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# Interpreting bills of rights: The value of a comparative approach

Jack Tsen-Ta Lee\*

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In certain jurisdictions, among them Malaysia, Singapore, and the United States, the practice of consulting comparative legal materials in interpreting domestic bills of rights has been criticized as illegitimate. This article examines four main concerns: (1) the texts of bills of rights—the argument that a bill of rights is to be interpreted within its own “four walls” and not in the light of analogies drawn from other jurisdictions; (2) national identity—the argument that a bill of rights embodies the values of a nation’s people, and it is wrong to refer to foreign experiences to determine such values; (3) different domestic conditions—the argument that comparative legal materials do not reflect local economic, political, social, or other conditions that differ from those in other jurisdictions; and (4) certain practical concerns. The article concludes that, notwithstanding these concerns, there are sound justifications for courts to take a comparative approach to the interpretation of bills of rights and substantial benefits to be derived from such an approach.

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.<sup>1</sup>

— RUDOLF VON JHERING, 1818–1892

While it seems a widespread practice in common law jurisdictions for courts to refer in their judgments to legal material from other jurisdictions, particularly those with which they share a similar heritage, on closer examination, this assertion turns out to be rather an overstatement. It is true insofar as traditional common law subjects,

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<sup>1</sup> RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* [THE SPIRIT OF ROMAN LAW AT DIFFERENT STAGES OF ITS DEVELOPMENT], Part I, 8f (B. Schwabe 9th ed. 1955), cited in KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 17 (Tony Weir trans., Clarendon 3d rev. ed. 1998).

such as contract and tort law, are concerned but less so for constitutional and human rights law. In fact, in certain jurisdictions, among them Malaysia, Singapore, and the United States, some quarters are decidedly skeptical about the legitimacy of consulting comparative materials in relation to these latter areas of the law. In November 2005, U.S. Attorney General Alberto Gonzales expressed concern over what he saw as the “growing tendency” of judges to interpret the Constitution by reference to foreign law, which, he said, might “undermine the long tradition of reverence that Americans have for the supreme law of the land.”<sup>2</sup>

This skepticism is curious, for it seems useful for a court to refer to foreign legal material—including cases, legislation, and academic writings—for several reasons. For instance, a court may use comparative material to shed light on the effect that should be given to the text of a bill of rights in its own jurisdiction, especially where the point has not yet arisen in the local context, or it is contended that previous interpretations are flawed. The reference may be fairly superficial; for instance, the experiences of foreign jurisdictions may be cited as indicative of international trends generally, or trends among established democratic nations, to support or disavow a particular approach taken by the court. Alternatively, a court may identify a doctrine of foreign law and apply it in articulating the meaning of the text of a domestic bill of rights, with suitable modifications if necessary. In addition, a court may find foreign law valuable not for its substantive content but for its general approach to the interpretive enterprise, enabling it to rationalize its own approach to interpreting its own country’s bill of rights.

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<sup>2</sup> Alberto R. Gonzales, *Prepared Remarks*, Address at the University of Chicago Law School 2 (Nov. 9, 2005) available at <http://www.law.uchicago.edu/files/Attorney-General-Foreign-Law-Speech>. Transcript also available at [http://www.usdoj.gov/ag/speeches/2005/ag\\_speech\\_0511092.html](http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511092.html) (websites last visited Oct. 5, 2006).

This article examines why the use of comparative material for these purposes has been criticized as illegitimate. Specifically, four main concerns are dealt with. The first is one based on the texts of bills of rights. Under this heading we will consider whether a court is justified in declining to consider comparative material on the ground that the text of a foreign bill of rights differs from that of the domestic charter. This concern has particularly held sway in the Commonwealth republics of Malaysia and Singapore. On the other hand, in the United States the principal concern appears to be that since a bill of rights reflects the identity and values of the nation, it is inappropriate to look to the experience of other countries. We will examine that concern, as well as two other concerns based on varying domestic conditions in different jurisdictions and the practicality of referring to foreign law. It is concluded that there are, in fact, sound justifications for courts taking a comparative approach to the interpretation of bills of rights.

*1. Concern based on the text: The “four walls” doctrine*

In 1963, the chief justice of the Federation of Malaya stated in *Government of the State of Kelantan v. Government of the Federation of Malaya* that the Malayan Federal Constitution was “primarily to be interpreted within its own four walls and not in light of the analogies drawn from other countries such as Great Britain, the United States of America or Australia.”<sup>3</sup> This statement appeared in a short judgment delivered on the eve of the coming into force of the Malaysia Act 1963 (U.K.),<sup>4</sup> which, as the history books tell us, resulted in the merger of the Federation of Malaya and the British colonies of North Borneo (Sabah), Sarawak, and Singapore to form the new Federation of Malaysia and, thus, the independence of the colonies from Great

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<sup>3</sup> Gov. of Kelantan v. Gov. of Malaya, [1963] 1 M.L.J. 355, 358 (Mal.).

<sup>4</sup> Malaysia Act [1963] c. 35.

Britain. The case was the result of an attempt by the state of Kelantan, then a member of the Federation of Malaya, to block the merger and thus the formation of Malaysia.

In these circumstances of urgency, Chief Justice James Thomson can perhaps be forgiven for neither describing the analogies from foreign jurisdictions that he declined to apply to the Malayan Constitution, nor explaining clearly what he meant by an interpretation within the four walls of a constitution. However, in support of his statement, he referred to *Adegbenro v. Akintola*,<sup>5</sup> a judgment of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Nigeria that had been rendered less than three months earlier. There, Viscount Radcliffe, delivering their lordships' judgment, said:<sup>6</sup>

[T]he Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

If Chief Justice Thomson's statement was to be understood in the light of *Adegbenro v. Akintola*, then *Government of the State of Kelantan* stands for the proposition that foreign principles of law should not be applied if they cannot be accommodated by the constitutional text. The rule ensures that the text is not ignored.

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<sup>5</sup> *Adegbenro v. Akintola*, [1963] A.C. 614, [1963] 3 W.L.R. 63 (P.C.) (appeal taken from Nig.).

<sup>6</sup> *Id.*, [1963] A.C. at 631–632.

Although the “four walls” theory or doctrine (as it has been termed by academics)<sup>7</sup> has been applied repeatedly by the courts of Malaysia<sup>8</sup> and Singapore, it does not appear to have been understood in the manner suggested above. As regards Singapore, the doctrine was reiterated by the Privy Council almost twenty years after *Government of the State of Kelantan in Ong Ah Chuan v. Public Prosecutor*,<sup>9</sup> when the Privy Council was still Singapore’s court of final resort. In that case it was submitted, on the appellants’ behalf, that a rebuttable presumption created by the Misuse of Drugs Act 1973 conflicted with the “presumption of innocence,” which was claimed to be a fundamental human right protected by articles 9(1) and 12(1) of the Singapore Constitution.<sup>10</sup> Article 9(1) prohibits the deprivation of life or personal liberty save in accordance with law, while article 12(1) guarantees all persons equality before the law and equal protection of the law. The appellants’ counsel submitted that in interpreting these articles reference should be made to cases from India and the United States, among others. Lord Diplock, in delivering the judgment of the Court that dismissed the appeal, expressed the view that the two articles differed considerably in their language from the corresponding provisions of the Indian Constitution in that the former were much less detailed. Articles 9(1) and 12(1)

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<sup>7</sup> Li-ann Thio, *The Secular Trumps the Sacred: Constitutional Issues Arising from Colin Chan v. Public Prosecutor*, 16 SING. L. REV. 26, 62 (1995); Li-ann Thio, *Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs*, SING. J. LEGAL STUD. 328, 347 (2002); Victor V. Ramraj, *Comparative Constitutional Law in Singapore*, 6 SING. J. INT’L & COMP. L. 302 (2002); Li-ann Thio, *Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law*, 8 SING. Y.B. INT’L L. 41, 59 (2004).

<sup>8</sup> Loh Kooi Choon v. Gov’t of Malaysia, [1977] 2 M.L.J. 187 (Fed. Ct.) (Mal.); Phang Chin Hock v. Public Prosecutor, [1980] 1 M.L.J. 70 (Fed. Ct.) (Mal.); Public Prosecutor v. Pung Chen Choon, [1994] 1 M.L.J. 566 (Sup. Ct.) (Mal.). See also Public Prosecutor v. Ooi Kee Saik, [1971] 2 M.L.J. 108 (High Ct.) (Mal.).

<sup>9</sup> Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648, [1980] 3 W.L.R. 855, [1980–1981] S.L.R. 48; [1981] 1 M.L.J. 64 (P.C.) (appeal taken from Sing.).

<sup>10</sup> SING. CONST. (1999) revised edition; available at <http://statutes.agc.gov.sg>.

differed even more widely from the Bill of Rights in the United States Constitution.

Thus:

[i]n view of these differences their Lordships are of opinion that decisions of Indian Courts on Pt III of the Indian Constitution should be approached with caution as guides to the interpretation of individual articles in Pt IV of the Singapore Constitution; and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.<sup>11</sup>

Following this lead, the four walls doctrine has been applied in various Singapore cases. In *Att'y-Gen. v. Wain (No. 1)*,<sup>12</sup> the respondents, who were facing an action for contempt by scandalizing the court after the publication of a news article in the *Asian Wall Street Journal*, sought to rely on decisions from Canada and other Commonwealth jurisdictions relating to freedom of speech. The judge held that the Canadian decisions did not constitute useful authority "for they are decisions based on the Canadian Charter of Rights and Freedoms which has no parallel in Singapore."<sup>13</sup> As regards the cases from other parts of the Commonwealth, the judge said that:

though they make interesting reading, I find that so many of them turn on their own facts. As is to be expected, the judges in making their decisions in those cases were concerned with the social, political, industrial and other economic conditions prevailing in their respective societies at the particular time. It is therefore difficult to reconcile or to rationalize the many different and conflicting views expressed by the judges in their decision-making process. At best the cases only serve as illustrations of the application of the law of contempt in those countries.<sup>14</sup>

In *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,<sup>15</sup> a defamation case, the appellant invited the court to consider freedom-of-speech guarantees in bills of rights from jurisdictions such as Canada, India, and the United States, as well as article 10

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<sup>11</sup> [1981] A.C. at 669, [1980–1981] S.L.R. at 60–61, para. 22.

<sup>12</sup> *Att'y-Gen. v. Wain (No. 1)*, [1991] S.L.R. 383, [1991] 2 M.L.J. 525 (High Ct.) (Sing.).

<sup>13</sup> *Id.*, [1991] S.L.R. at 393, paras. 31–32.

<sup>14</sup> *Id.*

<sup>15</sup> *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, [1992] 2 S.L.R. 310 (C.A.) (Sing.).

of the European Convention on Human Rights. He submitted that article 14(1) of the Singapore Constitution, which protects freedom of speech and expression, required defamation law to be modified such that the defense of qualified privilege would pertain to the publication of defamatory statements relating to the official conduct or performance of public duties by public officials or candidates for public office. The defense attached, he claimed, when such statements were made by those who had an honest and legitimate interest in the matter to those who had a corresponding and legitimate interest, whether as electors or as citizens potentially affected by the conduct of public officials. Two leading cases—the decision of the U.S. Supreme Court in *New York Times Co. v. Sullivan*<sup>16</sup> and that of the European Court of Human Rights in *Lingens v. Austria*<sup>17</sup>—were heavily relied upon. The Court of Appeal declined to consider this submission, holding that the terms of article 14 differed materially from the First and Fourteenth Amendments of the U.S. Constitution and from article 10 of the European Convention on Human Rights.

Singapore courts continued to apply the four walls doctrine even after appeals to the Privy Council were completely abolished with effect from April 8, 1994,<sup>18</sup> and the Court of Appeal became Singapore's final appellate court. *Chan Hiang Leng Colin v. Public Prosecutor*<sup>19</sup> concerned orders by the Minister for Home Affairs banning as undesirable all publications of the Watchtower Bible and Tract Society, which produced materials for the Jehovah's Witnesses. The case involved a challenge to the validity of these orders on the ground that they were contrary to the freedom of religion protected by article 15 of the Singapore Constitution. In response to an

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<sup>16</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>17</sup> *Lingens v. Austria*, 8 Eur. H.R. Rep. 407 (1986) (Eur. Ct. H.R.).

<sup>18</sup> With the enactment of the Judicial Committee (Repeal) Act 1994 (No. 2 of 1994) (Sing.).

<sup>19</sup> *Chan Hiang Leng Colin v. Public Prosecutor*, [1994] 3 S.L.R. 662 (High Ct.) (Sing.).



argument by the appellant that was based on the First Amendment to the U.S. Constitution, Chief Justice Yong Pung How referred to the four walls doctrine:

There is a fundamental difference between the right to freedom of religion under the First Amendment to the United States Constitution and art 15. The American provision consists of an “establishment clause” which proscribes any preference for a particular religion (Congress shall make no law respecting an establishment of religion) and a “free exercise clause” which is based on the principle of governmental non-interference with religion (Congress shall make no law prohibiting the free exercise thereof). Significantly, the Singapore Constitution does not prohibit the “establishment” of any religion. The social conditions in Singapore are, of course, markedly different from those in the United States. On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context.<sup>20</sup>

*Chan Hiang Leng Colin's* invocation of the doctrine was followed in the unreported decision by the High Court—Singapore’s superior court of unlimited original jurisdiction—of *Peter Williams Nappalli v. Institute of Technical Education*,<sup>21</sup> in which a teacher was dismissed for refusing on religious grounds to take the national pledge or sing the national anthem. One of the issues considered was the effect of the constitutional guarantee of freedom of religion on his contractual obligations. Referring to *Chan Hiang Leng Colin*, Justice Tan Lee Meng affirmed the four walls doctrine, observing that there were “differences between the American position and the Singapore Constitution and that social conditions in Singapore are markedly different from those in the United States.”<sup>22</sup> On appeal, the doctrine was once again cited with approval by the Court of Appeal.<sup>23</sup>

Two features of the foregoing decisions warrant mention. First, there is a tendency for foreign case law to be dismissed as irrelevant under the four walls

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<sup>20</sup> [1994] 3 S.L.R. 681 (High Ct.) (Sing.).

<sup>21</sup> *Peter Williams Nappalli v. Institute of Technical Education*, [1998] SGHC 351, paras. 40–42 (High Ct.) (Sing.). The four walls doctrine was also cited with approval in *Taw Cheng Kong v. Public Prosecutor*, [1998] 1 S.L.R. 943, para. 78 (High Ct.) (Sing.).

<sup>22</sup> *Id.* at para. 42.

<sup>23</sup> *Nappalli Peter Williams v. Institute of Technical Education*, [1999] 2 S.L.R. 569, para. 19 (C.A.) (Sing.).

doctrine on the basis of differences in wording between the foreign bill of rights and the domestic constitution. Second, this dismissal is often buttressed by a declaration that foreign law is inapplicable locally because conditions in the two jurisdictions differ. If, as has been suggested above,<sup>24</sup> the four walls doctrine is essentially directed at preventing the constitutional text from being disregarded, the second feature is, arguably, an objection to foreign law that stands apart from the four walls doctrine. That point, therefore, will be considered below, in section 3, of this article. The balance of this section will examine the first feature.

The four walls doctrine may be applied without much difficulty where the text speaks unambiguously. In *Adegbenro v. Akintola*,<sup>25</sup> for example, the main issue to arise was whether the governor of the Western Region of Nigeria was entitled to dismiss the respondent from the premiership without a vote having been taken, solely on the basis of a letter signed by 66 of the 124 members of the House of Assembly stating that they no longer supported the premier. The governor purportedly had acted under section 33 of the Constitution of Western Nigeria, which reads: “(10) ... the Ministers of the Government of the Region shall hold office during the Governor’s pleasure: Provided that—(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly... .” One of the arguments advanced by the respondent was that the Nigerian provincial constitutions were modeled on the constitutional doctrines of the United Kingdom, and, since the British Sovereign would not be regarded as acting with constitutional propriety in dismissing a prime minister from office without an adverse vote in the House of Commons, so the governor in Western Nigeria must be similarly precluded

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<sup>24</sup> *Supra* notes 5–8 and accompanying text.

<sup>25</sup> *Supra* note 5.

from exercising his removal powers in the absence of a vote of the same kind. The Privy Council declined to accept this argument, finding, *inter alia*, nothing in the general scheme or in specific provisions of the Constitution that stated that the governor was precluded, legally, from forming his opinion on the basis of anything but votes formally given on the floor of the House.

On the other hand, as bills of rights often embody broad statements of principle, it is arguably inaccurate to declare that foreign law can shed no light on their texts. For example, as we have seen, article 9(1) of the Singapore Constitution provides that “[n]o person shall be deprived of his life or personal liberty save in accordance with law.” The due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution state that no person shall be deprived of “life, liberty, or property, without due process of law.” Regardless of the differences in wording, can it be said definitively that American cases involving the due process clauses are of no help at all in elucidating what constitutes an improper deprivation of life and personal liberty in the context of the Singapore Constitution? A court would have to satisfy itself that any foreign legal principles referred to were consonant with domestic constitutional doctrine, but a minor difference in the phrasing of domestic and foreign texts should not in itself disqualify foreign principles of law from consideration in the interpretation of domestic bills of rights.

Victor Ramraj terms the four walls doctrine “legal rhetoric” and observes that it is routinely disregarded by the Singapore courts in practice.<sup>26</sup> Using a vocabulary developed by Sunit Choudhry,<sup>27</sup> Ramraj notes that the Singapore courts have used foreign case law in “genealogical interpretations” of the Constitution—that is,

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<sup>26</sup> Ramraj, *supra* note 7, at 309–310.

<sup>27</sup> Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819 (1999).

interpretations based on the notion that relationships of genealogy and history, which tie certain constitutions together, offer sufficient justification for the importation and application of entire areas of constitutional doctrine.<sup>28</sup>

In Singapore, for instance, it is common for courts to refer to Malaysian and Indian case law when interpreting the Constitution; the fundamental liberties in the Singapore Constitution were inherited from the Malaysian Constitution, which was inspired, in turn, by the Indian Constitution.<sup>29</sup> As an example, it was held in *Kok Hoong Tan Dennis v. Public Prosecutor*<sup>30</sup> that a legislative provision does not violate article 12(1) of the Singapore Constitution, which provides that “[a]ll persons are equal before the law and entitled to the equal protection of the law,” if it passes the “rational nexus” test. This test requires the classification employed by the provision to be founded on an intelligible differentia that distinguishes persons grouped together from others left out of the group, and the differentia must have a rational relation to the end to be achieved by the law in question. In other words, there must be a logical nexus between the basis of classification and the purpose of the law.<sup>31</sup> The rational nexus test was adopted from the decision of the Malaysian Federal Court of Criminal Appeal in *Datuk Haji bin Harun Idris v. Public Prosecutor*,<sup>32</sup> which followed the Indian Supreme Court case of *Shri Ram Krishna Dalmia v. Shri Justice S R Tendolkar*.<sup>33</sup> It is to be noted that the wording of article 12(1) of the Singapore Constitution differs slightly from the negative phrasing of article 14(1) of the Indian

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<sup>28</sup> Choudhry, *id.* at 838.

<sup>29</sup> Ramraj, *supra* note 7, at 311–313.

<sup>30</sup> *Kok Hoong Tan Dennis v. Public Prosecutor*, [1997] 1 S.L.R. 123 (High Ct.) (Sing.).

<sup>31</sup> *Id.* at para. 34.

<sup>32</sup> *Datuk Haji bin Harun Idris v. Public Prosecutor*, [1977] 2 M.L.J. 155 (Fed. Ct.) (Mal.).

<sup>33</sup> *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*, A.I.R. 1958 S.C. 538, [1959] Sup. Ct. Rep. 279, 296–297 (Sup. Ct.) (India).

Constitution: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

A genealogical interpretation appears to assume that if a local bill of rights was modeled on a foreign bill of rights, the legislature must have intended foreign legal doctrines to be applicable to the local context as well. However, unless there is evidence—such as reported legislative history—pointing to this conclusion, the assumption may not be justified. Rather, what a court should be asking itself is whether the concepts embodied in the text of a foreign bill of rights and the meanings that have been ascribed to that text are able to elucidate the content of corresponding provisions in the local bill of rights.

Neither has the four walls doctrine deterred Singapore courts from considering, both favorably and unfavorably, cases from jurisdictions other than Malaysia and India. In *Peter Williams Nappalli* before the High Court,<sup>34</sup> the judge, having referred to the doctrine with approval, went on to use foreign cases to buttress his argument, citing two U.S. cases, a Sri Lankan case, and an English case. On appeal, the Court of Appeal again invoked the four walls doctrine, and then proceeded to consider Australian, Philippine, American, English, and Canadian cases.<sup>35</sup> Indeed, it appears that the four walls doctrine is sometimes used as a device for rejecting certain lines of foreign authority while accepting others.

Ramraj characterizes this way of proceeding<sup>36</sup> as analogous to what Choudhry calls a “dialogical interpretation” of a bill of rights.<sup>37</sup> A court taking this interpretive approach engages in a kind of dialogue with comparative jurisprudence in order to

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<sup>34</sup> *Supra* note 21.

<sup>35</sup> *Id.* at 308–309.

<sup>36</sup> *Id.* at 313–317.

<sup>37</sup> Choudhry, *supra* note 27, at 836.

better understand its own constitutional system and jurisprudence.<sup>38</sup> The court examines comparative case law and doctrine, not so much to gain an accurate picture of the state of the law in the other jurisdiction as to identify the assumptions that underpin it. The comparative jurisprudence serves as an “interpretive foil”: in analyzing why foreign courts have reasoned a certain way, a court will surely ask itself why it reasons the way it does.<sup>39</sup>

Having identified the assumptions underlying the foreign law and its own law, the court then faces a set of interpretive choices. If the court opts to reject foreign assumptions in favor of its own, the exercise is nonetheless bound to have heightened its awareness and understanding of constitutional difference, which, in turn, will shape and help guide the process of subsequent constitutional interpretation. Conversely, if constitutional similarities are identified and embraced, dialogical interpretation grounds the legitimacy of importing comparative jurisprudence and applying it as law.<sup>40</sup>

As a further possibility, a court may reject ingrained assumptions both in the foreign law and the law of its own jurisdiction and stake out a new interpretive approach proceeding from radically different premises, or determine instances of presumed constitutional difference to be unfounded. Thus, the process of dialogical interpretation “can lead the court to fundamentally re-assess its previous judgments, and to use comparative jurisprudence as a means to initiate radical legal change.”<sup>41</sup>

Foreign constitutional jurisprudence is often considered by Singapore courts dialogically, only to be ultimately rejected.<sup>42</sup> On the other hand, older lines of foreign

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<sup>38</sup> *Id.*

<sup>39</sup> Choudhry, *supra* note 27, at 857.

<sup>40</sup> *Id.* at 858.

<sup>41</sup> *Id.*

<sup>42</sup> Ramraj, *supra* note 7, at 314.

authority, which would not now be referred to in their own jurisdictions, have been followed in preference to modern jurisprudence. In *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*,<sup>43</sup> the Canadian case *Tucker v. Douglas*<sup>44</sup> was cited with approval. This case, decided before the Canadian Charter of Rights and Freedoms came into force on April 17, 1982, is unlikely to be considered persuasive in Canada today. Similarly, in *Chan Hiang Leng Colin*,<sup>45</sup> the Singapore High Court, after invoking the four walls doctrine, referred with approval to *Adelaide Co. of Jehovah's Witnesses Inc v. Commonwealth*,<sup>46</sup> an Australian case decided during World War II.<sup>47</sup>

Ramraj acknowledges that it might be argued that such selective use of foreign constitutional cases is objectionable because the local court is employing these cases in support of its own position by taking them out of their legal and historical context. However, he says this misses the point: the dialogical approach merely uses comparative case law “instrumentally, as a means to stimulate constitutional self-reflection,”<sup>48</sup> and does not purport to make normative claims based on the cases.<sup>49</sup>

There is something to be said for judges using foreign material as a source of inspiration when considering how bill of rights jurisprudence should be developed; this is a point to which I return later.<sup>50</sup> Further, a key advantage of a dialogical approach is that it does not require the court to acquire a deeper understanding of the workings of a borrowed foreign legal doctrine and the role that it plays in the legal system from which the doctrine is derived.

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<sup>43</sup> *Supra* note 15.

<sup>44</sup> *Tucker v. Douglas*, [1950] 2 D.L.R. 827 (C.A.) (Sask.).

<sup>45</sup> *Supra* note 19.

<sup>46</sup> *Adelaide Co. of Jehovah's Witnesses Inc v. Commonwealth*, (1943) 67 C.L.R. 116 (High Ct.) (Aust.).

<sup>47</sup> Ramraj, *supra* note 7, at 315.

<sup>48</sup> Choudhry, *supra* note 27, at 892.

<sup>49</sup> Ramraj, *supra* note 7, at 315–316.

<sup>50</sup> See the discussion on cross-fertilization *infra*, at the text accompanying notes 107–108.

However, while in theory it is possible for a judge to refer to comparative material solely for instrumental purposes, in many cases it will be hard to imagine the judge does not have a preference for one line of authority over another. However, for a judge to act in this way would be undesirable, particularly if he neither articulates why obsolete legal principles are being applied nor provides convincing reasons why modern lines of authority have been rejected. A judgment that uses dialogical interpretation in this manner thus risks appearing arbitrary and illogical.

In summary, the four walls doctrine does not mandate a wholesale rejection of comparative constitutional material, as we have seen in jurisdictions such as Singapore and Malaysia, which have repeatedly affirmed the doctrine but nonetheless drawn upon foreign law in genealogical and dialogical interpretations of their respective Constitutions.

However, both genealogical and dialogical interpretations have their weaknesses. Genealogical interpretation is legitimate provided there exists sufficient evidence that when the legislature imported the words of a foreign bill of rights into a local statute it intended also to import the meanings given those words by foreign judicial interpretation. Otherwise, a more sensible approach is for the local court to assess whether comparative material, whether or not originating from an “ancestral” bill of rights, is capable of illuminating the meaning of the local text. Dialogical interpretation appears to be conceptually acceptable, but judgments that refer to foreign cases out of context may come across as irrational.

The four walls doctrine should be understood, properly speaking, as a rule aimed at ensuring that a foreign legal principle is not applied when it cannot be validly accommodated by the text of a bill of rights. The doctrine, therefore, does not altogether exclude the use of comparative constitutional material. If this view is



accepted, the difficulties with the genealogical and dialogical interpretations discussed above do not undermine the point.

## *2. Concern based on national identity*

Skepticism has also been directed against the use of comparative constitutional material on the ground of what Mark Tushnet calls “expressivism”—the idea that constitutions help constitute the nation, to varying degrees in different nations, offering to each nation’s people a way of understanding themselves as political beings.<sup>51</sup> Because a constitution is seen as embodying the commitments that define a national identity, this is said to speak against constitutional borrowing.<sup>52</sup>

This was one of the main points made by the U.S. attorney general in his address at the University of Chicago Law School. Gonzales noted that the U.S. Constitution was built upon the consent of the governed. When the Supreme Court held a law to be unconstitutional, it was vindicating the will of a sovereign people embodied in the written Constitution against the temporary expression of popular will manifested in the particular actions of a legislature. Therefore, he questioned how the standards of anyone other than the people of the U.S. could legitimately be relevant to determining the will of the American people.<sup>53</sup>

The position is also exemplified in the views of Justice Antonin Scalia in several U.S. Supreme Court decisions handed down in the past two decades. In Scalia’s dissent in *Thompson v. Oklahoma*,<sup>54</sup> as well as in a judgment on behalf of the

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<sup>51</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225–1228 (1999).

<sup>52</sup> Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 648–649 (1999).

<sup>53</sup> Gonzales, *supra* note 2, at 19.

<sup>54</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687 (1988).

majority in *Stanford v. Kentucky*<sup>55</sup>—both cases deal with the constitutionality of executing felons who were young adolescents at the time the crimes were committed<sup>56</sup>—he objected emphatically to even the most formulaic references to legal rules in other Western democracies.<sup>57</sup>

The majority in *Thompson* held that executing a person younger than sixteen years of age at the time of the commission of the capital offense ran counter to civilized standards of decency. It observed that this was consistent with the views of “other nations that share our Anglo-American heritage, and by leading members of the Western European community.”<sup>58</sup> The same position was taken in Justice William Brennan’s dissenting judgment in *Stanford*.<sup>59</sup> Justice Scalia disagreed with this approach in footnotes to his judgments in the two cases,<sup>60</sup> calling it

totally inappropriate as a means of establishing the fundamental beliefs of this Nation... . We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so “implicit in the context of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.<sup>61</sup>

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<sup>55</sup> *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969 (1989).

<sup>56</sup> In *Thompson v. Oklahoma*, *supra* note 54, the Supreme Court held that statutes that permitted the imposition of capital punishment on a person under the age of sixteen at the time when the offense was committed violated the Eighth and Fourteenth Amendments of the Constitution. *Stanford v. Kentucky*, *supra* note 55, decided that such punishment was permissible if a person was over the age of fifteen but under eighteen at the relevant time. The latter decision was abrogated in *Roper v. Simmons*, 125 S. Ct. 1183 (2005): *infra* note 67 and the accompanying text.

<sup>57</sup> Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., Praeger 2002), ch. 1, 3 at 5.

<sup>58</sup> *Thompson*, *supra* note 54, 487 U.S. at 830–831, pointing out that the United Kingdom, New Zealand, and the Soviet Union did not permit the execution of juveniles; that the death penalty had been abolished entirely in Australia (except for New South Wales), West Germany, France, Portugal, the Netherlands, and all Scandinavian countries; and that it was available only for exceptional crimes such as treason in Canada, Italy, Spain, Switzerland, and in New South Wales in Australia.

<sup>59</sup> *Stanford*, *supra* note 55, 492 U.S. at 389. Justice Brennan’s dissent was joined by Marshall, Blackmun, and Stevens.

<sup>60</sup> *Thompson*, *supra* note 54, 487 U.S. at 868 n. 4; *Stanford*, *supra* note 55, 492 U.S. at 369 n. 1.

<sup>61</sup> *Thompson and Stanford*, *id.*

Justice Scalia's opinions in this regard emerge elsewhere. The 1997 case of *Printz v. United States*<sup>62</sup> involved the federal Brady Handgun Violence Prevention Act,<sup>63</sup> the provisions of which directed the attorney general to establish a national system for instantly checking the backgrounds of prospective handgun purchasers; the law also required the chief law enforcement officer of each local jurisdiction to perform such checks and related tasks on an interim basis until the national system became operative. The petitioners, who were the chief law enforcement officers for counties in Montana and Arizona, challenged the constitutionality of the interim provisions on the ground that congressional action could not compel state officers to execute federal laws. This argument was accepted by a plurality of the Supreme Court.

In a dissenting opinion, Justice Stephen Breyer found support for his opposing view in the fact that the United States was not the only nation that sought to reconcile the practical need for a central authority with the democratic virtues of more local control. He noted that the federal systems of Switzerland, Germany, and the European Union all provided that constituent states, not federal bureaucracies, would implement many of the laws, rules, regulations, or decrees enacted by the central federal body.<sup>64</sup> He remarked:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own... . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem. ...<sup>65</sup>

Justice Scalia, writing the plurality opinion, responded that "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of

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<sup>62</sup> *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997).

<sup>63</sup> Brady Handgun Violence Prevention Act, 18 USC § 921 et. seq., (named for presidential press secretary James Brady, who was shot with an illegal handgun during an attempted assassination of President Ronald Reagan in 1981).

<sup>64</sup> *Printz*, *id.* at 521 U.S. at 976 (Stevens J. joining).

<sup>65</sup> *Id.* at 977.

course quite relevant to the task of writing one... . The fact is that our federalism is not Europe's. It is 'the unique contribution of the Framers to political science and political theory.' ”<sup>66</sup>

The Supreme Court returned to the constitutionality of imposing capital punishment on juveniles in *Roper v. Simmons*.<sup>67</sup> Sixteen years earlier, *Stanford v. Kentucky*<sup>68</sup> had held that such punishment was permissible if a person was over the age of fifteen but under eighteen at the time of the offense. This time, a majority of the Court found that, because standards of decency had evolved since *Stanford*, the Eighth and Fourteenth Amendments of the Constitution now forbade the imposition of the death penalty on offenders under the age of eighteen at the time of commission. While the majority saw the disproportionateness of the death penalty for juvenile offenders confirmed by the fact that the United States was the only country in the world that continued to give official sanction to the practice, this stark fact did not suggest a definitive interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." However, on previous occasions the Court had referred to the laws of other countries and to international authorities as instructive in this regard. The United Kingdom's experience was held to be particularly relevant in light of the historic ties between the two countries and the Eighth Amendment's origins in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." <sup>69</sup> The majority concluded: "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of

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<sup>66</sup> *Id.* at 921 note 11, citing *U.S. v. Lopez*, 514 U.S. 549 at 575, 115 S. Ct. 1624 at 1638 (1995).

<sup>67</sup> *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

<sup>68</sup> *Supra* note 55.

<sup>69</sup> 1 W. & M., c. 2, s. 10: *Roper*, *supra* note 67 at 1198–1199.

certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>70</sup>

Justice Sandra Day O’Connor echoed these sentiments in her dissenting opinion:

[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.<sup>71</sup>

Not surprisingly, Justice Scalia took exception to the reference to foreign and international legal materials. In his opinion, the majority’s basic premise as he characterized it—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. He noted that, in many significant respects, the laws of most other countries differed from American law. This included not only explicit provisions of the Constitution but even many interpretations of the Constitution prescribed by the Supreme Court itself.<sup>72</sup> The Court either had to profess its willingness to reconsider all these matters in light of the views of foreigners or to cease putting forth foreigners’ views as part of the reasoned basis of

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<sup>70</sup> Roper, *id.* at 1200.

<sup>71</sup> Roper, *supra* note 67 at 1215–1216. However, as she did not believe that a genuine national consensus against the juvenile death penalty had yet developed, and because she did not believe that the majority’s moral proportionality argument justified a categorical, age-based constitutional rule, she was of the view that the international consensus described by the majority could not be regarded as confirmation of the Court’s decision: *id.* at 1215.

<sup>72</sup> *Id.* at 1226. Scalia J. found the majority’s particular reliance on the laws of the United Kingdom “perhaps the most indefensible part of its opinion.” Taking a characteristically originalist viewpoint, he said it was true that the United States shared a common history with the United Kingdom, and that the Court often consulted English sources when asked to discern the meaning of a constitutional text written against the backdrop of eighteenth-century English law and legal thought. If the majority had applied that approach, it would have found that the “cruel and unusual punishments” provision of the English Declaration of Rights was originally meant to describe those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown’s judges. Under that reasoning, the death penalty for under-18 offenders would have easily survived the present challenge: *id.* at 1227.

its decisions. “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.”<sup>73</sup> In his view the majority had relied on foreign sources, not to underscore the Court’s “fidelity” to the Constitution, its “pride in its origins,” and its “own [American] heritage,”<sup>74</sup> but to set aside the centuries-old American practice—one still engaged in by a large majority of the states—of letting a jury decide whether, in the particular case, youth should be the basis for withholding the death penalty.<sup>75</sup>

It needs to be appreciated that, in determining whether a particular form of punishment is “cruel and unusual” under the Eighth Amendment, the Supreme Court has stated that it must consider whether there is a national consensus that laws allowing such punishment contravene modern standards of decency in the country.<sup>76</sup> This may explain to some extent why Scalia vehemently opposed references to foreign and international law in the juvenile death penalty cases: he believed that foreign law could have no bearing on the beliefs and practices of the United States.<sup>77</sup> But this does not explain his parochialism and opposition to comparative material in *Printz*, which was not an Eighth Amendment case.

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<sup>73</sup> *Id.* at 1227. *See also id.* at 1229: “... I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.” Eclecticism toward foreign law may not be objectionable if one appreciates the distinction between legal transplants and cross-fertilization; this point is discussed in section 3, *infra*.

<sup>74</sup> *Supra* note 70.

<sup>75</sup> *Roper*, *supra* note 67 at 1229.

<sup>76</sup> *Id.* at 1217–1218 *per* Scalia J. (dissenting), citing *Trop v. Dulles*, 356 U.S. 86 at 101, 78 S. Ct. 590 (1958).

<sup>77</sup> Vicki Jackson, however, notes that foreign and international law have been referred to in interpreting the Eighth Amendment since the nineteenth century: Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109 (2005), citing *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879) (sentence of death by shooting in the Utah Territory constitutional, partly because “[c]orresponding rules [that] prevail in other countries” supported the practice); see also the cases cited, *supra* note 8.

Tushnet<sup>78</sup> is of the view that expressivism and the use of comparative constitutional material are not inconsistent, because judges of wide learning—whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields—may see things about their own society that judges with a narrower vision miss. Having seen their society from this broader perspective, these judges might then use standard methods of constitutional interpretation, such as reliance on text, structure, history, or democratic theory, to reach results that their colleagues might not have reached. Hence, comparative constitutional law operates in the way that a general liberal education does. If judges are entitled to rely on what they take from great works of literature as they interpret the Constitution, they should be entitled to rely on comparative constitutional law as well.<sup>79</sup>

More importantly, expressivism does not preclude the existence of constitutional norms that transcend national boundaries. In fact, it is apt to see domestic bills of rights as embodying universally shared norms. Lorraine Weinrib finds a nation-centric approach to constitutional interpretation to be incorrect. She sees in the rights-protecting instruments adopted in the aftermath of World War II a shared constitutional conception that, by design, transcends the history, cultural heritage, and social mores of any particular nation-state. The shared conceptual foundation of these instruments is to secure democratic government, the rule of law, and protection for equal human dignity. They require all states to treat everyone over

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<sup>78</sup> Tushnet, *supra* note 51.

<sup>79</sup> Tushnet, *id.* at 1236–1237. *See also* Jackson, *supra* note 77, at 116–117 (if more than one interpretation of the Constitution is plausible from domestic legal sources, approaches taken in other countries may provide helpful empirical information in deciding what interpretation will work best; further, comparisons can shed light on the distinctive functioning of the domestic legal system); Ruth Bader Ginsburg, *A Decent Respect of the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, 64 CAMBRIDGE L.J. 575, 580, 584 (2005) (foreign opinions not authoritative, but “add to the store of knowledge relevant to the solution of trying questions,” and since judges are free to consult other forms of legal commentary such as restatements of law, treatises, and law reviews, there should be no objection to them considering the analysis of a question contained in a foreign case as well).

whom they hold power as ends, not means, and to respect both their full and equal humanity and desire for self-fulfillment.<sup>80</sup> She argues that a constitution, therefore, should not be interpreted with the stress laid on national consensus but, rather, in light of the shared conceptual foundation. Naturally, this approach embraces the use of comparative material.

Weinrib's view fits in with Choudhry's "universalist interpretation" of a constitution, although the latter does not identify any specific shared conceptual foundations. However, as Ramraj explains, a universalist interpretation involves an assumption that there exist constitutional norms that transcend jurisdictions; thus, the interpretation and articulation of these norms by one particular constitutional court can be drawn on by any other constitutional court.<sup>81</sup> It is very difficult to argue that there is no intersection of constitutional values across jurisdictions at all, and a minimal intersection is enough to justify the claim that a universalist approach to comparative constitutional jurisprudence is at least sometimes warranted. Once it is acknowledged that there are minimally some constitutional norms that transcend jurisdictions, this justifies a court in looking to foreign constitutional cases for assistance in understanding them.<sup>82</sup> In addition, if the potential existence of transcendent constitutional norms is accepted, a court is justified in looking to comparative material to search for them, whether or not such norms are ultimately uncovered.<sup>83</sup>

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<sup>80</sup> Weinrib, *supra* note 57, at 15. *See also* Jackson, *supra* note 77, at 118 (individual rights embedded in national constitutions have 'universal' aspects, and foreign or international legal sources may illuminate these suprapositive dimensions of constitutional rights, as when constitutional text or doctrine requires contemporary judgments about a quality of action or freedom, such as the 'reasonableness' of a search or the 'cruelty' of a punishment).

<sup>81</sup> Ramraj, *supra* note 7, at 304.

<sup>82</sup> *Id.* at 325–326.

<sup>83</sup> *Id.* at 329.



A recent decision of the Singapore Court of Appeal provides an example of how a court may find that a transcendent norm is protected by a national bill of rights. In *Nguyen Tuong Van v. Public Prosecutor*<sup>84</sup> the appellant had been convicted at first instance, under the Misuse of Drugs Act,<sup>85</sup> of importing 396.2 grams of diamorphine into Singapore without authorization. The quantity of controlled drugs involved in the case was sufficient to trigger the mandatory penalty of death by hanging. The appellant challenged this on the basis that it would be contrary to the prohibition in customary international law against cruel and inhuman treatment or punishment, which was part of the “in accordance with law” requirement in article 9(1).<sup>86</sup> The Court agreed that it was widely accepted that the prohibition against cruel and inhuman treatment or punishment does amount to a rule in customary international law but found that the appellant had not shown a specific prohibition in customary international law against hanging as a mode of execution. Nor was there enough evidence to show a customary international law prohibition against the death penalty generally.<sup>87</sup>

Regardless of what one thinks of the outcome of *Nguyen Tuong Van*, by recognizing the existence of the prohibition against cruel and inhuman treatment or punishment in customary international law, the Court of Appeal acknowledged that the bill of rights in the Singapore Constitution reflects transcendent constitutional norms. This approach opens the door to the recognition, in appropriate cases,<sup>88</sup> of

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<sup>84</sup> *Nguyen Tuong Van v. Public Prosecutor*, [2005] 1 S.L.R. 103 (C.A.) (Sing.).

<sup>85</sup> Cap. 185, (2001) Rev. Ed. (Sing.).

<sup>86</sup> *Nguyen Tuong Van*, *supra* note 84, at para. 89. Art. 9(1) is set out in the text accompanying notes 10–11.

<sup>87</sup> *Id.* at paras. 91–92. In addition, it held that even if there were a customary international law rule prohibiting execution by hanging, the domestic statute providing for such punishment, that is, the Misuse of Drugs Act, prevailed in the event of inconsistency: *id.* at para. 94.

<sup>88</sup> Note, however, the view taken that if the word *law* in the Constitution includes international law, it is only where the executive and the courts “agree” that a specific customary rule (which

other transcendent norms in which the Court may be prepared to consider foreign materials that reveal how such norms are construed by other jurisdictions.

Although expressivism and universalism are not mutually inconsistent, they appear to pull in opposite directions. However, a balance may be struck between them, as is well illustrated by South African constitutional law. In 1994, the interim constitution<sup>89</sup> of postapartheid South Africa came into force. Section 35(1) of chapter 3 of that constitution stated: “In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”<sup>90</sup>

The terms of section 39 of chapter 2 of the current South African Constitution,<sup>91</sup> which took effect<sup>92</sup> in 1997 following extensive discussions and public consultations by the Constitutional Assembly, are quite similar to section 35(1) of the interim constitution. Section 39 reads:

When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.<sup>93</sup>

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conflicts with parliamentary legislation) applies that such a customary rule may be said to have been incorporated into the Constitution, unless a nonderogable rule of customary international law (that is, *jus cogens*) is involved where, as a matter of law, it would be unimaginable that Singapore would object to it: C.L. Lim, *The Constitution and the Reception of Customary International Law*: Nguyen Tuong Van v. Public Prosecutor, [2005] SING. J. LEGAL STUD. 218, 227–233.

<sup>89</sup> S. AFR. (Interim) CONST. 1993.

<sup>90</sup> Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 206–207 (1998).

<sup>91</sup> S. AFR. CONST. 1996.

<sup>92</sup> Except for one provision relating to the election of chairpersons to municipal councils: Proclamation No R 6, 1997.

<sup>93</sup> Webb, *supra* note 90, at 206–207.

Hoyt Webb has theorized that South African courts, tribunals, and forums, which includes the Constitutional Court, were specifically enjoined to consider international law and permitted to consider foreign law, when interpreting the Constitution's bill of rights, because

reference to external jurisprudence from "open and democratic" societies offered an appropriate method for assuring the public that the "Fundamental Rights" described in the [interim and final] Constitutions would be reasonably protected from future interpretational mischief or bigotry.

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Given the uniquely terrible history of apartheid under which South Africa's legal and administrative systems were established to enforce and maintain the segregation, marginalization and minimization of the majority of South Africans of color, the framers of the IC [interim Constitution] wisely ensured that the standards applied to the construction of the post-apartheid legal system were not drawn from the same well, but from purer waters.<sup>94</sup>

The operation of section 35(1) of the interim Constitution is exemplified by the decision of the Constitutional Court in *State v. Makwanyane*,<sup>95</sup> which abolished the death penalty in South Africa. At several points in the lengthy decision, international and foreign comparative jurisprudence was examined. Nonetheless, the Court was careful to underline the fact that foreign legal principles should not be applied blindly. As Chief Justice Arthur Chaskalson, who delivered the leading judgment, put it: "Although we are told by section 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 of our Constitution."<sup>96</sup>

For instance, in assessing whether the death penalty violated section 11(2) of the interim constitution, which provided that "[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment," Justice Chaskalson

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<sup>94</sup> *Id.* at 208 and 219.

<sup>95</sup> *State v. Makwanyane* 1995 (3) S.A. 391 (C.C.) (S. Afr.).

<sup>96</sup> *Id.* at 414.

considered cases on the Eighth and Fourteenth Amendments to the United States Constitution prohibiting the imposition of cruel and unusual punishments. He noted that because this Constitution contemplates the existence of capital punishment,<sup>97</sup> the U.S. Supreme Court had taken the position that capital punishment was not unconstitutional per se but could be arbitrary, and thus unconstitutional, in certain circumstances. Difficulties with this approach experienced in the United States persuaded him that South Africa should not follow the same route.<sup>98</sup> Further, the different language used in the interim constitution and the U.S. Constitution meant that each text merited a different analysis.<sup>99</sup> Nonetheless, elements of the U.S. Court's analysis of the issues, especially as it related to the impropriety of arbitrariness and inequality in the imposition of the punishment, were germane to the analysis of relevant provisions of the interim constitution.<sup>100</sup> In the end, Chaskalson was satisfied that in the context of the interim constitution, the death penalty was cruel, inhuman, and degrading punishment and thus violated section 11(2).<sup>101</sup>

In *Makwanyane*, therefore, one of the main issues faced by the South African Court was to arrive at a determination of what constitutes cruel, inhuman, and degrading punishment. The substance of this judgment may be regarded as a transcendent constitutional norm that the Court elucidated by examining comparative legal material. Aware that its decision had to be consonant with the

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<sup>97</sup> The Fifth Amendment states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...” and “nor shall any person ... be deprived of life, liberty or property, without due process of law.”

<sup>98</sup> *Makwanyane*, *supra* note 95, at 422.

<sup>99</sup> Unlike the South African interim constitution, the United States Constitution does not have a limitations clause, thus forcing courts to find limits to constitutional rights through a narrow interpretation of the rights themselves: *Makwanyane*, *id.* at 435. On the limitations clause in the South African interim constitution, *see infra* notes 111–115 and the accompanying text.

<sup>100</sup> *Id.* at 417–421. *See Webb*, *supra* note 90, at 238–240.

<sup>101</sup> *Makwanyane*, *id.* at 433–434.

terms of the Constitution, it did not apply foreign or international legal principles unthinkingly but used them to inform the constitutional law of South Africa and, eventually, to develop its own legal principles. In this way, the Court demonstrated how expressivism and universalism may be successfully balanced.

To recapitulate, accepting an expressivist view of a constitution or a bill of rights does not require a judge to refrain from referring to comparative material, for such material may, in fact, assist him in better understanding the national identity of his country. More significantly, a domestic bill of rights is appropriately viewed as encapsulating transcendent constitutional norms. That being the case, it should be permissible both to use comparative material to identify such norms and to comprehend them. Of course, in referring to comparative material, judges must be careful to ensure that such comparison is consistent with the text of the domestic bill of rights.

### *3. Concern for differing conditions*

We have seen that Singapore courts have, on a number of occasions, declined to consider comparative legal material on the basis, ostensibly, that social or other conditions in Singapore and the foreign country differ. Unfortunately, there is often no explanation in the holdings as to just how the conditions are different or why such differences are relevant. As Li-ann Thio has pointed out: “This perfunctory [waving] away of foreign cases on the basis of ‘we’re different’ is undesirable. A focused elaboration of the different social conditions of these countries would aid in assessing their relevance to the matter at hand.”<sup>102</sup>

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<sup>102</sup> Li-ann Thio, *An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication*, (1997) 27 HONG KONG. L.J. 152, 176, quoted in Ramraj, *supra* note 7, at 331.

Nonetheless, the underlying concern is valid. A key reason for referring to comparative material is a perception that there may be a constitutional doctrine or mode of analysis originating in a foreign jurisdiction that is suitable for domestic application. However, the comparative material may not be appropriate if conditions between the domestic and foreign jurisdictions differ to such an extent that the foreign doctrine might operate unpredictably or detrimentally. Seth Kreimer cautions that there may be a “problem of translation”: borrowing a foreign concept “yields no guarantee, or even likelihood, that the concept will mean the same thing to our courts that it does to its originators, or that the results reached in the [foreign] context will mirror the results the doctrine yields in its home arena, even if we were certain that those results were to be emulated.”<sup>103</sup> It is also risky to predict the functioning of a legal doctrine in a new legal environment based on the way it functioned in the old one.<sup>104</sup>

Admittedly, it is difficult to anticipate how a foreign legal doctrine will fare when applied in the domestic context. However, our concern over differing conditions may be assuaged by considering a distinction drawn by John Bell between legal transplants and cross-fertilization.<sup>105</sup> Transplants entail the transposition of a doctrine from one legal system to another.<sup>106</sup> There are doubts about the effectiveness of this process, about whether a foreign doctrine grafted on to a

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<sup>103</sup> Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 at 646–647 (1999).

<sup>104</sup> *Id.* at 642.

<sup>105</sup> John Bell, *Mechanisms for Cross-Fertilisation of Administrative Law in Europe*, in *NEW DIRECTIONS IN EUROPEAN PUBLIC LAW* (Jack Beatson & Takis Tridimas eds., Hart 1998), ch. 11, 147.

<sup>106</sup> *Id.* at 147–148.

domestic legal system will “take” if it is incompatible with domestic circumstances.<sup>107</sup>

On the other hand,

[c]ross-fertilisation implies a different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.<sup>108</sup>

Alan Watson points out that if what is sought in a foreign system is an *idea* that can be transformed into part of the law of one’s own country then a systematic knowledge of the law or political structure of a donor system is not necessary.<sup>109</sup> In the same vein, the significance of differing conditions, social and otherwise, between the foreign and domestic jurisdictions may be downplayed. Thus, concerns regarding the operation of foreign legal doctrines in the domestic context may be addressed so long as such doctrines are not seen as potential material for wholesale transplantation but, rather, as inspiration for indigenous development in the domestic law.

In deciding *Makwanyane*,<sup>110</sup> the South African Constitutional Court gave consideration to whether the limitations clause in section 33 of the interim constitution<sup>111</sup> would uphold the validity of the death penalty, which had been found

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<sup>107</sup> See, e.g., Alan Watson, *Legal Transplants and Law Reform*, 92 L.Q.R. 79, 81 (1976): “Without hesitation one can accept the proposition that a foreign legal rule will not easily be borrowed successfully if it does not fit into the domestic political context. The word ‘political’ is used . . . with a rather wide meaning, with reference not only to the structure of government and governmental institutions but also to powerful organised groups. . . .”

<sup>108</sup> Bell, *supra* note 105, at 147–148.

<sup>109</sup> Watson, *supra* note 107, at 79.

<sup>110</sup> *Makwanyane*, *supra* note 95.

<sup>111</sup> Section 33(1) states: “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

- a. shall be permissible only to the extent that it is—
  - i. reasonable; and
  - ii. justifiable in an open and democratic society based on freedom and equality; and
- b. shall not negate the essential content of the right in question, and provided further that any limitation to—
  - i. a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or

to be cruel, inhuman, and degrading punishment and thus unconstitutional. Examining the interpretive techniques of the Supreme Court of Canada, the German Federal Constitutional Court, and the European Court of Human Rights, the Court found that limitations analysis typically consists of some form of a balancing test by which the courts review the means and ends of the offending legislation.<sup>112</sup> However, due to textual differences between the interim constitution, on the one hand, and the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany, on the other, the Court decided against directly adopting the tests used in those jurisdictions.<sup>113</sup>

As for the proportionality test used by the European Court of Human Rights, Chaskalson found it an unsuitable guide to the interpretation of section 33 because the South African Court is not under the same constraints as the European Court. The latter is obliged to accommodate the sovereignty of its member states through the “margin of appreciation” doctrine, by which national authorities are allowed more discretion to contravene rights in areas concerning morals and social policy but less where a law seeks to limit a right fundamental to democratic society or interferes with intimate aspects of private life.<sup>114</sup> The chief justice proceeded to articulate a new test that involved the weighing up of competing values and, ultimately, an assessment based on proportionality that examined the reasonableness and necessity for the limitation of constitutional rights.<sup>115</sup>

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- ii. a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.”

<sup>112</sup> Makwanyane, *supra* note 95, at 436–439.

<sup>113</sup> *Id.* at 438–439.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 436. *See* Webb, *supra* note 90, at 241–243.



Aside from the use of comparative material in legal cross-fertilization, there is a further point that follows from our consideration of transcendent constitutional norms. Ramraj argues that the existence of local, empirical conditions (social, economic, or historical) affecting the application of a general norm does not in itself present a challenge to comparative constitutional methodology or the universalist approach to foreign constitutional cases, if one accepts that at least some constitutional norms are transcendent.<sup>116</sup> In his view, whatever the peculiarities of the local conditions, the courts are nonetheless free and, he would argue, duty-bound to look elsewhere for transcendent constitutional principles to apply in a particular case. In doing so, they might well realize that not all local conditions are as special as they may seem initially.<sup>117</sup>

In other words, the existence of differing social and other conditions in the domestic and foreign jurisdictions does not impair the use of comparative material in discerning transcendent constitutional norms. Once a norm is identified, if local empirical conditions are so peculiar as to warrant a departure from the common normative standard, then a duty lies on the court to show clearly what these conditions are and why they justify the departure.<sup>118</sup> Alternatively, it is justifiable to refer to comparative material eclectically in legal cross-fertilization, using it as a catalyst for an evolution of legal principles within the domestic legal system.

#### *4. Practical concerns*

In addition to the concern with principle, the consideration of foreign law in the interpretation of bills of rights can raise practical questions. These were invoked by

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<sup>116</sup> Ramraj, *supra* note 7, at 329–331.

<sup>117</sup> *Id.* at 331–332.

<sup>118</sup> *Id.* at 331.

the U.S. attorney general when he commented in his November 2005 speech that the use of comparative legal materials presents “a problem of selection and at least the appearance of capriciousness.”<sup>119</sup> In his view, if it is accepted that foreign law can properly be used in construing the Constitution, at a minimum it should be done in a way that comprehensively examines all relevant international sources. However, it may be impossible for even the most conscientious judge or lawyer to avoid being selective or arbitrary in the use of foreign law.<sup>120</sup> Further, even assuming that the necessary sources of foreign law can be gathered and translated, it would be an even greater task to understand and evaluate them fully.<sup>121</sup>

Jeremy Waldron would disagree with Gonzales and, by virtue of his theory for the citation of foreign law in the interpretation of the U.S. Constitution, push the boundaries a little further. In his opinion, judges may refer to the *ius gentium*—the law of nations in a broad sense—which he defines as a set of legal principles that has established itself as a sort of consensus among judges, jurists, and lawmakers around the world,<sup>122</sup> or, as he puts it, “a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems.”<sup>123</sup> He draws an analogy with the world of medical science. If a new disease or epidemic appeared within the U.S., it would be ridiculous to say that to address the problem one should turn only to American science. On the contrary, U.S. scientists would want to look abroad, as well as inward, to see what scientific

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<sup>119</sup> Gonzales, *supra* note 2, at 10.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 11–12. See also Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 165–166 (2005) (decision costs (time, effort, and expense involved in deciding cases in a particular way) and error costs (likelihood of making mistakes by pursuing a particular method) seem likely to be high for American courts dealing with foreign materials, given language and cultural barriers and most American lawyers’ lack of training in comparative analysis).

<sup>122</sup> Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005).

<sup>123</sup> *Id.* at 133.

conclusions and strategies had emerged, been tested, and mutually validated in the public health practices of other countries. Similarly, a constitutional law problem such as that posed by *Roper v. Simmons*<sup>124</sup> should be treated as one where the experiences of other legal systems in grappling with, untangling, and resolving rival rights and claims are relevant.<sup>125</sup>

Waldron stresses that under his theory, the appeal to foreign law is not a piecemeal practice, which he regards as open to discrediting.<sup>126</sup> Rather, the *ius gentium* represents a consensus similar to that in science, which is not merely an accumulation of authorities but a “dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another’s work.”<sup>127</sup> Just as scientists are expected to consider findings they have reason to trust and not look to the work of suspect or disreputable laboratories, a *ius gentium* inquiry may similarly restrict itself to a consensus among “civilized” or “freedom-loving” countries.<sup>128</sup>

Gonzales overstates the problem. The realities of legal and judicial practice make a selective approach to foreign legal materials inevitable; however, this does not render the process entirely arbitrary. There is nothing wrong with lawyers and judges using skills and discernment honed by experience to choose the foreign laws most likely to prove useful in the interpretive enterprise. Factors guiding the selection process might include the extent to which a foreign legal system and the domestic system share similar values, such as a respect for democracy, a concern for

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<sup>124</sup> *Supra* note 67.

<sup>125</sup> Waldron, *supra* note 122 at 144.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 145.

<sup>128</sup> *Id.*

the rule of law, and the protection of individual liberties;<sup>129</sup> the degree of similarity between the issues faced by the two systems; and whether sufficient foreign legal materials are available in a language that the judge and the parties are able to work with. It is only to be expected that the foreign jurisdictions most likely to be chosen are those whose courts have had more experience in dealing with complex constitutional issues, rather than distant lands whose laws are not well known.

Waldron's *ius gentium* theory limits the foreign laws that judges may consider to those that reflect a harmony of opinion among like-minded nations. Where such consensus can be found courts would do well to take it into account. However, the discretion of judges should not be unduly restricted in this manner. As explained in section 3, there is value in a cross-fertilization of ideas, in judges gaining insights from other nations' laws, and in using them to stimulate homegrown development in their own legal systems. To elaborate on Waldron's public health analogy, scientists should not close their eyes to advances in other countries that have yet to be taken up in their own. As part of the scientific vanguard, they may play a significant role in creating a new consensus.

According judges a broad discretion to consider foreign laws may open them to the charge that the interpretive enterprise becomes, as Young puts it, "profoundly manipulable."<sup>130</sup> The charge seems to stem from the assumption that the range of comparative legal materials is so vast that, if judges hunt around diligently enough, they will be able to find support for any personal predilection. However, this

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<sup>129</sup> See, e.g., Jackson, *supra* note 77, at 125–126 (“[P]ractices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours [the U.S.] are likely to have more positive persuasive value as to the empirical consequences of doctrinal rules, the legitimate justifications for government action, or the implications of basic constitutional commitments”).

<sup>130</sup> Young, *supra* note 121, at 167. See also Gonzales, *supra* note 2, at 12: “[I]t cannot be expected that the laws of all sovereign nations—or, perhaps, even all the courts of a single nation—will agree on a disputed point of constitutional law. The decisionmaker will then be left somehow to choose among them. And this, of course, may lead to ... judicial activism or unrestrained judicial discretion. ...”

presumes that there exists a precedent for every point of view under the sun—which, arguably, has not been proved. Besides, the onus would be on the judge to give sufficient reasons for justifying the reliance on a particular authority and why it should be accorded more weight than other local and foreign authorities that take a different point of view.

The difficulties of understanding comparative legal materials should not be exaggerated. As Young admits, the law engages virtually the full range of human activity; this means that courts must inevitably dabble in a wide range of disciplines in which they may lack specific training or expertise, including science and engineering in patent cases, and psychology in criminal cases. As in those instances, judges must simply be careful, articulate, and thorough when they cite foreign law.<sup>131</sup>

##### *5. The value of a comparative approach*

This article has examined four concerns that have been raised to challenge the use of comparative material to interpret bills of rights. The first, reflected in the four walls doctrine, makes little sense if all it asserts is that foreign material is irrelevant because it is not based on the local bill of rights. Many courts, including those of Singapore and Malaysia, reject this flawed reasoning. These courts often refer to foreign material in interpreting domestic bills of rights, particularly when it originates from a legal system linked to the domestic one by ties of genealogy and history (a genealogical interpretation) or helps judges to better understand and express the assumptions behind their own reasoning (dialogical interpretation).

The four walls doctrine should be understood not as a general injunction against the use of comparative constitutional material but, rather, as a rule aimed at

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<sup>131</sup> Young, *supra* note 121, at 166.

ensuring that a foreign legal principle is not applied when it cannot be accommodated validly by the text of a bill of rights. That said, the touchstone for considering comparative material is whether it is useful in explicating the local bill of rights. In this connection, it is interesting that the Privy Council no longer takes the narrow (and, in my view, incorrect) interpretive approach that it applied in *Ong Ah Chuan*.<sup>132</sup> The issue raised in *Reyes v. The Queen*,<sup>133</sup> an appeal from Belize, was whether a mandatory death sentence imposed on the appellant was constitutional. In holding that it was not, apart from its own past decisions and those of the Belizean courts, the Privy Council referred to cases from Australia, Canada, the European Court of Human Rights, Guyana, Jamaica, India, the Inter-American Commission on Human Rights, Mauritius, South Africa, the United Kingdom, and the United States.

Second, while a constitution or bill of rights may be seen as embodying the commitments that define a national identity, which should be shaped only by reference to homegrown beliefs and traditions, this view does not require a judge to eschew foreign law. Indeed, such comparative material may help one both to recognize and to shape the national identity of the country. Of greater significance is a perception that domestic bills of rights are best seen as incorporating universal or transcendent norms—they are, in this sense, specific applications of general principles. Given this is the case, comparative material enables such transcendent norms shared by different bills of rights to be sought and understood.

Third, the concern that foreign bill-of-rights material may be irrelevant to a domestic legal system—to the extent that local conditions, social or otherwise, differ from conditions in foreign jurisdictions—is minimized if we see foreign law as

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<sup>132</sup> *Supra* note 9.

<sup>133</sup> *Reyes v. The Queen*, [2002] 2 A.C. 235, [2002] 2 W.L.R. 1034 (P.C.) (appeal taken from Belize).

facilitating the organic development of domestic law, rather than as a source of self-contained solutions to be transplanted into the domestic legal system. Further, the existence of transcendent constitutional norms necessarily implies the possibility of referring to comparative material. If a court perceives that local empirical conditions justify departing from a transcendent norm, then the onus lies on it to explain why this is so. It is not an injunction to shun foreign law altogether.

Finally, while the choice of foreign law references is necessarily subjective, and judges and lawyers may not be fully equipped to understand and evaluate comparative legal materials, it is hardly right to characterize the endeavor as capricious. The appraisal of foreign legal materials is arguably no more difficult than coming to grips with other areas of human experience of which courts and counsel have no specialist knowledge.

Meanwhile, the discussion in this article has hinted at some of the benefits of a comparative approach to interpreting bills of rights. I propose to highlight two of these. The first is that a judge who encounters a novel constitutional problem in his jurisdiction is not compelled to slash his own way through the undergrowth but, by referring to foreign material, can gain valuable insights into how other jurisdictions have framed the issues and developed solutions.

*Enright v. Ireland*,<sup>134</sup> a decision of the High Court of Ireland, is a case in point. The plaintiff had been convicted of sexual offenses in 1993. Prior to his release from prison, the Sex Offenders Act 2001 came into force, obliging such offenders to notify the *garda* authorities within seven days of their release; to furnish their name, date of birth, and home address; and to comply with ongoing reporting obligations with respect to their whereabouts. The plaintiff sought declarations that various

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<sup>134</sup> *Enright v. Ireland*, [2003] 2 I.R. 321 (High Ct.) (Ir.).

provisions of the act were unconstitutional, particularly section 7(2), which made the Act applicable to persons convicted prior to the Act's entry into force but released after that date.

The novel issue facing Judge Mary Finlay Geoghegan was whether the provisions of the act in question contravened article 38.1 of the Irish Constitution,<sup>135</sup> which states: "No person shall be tried on any criminal charge save in due course of law." In dealing with this issue, two questions had to be answered: first, whether that guarantee included the right to be subject to penalty only in accordance with the law that existed at the time of a crime's commission, and, second, whether the impugned provisions of the Sex Offenders Act amounted to a criminal penalty.

As regards the first question, Geoghegan examined various cases from the United States and concluded that article 38.1 did indeed prohibit *ex post facto* criminal laws, particularly laws that would subject persons to punishments greater than those that existed at the time of their offenses. She said:

This conclusion I consider to be supported ... by the long standing view of the courts in the United States that the prohibition against *ex post facto* laws includes a prohibition against a law which increases the penalty after the date of commission of the offense. The unswerving acceptance of such a principle which has long historical origins supports the view that this is a long recognized and established right in relation to criminal trials in the common law world.<sup>136</sup>

The judge again turned to U.S. cases to answer the question regarding the meaning of "penalty," observing strong similarities between the principles applied by U.S. courts, when considering penalties for the purposes of the prohibition against *ex post facto* laws, and the principles according to which Irish courts considered whether or not an offense was a minor offense and whether certain sanctions formed

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<sup>135</sup> IR. CONST., 1937.

<sup>136</sup> Enright v. Ireland, *supra* note 134, at 331.



part of the penalty or primary punishment for that offense.<sup>137</sup> Applying the Supreme Court decision in *Kennedy v. Mendoza-Martinez*,<sup>138</sup> the judge held that the provisions of the Sex Offenders Act were not punitive in nature and hence upheld its constitutionality.

The case demonstrates how a court may benefit from the experience of a foreign jurisdiction by applying what was learned there to a novel issue that has arisen locally. However, the four walls doctrine and the South African experience show that a judge need not adopt the foreign legal principles wholesale—indeed, it would be wrong to do so—without closely examining whether these principles fit the text of the local bill of rights. It is helpful if we keep in mind three points that John Allison has identified if cross-fertilization from one jurisdiction to another is not to degenerate into hazardous transplantation:

- 1) The doctrinal ramifications—how domestic legal rules and doctrines might adapt to the external impetus and whether or how they will still fulfill the functions they were meant to fulfill.
- 2) How such adaptation might be justified in the legal and political theory or theories underpinning the legal system.
- 3) How domestic judicial (and, one might add, governmental and social) institutions and procedures might cope with the proposed doctrinal adaptation.<sup>139</sup>

The second benefit of a comparative approach is that it ensures that important judgments concerning the fundamental liberties of individuals are made with an eye on evolving national and international standards. We have seen how South Africa's

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<sup>137</sup> *Id.* at 334.

<sup>138</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962).

<sup>139</sup> John W.F. Allison, *Transplantation and Cross-Fertilisation*, in *NEW DIRECTIONS IN EUROPEAN PUBLIC LAW* (Jack Beatson & Takis Tridimas eds., Hart 1998), ch. 12, 169 at 175–176.

Constitution requires the courts to have regard for international and foreign law specifically to shield the fundamental rights in the Constitution against distortion by an oppressive future government.

Judges should also take into account foreign legal developments, assuming it is acknowledged that domestic bills of rights embody transcendental norms. A South African case, *Mohamed v. President of the Republic of South Africa*,<sup>140</sup> illustrates this point. The applicant in this case was alleged to have been involved in the bombing of the U.S. embassy in Dar es Salaam in August 1998. He was indicted in the United States, where an arrest warrant was issued against him by the federal district court. Arrested by members of the South African Alien Control Unit operating in cooperation with U.S. officials, he was transported to the United States to stand trial on capital charges. The applicant brought an action claiming that being handed over to the United States authorities had infringed his constitutional rights—the rights to life, to dignity, and not to be subjected to cruel, inhuman, or degrading punishment—since South Africa had obtained no prior undertaking from the United States that the death penalty, which had been found to be unconstitutional in South Africa,<sup>141</sup> would not be imposed or carried out.

The Constitutional Court studied a decision of the Supreme Court of Canada holding that to send a person to a state where he would be subject to capital punishment without assurances that this penalty would not be imposed on him unjustifiably violated principles of fundamental justice.<sup>142</sup> It also looked at European Court of Human Rights cases establishing that to expel or extradite a person to a state when there are substantial grounds for believing that he is in danger of being

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<sup>140</sup> *Mohamed v. President of the Republic of South Africa*, 2001 (3) S.A. 893 (C.C.) (S. Afr.).

<sup>141</sup> *State v. Makwanyane*, *supra* note 95.

<sup>142</sup> *U.S. v. Burns*, [2001] 1 S.C.R. 283, (2001) 195 D.L.R. (4th): *see* Mohamed, *supra* note 140, at 913, paras. 46–47.

subjected to torture or to inhuman or degrading treatment or punishment there violates the European Convention on Human Rights.<sup>143</sup> The South African court concluded that these cases were consistent with the weight that the Constitution gave to the spirit, purport, and purposes of the Bill of Rights and the positive obligation that it imposed on the state to “protect, promote and fulfill the rights in the Bill of Rights.”<sup>144</sup> It agreed, therefore, with the applicant that his removal to the U.S. had violated the Constitution and granted various declarations sought by him.

It is proposed, here, that in *Mohamed's* case what the South African Constitutional Court did, in effect, was to identify a transcendent norm—namely, the prohibition against sending a person to another state where he is likely to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. As this norm was embodied in the Constitution, the Court was justified in considering the implications that foreign courts had ascribed to it.

This is not to say that a domestic court may not refuse to follow the interpretations of transcendent norms prevailing in foreign jurisdictions. However, the fact that it proposes to depart from the practices of other democratic nations should give the court pause, implicitly asking it to consider why the laws of other nations have developed as they have and, further, to identify the material differences between those nations and the court's own jurisdiction that demand a different approach.

Returning to the quotation by von Jhering at the beginning of this article and extending the analogy: imagine the judge as a herbalist who seeks a cure for a constitutional ailment. To increase the chances of finding the right treatment for the

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<sup>143</sup> *Soering v. U.K.*, 11 Eur. H.R. Rep. 439 (1989) (Eur. Ct. H.R.); *Chahal v. U.K.*, 23 Eur. H.R. Rep. 413 (1996) (Eur. Ct. H.R.); *Hilal v. U.K.*, 33 Eur. H.R. Rep. 2 (2001) (Eur. Ct. H.R.): see *Mohamed*, *id.* at 916–917, paras. 56–58.

<sup>144</sup> S. AFR. CONST. 1996, *supra* note 91, s. 7(2): see *Mohamed*, *id.* at 58.

patient, the sensible herbalist will gather a selection of herbs from a variety of locations. It is only prudent to scrutinize all the plants to determine whether or not there are any noxious weeds among them. However, once he has ascertained that a plant can indeed provide an efficacious cure, he would be foolish to reject it to his patient's detriment merely because it was not found in his own garden.