WHY INDIAN JUDGES WOULD RATHER BE ORIGINALIST : DEBUNKING PRACTICES OF COMPARATIVE CONSTITUTIONAL LAW IN INDIA

*Gautam Swarup**

Lorraine Weinrib had written of a post-war paradigm of domestic constitutional law predicting its adoption by nations around the world.[1] This paradigm consisted of two components, institutional and doctrinal, that according to him were so fundamentally entrenched in the post-war modern[2] world that escaping this convergence (of domestic constitutions around the world) would require nothing less than a firm adherence to authoritarianism and principles against the rule of law. Institutionally, this paradigm insisted on the importance of judicial review by an independent constitutional court, rejecting parliamentary supremacy in its strongest forms. Doctrinally, it presented itself through national commitments to the protection of basic human rights[3] through proportionality tests licensed by explicit limitations of State power; additionally it included a separate commitment to 'rule of law'[4] principles regarding procedural regularity, legal transparency and legal reform in order to avoid defeating reasonable expectations of legal stability. One would sense that this paradigm has acquired considerable momentum over the decades after the war, given the emergence of international institutions and organizations of States that have constantly enunciated their commitment to such values.[5] *Convergence* here does not merely refer

* Student, B.A., LL.B (Hons.) (IV Year) National Academy of Legal Studies and Research (NALSAR) University of Law, Hyderabad. I would like to express my gratitude to Prof. Amita Dhanda and Manav Kapur for valuable insight and comments on the issue. Eternal gratitude to Prof. Vepa P. Sarathi, for initiating a lot of us into an appreciation of the law and for teaching us that an understanding of it is only possible through relentless pursuit of knowledge, which is not possible in a classroom.

1 Lorraine E Weinrib, *The Postwar Paradigm of American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, Sujith Choudhry (Ed., 2006).

2 On a general description of how written constitutions after the World War II have been influenced by liberal ideologies, *See* Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 Indian J. Const. L. 11, 15 (2008).

3 *See* Mark Tushnet, *The Inevitable Globalisation of Constitutional Law,*

4 *See* Weinrib, *supra* n.1 at 93-98.

5 *See* Mark Tushnet, *Some Skepticism About Normative Con-stitutional Advice, 49 WM. & MARY L. REV. 1473 (2008).* The trend I refer to here is demonstrated by the prominence of many international human rights treaties and conventions. Such instruments have been both global and regional and regardless of geographic specificity, have been critical in

to a universal commitment to international legal human rights norms[6] but encompasses also our understanding of comparative constitutional law as a matter of judicial process- which is the migration of constitutional values, ideas and principles across jurisdictions and their adoption by constitutional courts. Unlike the former,[7] the later lacks authority and legitimacy, and is invariably a product of judicial discretion.[8]

Such a practice, where domestic constitutional courts increasingly rely on comparative references to frame and articulate their own position on a given constitutional issue has come to acquire a central position amongst the leading democracies in the world.[9] For instance, the South African Constitutional Court in its landmark ruling determining the unconstitutionality of the 'death penalty' examined pertinent jurisprudence from more than a dozen jurisdictions, including the European Court of Human Rights and the United Nations Committee on Human Rights.[10] Similarly, the United States Supreme Court, which has the most deeply entrenched traditions of *constitutional exceptionalism*[11], in two very recent cases in *Lawrence v. Texas*[12] and in *Roper v. Simmons*[13] did not just refer to comparative law sources, but also heavily relied on them while overturning its own precedent. Such a trend is also rampant in Canada[14] and in other

the spread of human rights awareness throughout the world. Also relevant is the rise of trans-national governmental organisations that have provided another institutional avenue in pushing towards the globalisation of constitutional law.

6 Tushnet *supra* n.3 argues that while ratification of international instruments might be the primary bases of the spread of human rights amongst States, in recent decades it is attributable more to the coming together of judges and lawyers of constitutional courts all over the world.

7 Notably, as a matter of stated international law, the fact that a nation may be unable to comply with international obligations it has undertaken because of its internal federal structure does not in general relieve the nation of its duty to comply and its vulnerability to sanctions for noncompliance. *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (*"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*).

8 This point has been extensively dealt with later in the essay. However, for a brief overview, *see generally* Shylashri Shankar, *The Substance Of The Constitution: Engaging With Foreign Judgments In India, Sri Lanka, And South Africa,* 2 Drexel L. Rev. 373.

9 Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method,* 2 Indian J. Const. L. 11 (2008).

10 *S v. Makwanyane,* 1995 [3] SA 391 [CC].

11 David C. Gray, *Why Justice Scalia Should be A Constitutional Comparativist... Sometimes,* 59 Stan. L.Rev. 1249 (2007).

12 123 S. Ct. 2472 (2003).

13 543 U.S. 551, 627 (2005).

14 On the Canadian experience with constitutional comparativism, *See Laskin, The Supreme Court of Canada: A Final Court of and for Canadians, 29 CAN. B. REV. 1038(1951). See Also,* P.K. Tripathi, *Foreign Precedents and Constitutional Law,* 57 Colum. L. Rev. 319 at 327.

nations spread across Asia[15] and South America[16] indicating 'geographic neutrality' in this practice of citing foreign precedent. Our present endeavour is to examine the nature of cross-constitutional borrowing in India, debates over which have been sparked by the Delhi High Court's recent ruling in *Naz Foundation v. Government of NCT of Delhi,*[17] where it relied on foreign sources while striking down India's sodomy law in S.377 of the Indian Penal Code, 1860.

Literature on the relevance of foreign law post-*Naz* is abundant,[18] with the majority of scholars arguing in favour of according legitimacy to the use of foreign law in domestic constitutional adjudication. The major arguments in this regard are based on the geographical neutrality of certain values- that human rights are universal[19]- and that regardless of the lack of binding authority foreign citations may possess, they are *dialogically* instrumental in resolving interpretative conflicts, reflecting the distinctive functioning of one's own constitution, and are a means of engaging with foreign nations thereby fostering mutual respect and extending cultural influence.[20] However these arguments merely posit foreign law, at best, as relevant but non-binding sources. Notwithstanding their considerable merit, this paper seeks to present the alternative view on the use of foreign precedent in Indian constitutional adjudication, arguing that such a practice inflicts significant damage to the text of the Constitution, raising critical questions over the scope of judicial discretion in constitutional adjudication and the role of a higher court judge as an 'interpreter of the constitution'.

Accordingly, in the first section, I will examine the theoretical foundations of comparative constitutional adjudication. In doing so, the underlying bases of both permissible and impermissible

15 *See* Christopher McCrudden's analyses of the use of foreign citations in a wide array of countries across Asia, South Africa and other continents. Christopher McCrudden, *A Common Law of Human Rights,* 20(4) Oxf. J. Leg. Studies, 499-532 (2000).

16 *Ibid.*

17 160 DLT 277 (2009).

18 *See,* e.g., Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,* 74 IND. L. J. 819 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1225 (1999); Eric A. Posner & Cass R. Sunstein, *The Law of Other States,* 59 STAN. L. REV. 131 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium,* 119 HARV. L. REV. 129 (2005); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison,* 56 AM. J. COMP. L. 947

19 *See* Anne-Marie Slaughter, *A Brave New Judicial World,* in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 277-278.

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

constitutional comparison will be illustrated. In the subsequent section, an extensive examination of the flaws of comparative constitutionalism will be undertaken, and it will be demonstrated that such practice has no legitimacy, not just because it is not constitutionally permissible, but also because it distorts the nature of judicial process in constitutional adjudication. In the last section, concluding remarks will be made by proposing an alternative model in the form of originalism. The aim here will be to provide a framework for judicial decision making in constitutional adjudication, while at the same time demarcating the permissible extent of comparative borrowing in constitutional interpretation.

THEORETICAL FOUNDATIONS OF CROSS-CONSTITUTIONAL BORROWING

In human rights cases, courts may feel a particular common bond with each other, because such cases engage core judicial function in many countries around the world. They ask Courts to protect themselves against abuse of State power, requiring them to determine the appropriate level of protection in light of a complex matrix of historical, cultural and political needs and expectations.[21]

Constitutional adjudication of civil liberties is by far one of the most active areas as regards the international migration of ideas. This phenomenon is principally a consequence of the emergence of 'constitutionalism' as the normative backbone of governance[22], and the transition to 'democracy' made by nation-States across the post-war world. The resultant effect has been the abdication of authoritarian regimes for rule-of-law constitutionalism (or constitutional supremacy) and the establishment of strong traditions of judicial review through an independent judiciary.[23] Strong traditions of judicial review have however often transformed into even stronger traditions of 'judicial activism',[24] with an enhanced role of the judiciary in the State, and the emergence of what Prof.Ran Hirschl has called 'juristocracies'.[25]

21 Anne Marie Slaughter, *Judicial Globalisation,* 40 Va. J. Intl. Law 1103, 1111 (2000).

22 Vicki Jackson and Mark V Tushnet, COMPARATIVE CONSTITUTIONAL LAW, 2nd Edition (2006).

23 Weinrib, *supra* n.1.

24 *See* Ran Hirsch, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method,* 2 Indian J. Const. L. 11, 16 (2008).

25 *See generally* Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitu-tionalism* (2004) as cited in Shylashri Shankar, *The Substance Of The Constitution: Engaging With Foreign Judgments In India, Sri Lanka, And South Africa,* 2 Drexel L. Rev. 373.

This was a truly global phenomenon, and while some might claim that its roots lay in western countries[26] - since most modern democracies have adopted institutional and doctrinal setups that originated in western States - that was not the case. The phenomenon was global owing more to its inevitability consequent to the abdication of authoritarianism.[27] So even while most modern States have borrowed heavily from western nations while drafting their constitutions - by adopting features that might suit their own culture - civil liberties and the spread of democracy as such do not owe their existence to the west.

Historical association in the form described above may however be a very strong factor determining the weight and acceptability of foreign precedent in a country.[28] The fact that features of a country's Constitution are borrowed from another's, endorses the view that it may continue to learn from such other country's constitutional experience. This factor explains how precedent from English Courts have found their way into the law of the United States, almost all commonwealth nations, and even Israel.[29] While in the United States, most Statutes formally incorporated English common law (as of the year 1607) as far as applicable,[30] countries like Australia and Canada may be said to have never even completely severed themselves from the British judicial framework.[31] The case with India is not too different, albeit significantly more complex. While we are certainly a former British colony, our Constitution did not adopt British traditions in their purest form. Unlike the British, our political structure for instance,

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26 *See* Sujith Choudhry, THE MIGRATION OF CONSTITUTIONAL IDEAS, 1st Ed. (2006).

27 Mark Tushnet, *The Inevitable Globalisation of Constitutional Law,* Prepared for presentation at a workshop on separation of powers at "The Changing Role of Highest Courts in an Inter-nationalizing World," sponsored by the Hague Institute on International Law, October 23–24, 2008, *As Accessed at http://scs.student.virginia.edu/~vjil/PDF/49_985-1006.pdf.* A different version of this essay has appeared in THE CHANGING ROLE OF HIGHEST COURTS IN AN INTERNATIONALISING WORLD (Sam Muller ed., 2010).

28 P.K. Tripathi, *Foreign Precedents and Constitutional Law,* 57 Colum. L. Rev. 319 at 322.

29 *Ibid.*

30 *See* Patterson, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 205, 1st Ed. (1953) *as referred in* Tripathi, *ibid.* at p. 322.

31 In Australia, the Judicial Committee of the Privy Council was never recognized as the highest court in matters involving the federal division of power, and the High Court refused to be bound by the decisions of the Committee in such matters.
In Canada, criminal appeals to the Committee were abolished by Criminal Code § 1024(4), 23-24 GEO. 5, c. 17, § 17(4) (1933); and the Supreme Court Act Amendment of 1949, 13 GEO. 6, c. 37, §§ 354(1)-(2), established the Supreme Court of Canada as the final court in all matters.

was not entrenched in the same deep commitment to parliamentary supremacy. Instead, our system is characterized by cross-institutional concurrence of a very unique kind, and if at all, bears similarity with the United States. Similarly, the Constitution provides for 'fundamental rights' and a power of 'judicial review' that cannot be abridged, in a manner that resembles the American system. Therefore while our long historical association with the British factors in significantly while considering English precedent, in constitutional matters, as a matter of practice,[32] American precedent are often accorded with much more weight.[33] Therefore, apart from *historical association,* the incidence of *cognate legal systems* and the *analogous nature of constitutional institutions* play a clinical role on the acceptability of foreign precedent in another country.

Let us consider the Indian case to illustrate the above. In the Indian constitutional court, citing of foreign cases, particularly American, is almost an accepted practice and reference to such precedent, while clearly not binding, is certainly welcomed as a legitimate source. This practice happens most often in matters relating to rights adjudication and affirmative action. *Historical association* has always been the primary grounds of our acceptance of foreign precedent. This is evidenced by our adoption of substantial rights jurisprudence in matters relating to Articles 14 and 15. Identifying our equality protection clause with that of the United States and the embodiment of the *rule of law* from English common law, the Supreme Court has not only borrowed heavily from both jurisdictions, but also used them effectively to evolve its own jurisprudence on Article 14 in India. For instance, the Indian Supreme Court borrowed the test of determining the unconstitutionality of State action under Article 14 from the US Sup. Ct. ruling in *Snowden v. Hughes*[34] in most of our landmark rulings on Article 14 prior to the evolution of the 'old doctrine'.[35] It took a considerable amount of time before this position was changed and the Court evolved its own classification tests in *R.K.Dalmia* and *Anwar Ali Sarkar.*[36] The change in position and the

32 Adam A Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,* 24 Berkely J. Int. Law 218 (2006).

33 *See* Tripathi *Supra* n.28.

34 321 U.S. 1, 88 L. Ed. 497.

35 *See* H.M.*See*rvai, CONSTITUTIONAL LAW OF INDIA, 4TH Ed 1991 (rep.2010) on p.450.

36 *R.K.Dalmia v. S.R.Tendolkar,* (1959) S.C.R. 279; *State of West Bengal v. Anwar AliSarkar,* (1952) S.C.R. 284.

evolution of our so called 'old doctrine' was inevitable; the position in *Snowden* had for long been obsolete in the Unites States.[37] Interestingly, even in evolving this position, the latter two cases have followed US constitutional experience.[38]

One would appreciate that while we borrowed the scheme of the right under Articles 14 and 21 from the American Constitution, our guarantees as to the freedom of speech and expression are markedly different, and far more detailed than the American guarantee in the First and Fourteenth Amendments.[39] Therefore practically no reference was made to foreign case law on this provision until well after the controversial ruling in *Romesh Thapar*[40]- where the Court confined itself to the fields under Article 19(2) while examining the validity of a law restricting the freedom of speech. This decision was the subject of a lot of misunderstanding and soon after it, there came up a host of cases urging the Court to borrow the test of 'clear and present danger' from the United States. Unfortunately most of these were settled at the level of the High Court and before they could be appealed in the Apex Court, the Parliament amended Article 19(2) to broaden the grounds of restrictions. Of particular interest, illustrating how the *incidence of cognate legal systems*[41] can merit cross constitutional borrowing is the ruling on the freedom of speech by the Punjab High Court. In *Amar Nath v. State*[42], Justice Kapoor provided a very lucid explanation of why the Court in *Romesh Thapar* should have imported the test of *'clear and present danger'*, arguing that even though Articles 13(2), 19(1) and 19(2) are not textually similar to the First and Fourteenth Amendments of the American Constitution, the latter was very obviously the main base of our freedom of speech guarantee.

Now while the drafting of Part III of our Constitution relating to 'Fundamental Rights' evidences heavy borrowing from other jurisdictions, the drafters have also made marked departures on many specific issues. The classic instance of this is our rejection of the words

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37 *Snowden v. Hughes, supra* n. 34 at p.449.

38 Both these cases borrowed heavily from the position in America after the application of the *Snowden test* was severely limited. *See* The Congressional Edition of the U.S. Constitution (4th Ed.) p.1374. On the manner in which the new 'classification test' has been borrowed from the United States, *see* H.M.*See*rvai *supra* n.35 at p.453.

39 See Tripathi, *Supra* n. 28 at 327.

40 *Romesh Thapar v. Madras,* A.I.R. (37) 1950 S.C. 124.

41 This point is also illustrated by Tripathi *supra* n. 28.

42 A.I.R. (38) 1951 Punjab 18.

'except in due process of law' in our liberty guarantee under Article 21, even though the analogous American provision makes such a qualification. It is important to note that our Courts have in the past not indulged in a haphazard application of foreign law without regard to a context. The Court in *A.K.Gopalan*[43] was called into examine this provision and it ruled on whether *'law'* here should be interpreted broadly as *natural law*, therefore giving the Court much latitude in developing and applying its own standards to the *'Right to Life and Liberty'*. The learned judges here however, observe that while the American Courts have been given this latitude through a broadly worded 'due process of law' clause, our Constitution makers deliberately declined to adopt this American doctrine. Instead of leaving it to the Courts to work out procedural standards of this right, the Constitution of India has expressly provided for them in Article 22. The petitioner, being detained under the preventive detention law, could not avail of the protection under Article 22. On these grounds, American precedent on the issue was rejected and his detention was upheld.

I argue therefore that historical association, cognate legal systems and analogous constitutional institutions would constitute legitimate grounds of cross constitutional borrowing by domestic courts. There are yet three other theories, often forwarded by constitutional scholars across the globe, that hold considerably less merit in building a case for comparative borrowing. William Eskridge explained these three very succinctly in a piece he wrote favouring the USSC's comparative approach in *Lawrence.*[44]

The *first*, was examining foreign law tested interpretations to open textured provisions of our own constitution with reference to a normative consensus. The idea behind this was that if interpretative conflicts are present in our own precedent, then resort to foreign law from jurisdictions that have had similar experiences might help resolve our own issues. The theory was evident in *Lawrence* since in striking down the law criminalizing sodomy, the majority relied on precedent of the ECHR[45] even while domestic precedent of the Supreme Court in *Bowers*[46] ran directly against it. The majority's rationale behind

43 *A. K. Gopalan v. Madras,* A.I.R. (37) 1950 S.C. 27.

44 William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism,* 2 INT L J. CONST. L. 555.

45 *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981).

46 *Bowers v. Hardwick,* 478 U.S. 186 (1986). (*'Bowers'*)

preferring three ECHR cases over its own, was that *Bowers* wrongly reflected social and cultural norms of the United States and that the values emphasized by *Bowers* were not universally held. It was also evident for instance in our own evaluation of the right under Article 15 when the conflict was between the right of an individual and the State's interests in affirmative action or protective discrimination laws.[47] In evolving the doctrine of strict scrutiny under Indian law, the Court practically sidestepped all existing jurisprudence governing these rights in India.

Second, citing foreign law helped the court to evaluate claims before it with respect to an empirical assessment rather than a normative study. This is often the case when the court is called in to make normative valuations of a particular claim, where scope of a right is incapable of being determined according to constitutionally prescribed standards. It then helps the court to make such valuations based on an empirical assessment of how the claim has been responded to in other parts of the world. For instance, when the Court in *Naz* was called into examine the validity of our sodomy law, it sought reliance on a plethora of foreign decisions to demonstrate that several other nations had already struck down their sodomy laws. This view is similar to the 'Condorset Jury Theorem' of evaluation of claims. This theory was evolved by Eric Posner and Cass Sunstein and prescribes that if the collective wisdom of foreign jurisdictions provides a certain answer, then the law of larger numbers provides good reason to regard that answer as correct.[48]

Third, such reference demonstrates respect for foreign courts and tribunals. Madhav Khosla rather forcefully argues[49] in favour of this role saying this practice presents an image of India to the rest of the world and is critical in bolstering our rise as not just an economic power, but also a global superpower. Given such a context, courts should be aware of the attention their rulings on human rights issues would invite. Therefore, even regardless of whether a law was

47 *Anuj Garg v. Hotel Association of India,* AIR 2008 SC 663. Elsewhere I have illustrated how the decision was in blatant disregard for existing jurisprudence on the laws of protective discrimination and affirmative action in India. *See* Gautam Swarup, *Heightened Constitutional Scrutiny of Affirmative Action Measures,* NUALS L. J. [5] 19 (2011)

48 Eric A. Posner & Cass R. Sunstein, *The Law of Other States,* 59 STAN. L. REV. 131 (2006).

49 Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision,* 59 Am. J. Comp. L. 909 at p.914.

unconstitutional, purely from a foreign policy perspective, being in consonance with the global dialogue on human rights issues would be in India's interest. Not doing so would invite significant international criticism.[50]

In some form or the other, scholars in India and globally have endorsed these theories as legitimate grounds for importing foreign law. This essay will argue that while normatively these three viewpoints might hold some merit, theoretically, and constitutionally speaking, they do not. As the next section will illustrate, such a practice is not just constitutionally impermissible, but even as a matter of judicial process, it seriously distorts the functions of a constitutional court.

OBJECTIONS TO COMPARATIVE REFERENCES IN CONSTITUTIONAL LAW

In *Naz Foundation,* comparative law was heavily relied on by the Court to reach two major conclusions. The first, was to expand the scope of the right to life and liberty under Article 21 as encompassing an absolute right to privacy through the use of cases from countries such as the United States, ECHR, South Africa, Fiji and Nepal[51]; such right to privacy further being construed to include the right to intimate sexual relations. The second conclusion, was through an extensive use of comparative case law from the ECHR and the United States Supreme Court to evolve a new concept of *constitutional morality*[52], holding that popular disapproval of homosexuality on grounds of morality, no matter how widespread, is not a legitimate reason to limit a constitutionally protected right. Even while comparative law featured prominently in this constitutional court's decision, the Court offered little by way of reasoning to explain this interpretative move.[53] This reliance on foreign law to arrive at such conclusions begs a question on the *authoritative value* of foreign precedent in Indian constitutional adjudication. Conventional wisdom on the idea of *authority* deems that the force of an *authoritative* directive

50 Even though it deals with a legislative measure the reaction to Uganda's recent anti-gay proposals are indicative of this. *See* Uganda criticized over anti-gay proposals, CNN, Dec.10, 2009, *available at* http://edition.cnn.com/2009/WORLD/europe/12/10/uk.uganda.protests/index.html.

51 *Naz Foundation,* paras.29-48.

52 *Naz Foundation,* paras.75-79.

53 *See* Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision,* 59 Am. J. Comp. L. 909 at p.914.

comes from its *source* and as such is content independent.[54] Regardless of its personal evaluation of a specific problem, a subject would be bound by a particular source deemed to be an *authority* not by virtue of the substantive merit held by such a source, but owing to content-independent reasons.[55] But *Naz* did not characterise foreign sources with such an attribute. Such value to foreign precedent would make them binding on Indian constitutional courts and there is widespread consensus even among proponents of comparative citation that foreign law can never hold such binding value. It was but the discretion of the judge as to whether he deemed it necessary to rely on a particular source or not- and this was a decision based on *content-dependent* reasons. This is precisely where a primary objection to the use of foreign sources in domestic law would lie.

In constitutional adjudication, as a matter of democratic institutional theory there is a specific role played by a judge, which is to restrict himself to interpretation and application of the Constitution as it stands.[56] While this is seldom the case and judges often go beyond the wording of constitutional text in their over-zealous attempt to be *activist,* this principle underlies a very important function of restricting 'judicial discretion' in such matters. The idea behind it is that judges should not substitute constitutional values with their own judgment; the power of *judicial review* demands that they review State action against the touchstone of the Constitution itself.[57] Their independent moral judgment as such, has no role here. If this were not the case, judges would in fact be working backwards and using sources external to the constitution as a means to reach predetermined ends.[58] In this context there are two clinical issues with the use of foreign law in domestic jurisprudence, *first* that its use is typically prominent in situations characterised by disregard for existing constitutional jurisprudence. Take for instance the Apex Court's ruling in *Anuj Garg v. Union of India*[59] which demonstrated an outrageously acontextual

54 H.L.A Hart, ESSAYS ON BENTHAM:JURISPRUDENCE OF POLITICAL THEORY, 1st ed. (1982) pp.243-268.

55 Frederick Schauer, *Authority and Authorities,* 94 Va. L. Rev. 1931, 1935 (2008).

56 A.M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 2d ed., New Haven: Yale University Press, (1986).

57 Scalia-Breyer Debates in the Amercial Society of Constitutional Law's Annual Lecture Series, *As Accessed At http://www.freerepublic.com/focus/news/1352357/posts.*

58 *See* Basil Markesinis & Jorg Fedtke, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION, 167, (UCL Press London, 1st Ed. 2006). *See Also* Richard A Posner, *Foreward: A Political Court,* 119 Harv. L. Rev. 31, 88 (2004).

59 AIR 2008 SC 663.

application of the doctrine of *strict scrutiny* to the Indian scenario of affirmative action. In doing so, the Court not only disregarded that the degree of rights tests[60] which were already prevalent in India in different form, but also the fact that the Indian Constitution expressly provides for affirmative action measures by the State.[61] As if these were not enough, the Court further complicated equality jurisprudence in India by incorporating this concept in opposition to protective discrimination laws. A nuanced understanding of the case is not necessary here; however it would suffice to say that simply lifting off this doctrine from American jurisprudence and applying it to the Indian scenario of rights adjudication- which is far more complex- was terribly flawed. Similarly in *Naz*, the Court chose to rely on foreign law to demonstrate the right to privacy even while Indian law in *Kharak Singh v. State of Uttar Pradesh*[62] and *Govind v. State of M.P.*[63] explicitly recognised this right in Indian constitutional law. While the argument maybe that foreign law cited better demonstrated the position being established by the court, the relevant question to be asked is what is the kind of 'authority' such practice attributes to foreign law. It may very well be that foreign law possesses absolutely no authority at all even in such instances; that foreign law is merely illustrative of a empirical acceptance of such a position. If this were the case, then a point could also be made that such practice helps demonstrate India's respect for foreign constitutional courts and fosters mutual respect amongst foreign democracies. But such an argument can only be made when the Court reaches the same ruling even *de hors* its aid to foreign law, by relying solely on domestic precedent and constitutional interpretation. *Naz* cannot therefore stake claim to such a rationale.

The *second* issue with the use of foreign law in the context of *content-dependency* is that it often turns out to be an exercise in endless judicial discretion.[64] If a court is relying on foreign law for content dependent reasons, then there are no rules to determine the law that

60 It is often argued that the scheme of a degree of rights exists in the Indian equality protections through Articles 14, 15 and 16. This jurisprudence also evolved from the case of *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217. *See Also* Tarunabh Khaitan, *Beyond Reasonableness: A rigorous Standard of Review for Article 15 Infringement*, 50 (II) JILI (2008), 177.

61 *Ibid.* This emerges from Articles 15 and 16 of the constitution that provide for affirmative action by the State in the interests of children, women and minorities.

62 AIR 1963 SC 1295.

63 AIR 1975 SC 1378.

64 *See* Tripathi *supra* n.28.

ought to be relied on, given the diversity of opinion on a specific matter one may find moving across jurisdictions. In his foreword for the Harvard Law Review, Judge Richard Posner argued that *"if foreign decisions are freely available, any judge wanting a supporting citation has only to troll deeply enough in the worlds corpora juris to find it."*[65] This concern over *cherrypicking* of foreign citations that best support a position sought by the Court has been the subject of much discourse in comparative law.[66] For instance, P.K.Tripathi way back in 1957 illustrated how the constitutional courts of Australia, India, Israel, Canada and the United States have made instrumental use of foreign decisions in order to find justifications for results they sought to achieve in their own judgments.[67] There is no better illustration of cherrypicking than *Naz* itself. In citing decisions from jurisdictions as varied and culturally diverse as Nepal, Fiji and Hong Kong, the Delhi High Court was rationalising its ruling using authorities (persuasive as they may be) in a manner guided by absolutely no interpretative methodology. Furthermore, even while citing cases from several such jurisdictions, the Court neither justified the reason behind selectively choosing from such jurisdictions, nor did it attempt to distinguish between different sources of foreign law.[68] As I argued in the first section, there are certain grounds of permissible comparative borrowing; however the use of foreign law demonstrated by *Naz* bears no relation to the Indian constitutional conspectus- historical or analogous. Another interesting dimension to concerns over cherrypicking may be exposed by foreign citations in the majority and minority rulings in *Bachan Singh v. State of Punjab.*[69] While determining the constitutionality of the death penalty, the majority and minority both make references to the same US Supreme Court decisions to arrive at different conclusions. For instance the majority first cites *Furman v. Georgia*[70] to show that the court's articulation of "contemporary standards of morality among the American people" as the bases of unconstitutionality of the death penalty[71], saw massive backlash in the form of public referenda, polls and state legislatures. Soon after, the death penalty was reinstated by the legislatures of 32

65 Richard A.Posner, *Foreward: A Political Court*, 119 Harv. L. Rev. 31,88 (2004).
66 *See supra* n.18.
67 *Tripathi*¸*supra* n.28.
68 *See* Madhav Khosla, *supra* n. 49.
69 AIR 1980 SC 898, 1980 Cri.L.J. 636.
70 408 US 238 – 1972.
71 8th Amendment, United States Constitution.

States. It then moves cites the US Apex Court's ruling in *Gregg v. Georgia*[72] to hold that no standards howsoever meticulously drafted can totally exclude the scope for some arbitrariness and hence judicial discretion in sentencing, cannot be the sole basis to hold the death penalty unconstitutional. The minority however held that notwithstanding the legislative and democratic backlash, *Furman v. Georgia* continued to be good law and the *Greg v. Georgia* could not necessarily be taken to rule on the constitutionality of the death penalty. Essentially, the same two rulings have been utilised differently by the minority and majority in *Bachan Singh* and have reached entirely different conclusions.

There are some proponents of the view that non-binding sources such as foreign law may often be chosen for *content-independent* reasons, thus operating as authoritative sources.[73] This view does not suggest that by operating as authoritative sources, foreign law would in fact be a *binding source*; the suggestion is merely that while non-binding, foreign citations are *legitimate and permissible* sources of law. In fact, Christopher McCrudden while countering Tripathi's argument that 'foreign law possesses absolutely no compelling force of its own', gives several reasons as to why the argument based on 'limitless judicial discretion' is by itself, no longer compelling enough to bar such a practice[74]. His reasons seem to suggest that while there may be no rules *per se* that govern the use of foreign law, the past few decades and emergence of globalisation have lead to there being of certain 'criteria' of relevance that regulate its use. The point that Schauer's analyses of 'non-binding authorities'[75] and McCrudden's reasoning on the permissibility of foreign citations brings out, is essentially that while foreign law does not operate authoritatively as precedent, meaning a judge 'does not have to' rule the same way, they are legitimate sources even for reasons independent of their content.

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72 428 US 153 - 1976

73 Frederick Schauer, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 71 (2009) ("Although optional authorities are sometimes selected because they are persuasive, more often they are selected as authorities because the selector trusts the authority even if he does not agree with theconclusion or, more likely, believes himself unreliable in reaching a conclusion on which the authority, whether commentator or other court, is though more reliable"). *See*, e.g., Ernest A. Young, Foreign Law and the Denominator Problem, 119 Harv. L. Rev. 148 (2005).

74 Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 "Oxford J. Legal Stud" 499 (2000).

75 Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1935 (2008).

Therefore, a judge of a constitutional court may nonetheless rely on foreign precedent in making a particular ruling. Judge Aahron Barak in his book on a judge in a democracy seems to suggest similarly when he says "...I do not advocate adopting the foreign arrangement. It is never binding. I just advocate an open approach, one that recognises that for all our singularity, we are not alone".[76] Many others have suggested the use of foreign law under the 'universalist model'[77], whereby constitutional courts would be permitted to make references to foreign law, under the presumption that judges around the world are interpreting the same set of principles and therefore, it is only reasonable that we be open to learning from the experiences of other nations. However while this model may be applicable to a very limited set of rights, such as the equality protection and say, the right to life and liberty, this is definitely not true for others. There is a vast divergence amongst countries around the world - all democracies and owing allegiance to the rule of law- in the way they define and apply even the same set of rights. Take for instance countries that are explicitly secular; while India's outlook to secularism is completely different, granting express protections to the rights of minorities, the Unites States seems to be more *absolute* in its approach to secularism.[78] This is true for a vast number of other rights, such as the freedoms under Article 19 of our Constitution, the rights of backward classes under Article 16 and the protection under Article 20(3) of the Constitution- it is absolutely impossible to apply them in the same manner as they have been in other democracies of the world. The issue is that this model of comparative law omits significant institutional details that are rather unique to systems being compared. In doing so, they assume a high degree of congruence between "constitutional problems and their possible solutions across the spectrum of contemporary constitutional democracy."[79]

76 Aharon Barak, THE JUDGE IN A DEMOCRACY 199 (2006). As noted, this point is routinely emphasized by comparative constitutionalists. *See*, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Intl L. J. 191, 193 (2003); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111-112 (2005).

77 *See eg.* Sujith Chowdhry, *How to Do Comparative Constitutional Law in India, Comparative Constitutionalism in South Asia* (S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., Oxford University Press: New Delhi, 2010); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999); David Law, *Generic Constitutional Law*, 89 Minnesota Law. Rev. 652 (2005).

78 *See* generally Rajeev Dhavan, *Religious Freedom in India*, 35 Am. J. Comp. L. 209 (1987).

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

The Indian constitutional court however invariably follows a combination of the 'universalist' and the 'dialogical' models of doing comparative law. On the one hand we refer to decisions from older, more experienced democracies- such as Canada, the United States, the United Kingdom and Australia - while interpreting open-textured provisions such as our equality and liberty guarantees. On the other hand, references to foreign jurisprudence are often an attempt at introspection, enabling distinctions between the two jurisdictions to help lead to a better understanding of our own legal framework.[80] Such an approach holds great promise; while it does not disregard that there might in fact be significant differences between jurisdictions, it does not entirely eliminate the possibility of learning from other experiences. However, it would seem that we are entrusting the judges with too complicated a task, one that is capable of being counterproductive if incorrectly approached. Not only does it entail an awareness of our unique social structures and constitutional framework, it also demands the same extent of awareness of the jurisdiction from which we seek to borrow. The objection to such *content independent* reasons for the use of foreign law therefore lies in the idea of *cultural specificity.*[81] This objection, if I may say so, essentially doubts the very competence of judges with respect to making the requisite cultural translations between two cultures. Constitutions often emerge of a nation's distinctive cultural and political history and to entrust a hyperactive judiciary with the task so enormous, going much beyond just interpreting their own constitution, is against the spirit of a democracy. As Carl Schmidt once observed, a constitution is not based on a norm, whose justness would be the foundation of its validity. "It is based on a political decision concerning the type and form of its own being, which stems from its political being. . . . The people - the nation - remains the origin of all political action."[82] Therefore, even if we somehow can find normative virtue in a powerful judiciary, for a judge to be given the discretion to go far beyond the Constitution and interpret it with reference to constitutional experiences of other jurisdictions is a far-fetched proposition. Elsewhere it has been argued that in the past decade or so, the Indian

80 Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 Am. J. Comp. L. 909 at p.914.

81 Shylashri Shankar, *supra* n.8 at p.3.

82 Carl Schmitt, CONSTITUTIONAL THEORY, 125, 128 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

judiciary has been stretching the bounds of its own Constitution in civil liberties issues.[83] For instance in two very similar rulings in *Vineeth Narain v. Union of India*[84] and *State of West Bengal v. Centre for Protection of Democratic Rights*[85], the Court demonstrated its willingness to not only overstep its limits and enter the executive domain, but also its inclination to sidestep constitutional limitations on its writ jurisdictional power under Article 32 of the Constitution. Also, *Vishakha v. State of Rajasthan,*[86] determinately laid down the foundations for the Courts' power to *make law* where it found that the legislature had not. There are several such instances where the constitutional court, instead of restricting itself to interpreting the Constitution, has virtually rewritten the Constitution. The problem with extra-constitutional borrowing adding up to this conundrum, is the complexity of making correct considerations of the cultural and constitutional matrix of other jurisdictions. This problem is specifically highlighted by Prof.Vicki Jackson where she makes references to distinctions in borrowing in rights adjudication cases and others such as 'federalism'. She argues against borrowing in the latter case since constitutional features such as 'federalism' are often a peculiar product of political compromise in historically unique moments, and are designed as a matter of practicality more than a principled accommodation of those features.

The South African Constitution is well known for its aspirations of creating a 'universalist' model, permitting (rather 'requiring') its constitutional court to freely borrow from the experiences of other jurisdictions. As Anne Marie Slaughter puts it, it is a function of the country's desire to be a part of a global legal community and to make explicit, the consistence of its constitutional law, with the law of other leading democratic legal systems.[87] Our Constitution however does not contain any such aspirations. And as long as this is the case, it is only right that our only attempts to be part of a global dialogue must

83 *See generally* M. Rao, *Judicial Activism*, (1997) 8 S.C.C. 1(Jour): A. M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability* (2000) 4 S.C.C. 1– 10(Jour); Shubankar Dam, *"A court of law and not of justice"—is the Indian Supreme Court beyond the Indian Constitution?* Public Law, Summer 2005. Available at SSRN: http://ssrn.com/abstract=969976.

84 AIR 1998 SC 889 (*hereafter 'Vineeth Narain'*).

85 (2010) 3 SCC 571.

86 (1997) 6 SCC 241.

87 *See* Anne-Marie Slaughter, A Brave New Judicial World, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 277-278 (Michael Ignatieff ed., 2005) as referred in Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 Am. J. Comp. L. 909.

be through constitutionally permitted ratification of international instruments, not judicial outreach.

CONCLUSION: AN ALTERNATIVE MODEL OF INTERPRETATION THAT ALLOWS LIMITED CONSTITUTIONAL COMPARISON

Thus far, this essay probably reads as rather cynical, given that it has come to reject a process that is responsible a great deal for the most landmark and inspirational rulings of our constitutional court in the area of liberties and fundamental rights. Incidentally, it also seems to be the case in many leading democracies that the most revolutionary constitutional law decisions have involved significant cross-border dialogue.[88] This essay however is but an effort to recognize the exclusively interpretative role of our Constitutional Court, and in doing so, prescribes that the Court's *activism* must not go beyond the extent, and in a manner not permitted by, the Constitution.

In India, there is evidence, empirical and otherwise, that the number of constitutional law cases that rely on foreign citations in their rulings has considerably increased after the controversial case of *ADM Jabalpur v. Shivkant Shukla.*[89] Suddenly the scope of the courts' powers of judicial review seemed to expand to include rights not only un-enumerated, but also unfathomed by the framers.[90] In its quest to undo the damage inflicted in this ruling, it assumed a role that defined the course of rights adjudication for many decades. I argue that this very trend and the transformative role that the Court has assumed post emergency has somewhere diluted the distinction between *what*

88 Hirschl, *supra* n.9 at p.13.

89 In her piece on the comparative nature of the Indian Constitutional Court, Dr.Tania Groppi has empirically analysed how the Courts have increasingly played a comparative role in constitutional interpretation after the emergency decision in *A.D.MJabalpur v. Shivkant Shukla,* (1976) 2 SCC 521. Her conclusions are interesting in so much as the inferences one can draw from them lead us to believe that the Court is in some way attempting to undo the damage to the rights guarantees in that decision. May other authors have similarly opined that the Apex Court turned *reactionary* after the folly of its decision in *A.D.M.Jabalpur. See* Valantina Rita Scotti, *The Supreme Court of India and the use of foreign Courts decisions, As Accessed At http://www.juridicas.unam.mx/wccl/ponencias/12/208.pdf. See Also* H.M.*See*rvai, CONSTITUTIONAL LAW OF INDIA, Vol.1, p. 235.

90 There is significant literature on this aspect of the judicial review where constitutional courts in India have taken advantage of this extra ordinary power to evolve rights that were guaranteed no express protection in the Indian constitution. For a broad overview, *see* S. P. Sathe, JUDICIAL ACTIVISM IN INDIA (Oxford University Press Publishers) 2003.

courts ought to do and *what courts in fact are doing*, the latter being confused with *what ought to happen*. The submission here was simply that in an over-zealous role as this guardian of the people, the courts have gone overboard in protecting rights, often circumventing constitutionally prescribed limitations on their own powers. The relevant question to be raised is,whether it was imperative for the Court to use extra-constitutional means to evolve such jurisprudence, or whether the Court could have somehow relied on material internal or ancillary to the Constitution to achieve the same ends.

The *originalist* argument is that in matters of constitutional adjudication, the judiciary of a country should interpret constitutional provisions in a manner that is consistent with the meaning sought to be accorded to them by framers of the Constitution. In many ways therefore, the Constitution would seem *'frozen in time'* as regards the purport of those provisions.[91] The *activist* argument against such an interpretation would be that this essentially would make the Constitution a rigid, inflexible set of laws incapable of evolving with societal changes. The problem with such opposition, in my opinion is that it confuses the distinction between the *original meaning* of the constitution on one hand, and *originalist application* on the other. Specific to rights adjudication for instance, while the constitutional guarantee to *free speech* would have a limited application in 1951 owing to the limited means of communication, this would not take away from the application of the same guarantee to the internet, or the television. Since the ideals entrenched in 'Fundamental Rights' are essentially objective moral ideals, their application as such need not be historically contingent.[92] They are therefore capable of responding to societal changes without references to external material. An originalist interpretation thus looks only at the meaning of the guarantee, not to the extent of its application. Regardless of this our constitutional framers in fact called it *living document*[93], so that it would

91 A departure from this rule is denoted by the maxim *lex posterior derogate legi prori* which implies that we may consider evidence that post dates a section of the Constitution if that evidence is contemporary with a constitutional amendment that bears on the meaning or language that appears in the earlier provision.

92 *See* Gray, *supra* n.11 at p.1271.

93 Shylashri Shankar, *The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa*, Drexel L. Rev., 2(2), (2010), pp. 373-425. The author here elucidates the purport of what is meant by a *living constitution* and brings out that it is one which should be interpreted in light of experience, that is should be dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of envisaged by the framers of the Constitution.

not be one *frozen in time* and could respond to the aspirations and requirements of a changing society. However, this fluidity that the framers sought to give the Indian Constitution was not in the manner of its application, but through simplicity in the process of amendment of the Constitution.[94] Therefore, notwithstanding that a constitutional provision may not at times be in sync with societal changes, the task of the Courts would yet be limited to interpreting the provision as it stood, and leave it to the legislature to make the necessary changes.

This approach is different from *strict constructionalism* or *textualism*, which is far more rigid in its approach.[95] Let us consider an example elucidated by our Supreme Court involving Chapter 14-A of the Constitution. This chapter lays down the powers of the Parliament to transfer judicial functions in specific areas to specially constituted tribunals. While the strict constructionist would interpret the specific powers of the parliament enshrined therein *strictly*, and therefore exhaustively, the Court took an originalist stand construing the provision as merely specifying a genus, thereby entailing that any other area falling within such genus- even if not specified in such provision- would likewise be within the domain of legislative competence.[96]

Sujit Chowdhury criticises the originalist by arguing in terms of two processes, namely, *globalization* and the *spread of human rights.* According to him the growth of both these processes has made a very strong case for a judiciary to be comparativist.[97] However, this belief, I would argue suffers from disregarding the tradition and historical setting that the Indian Constitution was based in. Given that the Indian Constitution was based in a setting of unprecedented diversity, and

94 In his concluding speech during the Constituent Assembly Debates, Ambedkar pointed out that compared to the American and Australian constitutions, the process for amendment of the Indian Constitution was much simpler. Indeed, the provisions for amendment is what makes a constitution a living document, and successive governments have not been shy of using it. So far the Indian Constitution has been amended 94 times; and there are plenty more on the way. This is in contrast to the US Constitution, ratified over two centuries ago, which has been amended a mere 27 times; the first 10 – or what is known as the Bill of Rights – happening within a few years of the Constitution coming into effect.

95 *See generally* Jamal Greene, *On the Origins of Originalism*, Columbia Public Law and Legal Theory Working Papers, Columbia Law School, 2009.

96 *Union of India v. R.Gandhi*, 2010 (3) CTC 517, 2010 (5) SCALE 514, [2010] 100 SCL 142 (SC).

97 *See* Sujith Chowdhry, *How to Do Comparative Constitutional Law in India, Comparative Constitutionalism in South Asia* (S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., Oxford University Press: New Delhi, 2010).

that our constitution was accordingly framed to suit the Indian context, there is little to learn from the experience from other jurisdictions. Many provisions, specifically the rights guarantees were tailor-made to suit the Indian context, and therefore, even if learning from the experience of other jurisdictions is permissible, it is legitimate only to extent that it allows us to compare it with our own and enhance the understanding of our own Constitution.[98] Shared normative commitments may only be a justification to be comparative to the extent that the similarities are even contextually the same. The aim must therefore be to evolve our own constitutional culture, and this is something that may get eroded when judges resort to material beyond the constitution to arrive at findings. Accordingly, the only considerations relevant to constitutional adjudication are text, history, tradition and precedent; while the comparativists argue for 'consequence' to be an additional criterion.[99] There is a good reason why 'consequence' is irrelevant to constitutional interpretation. For the *consequences* of a provision to be relevant to constitutional interpretation seems counterproductive in so much as that would lead to judicial law-making where the judiciary feels the consequences are not desirable. Such is the domain of only the legislature. It is of further importance in the Indian context since our procedure for constitutional amendment is far simpler than most other jurisdictions. This explains how our legislature has in a mere span of 60 years, amended the Constitution more than a hundred times. Therefore while the procedure for constitutional drafting may in fact be deeply comparative, the role of the courts is not.[100]

One would then observe that the 'mischief rule' or the 'purpose rule' as relevant tools of constitutional interpretation.[101] It would seem rather pertinent given the application of rights guarantees in the Indian context. Looking at the purpose behind a guarantee is far more fruitful in examining its applicability than looking at its consequences. For instance, if one would take the *mischief* sought to be removed by the equality guarantee against *discrimination*, then it seems rather simple

98 *Ibid.* on the dialogical model of comparative interpretation on p.27.

99 *See* Vicki C.Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement,* Harvard Law Review, Vol.119, No.1 (Nov.2005) p.109 at 111.

100 Scalia-Breyer Debates in the Amercial Society of Constitutional Law's Annual Lecture Series, *As Accessed At http://www.freerepublic.com/focus/news/1352357/posts.*

101 David C. Gray, *Why Justice Scalia Should be a Constitutional Comparativist... Sometimes,* 59 Stan. L.Rev. 1249 (2007).

to assume that the Constitution proscribes any sort of discrimination by virtue of the equality guarantee subject to the express limitations therein. The function of the Courts, is limited to just this. Stretching constitutional guarantees to serve ends that are determined by the judge as being *'just'*, and in *'interests of the society'* could not have been envisaged by the framers to be a function of the courts. That continues to be the exclusive domain of the Parliament. Given therefore, that Courts are a creation of the Constitution, their legitimate role is to remain within the limits prescribed to it within the Constitution. In any case, a failure to have protected the sanctity of the Constitution in the *Emergency Case*[102] cannot under any circumstances justify judicial overreach as a response.[103]

As I argued in the first section, *historical association,* the incidence of *cognate legal systems* and the *analogous nature of constitutional institutions* are yet legitimate grounds for constitutional comparison. Applied religiously, these grounds not only stand against criticisms levied against other comparative models, but are also relevant considerations to the originalist in constitutional interpretation.[104] The advantages of this theory of interpretation lie in the fact that it provides judges with a suitable framework within which to operate. Demarcating the domain of adjudication provides an answer to the question *'what the judge ought to do?'* and thus makes the constitutional adjudication more about testing State action against the Constitution, rather than moulding the Constitution to attain desired ends. Objectivity and stability are thus critical to this exercise. Given that the Constitution is after all the supreme document of the country, often adopted by a democratic process, such a model of constitutional interpretation would be a far more legitimate process of interpretation than activism.

102 *A.D.M.Jabalpur v. Shivkant Shukla,* (1976) 2 SCC 521.
103 *See* Shylashri Shankar, *supra* n.8.
104 Gray, *supra* n.11.