

Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence

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I. INTRODUCTION

In the world of international constitutional law, the use of foreign judicial decisions in domestic jurisprudence has long created controversy and confusion for both lawmakers and legal scholars. This once seemed strictly an American problem because of America's unique system of judicial review; however, with the tremendous growth in constitutional courts throughout the world, the debate has expanded greatly over the past few decades.² While some countries decry the practice or merely avoid it, others embrace its usefulness and specifically authorize justices to examine foreign law.³

Perhaps the first point that must be reiterated on the use of foreign jurisprudence for domestic constitutional interpretation is that nothing in this article—or any other publication—implies that foreign jurisprudence should ever be considered in any way binding.⁴ While at this point of comparative scholarship, such a clarification would seem both trivial and obvious, it still bears mentioning.

Beyond this caveat, there are many purposes for examining foreign jurisprudence. The three that are discussed below are in no particular order and are in no way comprehensive. They are merely a restatement of three vital purposes that feature prominently in both comparative constitutional jurisprudence and comparative academic literature.

While there are countless functions of foreign opinions in the jurisprudence

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2. See William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction* 82 TEX. L. REV. 1653, 1653 (2004).

3. Compare S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (stating courts “shall not consider international law” when exercising judicial authority), and S. 1387, 2009-2010 Gen. Assemb., 118th Sess. (S.C. 2010) (stating courts shall not look to international law of other nations), and H.R. 785, 2010 Leg., Reg. Sess. (La. 2010) (preventing courts from applying international law when it would violate domestic law), with S. AFR. CONST., 1996, ch. 2, § 39. (requiring courts to consider international law in interpreting Bill of Rights).

4. See Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law*, 37 GA. J. INT'L & COMP. L. 219, 233 (2009).

of the South African Constitutional Court, perhaps the most prominent is the examination of the logic and reasoning used to confront a particular problem. As Professor Ursula Bentele writes, “[o]bviously the substantive law is not what matters, but rather the reasoning at work in confronting a common problem or issue.”⁵ When one is confronted with the opinion of a foreign judge, one is forced to examine his or her own biases, prejudices, and opinions, and it is imperative to the act of judging to be open to persuasion.⁶

It is also worth mentioning that before one even examines the reasoning of a foreign justice, it is often helpful to examine foreign opinions in an attempt to identify the problem. As former South African Constitutional Court Justice Laurie Ackermann observes,

without the correct formulation of a constitutional problem, it is hardly possible to come up with the right constitutional answer. Of course, the right problem must, in the end, be discovered in one’s own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.⁷

The final justification for the use of foreign jurisprudence in constitutional decisions that will be discussed here is the growing prominence of a “common thread” of standards that are applied universally. The South African Constitutional Court looked to foreign law for such a common thread with regards to the South African Constitution’s Article 12 assurance that every individual has the right “not to be treated or punished in a cruel, inhuman or degrading way.”⁸ The court interpreted this section by surveying similar provisions throughout the world to determine what was generally considered cruel, inhuman, or degrading.⁹ In effect, the court found that as all humans have a right to be free from such treatment, it was worthwhile to examine the determinations of foreign courts as to what punishments are classified as such.¹⁰ A similar “common thread” could easily be found in many if not all of the fundamental human rights concerns that are discussed here.

This article aims to move beyond the question of whether foreign law should be used in domestic constitutional jurisprudence and into the realm of which foreign sources should be relied upon and why these sources should be given particular attention. It has been said in past literature that one of the main

5. *Id.* at 226.

6. *See id.* at 239 (discussing judicial views on usefulness of foreign opinions).

7. Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169, 184 (2005).

8. S. AFR. CONST., 1996, ch. 2, § 12.

9. *State v. Williams* 1995 (3) SA 632 (CC) at 35-40 (S. Afr.) (discussing meaning of “cruel, inhuman or degrading” in American context).

10. *Id.* at 90-96 (holding juvenile whipping unconstitutional).

objections to the use of foreign analysis is the methodological concern over “forum shopping” or “cherry-picking,” in which a justice determines his or her preferred policy result and simply surveys international courts to find a source to achieve the desired end.¹¹ If this were to accurately describe the process by which justices come to decisions, it would be disastrous. Luckily, according to justices of the Constitutional Court of South Africa—a court intimately familiar with the examination of foreign law—it does not accurately describe the process by which they determine what foreign sources to examine.

Many factors are considered when choosing foreign legal sources. According to Deputy Chief Justice Dikgang Moseneke, a key consideration is whether the society is an open and democratic one. The country foreign sources are chosen from should mimic the regime type of his country.¹² The foreign jurisdiction should also have a similar system of adjudication—in the case of South Africa, adversarial.¹³ Similarly, several of the South African justices described subject matters on which foreign courts had confronted problems similar to those in South Africa and thus were valuable sources of reasoning.¹⁴ These problems include demographics, economics, and general values, and will be discussed in much greater detail below.

This article’s purpose is to discuss what broad-based factors should be used in determining sources for foreign jurisprudence in constitutional litigation. The focus of the article will be legal actions regarding fundamental human and socioeconomic rights. Foreign jurisprudence is indeed useful in other areas of the law. However, these areas are outside of the scope of this paper.

The first broad-based factor that should be examined when using foreign jurisprudence is the circumstances that surrounded the drafting of the constitutional provision at issue. It is important to note that all law, including constitutional law, exists within a particular context. This context includes a country’s unique history, distinctive economic and social circumstances, and political system.¹⁵ In the particular arena of constitutional law, it is frequently the responsibility of justices to examine where the law fits within the circumstances in which it was created. If there are tremendously different circumstances that surround the passing of a constitutional provision in a foreign state, although it appears similar, the meaning could vary substantially.

Another important factor in constitutional analysis is the interest the provision was written to protect.¹⁶ While at first glance two countries’

11. Bentele, *supra* note 4, at 238-39 (noting cherry-picking as common criticism of looking to sources from foreign jurisdictions).

12. *Id.* at 238.

13. *Id.* (discussing concerns over which foreign jurisdictions to consult).

14. *Id.* (noting nature of legal question leads court to certain foreign jurisdictions).

15. See Ackermann, *supra* note 7, at 175-76 (discussing circumstances molding constitutions).

16. See *id.* at 177 (noting meaning of guaranteed right decipherable only in light of interests it is designed to protect).

constitutional articles may seem similar, if they were crafted to protect different interests, it is very unlikely that they represent the same underlying principles. Jurisprudential analysis would thus not be particularly worthwhile to foreign courts. A careful analysis of the jurisprudential history and background surrounding the constitutional provision is therefore necessary.

The economic status of the country, including its access to finite resources and the social characteristics of the state, are the final two factors that will be discussed in this paper. Although not specifically legal, they are of a legal realist nature and do affect the function of law.

It is vital that, when examining foreign jurisprudence, states take into account economic differences. While in a perfect world this would be irrelevant, the constitutional adjudicator does not do his or her work in a vacuum. A particular decision that would have one result in a country with tremendous wealth might have a vastly different result in an impoverished nation. Economic differences, therefore, are something that must be taken into account.¹⁷ A decision without such consideration could have disastrous results.

Finally, countries' social characteristics—including racial, religious, and ethnic makeup—as well as their particular histories are very important when selecting foreign legal sources to examine. For example, in South Africa, the post-apartheid democratic constitution was written in a progressive manner that would not only protect rights but would also alleviate past inequities.¹⁸ A country without similar past inequities may not be a good source of legal analysis for the South African Constitutional Court. Thus, for the South African Constitutional Court or any constitutional court, when looking to foreign legal sources, it is very important to examine whether those sources are informed by a similar historical and social context.¹⁹ Foreign laws without such similar context would likely be distinguishable.

II. CIRCUMSTANCES AT DRAFTING

It has often been said that the law is reactive.²⁰ Nowhere is this generalization more apt than in the world of constitutional law. There is no country where the foundational legal documents emerged from a mere vacuum. As Justice Laurie Ackermann observed, constitutions “often reflect . . . a response to particular histories and political and social ills.”²¹

Evidence of such an eye towards the past can often be found within the preambles of various foundational legal documents. For example, in the South

17. See Bentele, *supra* note 4, at 250.

18. See Ackermann, *supra* note 7, at 175-76.

19. See Bentele, *supra* note 4, at 236 (noting Justice Alito's admonition of looking to provisions of foreign law without contextualization).

20. See generally Donald J. Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125 (1973).

21. See Ackermann, *supra* note 7, at 175 (opining constitutions typically product of history).

African Constitution, written in order to embrace democracy after a decades-long struggle to defeat apartheid, the preamble both “[r]ecognise[s] the injustices of [the nation’s] past” and “[h]onour[s] those who suffered for justice and freedom in [South Africa].”²² Similarly, the Eritrean foundational document, written in the wake of a three decades-long war for independence from Ethiopia, recognizes those “who sacrificed their lives for the causes of [Eritrean] rights and independence.”²³ While most subsequent “constitutional moments” occur in times of less societal transition, it is no less important to examine the context from which those provisions emerge.²⁴

The particular circumstances surrounding passage can influence an entire constitutional document, or merely a single provision. For example, the South African Constitution was passed in the wake of a racist apartheid system.²⁵ Similarly, the German Basic Law and Constitution of Japan were passed in the fallout of World War II.²⁶ In contrast, the United States Constitution, ratified in 1787, was not written with the rights of slaves and former slaves in mind. However, the Fourteenth Amendment, adopted in 1868, was written for this purpose.²⁷ This particular provision was written with different goals in mind than those that influenced the rest of the document.

In presenting this point, two particular types of constitutional moments will be examined. The first of these is a constitution’s drafting in response to prolonged domestic pressure. Such examples can be found throughout the democratic world. They manifest themselves through popular movements often involving rallies, campaigns, and protests or movements finding the majority of their support in the political or economic elites. This category includes general constitutional provisions that existed in the document’s original bill of rights or similar sections. Such clauses can be included here because initial constitutions, when not reacting to a particular event, generally represent the consensus formed by either popular support or political elites within the context of a constitutional convention or drafting caucus.

The second opportunity for constitutional change is through a particular and direct historical moment. There is often considerable overlap in the reasons for altering a constitution or changing the constitutional regime. That is to say that oftentimes a particular moment sets off a movement that takes some time to

22. S. AFR. CONST., 1996, pmb1.

23. ERI. CONST. pmb1. (2001); *Eritrea Profile*, BBC NEWS (July 19, 2011), <http://www.bbc.co.uk/news/world-africa-13349078> (noting circumstances under which constitution was written).

24. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 489 (1989) (discussing failed constitutional moments).

25. The South African Constitution was adopted on October 11, 1996, following three years of an interim constitution after apartheid.

26. The German Grundgesetz was passed on May 9, 1949, and the Japanese Constitution took effect on May 3, 1947.

27. See generally Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982).

effectuate change. For the purposes of this paper, such a movement will be considered as part of the second category. After all, thought and consultation before change in governance are vital elements of an open and democratic society.

This particular distinction is an important one in constitutional interpretation. The first such category is often the codification of a normative ideal. Simply put, a large group of citizens—or a large proportion of those responsible for constitutional drafting—believe that the country would be better off if this ideal were a part of the law. Most fundamental human rights provisions fall within this group. The latter category is in response to a particular event that the nation would like to ensure either continues to happen or—much more frequently—never happens again. The concreteness of the latter often causes a very different type of jurisprudential interpretation than the former.

Take, for example, disputed elections. Throughout history, it has been an unfortunate reality that defeated incumbents, especially in new and developing democracies, refuse to relinquish power. Certain geographic areas, including Latin America and Africa, are particularly familiar with this practice. As a great many of these countries move towards stable democracy, there has been considerable effort to ensure that power is transitioned peacefully. Some states have gone as far as to entrench term limits in the constitution, ensuring that no government can extend them in an effort to hold on to power, without sacrificing the constitutionality of the regime.

Take the recent example of Honduras, a country with a history of incumbents refusing to hand over power at the end of their terms.²⁸ This history informed the country's most recent constitutional assembly, convincing them to not only limit the presidential term to a single four-year term, but also to include article 374, which states that the constitutional articles “that relate to . . . the presidential term” cannot be altered.²⁹

This provision belongs squarely in the second category discussed above. It is a response to a particular historical event or series of events that Honduras would like to ensure never again plunges their emerging democracy into turmoil. Article 374 is not a mere normative exercise, with the country's political elite determining that the country would be better served if presidential term limits are never altered.

One can see the important difference between the two positions when an alteration is proposed. In 2009, former President Manuel Zelaya proposed a referendum for the convening of a new constitutional assembly that would

28. See *Background Note: Honduras*, U.S. DEP'T OF STATE (Aug. 18, 2010), <http://www.state.gov/r/pa/ei/bgn/1922.htm>.

29. HOND. CONST. arts. 237, 239, 374; Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 345-46 (2010).

change the term limit and thus allow him to serve more than one term. This move was quickly struck down as illegal, in violation of article 239 as amended by article 374.³⁰ Mr. Zelaya then changed his methods and asked for an “opinion poll” that would determine whether the country’s citizenry desired such a referendum to take place later.³¹ This move was similarly struck down as illegal and resulted in the forced, military removal of a pajama-clad Mr. Zelaya from the Honduran Presidential Palace.³²

While the whole of Mr. Zelaya’s activities does lend itself to the belief that he was attempting to subvert the constitution, his motivations are not the focus of this article, nor is his removal from the Presidential Palace by force and immediate exile to Costa Rica, the legality of which will no doubt be debated for quite some time in Honduran and international legal circles. What must be examined for the purposes of this article is the seemingly broad reading of article 374.

Article 374, which states that presidential terms cannot be altered beyond a single four-year term, was used to strike down an opinion poll asking whether the country would like to see a ballot referendum for a new constitutional assembly at the next election.³³ By any measure, this is an expansive reading of the provision. This liberal reading was no doubt informed by the country’s history and resulting sensitivity to the attempts of incumbent politicians at holding onto their power.

It is extremely unlikely that countries without similar histories would have developed a similar sensitivity to attempts at holding onto power. There is undoubtedly a link between this lack of sensitivity and the lack of public controversies or constitutional court cases in places without similar histories. On a purely hypothetical note, it is difficult to imagine that a country with a history of peaceful transition from one leader to the next would react in a similar manner to the events described above. Indeed there is no shortage of historical precedents where a sitting government began the process of a new constitutional assembly without tremendous public uproar and constitutional court interference.

As the case above clearly demonstrates, the application and interpretation of constitutional law is influenced by the historical context in which it was created. Nowhere is this more prevalent than in the area of fundamental rights.

In addition to the normative ideal/singular event dichotomy discussed above, in certain situations various punishments or government actions simply mean different things in different historical contexts. Perhaps the most salient

30. Miguel A. Estrada, *Honduras’ Non-Coup*, L.A. TIMES, July 10, 2009, available at <http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10>.

31. *Id.*

32. Elisabeth Malkin, *Honduran President is Ousted in Coup*, N.Y. TIMES., June 28, 2009, available at <http://www.nytimes.com/2009/06/29/world/americas/29honduras.html>.

33. See Estrada, *supra* note 30 (discussing attempt by Mr. Zelaya to have referendum).

example of such a difference is the South African Constitutional Court's death penalty jurisprudence.

In *State v. Makwanyane*, the South African Constitutional Court outlawed the death penalty as inconsistent with the constitutional guarantees of a right to life as well as the prohibition of cruel and unusual punishment.³⁴ The decision, written in 1995, had virtually no body of domestic constitutional jurisprudence from which to draw.³⁵ Thus, the decision draws from the constitutional capital punishment jurisprudence of Botswana, the European Court of Human Rights, the United States, and others.³⁶ It also draws on the work of the Human Rights Committee in interpreting the International Covenant on Civil and Political Rights.³⁷

The decision pays particular attention to the case of *Gregg v. Georgia* decided by the United States Supreme Court.³⁸ In fact, the South African Constitutional Court found no substantive difference between the "guided discretion" approach created in *Gregg* and the challenged portion of the South African Criminal Procedure Act.³⁹ The guided discretion approach was found to be constitutional in the United States based on the considerable guidance given to the judge or jury. The Court reasoned that this guidance would eliminate the discriminatory application of capital punishment.⁴⁰

The Constitutional Court did not share the optimism of the U.S. Supreme Court. Writing for the Constitutional Court, former Chief Justice Chaskalson commented on the minute percentage of cases that result in a death sentence and the various factors that could influence those decisions.⁴¹ In many cases, the overriding issue is one of pure chance for the defendant. Often the outcome depends on, for example, how the case is presented to the prosecutor and how it is investigated.⁴² Despite the guided discretion given by the Criminal Procedure Act, race and poverty could also be factors.

Justice Chaskalson notes that "[t]here is an enormous social and cultural divide between those sentenced to death and the judges before whom they appear, who are presently almost all white and middle class," and that "[a]ll this is the result of our history, and with the demise of apartheid this will change. Race and class are, however, factors that run deep in our society and

34. See *State v. Makwanyane* 1995 (3) SA 391 (CC) at 151 (S. Afr.) (describing death penalty as violation of constitutional principles).

35. *Id.* at 20-22 (outlining paucity of sources regarding death penalty in South Africa).

36. *Id.* at 23-37 (looking to other nations for guidance).

37. Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. INT'L L. REV. 209, 220 (2006) (discussing other nations' impact on South African death-penalty jurisprudence).

38. 428 U.S. 153 (1976).

39. See Kende, *supra* note 37, at 222.

40. See *Gregg*, 428 U.S. at 221-24 (noting death penalty rarely imposed for crime of robbery).

41. See *State v. Makwanyane* 1995 (3) SA 391 (CC) at 18 para. 26 (S. Afr.).

42. *Id.* at 34 para. 48 (acknowledging elements of chance at every stage of judicial process).

cannot simply be brushed aside as no longer being relevant.”⁴³

Guided by these facts, the Constitutional Court held that despite the tremendous similarities between *Gregg v. Georgia* and *State v. Makwanyane*, the historical differences of the two nations prevented the court from applying similar reasoning.⁴⁴ While there is considerable debate as to the intent of the drafters of the United States Constitution, there is little doubt that the South African Constitution was created as a socially-transformative document that would bring the nation together after its many years of both de jure and de facto segregation.⁴⁵ The constitutional era was ushered in under the shadow of the racist system of apartheid, in which all of the justices had come of age.⁴⁶ Throughout this era, capital punishment had been used as a method of political and racial repression.⁴⁷

In the above example, the circumstances that existed at the time of the provision’s drafting, and the purposes for the provision, made the *Gregg* reasoning inapplicable in South Africa. While America has experienced considerable racial animus, violence, and marginalization throughout its history, the justices of the Supreme Court felt that such prejudice could be minimized or eliminated through proper guidance from the legislature. South African Constitutional Court justices did not share that belief, based on its prevalence throughout recent South African history, and considered the possibility of discriminatory application of the death penalty to be offensive to the interim constitution.

The South African Constitutional Court examined legal analysis of a provision identical in form to the challenged law. However, upon review, the analysis was distinguished based on the circumstances that surrounded the provision’s passage and its historical context. Each court was tasked with determining whether the amendment prohibited capital punishment through its ban of cruel and unusual punishment. The U.S. Supreme Court examined the law and found that in the long history of America, the punishment “comports with the basic concept of human dignity at the core of the Amendment.”⁴⁸ Alternately, the Constitutional Court examined the relationship between the death penalty and cruel and unusual punishment, finding that based on the history of capital punishment’s use in South Africa as a tool to punish and repress freedom fighters, it was cruel and unusual.⁴⁹

43. *Id.* at 35 n.78.

44. *See id.* at 151-52 para. 262 (Mahomed, J., concurring) (stressing importance of historical background of nations).

45. *See Kende, supra* note 37, at 216-17 (referencing social goals of South African Constitution).

46. *See* Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1748 (2004) (describing Constitutional Court’s transition).

47. Nathan V. Holt, Jr., *Human Rights and Capital Punishment: The Case of South Africa*, 30 VA. J. INT’L L. 273, 303 (1989) (referencing imposition of capital punishment to deter prohibited behavior).

48. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

49. *See generally* Kende, *supra* note 37.

The South African justices were able to look to the jurisprudence of an internationally respected court, examine its reasoning and find that the reasoning espoused by Justice Stewart was not applicable in South African law.⁵⁰ While the two situations were factually identical, they existed in different historical contexts and were based on constitutional articles with different drafting circumstances.

The circumstances surrounding the South African Interim Constitution made the reasoning different and thus changed the result. The court did not “cherry-pick” or simply search for a predetermined policy answer in foreign law; rather it examined other courts’ reasoning given similar factual circumstances, confronted that reasoning, found the reasoning to be different than what was required by the South African Interim Constitution, and reached a different result.⁵¹ This process is at the heart of judging.⁵²

III. INTERESTS CONSTITUTIONAL PROVISION IS DESIGNED TO PROTECT

It is an interesting peculiarity of law that while words on a page may frequently seem to be straightforward, that is never the case. Such is obvious to anyone with experience in the law, regardless of the subject matter. A country’s constitution, generally a broad document full of aspirational statements of positive rights, is seldom as straightforward as it seems. Many courts have been created and academic papers written in attempts to decipher these documents. It may seem trite, but the sheer complexity of constitutional law should be taken into account when examining foreign jurisprudence for use in domestic constitutional litigation. Rights espoused in two foundational documents can appear to be exactly the same but can differ in important ways. Despite linguistic similarities, rights provisions can be designed to protect significantly different interests, a factor that will harm the analysis’s usefulness to foreign litigation.

For example, freedom of religion is a right guaranteed in nearly all constitutions throughout the world and is considered to be a part of customary international law. The right exists in many forms. The International Covenant on Civil and Political Rights has the following to say about the issue:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance,

50. *See id.* at 221 (explaining difference in reasoning due to death penalty’s disparate impact along racial and poverty lines).

51. *See id.* at 220 (discussing court’s examination of cases from variety of countries yet lack of emulating other countries).

52. *See Ackermann, supra* note 7, at 185.

practice and teaching.⁵³

Many constitutional systems, shorten this phrase to “everyone has the right to freedom of conscience, religion, thought, belief, and opinion,” or a similar provision.⁵⁴

Now consider two hypothetical countries, Almriza and Byzcentonia. Both countries are constitutional, republican democracies with a bill of rights that contains a freedom of religion clause. The clauses are identical to chapter 2, section 15(1) of the South African Constitution. However, a brief review of the historical record and the legislative history would show the two articles were written by the constitutional assemblies to protect vastly different interests.

Almriza is a democracy with a considerable Faretee majority as well as many smaller religious minority groups. It emerged following a revolution from an oppressive Faretee theocracy that had enforced its brand of Faretee law on the entire population. Since the revolution, every election has been won by a center-left party. There is no allegation or suspicion of election rigging; it is merely the will of the people that the center-left party continues to govern. This same center-left party was primarily responsible for writing the country’s constitution; however, there was tremendous consultation with other groups. The party, as well as the constitution, is strongly focused on individual rights.

The constitutional assembly in Almriza discussed many rights. Based on the history of the country, as well as its majority Faretee population, what “freedom of religion” would mean was hotly contested. In the end, it was determined that the right allowed the open practice of religion as well as individual freedom from forced adherence to religion and religious law.

Byzcentonia is a peaceful democracy that has existed for several centuries. It did not emerge from revolution or war and has a history of peaceful transition of power. Similar to Almriza, the country has a large Faretee majority as well as many religious minorities. The country’s constitution was written early on in the international constitutional tradition and has a focus on greater well-being. It also ensures individual rights will be respected through the inclusion of a positive bill of rights that can be enforced against the government.

With a history of peaceful transition and harmony, Byzcentonia did not hotly debate its bill of rights. Nevertheless, the clause on freedom of religion was extremely important to the citizens. The clause ensured the country’s religious minorities had a right to practice and could assert that right through the courts if necessary. It also ensured the country’s Faretee majority could continue practicing openly. Above all, the clause secured the right of each citizen to practice whatever religion to which he or she subscribes.

53. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 18(1), U.N. Doc. A/RES/2200 (Dec. 16, 1966).

54. S. AFR. CONST., 1996, ch. 2, § 15.

Both Almriza and Byzcentonia are robust, peaceful constitutional democracies with majority Faretee populations as well as thriving religious minorities. They both have provisions in their constitutions that protect the right to free exercise of religion. However, based on the drafting history, the two textually identical clauses are meant to protect two completely different interests.

While Byzcentonia included the clause in an effort to allow each individual citizen the freedom to practice his or her religion, Almriza included the clause in an effort to ensure that each citizen was protected from religion. This does not imply Almriza opposes the free practice of religion; however, individuals' interest in freedom from religious coercion is of greater importance to the constitutional tradition of Almriza. This subtle difference can have tremendous implications in interpretation.

Consider the case of an individual living near a Faretee temple. Throughout the day and night, the individual is awakened and startled by the calls of the Faretee minister through the loudspeaker, calling worshippers to temple, as well as the tremendous noise created by the bells in the temple's tower. This individual is frightened by the noise. It interrupts his sleep and affects his ability to focus on his job.

The courts of Almriza are much more likely to be sympathetic to legal action by this individual than the courts of Byzcentonia. It is the foundation of the Almriza Constitution that each individual has the right to be free from religion if he or she chooses. This individual, based merely on the location of his home and business, is being held hostage by the religious practices of others.

It is extremely unlikely that the courts of Byzcentonia would be receptive to the man's claim. He has a right to practice any religion, or no religion; however, the bells and loudspeaker are parts of the Faretee religion. Each individual Faretee does not have any less right to practice his or her religion than the complainant.

Such a difference is vitally important in the examination of foreign jurisprudence in domestic constitutional decision making. While international constitutional provisions may be textually similar, they may represent fundamentally different rights than those protected under domestic provisions. There are many instances where such appearances can be similarly deceiving. In order for foreign legal reasoning to apply to domestic litigation, it is vital that the legislative history of the provision ensure the same interest is being protected.

IV. ECONOMIC FACTORS, INCLUDING RESOURCES

Litigation surrounding fundamental rights is always a balancing act. For example, while an individual has the right to a fair trial—as guaranteed by most constitutions internationally, various international conventions, and customary

international law⁵⁵—that right must be weighed against the state’s right to enforce its laws. Similarly, the right to travel is an important internationally recognized right,⁵⁶ but it must not infringe upon the state’s ability to regulate both its populace and the flow of people into and out of its borders. Every discussion on human rights must similarly balance these interests.

Thus, here begins the legal realist section of the paper. Constitutional law does not exist in a vacuum. The state, although limited by its resources, always has the responsibility to adhere to the fundamental rights of an individual. There are constitutional documents that acknowledge this fact. For example, although the South African Bill of Rights directs its legislature to take efforts to ensure citizens have access to land, housing, healthcare, food, water, and social security, it acknowledges that all must be done “within its available resources.”⁵⁷

In the world of comparative law, the question of resources is merely a factor in comparing the factual scenarios of controversies from foreign jurisdictions. Wealth varies worldwide, and we must take this into account when attempting to glean insight from foreign jurisprudence.⁵⁸

Take one example from the right to a fair trial given above. In the case of *Ferreira v. Levin*, Justice Laurie Ackermann of the South African Constitutional Court writes:

The aphorism proclaims that it is better for ten guilty accused to go free than to have one innocent accused wrongly convicted. Does the same hold true if the proportion is stretched to a hundred to one or to a thousand to one? And must a system, which only produces one in a hundred wrong acquittals in one country, be maintained in another if it would consistently give rise to three in five wrong acquittals in the latter?⁵⁹

There can be little doubt that no open and democratic society could survive either extreme, given either its high numbers of not guilty verdicts for clearly guilty persons or a sixty percent wrongful acquittal rate.

It was within this context that the South African Constitutional Court analyzed *Ferreira*. The court determined that while the United States bars the use of both direct and derivative evidence stemming from self-incrimination, doing so in South Africa would be inappropriate.⁶⁰ In addition to subtle constitutional differences, Justice Ackermann found it important that the United

55. G.A. Res. 2200A, *supra* note 53, art. 14 (describing right to fair trial).

56. *Id.* art. 12 (describing right of freedom to travel between states).

57. S. AFR. CONST., 1996, ch. 2, §§ 25-27 (limiting legislature’s duty to provide human rights by South Africa’s resources).

58. See Bentele, *supra* note 4, at 250.

59. *Ferreira v. Levin* 1996 (1) SA 984 (CC) at para. 133 (S. Afr.).

60. See *id.* at para. 152 (describing difference in approach most appropriate for South Africa).

States “has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime.”⁶¹ This forces South Africa to be much more flexible with its approach to criminal justice.⁶²

There are two important things to note about the disparity in resources between countries. First, not all fundamental rights exist in the context of a country’s resources. While it is true that an individual’s right to freedom of expression must be balanced against other individual rights, this balancing rarely requires the use of tremendous resources to enforce. This dichotomy is similar to that of many other fundamental rights and freedoms. With this in mind, it is not a factor that must be considered for all rights jurisprudence, only for those that must be weighed against finite government resources. This includes, among others, various trial rights including the right to a speedy trial and the above-mentioned right against self-incrimination.

Second, and perhaps the most important, nothing in the above analysis suggests that a country with limited resources should be somehow absolved of its human-rights responsibilities. It is the responsibility of every nation to ensure the protection of its citizens. However, that protection exists within a particular context that takes into account a state’s finite resources. The legal system of a particular state should be adapted to the resources they possess. In so adapting, it is possible that jurisprudence from a different economic context would become inapplicable.

V. SOCIAL CHARACTERISTICS, INCLUDING RACE, RELIGION, AND ETHNICITY

The current legal realist analysis is based entirely on the fact that the law does not exist in a vacuum. Where a substantial amount of the world of constitutional law is directly affected by the finite resources of a state, much of the arena is also directly affected by social characteristics. These characteristics include the racial, ethnic, and religious makeup of a country. This is particularly important when one looks at nondiscrimination as a fundamental principle of human rights.⁶³

Within individual democracies there exists a tremendous international variance of racial, ethnic, and religious makeup. For the purposes of examination, South Korea claims near total ethnic homogeneity while some states—in particular those of the post-colonial variety—boast tremendous ethnic diversity.⁶⁴ Ghana, for example, reports nine major ethnic groups, with the largest one being forty-five percent of the population and a robust

61. *See id.*

62. *See id.* (noting South African approach to criminal justice should be flexible).

63. G.A. Res. 2200A, *supra* note 53, art. 26.

64. *The World Factbook: Korea, South*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last updated Aug. 23, 2011).

percentage of the population that describes itself as “other.”⁶⁵ Similar international variation can be found within the categories of both race and religion.

Within this context, the principle of nondiscrimination can be easily enforced in tremendously homogenous societies, or it can take extraordinary amounts of work in diverse societies such as Ghana, the United States of America, or South Africa. Judges are well aware of this reality. It is not merely the racial, ethnic, or religious makeup that judges are aware of, but the socioeconomic realities as well. For example, justices of the South African Constitutional Court found the vision of the Indian Supreme Court tremendously useful because India is also a heterogeneous society with substantial wealth inequality.⁶⁶ Therefore, socioeconomic makeup must be taken into account whenever any foreign jurisprudence is examined in domestic litigation.

Nondiscrimination is also not an absolute principle. While constitutions frequently contain strongly worded warnings banning government action that is dependent on race, religion, or ethnicity, there is considerable disagreement on the proper application of these clauses.⁶⁷ Many international legal scholars believe that these clauses should, and often do, ban all forms of government action based on protected classes; others attempt to classify the challenged laws as either “benign” or “invidious,” with the former being acceptable in an effort to remedy past discrimination and the latter being wholly repugnant to human rights principles.⁶⁸

Certain states have codified this distinction. For example, the Canadian Charter of Rights and Freedoms includes a caveat that “[the nondiscrimination clause] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁶⁹

A similar clause exists in the South African Constitution.⁷⁰ The drafters drew influence from the Canadian Charter.⁷¹ As a result, the South African Constitutional Court has frequently upheld affirmative action legislation. In

65. *The World Factbook: Ghana*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> (last updated Aug. 23, 2011).

66. See Bentele, *supra* note 4, at 238 (identifying Indian Supreme Court’s take on economic issues as particularly helpful).

67. See Michelman, *supra* note 46, at 1738 (discussing difficulties in interpreting anti-discrimination clause).

68. See *id.* at 1738-42.

69. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 15(2), *being* Schedule B to the Canada Act, 1982, c. 11, § 15(2) (U.K.). The Canadian Charter of Rights and Freedoms also includes a standard nondiscrimination clause. *Id.* § 15(1).

70. S. AFR. CONST., 1996, ch. 2, § 9(2) (containing caveat to nondiscrimination clause).

71. See Bentele, *supra* note 4, at 228 (noting Canadian influence on South Africa Constitution).

contrast, the United States Constitution does not contain a similar provision.⁷²

While the South African Constitutional Court has found insight from the American Supreme Court on affirmative action, it has been used mainly to distinguish the holdings. The greatest alternative example is Justice Albie Sachs's reliance on a dissent by the venerable Justice Thurgood Marshall. Marshall spent a great deal of energy distinguishing measures used to segregate and continue a racist past from those used to remedy the effects of that past.⁷³ Justice Sachs wrote that the inclusion of chapter 2, section 9(2), had been an unambiguous certification of the reasoning used by Justice Marshall, one that would be appropriate in a South African context.⁷⁴

It is worth mentioning that the above example is one of fealty to law that is often derided by the critics of the use of foreign jurisprudence. While the American Court is one that is internationally influential—and both America and South Africa are tremendously heterogeneous societies—ultimately it was the wording of the South African Constitution that determined the legal answer. The American holding was examined and found to be inapplicable, both legally and factually, to the Constitution of South Africa. The inclusion of chapter 2, section 9(2) was a clear endorsement of the benign/invidious classification—similar to that written of by Justice Marshall—and ultimately it was the text that controlled.

VI. CONCLUSION

“If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something.”⁷⁵

Over the past few decades there has been a tremendous growth of constitutional courts throughout the world. Such courts are given extraordinary power. That is, the power to undo law that has been passed by democratically elected popular representatives. It can be argued that this is perhaps the most important responsibility in the whole of the legal system.

Moreover, there is no job that should be done with greater care and diligence than the application of sound constitutional principles to the review of legislation. The growth of international constitutional courts, and the maturation of jurisprudence from others, has created an impressive array of

72. See U.S. CONST. amend. XIV (banning discrimination without caveat).

73. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting) (assessing distinction between malicious and remedial legislation).

74. *Minister of Fin. v. Van Heerden* 2004 (6) SA 121 (CC) at para. 148 (S. Afr.) (discussing Justice Marshall's approach to race-motivated legislature).

75. Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion at American University, Washington College of Law (Jan. 13, 2005), available at www.freerepublic.com/focus/f-news/1352357/posts (explaining Justice Breyer's reasons for relying on foreign law).

constitutional jurisprudence throughout the world.

In the particular realm of fundamental rights litigation, there is a tremendous overlap of experience. Through the growing internationalization of law and the frequent import and export of legal systems, there is an ever-expanding similarity among much of the world's human-rights protections. There is no reason why, due to the great responsibility and corresponding due diligence, the body of fundamental human-rights jurisprudence cannot be consulted.

Beyond this obvious possibility is the greater question of what law should be consulted. What ensures that justices will not simply replace legal thought with policy judgment and "cherry-pick" legal reasoning from a legal system that has made the determination he or she desires? The answer is through careful deliberation and the consideration of various legal and nonlegal factors.

It is of the utmost importance to examine the underlying circumstances at the time the provision was passed as well as the interests it is designed to protect. If either of these is considerably different than those in the jurisdiction in question, the analysis will be inapplicable. Constitutional analysis often centers on the balancing of two interests. If the provision was passed under vastly different historical circumstances, the balance may be considerably altered. Similarly, if the article is designed to protect a different interest, then the balancing analysis will be completely changed.

One cannot discount the extraordinary way in which the society that surrounds the court both influences and is influenced by the decisions made within its walls. For this reason, it is imperative to consider factors other than the law as it exists on paper. Often, decisions made by societies with high economic power and great resources would not have the same effect in countries with less economic strength. This is particularly true in the areas of fundamental rights that require great resources to implement, such as those associated with a fair trial. It is also important to consider the racial, ethnic, and religious makeup of a society. States with tremendous homogeneity are likely less affected by human rights problems involving discrimination than heterogeneous ones. Thus, the legal analysis of states with different makeups may be of little use.