, irrespective of the conduct being voluntary or involuntary.

The Indian court in its decision concluded that alleged unnatural sex between two male, two female and male and female has been *decriminalized*, provided the conduct qualifies three elements; it is between adults; it is voluntary and it is in private. In other words, *actus reus* of unnatural sex is recognised as criminal in three situations, (i) any sexual conduct described under section 377 between non-adults (below the age of 18 years) even if it is voluntary and consensual [maturity rule] (ii) If such conducts are forceful, non-consensual, or involuntary; they are still penal [harm rule] (iii) Any sexual conduct with animal is still penal even if an adult is involved in it [lack of consent rule and manifest morality rule].

disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order."

[12] In addition to the *locus standii* issue, other issues before the court included;
a. What is the basis of identification of homosexual or third gender people?
b. Whether it happens because of the mental perversion of an individual or such characteristic appears naturally.
c. Whether or not the state has meted out discriminatory treatment to the citizens whose sexual orientation is homosexual and gender identity is third gender

[13] On the developments since *Sunil Babu case* provisions under the new Constitution can be seen. Also see AJ Agrawal, "Trans Rights in Nepal: Progress and Pitfalls", *Centre for Law and Policy Research* July 2020. Available at https://clpr.org.in/blog/trans-rights-in-nepal-progress-pitfalls/. The author maps the progress made on the LGBTQI agenda since the *Sunil Babu Pant Case* under the New Nepal Constitution, 2015. Emphasis on the amendments been made to various forms including immigration forms, census data collection forms, passports and citizenship certificates. Also, pending legislative and other reforms.

[14] (2018) 10 SCC 1

The Indian court in reaching the above conclusion made reference to the decisions of foreign domestic courts, regional courts,[15] and international treaty bodies.[16] The domestic courts whose decisions were referred to included that of the United Kingdom, the Supreme Court at the Philippines,[17] the Constitutional Court of South Africa,[18] the United States Supreme Court,[19] Canadian courts,[20] etc. The case of *Navtej Singh* has been widely quoted as being a landmark on the agenda of *decriminalization of homosexuality*. The case relies on foreign material, i.e., existing human rights jurisprudence on the de-criminalization of homosexual conduct between consenting adults based on human rights principles and rights including privacy, freedom and non-discrimination. *Navtej Singh* sheds light on the consistent efforts made across jurisdictions to revisit colonial laws/provisions under the *homosexuality and human rights agenda*.[21]

IV. Universality of Human Rights

The above two decisions [*Sunil Babu Pant* and *Navtej Singh*] shed light on the merits of the practice of cross-referencing in light of international human rights:

1. *On the universality of human rights*: Cross-referencing by the courts can be viewed as cutting across historic, regional and cultural affiliations; the same reflecting and advancing the *universalistic characteristics* of human rights standards.

[15] The European Court of Human Rights was quoted as follows; "…although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved…"

[16] In particular, the Indian court refers to the international treaty body- Human Rights Committee under the International Covenant on Civil and Political Rights [*Toonen Case*- HRC- "laws used to criminalize private, adult, consensual same-sex sexual relations violate the right to privacy and the right to non-discrimination".
Further, Indian court refers to the *Yogyakarta Principles* on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. On the Yogyakarta Principles the court writes; "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."

[17] The Philippines Court is referred to in the context *freedom of expression*, interpreted to be inclusive of *freedom of expressing one's homosexuality* and the *activity of forming political associations* that support LGBT individuals.

[18] The South African Constitutional Court's theory in *National Coalition for Gay and Lesbian Equality and another v. Minister of Justice* [1998].

[19] US cases are quoted in light of issues including the *freedom of choice for homosexuals* as protected under the US Constitution, and *practices of discrimination* at the workplace based on their sexual orientation.

[20] Cases from Canada are discussed to highlight that an act of *discrimination includes harm and potential harm to the dignity of gay and lesbian individuals.*

[21] De-criminalization of certain kind of conduct has been an important domestic reforms agenda, also widely discussed by courts. The universal appeal of the agenda is paving way for a more concrete understanding of an emerged *human right against criminal sanctions*.

For a discussion on the pursuit of domestic legal reforms towards de-criminalization, see 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", *Harvard International Law Journal*, Vol. 59, Spring at (2018). In the paper, the authors in context of reforms in Rwanda write; *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*. Also, every colonial law, no matter the content, is in conflict with certain provisions of Rwanda's Constitution, just by virtue of its ignoble provenance. They offer four reasons why colonial laws conflict with the constitution. Two can be cited here for relevance, first, "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. Second, 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…"

2. *On the inclusiveness in decisions*: The practice is making the approach of domestic courts suitably *inclusive* and much *informed* about the available cross jurisdictional interpretations.

3. *On common jurisprudence*: Cross-referencing is creating a pool of common jurisprudence on human rights standards.

4. *On consensus across jurisdictions*: Cross-referencing involves the inclusion of specific human rights standards in the decisions of many courts of different jurisdiction, elevating those standards to a position of being backed by consensus and also influential in decision making.[22]

5. *On new standards*: Cross-referencing can be seen as introducing a field of new rights e.g. the right against *criminal sanctions* or criminalization, as seen in the *Navtej Singh* case. [23]

Taking into consideration the above points, it can be argued that cross-referencing by domestic courts is *sustaining* and advancing the *universalization of human rights* standards and interpretations. And while the task of generalization is easier, the complexities and uncertainties in the process of adjudication and interpretation by domestic courts cannot be ignored. Awareness of the same may assist in understanding the true import of cross-

[22] Mallika Ramachandran, "Domestic Law and the Core Obligations under ICESCR: Specific Reference to India", *Be the Classroom Series*, May (2020). The author looks at the use of the *minimum core standard* as defined by the Committee on Economic, Social and Cultural Rights in many of its decisions under the ICESCR. The author cites domestic cases using the *minimum core standard* including *Mohd. Ahmed* (Minor) v. *Union of India* [decided 17 April 2014, Delhi High Court], and *Ajay Maken* v. *Union of India* [decided 18 March 2019, Delhi High Court]. https://www.betheclassroomseries.com/developments.

[23] The de-criminalization agenda within the international human rights framework is not limited to only homosexuality or LGBT claims. Other claims including women's right to abortion, de-criminalization of adultery etc. In particular, the de-criminalization of adultery agenda has been an equally important human rights agenda at the domestic, regional and international platforms. At the international level, the de-criminalization of adultery agenda has been advanced by UN treaty bodies including the Human Rights Committee under the International Covenant on Civil and Political Rights. Under the United Nations Special Procedures (Special Rapporteurs, Independent Experts, Working Groups) the Working Group on the issue of Discrimination against Women in Law and in Practice in 2012 issued a Statement titled *adultery as a criminal offence violates women's human rights* [Frances Raday, Chair of the WG on Discrimination against Women]. The above statement highlighted the works of the Human Rights Committee—ICCPR, the Committee under the ICESCR and the CEDAW Committee indicating that laws criminalizing adultery as obsolete and discriminatory legislations. Quoting from the Statement, "*the experts on the Working Group emphasized that the criminalisation of sexual relations between consenting adults is a violation of their right to privacy, infringing the International Covenant on Civil and Political Rights, as established almost two decades ago by international human rights jurisprudence… Maintaining adultery as a criminal offence—even when, on the face of it, it applies to both women and men— means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women".*

The de-criminalization agenda is still active and influential at both international and domestic platforms. Several domestic courts have responded and advanced the agenda. In context of reforms in Indonesia, Panjaitan writes; *there has been continuous trend throughout the world of countries reforming and abolishing often archaic laws criminalizing adultery. In 2018, India made the move of abolishing its colonial-era adultery law. The Philippines is now currently revising its Penal Code and one of the key considerations in the discussions is the abolition of the provisions on adultery. Indonesia now has the opportunity to step up and assert itself as a progressive leader in Asia in eliminating discrimination against women by removing the provision criminalizing adultery in its draft Penal Code.* See Ruth Panjaitan, "On decriminalizing adultery in Indonesia" International Commission of Jurists- Advocates for Justice and Human Rights. Available at https://www.icj.org/on-decriminalizing-adultery-in-indonesia/

referencing in context of human rights. Many questions become important, including whether there are different approaches coming from different courts while citing foreign cases? Is the practice of cross-referencing sufficient to argue that there exists an *emerged consensus* on the subject matter? Is it strategic for domestic courts to quote foreign case law or are they bound to do so? Are all human rights received equal attention? etc.

While all of the above are not discussed in this paper, a few arguments can be made to identify gaps in accepting the *universalization of human rights* role of cross-referencing. Continuing on the homosexuality and human rights agenda (*Sunil Babu case* and *Navtej Singh Case*), the following case of *Ong Ming* (2020) adds further to the discussion on cross-referencing.

V. Contesting the Universality

The practice of cross-referencing highlights the human rights standards on which domestic courts across jurisdictions agree. At the same time, the position of *disagreement* or *contestation* with foreign court decisions cannot be overlooked. Greater evidence on *disagreement* with foreign court decisions (international–regional–domestic) potentially opens for further discussion, yet again, the *role* and *influence* of domestic courts in the application and promotion of human rights standards.[24] The point can is illustrated in the case of *Ong Ming Johnson* v *Attorney-General*. [25] The *Ong Ming* case was decided by the Supreme Court of Singapore. In that case, in question was the *constitutionality* of Section 377 A of the Penal Code. Section 377A provides, any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years. The section includes all forms of male homosexual activity including penetrative and non-penetrative sex, whether in public or in private and with or without consent. In the words of the Singapore court, the Section was intended to *safeguard public morals generally and enable enforcement and prosecution of all forms of gross indecency between males*.

The petitioner in the case argued that 377 A is inconsistent with the provisions of the Constitution (Article 9 (1), 12 (1), 14 (1) (a)), and that the criminalisation of sex between men limited the ability of homosexual men to freely express their sexual orientation and exchange ideas pertaining to sexuality and sexual orientation. The petitioners also sought the re-consideration of a previously decided case of *Lim Meng Suang CA* (on the purpose and objective of 377A), in light of recent international judicial developments. While addressing the various arguments raised, the court upheld the validity of the said provision, stating that *the*

[24] See Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", Vol. 30 No.4 *The European Journal of International Law* 1129–1163 (2019).
[25] [2020] SGHC 63.

provision continues to serve its purpose of safeguarding public morality by showing societal moral disapproval of male homosexual acts. [26]

The case can be seen to expressly illustrate the position of contestation over the *human rights and homosexuality agenda,* as has been previously discussed in the paper in light of the *Sunil Babu Pant* and *Navtej Singh* cases. The case highlights the *contested universality* aspect of cross-referencing for two reasons;

a. Disagreement with foreign case law is central to the *Ong Ming* decision

The court in *Ong Ming* refers to the Indian case of *Navtej Singh* v. *Union of India*[27], which involved the same subject matter of *de-criminalization of homosexuality*. O*ng Ming* refers to *Navtej Singh* and expressly disagrees with the decision of the Indian court.

The disagreement is expressed in the following words; "*a similar point may be made in addressing Navtej, where the Supreme Court of India ruled that the criminalization of male homosexual conduct violates, among other rights, the right to freedom of expression. I am unable to agree with the reasoning of the Indian Supreme Court given that the court appeared to have accepted a wider meaning of what constitutes "expression", extending beyond verbal communication of ideas, opinions or beliefs … An expansive interpretation can potentially lead to absurd outcomes*".

b. Challenge to the validity and binding nature of international human rights standards is central to the *Ong Ming* decision[28]

Although outside the scope of this paper, the case also expresses disagreement over the widely cited principles called the *Yogyakarta Principles on Sexual Orientation and Gender Identity* [also referred to in the *Navtej Singh* and *Sunil Babu* cases, discussed earlier]. The *Yogyakarta Principles* have been quoted, referred to and relied on by domestic courts the world over. The judgment of the court in *Ong Ming* puts into perspective the questions related to the validity and applicability of the principles. On this point the court writes; "*reference was also made [by the Indian Supreme Court] to the Yogyakarta Principles in arguing that the right to freedom of expression extends to one's expression of sexual identity. The Yogyakarta Principles are, however, of limited assistance or relevance in the present case. With only 29 signatories to date, less than one-sixth of the 193 current member states of the United Nations have subscribed to them. Singapore is not one of the 29 signatories. The plaintiffs are attempting to establish a rule of customary international law that the right to freedom of expression necessarily encompasses one's expression of sexual identity,*(however) *the requirement of*

[26] The court considered the points raised by the petitioners including the non-enforcement of the said provision and the redundancy of 377 A.
[27] (2018) 10 SCC 1.
[28] The case also involves a discussion on the validity of decisions of the Human Rights Committee under the ICCPR and the European Court of Human Rights on the *proportionality test*.

widespread state practice is plainly not met. Such a rule must first be clearly and firmly established before its adoption by the courts".[29]

The *Ong Ming* Case illustrates and opens for discussion the relevance of *disagreements* with foreign case law within domestic court judgments. The fact of disagreement within judgments necessitates a re-visit to the perceived *universal acceptance or consensus-based quality of* human rights standards.

VI. Final Points

It is undisputed that cross-referencing enhances the position of the interpreter by opening up a wide range of arguments and legal possibilities. Also, cross-referencing of international–regional–domestic standards has become an indispensable part of the process of deliberation, engagement, and conflict resolution in the field of human rights. One may also view cross-referencing as bringing forth a culture of reading multiple perspectives on human rights without treating one as superior or inferior to the other.

In this paper, a few selected cases were discussed in order to make broader generalizations about cross-referencing and human rights. However, a more detailed appraisal of the general trends and variations in cross-referencing is *much needed* for a more constructive understanding of (a) the *extent* to which domestic courts are contributing towards the *universality* and *consensus quotient* of human rights standards, (b) what practices advance and promote the international human rights agenda.

In conclusion, while viewing domestic courts as an active site involved in the use and application of human rights standards, one may consider and also test the following;

- First, a single domestic case can be representative of a certain reality about human rights.
- Second, a single case can be determinative of the consensus or contestations on human rights standards.
- Third, judicial interpretations handed out by domestic courts are a resultant of several complex factors. These factors may influence the court directly or indirectly. The factors may include international events or formal political commitments that lie outside the jurisdiction of the court.
- Fourth, the practice of cross-referencing is more closely tied to the adjudication and interpretation of domestic laws/situations than to external situations.

[29] The validity and applicability of the Yogyakarta Principles has been open to question in many contexts. See Piero A. Tozzi, Report-*Six Problems with the "Yogyakarta Principles*", Catholic Family and Human Rights Institute, Washington-New York, 2007. In the brief, Tozzi posed a challenge to the universality and normative character of the Principles. The report stated that the principles endorse the views of *narrow group of self-identified "experts"* and are *not binding in international law* for they have not been negotiated nor agreed to by member states of the United Nations… Quoting Tozzi, , *as with suicide, neither contraception, abortion, homosexual acts nor euthanasia can be universally willed, for to do so would mean the end of the human species, which self-evidently is not compatible with anyone's conception of the "common good."*

- Fifth, disagreements within foreign case law cast a shadow on the perceived *universal acceptance and application of* human rights.
- Sixth, *domestic courts* are active contributors to the common pool of international human rights jurisprudence, alongside independent bodies representative of constitutional values and domestic experiences.