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CONSTITUTIONAL BORROWING AS JURISPRUDENTIAL AND POLITICAL DOCTRINE IN *SHRI D.K. BASU V. STATE OF WEST BENGAL*

Sam F. Halabi[†]

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I. INTRODUCTION

The discipline of comparative constitutional law today is focused in significant part on the study of how and why judges use foreign precedent.[1] Scholars debate the propriety of using foreign precedent as "authority,"[2] circumstances under which such use is consistent with democracy (or a product of democratization),[3] and which constitutional traditions may derive the greatest benefit from comparison.[4] While comparative law theorists have long reflected on, and struggled with, a standard disciplinary vocabulary to describe what judges do when they engage in "comparative constitutional law," the

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[1] *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 1 (2010) [hereinafter JACKSON, CONSTITUTIONAL ENGAGEMENT] (reviewing recent legislative attempts to both restrict judicial borrowing and to expand it, as well as to identify the focus on judicial constitutional interpretation); JEREMY A. RABKIN, LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 23 (2005); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Andrew R. Dennington, *We Are the World?: Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in* Atkins, Lawrence, *and* Roper, 29 B.C. INT'L & COMP. L. REV. 269 (2006); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40; Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653 (2009); Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 FORDHAM L. REV. 635 (2008).

The focus on judicial behavior is just that—a focus. Scholars are increasingly examining other types of constitutional convergence and divergence accomplished through comparison. *See, e.g.*, Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399, 422 (2011) (warning against overreliance on anecdotal evidence in the comparative constitutional context); Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643 (2011) (comparing the relative difficulty of constitutional amendment processes). Certainly, in the past, scholars have focused on constitutional borrowing as part of the constitutional drafting or institutional design processes following decolonization or after the fall of the Berlin Wall. *See* Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 196–98 (2003).

[2] *See e.g.*, JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 1 (noting legislatures, including the U.S. Congress, that have attempted to restrict judicial borrowing); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008).

[3] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2005); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 948–49 (2008); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 40 (1998).

[4] *See* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003) [hereinafter Jackson, *Transnational Discourse*].

existing scholarship generally distributes judges' use of foreign precedent into one of three modes of comparative adjudication.[5] First, courts use foreign precedent to identify "universal" principles of law applicable across jurisdictions. Second, courts sharpen understanding of domestic law through contrasting foreign judgments. Third, courts use foreign authority to identify, then choose, constitutionally permissible options to solve jurisprudential or policy problems.[6] These theories have a methodological approach in common: scholars analyze the treatment given certain foreign decisions and sort the cases into one category or another.[7]

This Article is in part an effort to consolidate these descriptive categories.[8] It is also aimed at building the body of scholarship devoted to constitutional borrowing as an activity undertaken by constitutional courts as part of their political competition with legislatures and executives. Specifically, judges may borrow from each other not only or even mostly in order to shed light on a constitutional dispute but rather to mutually reinforce the political authority of each to render orders, which scale back executive or legislative prerogatives. By "constitutional borrowing", I mean specifically judges' consideration of decisions reached by judges in foreign jurisdictions in contrast to borrowing in the wider context of constitutional drafting or institutional design.[9]

Political scientists, of course, have long studied judiciaries as political actors whose incentive to compete or collaborate with other actors is shaped by a number of cultural, political, economic, and social factors.[10] Judicial review

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[5] *See* Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301 (2004); Dixon, *supra* note 3, at 948–49; Igor Stramignoni, *The King's One Too Many Eyes: Language, Thought, and Comparative Law*, 2 UTAH L. REV. 739, 740–41 (2002); Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 715 (2004).

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

[7] JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 1, at 9; Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 516–27 (2000); Shannon Ishiyama Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188 (2001). The terminology differs, but the principles share basic analytic features. For example, Mark Tushnet may refer to the same process that a court undertakes in considering foreign precedent as "functional", whereas Sujit Choudhry might call it "dialogical" and Roger Alford may say "pragmatic". In her recent and comprehensive work on the issue, Vicki Jackson refers to courts' use of foreign precedent as "convergence", "resistance", and "engagement", where "convergence" roughly approximates "universalism", whereas "resistance" and "engagement" correspond to variations on what Choudhry refers to as "dialogical" or "genealogical" modes of constitutional interpretation.

[8] See John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW 1, 4 (2d. ed. 2009) (noting the importance of comparative law for creating a common vocabulary and analytical method).

[9] *See* Epstein & Knight, *supra* note 1.

[10] *See generally* INSTITUTIONS AND PUBLIC LAW (Tom Ginsburg & Robert A. Kagan eds., 2005) [hereinafter GINSBURG & KAGAN]; RAN HIRSCHL, TOWARDS JURISTOCRACY: THE

occupies a prominent role in this literature, as it brings into sharpest focus the assertion of judicial power, especially over elected and thus theoretically more legitimate actors, such as legislatures. Judicial review, of course, is not a court's only means of asserting claims to political authority.[11] So, on the one hand, there is a rich literature authored principally by legal scholars studying the ways in which courts use foreign precedent to interpret constitutions and statutes.[12] On the other hand, there is a similarly large effort undertaken to understand courts' political power relative to legislatures and executives.[13] Legal scholars and political scientists have paid less attention to finding cases where both of these behaviors—the jurisprudential and the political—might be tested. This Article presents one such effort.

This Article applies existing theories of comparative constitutional interpretation[14] to the Supreme Court of India's judgment in *Shri D.K. Basu v. State of West Bengal* (*D.K. Basu*), confirming and expanding basic rights attaching to arrest and detention and compensatory remedies for violations of those rights.[15] Drawing on constitutional precedent from the United

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ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12–13 (2004); Martin Shapiro, *The Success of Judicial Review and Democracy*, *in* ON LAW, POLITICS AND JUDICIALIZATION 149 (Martin Shapiro & Alec Stone Sweet eds., 2002); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319 (2010).

[11] *See, e.g.*, Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 393 (2007) (arguing for a "commitment to constitutional 'dialogue' as the most desirable model of cooperation between courts and legislatures in the enforcement of socioeconomic rights"); David Fontana, *Docket Control and the Success of Constitutional Courts*, *in* COMPARATIVE CONSTITUTIONAL LAW 624, 633–34 (Tom Ginsburg & Rosalind Dixon eds., 2011) (noting alternative means by which constitutional courts acquire or cede power relative to other branches).

[12] *See, e.g.*, NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (2003); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1087–90 (2002). *See also* Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) ("Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"); Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (foreign material "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ."); United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 21 CARDOZO L. REV. 253, 282 (1999) (alteration in original) ("[C]omparative analysis emphatically is relevant to . . . interpreting constitutions and enforcing human rights."); Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003).

[13] *See* GINSBURG & KAGAN, *supra* note 10; Shapiro, *supra* note 10; Landau, *supra* note 10.

[14] Choudhry, *supra* note 6.

[15] Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416 (India).

Kingdom,[16] the United States,[17] Ireland,[18] Trinidad and Tobago,[19] and New Zealand,[20] the Supreme Court of India elaborated the procedural framework to protect the rights of those arrested and detained from police abuse. Generally celebrated as an exercise in comparative constitutional law, but rarely analyzed with any detail, the case is particularly useful because of the numerous sources of authority to which it refers to support a similarly large number of conclusions as to India's constitutional principles.[21] The Court fashioned its judgment so as to enhance its authority via the constitutional guarantee to the right to life—which the Supreme Court of India has generally used to order the enforcement of otherwise non-judiciable social and economic rights—as well as to abrogate states' sovereign immunity for damages sustained as a result of abuse, injury, or death in police custody.[22] The judgment also weighed foreign approaches to the measure and limits of money damages awarded as compensation. In relying on foreign authority, the Supreme Court of India also emphasized its political role, expanding its oversight over police practices and vesting itself with the right to order money damages notwithstanding explicit acknowledgment that neither the constitution nor parliament had authorized it to do so. The case, therefore, usefully tests whether existing theories adequately describe the process of comparative constitutional interpretation as well as exploring whether constitutional borrowing plays a role in constitutional courts' claim to political authority.[23]

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[16] Police and Criminal Evidence Act, 1984, c. 60 (Eng.).

[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] The State (at the Prosecution of Quinn) v. Ryan, [1965] I.R. 70, 122 (Ir.); Byrne v. Ireland, [1972] I.R. 241 (Ir.).

[19] Maharaj v. Att'y Gen. of Trin. & Tobago, [1979] A.C. 385.

[20] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667 (CA).

[21] *See, e.g.*, Surya Deva, *Human Rights Realization in an Era of Globalization: The Indian Experience*, 12 BUFF. HUM. RTS. L. REV. 93, 98 n.32 (2006); Jackson, *Transnational Discourse*, *supra* note 4, at 293–94 n.84 (2003); Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575, 604 n.181 (2006); Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*, 22 AM. U. INT'L L. REV. 521, 537 n.88 (2007).

[22] Abhishek Singhvi, *India's Constitution and Individual Rights: Diverse Perspectives*, 41 GEO. WASH. INT'L L. REV. 327, 344–45 (2009) (citations omitted) ("Thus, Article 21 has been invoked in various civil and political rights cases, including pretrial release on bail bond, speedy trial for child offenders, award of compensation in public law writ jurisdiction, prohibition of cruel punishment, custodial excesses and deaths, delayed criminal trials, the requirements of a fair trial, and so forth. It also has been invoked for broader issues, such as housing atomically active substances, the validity of beauty contests involving derogatory representation of women, environmental jurisprudence (including the Public Trust doctrine, the 'Precautionary Principle,' and the right to clean air and water), the right to health, housing, livelihood, and so forth.").

[23] *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 2 (2003) ("This tension is particularly apparent where constitutionalism is safeguarded through judicial review. One government body, unelected by the people, tells an elected body that its will is incompatible with the fundamental aspirations of the people."); HIRSCHL, *supra* note 10, at 12–13 (using the examples of Canada, Israel, New

A focus on *D.K. Basu* is especially warranted given the regard with which that case—and more broadly the Supreme Court of India—is held by prominent jurists, comparative law scholars, and constitutional advocates. Luzius Wildhaber, former President of the European Court of Human Rights, in a speech delivered to the British Institute of Human Rights emphasizing the role of courts in providing an effective control over executive authorities, quoted *D.K. Basu* for the principle that "[t]he State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves."[24] Bas de Gaay Fortman praises *D.K. Basu* for the independence and creativity exercised by the Supreme Court of India in fashioning procedural protections for detainees.[25] Vicki Jackson cited *D.K. Basu* as part of the Supreme Court of India's general willingness to use international law and foreign precedent to inform constitutional meaning.[26]

Indeed, the Supreme Court of India occupies a prominent place in the field of comparative constitutional law generally. More thoroughly detailed below, the Constitution of India drew upon the growing body of international human rights law as well as American, Australian, British, Canadian, German, and Irish constitutional features and provisions.[27] The Supreme Court of India has therefore freely referred to foreign constitutional courts' precedent from its inception.[28] Together with the constitutional courts of South Africa and Germany, the Supreme Court of India's jurisprudence "features prominently in the comparative law literature" both because of its constitutional history and because of its "strong commitment to democracy and rule of law in the face of significant developmental challenges and internal conflict and, in more recent decades, the activist approach of Indian courts to the enforcement of positive rights."[29] Because India both borrows and donates seminal constitutional decisions, it is a useful example through which to study constitutional courts' borrowing more generally. It is, of course, important to note that the Supreme

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Zealand, and South Africa to explore the institutional incentives constitutional courts have to transfer authority from decision-making majoritarian bodies like legislatures to judiciaries).

[24] Luzius Wildhaber, President, Eur. Court of Human Rights, Human Rights and Democracy 13 (Nov. 22, 2001), *available at* http://www.bihr.org.uk/sites/default/files/wildhaber-transcript.pdf.

[25] *See* Bas de Gaay Fortman, *'Adventurous' Judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development*, 2 UTRECHT L. REV. 22, 34 (2006), *available at* http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/24/24.

[26] Jackson, *Transnational Discourse*, *supra* note 4, at 294 n.84.

[27] *See generally* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476 (2003) (detailing the origins and influences of both India's constitutional text and its constitutional court).

[28] Sujit Choudhry, *How to Do Comparative Constitutional Law in India:* Naz Foundation*, Same Sex Rights, and Dialogical Interpretation*, *in* COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45, 53 (Sunil Khilnani, Vikram Raghavan & Arun K. Thiruvengadam eds., 2013) (citing Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218 (2006)).

[29] David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 829–30 (2012) (footnotes omitted).

Court of India explicitly places itself within a large but discrete community of common law courts. Constitutional courts in Korea, Japan, and Taiwan, for example, practice "scarce engagement in explicit comparative analysis."[30] Even within the common law judicial community, not all courts participate in borrowing foreign precedent as robustly. Thus, although *D.K. Basu* is significant both for its individual importance and the practice of the Supreme Court of India generally, it is worth noting potential limits on its applicability to the conduct of constitutional courts, especially those outside the common law tradition.

Nevertheless, the basic conclusion provided herein is that there is some evidence that constitutional courts are forging a separate epistemic community, an independent source of political authority outside the constituent nations from which the judges decide.[31] This community transcends the kind of "conferencing", "dialogue", or "engagement" fora advocated by specific treaty bodies, legal scholars, and individual jurists.[32] In short, while constitutional

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[30] Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165, 1176 (Michel Rosenfeld & András Sajó eds., 2012).

[31] *See* Jackson, *Transnational Discourse*, *supra* note 4, at 283 (citations omitted) ("References to transnational sources may relate not only to the place of the court's nation in the community of nations, but also to the status and relationship of courts to each other in the development of law, thus fostering an autonomous professionalism of independent courts (to which end the display of knowledge alone may have some perceived value) and/or the autonomous content of law under the interpretive control of judges. Recognizing the dignity and authority of other decision-makers may add to their legitimacy within their own legal orders, or confer it on others."); Ronald J. Krotoszynski, Jr., *"I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1325 (2006) ("The conversations plainly enhanced mutual understanding of how foreign constitutional courts function, the role that the courts play in domestic government, and the problems that the various courts confront in going about their job of safeguarding constitutional values. At the same time, however, this lack of knowledge has rather serious implications for advocates of the strong form of IJD: how can one reliably "borrow" a precedent when one lacks even the most rudimentary understanding of the institution that issued the opinion and the legal, social, and cultural constraints that provided the context for the decision? A precedent is more than bare words on a page. A precedent is the product of a socio-legal culture: reading a text as nothing more than a text risks grave misunderstandings that could prove embarrassing to the borrowing court.").

[32] *See, e.g.*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to* Shari'a *Threaten Human Rights?: How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 411–12 (2006). *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) ("Like the phrase 'regularly constituted court,' [widely accepted judicial guarantees are] not defined in the text of the Geneva Conventions but must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law."); Sam Foster Halabi, *The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of the Parties*, 39 GA. J. INT'L & COMP. L. 121 (2010) (describing the Bangalore Principles by which common law judges use principles of international law to fill in gaps in national law); Sam Foster Halabi, *The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in the Post-*Erie *Era*, 23 DUKE J.

courts do engage with foreign law in the ways described by prominent comparative law scholars, they also appear to be forging a body of judge-made law which relies upon mutual reference for legitimacy.[33]

In *D.K. Basu,* Justice A.S. Anand of India and Justice Michael Hardie Boys of New Zealand appear to complete a jurisprudential cycle whereby one judge establishes a right or set of rights which is then authorized by a second judicial body whose decision is then recycled back as authority in the original issuing court (and, in the case of *D.K. Basu*, by the same authoring judge). Given courts' "central role in legitimizing and validating the exercise of public power" and their "obligation to engage in a process of justification for their own decisions" it is important to understand whether they are acting in a national or transnational capacity.[34]

The concern among critics of constitutional borrowing has been that judges will "cherry pick" foreign precedent to lead to a preferred outcome in a given case. What scholars have paid less attention to is that a judge may use foreign precedent as part of building a global body of legal authority supporting not only mutual recognition of interpretive principles but also structural authority like the remedial powers that national courts enjoy relative to national legislatures or sub-national actors, such as provinces or states. This possibility is not well-accommodated by existing theories articulated by legal scholars, but it contributes to the effort undertaken by political scientists to understand the exercise of the judicial power as part of a competitive institutional dynamic among legislative, executive, and judicial authorities.

The remainder of this Article is organized as follows: Part II reviews existing theories and terminology describing theories of comparative constitutional interpretation, briefly summarizing their features and use in constitutional court reasoning. Part III presents the factual and procedural background of *D.K. Basu*, sketching the prevalence of death and torture in police detention, the relevant Indian custody jurisprudence, and the use made by the Court of precedents and reasoning from foreign jurisdictions. Part IV more thoroughly develops comparative constitutional theory as applied to the case of *D.K. Basu*, weighing the relevant theories and assessing whether those theories usefully describe the Court's borrowing behavior. Part V presents the

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COMP. & INT'L L. 63 (2012) (noting judicial conferencing recommended under the Hague Convention on Civil Aspects of International Child Abduction); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (discussing alternative forms of transnational judicial dialogue and the importance of such dialogue to the judiciary as an institution. Justice Anand's judgment in *D.K. Basu* is a good example of the latter.).

[33] As many scholars have argued, the relationship between courts and executives or legislatures need not be absolute. Courts may engage in "dialogic" judicial review, for example, inviting executive or legislative action through their decisions. *See* Rosalind Dixon, *The Supreme Court of Canada*, Charter *Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 238–39 (2009).

[34] Choudhry, *supra* note 6, at 885.

conclusions of the case that may aid in our understanding of the complex use that constitutional courts make of foreign judgments and reasoning.

II. THEORETICAL APPROACHES TO COMPARATIVE CONSTITUTIONAL INTERPRETATION: UNIVERSALISM, EXPRESSIVISM, AND PRAGMATISM

The field of comparative constitutional law has not yet developed a standardized terminology for descriptions of what courts do when they borrow or refer to foreign precedent. For example, in his seminal exploration of the field, Mark Tushnet referred to "functionalism", "expressivism", and "bricolage" to describe the comparative constitutional adjudicative process.[35] Functionalist approaches to constitutional comparativism acknowledge that certain constitutional provisions are meant to secure a particular form of governance, and judges are able to discover which constitutional provisions serve those underlying purposes through comparison and contrast between constitutional structures. "Expressivism" describes comparisons undertaken to ascertain the extent to which constitutions represent underlying national cultures and experiences and how those experiences manifest through constitutional interpretation.[36] "Bricolage" posits that constitutions are often assembled from borrowed ideas that, in turn, justify reference to those borrowed ideas as a constitutional experience unfolds.[37]

Sujit Choudhry contemporaneously offered a comprehensive classification scheme for judicial borrowing, referring to "universal", "dialogical", and "genealogical" interpretation.[38] "Universalism" refers to the effort by jurists to discover broadly applicable principles underlying constitutional concepts, such as the state's ability to deprive a citizen of his or her liberty or life.[39] "Dialogical" interpretation is used to explore

[35] Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 22–26 (Sujit Choudhry ed., 2006); Choudhry, *supra* note 6, at 835–38; Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

[36] Tushnet, *supra* note 35, at 1276–78. Tushnet cites American tolerance of hate speech as traceable to a constitutional commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open" where other national experiences, Germany's, for example, justify greater flexibility for law-makers to restrict speech aimed at inciting ethnic or religious hatred. *Id.* at 1276 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[37] *Id.* at 1285–87. *See also* Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 595 n.40 (2010) (citing Tushnet, *supra* note 35) (performing "analysis of the viability of constitutional transplants; attitudes including functionalism (consideration of suitability of the adoption of a rule through the assessment of the functions its [sic] fills in the home system and the parallel functions in the receiving system), expressivism (careful treatment of constitutions, being expressions of national credos), and bricolage (assembly of any available rule, essentially undiscriminately)").

[38] *See* Choudhry, *supra* note 6.

[39] *Id.* at 833.

constitutional differences of significant, if not universal, import.[40] For example, the use of race-based criteria for employment or university admissions plays a unique constitutional role in both the United States and South Africa given the relationship between their historical experiences and constitutional provisions regarding equality and due process.[41] "Dialogical" comparative constitutionalism allows judges in these jurisdictions and others to examine how their particular experience does or should shape the constitutional rights of individuals or the validity of public law measures aimed at addressing past inequities. "Genealogical" forms of comparative constitutional adjudication examine constitutional provisions in light of their source.[42] For Choudhry, this matters because many constitutions, especially those drafted under or influenced by British colonial institutions, contain provisions reflecting at least one and often many more constitutional experiences.[43]

In her comprehensive treatment of comparative constitutional jurisprudence, Vicki Jackson similarly classified constitutional borrowing into a spectrum comprised of "convergence", "resistance", and "engagement."[44] Like Choudhry's universalism, Jackson's "convergence" occurs when one constitutional court adopts another constitutional court's interpretation or reasoning based either 1) on the relationship between a greater number of courts adopting it and the chance that it is correct or 2) on its consistency with international legal norms embodied in, for example, international human rights instruments. Courts resist foreign precedent because reference to other constitutional courts threatens the cultural or national distinctiveness embodied in a constitution, undermines certain interpretive theories like originalism and textualism, and compounds the already existing democratic tension inherent in the power of judicial review.[45] "Engagement", which essentially covers possibilities between convergence and resistance, is "founded on commitments to judicial deliberation and open to the possibilities of either harmony or dissonance between national self-understandings and transnational norms."[46]

[40] *Id.* at 835–36.

[41] *Id.* at 836 n.70.

[42] *Id.* at 838.

[43] *See id.* at 838 n.81.

[44] JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 1, at 17–23.

[45] *Id.*

[46] *Id.* at 9. "Sujit Choudhry's 'dialogical' stance corresponds to Jackson's 'engagement'" and "analysis of possible approaches to the reception of foreign law." Cohn, *supra* note 37, at 595 n.40 (citing JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 1; Choudhry, *supra* note 6, at 835–38; Choudhry, *supra* note 35, at 1, 22–26). "Attitudes includ[e] convergence (adoption, based on the assumption of the desirability of convergence with, if not incorporation of, foreign and international norms); resistance (rejection, expressed for example in American exceptionalism); and engagement (a practice of informed consideration prior to possible adoption, under which transnational law is considered a possible, but not controlling, form of legal development)." Cohn, *supra* note 37, at 595 n.40 (citing JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 1). *See also* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

Roger Alford contextualizes comparative constitutional adjudication through underlying interpretive theories—originalism, natural law, majoritarianism, and pragmatism—which similarly categorize judges' use of foreign precedent in constitutional cases.[47] Alford evaluates the relative merit of constitutional borrowing through these interpretive theories although they similarly reflect concepts embodied in Choudhry's "universalism" (natural law), Jackson's "resistance" (originalism), and Tushnet's "functionalism" and "bricolage" (pragmatism). There are, of course, other classifying schemes, each of which emphasizes certain normative or empirical problems that accompany the study of courts' use of foreign precedent. Taavi Annus summarized the state of the field this way:

> Attempts to categorize uses of comparative law by courts are numerous. Although most authors claim that there are three uses of comparative constitutional law, there is a general lack of coherency among these classifications. For example, Tushnet discusses functionalism, expressivism, and bricolage. Choudhry contends that there are three modes of comparative constitutional interpretation: universalist, dialogical, and genealogical. . . . Another way of seeing the use of comparative law is to differentiate between defining and justifying relevant issues and clarifying the reasoning behind comparative analysis in moral and policy balancing. One can refer to 'evaluative,' 'intentionalist,' 'textualist,' and 'authority-based' comparisons. One might also distinguish between 'necessary' and voluntary,' between genealogical' and 'ahistorical,' and between 'positive' and 'negative' recourses to comparative law. . . . The court may use comparative law in order to 'find a solution' or 'justify a solution,' as well as for the purpose of 'internal utility' or 'external legitimacy.' The comparison may be 'vertical' or 'horizontal.' Alternatively, one might distinguish between the 'general and indirect,' as opposed to 'specific and direct,' influence of comparative constitutional materials, as well as between explicit and non-explicit uses of comparative constitutional law.[48]

As this passage hints, the field of comparative constitutional law is tilted toward the classificatory. Courts borrow or resist borrowing in one of several "modes", "postures", or "methods." Use of foreign materials is similarly ascribed to the nature or function of the original source or the parallel structures or principles to which they are applied.

Describing with accuracy the constitutional borrowing phenomena is an important part of understanding judicial behavior as the "global community of

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[47] Alford, *supra* note 4.

[48] Annus, *supra* note 5, at 307–08 (citations omitted).

courts" grows more tightly knit.[49] But the more fundamental relationship at stake in the comparative constitutional law debate is the relationship between judicial power and democratic legitimacy.

Indeed, the fundamental controversy, as Alford, Jackson, Tushnet, Choudhry, and, it is fair to say, most scholars who have weighed in on the debate have identified, is whether resort to comparative constitutional precedent is consistent with republican democratic principles. This is the distinction that Mary Ann Glendon draws, for example, in claiming that use of foreign precedent is legitimate where it is used to affirm executive or legislative measures but not legitimate where it is used to invalidate them.[50] The question is whether, as proponents argue, comparative constitutional jurisprudence provides yet another body of persuasive authority that poses no more of a threat than a court's use of a law review article or whether, as critics argue, constitutional borrowing has fundamental institutional consequences that are inconsistent with conventional notions of democracy.[51]

Comprehensive surveys of foreign borrowing and descriptive classification are less likely to focus on that question than analyzing whether any given episode of borrowing enhances judicial authority. In order to explore this latter question, I searched for a case in which a constitutional court applied numerous sources of foreign constitutional precedent to support a wide range of constitutional conclusions, both to explore the robustness of existing classifications as well as to explore whether constitutional borrowing presents independent manifestations of the "countermajoritarian difficulty."[52] At the risk of oversimplifying these theories, I have labeled them "universalism", "expressivism", and "pragmatism", folding in Jackson's "convergence" with Choudhry's "universalism", similarly using Tushnet's "expressivism" to encompass Jackson's "engagement" and "resistance" and Choudhry's "genealogical" and "dialogical" modes, and "pragmatism" to include Tushnet's "bricolage."

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[49] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003).

[50] Mary Ann Glendon, *Judicial Tourism: What's Wrong with the U.S. Supreme Court Citing Foreign Law*, WALL ST. J., Sept. 16, 2005, at A14.

[51] H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987).

[52] Methodologically, the benefits and disadvantages of the case study are well-known. The case study provides a useful object to apply ideas and methods that have developed through other theoretical and empirical work. It is most useful when the line is not clearly evident between the phenomena being studied—in this case, constitutional borrowing—and the context in which that phenomena occurs, the judicial interpretation. The case study, however, cannot establish conclusions that are general or reliable. Notwithstanding these limitations, case studies are abundant in social and natural sciences literature and remain central to business, public policy, and the related form of the case method in legal education in the United States. *See, e.g.*, Kevin M. Clermont, *Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two*, 47 ST. LOUIS U. L.J. 111, 115–17 (2003) (summarizing the case method in legal education); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 754–57 (2003) (discussing the usefulness of case studies as a vehicle for analyzing legal problems).

A. *Universalist Interpretation*

Constitutional courts invoke "universalism" when their decisions assert that constitutional rights are cut from a universal cloth of rights and obligations.[53] Constitutional courts are "engaged in the identification, interpretation, and application of the same set of principles."[54] The exact legal structures and procedures may differ, but most legal systems nevertheless share underlying principles. And constitutional courts are particularly suited to secure those principles to all citizens.[55] "[E]very legal system in the world is open to the same questions and subject to the same standards, so that when systems do differ, it is often the result of historical accident or temporary or contingent circumstances."[56] Because constitutions and their highest interpretive bodies face problems common to all societies, those societies may, at the very least, develop a common vocabulary and set of theoretical concepts.[57] Roger Alford analogizes universalism to the natural law tradition in which principles of equality, justice, and liberty are ultimately traceable to a limited number of divine virtues.[58]

Recent scholarly discussions have focused on the use of universalist interpretation in cases involving the extent of the state's ability to punish crimes by depriving citizens of their lives.[59] Universalist interpretation uses the reasoning and precedent of foreign jurisdictions in order to identify norms and principles operating in constitutional republics, viewing those precedents

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[53] *See* Miguel González Marcos, *Comparative Law at the Service of Democracy: A Reading of Arosemana's Constitutional Studies of the Latin American Governments*, 21 B.U. INT'L L.J. 259, 317 (2003). The debate about whether there can or should be a universal human code remains heated, although it is assumed for purposes of this argument that a set of universal human values is realizable and desirable. *See* Rushworth M. Kidder, *Universal Human Values: Finding an Ethical Common Ground*, FUTURIST, July–Aug. 1994, at 8, 8–13.

[54] Choudhry, *supra* note 6, at 833.

[55] *See* RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986).

[56] Choudhry, *supra* note 6, at 834.

[57] *Id*.

[58] Alford, *supra* note 4, at 663 ("As late as 1829 the Court could declare the natural law pronouncement that '[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.'") (citing Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829)).

[59] *See* EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002) (referring to the interpretation of, for example, dignity, in courts in countries like Germany, Israel, and South Africa, which have simultaneously claimed that such a right is universal while reaching different conclusions as to its meaning and breadth); Dixon, *supra* note 3, at 951; Ruth Bader Ginsburg, "*A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 26 ST. LOUIS U. PUB. L. REV. 187, 195 (2007). The degree of "universalism" is highly dependent on the description and nature of the right at issue. Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001); Lombardi & Brown, *supra* note 32, at 420.

as evidence of deeper currents of a universal rule of law.[60] In *Ferreira v. Levin,* South Africa's Justice Ackermann summarized comparative interpretation as exploring "our own common law as well as the common law in other jurisdictions . . . . in the context of an 'open and democratic society based on freedom and equality' . . . *'to promote the values which underlie' precisely such a society*."[61] In these cases, reflective of a much larger body of comparative decisions, judges openly attempt to "discover" the features of a universal, common set of citizens' rights.[62]

Universalism enjoys positive as well as normative justifications. According to Jeremy Waldron, judges relying on foreign precedent may, through an iterative process, achieve a consensus, or some version of uniformity on fundamental principles or interpretations of those principles.[63] The greater the degree of agreement, the more likely the grounds of agreement are to be correct or at least deserving of substantial consideration. Striking down the juvenile death penalty in the United States, the U.S. Supreme Court, speaking through Justice Anthony M. Kennedy, invoked the practice of examining "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[64] In their historical analysis of U.S. Supreme Court reference to foreign law, Steven Calabresi and Stephanie Zimdahl argue that this utilitarian approach has subtly underscored decades of American constitutional interpretation.[65] U.S. Supreme Court justices refer to

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[60] As Jackson notes, sometimes these uses are explicitly or implicitly invited. Jackson, *Transnational Discourse*, *supra* note 4, at 290–92 (citations omitted) ("Some constitutions specifically or implicitly authorize consideration of foreign or international law in the resolution of constitutional rights questions. The South African Constitution specifically provides that '[W]hen interpreting the Bill of Rights, a court . . . must consider international law; and . . . may consider foreign law,' and the South African Court has done both on a number of occasions. The Constitutional Court has repeatedly held that the constitutional mandate to consider international human rights law 'would include nonbinding as well as binding law,' an interpretation by no means obvious though apparently accepted as correct. In addition to provisions specifically authorizing the consideration of foreign law, clauses like Canadian Charter Section 1, permitting only those limitations of rights demonstrably justified in a 'free and democratic' society, implicitly invite consideration of the practices of other democratic nations. Similar language is found in some provisions of the ICCPR and of the regional human rights conventions.").

[61] *Ferreira v. Levin & Others* 1996 (1) SA 984 (CC) at 111 para. 91 (S. Afr.) (emphasis added) (footnote omitted).

[62] Amnon Reichman, *The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law*, 31 FORDHAM INT'L L.J. 76, 136 (2007); Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 420–21 (1998).

[63] *See* Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005).

[64] Roper v. Simmons, 543 U.S. 551, 575 (2005).

[65] Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

foreign law to confirm their reasoning based initially and principally on the U.S. Constitution and prior Court precedent.

B. Expressivist Interpretation

Expressivist comparative constitutional law does not expound "universal" values underlying legal systems. Examination of foreign jurisprudence may nevertheless provide a useful source by which to criticize, evaluate, and more fully understand one country's own legal system.[66] This "dialogical" or "expressive" use of comparative jurisprudence "exposes the practices of one's own legal system as contingent and circumstantial, not transcendent and timeless."[67] Comparing legal systems and rules, constitutional adjudicators may not discover universal values like those of the "open and democratic society" but will nevertheless discover the essential underpinnings of their own constitutional framework and, subsequently, more effectively decide crucial constitutional questions in light of that understanding.[68] Expressive interpretation is used more frequently and applies to a broader set of rights than "universalist" interpretation including affirmative action, copyright, and the right to education or health.[69]

1. Expressivism and the Constitutional Reflection of Culture

U.S., Canadian, and European constitutional courts, for example, have engaged in expressive interpretation to reach varying conclusions as to the protections that individuals enjoy as to free speech and expression. Consider the example of hate speech. In 1992, the U.S. Supreme Court struck down as unconstitutional the following Bias-Motivated Crime Ordinance passed by the city of St. Paul, Minnesota:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not

[66] *See also* Annus, *supra* note 5, at 314 (alternatively referring to dialogical interpretation as the "soft use of comparative experience").

[67] Choudhry, *supra* note 6, at 836.

[68] *See* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424–27, 437–39 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (discussing the emergence of a global legal community through judicial dialogue). *But see* McCrudden, *supra* note 7 (expressing skepticism about the value of transnational discussions or comparative reasoning in the area of human rights).

[69] *See* Annus, *supra* note 5, at 305 (citations omitted) ("A third [area of comparative constitutional law] focuses on substantive constitutional law issues, and compares approaches by different countries, or otherwise reviews the solutions of one country from an 'outsider' perspective or for an outside reader. Such issues are very diverse, and have ranged from free speech to affirmative action."). *See also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

> limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[70]

St. Paul convicted a teenager, R.A.V., after he burned a cross on the lawn of an African-American family. The Minnesota Supreme Court upheld the conviction on the basis that burning the cross incited violent behavior within the scope of a long-established exception to the free speech protections afforded by the First Amendment to the U.S. Constitution.[71] The U.S. Supreme Court disagreed and determined that the ordinance violated the First Amendment because the breadth of the ordinance might prohibit "otherwise permitted speech solely on the basis of the subjects the speech addresses."[72] In other words, the American right to free expression was to be largely free of government interference—any hint that protected free speech may be endangered was sufficient to invalidate government regulation. The *St. Paul* decision became the paradigmatic case of the American approach to free speech—fear that the state was given too much discretion dominated the Court's analysis.[73]

Relying in part and distinguishing in part the reasoning of the U.S. Supreme Court in *R.A.V. v. St. Paul*,[74] the Supreme Court of Canada reached a different conclusion as to protected speech. In *R. v. Keegstra*, the Supreme Court of Canada upheld the conviction of James Keegstra for violating the "Hate Propaganda" provision of the Canadian Criminal Code, which prohibited communications that "willfully promote[] hatred against any identifiable group . . . ."[75] An Alberta trial court convicted Keegstra, a high school teacher, based on his teachings attributing "various evil qualities to Jews."[76] After reviewing the "reasonable limits" imposed on the rights and freedoms contained in the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada addressed "a . . . crucial [matter] to the disposition of this appeal: the relationship between Canadian and American approaches to the constitutional protection of free expression, most notably in the realm of hate propaganda."[77] Ultimately concluding that "Canada's constitutional vision depart from that endorsed in the United States,"[78] the Supreme Court of

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[70] R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

[71] The "fighting words" exception was established in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[72] *St. Paul*, 505 U.S. at 381.

[73] Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 27 (2003).

[74] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[75] Criminal Code, R.S.C. 1985, C-46, § 319(2) (Can.).

[76] R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

[77] *Id.*

[78] *Id.*

Canada nevertheless cited U.S. Supreme Court decisions as "evidence of a recognition that content discrimination is sometimes accepted."[79] The decision made extensive use of expressive interpretation—the justices explored not only similarities but differences with American constitutional law in sharpening the Canadian experience with free speech and the wider berth given to Canadian provincial governments to regulate it.

Similarly, Judge Bonello of the European Court of Human Rights (ECHR) concurred in *Ceylan v. Turkey*[80] but rejected the test favored by the ECHR in favor of the standard set forth by the U.S. Supreme Court in *Schenck v. United States*.[81] Munir Ceylan was a Turkish national who, while president of the petroleum workers' union (*Petrol-İş Sendikasi*), wrote an article entitled "The Time Has Come for the Workers to Speak Out—Tomorrow It Will Be Too Late" in the July 21–28, 1991, issue of *Yeni Ülke* (New Land), a weekly newspaper published in Istanbul.[82] The Turkish government brought a criminal action against Ceylan in the Istanbul National Security Court resulting in his conviction under Article 312, sections 2 and 3 of the Turkish Criminal Code for inciting the people to hostility and hatred by making distinctions based on ethnic or regional origin or social class.[83] He was sentenced to one year and eight months' imprisonment and a substantial fine.[84] The European Court of Human Rights determined that the "pluralism, tolerance and broadmindedness" of a democratic society required freedom of expression, as did an individual's self-fulfillment.[85] Any exceptions to such freedom must be strictly construed, and political speech was particularly protected unless such speech were "incite[ment] to violence."[86] Judge Bonello, regarding the Court's formulation as insufficiently broad, argued instead for an imminence requirement—by and large the only distinction between the European Court of Human Rights formulation and the American one.[87]

In these expressive experiences, courts sharpen constitutional similarities and differences in the context of a given cultural, political, and

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[79] Roy Leeper, Keegstra *and* R.A.V.*: A Comparative Analysis of the Canadian and U.S. Approaches to Hate Speech Legislation*, 5 COMM. L. & POL'Y 295, 306 n.76 (2000) (citing *Keegstra*, 3 S.C.R. at 742; Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (commercial speech); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985) (political speech); New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Roth v. United States, 354 U.S. 476 (1957) (obscenity)).

[80] Ceylan v. Turkey, 30 Eur. Ct. H.R. 73 (1999).

[81] Schenck v. United States, 249 U.S. 47 (1919).

[82] *Ceylan*, 30 Eur. Ct. H.R. 73, ¶ 8.

[83] *Id.* ¶¶ 9–11.

[84] *Id.* ¶ 11.

[85] *Id.* ¶ 32(i).

[86] *Id*. ¶ 34.

[87] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Whitney v. California, 274 U.S. 357, 376 (1927); Abrams v. United States, 250 U.S. 616, 630 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919).

economic context.[88] The expansive reach of free speech in the United States is deemed too broad in the Canadian context and misformulated in the European context, which emphasizes free speech as a positive right needed for self-fulfillment. Discussing the U.S. Supreme Court's decision in *New York Times v. Sullivan*,[89] the South African Constitutional Court refused to adopt "horizontal application"—that private parties may invoke constitutional protections in their private law disputes—because of the important appellate "division of labor" established by South African Constitutional framers.[90] The expressive mode emphasizes "constitutional difference . . . . [A] constitution is only unique by comparison to other constitutions that share some feature or characteristic which that constitution does not."[91]

2. Expressivism as Divergence from Sibling Constitutional Traditions

Historical relationships and adopted legal structures and traditions can "offer sufficient justification to import and apply entire areas of constitutional doctrine."[92] "Constitutions tied together by genealogy are related either like parent and child, or like siblings who have emerged from the same parent legal system."[93] Borrowing constitutional jurisprudence from "sibling" legal systems takes as its starting point a shared set of moral-political values, which, in turn, can borrow from one another legitimately.[94] This kind of borrowing takes as its approximate parallel Burkean traditionalism, in which long-standing, common norms and practices justify sisterhood of legal and political systems, even without concerted efforts to guard those legal systems from internal or external challenges.[95]

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[88] Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006) (exploring the limitations and possibilities of comparative constitutional adjudication in the Australian context).

[89] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[90] *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at 42 para. 57 (S. Afr.) (Kentridge, Acting J.) ("The consequence would be that appeals in all [horizontal application] cases would lie to the Constitutional Court, and the Appellate Division would be deprived of a substantial part of what has hitherto been its regular civil jurisdiction.").

[91] Choudhry, *supra* note 6, at 856.

[92] *Id.* at 838.

[93] *Id.*

[94] *See* Herman Schwartz, *The Internationalization of Constitutional Law*, 10 HUM. RTS. BRIEF 10 (2003) (arguing that the phenomenon is least developed in the United States, where it faces significant opposition); Shawn E. Fields, Note, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit from Foreign Law*, 86 B.U. L. REV. 963, 995–97 (2006). *See also* Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 439 (2005).

[95] *See* Jennifer M. Welsh, *Edmund Burke and the Commonwealth of Europe: The Cultural Bases of International Order*, *in* CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 173, 173–92 (Ian Clark & Iver B. Neumann eds., 1996).

American courts regularly refer to British jurisprudence to interpret the U.S. Constitution on the basis that the U.S. Constitution originated out of the unique relationship between England and the American colonies immediately before U.S. independence. In *Loving v. United States*, U.S. Army private Dwight Loving was sentenced to death for murdering two taxicab drivers.[96] Loving challenged his sentence on the basis that the President did not have the power to prescribe aggravating factors, a power solely within Congress's purview.[97] Relying on English legal history, Justice Kennedy argued that in order to understand the power of Congress and the President in the context of courts-martial, the U.S. Supreme Court must examine the comparative constitutional law of England because of the relevance of Parliamentary attempts to regulate military tribunals.[98] Similarly, in *District of Columbia v. Heller*, the U.S. Supreme Court determined that the Second Amendment protected an individual's right to bear arms, largely through reference to the development of English law.[99]

Canadian judges have consistently looked to the practice of U.S. courts with respect to the treatment of Native Americans. The common British ancestry of the American and Canadian dealings with indigenous peoples and the elaboration of those principles by Chief Justice John Marshall "is prima facie relevant to the interpretation of the Canadian Constitution, in particular Section 35(1)'s . . . affirmation of existing aboriginal rights; indeed, those principles 'are as relevant to Canada as they are to the United States.'"[100] While common law and doctrines may shift, expressive interpretation legitimizes the use of sibling legal doctrine as a source of constitutional interpretation.[101]

C. Pragmatist Interpretation

Courts engage in pragmatic borrowing to find "possible solutions to similar problems at home."[102] Pragmatism therefore does not require, nor is it generally affected by, incongruity between the national cultures or

[96] Loving v. United States, 517 U.S. 748, 751 (1996).

[97] *Id.* at 758.

[98] David Fontana, Note, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 550 (2001).

[99] District of Columbia v. Heller, 554 U.S 570, 599 (2008) ("We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.").

[100] Choudhry, *supra* note 6, at 871.

[101] *Id.* at 884–85. *See also Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions*, 120 HARV. L. REV. 1936, 1937 (2007).

[102] Alford, *supra* note 4, at 692.

constitutional structures informing the foreign law that is borrowed. In *Printz v. United States*,[103] Justice Breyer, in his dissent, urged the Court to examine the experiences of other federal political entities—Switzerland, Germany, and the European Union—to inform whether local enforcement of federal gun regulation better advanced the objective embodied in the Tenth Amendment of the United States Constitution—namely, that the federal government's law-making powers intrude to the least extent possible on local law-making and enforcement prerogatives.[104] Acknowledging that "there may be relevant political and structural differences between their systems and our own," Justice Breyer nevertheless suggested that the establishment of a federal gun control bureaucracy to enforce the Brady Act imposed greater impediments to "state sovereignty or individual liberty" than Congress's fairly modest requirement for state officials to use "reasonable efforts" to implement the law.[105] Justice Breyer did not suggest that central commandeering of local officials to enforce federal law was, in general, a necessary feature of constitutional, federal republicanism (universalism) nor did he suggest that any fundamental aspect of the U.S. Constitution required the Court to invalidate Congress's allocation of enforcement authority to state police (expressivism). Indeed, what he proposed was a practical way to think through the problem posed by a law that flowed from one of Congress's enumerated powers with an aspect of enforcement that, in his view, better balanced the federal-state balance embodied in the Tenth Amendment than outright rejection.

In *Miranda v. Arizona*,[106] the U.S. Supreme Court determined that custodial interrogations of criminal defendants were inherently coercive and that this compulsion was in tension with the Fifth Amendment's prohibition on self-incrimination.[107] The Court imposed procedural requirements on police—to inform subjects of custodial interrogation that they could remain silent, that statements would be used as evidence against them, that they had a right to counsel, and, if indigent, then counsel would be appointed—as part of a judicially-fashioned remedy critical to the preservation of citizens' Fifth Amendment rights.[108] The Court reviewed the law of coerced confessions from England, Scotland, India, and Sri Lanka,[109] which imposed varying levels of protections to those in police custody.[110] Noting that India's Constitution provided a similarly worded prohibition on self-incrimination, the Court observed that confessions made to police officers were inadmissible in criminal proceedings as substantive evidence against the accused, and "confessions made to others while in police custody must be made in the

[103] Printz v. United States, 521 U.S. 898 (1997).
[104] *Id.* at 977 (Breyer, J., dissenting).
[105] *Id.*
[106] Miranda v. Arizona, 384 U.S. 436 (1966).
[107] *Id.* at 467.
[108] *Id.* at 466–68.
[109] The Court referred to Sri Lanka as "Ceylon."
[110] *Miranda*, 384 U.S. at 488–89.

immediate presence of a magistrate" to be admissible.[111] Chief Justice Warren noted that the Supreme Court of India had imposed an additional twenty-four-hour period between arrest and any confession to ensure time for the defendant to deliberate on the confession.[112] Although the Court referenced foreign law principally for the purpose of showing that court-imposed procedures would not overburden police, the U.S. Supreme Court opted for procedural requirements closely mirroring those used in England at the time.[113]

There is, of course, no textual basis for the *Miranda* protections in the Fifth Amendment, and the Sixth Amendment right to counsel does not attach until formal criminal adversarial proceedings commence.[114] Rather, the Court struggled with the formation of a judicially administrable remedy given the constitutional problem it had identified. The *Miranda* warnings, as we now know them, were not the Court's only option. The Court could have imposed an absolute prohibition on the use of statements made in police custody as evidence against a criminal defendant, consistent with practice in India. Constitutional borrowing allowed the Court to survey a range of possible remedies and identify those that balanced the value of statements made in police custody as evidence and prosecution of crime with the "inherently coercive" nature of custodial interrogations. Again, this choice was made despite important structural and cultural differences between borrowing and donating courts.

III. *SHRI D.K. BASU V. STATE OF WEST BENGAL*

While it inherited British language, political institutions, and, to some extent, culture as a result of Britain's long colonial presence, India separated from the United Kingdom contemporaneously with, and influenced in significant part by, the codification of universal human rights that had slowly grown in number and detail over the course of the nineteenth century. The Constitution of India reflected parliamentary norms under which British democracy worked but adopted American principles of separation of powers including a co-equal supreme court.[115] It chose Australian and Canadian principles of federalism to distribute sovereignty between the national and state governments.[116] Because of this history, Indian judges have long been comfortable with constitutional borrowing.[117]

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[111] *Id.* at 489 n.60. *See also* The Indian Evidence Act, No.1 of 1872, INDIA CODE (1872), *available at* http://indiacode.nic.in; C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195 (2005).

[112] *Miranda*, 384 U.S. at 489 n.60.

[113] *Id.* at 487–88.

[114] Maine v. Moulton, 474 U.S. 159 (1985).

[115] Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 29 COLUM. J. ASIAN L. 93, 114–15 (2006).

[116] Singhvi, *supra* note 22, at 336.

[117] *Id.*

A. Factual and Procedural Posture

India's geography and history have magnified the tensions nearly every state experiences in balancing the role of securing order and geopolitical security with the realization of at least a minimum core of citizens' rights.[118] At the time of its break with Britain, Indian citizens had suffered from long-standing and abusively deployed emergency laws passed and then implemented with increasing severity as the independence movement gathered momentum.[119] The drafters of the Constitution of India sought to include fundamental protections against the kinds of officially sanctioned abuses prevalent under the British.[120] Yet India was born into an extraordinarily precarious security situation, surrounded along much of its land border by actively hostile or latently antagonistic states that sponsored individual acts of violence within both disputed and undisputed Indian territory. Internally, the state persistently faced insurrections based on caste disparity or tribal identity. According to Anil Kalhan:

> India's decades-long struggle to combat politicized violence has created what one observer has termed a 'chronic crisis of national security' that has become part of the very 'essence of [India's] being.' Thousands have been killed and injured in this violence, whether terrorist, insurgent, or communal, and in the subsequent responses of security forces.[121]

The Constitution of India, while guaranteeing fundamental rights, such as speech, expression, assembly, association, and free movement, as well as rights upon arrest, such as access to counsel, allows Parliament flexibility to curtail those rights in the interests of the "sovereignty and integrity of India," the security of the state, or public order.[122] In periods of declared emergency, those rights may be suspended altogether.[123] As a special report from the Committee on International Human Rights of the Association of the Bar of the City of New York documented, many of the "exceptional" and emergency measures put in place by the British have been reincorporated in laws and

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[118] *See* Kalhan et al., *supra* note 115, at 99.

[119] Kumar, *supra* note 111, at 198–200; Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 249–50 (2009) (footnote omitted) ("This deference [to the executive] in the litigation context is consistent with India's history of granting the executive branch sole power to determine whether to disclose information in any number of contexts, and applying strict and often harsh enforcement of its Official Secrets Act, a legacy of British colonial rule in India.").

[120] Kumar, *supra* note 111, at 199.

[121] Kalhan et al., *supra* note 115, at 99 (alteration in original) (citations omitted). *See* Singhvi, *supra* note 22, at 356 ("India is more affected by terrorism than any place on earth, except Iraq.").

[122] INDIA CONST. art. 19, § 2, cl. 4.

[123] *Id.* art. 359, § 1, cl. 1.

police procedures governing the rights of citizens in police custody.[124] Indian states, which enjoy general control over criminal investigation and prosecution,[125] continue to use these regulations against criminals, rebels, and innocent parties.[126] The human cost of these regulations has been severe.

India's principal security entanglements have involved Pakistan, from which it violently separated in 1947.[127] Between 1947 and 1971, Pakistan also ruled the province of East Pakistan, which bordered the Indian province of West Bengal.[128] East Pakistan, separated from Pakistan by the entire state of India, suffered economic, linguistic, and political marginalization.[129] In 1970, East Pakistan's largest political party, the Awami League, won a sufficient number of seats in national elections to form a government for West and East Pakistan.[130] West Pakistani military and political elites refused to allow the League to do so and, combined with a lethargic response to a deadly cyclone in East Pakistan in the same year, led to a war for independence.[131] The war began in March 1971 and lasted through December, when India intervened on behalf of East Pakistan.[132] East Pakistan became Bangladesh upon independence.

The conflict sent millions across the border into the Indian state of West Bengal, exacerbating the security problems for a state already struggling with an indigenous movement to violently force the redistribution of property to historically marginalized groups.[133] Through 1974, the Indian state of West Bengal detained 15,000 to 20,000 people without trial, some for five years or more; eighty-eight died in police custody.[134] D.K. Basu, Executive Chairman

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[124] Kalhan et al., *supra* note 115, at 125.

[125] *Id.* The most senior police administrators, however, are drawn from the Indian Police Service who are recruited and trained by India's Home Ministry.

[126] AMNESTY INT'L, INDIA: TIME TO ACT TO STOP TORTURE AND IMPUNITY IN WEST BENGAL (2001).

[127] *See, e.g.*, Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41 (2003).

[128] *Id.* at 62 n.79.

[129] Ninette Kelley, *Ideas, Interests, and Institutions: Conceding Citizenship in Bangladesh*, 60 U. TORONTO L.J. 349, 352–53 (2010).

[130] FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 114–19 (1999).

[131] *Id.* at 114.

[132] Jason Daniel Medinger, *The Holy See, Historicity, and Humanitarian Intervention: Using Integrative Jurisprudence to Inform Contemporary Practice*, 41 TEX. INT'L L.J. 39, 63–64 (2006).

[133] HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES" 127–28 (1999); *India's Naxalite Insurgency: Not a Dinner Party*, ECONOMIST (Feb. 25, 2010), http://www.economist.com/node/15580130 (describing the Naxalite insurgency).

[134] AMNESTY INT'L, SHORT REPORT ON DETENTION CONDITIONS IN WEST BENGAL JAILS 3, 6 (1974), *available at* http://www.amnesty.org/es/library/asset/ASA20/001/1974/en/2bab0d13-f427-46e1-b3c6-9426278d8ce8/asa200011974en.pdf. Similarly, in the state of Punjab, police responded to the long-running Sikh separatist movement with "systematic torture and summary executions." Ami Laws & Vincent Iacopino, *Police Torture in Punjab, India: An Extended Survey*, 6 HEALTH & HUM. RTS. 195, 197 (2002).

of Legal Aid Services of West Bengal, sent a letter to the Chief Justice of the Supreme Court after several deaths in 1986 and recommended that the Court "develop 'custody jurisprudence'" and "formulate modalities for awarding compensation."[135]

The judiciary in India is comprised of an integrated court system that administers justice for both the federal government and the states. In this integrated court system, the Supreme Court of India is the highest and final court of appeal. The Supreme Court has original jurisdiction on issues of the enforcement of civil and human rights.[136] The Court treated D.K. Basu's letter as a "writ petition" invoking the Court's original jurisdiction;[137] another letter followed from the Aligarh province detailing a death in police custody.[138] Taking notice of widespread allegations in all states, and the challenge of the "national" issue of custody abuse and death, the Court issued notices to "all the State Governments to find out whether they . . . desire[d] to say anything in the matter."[139] While many states responded with, in the Court's view, unsatisfactory reassurances of procedures and safeguards, some contributed specific recommendations, as did the Law Commission of India.[140]

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[135] Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416, at para. 1 (India). In *Janata Dal v. H.S. Chowdhary*, A.I.R. 1993 S.C. 892, para. 53 (India), the Supreme Court of India defined public interest litigation (PIL) as "a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected." The judiciary plays an active role in public interest litigation, which does not face the standing obstacles that would prevent such litigation in U.S. federal courts. In India, the judiciary directs public interest litigation and actively monitors the outcomes of the decisions. As early as 1976, Indian courts have opened public interest litigation as a course for policy change by expanding standing requirements. "[W]here a wrong against community interest is done, '*no locus standi*' will not always be a plea to non-suit an interested public body chasing the wrong-doer in court. . . . '*Locus standi*' has a larger ambit in current legal semantics than the accepted individualistic jurisprudence of old." Maharaj Singh v. State of Uttar Pradesh, (1977) 1 S.C.R. 1072, 1083–84 (India).

[136] Article 32 of the Constitution of India provides for public interest litigation, expressly granting an individual access to the Supreme Court of India. INDIA CONST. art. 32. Public interest litigation is more thoroughly explained in the Civil Procedure Code of India. *See* Prashant Bhushan, *Sacrificing Human Rights and Environmental Rights at the Altar of "Development"*, 41 GEO. WASH. INT'L L. REV. 389, 390 (2009) ("The majority of India's impoverished people are unable even to access the country's judicial system. In an attempt to deal with this lack of access to the judicial system, an activist Supreme Court of India created a new jurisdiction now known as 'Public Interest Litigation' (PIL) thirty years ago.").

[137] *See* S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 201–09 (2002) (describing the liberalization of the *locus standi* rule to allow social action groups to bring suit on behalf of prisoners and the poor where stricter rules of standing prevented vindication of important rights by the Supreme Court of India).

[138] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 4.

[139] *Id.*

[140] *Id.* at paras. 5–8.

B. The Judgment

The judgment by Justice Anand was composed of two parts: establishing procedural safeguards and elaborating a system of compensation for victims of police abuse.[141] The judgment emphasized first the global effort against torture and its status as a special aim of international conventions and declarations.[142] In light of the unique role of police in efforts against torture, Anand invoked the particular sections of the Constitution of India applicable to forbidding torture, abuse, and lethal force in custodial detention.[143] Article 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[144] Article 22 secures basic rights of arrestees including rights to know reasons for detention and immediate access to legal counsel.[145] Despite constitutional protections, police seeking to secure evidence and confessions failed to record arrests and recharacterized detentions as "prolonged interrogation[s]."[146]

> Instances have come to ou[r] notice where the police [have] arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrest[ed] person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometime[s] resulted [in] his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody.[147]

In the view of the Court, the difficulty in securing evidence against police officers in detention circumstances meant that the only effective safeguards would be those that facilitated procedural transparency and accountability.[148] Outlined in paragraph 36, the judgment imposed basic measures of wearing plainly identifiable police credentials, recording arrests in the presence of a family witness, informing of next of kin in case of arrest,

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[141] *See*, *e.g.*, *id.* at para. 30 (discussing ways to check the abuse of police power, including transparency of action and accountability, among others). *See also id.* at para. 42 ("[T]he victim of crime needs to be compensated monetarily also.").

[142] *See*, *e.g.*, *id.* at para. 13 (referring to Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 5 (Dec. 10, 1948)).

[143] *Id.* at para. 17.

[144] INDIA CONST. art. 21.

[145] *Id.* art. 22(1).

[146] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 18.

[147] *Id.* at para. 2.

[148] *Id.* at para. 30.

reading of rights and warnings, availing detainees of physician services, providing lawyers, and posting notices in police stations.[149]

The Court further expanded its powers to establish a compensatory scheme for violation of constitutional rights—even though the Government of India had expressly reserved against the International Covenant on Civil and Political Rights ("ICCPR")[150] terms for compensation for victims of unlawful arrest and the Indian Constitution conferred no such right.[151] Justice Anand confirmed that the doctrine of sovereign immunity was not applicable in cases where public servants violated constitutional rights, described actions for civil damages as too burdensome, and appropriated the power to award monetary damages in the court, "finding the infringement of the indefeasible right to life" which may be "the only effective remedy to apply balm to the wounds of the family members of the . . . victim."[152]

C. Comparative Constitutional Adjudication

The Court analyzed foreign law, both judicial and legislative, in both the procedural and compensatory parts of the judgment.

1. United Kingdom

Drawing upon the English experience, Anand suggested that the British followed a similarly "progressive" path from permitting torture during investigations, to strongly narrowing the power of the state when investigating crimes.

> The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips' Committee . . . . In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved . . . . The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission . . . .[153]

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[149] *Id.* at para. 36.

[150] International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[151] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 43.

[152] *Id.* at paras. 44–46.

[153] *Id.* at paras. 14, 16.

2. United States

The judgment further considered the balancing required where the flexibility of the police to investigate and prevent crime and terrorism conflicted with the ideals of a society protective of its civil liberties.

> It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by . . . hardened criminals . . . . The cure cannot, however, be wors[e] than the disease itself.[154]

Citing *Miranda v. Arizona*, the Supreme Court ruled that the police power of the state was always limited by constitutionally guaranteed rights[155]:

> A recurrent argument, made in these cases is that society's need for interrogation out-weighs the privilege. This argument is not unfamiliar to this Court. . . . The who[l]e thrust of our foregoing discussion demonstrates that *the Constitution has prescribed the rights of the individual* when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. *That right cannot be abridged.*[156]

3. Ireland

Justice Anand's opinion made more extensive use of foreign constitutional law in exploring the legitimacy of the Supreme Court's ordering monetary damages for violation of constitutional rights. The Court employed Irish constitutional decisions for the authority that a constitutional court enjoyed, the primary place of securing individual constitutional rights, citing *The State (at the Prosecution of Quinn) v. Ryan*,[157]

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[154] *Id.* at para. 34.

[155] *Id.* at para. 33 (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)). *See also* Singhvi, *supra* note 22, at 328 (noting the distinctions between U.S. due process jurisprudence and the Indian constitutional bases for redress of violations of constitutional rights).

[156] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 33 (alteration in original) (citation omitted). This remains the case under U.S. law, although the question lies at the center of current U.S. Executive Branch efforts to detain and/or prosecute those whom it suspects of planning violent attacks against the U.S. or its citizens. Courts have struggled with the extent to which suspects are entitled to the protections of accused criminals or only those given to wartime combatants. *See* Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1120 (2005) (from a panel discussion entitled "Wartime Security and Constitutional Liberty"); Charles I. Lugosi, *Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225 (2003); Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255 (2006).

[157] The State (at the Prosecution of Quinn) v. Ryan, [1965] I.R. 70 (Ir.).

> It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at [n]ought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, *it follows that no one can with impunity set these rights at [b]ought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires*.[158]

and that those rights deserved judicially created remedies, citing *Byrne v. Ireland*,[159]

> In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, *the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed*.[160]

4. Trinidad and Tobago

The Court further relied upon the decision of *Maharaj v. Attorney General of Trinidad and Tobago*[161] for the proposition that the remedy for constitutional violations undertaken by the government or through the omission of government action constituted a claim separate from normal civil causes of action sounding in tort, e.g., false imprisonment.

> An order for payment of compensation, [the Attorney General] submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section I 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) [of the Constitution of Trinidad and Tobago] and may well be the only practicable form of redress . . . . The very wide powers to make

[158] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 49 (alteration in original) (citation omitted) (internal punctuation omitted).
[159] Byrne v. Ireland, [1972] I.R. 241, 264 (Ir.) (Walsh, J.).
[160] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 50 (alteration in original).
[161] Maharaj v. Att'y Gen. of Trin. & Tobago, [1979] A.C. 385.

> orders, issue writs and give directions are ancillary to this. . . . [The claim for monetary compensation for deprivation of liberty otherwise than by due process of law] is a claim in public law for compensation for deprivation of liberty alone.[162]

5. New Zealand

The Supreme Court of India finally relied upon a New Zealand Court of Appeal case, which in turn employed constitutional decisions from the United Kingdom, Ireland, and prior constitutional precedent from India. In *Simpson v. Attorney General [Baigent's Case]*,[163] the Court of Appeal "considered the applicability of the doctrine of vicarious liability for torts like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act . . . ."[164] The court observed that:

> The New Zealand Bill of Rights Act[,] unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise [their] . . . duties will observe the rights that the Bill affirms. It is[,] I consider[,] implicit in that commitment, indeed essential to its worth, that the courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. . . . *Enjoyment of the basic human rights are the entitlement of every citizen and their protection the obligation of every civilized state. They are inherent in and essential to the structure of society*. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred . . . is . . . equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning.[165]

[162] *Shri D.K. Basu*, 1 S.C.R. 416, at paras. 51–52.
[163] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667 (CA).
[164] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 53.
[165] *Id.* at paras. 53–54 (alteration in original) (citation omitted).

IV. APPLYING THEORIES OF COMPARATIVE INTERPRETATION TO *D.K. BASU*

The court's analysis of, and reliance upon, foreign decisions from common law jurisdictions present an opportunity to test universalist, expressivist, and pragmatist theories of comparative constitutional adjudication. The Supreme Court of India used the decisions of American, Irish, and New Zealand courts to demonstrate a common role for courts in relation to the rights of the criminally accused and detained.[166] The Court also weighed differing approaches to measures of damages for constitutional violations, including the ability of the state to seek contribution from officials liable for those damages.

A. Universalism: Freedom from Custodial Abuse

While the Supreme Court of India focused on a fundamental norm of international human rights law and constitutional rights in India—the prohibition on torture[167]—it used foreign law principally to emphasize the role of courts "as custodian and protector of the fundamental and the basic human rights of the citizens."[168] Justice Anand referred to *Miranda v. Arizona* for the principle that the state's interest in the security of its citizens (through arrest and detention) was necessarily subordinate to constitutional enshrinement of rights against self-incrimination.[169] The precedent from Irish and New Zealand courts—neither of which involved torture or custodial interrogation—went much further.[170]

In *The State (at the Prosecution of Quinn) v. Ryan*, the Supreme Court of Ireland determined that an Irish inspector had, with the assistance of two British policemen, conspired to deprive an Irish citizen of his right to challenge the validity of a warrant for his arrest issued by an English court.[171] The case brought to light a conflict between British law in effect before Irish independence—mutual backing of warrants—and the Irish Constitution, which granted a defendant the opportunity to contest the validity of the warrant.[172] Justice Anand cited *Ryan* for the principle that the Supreme Court as the

[166] *Id.* at paras. 33, 49–50, 53–54.

[167] *Id.* at para. 11 ("No violation of any of the human rights has been the subject of so many Conventions and Declarations as 'torture'—all aiming at total banning of it in all forms but inspite [sic] of the commitments made to eliminate torture, the fact remains that torture is now more widespread than ever before.").

[168] *Id.* at para. 9.

[169] *See id.* at para. 33.

[170] *See id.* at paras. 49–50, 53–54.

[171] The State (at the Prosecution of Quinn) v. Ryan, [1965] I.R. 70 (Ir.).

[172] Charles L. Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 790 (1977).

"custodians of [fundamental] rights" enjoyed "powers in this regard . . . as ample as the defence of the Constitution requires."[173]

In *Baigent's Case*, the New Zealand police visited an incorrect address specified on an otherwise valid warrant for the premises belonging to a suspected drug dealer.[174] The occupants informed the police that they had the wrong address to which the police replied, "We often get it wrong, but while we are here, we will have a look around anyway."[175] The residents of the incorrectly designated address brought suit against the Attorney General for negligence, trespass, abuse of process, and violation of their rights under New Zealand's newly adopted 1990 Bill of Rights Act, which prohibited unreasonable searches and seizures.[176] The common law torts were rejected by the New Zealand High Court because of statutory immunities granted to police when executing warrants.[177] The New Zealand Court of Appeal—the name of its highest court at that time—reinstated the trespass and abuse of process claims because statutory immunities did not protect actions taken in bad faith.[178] More importantly, the Court of Appeal determined that, while the Bill of Rights Act did not authorize money damages for violations—indeed, the Court noted that Parliament had specifically rejected a draft of the Bill of Rights Act that included a remedies provision—the Court could fashion a remedy and hold the government liable for violations of rights specified in the law. It is this latter authority—that courts are "not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed"—that the Supreme Court of India emphasized with respect to a universal role for constitutional courts.[179] The

[173] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 49. In 2001, after both *D.K. Basu* and *Baigent's Case*, the Irish Supreme Court cut back on the broad reading given to *Quinn*. In *Sinnott v. Minister of Education*, the Court determined that:

> [i]t is essential to read the passage [cited in *D.K. Basu*] in its context. So read, it is clear that it is not an assertion of an unrestricted general power in the judicial arm of government but rather a strong and entirely appropriate statement that a petty fogging, legalistic response to an order in the terms of Article 40.4 of the Constitution will not be permitted to obscure the realities of the case, or to preclude appropriate action by the courts.

Sinnott v. Minister of Educ., [2001] 2 I.R. 545, 709 (Ir.).

[174] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667 (CA).

[175] J.A. Smillie, *The Allure of "Rights Talk":* Baigent's Case *in the Court of Appeal*, 8 OTAGO L. REV. 188, 188 (1994).

[176] *[Baigent's Case]* 3 NZLR 667, 691.

[177] Smillie, *supra* note 175, at 189 n.3 (noting the immunity extended by section 39 of the 1958 Police Act).

[178] Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 215 (2008) ("New Zealand's highest court held that the search did violate the bill of rights. In addition, it held that the existing prohibition on damage remedies for public wrongs did not cover bill-of-rights violations, and that it should exercise its power as a common-law court to create a remedy of damages for violations of the bill of rights. This was, at the very least, an aggressive approach to the bill of rights.").

[179] Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416, at para. 53 (India).

New Zealand Court of Appeal, like the Supreme Court of India, relied on the British Privy Council's decision in *Maharaj v. Attorney General of Trinidad and Tobago* for the principle that the government could be held directly liable for breaches of public law.[180]

Universalism conventionally emphasizes a substantive principle of "transcendent" law "evinced by [its] presence in legal systems in other countries."[181] In *D.K. Basu*, the relevant principle was a structural one emphasizing the role of constitutional courts in ensuring the fundamental rights of citizens. Indeed, in the view of the Supreme Court of India, referring to the New Zealand Court of Appeal, that relationship "[did] not depend on the legal or constitutional form in which [rights] are declared."[182] Emphasizing this role was important because the Supreme Court of India not only substantially lengthened the list of procedural requirements imposed on police upon arresting a citizen but also ordered the availability of monetary compensation when citizens' rights were violated as a result.[183] Before the Supreme Court's decision, the police were required not only to notify individuals arrested and taken into custody of the charges against them but also to produce them before a magistrate within twenty-four hours.[184] The Supreme Court additionally required that:

> (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee insist be recorded in a register.
>
> (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
>
> (3) A person who has been arrested or detained and is being held in custody in a police or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting

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[180] Smillie, *supra* note 175, at 190.
[181] Choudhry, *supra* note 6, at 842–46.
[182] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667, 702 (CA).
[183] *Shri D.K. Basu*, 1 S.C.R. 416, at paras. 30, 42.
[184] *Id.* at para. 17.

witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her bed, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the . . . Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the

> arrest and at the police control room it should be displayed on conspicuous notice board.[185]

Justice Anand articulated, and relied upon, the proposition that a state is responsible for the enforcement of its laws through the police but that the violent methods and authority attaching to that responsibility give rise to two "threats." First, the police may accurately identify criminal suspects, but in the process of collecting evidence or interrogating the suspect, the police will use violent methods to coerce confessions.[186] Second, the authority and violence of the police, if not properly administered, may become an arm of local bosses who use the state's machinery to settle scores, intimidate ethnic or economic rivals, and jeopardize faith in the rule of law.[187] Yet the Supreme Court of India did not use foreign precedent principally to support those assertions—although *Miranda v. Arizona* certainly does. It instead used foreign precedent to suggest that it is the courts' role to strike that balance.

B. Expressivism: Convergence and Divergence in Constitutional Structure and Judicially-Ordered Remedies

Expressivist interpretation is fundamentally about courts exploring foreign precedent in order to discover and explain constitutional difference. Expressivism requires at least three procedural steps: identifying underlying assumptions of foreign jurisprudence, analyzing differences between those assumptions and "domestic assumptions," and sharpening constitutional provisions as a matter of historical and social circumstances shaping the deciding court's constitution.[188]

Citing relevant Irish precedent, the Court noted that "Ireland, which has a written constitution, guaranteeing fundamental rights . . . like the Indian Constitution contains no provision of remedy for the infringement of those rights."[189] Yet the Supreme Court of Ireland had fashioned remedies for constitutional violations that imposed liability not only on wayward actors—such as police acting on a knowingly invalid warrant—but on the state itself for "failure to discharge the constitutional obligation imposed."[190] In *Byrne v. Ireland*, the Supreme Court of Ireland determined that the government's sovereign immunity had not survived the drafting of the 1937 Constitution,

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[185] *Id.* at para. 36. *See also* Kalhan et al., *supra* note 115, at 117 ("In its landmark case of *D.K. Basu v. State of West Bengal*, the Supreme Court extended the Constitution's procedural guarantees further by requiring the police to follow detailed guidelines for arrest and interrogation.").

[186] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 18.

[187] *See* Chris Gagne, Note, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 B.C. THIRD WORLD L.J. 261, 286 (2005).

[188] Choudhry, *supra* note 6, at 857–58.

[189] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 48.

[190] *Id.* at para. 50.

which specified certain immunities belonging to the President and members of the Oireachtas, Ireland's parliament.[191]

Katherine Byrne's suit was fairly pedestrian, so far as it goes. She fell on a public walkway after employees from Ireland's Department of Posts and Telegraphs failed to effectively fill a trench, causing a subsidence of the path on which Ms. Byrne stumbled.[192] But her ability to sue the state for damages in tort implicated Ireland's sovereign immunity and thus the courts' ability to fashion remedies for violations of constitutional rights. If sovereign immunity barred her action, it barred actions against the state for other violations as well.

This distinction had emerged in Indian jurisprudence, although it was treated differently. While Justice Anand conceded that the sovereign immunity defense might obtain for actions in tort, it did not provide a defense against violations of fundamental rights:

> In this context it is sufficient to say that the decision of this Court in *Kasturilal* upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the application in the constitutional scheme and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of fundamental rights, when the only practicable mode of enforcement of the fundamental rights call be the award of compensation.[193]

Without this distinction, he wrote, the law "relegat[ed] the aggrieved to the remedies available in civil law, limit[ing] the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens."[194]

> The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities.

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[191] Byrne v. Ireland, [1972] I.R. 241, 264–66 (Ir.) (Walsh, J.). This is apparently a controversial point in Irish constitutional law. Ireland's 1937 Constitution contained a specific provision to carry over prerogatives from the Irish Free State (1922–1937). *Id.* at 271 (citing Article 73 of the Constitution of the Irish Free State). To reconcile that provision with its ultimate conclusion, the Court determined that the Irish Free State Constitution had not carried over the prerogatives from when Ireland was part of the United Kingdom. *Id.* at 271–74. Because the prerogatives did not exist under the Irish Free State, the provision in the 1937 Constitution could not therefore make them available to bar Byrne's suit. I owe this explanatory note to Professor Oran Doyle.

[192] Tom Hannon, *Locus Standi: Considering the Irish Position*, 8 INT'L L. PERSP. 73, n. 41 (1996).

[193] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 44 (citing Kasturi Lal Ralia Ram v. State of Uttar Pradesh, (1965) 1 S.C.R. 375 (India)).

[194] *Id.* at para. 46.

> Mere punishment of the offender cannot give much solace to the family of the victim—civil action for damages is a long drawn and cumbersome judicial process. [195]

To support this conclusion, Justice Anand relied on the Judicial Committee of the U.K. Privy Council interpreting Section 6 of the Trinidad Constitution.[196] That section provided that "without prejudice to any other action with respect to the same matter which is available . . . apply to the High Court for redress."[197] A majority of the Judicial Committee determined that the provision authorized the availability of a remedy for breaches of fundamental rights that sounded not in tort (vicarious liability for the acts of government agents) but in a direct action against the state for a violation of public law.[198]

The justifications that the Supreme Court of India identified for its broad remedial powers fit within the "expressivist", "dialogical", "engagement", and "bricolage" modes of constitutional interpretation. While Justice Anand did not emphasize the common legal heritage shared by the courts from which he borrowed, elsewhere in the opinion he hinted at the relevance of systems derived from British judicial institutions. His reference to foreign law began with early English tolerance of torture and forced confessions and British progress toward enlightened practices (based, in part, on Canadian experience).[199] He referred only to legal authorities that shared British judicial heritage.[200]

While India's Constitution reflected a separate national experience—he noted the Court's willingness to uphold preventive detention measures based on India's security situation—he identified constitutional similarities and differences that nevertheless imparted broad remedial powers to courts to protect fundamental rights.[201] Ireland and India, unlike New Zealand or the United Kingdom, decided cases according to a written constitutional tradition.[202] Although they diverged on the issue of the applicability of

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[195] *Id.*

[196] Joanna Harrington, Comment, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 AM. J. INT'L L. 126, 128 (2004).

[197] Smillie, *supra* note 175, at 190.

[198] *Id.* The individual rights guarantees provided in the Constitution of Trinidad and Tobago closely follow the Canadian Bill of Rights.

[199] *See supra* Part III.C (discussing the Court's comparisons to the United Kingdom, United States, Ireland, Trinidad and Tobago, and New Zealand).

[200] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 14.

[201] Jayanth K. Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 LAW & INEQ. 265, 268–69 (2004) (noting the surprise of many activists when India's Supreme Court upheld a provision of the Terrorist and Disruptive Activities Act admitting into evidence uncorroborated witness statements gathered by the police).

[202] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 48.

sovereign immunity to tort suits, they shared a tradition of court-fashioned remedies for violations of constitutional rights.[203]

C. Pragmatism: Defining the Limits of Money Damages as Remedy for Civil Rights Violations

Faced with a number of victims of police abuse across India and only prospectively imposed procedures for ensuring their rights, the Supreme Court of India also grappled with what remedy, if any, it could grant retrospectively. The Court determined that mere judicial acknowledgment of the wrongs "does not by itself provide any meaningful remedy" to victims of custodial violence[204]—nor, in the Court's view, did statutory provisions of the India Penal Code, which regulated police who violated detainees' rights.[205] Justice Anand acknowledged that India had reserved against Article 9(5) of the ICCPR—which requires that victims of unlawful arrest or detention "have an enforceable right to compensation"[206]—and the Constitution of India provided no express authority to grant compensation.[207]

While the Court located its authority to fashion remedies in its basic structural role of protecting fundamental rights, the amount of damages was less clear. The courts of India, like courts elsewhere, had first struggled with whether courts enjoyed any right to award money damages, a power that implicated legislative prerogatives.[208] Even if a court concluded, as many had, that an order to pay money damages was within the power of the court to remedy violations of constitutional rights, they next grappled with the appropriate measure, often noting the difficulty in analogizing to tort equivalents.[209] This may in part explain Justice Anand's reference to *Maharaj v. Attorney General of Trinidad and Tobago*.[210]

In *Maharaj*, a trial court judge cited a barrister of the Trinidad and Tobago bar for contempt of court based on a vague and otherwise unexplained "vicious attack on the integrity of the Court."[211] Maharaj ordered the attorney to serve seven days' imprisonment.[212] Under the law of Trinidad and Tobago at the time, the attorney had no right to appeal a contempt order to the Trinidad and Tobago Court of Appeal and could only appeal to the Judicial Committee

[203] *Id.*
[204] *Id.* at para. 41.
[205] *Id.* at para. 42.
[206] ICCPR, *supra* note 150, at art. 5.
[207] *Shri D.K. Basu*, 1 S.C.R. 416, at para. 43.
[208] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (citing Marbury v. Madison, 1 Cranch 137, 163 (1803)) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").
[209] *Shri D.K. Basu*, 1 S.C.R. 416, at paras. 44–47.
[210] Maharaj v. Att'y Gen. of Trin. & Tobago, [1979] A.C. 385.
[211] *Id.* at 391.
[212] *Id.* at 390–91.

of the United Kingdom Privy Council (the highest court of appeal for Trinidad and Tobago) with special leave.[213]

While the attorney did pursue that route, the attorney also brought an original suit against Maharaj and the Attorney General of Trinidad and Tobago for violation of his constitutional right "not to be deprived of his liberty without due process of law."[214] Section 6 of the Constitution, at the time, provided:

> [W]ithout prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress. . . . The High Court shall have original jurisdiction . . . and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of [constitutional rights] . . . .[215]

The plaintiff requested a declaration that the order committing him to prison for contempt was unconstitutional and illegal, that he be immediately released from custody, and that damages be awarded him against the Attorney General "for wrongful detention and false imprisonment."[216] The second trial judge who heard the motion refused jurisdiction, arguing that to hear the complaint would in effect be an exercise of appellate review over the initial contempt order.[217] When the Judicial Committee of the Privy Council finally heard his appeal from the initial contempt order, it determined that the court had violated his right to contest the charges against him.[218] On appeal from the second action, the Judicial Committee determined that the state owed him monetary compensation for the loss of his liberty because he had already served his seven days.[219] "The contravention was in the past; the only practicable form of redress was monetary compensation."[220] In order to reach that conclusion, the Committee liberally interpreted "redress" within the meaning of Section 6.[221]

The Judicial Committee distinguished a tort action for false imprisonment principally on the basis of damages:

> The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It

[213] *Id.* at 391.
[214] *Id.* at 393 (quoting TRIN. & TOBAGO CONST. art. VI, § 1).
[215] *Id.*
[216] *Id.* at 391.
[217] *Id.* at 392.
[218] *Id.* at 397.
[219] *Id.* at 398.
[220] *Id.*
[221] *Id.* at 399.

> is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration.[222]

The Committee noted that these damages were available from the state directly and not the trial judge personally, a finding that was important to preserve the "long established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise or purported exercise of his judicial functions."[223]

> [N]o change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6 (1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution.[224]

In *Maharaj*, the Judicial Committee noted that the plaintiff did not request, and therefore it did not pass upon, whether punitive damages were available for violations of constitutional rights.[225]

Justice Anand adapted this regime from the *Maharaj* case. The Privy Council determined in *Maharaj* that a plaintiff in a constitutional rights case enjoyed a right to compensation from the state for a violation of public law but barred any resort that the plaintiff or the state might have to the individual perpetrator of the constitutional violation.[226] Thus, a trial judge might violate a party's (or attorney's) rights but would not be individually liable for compensation paid to compensate the victim. By contrast, the Supreme Court of India determined that courts could award victims compensatory, but not punitive, damages (the *Maharaj* court reserved ruling on the possibility of punitive damages in constitutional cases), but the state would enjoy a right of indemnification against the "wrong-doer."[227] Moreover, damages awarded for

[222] *Id.* at 400.
[223] *Id.* at 399.
[224] *Id.*
[225] *Id.* at 400.
[226] *Id.* at 399.
[227] Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416, at para. 56 (India) (alteration in original) ("The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the

violation of a constitutional right were in addition to, not in place of, any tort remedies available to a plaintiff, although the State could, under certain circumstances, offset any award of damages for a constitutional violation with an award obtained in a tort suit.[228]

V. *D.K. BASU V. STATE OF WEST BENGAL* AS POLITICAL DOCTRINE

The Supreme Court of India's judgment in *Shri D.K. Basu* therefore confirms the basic soundness of current categorization and classification schemes for constitutional borrowing as articulated by Choudhry, Jackson, Tushnet, and others.[229] But what about the more fundamental concern that judges, in the course of borrowing constitutional precedent, are not just wisely consulting a useful body of persuasive authority but are, in fact, using foreign precedent to enhance or establish the law-making powers of the judiciary?

In *D.K. Basu*, there are two principal actions which might support critics' concerns. First, each principle of foreign constitutional law cited by Justice Anand is used to expand the remedial and structural powers of the Supreme Court of India. Anand cited *Miranda v. Arizona* for the non-derogability of the rights of criminal detainees,[230] Irish constitutional precedent reserving to the Supreme Court "powers [to remedy violations of rights] . . . as ample as the defence of the Constitution requires,"[231] Trinidadian precedent to establish that plaintiffs could resort immediately to the Supreme Court for relief instead of pursuing tort actions against state officers,[232] and New Zealand precedent for the extraordinary conclusion that the rights of criminal detainees

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wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on [the] punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be fell to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait, jacket [sic] formula can be evolved in that behalf. The relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.").

[228] *Id.*

[229] GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 133 (2003) ("The widely renowned American solicitude for local authority was carefully noted as a predicate for observing that even the framers of the United States Constitution had provided for a safeguard against a 'failure of constitutional machinery' in the states. Justice Sawant pointed out that Article 356 [of the Indian Constitution] 'was based on Article 4, Section 4 of the American document' . . . .").

[230] *Shri D.K. Basu*, 1 S.C.R. 416, at para 33.

[231] *Id.* at para. 49.

[232] *Id.* at para. 51.

are human rights that "do not depend on the legal or constitutional form in which they are declared."[233] Thus, the Supreme Court of India appropriated to itself the ability to identify, regulate, and redress wrongdoing by state police officials and their agents. Similarly, it appeared able to do so as a function of universal human rights and not, it would seem, by other constitutional or legal constraints.

A. *The Accumulation of Structural-Expansionist Precedent From* **Maharaj** *to* **Baigent's Case**

Second, *D.K. Basu* represented the accumulation and mutually-reinforced legitimacy of structural-expansionist precedent drawn from widely disparate constitutional and factual contexts. The principle that courts must define and enforce procedural and monetary remedies for violations of constitutional rights migrated from the Trinidadian case of *Maharaj* in the civil contempt context to *Nilabati Behera v. State of Orissa,* a 1993 Supreme Court of India decision on custodial death,[234] to one of several additional precedents used (including *Nilabati Behera*) by the New Zealand Court of Appeal in *Baigent's Case* (in the search and seizure context), all of which the Supreme Court of India used again in *D.K. Basu.*

In *Nilabati Behera*, the Supreme Court of India ordered the payment of monetary compensation for the custodial death[235] of Nilabati Behera's son, Suman Behera.[236] Suman was a twenty-two-year-old male arrested on suspicion of theft and detained by the police at 8 a.m. on December 1, 1987.[237] Thirty hours later, Suman's mother learned that her son's dead body had been found by nearby train tracks.[238]

Suman's mother brought an action based on the theory that custodial death amounted to a violation of Suman's Article 21 constitutional right to life.[239] After considering relatively objective medical evidence to reject police assertions that Suman escaped and was struck by a passing train, [240] the Court

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[233] *Id.* at para. 53.

[234] Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746 (India), *available at* http://www.unhcr.org/refworld/pdfid/3f4b8e004.pdf.

[235] "Custodial death" means "the death of a person in custody whether of the [p]olice or [j]udicial." Sonakshi Verma, *Custodial Death*, ARTICLESBASE (Mar. 12, 2010), http://www.articlesbase.com/criminal-articles/custodial-death-1977427.html.

[236] *Nilabati Behera*, 2 S.C.C. 746, at para. 24.

[237] *Id*. at para. 1.

[238] *Id*. For a complete list of Suman's injuries, see *id*. at para. 7.

[239] *Id.* at para. 1. Suman's mother actually wrote a letter to the Court outlining her grievance, and the Court treated the letter as though it were a Writ Petition under Article 32 of the Constitution of India. Fali S. Nariman, *Fifty Years of Human Rights Protection in India: The Record of 50 Years of Constitutional Practice*, 12 STUDENT ADVOC. 4, 10 (2000).

[240] *Nilabati Behera*, 2 S.C.C. 746, at para. 8. Evidence was produced before the district judge from a medical examiner that indicated that Suman's injuries were caused by blunt objects and that he received them ante-mortem. *Id.* Thus, this evidence "exclude[d] the possibility of all the injuries to Suman Behera being caused in a train accident while indicating

analyzed whether or not it had the authority to provide compensation for the deprivation of a fundamental right. In order for the Court to reach its decision, it relied on domestic,[241] foreign, and international human rights authority.[242]

The Court in *Nilabati Behera* used *Maharaj v. Attorney General of Trinidad and Tobago* for the same proposition as *D.K. Basu* (Justice Anand sat on both panels): that violation of constitutional rights imparted a right for the plaintiff to bring suit directly against the state for a breach of public law, not, or at least not exclusively, on a theory based in tort or vicarious liability.[243] The Court noted that in *Maharaj*, the Judicial Committee of the Privy Council considered whether Section 6 of the Constitution of Trinidad and Tobago, excerpted above, permitted monetary compensation.[244] The state's argument, "that an order for payment of compensation did not amount to the enforcement of the rights that had been contravened, was expressly rejected."[245] Instead, the Judicial Committee of the Privy Council held "that an order for payment of compensation, when a right protected had been contravened, is clearly a form of 'redress' which a person is entitled to claim under Section 6, and may well be 'the only practicable form of redress'."[246] Justice Verma, who wrote the opinion in *Nilabati Behera*, cited *Maharaj* for the proposition that "enforcement of [a] constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention."[247]

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that all of them could result from the merciless beating given to him." *Id.* In light of this evidence, the police's defense was viewed by the Court rather weakly based on several factors. The police did not produce any evidence that Suman had escaped or that they had conducted a search. *Id.* at para. 6. The Court also noted that the body was discovered by rail workers the following morning, yet the police did not arrive nor take custody of the body until much later in the day. *Id.* The Court seemingly inferred that if the police were worried about a custodial escapee, they certainly did not act as though re-apprehending him was any sort of priority. *See id.* Based on the facts, "[t]he burden [was] . . . clearly on the [police] to explain how Suman Behera sustained those injuries which caused his death." *Id.* at para. 4. The police agreed that they would have been liable for depriving a person of his or her fundamental rights in their custody; however, they simply denied depriving Suman of his fundamental rights. *Id.* at para. 5.

[241] Chief among these sources was *Rudul Sah v. State of Bihar*. In *Rudul Sah*, the Supreme Court of India determined that it had the authority to allow compensation for the deprivation of a fundamental right under Article 32 of the Constitution of India, stating that "respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to [a] petitioner's rights. It may have recourse against those officers." Rudul Sah v. State of Bihar, (1983) 3 S.C.R. 508, 514 (India).

[242] Besides the *Maharaj* case, which will be discussed in length above, the *Nilabati Behera* Court references Article 9(5) of the International Covenant on Civil and Political Rights, 1966. *Nilabati Behera*, 2 S.C.C. 746, at para. 21 ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."). *See also* ICCPR, *supra* note 150.

[243] *Nilabati Behera*, 2 S.C.C. 746, at paras. 15–17 (citing Maharaj v. Att'y Gen. of Trin. & Tobago, [1979] A.C. 385).

[244] *Id.* at para. 15.

[245] *Id.*

[246] *Id.*

[247] *Id.* at para. 16.

Simpson v. Attorney General [Baigent's Case] relied upon both *Maharaj* and *Nilabati Behera* to extend the New Zealand Court of Appeal's ability to order relief for violations of rights guaranteed in the Bill of Rights Act.[248] The New Zealand Court of Appeal broadened the Crown's liability for the violation of civil rights (the aforementioned illegal search of Mrs. Baigent's home under the strenuous objection of the family who alerted the police to the inaccuracy of the warrant).[249] The Court outlined three ways the Crown could be liable for a breach of the New Zealand Bill of Rights Act: 1) "[i]t is an independent action against the Crown; 2) [i]t is an action in public law, not tort law in any form; 3) [i]t is a strict liability action for contravention of fundamental human rights."[250] The *Baigent's* Court, quoting Lord Diplock in *Maharaj*, stated:

> Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. . . . The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution [of the Republic of Trinidad and Tobago].[251]

Lacking any explicit grant to remedy violations of its Bill of Rights Act, like Section 6 of the Trinidad & Tobago Constitution, the Court of Appeal cited *Byrne v. Ireland*,[252] *State v. Ryan*,[253] and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[254] for the general proposition that

[248] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667, 692, 700 (CA).

[249] *See id.*

[250] Melanie Smith, Note, *Burgeoning Baigent?: A Critique of the Law Commission's Analysis of* Baigent's Case, 28 VICTORIA U. WELLINGTON L. REV. 283, 285–86 (1998) (footnotes omitted).

[251] *Baigent's Case*, 3 NZLR at 692 (quoting Maharaj v. Att'y Gen. of Trin. & Tobago, [1979] A.C. 385, 396, 399) (internal quotation marks omitted).

[252] *Baigent's Case* actually referenced several cases from the Irish Supreme Court, but *Ryan* and *Byrne* were the major influencing cases. *See id.* at 701–02.

[253] The State (at the Prosecution of Quinn) v. Ryan, [1965] I.R. 70 (Ir.).

[254] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens*, unlike the other cases referenced thus far, actually allows for suit to be brought in private law. *See id.* at 397; *see also Baigent's Case*, 3 NZLR at 702.

courts must safeguard constitutional rights.[255] As J.A. Smillie noted, the problem with the application of those precedents is that the New Zealand Bill of Rights Act "is not an entrenched supreme law like the Constitutions of Ireland and the United States"; it was passed as an ordinary statute.[256] Indeed, parliamentarians had considered and rejected judicially enforceable rights under the Act.[257] However, citing *Nilabati Behera,* the Court of Appeal determined that limiting the plaintiffs to actions in tort improperly constrained the fundamental role of courts in guaranteeing fundamental rights:

> The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. . . . The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights.[258]

Based on American, Indian, and Irish precedent (albeit in starkly different constitutional and factual contexts), the *Baigent's* Court determined "that the courts are the ultimate guardians of human rights and they must enforce those rights regardless of Parliament's intention."[259]

The *Baigent's* dissent made the point that the New Zealand Bill of Rights Act could be repealed at any time by a simple majority vote and therefore lacked the equivalent democratic weight as fundamental constitutions that provided specific and detailed mechanisms for amendment or change.[260] Nevertheless, the *Baigent's* Court concluded that "[t]he New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights

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[255] *Baigent's Case*, 3 NZLR at 701 (quoting Byrne v. Ireland, [1972] I.R. 241, 264 (Ir.) (Walsh, J.)) (internal quotation marks omitted) ("In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed. The Oireachtas cannot prevent or restrict the citizen from pursuing his remedy against the State in order to obtain or defend the very rights guaranteed by the Constitution in the form of obligations imposed upon the State.").

[256] Smillie, *supra* note 175, at 191.

[257] *Id.* at 193–94.

[258] Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746, at paras. 33–34 (India).

[259] Smillie, *supra* note 175, at 197.

[260] *See id.* at 190–91.

that the Bill affirms."[261] The Bill of Rights Act surely implemented obligations that New Zealand had undertaken in ratifying the ICCPR, so it arguably represented the kind of fundamental rights for which the Irish and U.S. Constitutions stood. However, the ICCPR itself gives states substantial flexibility in implementing its provisions and by no means requires or authorizes judiciaries to have the final say on enforcement.[262]

B. From Baigent's Case *to* D.K. Basu

The panel in *D.K. Basu* imported the accumulated precedent beginning with *Nilabati Behera* in both establishing *Miranda*-like protections for arrestees as well as a comprehensive regime for monetary compensation should those protections be violated. It is entirely possible that the *D.K. Basu* panel could have constructed the same regime based on its own precedent. Indeed, as early as 1983, the Supreme Court of India signaled its potential power to order compensation for breaches of Article 21 in *Rudul Sah v. State of Bihar*, noting that "[o]ne of the telling ways in which . . . the mandate of Article 21 [is] secured, is to mulct its violaters in the payment of monetary compensation."[263] It had rejected state sovereign immunity in the context of police assault in *Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi*,[264] although *Nilabati Behera* and *D.K. Basu* are regarded as the most important decisions establishing the Court's constitutional basis for awarding compensation for violations of Article 21.[265] The Supreme Court of India's citation of foreign precedent may have served a signaling function that, like other states in which the rule of law was well established, India would not tolerate abuses in police custody.[266]

Another less flattering possibility is that Justice Anand duplicated, without any significant analysis as to germaneness, the foreign precedent cited in *Baigent's Case.* Former Supreme Court of India Justice Ruma Pal used the Fifth V.M. Tarkunde Memorial Lecture to expose what she called the "seven sins" of the Indian judiciary including "plagiarism and prolixity":

> If 'independence' is taken to mean 'capable of thinking for oneself' then the fourth sin is plagiarism and prolixity. I club the two together because the root cause is often the same namely the prolific and often unnecessary use of passages from text-books and decisions of other judges—without

[261] *Simpson v Att'y Gen. [Baigent's Case]* [1994] 3 NZLR 667, 702 (CA).

[262] *See* ICCPR, *supra* note 150, at art. 2, para. 2.

[263] Rudul Sah v. State of Bihar, (1983) 3 S.C.R. 508, 514 (India).

[264] Saheli, A Women's Res. Ctr. v. Comm'r of Police, Delhi, A.I.R. 1990 S.C. 513 (India).

[265] *See* REDRESS, RESPONSES TO HUMAN RIGHTS VIOLATIONS: THE IMPLEMENTATION OF THE RIGHT TO REPARATION FOR TORTURE IN INDIA, NEPAL, AND SRI LANKA 24–25 (2003), *available at* http://www.redress.org/downloads/publications/IndianSeminarReport.pdf.

[266] *See* Naresh Mahipal, D.K. Basu Vs. State of West Bengal, EXPERTSCOLUMN (Aug. 31, 2009), http://expertscolumn.com/content/dk-basu-vs-state-west-bengal.

> acknowledgment in the first case and with acknowledgment in the latter. Many judgments are in fact mere compendia or digests of decisions on a particular issue with very little original reasoning in support of the conclusion.[267]

Yet Justice Anand's use of foreign precedent was combined with prior domestic precedent as part of a broader effort to show consensus among states with legal systems in the British tradition and the similar practice among courts in those jurisdictions of reserving for themselves the last say on the substance of fundamental rights and the authority of courts, generally, to safeguard them[268]:

> [I]t is now a well accepted proposition in most of the jurisdictions, that monetary . . . compensation is an appropriate and indeed an effective and sometime[s] perhaps the only suitable remedy for redressal of the *established* infringement of the fundamental right to life of a citizen by the public servants and the State is victoriously liable for their acts.[269]

In some sense, this is exactly the way jurisprudence should, or at least does, develop in what Anne-Marie Slaughter has referred to as "a global community of courts."[270] In this context, constitutional courts may view themselves as part of a consensus-building, rights-protecting regime that shares features of the universalist and expressivist theories. Courts that engage in this regime may adopt the same prima facie legitimacy of each other's judgments. In *D.K. Basu*, Justice Anand gives some evidence of this community, in that the New Zealand *Simpson* court adopted foreign precedents, including an earlier judgment of the Supreme Court of India on rights of detainees,[271] which, in turn, serves as part of the justification for the result reached in *D.K. Basu*. The court's judgment thus derives from a legal regime composed of constitutional courts.[272]

On one hand, there may be nothing particularly to worry critics of comparative constitutional adjudication, given that *D.K. Basu* as well as the New Zealand Court of Appeal interpreted their laws in light of national obligations under the ICCPR. Even U.S. federal courts acknowledge that looking at foreign precedent is part of ensuring the federal government's

[267] Justice Ruma Pal, 5th V.M. Tarkunde Memorial Lecture: An Independent Judiciary (Nov. 10, 2011), *available at* http://theradicalhumanist.com/index.php?option=com_radical&controller=article&cid=431&Itemid=56.

[268] *See* Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416, at para. 23 (India).

[269] *Id*. at para. 56 (alteration in original).

[270] *See* Slaughter, *supra* note 49.

[271] Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746 (India).

[272] *See* Choudhry, *supra* note 6, at 871.

interest in uniform treaty interpretation.[273] Moreover, courts read new civil causes of action and remedies into existing constitutional and statutory regimes with some frequency.

On the other hand, the process by which courts in India and New Zealand used each other's constitutional adjudication to expand their powers to remedy police abuse and waive sovereign immunity for official misconduct gives at least some evidence that constitutional borrowing may lead to an additional source of law-making authority lacking the conventional attributes of democratic law-making. It is true, as David Fontana has suggested, that there is no shortage of comparative constitutional doctrine that might be used to support principles of judicial restraint, rather than activism or even activism consistent with "conservative" politics.[274] Indeed, when the Supreme Court of New Zealand (established in 2004 to be the new highest court of appeal) was presented the opportunity to extend the rule in *Baigent's Case* to judicial violations of fundamental rights, it declined to do so. Justices McGrath and Young, writing in the majority, emphasized the constitutional difference between Trinidad and Tobago's constitution relevant in *Maharaj* and cited the U.S. Supreme Court case of *Bradley v. Fisher*[275] for the impracticability of a system allowing bad faith, gross negligence, or recklessness exceptions to a broad doctrine of judicial immunity.[276] Yet whatever the politics underlying any given constitutional dispute, *D.K. Basu* and the precedent upon which it was based appear to show another dimension to an already complex countermajoritarian difficulty posed by judges with independent authority to make or shape laws.

VI. CONCLUSIONS AND IMPLICATIONS

The Supreme Court of India's judgment in *D.K. Basu* thus, by and large, confirms current scholarly classification schemes for comparative constitutional adjudication. The procedural and compensatory regime imposed by the Court tracked a universalist interpretation of rights of criminally accused and the role of courts in preventing the abuse of executive power in the local enforcement of laws. The Supreme Court of India further engaged in expressive interpretation in clarifying its own constitutional machinery and the available remedial powers for the court as a part of that machinery. Pragmatically, the Court could have adopted any of a number measures of

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[273] *See, e.g.*, Abbott v. Abbott, No. 08–645 (S. Ct. May 17, 2010), *available at* http://www.supremecourt.gov/opinions/09pdf/08-645.pdf.

[274] David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 49 (2011).

[275] 80 U.S. (13 Wall.) 335 (1871).

[276] *See Att'y Gen. v Chapman* [2011] NZSC 110, at paras. 169–70 (SC); Darise Bennington, *Judiciary Not Liable for Public Law Damages Under* Baigent, NZLAWYER (Sept. 23, 2011), http://www.nzlawyermagazine.co.nz/Archives/Issue169/169N1/tabid/3673/Default.aspx.

damages and indemnificatory possibilities with respect to individual states, police officers, or other government agents.

Yet the judgment provides some grounds for critics' concerns. While the confrontation between civil liberties and the necessity of effective law enforcement faces the vast majority of modern states, the role of the courts is not necessarily a fixed one. *D.K. Basu* established or solidified the Supreme Court of India's role as a preeminent player in resolving that confrontation, a role that may be problematic given India's vast size and recurrent insurrectionary activity. Indeed, the role of courts on that particular issue necessarily involves historical context. Constitutional courts like South Africa's may engage in comparative jurisprudence in order to "internationalize" their legal regimes to "affirm [their] membership in, or to rejoin, the mainstream of international society."[277] Some South African Constitutional Court judges have explicitly invoked this aim, as, for example, did Justice Aharon Barak of Israel.[278]

Judges increasingly interacting with one another, facing common challenges of interpretation and the ordering of rights, will almost inevitably form important transnational linkages in which constitutional law becomes "international" and for which it will become important to identify the practices of constitutional courts, as both national and international actors. This Article has shown not only that such a line might not be clear but also that the principal concern now articulated by opponents of comparative constitutional adjudication—that national judges will use foreign precedent to undermine laws passed by legitimately elected legislators—is only one aspect of the problem. Judges may increasingly view themselves as part of a law-making community that includes, but is not limited to, their national role or selection. That self-perception has important distributional consequences for internal allocations of political power, given that popular checks on judiciaries often lack the regularity and strength applied to legislators and executives.

Justice Anand appeared fairly unconcerned with this confrontation between elected branches and the judiciary. In *D.K. Basu*, he quoted the following from the 1949 Hamlyn Lecture by Sir Alfred Denning:

> No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age.

[277] Choudhry, *supra* note 6, at 888.
[278] JACOBSOHN, *supra* note 229, at 236–37.

> They must be replaced by new and up-to date [sic] machinery, by declarations, injunctions and actions for negligence. . . . This is not the tasks [sic] of Parliament. . . . the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must even be allowed in this country.[279]

[279] Shri D.K. Basu v. State of West Bengal, (1996) 1 S.C.R. 416, at para. 47 (India) (citation omitted).