

THE SUBSTANCE OF THE CONSTITUTION: ENGAGING WITH FOREIGN JUDGMENTS IN INDIA, SRI LANKA, AND SOUTH AFRICA

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INTRODUCTION

*A constitution is not based on a norm, whose justness would be the foundation of its validity. It is based on a political decision concerning the type and form of its own being, which stems from its political being. . . . The people, the nation remains the origin of all political action.*¹

*Many of our constitutional rights and values—liberty, equal protection of the law, due process, freedom of expression—reflect not only specific decisions made in the United States, but also widely shared commitments of many Western democracies.*²

The last two decades have seen an expansion of judicial power in developing and newly democratizing countries across the globe. The enhanced role for the judiciary, which some scholars have categorized as a “juristocracy,”³ has accompanied a dialogue or at least a tendency for judges to look beyond their national borders at other courts for assistance in resolving difficult national, legal, and political disputes. The Supreme Court of Pakistan has drawn on the rationale of India’s apex court to support public interest litigation, while In-

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1. CARL SCHMITT, *CONSTITUTIONAL THEORY* 125, 128 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

2. Vicki Jackson, *Yes Please, I'd Love to Talk With You*, *LEGAL AFF.* (July–Aug 2004) [hereinafter Jackson, *Yes Please*], http://www.legalaffairs.org/issues/July-August_2004/feature_jackson_julaug04.msp.

3. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

dia's courts have referred to judgments from South Africa, the United States, Canada and the European Convention on Human Rights (ECHR) to argue for a right to life with dignity. Such engagement with foreign laws has provoked criticism from influential judges like Justice Antonin Scalia of the U.S. Supreme Court for eroding national sovereignty and even imposing foreign interpretations on culturally contextual national issues.

The objection to using foreign judgments, however, confuses two levels at which law operates. The first level is the formal authority or legitimacy of the law—the foundation or the source of the law. German legal and political theorist Carl Schmitt makes a distinction between the constitution in a broad and overarching sense and the constitution as a set of laws. For Schmitt, “the essence of the constitution is not contained in a statute or a norm” but in a prior and “fundamental political decision by the bearer of the constitution-making power. In a democracy . . . this is a decision by the people.”⁴ His quote above that the people and the nation are the origin of all political action and create the ethical substance of the state pertains to the legitimacy of the laws.⁵ Justice Scalia's critique is stronger when we focus on this level—that engagement with foreign precedents will reduce sovereignty if judges use foreign notions, say, of decency, instead of American ones to decide if a punishment is cruel.⁶ Here, American legal theorist Professor Vicki Jackson, a proponent of using foreign cases, is less persuasive in her argument that western democracies share ethical commitments.⁷

But, if we examine the second level of what law does, not as the formal authority, but in terms of the process of law, foreign precedents perform a useful function in enabling judges

4. SCHMITT, *supra* note 1, at 77.

5. *Id.* at 75; see also PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM 10–11 (1997) (noting that the “problem of popular sovereignty and its relationship to constitutional law” (i.e., who is sovereign) appears in debates on U.S. constitutional theory. “‘We the People’ may be either the ‘republican’ community of citizens or the civil rights and procedures that constitute a ‘liberal’ conception of the Constitution.”).

6. See *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (arguing that reliance on the civilized standards of decency in other countries when assessing whether capital punishment for a 15-year-old was cruel and unusual was “totally inappropriate as a means of establishing the fundamental beliefs of this Nation”).

7. See Jackson, *Yes Please*, *supra* note 2.

to construct examples. If “[r]easoning by example in the law is a key to many things,”⁸ then Justice Scalia is wrong about the perils of engaging with foreign cases, while Professor Jackson is right that looking abroad at a normative commitment shared with another country will help in illuminating the common and singular commitments of domestic constitutional rights.⁹

This Article argues that foreign precedents perform a useful function primarily at the process level, by enabling judges to understand the normative assumptions and debates within their domestic contexts. Home countries need not even share a normative commitment with the foreign country. The concern of the American originalists, that the uniqueness of a constitution does not permit engaging with foreign decisions, is misplaced. For instance, Frank Michelman’s analysis of the South African experience with affirmative action helps us understand why American judges rule differently on these issues. The South African resolution to affirmative action matters lies through an ideological port where Americans do not call, namely the subscription to a thick constitutional project of racially redistributive social transformation.¹⁰ Using judgments from India, Sri Lanka, and South Africa, this Article shows how judges use comparative materials to interrogate, discover, and expose the factual and normative assumptions underpinning their own constitutions.¹¹

Part I argues that much of the debate on whether to borrow has confused the two levels of law, and shows that it would be more useful to focus on the second level and investigate the functions that foreign precedents perform, i.e., the how and the why of such engagement. My approach differs from the neo-functionalist approach, which has been criticized for assuming a common normative constitutional vision across societies that, in reality, has not yet emerged.¹² Unlike the neo-

8. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5–6 (1949).

9. See Jackson, *Yes Please*, *supra* note 2.

10. Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1760 (2004).

11. See Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 21 (2006).

12. See generally Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2003–04) [hereinafter Teitel, *Global Age*] (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds.) (2003)) (criticizing the neo-functionalist approach).

functionalist approach—which focuses on the constitutional problem and its solution—the dialogical approach, advocated in this Article, identifies the process of constitutional interpretation. Like the Canadian constitutional scholar, Sujit Choudhry, I eschew the term “borrowing” because it “inaccurately connotes ownership on the part of the lender” and implies that the ideas must be used “as is.”¹³ Migration, on the other hand, presumes nothing about the attitudes of the giver or the recipient; or about the properties or the fate of the legal objects transferred. Rather, as Neil Walker says, “it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.”¹⁴

Parts II and III draw on Carl Schmitt’s *Constitutional Theory* to classify the engagement with foreign laws in a way that allows us to understand how a court identifies and even challenges the assumptions underlying its own constitutional doctrine.¹⁵ Part II discusses the constitutional imperatives, ambiguities, and silences of the Indian, Sri Lankan, and South African constitutions, while Part III outlines the classificatory perspective. Part IV uses these classifications to understand judicial engagement with foreign decisions in the three countries in religious freedom cases. Part V addresses the implications of cross-judicial engagement in a globalizing world.

I. THE PERILS AND USES OF BORROWING FROM FOREIGN SOURCES¹⁶

For centuries, constitutional designers and interpreters have looked beyond their shores to discover possible sources for emulation.¹⁷ But with the increased trafficking in constitu-

13. *Id.*

14. *Id.*

15. See SCHMITT, *supra* note 1.

16. See Gary Jeffrey Jacobsohn & Shylashri Shankar, *Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity*, in *COMPARATIVE TRADITION IN SOUTH ASIA* (Sunil Khilnani & Vikram Raghavan eds.) (forthcoming).

17. A notable example from India is its borrowing of the idea of Directive Principles from Ireland. Responding to criticism that the draft of the Indian Constitution borrowed heavily

tional ideas that has accompanied the global judicialization of politics, the appropriateness of doing so—particularly as this relates to the activity of courts—has emerged in recent years as a contested issue. The controversy is particularly pronounced in the United States, whose Supreme Court judgments are often cited by other countries' courts, yet its Justices have historically been reluctant to return the compliment.¹⁸

There are two objections to citing foreign decisions: judicial opportunism and cultural specificity. "If foreign decisions are freely citable," argues Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, "any judge wanting a supporting citation has only to troll deeply enough in the world's *corpus juris* to find it."¹⁹ Critics argue that such references to foreign law are an illegitimate, antidemocratic usurpation of judicial authority, or an effort to obscure the absence of solid grounding in U.S. law for a result based on foreign fads rather than American conceptions of law.²⁰ For others like Indian legal scholar P.K. Tripathi (who argued this point nearly fifty

from other constitutions at the expense of India's indigenous village system, B. N. Rau (the author of the original draft) said:

so long as the borrowings have been adapted to India's peculiar circumstances, they cannot in themselves be said to constitute a defect To profit from the experience of other countries or from the past experience of one's own is the path of wisdom. There is another advantage in borrowing not only the substance but even the language of established constitutions; for we obtain in this way the benefit of the interpretation put upon the borrowed provisions by the courts of the countries of their origin and we thus avoid ambiguity or doubt.

SRI BENEGAL NARSINGA RAU, *INDIA'S CONSTITUTION IN THE MAKING* 361 (B. Shiva Rao ed., 1960).

18. For a discussion of this controversy, see generally Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004). The scholarly literature on this subject is rapidly growing. A representative sample of contrasting views may be found in Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2004-05) and Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, [hereinafter Jackson, *Constitutional Comparisons*] 119 HARV. L. REV. 109 (2005).

19. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 86 (2005) [hereinafter Posner, *A Political Court*]. Posner's objection deals with the selectivity within an issue (why look at some countries instead of others?), and selectivity across issues (why use comparative analysis in some cases but not in others?).

20. See Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF. (July-Aug 2004), http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julyaug04.msp [hereinafter Posner, *No Thanks*]; see also *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (noting that the Court's discussion of foreign views "is . . . meaningless dicta"); Robert H. Bork, *Whose Constitution Is It, Anyway?*, NAT'L REV., Dec. 8, 2003, at 37, 38; Antonin Scalia, *Commentary, International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Laws*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996).

years ago), the flaw in the practice of citing foreign sources is that it exacerbates the problem of judicial discretion and fallibility.²¹

One response to this critique is from the functionalists who claim that political institutions perform certain tasks common to all well-functioning systems of governance, and experiences elsewhere can provide insights into functional themes already present in domestic law.²² However, the functionalist approach has been criticized for omitting “institutional details unique to the systems being compared,”²³ and for assuming “a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracy.”²⁴

This brings us to the second objection to borrowing, which holds that constitutions emerge out of each nation’s distinctive history (i.e., are culturally contingent). “[F]oreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices . . . are largely ignorant,” notes Judge Posner.²⁵ The culture objection doubts the competence of judges in making the necessary functional translations between two cultures. For instance, the use of a Canadian case by South African judges who were examining the legal validity of the use of cannabis for health effects demonstrates the concern that may arise—under the cultural objection—when judges from one culture use case precedent from another culture.²⁶ Such failures are arguably more likely to occur in areas of the law where the issues under consideration are less amenable to the application of universal standards.²⁷

21. Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 347 (1957).

22. See Teitel, *Global Age*, *supra* note 12, at 2574 n.17 (reviewing KONRAD ZWIEGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 32–47 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1977)).

23. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1239 (1999).

24. Teitel, *Global Age*, *supra* note 12, at 2576 (quoting COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 8 (Norman Dorsen et al. eds., 2003)).

25. Posner, *A Political Court*, *supra* note 19, at 86.

26. Andrea Lollini, *Legal Argumentation Based on Foreign Law: An Example from the Case Law of the South African Constitutional Court*, 3 UTRECHT L. REV. 60, 68–71 (2007), available at <http://www.utrechtlawreview.org/publish/articles/000037/article.pdf>.

27. This can be seen as a response to Judge Posner’s selectivity criticism. See Posner, *A Political Court*, *supra* note 19.

For example, Professor Jackson argues that the benefits of cross-national borrowing are lower for adjudicating issues of federalism than for individual rights.²⁸ This is because “federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests.”²⁹

This concern about retaining a constitutional identity is inherent in any reference or translation from other cultures by judges who must distinguish among the various constitutive commitments that might differentiate countries, or in Carl Schmitt’s terms, reflect the political decision of a national people.³⁰ Judges operate within the framework of a particular constitution, which has its own normative imperatives, such as balancing social reform and maintaining the integrity of group religious life (India),³¹ creating a democratic, universalistic, caring, and aspirationally egalitarian society (South Africa),³² or guaranteeing a preeminent position to Buddhism (Sri Lanka),³³ among others. But as Tushnet points out, the degree to which a constitution, as interpreted by a court, “shape[s] culture varies from nation to nation.”³⁴ Given these problems, one might ask: Why should judges resort to comparative material as a device to resolve whether a particular measure violates a particular provision of their constitution?³⁵

28. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272 (2001).

29. *Id.* at 273.

30. See SCHMITT, *supra* note 1, at 125.

31. INDIA CONST. arts. 17, 25–30.

32. S. AFR. CONST. 1996 pmb.

33. SRI LANKA CONST. art. 9.

34. Tushnet, *supra* note 23, at 1270. The Indian Constitution is an effort by the founders to design a secular and democratic constitution for a highly stratified and religiously pluralist society. “[Y]et, because the Indian Supreme Court does not occupy a large space in the nation’s political culture, it seems inaccurate to suggest that the Indian Constitution as interpreted by the nation’s Supreme Court expresses much about India.” *Id.* at 1271 (citation omitted). In contrast, the German emphasis on free speech indicates a “commit[ment] to ‘militant democracy,’ which means that the law must be militant on behalf of democracy to suppress anti-democratic speech,” which stems from the country’s experiences under Hitler. *Id.* at 1279 (citing Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1463–64 (1996)).

35. Alford, *supra* note 18, at 644.

A. In Defense of Engagement

Opponents of engagement are wrong on two counts. First, Professor Choudhry is correct that they have erroneously framed the issue.³⁶ These opponents suggest that comparative jurisprudence is legally binding on the one hand—meaning that the court is acting as an agent of foreign authorities—and on the other hand also say that it is not legally binding, implying that such citation is mere window-dressing for judicial legislation.³⁷ In either case, opponents view comparative jurisprudence as illegitimate.³⁸

Instead, let us frame the issue in terms of the place of comparative jurisprudence in the process of legal reasoning. Legal theorist Edward Levi reminds us that the process of law involves “reasoning by example,” and such reasoning highlights important commonalities and divergences in interpreting laws, statutes, and constitutions.³⁹ Constitutions enshrine a community’s ideals, which may and often do conflict when set in ambiguous categories.⁴⁰ “These categories bring along with them satellite concepts covering the areas of ambiguity. It is with a set of these satellite concepts that reasoning by example must work.”⁴¹ And it is in these examples that comparative jurisprudence plays a key role. In a case where the two positions reflect two causal pathways of the implications of enforcing, overturning, or creating a right, the comparative glance allows judges to view the implications of other paths taken.⁴² For example, there is a case from India where a minority opinion on religious freedom drew from U.S. case law to point out that imposing restrictions was not the only way to ensure that religious freedom could flourish.⁴³

36. Choudhry, *supra* note 11, at 9.

37. *Id.*

38. *Id.*

39. LEVI, *supra* note 8, at 6.

40. *Id.* at 7.

41. *Id.*

42. Pragmatists like Posner would ask, how do we know if another system works well or if it would work well if transplanted here? The answer is that we do not know, but then we do not know if the current system will continue to work well. Maybe the case is in court because the current system has collapsed.

43. *Comm’r of Police v. Acharya Jagadishwarananda Avadhuta (Ananda Margi Case)*, (2004) 12 S.C.C. 770, ¶¶ 58, 65 (Lakshmanan, J., concurring).

Second, the critics' arguments weaken when the definitional misconceptions about the terms "foreign" and "use" are examined. Most countries have drawn on ideas and constitutions from abroad—e.g., the Napoleonic Code was adopted by Europe, and the ideas of English theorist John Locke and old English law can be found in the U.S. Constitution. Moreover, as Adam M. Smith points out, "it is unclear whether laws (foreign or domestic) need to be concrete for their use to be imputed" (e.g., use of "customary international law"), and whether use includes "foreign theoretical concepts," and the "canon[s] of construction rather than [their] holding[s]." ⁴⁴ It is also not factually correct that U.S. courts do not draw on foreign case law. ⁴⁵ Several scholars have argued that "comparative constitutionalism ought to be reconcilable with the originalist principles of judicial review" because the "colonial judiciary referred to English law, Norman law, and other classical influences," so "the very idea of 'higher' law was informed by international and foreign sources." ⁴⁶

Professor Jackson provides us with some answers on the importance of engaging comparatively: "[T]ransnational legal sources may helpfully interrogate understanding of our own Constitution in several ways." ⁴⁷ First, if there is more than one domestic precedent on the issue to be resolved, "approaches taken in other countries may provide helpful empirical information in deciding what interpretation will work best here [in the United States]." ⁴⁸ Second, comparison can shed light on the distinctive functioning of one's own system. ⁴⁹ This is apparent in the rejection of American case law on sodomy by Indian and South African judges who fashioned solutions that resonated with their own constitutive commitments. Third,

44. Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 226 (2006). For a discussion of the history and patterns of foreign case law citations in India, see generally *id.* at 232–35, 239–62.

45. See Teitel, *Global Age*, *supra* note 12, at 2571–72 (citing U.S. Supreme Court cases that draw on international and foreign sources); see also Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 88–100 (2006); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 361–87 (2005).

46. Teitel, *Global Age*, *supra* note 12, at 2588.

47. Jackson, *Constitutional Comparisons*, *supra* note 18, at 116.

48. *Id.*

49. See generally SCHMITT, *supra* note 1 (comparing the history of constitutional governments in Europe and the United States).

foreign sources may illuminate supra-positive dimensions of constitutional rights, as when a constitutional text requires contemporary judgments about the quality of an action (e.g., the cruelty of a punishment or the outdatedness of a moral position). Fourth, they help judges make reflective comparisons by allowing them to distance themselves from, and check their own, first reactions.⁵⁰ The result of this exercise, as Scheppele and Jacobsohn point out, may well be the rejection of foreign precedents, but the exercise itself may be heuristically valuable in clarifying and deepening the understanding of one's own constitutional condition.⁵¹

B. The Approach to Migration of Ideas

Understanding how and why comparative jurisprudence is helpful will enable us to justify at a deeper level the appropriateness of engaging with foreign rulings and will counter Justice Scalia's objections about the ad hoc nature of the practice. Such a focus is required in an age when we live in a world of multiple and overlapping legal jurisdictions, and where it has become almost *de rigueur* for judges to dip into the cases of their overseas colleagues.⁵² Choudhry is right to point out the lacuna in the literature on the methodology and normative underpinnings of constitutional migrations.⁵³ The literature consists either of "static comparisons of different constitutional systems," which do not examine how and why constitutional ideas migrated across systems, or universalized ac-

50. McCrudden highlights four ways in which a judge uses foreign law: (1) a rhetorical use where a judge in 'X' quotes from a court in 'Y'; (2) an empirical information use where a court in 'X' cites a judicial decision in 'Y' to support an empirical conclusion that a particular approach is or is not workable; (3) citing a foreign ruling as establishing a reason for why a human rights claim against a government entity should not succeed; (4) the use of foreign material as a reason for why a human rights claim against a government entity should succeed. Christopher McCrudden, *Judicial Comparativism and Human Rights*, in *COMPARATIVE LAW: A HANDBOOK* 371, 378-79 (David Nelken & Esin Örücü eds., 2007).

51. See Kim L. Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 298 (2003); see generally Jacobsohn, *supra* note 18 (arguing that the role of constitutional arrangements in manifesting important aspects of national identity does not preclude looking to foreign constitutions' articulations of legal norms).

52. For instance, a citizen in Europe is a citizen of a state that is a member of the E.U. and is also subject to the legal orders issued by the European Commission on Human Rights and to certain worldwide legal regimes such as the World Trade Organization.

53. Choudhry, *supra* note 11, at 14-16.

counts of liberal democratic constitutions, which do not examine how the migration of ideas figures into their narratives of convergence.⁵⁴ Choudhry proposes the dialogical method where “[t]he goal [of a judge] is to use comparative materials as an interpretive foil, to expose the factual and normative assumptions underlying the court’s *own* constitutional order.”⁵⁵ He argues that “[c]omparative engagement highlights the contingency of legal and constitutional order, and opens for discussion and contestation those characteristics which had remained invisible to domestic eyes. Conversely, if the assumptions are similar, one can still ask whether those assumptions ought to be shared.”⁵⁶

This Article attempts to fill the lacuna. I draw on Choudhry’s dialogical method and use a comparative frame to make my case for more trans-judicial engagement. Some scholars like Michel Rosenfeld and András Sajó have explored whether the outcome of transplantation of ideas depends more on the nature of the rights, or on contextual issues relating to the conditions in the importing countries.⁵⁷ Their answer is that both matter: “There is little doubt that importation of liberal constitutional norms can contribute to increased liberalism and reduced illiberalism, although the success is context bound. How, or how much, however remains an open question.”⁵⁸

Contrary to the objections raised by Justice Scalia and others, different constitutional imperatives do not necessarily exclude an engagement with foreign decisions. As Teitel rightly points out, in contrast to the critical legal studies method, which emphasizes the political and economic basis for comparative exchange, the dialogical approach focuses on the juridical basis.⁵⁹ This approach contemplates a way to constitutional change that is potentially independent of politics. Law functions at the meta level of authority and at the meso (or middle) level of process—one of applying general rules of law to diverse facts.

54. *Id.* at 16.

55. *Id.* at 23.

56. *Id.*

57. See generally Michel Rosenfeld & András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 142, 142 (Sujit Choudhry ed., 2006).

58. *Id.* at 177.

59. Teitel, *Global Age*, *supra* note 12, at 2583–87.

Comparative jurisprudence is most useful at the level of process, i.e., legal reasoning, and when applied within a dialogical frame, the comparative method becomes a dynamic interpretive and discursive practice.

II. THE SUBSTANCE OF THE CONSTITUTION

Carl Schmitt argues in *Constitutional Theory* that the constitution is the soul of the state that signifies a unified and closed system of higher and ultimate norms, and functions as a command, an imperative.⁶⁰ The preamble expresses the political decisions of the people. Carl Schmitt writes:

Clauses like "the German people provided itself this constitution," "state authority derives from the people," or "the German Reich is a republic," are not statutes at all and consequently, are also not constitutional laws. They are not even framework laws or fundamental principles. As such, however, they are not something minor or not worthy of notice. They are *more* than statutes and sets of norms. They are, specifically, the concrete political decisions providing the German people's form of political existence and thus constitute the fundamental prerequisite for all subsequent norms, even those involving constitutional laws. Everything regarding legality and the normative order inside the German Reich is valid only on the basis and only in the context of these decisions. They constitute the substance of the constitution.⁶¹

A constitutional law, on the other hand, is the enabling legislation of the constitution-making will and must be distinguished from the constitution. Schmitt's contemporary and fellow legal theorist, Hans Kelsen, criticized Schmitt's notion of unity of the people:

What this unity consists of, which has a substantive, not some merely formal character, is not defined any

60. SCHMITT, *supra* note 1, at 59.

61. *Id.* at 78. Recently, there has been a revival of interest in Schmitt. See CALDWELL, *supra* note 5, at 5; see generally Otto Kirchheimer, *Remarks on Carl Schmitt's Legality and Legitimacy*, in *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 64, 64 (William E. Scheuerman ed., 1996) (discussing Schmitt's essay analyzing the Weimar Constitution and the state of German constitutional law).

more closely. It cannot be anything but a condition desired only from a definite political point of view. Unity as a wished-for ideal of natural law thrusts itself into the place of the positive-legal concept of the constitution.⁶²

While Kelsen has a point, this Article assumes that constitutions embody commands or imperatives. If we take Schmitt's reasoning that constitutions embody a command, a norm, or an imperative,⁶³ then an engagement with foreign decisions could enable judges to find, deepen or even challenge the imperative embedded in national constitutions. Or, conversely, the engagement could further muddy the contours. Even if the compromise is "not genuine" but simply draws out and postpones the "substantive decision through reciprocal compliance,"⁶⁴ an engagement with foreign cases would still perform the valuable task of highlighting the two sides of the debate. On the other hand, when the constitution is silent on an issue that was not relevant during the constitution-framing process, one of the outcomes of transnational dialogue could be a convergence with global normative commitments.

This Article analyzes how judges in India, Sri Lanka, and South Africa engaged with foreign jurisprudence in the area of religious freedom. By the "most similar cases" logic,⁶⁵ the three countries share sufficiently similar background characteristics in their colonial history,⁶⁶ common law systems, apex courts and constitutions, and multi-religious citizenries who have a fundamental (and justiciable) right to freedom of religion and conscience.⁶⁷

The three constitutions do not forbid judges from referring to foreign cases. The South African Constitution expressly re-

62. CALDWELL, *supra* note 5, at 116.

63. See SCHMITT, *supra* note 1, at 62–63.

64. *Id.* at 84.

65. See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 133–40 (2005) [hereinafter Hirschl, *Case Selection*]. The "most similar cases" principle holds that comparable cases must "be selected so as to hold constant non-key variables while isolating the explanatory power of the key independent variable." *Id.* at 134. In this Article, I examine whether judges see their own country's constitutional commands on religious freedom as being different from the constitutional imperatives of the countries from which they draw on for ideas.

66. All three were colonies of Great Britain. South Africa later became an Afrikaner colony.

67. See Hirschl, *Case Selection*, *supra* note 65, at 133–40.

quires judges to use controlling international law and encourages references to foreign laws in interpreting the South African Bill of Rights.⁶⁸ This is because it could not find points of reference in the segregationist ideology of the previous regime.⁶⁹ The Indian Constitution, on the other hand, merely asks the state to respect international law and treaty obligations⁷⁰ in the nonjusticiable section of the Constitution; similar but justiciable provisions exist in Sri Lanka.⁷¹ But as Smith points out, 24.6% of the Indian cases use foreign law;⁷² several landmark cases have cited and relied on the opinions of foreign courts with regard to the right to a fair trial, restraints on foreign travel, and freedom of press, among others.⁷³

Let us first assess the constitutional imperatives, ambiguities, and silences of the three constitutions.

A. *The Indian Constitution*⁷⁴

The Preamble of the Indian Constitution states that the Constitution was a solemn resolution on the part of the people of India to constitute the country into:

a [Sovereign Socialist Secular Democratic Republic]
and to secure to all its citizens: justice, social, economic
and political; liberty of thought, expression, belief,
faith and worship; equality of status and of opportunity;
and to promote among them all fraternity assur-

68. S. AFR. CONST. 1996 § 39(1)(b)–(c).

69. Lollini, *supra* note 26, at 63–64.

70. INDIA CONST. art. 51(c). Article 37 states that the principles contained in Part IV, which includes Article 51, shall not be enforceable in court. INDIA CONST. art. 37.

71. SRI LANKA CONST. art. 157.

72. Smith, *supra* note 44, at 239. The Chief Justice of India noted in a recent lecture that the Indian Supreme Court's "citation of foreign precedents is a routine practice." K.G. Balakrishnan, Chief Justice of India, *The Role of Foreign Precedents in a Country's Legal System* 23 (Oct. 28, 2008) (transcript available at http://www.supremecourtindia.nic.in/speeches/speeches_2008/28%5B1%5D.10.08_Northwestern_University_lecture.pdf). The Chief Justice alluded to the calls by "a vocal minority" to eschew "the imposition of an elitist and western Constitution" in the early years of independence and said that the "leaders as well as the judiciary chose to ignore these calls for revivalism with the firm belief that it was the emerging language of international human rights which would transform India into a modern liberal democracy." *Id.* at 23–24.

73. Smith, *supra* note 44, at 253–60 (giving examples of Indian cases looking to foreign courts for guidance). *But see id.* at 248 n.134 (referencing a case where the relevance of foreign law was rejected by an Indian judge).

74. See Jacobsohn & Shankar, *supra* note 16.

ing the dignity of the individual and the [unity and integrity of the Nation]⁷⁵

The principles of justice, equality and liberty enumerated in the Preamble were deeply entwined with the role of religion in the newly independent republic. The Indian Constitution was adopted against a backdrop of sectarian violence in a complex centuries-old story of Hindu-Muslim relations on the Asian subcontinent. Much of that history had been marked by peaceful co-existence; nevertheless, the bloodbath that accompanied Partition reflected ancient contestations and ensured that the goal of communal harmony (encapsulated in the liberty principle of the Preamble) would be a priority in the constitution-making process. The goal of social reconstruction (encapsulated in the equality and justice principles of the Preamble), if not as urgent, was certainly as important, and could not be addressed without constitutional recognition of the state's interest in the essentials of religion.⁷⁶ The depth of religion's penetration into a social structure (the caste hierarchy in Hindu religion) that was by any reasonable standard grossly unjust, meant that the framers' hopes for a democratic polity would have to be accompanied by the state's intervention in the spiritual domain. But this involved intervention in the temporal life as well. According to one commentator, "The Indian Constitution has to take religion as both an object of reform and at the same time claim that the state and public purposes do not pose a threat to the exercise of religion."⁷⁷

The Constitution of India articulates three principles in its treatment of religion: religious freedom; neutrality of the state towards all religions, wherein the state would neutrally assist and celebrate all faiths; and regulatory and reformatory justice, whereby religious freedom would be curtailed on grounds of public order, health and morality, and religious practices, and institutions could be regulated by the state in areas of eco-

75. INDIA CONST. pmbl. (amended by the Constitution (Forty-second Amendment) Act, 1976, available at <http://indiacode.nic.in/coiweb/amend/amend42.htm>).

76. What this means is that justices in India often find it difficult to avoid what their counterparts in many other countries can avoid, namely, an inquiry into theological issues so as to determine what exactly is integral to a given religion.

77. See Pratap Bhanu Mehta, *Passion and Constraint: Courts and the Regulation of Religious Meaning*, in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 311, 318 (Rajeev Bhargava ed., 2008).

nomic, financial, political, or other secular activity.⁷⁸ The Constitution provides for equality (Articles 14–16), social justice (Article 17 abolishes untouchability) and freedom of religion (Article 25) in the fundamental rights section, and advocates a uniform civil code in the non-justiciable goals for the state (Articles 44 and 46).⁷⁹ Additional provisions are designed to accommodate the other principal facet of Indian social reality, the entrenched character of communal affiliation. Under Article 26, religious denominations are granted the right to establish and maintain institutions for religious and charitable purposes,⁸⁰ and the same right is extended to the creation and administration of religiously-based educational structures in Article 30.⁸¹ Article 27 states that no person can be compelled to pay special taxes on the basis of religion,⁸² and Article 28 prevents religious instruction in wholly state-funded religious institutions.⁸³ Articles 29 and 30 include cultural and educational rights for minorities and prohibit discrimination in these areas.⁸⁴

Several ambiguities, however, remained with regard to religious freedom, which one could characterize in Schmitt's terms as compromises that were "not genuine." Such a compromise "consists in finding a formula that satisfies all contradictory demands and leaves, in an ambiguous turn of phrase, the actual points of controversy undecided. So the Constitution contains only an external, semantic jumble of substantively irreconcilable matters."⁸⁵ For Schmitt, while such com-

78. See generally Rajeev Dhavan, *Religious Freedom in India*, 35 AM. J. COMP. L. 209 (1987) (examining religious freedom in India through an analysis of three areas of constitutional litigation: control of religious endowments, regulation of minority educational institutions, and reform of personal law).

79. INDIA CONST. arts. 14–16, 17, 25–30, 44, 46. Article 25, which, after providing that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion," declares that the state shall not be prevented from "regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice," and "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus" (who would include Sikhs, Jains, and Buddhists). A Directive Principle (Article 44) asks the state to provide a uniform civil code to all citizens. INDIA CONST. arts. 25, 44.

80. INDIA CONST. art. 26.

81. INDIA CONST. art. 30.

82. INDIA CONST. art. 27.

83. INDIA CONST. art. 28.

84. INDIA CONST. arts. 29, 30.

85. See SCHMITT, *supra* note 1, at 84.

promises are “effective” because they would not be possible if there was no consensus between parties, the agreement merely postpones the decision and is satisfied with a “dilatory formula that takes account of all opposing claims.”⁸⁶

The principle of *sarva dharma sambhava*, or equal treatment of religions, is widely accepted as the foundational premise of India’s secular constitutional commitment, but its meaning has long been contested. While India did not establish an official religion (or give preeminent status to a religion as did Sri Lanka), it is not clear what is meant by the term “secular.” For some, it means that “no one religion should be given preferential status or unique distinction and that no one religion should be accorded special privileges That would be violative of basic principles of democracy.”⁸⁷ Under this banner of constitutionally required state neutrality to all, people with very little in common politically find common cause, such as Western-oriented constitutional liberals and many Hindu nationalists (who have figured out that the enforcement of this principle may work in favor of the majority religion).⁸⁸ Similarly, the Constitution does not specify a separation of religion and public life, and does not specify a procedure to determine who would represent the minority community in their dealings with the state.⁸⁹ As Indian political theorist Gurpreet Mahajan points out, the recognition of minority religious communities was a subject of controversy because even when communities like the Sikhs and Buddhists were “recognized as separate minorities,” they were not always “designated as distinct religions.”⁹⁰ These silences have made the court’s task of

86. *Id.* at 85.

87. *S. R. Bommai v. Union of India*, (1994) 3 S.C.C. 1, ¶ 259 (Ahmadi, J., concurring) (internal quotation omitted).

88. Another version is less formalistic in its understanding of equality and arguably more reflective of the reality of Indian secularism as well as its normative presuppositions. As explained by theorists such as Rajeev Bhargava, this depiction holds that the application of formal equality in a profoundly non-egalitarian society only ensures that pervasive inequality will be reproduced. See, e.g., Rajeev Bhargava, *What is Secularism For?*, in *SECULARISM AND ITS CRITICS* 486, 489 (Rajeev Bhargava ed., 1998). This reproduction of pervasive inequality leads Bhargava to endorse “contextualist secularism,” which has at its core the “strategy of principled distance.” *Id.* at 515–16.

89. But there is a separation of religion and political life, i.e., there are no reserved constituencies for religious groups, and religious rhetoric is forbidden in elections.

90. Gurpreet Mahajan, *Religion and the Indian Constitution: Questions of Separation and Equality*, in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 297, 306 (Rajeev Bhargava ed., 2008).

balancing the Constitution's dual commitment to social reform and the integrity of group religious life difficult, and complicated the state's approach to individual rights within groups.⁹¹ For instance, the principle of freedom of religion gave way when issues of caste equality were on the table.

Part IV assesses how the dilatory formula on religious freedom adopted in the Constitution produces contradictory attempts by the court to clarify the commands of the Constitution. In the process, foreign case law performed the task of clarifying the implications of paths taken in other contexts and sharpened the contours of the debate.

B. The South African Constitution

In contrast to the Indian Constitution's preoccupation with social justice constructed primarily along religious lines, the South African Constitution's primary concern is to return to its citizens a life with dignity because a majority was denied their humanity during Apartheid. The Preamble of the South African Constitution of 1996 states:

We, the people of South Africa, recognise the injustices of our past; honor those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that

91. The problem is dramatically highlighted in the Indian Supreme Court's repeated efforts to illuminate the state's obligation "to secure for the citizens a uniform civil code throughout the territory of India." See INDIA CONST. art. 44. This Article 44 commitment is located in the Directive Principles of State Policy section of the Constitution, which means that its aspirational content falls short of creating an enforceable legal right. See INDIA CONST. art. 37. Nevertheless, the Court's interpretive interventions in regard to these matters have left a significant impression on the Indian political landscape. Its judgment in *Khan v. Bano*, 1985 3 S.C.R. 844, in which a Muslim woman's claim to maintenance from her divorced husband was upheld over the objection that to do so would undermine Muslim personal law, precipitated a series of political actions—including the Government's support of legislation to undo the decision—that became a rallying cry for many who seven years later participated in the destruction of the Babri Masjid mosque in the city of Ayodhya. More recently, the principal opinion in *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, a case concerning one of the ingenious ways in which Hindu men have tried to circumvent the ban on polygamous marriages, roiled political waters again by declaiming, "When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of 'uniform civil code' for all citizens in the territory of India." See Jacobsohn & Shankar, *supra* note 16.

South Africa belongs to all who live in it, united in our diversity.⁹²

As legal scholar D.M. Davis points out, the apartheid judiciary was correctly accused of reshaping South African jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls.⁹³ The country's violent history had a fundamental impact on the new South African Constitution of 1996, a fact recognized by its judges. Justice Mahomed said:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁹⁴

The 1996 South African Constitution, which was modeled on the Canadian Charter of Rights and also borrowed from Germany and the United States, made a strong commitment to human dignity, democratic values, social justice, and fundamental human rights. The preamble goes on to state:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which gov-

92. S. AFR. CONST. 1996 pmb.

93. D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181, 182 (2003).

94. *State v Makwanyane* 1995 (3) SA 391 (CC) ¶ 262 (S. Afr.).

ernment is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.⁹⁵

These pledges were reiterated by the Constitutional Court of South Africa. In *Prinsloo*, the Court identified the central concern of independent South Africa:

We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.⁹⁶

Religious freedom, therefore, was constituted in an expansive manner as a way to celebrate diversity and realize the Preamble's commitment to "free the potential of each person."⁹⁷ In Schmitt's terms, the South African Constitution contains the command to interpret religious freedom in an expansive fashion.⁹⁸

C. The Sri Lankan Constitution

Since gaining independence from the British in 1948, the Sri Lankan state grappled with maintaining the hegemony of the majority Sinhalese Buddhists without undermining other ethnic (Tamil) and religious (Hindu, Muslim, Christian) identi-

95. S. AFR. CONST. 1996 pmb1.

96. *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) ¶ 31 (S. Afr.).

97. S. AFR. CONST. 1996 pmb1.

98. Section 15 of the South African Constitution states "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion." It permits religious observances in state and state-aided institutions provided they are conducted on an equitable basis and allow everyone to attend. S. AFR. CONST. 1996 § 15(2). It balances religious freedom and tradition/customary practices by stating that the section "does not prevent legislation recognising (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." S. AFR. CONST. 1996 § 15(3)(a). Section 31 affirms the individual rights of cultural, religious, and linguistic communities "to enjoy their culture, practice their religion and use their language." S. AFR. CONST. 1996 § 31(1)(a).

ties.⁹⁹ Buddhism was harnessed and politicized to respond to ethnic and linguistic differences, prompting commentators to compare it to Hindu nationalism in India. The Sinhala Buddhist worldview “equates ethnic community (Sinhalese Buddhists), religion (Theravada Buddhism), language (Sinhala), race (Aryan Sinhalese), and nation (Sri Lanka).”¹⁰⁰ Sinhala nationalism emphasized the unitary nature of the state controlled by the Sinhala majority and rejected equal status for Tamil nationalism because of historically buttressed fears of Dravidian conquest.¹⁰¹ Even the national flag, said one Tamil leader, represented the dominance of the Sinhalese community in the form of a lion with a sword.¹⁰²

The struggle between the majority Sinhalese and the minorities (Tamil, Muslim, etc.) played out in the arenas of citizenship and language. Immediately after independence, the failure of legal challenges to three discriminatory pieces of legisla-

99. Approximately 70% of the 20.1 million Sri Lankans are Buddhist, 15% Hindu, 8% Christian (mainly Roman Catholics), and 7% Muslim (mainly Sunnis). U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009: SRI LANKA, <http://www.state.gov/g/drl/rls/irf/2009/127371.htm> (last visited Apr. 5, 2010). Christians live mainly in the West, with much of the East Muslim and the North almost exclusively Hindu. Family law is adjudicated by the customary law of each religious group with final appeal to a secular authority, the Supreme Court. *Id.* Separate ministries in the Government address religious affairs, namely the Ministry of Buddhist Affairs, the Department of Muslim Religious and Cultural Affairs, the Ministry of Hindu Religious and Cultural Affairs, and the Ministry of Christian Religious Affairs. *Id.*

100. Douglas Allen, *Religious-Political Conflict in Sri Lanka: Philosophical Considerations*, in RELIGION AND POLITICAL CONFLICT IN SOUTH ASIA: INDIA, PAKISTAN, SRI LANKA 181, 188–91 (Douglas Allen ed., 1992) (warning against viewing Sinhala Buddhism as a monolithic entity, and citing studies that emphasize significant differences between popular and doctrinal/scriptural Buddhism, as well as traditional and modern revivalist Buddhism).

101. See generally Jayadeva Uyangoda, *The State and the Process of Devolution in Sri Lanka*, in DEVOLUTION AND DEVELOPMENT IN SRI LANKA 83 (Sunil Bastian ed., 1994) (providing a historical account of Sinhalese repudiation of unification with the Tamil community); Neelan Tiruchelvam, *The Politics of Federalism and Diversity in Sri Lanka*, in AUTONOMY AND ETHNICITY 197, 198–200 (Yash Ghai ed., 2000).

102. The flag has a lion with a sword facing two stripes in saffron and green symbolizing minorities. A Tamil senator, S. Nadesan, recorded his disapproval of the design in 1950:

I regret that I am unable to agree to the majority decision of the National Flag Committee. In my view a national flag apart from giving an honoured place to all communities in the flag must be a symbol of national unity Anyone viewing the design . . . cannot be blamed if he thinks that the minorities are given a place outside the Lion Flag Why then do we want to segregate the saffron and green strips which are provided to satisfy minority sentiments outside the borders of the Lion Flag?

Report of the National Flag Committee: Parliamentary Series Before H. Rep., Fourth Session of the First Parliament, No. 5 (1951) (dissenting statement of S. Nadesan QC, member of the Senate).

tion—the Ceylon Citizenship Act No. 18 of 1948 (depriving Tamils of their citizenship), the Franchise Legislation of 1949 (depriving Tamil plantation workers of Indian descent of the franchise), and the Official Language Act of 1956 (making Sinhalese the only official language)—eroded the faith of minorities in the institutions of the state.¹⁰³ The state tried to correct historical imbalances in education and employment for the Sinhalese at the expense of the Tamils and other minorities. Sovereignty was equated with unitarism and centralization, which soon found expression in the Sinhalization of administration, triggering militant secessionism of Tamils and an exodus of mixed-race Europeans.¹⁰⁴

Sri Lankan legal scholar Dr. Asanga Welikala argues that the formal constitutionalization of Sinhalese majoritarianism occurred in 1972:

The Constitution of 1972 discontinued the special protection accorded to minorities by Section 29 of the previous Constitution of 1947, expressly entrenched the unitary nature of republic, and impinged not only on the secular principle, but also trampled upon multicultural sensitivities by giving constitutional recognition to Buddhism as having a 'foremost' status in the state, entitling it to the latter's protection. It whittled down the principle of horizontal separation of powers at the centre and strengthened majoritarianism. In this way, Sri Lanka's first autochthonous constitution only served to aggravate ethno-political tensions by replicating the very constitutional anomalies at the heart of minority concerns.¹⁰⁵

103. JAYADEVA UYANGODA, QUESTIONS OF SRI LANKA'S MINORITY RIGHTS, MINORITY PROTECTION IN SOUTH ASIA SERIES NO. 2 58–63 (International Centre for Ethnic Studies Monograph 2001) (citing *Mudanayake v. Sivagnasunderam* (1957) 53 N.L.R. 25; *Kodikam Pillai v. Mudanayake* (1953) 54 N.L.R. 433 (challenging the Ceylon Citizenship Act No. 18 of 1948 and the Franchise Act of 1949 depriving these Tamils of citizenship and the franchise)). However the judges found the laws *intra vires*. *Id.* (citing *Kodeswaran v. Attorney General* (1970) N.L.R. 121 (S.C.) (challenging the Official Language Act, which required bureaucrats to pass language tests to qualify for promotion and increments. Again, judges refused to consider the constitutionality, and merely confined themselves to examining whether a public servant had the right to sue the crown for recovery of wages)).

104. NEIL DE VOTTA, BLOWBACK: LINGUISTIC NATIONALISM, INSTITUTIONAL DECAY AND ETHNIC CONFLICT IN SRI LANKA 6 (2004).

105. Asanga Welikala, *Towards Two Nations in One State: The Devolution Project in Sri Lanka*, LIBERAL TIMES, 2002, Vol. X, No. 3, at 6 [hereinafter Welikala, *Two Nations*].

The Sri Lankan Constitutions of 1972 and 1978 (the current one) are explicitly preservationist of a historical Sinhala project and establishing a preeminent position for Buddhism.¹⁰⁶ The Preamble of the 1978 Constitution states that the people of Sri Lanka agree to constitute the country into a “democratic, socialist republic,” ratify representative democracy and assure to all people “freedom, equality, justice, fundamental human rights, and the independence of the judiciary.”¹⁰⁷ The next paragraph lays out the political ethos:

We, the freely elected representatives of the People of Sri Lanka . . . humbly acknowledg[e] our obligations to our People and gratefully remembering their heroic and unremitting struggle to regain and preserve their rights and privileges so that the Dignity and Freedom of the Individual may be assured, Just Social, Economic and Cultural Order attained, the Unity of the Country restored, and Concord established with other Nations¹⁰⁸

The commitments in the Preamble are present in the constitutional laws. Article 9, which was introduced in 1972 and continued in 1978, guarantees “the foremost place” to Buddhism and makes it “the duty of the State to protect and foster the Buddha *Sasana* while assuring to all religions the rights granted by Articles 10 and 14(1)(e).”¹⁰⁹ Article 10 guarantees the “freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice,”¹¹⁰ and Article 14 allows the freedom of worship, free expression (including religious expression), and the freedom singly or in groups in public or private to manifest one’s religion or belief in “worship, observance, practice and teaching.”¹¹¹

106. See generally JAYADEVA UYANGODA, QUESTIONS OF SRI LANKA’S MINORITY RIGHTS, MINORITY PROTECTION IN SOUTH ASIA SERIES NO. 2 (International Centre for Ethnic Studies Monograph 2001) (arguing that any impulse for constitutional reform emanating from the Sinhalese political leadership was conceptualized not in terms of democratizing majority-minority relations within a pluralist framework, but as a way of giving juridical expression to the majority community’s nationalist aspirations).

107. SRI LANKA CONST. pmb.

108. *Id.*

109. SRI LANKA CONST. art. 9.

110. SRI LANKA CONST. art. 10.

111. SRI LANKA CONST. art. 14; see generally *Jeevakaran v. Ratnasiri Wickremanayake* (S.C. No. 623/96) 1997. The Hindu petitioner argued that the Government’s policy of removing a

Other rights include the right to be treated equally under the law and not to be discriminated against on religious grounds.¹¹² The Sri Lankan Supreme Court listed the sovereignty of the parliament, a unitary state, and a preeminent status for Buddhism as the key commands of the Sri Lankan Constitution in a landmark case.¹¹³ So, in Schmitt's terms, in the arena of religious freedom, the Sri Lankan Constitution contains the clear imperative that Buddhism should have a preeminent position.

III. CLASSIFYING ENCOUNTERS WITH FOREIGN JUDGMENTS

It is very hard to theorize about how a judge borrows from or engages with foreign rulings. A citation or even a discussion of a foreign case by a judge could be categorized as instrumental,¹¹⁴ pragmatic,¹¹⁵ bricolage,¹¹⁶ probative importation,¹¹⁷ or just a walk along a pilgrimage route—meaning that judges mention foreign case law to buttress their own rulings, but do not necessarily draw on the arguments used in those cases.¹¹⁸ The engagement is not always reasoned and judicious. For instance, in an article outlining the use of American precedents by the Indian, Israeli, Australian, and Canadian courts, legal scholar P.K. Tripathi rightly states that the use of such precedents are “little more than rationalizations of a

Hindu sacred day (Maha Sivarathi) from the list of public holidays was a violation of Article 14(1)(e), which protects freedom of religion, worship, and equality. *Id.* at 354. The Court held that there was a clear distinction between infringement of a right and “not facilitating” a right. *Id.* at 355. The state cannot interfere with the practice of religion, but does not have to facilitate such practice. *Id.*

112. Article 12 of the Sri Lankan Constitution (which corresponds to Article 14 of the Indian Constitution) forbids the state from denying to any person equality before the law, and equal protection of the law. SRI LANKA CONST. art. 12(1)–(2).

113. See *In re The Thirteenth Amend. to the Const. & The Provincial Councils Bill*, (1987) 2 Sri. L.R. 312, 319, 333.

114. See Tripathi, *supra* note 21, at 343.

115. See Alford, *supra* note 18, at 693–702.

116. Tushnet, *supra* note 23, at 1285–1306 (using this term for a process of random or playful selection from materials at hand).

117. Lollini, *supra* note 26, at 65–71.

118. Tripathi, *supra* note 21, at 345. Tripathi discussed how the courts of Australia, India, Israel, and Canada have made instrumental use of U.S. decisions to find justifications for results they sought to achieve in their judgments. Probative importation means that foreign interpretations are cited as if they were proof against or for an opinion, i.e., a judge arguing that “they also think this way abroad.” From this reasoning, judges arrive at their opinions: “considering that they think this way abroad, it follows that” See *id.* at 329–42.

choice largely shaped by the secret yet unmistakable pressures of psychological motivations."¹¹⁹ In the last decade, however, several scholars have argued that the influence of judiciaries on their counterparts in other continents could no longer be classified as dependent entirely on the whims of the justices.¹²⁰ In public interest litigation in India, judges used foreign rulings not just as "broad guidelines, but also for . . . specific decisional strategies invoked in those . . . decisions."¹²¹

Instead of trying to classify judgments based on the above categories, this Article identifies a judge's substantive encounters (not mere citation but an analysis of the key points of the ruling and its application to the case at hand) with foreign judgments in terms of the functions such deliberations perform, namely that: (1) judges identify the constitutional imperatives; (2) judges identify the constitutional ambiguities and competing positions; and (3) judges identify the constitution's silences and chart a convergent or divergent course with global normative concerns.

These then result in four types of outcomes: (1) congruity of normative principles at a meta level but divergence in outcomes in different contexts (historical, constitutional, and political);¹²² (2) convergence in the desired practical outcomes propelled by different contextual/constitutional preoccupations; (3) convergence of principles and outcomes that can result from a normative commonality (e.g., Professor Jackson's shared commitments) or overlap that spreads across a vast majority of competing normative outlooks;¹²³ and (4) divergence of principles and outcomes.

119. *Id.* at 346.

120. See McCrudden, *supra* note 50, at 391-94.

121. Arun K. Thiruvengadam, *In Pursuit of "The Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 INDIAN J. CONST. L. 67, 92 (2008). Critics of Anne Marie Slaughter, a pioneer in emphasizing trans-judicial influence, argue "that she places too much emphasis on the autonomous character of judges" and does not give sufficient attention to the factors that "work to constrain the ability of judges to engage with foreign decisions: institutional strength, esteem, wider social goals, the prevailing attitude in the political and popular sphere about particular foreign regimes, etc." *Id.* at 73.

122. For instance, principles of equality or religious freedom can be interpreted differently in two countries even though the overarching principles could have a similar resonance.

123. Substantive agreement among national courts and conformity with international covenants could, for instance, produce a convergence on basic human rights. See Teitel, *Global Age*, *supra* note 12, at 2593.

IV. CHARTING THE MIGRATION OF IDEAS

This Part assesses the interpretation of the right to religious freedom in three legal jurisdictions—Sri Lanka, India, and South Africa—and demonstrates the functions and outcomes generated by the engagement with foreign cases.

*A. Sri Lanka*¹²⁴

The interpretation of religious freedom in Sri Lanka is inextricably linked to the ethnic struggle for equality and even supremacy between the majority Sinhalese (who are predominantly Buddhist) and the minority Tamils. While the first constitution in 1948 did not address the position of Buddhism and even incorporated specific minority safeguards, later constitutions omitted these safeguards and gave primacy to Buddhism while simultaneously mandating religious freedom for the minority Hindu, Muslim, and Christian groups.¹²⁵

In *Premalal Perera v. Weerasuriya*, the petitioner, an employee of the Railway Department, complained that a circular authorizing the deduction of a contribution from him to the National Security Fund in the absence of an objection from him infringed his fundamental right to freedom of thought, conscience, and religion under Articles 10 and 14(1)(e) of the Constitution.¹²⁶ The petitioner claimed a violation because the money would be used by the government to buy arms, which would then be employed to destroy life, a practice repugnant to the tenets of the petitioner's Buddhist faith.¹²⁷ Drawing on cases from the United States and India, the Sri Lankan Supreme Court said that the Sri Lankan Constitution's view of religious freedom was, like in the United States, absolute, whereas in India, the freedom was subject to restrictions imposed by the state on the grounds of public order, morality, and health.¹²⁸ The absolute nature of protection of religious freedom included the protection of all beliefs rooted in religion. The Court said that the determination of what constituted a "religious belief" or practice did not depend on a judicial

124. Parts of the discussion draw on Jacobsohn & Shankar, *supra* note 16.

125. See *supra* Part II.C (discussing Sri Lankan Constitution).

126. (1985) 2 Sri. L.R. 177, 179–80.

127. *Id.* at 180.

128. *Id.* at 182, 191.

perception of the belief; or that the belief need be logical and acceptable.¹²⁹ The Sri Lankan courts could not, it said, be arbiters of scriptural interpretations, but would consider the opinions of experts only to assess if a belief was rooted in religion; and like in the United States, the Court could decide on the “sincerity” of the belief.¹³⁰ After outlining the form and spirit of the right in Sri Lanka, the Court dismissed the petitioner’s complaint saying that since no penal sanction attached to a failure to contribute to the fund, the expression of an objection by the petitioner to ensure that a contribution was not deducted from his pay did not infringe the free and fair exercise of his religious freedom.¹³¹

The function performed in this case by the comparative engagement with the right to religious freedom in the U.S. and India was one where Sri Lankan judges could interrogate the principle of religious freedom, view the implications of an absolute and a restrictive view for religious freedom, and then calibrate their own position.

However, in another case in 2003, the *Menzingen* judgment, which pertained to the right to propagate, the “absolute” quality of religious freedom outlined in the *Perera* case gave way when the primacy of Buddhism was perceived to be threatened.¹³² Here, the apex court held that the freedom to worship did not include the right to propagate.¹³³ The judge said: “In Sri Lanka the Constitution does not guarantee a fundamental right to ‘propagate’ religion as in Article 25(1) of the Indian Constitution. What is guaranteed here to every citizen is the fundamental right by Article 14(1)(e) to manifest, worship[,] observe, [and] practice that citizen’s religion or teaching.”¹³⁴

The petitioners, who included the Attorney General and members of a Buddhist nationalist party, challenged a Private

129. *Id.* at 192.

130. *Id.*

131. *Id.* at 195.

132. Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) (*Menzingen*), S.C. Determination No. 19/2003; see also New Wine Harvest Ministries (Incorporation), S.C. Determination No. 2/2003; Christian Sahanaye Doratuwa Prayer Centre (Incorporation) (*Prayer Center*), S.C. Determination No. 2/2001; Asanga Welikala, *The Menzingen Determination and the Supreme Court: A Liberal Critique*, CENTRE FOR POLICY ALTERNATIVES, Aug. 23, 2007, <http://www.cpalanka.org/page.php?id=0&pubid=157&key=9bdd5f06c37bdab66735ca41a9457925>.

133. *Menzingen*, S.C. Determination No. 19/2003, at 4.

134. *Prayer Center*, S.C. Determination No. 2/2001, at 23.

Member's Bill allowing a Christian group to "propagate a religion while taking advantage of the vulnerability of certain persons."¹³⁵ The Bill sought to incorporate a Catholic Order for the objectives of spreading the tenets of Catholicism through the following: providing religious, educational, and vocational training to youth; teaching in educational institutions; and serving in medical establishments, among others. The petitioners contended that the preamble of the bill, read with the third clause, "make[s] provision not only to propagate the [C]atholic religion, but to allure persons of other religions by providing material and other benefits . . . and thereby converting them to the faith that is sought to be spread."¹³⁶

The petition used the Indian Supreme Court's judgment disallowing conversion (principally *Stainislaus v. State of Madhya Pradesh*) as the centerpiece of their argument.¹³⁷ In the *Stainislaus* judgment, the Indian Supreme Court considered the question of whether freedom of religion and the right to propagate included the right to convert.¹³⁸ Article 25, Clause 1 of the Indian Constitution states that "subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."¹³⁹

The Sri Lankan justices referred to India's Chief Justice's reasoning in the *Stainislaus* case to agree with the petitioner's argument. Chief Justice Ray had outlined the limits of the right to propagate set forth in India's Article 25(1). "What the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets."¹⁴⁰ He said if a person converted another person to his religion by force (including threat of divine punishment or displeasure), fraud, or inducement (which may

135. *Menzingen*, S.C. Determination No. 19/2003, at 4.

136. *Id.* at 3.

137. *Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908 (challenging two state acts that regulated activity aimed at conversion on the grounds that they violated the right to propagate guaranteed by Article 25). See also Welikala, *Two Nations*, *supra* note 105, at 6; 2 H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1286-88 (4th ed. 1993) (criticizing Indian judges for disregarding propagation by persuasion).

138. *Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908., ¶ 14.

139. *Id.* (quoting INDIA CONST. art. 25, cl. 1).

140. Mehta points out that the distinction seems to largely turn on the motive of the speaker. Mehta, *supra* note 77, at 333.

be a gift or gratification including intangible benefits), such an act would impinge on the guarantee of the right to freedom of conscience.

The Sri Lankan apex court followed suit and ruled that it was permissible for persons to practice, but not to propagate, their religion. In accepting the *Stanislaus* precedent as authoritative, the Sri Lankan judges noted that constitutional provisions on conversion in the island nation were more restrictive than in India. The court pointed out that the omission of the word “propagate” in Articles 10 and 14(1)(e) of the Sri Lankan Constitution (unlike the Indian Constitution) was deliberate.¹⁴¹ Furthermore, as Buddhism was accorded a preeminent position by Article 9 of the Sri Lankan Constitution,¹⁴² it was unconstitutional for Christian organizations to incorporate proselytizing through “[the] spread [of] knowledge of [the] Catholic religion [and] to impart religious, educational and vocational training to youth.”¹⁴³ The third clause was seen as a threat to the very existence of Buddhism and Sri Lankan identity because it created “a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperienced[d], defenceless and vulnerable people to propagate a religion.”¹⁴⁴

The judges also drew on a decision of the European Court of Human Rights, where three officers of the Greek Air Force, who were followers of the Pentecostal church, were convicted for proselytizing three airmen of a lesser rank.¹⁴⁵ The Sri Lankan court said that “[a]n examination of clause 3(c), (d) and (e) indicate strong relationships that of teacher - student, nurse/doctor - patient, curator - refugee and that of guardian - minor” and, hence, “the reasoning of the European Court to the susceptibility of subordinate officers to superiors should apply with greater force in the case at hand.”¹⁴⁶ Inducement

141. *Menzingen*, S.C. Determination No. 19/2003, at 4 (“The Indian Constitution spells out the word ‘propagate’ in Article 25(1). Article 10 and 14(1)(e) of our Constitution do not refer to the word ‘propagate’ and therefore, it could be said that the provisions in our Constitution are more restrictive than that of Article 25(1) of the Indian Constitution.”).

142. *Id.* at 6.

143. *Id.* at 4.

144. *Id.* at 6.

145. *Larissis v. Greece*, 1998-I Eur. Ct. H.R. 362, ¶ 36 (1998) (noting that the three officer airmen were found guilty of proselytizing in the Permanent Air Force Court).

146. *Menzingen*, S.C. Determination No. 19/2003, at 5.

and propagation were seen as synonymous and, hence, a threat to Buddhism: "What is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion and the propagation and spreading [of] Christianity as postulated in terms of clause 3 would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*."¹⁴⁷

Thus, the Sri Lankan Court's engagement with foreign cases allowed them to calibrate the principle of religious freedom and enabled judges to deepen a constitutional imperative of giving pre-eminence to Buddhism.¹⁴⁸

B. India

The different conclusions drawn by the Indian Supreme Court in cases dealing with a denomination in the majority religion, Hinduism, and a denomination within a minority religion, Christianity, highlight the dilatory compromise adopted in the Indian Constitution on religious freedom. At the same time, the engagement with case law from the United States, Australia, and Canada, among others, clarified the competing positions in the debate.

A religious sect, known as Ananda Margi, wanted to perform the Tandava dance with knives, skulls, live snakes, and tridents on the streets of Calcutta. The police commissioner granted them permission to do so but without the knives and other accessories. The Ananda Margis challenged the commissioner's order in the Calcutta High Court, which held that performing the Tandava dance in public carrying a skull, trident, etc. was an essential part of Ananda Margi faith, and therefore, the Commissioner of Police could not impose conditions on it.¹⁴⁹ The state challenged the High Court order in the Supreme Court.¹⁵⁰ The Supreme Court had to decide first whether the Ananda Margis were a religious group.

In the 1950s, the judiciary faced the dilemma of balancing social justice concerns with religious freedom. When the con-

147. *Id.* at 7.

148. See discussion *infra* Part III.B.

149. See INDIA CODE CRIM. PROC. § 144 (1973), available at <http://www.mha.nic.in/pdfs/ccp1973.pdf> (forbidding public processions by five or more persons carrying arms, explosives, tridents, etc.).

150. *Ananda Margi Case*, (2004) 12 S.C.C. 770.

stitutional imperative to ensure social justice resulted in the formal outlawing of untouchability,¹⁵¹ reforms of the Hindu religion (including the opening of temples to lower castes),¹⁵² and the creation of affirmative action opportunities for the “backward classes” in educational institutions and the public sector,¹⁵³ some religious groups claimed that they were separate from the Hindu religion. The groups claimed that their practices—such as hereditary priesthood or banning entry of lower castes into the sanctum sanctorum—were essential parts of their religious belief.¹⁵⁴ But the nature of Hindu religion—practiced by 80.5% of India¹⁵⁵—which encompasses a plurality of beliefs, texts, and sects, made it hard for the Court to determine whether a sect belonged to Hindu religion or could be classified as a separate religion. This difficulty drew the judiciary into judging sectarian claims and drawing the boundaries of a religion.¹⁵⁶

The Court’s test for a religion evolved in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,¹⁵⁷ which involved questions regarding the scope of the right to freedom of religion granted by Article 25. The Court took the meaning of the term “religious denomination” from the Oxford Dictionary to mean “a collection of individuals classed together under the same name: a religious sect or body having a common faith and organization and designated by a distinctive name.”¹⁵⁸ With the *Ananda Margis*, the Court drew on an earlier ruling and said that the question as to their religious credentials was already settled—

151. INDIA CONST. art. 14.

152. INDIA CONST. art. 25.

153. INDIA CONST. art. 340.

154. For cases discussing temple entry, see, for example, *Seshammal v. State of Tamil Nadu*, A.I.R. 1972 S.C. 1586, ¶1; *Sastri Yagnapurushdasji v. Muldas Bhudaras Vaishya*, A.I.R. 1966 S.C. 1119, ¶ 21; *Sri Venkataramana Devaru v. State of Mysore*, A.I.R. 1958 S.C. 255, ¶ 12; *State of Kerala v. Venkiteshwara Prabhu*, 1961 A.I.R. 55 (Ker.), ¶ 3.

155. CENT. INTELLIGENCE AGENCY: *INDIA*, in *THE WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/in/html> (last visited Apr. 5, 2010).

156. See, e.g., *Sastri Yagnapurushdasji v. Muldas Bhudaras Vaishya*, A.I.R. 1966 S.C. 1119, ¶¶ 32–34 (noting that the court must consider what constituted the Hindu religion in order to evaluate the claim that the Swaminarayan sect does not belong to the Hindu religion).

157. (1954) 1 S.C.R. 1005.

158. *Id.* ¶ 15.

that Ananda Margi was not an institutionalized religion but a religious denomination within the Hindu religion.¹⁵⁹

The judges then tackled the next question: was the Tandava dance an essential religious practice of the denomination? Here, because of conflicting constitutional imperatives of ensuring state neutrality between religions and reformatory justice, the Court made two sets of distinctions: first, between “matters of religion” (which were firmly within the ambit of constitutional protection under Article 25) and “matters associated with religious practice” (secular matters were subject to state regulation); and second, between essential and non-essential parts of religion wherein only the former would be protected.¹⁶⁰

Again, this distinction evolved in *Shirur Mutt*, where the court was asked to decide which aspects of any particular religion were entitled to constitutional protection.¹⁶¹ In that case, the judges engaged in a dialogical fashion with United States and Australian cases to illuminate the nature of religious freedom in India.¹⁶² The Court rejected the definition proposed in an American case, *Davis v. Beason*,¹⁶³ in which it had been said that “[t]he term ‘religion’ has reference to one’s views of his relations to his creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with *cultus* or form of worship of a particular sect, but is distinguishable from the latter.”¹⁶⁴ Instead, the Indian judges averred:

We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of “religion” as given above could have been in the minds of our Constitu-

159. Acharya Jagdishwaranand Avadhuta v. Comm’r of Police, Calcutta (1984) 1 S.C.R. 447, ¶ 9.

160. A number of cases have challenged the ambit of state regulation, but I will not discuss them here. See generally GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE (1999).

161. Comm’r, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (*Shirur Mutt*), 1954 1 S.C.R. 1005, ¶ 31.

162. *Id.* ¶ 23.

163. 133 U.S. 333 (1890).

164. *Id.* at 342.

tion-makers when they framed the Constitution A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.¹⁶⁵

The Court drew instead on the observations of Australia's Chief Justice Latham and said that the Constitution "not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in article 25."¹⁶⁶ Justice Mukherjee proposed the test that a "practice" or set of beliefs must not only exist, but must be "essential" to that religion.¹⁶⁷ This test implicitly rejected what could be called the "assertion" test, whereby a petitioner could simply assert that a particular practice was a religious practice.¹⁶⁸ The Court assigned itself the task of assessing the sufficiency of evidence required to establish that a religious practice exists.¹⁶⁹ The Court's action was necessary because, as Mehta rightly argues, only then could the Court seek to narrow the gap between the guarantees of free exercise of religion and the public purposes served by the state, and make an even more far-reaching move to argue "that the secular, public purposes of the state *just are* the best expression of the free exercise of the particular religion in question."¹⁷⁰

165. *Shirur Mutt*, (1954) 1 S.C.R. 1005, ¶ 17.

166. *Id.* ¶ 18 (discussing *Adelaide Co. v. Commonwealth* (1943) 67 C.L.R. 116, 127 (Austl.)).

167. *Id.* ¶¶ 20, 23. But see Dhavan, *supra* note 78, at 220; J. DUNCAN M. DERRETT, *RELIGION, LAW AND THE STATE IN INDIA* 505 (Oxford Univ. Press 1999) (1968) (criticizing the court for making this distinction).

168. Dhavan, *supra* note 78, at 220.

169. *Id.*

170. Mehta, *supra* note 77, at 323.

The majority in the *Ananda Margi Case* reiterated the test and explained that the Ananda Margi dance needed to fit the criteria for an “essential practice” of religion.¹⁷¹

[The] test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character . . . [S]uch permanent essential parts [are] what is protected by the Constitution. No body [sic] can say that [an] essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the “core” of religion where the belief is based and religion is founded upon.¹⁷²

The implication of this test was that only the permanent, essential parts of a religion were protected by the Constitution, and these practices were perceived to be mandatory for its adherents. The Court determined that since the Ananda Margi order was founded in 1955 and the Tandava dance was introduced as a practice in 1966, the Tandava dance was not considered an essential part of the order.¹⁷³

The minority opinion highlighted the opposing position in the debate by drawing upon foreign law. Justice Lakshmanan, quoting from an earlier judgment, urged that no outside authority could sit in judgment over the professed views of a religion's adherents or determine whether the practice is warranted by the religion,¹⁷⁴ arguing “[t]hat is not their function.”¹⁷⁵ He made a distinction between “public order” and “law and order” and said that the contravention of law to affect public order must affect the community or the public-at-

171. *Ananda Margi Case*, (2004) 12 S.C.C. 770, ¶ 9.

172. *Id.*

173. *Id.* ¶ 10.

174. *Id.* ¶ 57 (quoting *Ratilal Pannachand Gandhi v. State of Bombay*, (1954) 1 S.C.R. 1055).

175. *Id.* ¶ 58.

large.¹⁷⁶ A mere disturbance of law and order leading to disorder was not one that affected public order.¹⁷⁷ When similar processions with swords and arms by other religious groups (Sikhs and Shia Muslims) were permitted by the Commissioner of Police on grounds that those practices were well established, the *Ananda Margis* also had the same right.¹⁷⁸ Citing a U.S. case, the judge said that “to allow any authority to judge the truth or falsity of a religious belief or practice is to destroy the guarantee of religious freedom in the Constitution.”¹⁷⁹ Thus, it was not for the police commissioner to decide whether a practice was well established.

The divergence between the majority and minority opinions in the *Ananda Margi Case* reflects the ambiguity inherent in the Indian Constitution caused by the postponed nature of the “not genuine” compromise on religious freedom. Foreign precedents performed the function of illuminating the implications of a causal path where the absence of restrictions on religious freedom did not result in adverse effects on public order.

In contrast to privileging the protection only of essential religious practices in the *Ananda Margi Case*, the Court emphasized the sincerity of belief in a case dealing with Jehovah’s Witnesses—a Christian denomination.¹⁸⁰ Three children, Bijoe, Binu Mol, and Bindu Emmanuel, were expelled from their government school because they did not sing the national anthem.¹⁸¹ Their father then filed a Writ Petition in the High Court to have his children re-enrolled, but the judge rejected the petition on the grounds that there was no word in the anthem that could offend anyone’s religious sensibilities.¹⁸² A two-judge bench of the Supreme Court overruled the High Court, stating that the lower court was “misdirected” because

176. *Id.* ¶ 63.

177. *Id.* (citing *Ram Manohar Lohia v. State of Bihar* (1966) 1 S.C.R. 740).

178. See *Mohamed Gani v. Superintendent of Police*, 2005 A.I.R. (Mad.), at ¶ 37 (permitting Muslims to hold funeral processions on a public street despite fears of a “communal clash”), available at <http://judis.nic.in/chennai/qrydisp.asp?tfnm=5174>.

179. *Ananda Margi Case*, (2004) 12 S.C.C. 770, ¶ 65 (citing *Ballard v. U.S.*, 329 U.S. 187, 201 (1946), which notes that a trial judge properly withheld from the jury’s determination “all questions concerning the truth or falsity of the religious beliefs or doctrines of [petitioners]”).

180. See *Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.R. 518.

181. *Id.* ¶ 1.

182. *Id.* ¶¶ 1–2.

the petitioners' objection was not to the language or sentiments of the anthem, but that Witnesses demurred from singing because of their "honest belief and conviction that their religion does not permit them to join any rituals except it be in their prayers to Jehovah their God."¹⁸³

Drawing on cases from Australia and the United States, the Court concluded that the sincerity of the Witnesses' religious belief was beyond question.¹⁸⁴ But were Witnesses entitled to be protected by the Constitution? The judges answered affirmatively:

We may at once say that there is no provision of law which obliges anyone to sing the National Anthem Article 51-A(a) . . . [simply] enjoins a duty on every citizen of India "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem" It will not be right to say that disrespect is shown by not joining in the singing."¹⁸⁵

The Court found that if a belief was genuinely and conscientiously held, it attracted the protection of Article 25,¹⁸⁶ thereby rejecting the majority opinion in a U.S. case, *Minersville School District v. Gobitis*.¹⁸⁷ Writing for the majority in *Gobitis*, Justice Frankfurter upheld mandatory flag salutation in schools on the grounds that the courtroom was not the arena for debating issues of educational policy.¹⁸⁸ Agreeing with the dissent in *Gobitis*, the Indian Supreme Court pointed out: "[Frankfurter's] view . . . was founded entirely upon his conception of judicial restraint."¹⁸⁹ Justice Stone's dissent in *Gobitis*, however, argued that the government "may suppress religious practices dangerous to morals" and public safety, "[b]ut it is a long step . . . to the position that government may, as a supposed educational measure and as a means of disciplining the

183. *Id.* ¶ 2 (internal quotation omitted).

184. *Id.* ¶ 7.

185. *Id.* ¶ 9 (quoting INDIA CONST. art. 51).

186. *Id.* ¶ 14.

187. 310 U.S. 586, 598 (1940) (holding that students' Fourteenth Amendment rights were not violated by required salutes), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

188. *Id.*

189. *Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.R. 518, ¶ 20.

young, compel affirmations which violate their religious conscience."¹⁹⁰

The Indian judges quoted from a Canadian case to make the point that for courts to hold that the exercises in question (i.e., refusal to salute the flag and sing the national anthem) had no religious significance "might well be for the court to deny that very religious freedom which the statute is intended to provide."¹⁹¹ Hence, the expulsion of the three children was a violation of their fundamental right to freedom of religion.¹⁹² The Court concluded that "our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it."¹⁹³

The Court's refusal to use the *Gobitis* case shows that the judges interpreted the constitutional project of ensuring religious freedom and cultivating tolerance as trumping a diffuse obligation on the part of the state to inculcate patriotism. The Court reiterated the Constitution's concern with allowing minority religions the space for free exercise. Article 25 was "incorporated in recognition . . . that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution" — a project that was dear to a constitution framed against the backdrop of sectarian violence.¹⁹⁴

Thus, the use of foreign rulings in *Bijoe* illuminated the paths taken in other countries that led to effective religious freedom.¹⁹⁵ But in cases like the *Ananda Margi Case*, involving a dilatory "not genuine" compromise of the Constitution, a comparative analysis helped to sharpen the divergent positions on the contours of religious freedom.¹⁹⁶

C. South Africa

Unlike India, where the court has focused on the essential nature of the religious practice, South Africa's constitutional

190. 310 U.S. at 602 (Stone, J., dissenting).

191. *Bijoe Emmanuel v. State of Kerala*, (1986) 3 S.C.R. 518, ¶ 21 (quoting *Donald v. Hamilton Bd. of Educ.*, [1945] O.R. 518, ¶ 5 (Can.) (Gillanders, J.A.)).

192. *Id.* ¶ 22.

193. *Id.* ¶ 24.

194. *Id.* ¶ 17.

195. *Id.* ¶ 21.

196. *Ananda Margi Case*, (2004) 12 S.C.C. 770.

commitment to returning to its citizens a life with dignity, and the emphasis it places on the state's role in creating a space for diversity, has made its judges less focused on questioning whether a religious practice is essential or voluntary. This less central but more expansive connotation of religious freedom is revealed in the judiciary's engagement with foreign precedents.

The South African courts delineated three aspects of religious freedom: the right to have a belief, the right to express that belief publicly, and the right to manifest that belief through worship and practice, teaching, and dissemination.¹⁹⁷ As in India, a South African court will ask the following questions when freedom of religion is at issue: "[f]irst, whether the source of the applicant's constitutional claim is a recognized religion; second[], whether the practice sought to be protected is a central part of the religion; and third[], whether the applicant's belief in the religious practice is sincere."¹⁹⁸ Unlike in India, where social justice concerns were intricately linked to the reform of religious practices (particularly for Hindus), in South Africa such anxieties were linked primarily to racial, not religious, categories, and this has influenced the way courts have engaged with foreign case law. I will discuss two cases: one concerning the conflict between the Rastafarian religious practice of smoking marijuana and the criminal law,¹⁹⁹ and another concerning the wearing of a nose stud in a school despite a ban on such jewelry by the educational authority.²⁰⁰

In 2002, the South African Constitutional Court decided *Prince v President of the Law Society of the Cape of Good Hope*, where they ruled that a Rastafari lawyer was not entitled to an exemption to use marijuana as part of his religious and cultural practice.²⁰¹ The appellant had completed most requirements to become an attorney but was denied enrollment by the Law Society because of two previous convictions for possessing cannabis.²⁰² South African law does not allow the pos-

197. M. Owen Mhango, Elisa Machado & Shylashri Shankar, *Right to Religious Recognition in South Africa, India and Brazil*, (unpublished) (manuscript at 6-17, on file with author).

198. *Id.* at 6.

199. See *Prince v President of the Law Soc'y of the Cape of Good Hope (Prince)* 2002 (2) BCLR 133 (CC) (S. Afr.).

200. *MEC for Education: KwaZulu-Natal v Pillay (Nose Stud Case)* CCT 51/06 (S. Afr.).

201. *Prince*, 2002 (2) BCLR 133 (CC) ¶ 142-44 (S. Afr.).

202. *Id.* ¶ 88.

session or use of psychotropic substances except for medical or scientific research purposes.²⁰³ Mr. Prince argued his case in the Constitutional Court and said that his possession of cannabis was part of his right to religious freedom as a Rastafarian.²⁰⁴ Celebration of all forms of pluralism constituted a fundamental part of the post-apartheid constitution built around the political myth of a Rainbow Nation. The majority and minority opinions agreed that the practice of using cannabis was part of Rastafarian religion, and that the appellant was sincere in his faith.²⁰⁵ The question on which they diverged was whether the appellant's right to use cannabis in the name of religious freedom could be limited reasonably and justifiably in an open and democratic society based on human dignity, equality, and freedom.²⁰⁶

The majority ruling, while agreeing with the minority opinion that the prohibition on the use of cannabis limited the religious freedom of Rastafarians, said that the limitation was justifiable for purposes of advancing an important government purpose, namely a war on drugs.²⁰⁷ The judges drew on the peyote case from *Employment Division v. Smith*²⁰⁸—a U.S. case where the Supreme Court declined to grant a group of Native Americans a religious-use exemption from a general law prohibiting use of peyote—to argue that there was “no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purposes and the use of cannabis for recreation.”²⁰⁹

The minority opinion of Justices Ngcobo and Sachs stressed the importance of religious rights particularly in a diverse democracy based on human dignity, equality, and freedom. Ngcobo argued that the existence of a law which “effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity.”²¹⁰ In a separate and concurring

203. *Id.* ¶¶ 3, 22–23.

204. *Id.* ¶ 1.

205. *Id.* ¶ 97.

206. *Id.* ¶ 111.

207. *Id.* ¶ 152.

208. *Employment Div. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

209. *Prince*, 2002 (2) BCLR 133 (CC) ¶ 130 (S. Afr.).

210. *Id.* ¶ 51 (Ngcobo, J., dissenting).

opinion by the minority, Justice Sachs pointed out that the South African Court rejected the U.S. Supreme Court's majority view in *Smith* that in a multi-faith country, minority religions might find themselves without a remedy against burdens imposed on them by formally neutral laws.²¹¹ Sachs agreed with the minority opinion that ways could be found to permit Rastafarians to use cannabis for religious purposes.²¹² It is unfamiliarity that breeds contempt, he said, pointing to the permission given by the U.S. courts for the sacramental use of wine during the era of Prohibition.²¹³

Thus, foreign decisions showed the Court the implications of a more restrictive path taken when a constitutional imperative (celebrating religion) clashed with law and order. But the minority opinion's citation of the Prohibition era case showed the inconsistencies in the American courts' position on the issue and highlighted the non-detrimental implications of a less restrictive path.

In 2002, a South African public school, Durban High School, denied one of its students, Sunali Pillay, the right to wear a nose stud at school.²¹⁴ The school threatened to expel Sunali if she continued to wear the nose stud, but prior to that, Sunali's mother brought a discrimination complaint before the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 (Equality Act).²¹⁵ The Equality Court ruled in favor of Durban High School, and on appeal to the High Court, its decision was reversed.²¹⁶ Durban High School then appealed to the Constitutional Court.

Unlike in *Prince*, the Constitutional Court ruled that constitutional protection of a sincere practice or belief which is central to a religion or culture will be granted regardless of whether the practice or belief is mandatory or voluntary.²¹⁷ The Court reasoned that the "fact that people choose voluntarily to adhere to a practice rather than through a feeling of obligation only enhances the significance of a practice to our

211. *Id.* ¶ 155 (Sachs, J., dissenting) (discussing *Smith*, 494 U.S. at 890, 908-09).

212. *Id.* ¶ 147-48.

213. *Id.* ¶ 158.

214. *Nose Stud Case*, CCT 51/06, ¶¶ 3, 5. For a description of the case see Mhango et al., *supra* note 197, at 15-17.

215. *Nose Stud Case*, CCT 51/06, ¶¶ 9-10, 15.

216. *Id.*

217. *Id.*

autonomy, our identity and our dignity.”²¹⁸ Hence, the protection of voluntary and mandatory practices conformed to the Constitution’s commitment to affirming diversity. Merely differentiating between mandatory and voluntary practices did not celebrate or affirm diversity, it simply permitted it, thus falling short of “our constitutional project which not only affirms religious diversity, but promotes and celebrates it.”²¹⁹ “The Court ruled that a learner was entitled to an exemption under the school code of conduct to wear a nose ring as part of her religious and cultural tradition.”²²⁰

Here, the South African courts engaged with U.S. cases in a way that illuminated the constitutional imperative to the state not just to permit but also to celebrate religious and cultural diversity.

D. A Comparative Frame

In all three countries, the constitutions promise the right to religious freedom without specifying a list of recognized religions that qualify for the right. The difference between the constitutional projects of India, Sri Lanka, and South Africa with regard to religious freedom is that India adopted a dilatory compromise while the other two countries had clearer imperatives.

In India, the project to promote social justice often conflicts with and trumps the project to promote religious freedom because of the ameliorative injunctions by the Indian state to reform unjust practices, such as discrimination against lower castes, within Hindu religion. For example, in an important early polygamy case, the Court observed that it was “rather difficult [t]o accept that polygamy is an integral part of Hindu religion.”²²¹ The appellants had challenged the Bombay Prevention of Bigamous Marriages Act which outlawed bigamy

218. *Id.* ¶ 64. See also *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding inmate’s free exercise rights were violated when prison officials denied him a special vegetarian diet, regardless of whether Seventh Day Adventist Church required vegetarianism, where inmate’s beliefs were sincerely held); *Martinelli v. Dugger*, 817 F.2d 1499, 1503–05 (11th Cir. 1987) (holding that although the prisoner must be sincere in his religious beliefs, there is no requirement that the beliefs be held by a majority of the members of the particular religion in order to have free exercise protection); *Mhango et al.*, *supra* note 197, at 15.

219. *Mhango et al.*, *supra* note 197, at 15.

220. *Id.* at 1.

221. *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 (Bom.) 84, 86.

for Hindus.²²² Chief Justice Chagla made a distinction between religious belief and religious practices, finding that the state and the Constitution protected the former, stating “[i]f religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people”²²³ The Court referred to the limitations on a right as explained in a U.S. case where the judge rejected the right of Mormons to practice polygamy and said that legislation to punish acts “inimical to peace, good order and morals of society” could not be challenged.²²⁴ Responding to the contention that the Act excluded polygamy among Muslims and hence was discriminatory against Hindus, the Court said that there was a reasonable basis for seeing Muslims as a separate class.²²⁵ Muslims, it said, saw marriage as a contract and admitted easy divorce; whereas Hindus viewed marriage as sacrament and the state, therefore, had to legislate the provision for divorce.²²⁶

In Sri Lanka, one of the central concerns of the 1978 Constitution is to maintain a pre-eminent position for Buddhism,²²⁷ a concern that judges viewed as an imperative when it clashed with the right to religious freedom for other communities. The engagement with India’s case law enabled Sri Lankan judges to deepen the imperative embedded in their Constitution.

In South Africa, on the other hand, religion is not a central concern the way it is in India and Sri Lanka; their chief goal is human dignity.²²⁸ The South African Constitution has separate articles guaranteeing religious freedom and cultural rights (unlike India and Sri Lanka where cultural rights are not read with religious freedom), and the right to religious freedom in South Africa is often read in conjunction with the right to human dignity guaranteed in the Constitution.²²⁹ In asking the state to celebrate religious and cultural diversity, the emphasis

222. *Id.* ¶ 1.

223. *Id.* ¶ 5.

224. *Id.* (quoting *Davis v. Beason*, 133 U.S. 333, 342 (1890)).

225. *Id.* ¶ 10.

226. *Id.*; see also *Ram Prasad Seth v. State of Uttar Pradesh*, 1957 A.I.R. 411 (All.) 413, ¶ 8 (concluding that polygamy was not an essential part of the Hindu religion).

227. SRI LANKA CONST. ch. 2.

228. S. AFR. CONST. 1996 § 10.

229. S. AFR. CONST. 1996 §§ 15, 30, 31.

is on expanding the scope of religious freedom rather than on regulating or reforming religions.

Religious freedom promised in the three constitutions was interpreted differently by judges who engaged with foreign cases in ways that illuminated the constitutional imperatives and inconsistencies. In India, due to the constitutional mandate of social justice that involved reforming unjust religious practices within the majority religion, several judgments classified religious practices into essential and inessential practices and decided that it was not the sincerity of belief but the mandatory nature of the practice (which is decided by the court) that would be key in determining the case. In South Africa, on the other hand, the constitutional mandate to celebrate religious and cultural diversity meant that the courts paid less attention to the mandatory nature of the practice and chose instead to emphasize sincerity of a claimant's belief (*Nose Stud Case*), unless the practices contravened criminal laws (*Prince*). In Sri Lanka, the absolute nature of protecting religious freedom gave way when the primacy of Buddhism was perceived to be threatened. In all three countries, foreign cases provided the deliberative tool that enabled judges to draw conclusions.

All three countries subscribed to the principle of religious freedom, but the principles played out differently due to differences in the historical, constitutional, and political contexts. The India-Sri Lanka comparison in the cases dealing with proselytization shows a convergence in the desired practical outcomes even though the constitutional imperatives were different. Foreign decisions provided the frame for the court to deliberate on the causal paths and implications of a decision.

V. CROSS-JUDICIAL ENGAGEMENT IN A GLOBALIZING WORLD

Some scholars conceive of a comparative analysis in terms of a timeless legal convergence (more as a theoretical ideal), systematizing broadly across cultures and world history;²³⁰ but, as Teitel points out, this integration is more limited.²³¹ In this Part, through an analysis of Indian and South African cases

230. See Teitel, *Global Age*, *supra* note 12.

231. *Id.* at 2593; see also Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 40 (2004) (expressing the "relatively small inroads" the human dignity clause has made).

that decriminalized sodomy, I discuss how the framework developed in Part II allows us to interrogate and understand motivations underlying the seemingly global convergence.

A. South Africa

There were two Constitutional Court cases dealing with the rights of homosexuals, but in this Article I will discuss the first case, *National Coalition for Gay and Lesbian Equality v The Minister of Justice (Sodomy Case)*, concerning the decriminalization of sodomy.²³² The petitioners had made equality the centerpiece of their argument.²³³

Here again, the Constitutional Court first explored foreign precedents and rejected a U.S. judgment²³⁴—*Bowers v. Hardwick*²³⁵—which allowed the states to retain their laws against sodomy.²³⁶ Contrasting *Bowers* enabled the South African judge to flesh out the contours of the imperatives expressed by the South African Constitution.²³⁷ Justice Ackermann said:

Our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgment in *Bowers* can really offer us no assistance in the construction and application of our own Constitution. The 1996 Constitution contains express privacy and dignity guarantees as well as an express prohibition of unfair discrimination on the ground of sexual orientation, which the United States Constitution does not. Nor does our Constitution or jurisprudence require us, in the way the United States Constitution requires of its Supreme Court, in the case of “. . . rights not readily identifiable in the Constitution’s text,” to “. . . identify the nature of rights qualifying for heightened judicial protection.”²³⁸

232. 1998 (6) BCLR 726 (W) ¶ 1 (S. Afr.).

233. *Id.* ¶¶ 29–30.

234. *Id.* ¶ 55.

235. 478 U.S. 186, 196 (1986) (holding that state sodomy laws did not violate the U.S. Constitution).

236. *Id.*

237. *Sodomy Case*, 1998 (6) BCLR 726 (W) ¶ 55 (S. Afr.).

238. *Id.*

The Court considered the validity of the criminalization of sodomy on three grounds: equality, dignity and privacy.²³⁹ It first established that differentiation on the grounds of sexual orientation constitutes unfair discrimination,²⁴⁰ and cited judgments by the European Court of Human Rights and the Supreme Court of Canada that recognized the serious psychological harm for gays from discriminatory provisions.²⁴¹ The Court then held that the common law crime of sodomy infringed on the right to dignity.²⁴² Like the term “religion” in India, the term “dignity” had not been defined in the South African Constitution. The judges, therefore, mulled over the definition of dignity. They defined dignity as requiring the Court to acknowledge the value and worth of all individuals:

Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalises all sexual intercourse per annum between men In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals [T]he sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.²⁴³

The Court agreed with the claimant’s argument that the sodomy laws were a breach of the right to privacy.²⁴⁴ Finally, the Court addressed religious objections and said that the view which holds that sexual expression should be limited to marriage between men and women, with procreation as its dominant or sole purpose, was sincerely held by persons, but such views “cannot influence what the Constitution dictates in re-

239. *Id.* ¶ 28

240. *Id.* ¶ 26.

241. *Id.* ¶ 23.

242. *See id.* ¶¶ 10, 36.

243. *Id.* ¶ 28.

244. *Id.* ¶ 32.

gard to discrimination on the grounds of sexual orientation.”²⁴⁵ The Court went on to say that “[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose [T]here is no justification for the limitation.”²⁴⁶

The South African Court linked its ruling to the “deep political morality” of the Bill of Rights.²⁴⁷ The Court’s decision may seem to converge with what Teitel calls a “law of humanity,”²⁴⁸ but the Court’s motivation for the ruling is embedded within its apartheid history. As Roux and Michelman note,²⁴⁹

245. *Id.* ¶ 38.

246. *Id.* ¶ 37. In the *Sodomy Case* decision, Justice Sachs wrote a concurring opinion discussing the relationship between equality and privacy, equality and dignity, and the meaning of the right to be different in an open and democratic society. *Id.* ¶ 107. Sachs said that it was less acceptable for the applicants to treat the right to privacy “as a poor second prize to be offered and received only in the event of the Court declining to invalidate the laws because of a breach of equality.” *Id.* ¶ 110. Sachs argued that the applicants made an invalid sequential ordering of equality and privacy. Instead, one should look at rights violations “from a person-centred rather than a formula-based position, and analyse them contextually rather than abstractly.” *Id.* ¶ 112 (citing *Egan v. Canada*, [1995] 2 S.C.R. 513, 82 (Can.) (L’Heureux-Dubé, J., dissenting)). A “single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights.” *Id.* ¶ 114. In the *Sodomy Case*, the violation of equality “is more egregious because it touches the deep, invisible and intimate side of people’s lives.” *Id.* Sachs cited Blackmun’s opinion in *Bowers* that the “‘right to be left alone’ should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation.” *Id.* ¶ 116 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting)). Sachs linked the opinion to the stance that just as liberty is negative and positive, privacy may be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realization can take place. *Id.* Importantly, “the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity.” *Id.* ¶ 120. Sachs made a distinction between dignity in the equality provisions, where inequality of treatment leads to indignity, and dignity in section 10 of the Bill of Rights, which includes a much wider range of situations and offers protection to persons in their multiple identities. *Id.* In the *Sodomy Case*, indignity of treatment led to inequality. Sachs argued that the use of dignity promoted the notion of substantive as opposed to formal equality, and hence the Court’s invalidation of sodomy laws was not made by using a different application of the law to anal intercourse according to whether the partner was male or female, but instead according to how the law has impinged on the dignity of the gay community. *Id.* ¶ 121.

247. *Id.* ¶ 136.

248. See Ruti G. Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J., 355, 357 (2002) (arguing that new international legalism or “humanity’s law” frames and legitimates “the form of policy-making choices in present global politics”).

249. Theunis Roux, Director, South Afr. Inst. For Advanced Const., Pub., Human Rights & Int’l Law, *The Dignity of Comparative Constitutional Law* (2008), http://www.saifac.org.za/docs/res_papers/RPS%20No.%2040.pdf; Michelman, *supra* note 10, at 1749–50.

South Africa's equality jurisprudence, in which human dignity has a central role, is a "never-again jurisprudence."²⁵⁰ The centrality of human dignity was not because the Constitutional Court "blindly followed" the Canadian court, but because the Court took the view that the denial of human dignity was at the heart of apartheid evil—that what was so wrong with apartheid was not just that people were treated differently, but that the basis for this differential treatment was the denial of black South Africans' inherent dignity.²⁵¹

B. India

Unlike the *Sodomy Case*, India relied on foreign cases to forge a more straightforward convergence with a global consensus or law of humanity.²⁵²

In July 2009, the Delhi High Court ruled that the criminalization of sodomy under Article 377 of the Indian Penal Code violated the right to live life with dignity, the right to privacy, the right to equality, and general standards of constitutional morality.²⁵³ The judgment held that Article 377 failed the triple test that "[a]ny law interfering with personal liberty of a person must satisfy": it fails to prescribe procedures; the procedures fail to stand the test of one or more fundamental rights conferred under Article 19; and it fails the equality test of Article 14.²⁵⁴ The judges in both India and South Africa²⁵⁵ drew in

250. Roux, *supra* note 249, at 3.

251. *Sodomy Case*, 1998 (6) BCLR 726 (W) ¶ 30 (S. Afr.).

252. Naz Foundation v. NCT of Delhi, WP(C) No. 7455, (Delhi H.C. 2009), available at http://www.nazindia.org/judgement_377.pdf.

253. *Id.* at 104–05.

254. *Id.* at 25 (citing Justice Bhagwati's judgment in *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248). Vikram Raghavan rightly argues that *Naz Foundation's* discussion of equality is its Achilles' heel:

From a purely tactical perspective, it is unclear why *Naz Foundation* even bothered addressing equality. It had already determined that Section 377 violated the penumbral fundamental right of equality-dignity. That finding provided a sturdy millstone to tie and sink the unconstitutional provision. In fact, the judges declined to deal with the Foundation's argument that Section 377 violated citizens' Article 19 freedoms because they were already convinced that the provision was unconstitutional. Could not the same approach have been taken with respect to the Foundation's equality arguments?

Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS L. REV. 397, 412 (2009).

255. *Minister of Home Affairs v Fourie Case* CCT 60/04 ¶ 78, 114 (S. Afr.), <http://tinyurl.com/fouriepdf>.

similar ways from a subsequent U.S. case on sodomy, *Lawrence v. Texas*²⁵⁶ (which overruled *Bowers*), by highlighting notions of individual dignity and the universal dignity of free persons, when decriminalizing sodomy.²⁵⁷ South Africa even went so far as to allowing common law marriage between two persons of the same sex.²⁵⁸

The Article 377 judgment, which drew extensively on these foreign precedents to construct the rationale, built on two notions: human dignity²⁵⁹ and privacy.²⁶⁰ While India does not have a specific constitutional provision on privacy, the Supreme Court's case law addresses privacy using provisions in Article 19(1)(a), which focuses on freedom of movement, and Article 21.²⁶¹ After situating the issue of sex between consenting adult men within the sphere of privacy, the Court rejected the Assistant Solicitor General's plea that homosexuality was against societal wishes.²⁶² The Court drew upon U.S. and South African cases to argue that moral disapproval was not a legitimate state interest justifying statutes banning homosexual sodomy.²⁶³

Additionally, the Court said that Article 377 failed the strict scrutiny test. It read sexual orientation as a ground analogous to sex and declared that discrimination based on sexual orientation was prohibited by Article 15.²⁶⁴ The Court drew on the South African discussion of political morality and called it constitutional morality, as distinct from public morality, and said that only the former could be a compelling state interest.²⁶⁵ But it was not clear what judges meant by constitutional morality — whether it was akin to a Schmittian constitutional

256. 539 U.S. 558 (2003).

257. Naz Foundation v. NCT of Delhi, WP(C) No. 7455, at 46.

258. See *Minister of Home Affairs v Fourie* Case CCT 60/04 (S. Afr.), <http://tinyurl.com/fouriepdf>.

259. Naz Foundation v. NCT of Delhi, WP(C) No. 7455 (citing *Egan v. Canada*, [1995] 2 S.C.R. 513, 82 (Can.) (L'Heureux-Dubé, J., dissenting)).

260. See, e.g., *id.* at 44 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)); *id.* at 46 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

261. The Indian Supreme Court had used U.S. case law (particularly the dissent in *Olmstead v. United States*, 277 U.S. 438 (1928)) to carve out a large personal space (marriage, procreation, child rearing, etc.) for individual rights.

262. Naz Foundation v. NCT of Delhi, WP(C) No. 7455, at 64.

263. *Id.* at 66–67.

264. *Id.* at 89.

265. *Id.* at 64.

imperative or a more diffuse consideration of the Indian Constitution.²⁶⁶

The Indian and South African courts engaged with foreign cases and decriminalized sodomy, but their rationales had complex and different links with their domestic constitutions and the globalizing regime. The practical outcome of engaging with foreign cases was the same, but the emphasis of the courts in the two countries differed, i.e., equality and dignity in South Africa, compared to privacy and dignity in India. This illuminates the foundational commitments of South Africa and the analogous silences in India. Another point of divergence between the two judgments was in the way the Indian Court did not mention religious objections to decriminalizing sodomy, even though the oral arguments included an objection on religious moral grounds to striking down Article 377. In contrast, the South African Court discussed and dismissed religious objections.²⁶⁷ The convergence with global

266. The court said that the Indian Constitution was “first and foremost a social document” aimed at furthering the goals of the social revolution. The core commitments are in Parts III and IV, Fundamental Rights and Directive Principles.

These are the conscience of the Constitution. The fundamental rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

Id. at 65; see also Raghavan, *supra* note 254, at 410 n.51 (highlighting the lineage of the term “constitutional morality”). Raghavan points out that *Naz Foundation* cited Ambedkar’s speech to the Constituent Assembly in November 1948 in which he extolled the need for greater constitutional morality. What *Naz Foundation* fails to mention is that Ambedkar’s discussion of constitutional morality had nothing to do with fundamental rights or civil liberties. Rather, Ambedkar was defending the Assembly’s heavy borrowing from the Government of India Act of 1935 for what he called “details of administration.” Raghavan, *supra* note 254, at 410 n.51 (citing VII CONSTITUENT ASSEMBLY DEBATES 38 (Nov. 1948) (statement of B.R. Ambedkar). “In fact, Ambedkar may have quite possibly been using the term ‘constitutional morality’ to refer to unwritten constitutional conventions and rules in the manner that the English legal historian, Maitland, used that term.” *Id.* (citing F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 398 (1908) (describing constitutional conventions as “rules of constitutional morality”)).

267. At the arguments stage, the two-judge bench said that the court was interested in scientific proceedings, not in the opinions of religious bodies. “A view of a religious body which viewed [MSM] as sinners could not be taken notice of by the court.” NOTES ON THE FINAL ARGUMENTS IN *NAZ FOUNDATION V. UNION OF INDIA* 26, <http://www.altlawforum.org/gender-and-sexuality/the-377-campaign/Summary%20of%20final%20arguments%20for%20webs%20ite.pdf/view>. Special Leave Petitions have been filed in India’s apex court (the Supreme Court) by the Apostolic Churches Alliance and Baba Ramdev (a Hindu) arguing that the high

concerns is more evident in the Indian decision and one could postulate that such union is more likely in cases where the commitments do not clash with constitutional imperatives. For instance, the Indian Court's transformation of non-justiciable socioeconomic rights (listed in the Directive Principles) to health, education, shelter, food, and environment, among others, into justiciable ones by using an expansive notion of the fundamental right to life is another example of a convergence with global normative commitments.²⁶⁸

VI. CONCLUSION

Do the ways in which judges in India, Sri Lanka, and South Africa engage with foreign laws help us see clearly the constitutional projects of these three countries? The answer is that they do and they do not. The South African judges, as D.M. Davis points out, paid special attention to the textual, political and legal-systemic differences between South Africa and the country chosen for comparison, then looked for applicable reasons in the judgments (majority and minority opinions) for or against the proposition being contended for, and finally for points of convergence between the open and democratic societies chosen for comparison.²⁶⁹ Foreign precedents helped judges clarify the constitutional commitments of their own country only when such commitments were imperatives in the Schmittian sense of the term (e.g., Sri Lanka's preservationist constitution, or South Africa's emphasis on celebrating religious freedom). But where the commands were confused or conflicted with other imperatives, the use of ideas from abroad helped judges (speaking through minority and majority opinions) to clarify the normative assumptions and the causal im-

court ruling would legalize prostitution and legitimize marriage between persons of the same sex. See Alternative L.F., *Transcript of Proceedings Before the Supreme Court on 17th August in the 377 Case*, <http://www.altlawforum.org/news/transcript-of-proceedings-before-the-supreme-court-on-17th-august-in-the-377-case> (citing Suresh Kumar Kaushal v. Naz Foundation, SLP(C) No. 15436/2009). In the first hearing by a two-judge bench, which included the Chief Justice, the court responded that prostitution was covered by another law, the Immoral Trafficking Prevention Act, and declined to stay the high court ruling. *Id.* (citing Suresh Kumar Kaushal v. Naz Foundation, SLP(C) No. 15436/2009).

268. See Thiruvengadam, *supra* note 121 (analyzing how Indian, Pakistani, and Bangladeshi judges drew on foreign precedents to fashion decisional strategies and crucial innovations on public interest litigation).

269. See D. M. Davis, *supra* note 93, at 195.

plications of the two sides of the debate (e.g., religious freedom cases in India). The global migration of ideas and Waldron's deep background principles were germane only when the constitution was silent and/or when the matter did not conflict with a key imperative (e.g., South Asian courts' jurisprudence on socioeconomic rights). Of course we must in the end acknowledge that the practice of constitutional borrowing, like other judicial practices, cannot be readily reduced to any single motivation. In the conversion case in Sri Lanka, for example, there is evidence that, in addition to the explicitly stated desire to preserve the majoritarian cast of constitutional identity, judges may have had other objectives in mind, including one reflective of a specific hostility towards American missionary groups.²⁷⁰ But as Jacobsohn points out, not all identity-reinforcing outcomes explain constitutional borrowing, though, as we have seen, constitutional borrowing is often importantly a dialogical attempt by judges to resolve contentious issues by drawing on the experiences of other countries.²⁷¹ Ultimately, borrowing results from a mix of motives—opportunistic, self-reflective, and sometimes unreflective.²⁷² Which one dominates may be less a function of judges themselves, and more a function of the institutional balance between the executive and the judiciary.

While the above analysis focused on three countries, other questions that need to be explored include whether there are differences between the way in which a country like India engages with the case law of Britain, from whom it received independence in 1947, as compared to its engagement with rulings from other countries. These questions relate to hierarchies of power and how they affect judges' engagement with particular jurisprudences. In the cases discussed above, it is clear that the judges in the three countries engage with their neighbors and/or western democracies with common law systems.²⁷³ The citation of cases in the three national courts supports the framework developed by Glensy that courts were

270. A former Supreme Court justice who was also a Christian made this point in an interview with the author. Interview with former Supreme Court Justice, in Colombo, Sri Lanka (Mar. 24, 2006).

271. Jacobsohn, *supra* note 18, at 1814–18.

272. *See id.*

273. *See supra* Part III.

guided by three parameters in locating foreign authority: the democratic quotient, societal affinities, and practical considerations.²⁷⁴ The three courts clearly were influenced by their colonial histories and consulted Anglo-American and commonwealth countries' case law in their deliberative exercise. Indian judges, for instance, were more likely to look to English, American, Australian, Canadian, and, more recently, South African and European court decisions. Sri Lankan judges were also likely to engage with solutions devised by Indian case law, but we need a more comprehensive analysis of, in Glensy's words, which countries count for each of the discussed cases.

In a world where people's migrations have created multicultural populations in hitherto homogeneous nations, and where courts struggle to resolve clashes between cultural/religious practices and rights of individuals (e.g., the issue of Muslim headscarves in Europe), the importance of looking abroad has increased. We will see more migrations of ideas and fewer debates on whether to do so in countries like the newly democratizing countries in Eastern Europe, Africa, and Latin America, which have drawn on existing constitutions in established democracies to fashion their own constitutional laws. In contrast, countries where the constitutional myth is one of original singular intent, almost autochthonous in its self-perception, like the United States, the resistance to looking abroad will remain, and continue to conflate the two levels of law. In a conversation with Sujit Choudhry, Justice Scalia noted that originalists view all foreign law as "irrelevant" except for old English law, which "served as a backdrop for the framing of the [American] constitution."²⁷⁵ The resistance of most U.S. judges to looking abroad could stem from their own constitutional imperative of avoiding muscular governments, precluding references to other countries where the conclusions might require more state intervention. Alternatively, a more institutional constraint could be operating in the United States, where the insular nature of legal education and the reliance of judges on the briefs prepared by lawyers unused to referring to foreign cases perpetuate the resistance to foreign case law. Such a stance would deprive judges in the United States of the

274. Glensy, *supra* note 45, at 361, 411-37.

275. Choudhry, *supra* note 11, at 6.

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important functions performed by foreign precedents that go beyond simple usefulness or help, but in fact deepen, in Choudhry's words, "a heightened sense of legal awareness through interpretive clarification and confrontation."²⁷⁶

276. *Id.* at 23.