

Comparative Constitutionalism in South Asia

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CHAPTER TWO

How to Do Comparative Constitutional Law in India

Naz Foundation, Same Sex Rights, and Dialogical Interpretation



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INTRODUCTION

How should Indian courts do comparative constitutional law? What precise role should comparative materials—constitutional texts and comparative jurisprudence—play in the interpretation of the Indian Constitution? Is their use simply rhetorical, nothing more than legal window-dressing for a judgment that has already been reached on other grounds, and merely designed to demonstrate that Indian judges are cosmopolitan and to impress their foreign peers? Is the citation of comparative materials a judicial attempt to assert India's membership in the family of liberal democracies? Is legal globalization the counterpart to economic globalization, making open

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trade in constitutional ideas the corollary to open access to markets? If the use of comparative constitutional materials does real work, does the practice of cosmopolitan citation carry with it the necessary implication that Indian constitutional adjudication is part of a transnational conversation on the relationship between rights, democracy, courts and the rule of law that knows no jurisdictional boundaries? Is the Indian Constitution merely a legal means to implement rights, that exist independently and apart from the Indian constitutional order, in universal principles of liberal political morality? Or is comparative analysis entirely inappropriate to the interpretation of a document that, as Rajeev Bhargava puts it, is the embodiment of India's 'first real exercise of political self-determination', and as Bhiku Parekh states, 'the clearest statement of the country's self-given identity'?¹

In this chapter, I want to offer a provisional answer to these questions, by puzzling through the recent judgment of the Delhi High Court in *Naz Foundation v. Union of India*,² examining in particular the court's use of comparative constitutional law. Comparative law did real analytic work in *Naz Foundation*. Moreover, *Naz Foundation* neither used comparative materials in a way that was universalist, nor deemed them irrelevant because of a commitment to the particular and distinctive national character of the Indian Constitution. It rejected the choice between universalism and particularism as reflecting a false dichotomy. The court reasoned *dialogically* with comparative materials, and used them as interpretive foils to identify, reframe, and enforce the premises of the Indian Constitution that were articulated during its adoption. At the heart of *Naz Foundation* is the analogy between untouchability and sexual orientation. In a growing number of constitutional systems, courts have condemned discrimination on the basis of sexual orientation, and interpreted constitutional guarantees of liberty and/or privacy in a non-discriminatory manner to encompass sexual intimacy between same-sex partners. The question was whether the holdings

¹ R. Bhargava, 'Introduction', in R. Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford University Press: New Delhi, 2008), pp. 1–42; B. Parekh, 'The Constitution as a Statement of Indian Identity', in Bhargava (ed.), *Politics and Ethics*, pp. 43–58. Neither Bhargava nor Parekh take any position on the use of comparative constitutional law in the interpretation of the Indian Constitution.

² (2009) 160 DLT 277 (hereinafter *Naz Foundation*).

and reasoning of those foreign courts resonated with pre-existing Indian constitutional premises. *Naz Foundation* held that they did. The court appeared to regard sexual orientation and untouchability as analogous, and accordingly seems to have reasoned that the Indian Constitution should condemn discrimination on the latter basis as much as on the former.

This chapter is an intervention in two debates. First, it contributes to the large and growing literature on Indian constitutional law, and in particular, the debate sparked by *Naz Foundation* over the role of comparative materials in that judgment. Second, it is part of a larger effort to change how we situate India in the field of comparative constitutional law. Although vibrant, the field narrowly focuses attention on a few central jurisdictions. The literature is organized around a relatively limited set of cases: Canada, Israel, Germany, New Zealand, South Africa, the United Kingdom, and the United States. India has suffered from comparative neglect. This is regrettable, because the Indian materials have much to contribute to a range of debates that are central preoccupations of the discipline.

One such debate is over the role of comparative materials in constitutional interpretation. Elsewhere, I have identified, elaborated, and defended the dialogical model of comparative constitutional interpretation through a detailed examination of its application in American, Canadian, and South African constitutional jurisprudence.³ The dialogical model provides the best explanation for the use of comparative constitutional law in *Naz Foundation*. Moreover, a close reading of *Naz Foundation* provides an occasion for the refinement of the dialogical model. It illustrates the role of argument by analogy—in this case, the idea that a constitutional system may single out social groups who have experienced severe disadvantage for the highest degree of constitutional protection, and that comparative materials may serve to highlight that other social groups experience analogous forms and levels of disadvantage that warrant a comparable constitutional

³ S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana L.J.*, (1999), 74(3): 819–92; S. Choudhry, 'The *Lochner* Era and Comparative Constitutionalism', *International J. of Const. L.*, (2004), 2(1) 1–55; and S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press: New York, 2006).

response. Additionally, *Naz Foundation* demonstrates that under the dialogical model, comparative materials can be used in a way that not only acknowledges, but also affirms, a distinct constitutional identity. Indeed, reasoning by analogy in *Naz Foundation* led the court to recover and reinterpret foundational constitutional premises that are core to the identity of the Indian constitutional order. The identity-affirming possibilities of comparative engagement have often been overlooked in the recent literature on comparative constitutional law, but are a common feature of constitutional argument across many jurisdictions.⁴ What differs, of course, is the particular constitutional identity that is being affirmed through this shared interpretive method.

THE DOCTRINAL POLITICS OF *NAZ FOUNDATION*

Naz Foundation held the application of Section 377 of the Indian Penal Code to consensual sexual acts of adults in private to be unconstitutional, on the basis of Articles 14, 15, and 21 of the Indian Constitution. In addition to being substantively bold, the judgment is doctrinally innovative. As Vikram Raghavan has carefully explained, *Naz Foundation* breaks new ground on several fronts.⁵ The judgment confidently asserts two propositions—that Article 21’s ‘right to life’ encompasses the ‘right to privacy’ and that the right extends to persons and not places—as if those propositions were settled law, when in fact they are not.⁶ It cites as precedents the Supreme Court’s judgments in *Kharak Singh v. State of Uttar Pradesh*,⁷ *Govind v. State of Madhya Pradesh*,⁸ and *District Registrar and Collector v. Canara Bank*,⁹ even though the support provided by those cases for the right to privacy set out by the court is weak. Without hesitation, *Naz*

⁴ For a similar argument that focuses on the use of Indian constitutional doctrine in the interpretation of the Sri Lankan Constitution, see in this volume, Chapter 6 (Gary Jeffrey Jacobsohn and Shylashri Shankar, ‘Constitutional Borrowing in South Asia: India, Sri Lanka, and Secular Constitutional Identity’).

⁵ V. Raghavan, ‘Navigating the Noteworthy and Nebulous in *Naz Foundation*’, *NUJS L. Rev.*, (2009), 2(3): 397–417.

⁶ Article 21 provides in full: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’.

⁷ AIR 1963 SC 1295 (hereinafter *Kharak Singh*).

⁸ (1975) 2 SCC 148 (hereinafter *Gobind*).

⁹ (2005) 1 SCC 496 (hereinafter *Canara Bank*).

Foundation applied the doctrine of substantive due process under Article 21 to protect the right to privacy, even though that doctrine has been used sparingly since it was announced by the Supreme Court in *Maneka Gandhi v. Union of India*.¹⁰ Prior to *Naz Foundation*, the principal target of the doctrine of substantive due process under Article 21 had been executive action. *Naz Foundation*—along with the Supreme Court’s recent decision in *Selvi v. Karnataka*—may mark the beginning of the application of a substantive due process to legislation.¹¹ Moreover, *Naz Foundation* reformulated that doctrine, elevating the standard of review set out in *Maneka Gandhi*, that the violation of an Article 21 right not be ‘arbitrary’, to a requirement that the state demonstrate that it has a ‘compelling state interest’ for infringing the right, a much more stringent standard.¹²

Tarunabh Khaitan has noted the potentially dramatic implications of *Naz Foundation* for Indian equality doctrine.¹³ The court held that Article 15 prohibits discrimination not only on enumerated grounds but also on grounds analogous thereto, including sexual orientation.¹⁴ Moreover, it also ruled that Article 15 has horizontal

¹⁰ AIR 1978 SC 598 (hereinafter *Maneka Gandhi*). For an overview of the Supreme Court’s Article 21 jurisprudence, see, T.R. Andhyarujina, ‘The Evolution of Due Process of Law by the Supreme Court’, in R. Dhavan, B.N. Kirpal, R. Ramachandran, and G. Subramaniam (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press: New Delhi, 2000), pp. 193–213; M. Mate, ‘The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases’, *Berkeley J. Int’l L.*, (2010), 28(1): 216–60.

¹¹ (2010) INSC 340 (5 May 2010). For commentary, see, A. Chandrachud, ‘Of Constitutional “Due Process”’, *The Hindu* (24 May 2010).

¹² The doctrine of substantive due process is a product of reading Article 21 in light of the doctrine of non-arbitrariness developed under Article 14. For recent commentary, see, A. Chandrachud, ‘How Legitimate is Non-Arbitrariness? Constitutional Invalidity in the Light of *Mardia Chemicals v. Union of India*’, *Indian J. Constitutional L.*, (2008), 2: 179–91. See also, R. Gupta and D. Sharma, ‘Doctrine of Arbitrariness and Legislative Action: A Misconceived Application’, *Nalsar Student L. Rev.*, (2010), 6: 22–34.

¹³ T. Khaitan, ‘Reading Swaraj into Article 15: A New Deal for All Minorities’, *NUJS L. Rev.*, (2009), 2(3): 419–32.

¹⁴ Article 15 provides in full:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

effect and applies to private parties. *Naz Foundation* would subject distinctions on prohibited grounds to strict scrutiny, and thus intervenes in the larger jurisprudential debate over the strict scrutiny standard, whose applicability to violations of Article 15 has been the subject of controversy in *Anuj Garg v. Hotel Association of India*,¹⁵ *Thakur v. Union of India*,¹⁶ and *Subhash Chandra v. Delhi Subordinate Services Selection Board*.¹⁷ Taken together, *Naz Foundation*'s holdings on the scope of Article 15 would revive a provision that has been overshadowed and rendered redundant by the general guarantee of equality in Article 14.¹⁸ On Article 14, the court appeared to hold that the provision prohibits both direct and indirect (that is, disparate impact) discrimination, which in principle should also apply to Article 15.

These aspects of the judgment have generated considerable scholarly debate, both among its critics¹⁹ and supporters.²⁰ The rich

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2. No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
 - a. access to shops, public restaurants, hotels and places of public entertainment; or
 - b. the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
 3. Nothing in this article shall prevent the State from making any special provision for women and children.
 4. Nothing in this article or in Clause (2) or Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

¹⁵ AIR 2008 SC 663.

¹⁶ (2008) 6 SCC 1.

¹⁷ For discussion of the strict scrutiny standard, see, T. Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement', *J. of Indian L. Institute*, (2008), 50(2): 177–208.

¹⁸ Article 14 provides in full: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

¹⁹ M.P. Singh, 'Decriminalization of Homosexuality and the Constitution', *NUJS L. Rev.*, (2009), 2(3): 361–80.

²⁰ Raghavan, 'Noteworthy and Nebulous'; S. Basheer, S. Mukherjee, and K. Nair, 'Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law', *NUJS L. Rev.*, (2009), 2(3): 433–43; P. Baruah, 'Logic and Coherence in *Naz*

tapestry of Indian constitutional jurisprudence defines the parameters of this discussion. What I want to explore, however, is the extensive reliance in *Naz Foundation* on comparative materials. Comparative constitutional law was a central feature of the judgment, and figured prominently at nearly every stage of the court's analysis. As Madhav Khosla has set out, comparative constitutional law was used in several different ways.²¹ Four warrant special mention. First, the court cited comparative case law from the United States, the European Court of Human Rights, South Africa, Fiji, and Nepal, which interpreted the right to privacy as encompassing the right to intimate sexual relations, in support of its holding that Article 21 encompasses the right to engage in such conduct, and was, therefore, violated by the challenged provision.²² This issue attracted the most serious and sustained engagement with comparative materials. Second, the court relied on comparative case law from Canada and South Africa to define the content of the right to dignity, also protected by Article 21, which the court held was violated as well.²³ Third, it turned to the decisions of the United States Supreme Court and the Constitutional Court of South Africa to hold that a facially neutral ban on 'unnatural sex' without reference to sexual orientation in fact deliberately targeted homosexuals as a class, because the prohibited sexual acts were closely associated with homosexuality.²⁴ Fourth, the court looked to decisions from the European Court of Human Rights and the United States Supreme Court to hold that popular disapproval of homosexuality on the grounds of morality, no matter how widespread, is not a legitimate reason to limit constitutionally protected rights.²⁵

While the court relied on comparative materials extensively, it offered little in the way of explanation or justification for this interpretive move. On the scope of the right to privacy, the court

Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity, *NUJS L. Rev.*, (2009), 2(3): 505–24; and S. Mandal, "Right to Privacy" in *Naz Foundation: A Counter-Heteronormative Critique*, *NUJS L. Rev.*, (2009), 2(3): 525–40.

²¹ M. Khosla, 'Inclusive Constitutional Comparison', *American J. Comp. L.*, (2011), 59(4): 909–34.

²² *Naz Foundation*, at para 29.

²³ *Ibid.*, at paras 26, 27, and 49.

²⁴ *Ibid.*, at paras 94–6.

²⁵ *Ibid.*, at paras 75–9.

justified its reference to the American jurisprudence by the fact that the Supreme Court had 'adverted' to these decisions in its own case law on privacy.²⁶ This is an argument from precedent. It is not a substantive justification for why that body of comparative jurisprudence is relevant, for the circumstances under which a court should have reference to it, for the issues with respect to which it is useful, and most fundamentally, for how precisely a court should rely on it. Even if the rote citation of precedent is adequate for the Delhi High Court, it will be insufficient for the Supreme Court. On the citation of comparative case law from other jurisdictions, in which courts found that criminal prohibitions on anal intercourse contravened a rights-protecting instrument, the court simply prefaced the recitation of these decisions under the heading 'global trends'. It failed to explain why these global trends were legally relevant to the interpretation of the Indian Constitution.²⁷

The failure of *Naz Foundation* to justify its use of comparative materials is of legal consequence because of their importance to the constitutional challenge. To understand why this is so, compare the role of comparative materials in *Naz Foundation* and *Lawrence v. Texas*.²⁸ *Lawrence* was one of the three most important foreign precedents cited by *Naz Foundation*—the other two being the European Court of Human Rights' decision in *Dudgeon v. United Kingdoms*²⁹ and the judgment of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*.³⁰ *Lawrence* provides a good analytical model for *Naz Foundation*, both because it involved the overruling of a criminal statute that prohibited anal intercourse and because it cited comparative jurisprudence with which the United States Supreme Court brought American constitutional doctrine into alignment. On one reading, *Lawrence* appears to have been a harder case than *Naz Foundation*, because of *Bowers v. Hardwick*,³¹ which *Lawrence* had to overrule. According to this view, the comparative materials did important work, because they provided the

²⁶ *Naz Foundation*, at para 31.

²⁷ *Ibid.*, heading preceding para 53.

²⁸ 539 U.S. 558 (2003) (hereinafter *Lawrence*).

²⁹ 45 Eur. Ct. H.R. (ser. A) (1981) (hereinafter *Dudgeon*).

³⁰ 1999 (1) SA 6 (hereinafter *National Coalition*).

³¹ 478 U.S. 186 (1986) (hereinafter *Bowers*).

resources to overturn a relatively recent precedent. This is how Justice Scalia's dissent in *Lawrence* characterized the role of foreign law. And this work had to be done in a constitutional system that is famously resistant to comparative constitutional argument—albeit one where that is beginning to change.³² By contrast, there is no equivalent to *Bowers* in India, since the constitutionality of the criminal prohibition on anal intercourse had never come before the Indian courts prior to *Naz Foundation*. So the comparative jurisprudence in that case was not counter-balanced by precedent. Rather, it was used to address a novel constitutional issue. Moreover, the foreign case law was cited in a system that has been open to comparative material from the outset. As Adam Smith has documented, the Supreme Court of India has cited comparative case law from its very inception and at a higher rate in its political and civil liberties cases than in its jurisprudence as a whole.³³

Yet, upon closer examination, *Lawrence* is not as relatively difficult and *Naz* not as relatively easy, as this analysis would suggest. The reason for this is a long line of cases which originated before both *Lawrence* and *Bowers* on the right to privacy and intimate sexual relations: *Griswold v. Connecticut*,³⁴ *Eisenstadt v. Baird*,³⁵ *Roe v. Wade*,³⁶ and *Planned Parenthood v. Casey*.³⁷ Read against the jurisprudence as a whole, *Bowers* was a mistake, and *Lawrence* merely the application and slight extension of a long-standing line of precedents. Indeed, Justice Stevens' dissent in *Bowers*—which was endorsed by the majority in *Lawrence*—conforms to the narrative that the exceptional case that does not fit with the others was *Bowers*, not *Lawrence*. It was *Lawrence* that was demanded by precedent, not *Bowers*. Comparative constitutional law at best merely confirmed a result that flowed naturally from internal sources. *Naz Foundation* was very different. Even prior to *Naz Foundation*, the developing Indian jurisprudence on the right to

³² V.C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press: New York, 2009).

³³ A.M. Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case', *Berkeley J. Int'l L.*, (2006), 24: 218–72.

³⁴ 381 US 479 (1965) (hereinafter *Griswold*).

³⁵ 405 US 438 (1972) (hereinafter *Eisenstadt*).

³⁶ 410 US 113 (1973) (hereinafter *Roe*).

³⁷ 505 US 833 (1992) (hereinafter *Casey*).

privacy, as commentators have noted, rested on unsure foundations.³⁸ Moreover, the issue of whether the right to privacy extends to sexual intimacy had not been decided by the Supreme Court of India, let alone raised in a single appeal. So the internal doctrinal resources available to *Naz Foundation* were meagre in comparison to those available to *Lawrence*. The external resources provided by comparative jurisprudence had to do a lot more work in *Naz Foundation* than in *Lawrence*. Comparative constitutional law mattered, and mattered centrally; indeed, it was the engine of doctrinal innovation in *Naz Foundation*. However, the court took the legal relevance of comparative constitutional law to be self-evident, when in actuality it was not.

Since the petitioner Naz Foundation and the respondent Voices Against 377 both cited these comparative materials, we might expect the justification for their relevance to the interpretation of the Indian Constitution to be found in these citations. This is not the case, however. Naz Foundation merely provides the arguments—or lack of argument—that the court later repeated in its judgment.³⁹ The submissions of Voices Against 377 shed considerable light on the global political-legal strategy of which *Naz Foundation* is a part. In a broad and increasing number of jurisdictions, spanning the developed and developing worlds, in both long-established and emerging liberal democracies, states have decriminalized anal intercourse between consenting adults in private. In some jurisdictions, these changes were brought about through legislation without the involvement of the courts. In other jurisdictions, judicial intervention—through domestic constitutional courts and international tribunals—has played an important role. Thus, Voices Against 377 refers to the cases of ‘key jurisdictions’ that have found unconstitutional criminal prohibitions on anal intercourse to be part of ‘a contemporary international judicial trend’ or ‘global judicial trend’.⁴⁰ The implication is that the Indian courts should participate in this project of legal convergence by finding Section 377 unconstitutional. But again, this begs the question of why the fact of global judicial convergence should count as a reason in Indian constitutional argument.

³⁸ Raghavan, ‘Noteworthy and Nebulous’.

³⁹ Submissions of Naz Foundation in *Naz Foundation*, at paras 42 and 173.

⁴⁰ Submissions of Voices Against 377 in *Naz Foundation*, at paras 1, 2, and 6.

Unfortunately, the legal literature offers insufficient assistance. Despite the fact that recourse to comparative materials is a widespread and long-standing feature of Indian constitutional interpretation, scholars have offered little by way of sustained explanation or justification. Sonia Katyal, Madhav Khosla, and Arun K. Thiruvengadam are notable exceptions.⁴¹ Much of the torrent of legal commentary sparked by *Naz Foundation* mentions its comparative engagement largely in passing, and describes, but does not assess, the court's justifications for this interpretive practice.⁴² Chief Justice Balakrishnan recently addressed the question extra-judicially.⁴³ However, his analysis raises more questions than it answers. Thus, while he acknowledges that Indian courts 'routinely cite' non-binding comparative case law because of its 'persuasive value', he does not set out the circumstances under which such citation is appropriate, or, more fundamentally, what about a foreign judgment would make it persuasive.⁴⁴

Naz Foundation has a conceptual lacuna at its very heart, created by the court's failure to justify the centrality of comparative constitutional reasoning to its judgment. This space has been filled by critics who have politicized the court's use of comparative constitutional law. The parties who opposed the challenge engaged directly on the issue of comparative methodology. The Joint Action Council Kannur attempted to distinguish the foreign cases, on the basis that the

⁴¹ S. Katyal, 'The Dissident Citizen', *UCLA L. Rev.*, (2010), 57(5): 1415–76; Khosla, 'Inclusive Constitutional Comparison'; A.K. Thiruvengadam, 'In Pursuit of 'the Common Illumination of our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia', *Indian J. Constitutional L.*, (2008), 2: 67–103; and A.K. Thiruvengadam, 'The Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective', in C. Raj Kumar and K. Chockalingam (eds), *Human Rights, Criminal Justice and Constitutional Empowerment* (Oxford University Press: New Delhi, 2007), pp. 264–309. See also, S. Shankar, 'The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa', *Drexel L. Rev.*, (2010), 2(2): 373–425.

⁴² See, Singh, 'Decriminalization of Homosexuality', pp. 363, 371 (critical of use of comparative constitutional law); Raghavan, 'Noteworthy and Nebulous', pp. 401, 402, 409, and 413; T. Khaitan, 'Reading Swaraj', p. 424; and S. Narrain, 'Crystallising Queer Politics: The *Naz Foundation* Case and its Implications for India's Transgendered Communities', *NUJS L. Rev.*, (2009), 2(3): 455–68.

⁴³ K.G. Balakrishnan, 'The Role of Foreign Precedents in a Country's Legal System', *National Law School of India Rev.*, (2010), 22(1): 1–16.

⁴⁴ *Ibid.*, pp. 7–8.

cases were brought by specific victims who adduced evidence of the breach of their rights and involved statutes that explicitly targeted homosexuals, which rendered those cases irrelevant to this appeal, which was brought by a public interest organization with respect to a facially neutral law.⁴⁵ But the stronger response came from the Union of India, which in its submissions before the Delhi High Court attacked the reliance on comparative constitutional law from the standpoint of cultural nationalism. Comparative jurisprudence was a mechanism to introduce foreign cultural norms into India that were at odds with norms deeply rooted in Indian tradition, religion and social practice. Thus, in defence of India's cultural distinctiveness, Indian courts should reject the use of comparative jurisprudence. The Union of India submitted that 'the Court should not interpret our Constitution in such a manner to thrust foreign culture in India where the [sic] morality standards are not as high as in India and where the society is governed by different laws and traditions'.⁴⁶

These arguments have created a constitutional politics around *Naz Foundation*, which has driven defensive attempts to reinterpret it. For example, I think this context explains Justice Verma's narrow re-reading of the judgment.⁴⁷ Justice Verma starts from the premise that Section 377 impedes access to HIV/AIDS therapy by homosexuals, because they will not seek treatment for fear of criminal sanction. This effect renders Section 377 unconstitutional because of the interaction of Articles 47 and 21. Article 47 makes it a directive principle of state policy that the state improve public health; Article 21 protects the right to life. Justice Verma argues that reading Article 21 subject to Article 47 creates a right to medical treatment for persons infected with HIV. Section 377 is therefore unconstitutional because it is a barrier to accessing medical treatment. On this reading, *Naz Foundation* did not establish that Article 21 encompasses a right to privacy and that this right to privacy encompasses sexual intimacy, including between homosexuals. The point I want to highlight is that Justice Verma's reinterpretation of *Naz Foundation* relies largely

⁴⁵ Submissions of Joint Action Council Kannur in *Naz Foundation*, at para 9.

⁴⁶ Submissions of Union of India in *Naz Foundation*, at para 43.

⁴⁷ 'Justice J.S. Verma comments on the *Naz Foundation Judgment*', <http://lawandotherthings.blogspot.com/2009/07/justice-jsvermas-comment-on-naz.html> (last accessed on 31 August 2012).

on established internal legal sources, which in part reflects the fact that the court did not adequately defend the recourse to comparative constitutional law. To resist this impulse, advocates of *Naz Foundation* need to defend the use of comparative constitutional law more fully.

THREE MODES OF COMPARATIVE CONSTITUTIONAL INTERPRETATION

I approach this task by briefly placing *Naz Foundation* in context.⁴⁸ The centrality of comparative constitutional law in *Naz Foundation* is far from unique. Constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication. Extensive and detailed treatments of foreign materials have become familiar features of constitutional adjudication in many courts. As Alan Brudner writes: '[T]hose who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions.... This interest, moreover, is a professional one. Comparative constitutional studies are valued, not as a leisurely after-hours pastime, but for the aid they give to judicial...interpreters of a national constitution'.⁴⁹

The growth in the use of comparative jurisprudence is part of a larger phenomenon: the migration of constitutional ideas across legal systems, which has emerged as one of the central features of contemporary constitutional practice. The migration of constitutional ideas occurs at various stages in the life-cycle of modern constitutions. The use of comparative law in constitutional interpretation is but one example. Another is the use of foreign constitutions in the process of constitution-making. Comparative materials are a source not only of models to be adopted and adapted, but also of lessons to be learned and dangers to be avoided.

Like any interpretive practice, the use of comparative constitutional law in constitutional interpretation requires justification. As Alexander Bickel explained over forty years ago, in liberal democracies that have opted for written constitutions enforced by unelected courts, the

⁴⁸ Choudhry, 'Globalization'; Choudhry, 'Lochner'; and Choudhry, 'Migration'.

⁴⁹ A. Brudner, *Constitutional Goods* (Oxford University Press: Oxford, 2004).

power of judicial review is a form of political power that cannot be legitimized through democratic accountability and control.⁵⁰ Courts must legitimize their power through both the processes whereby they determine whether issues come before the courts, and the reasons for their judgments, somehow distinguishing adjudication from other forms of political decision-making. The various features of legal reasoning—*stare decisis*, for example—are more than just the means through which courts arrive at decisions; they define and constitute the unique institutional identity of courts. The very legitimacy of judicial institutions hinges on interpretive methodology. So courts *must* explain why, how, and under what circumstances comparative law should count. And, if courts do not, judicial review is open to the charge of simply being politics by other means, cloaked in legal language and subject to attenuated democratic control.

Although Bickel wrote about constitutional interpretation in the United States, this is not a problem unique to that jurisdiction. In each and every country where the migration of constitutional ideas is on the rise, the demands of justification must be met. This is true even for countries such as South Africa, whose constitution provides that courts 'may consider foreign law' in interpreting its Bill of Rights and therefore licences comparative constitutional interpretation.⁵¹ Left unanswered by this provision are the questions of how comparative law is to be considered, and why and in what context courts should engage with it at all.

Consider three different answers to these questions: the particularist, universalist, and dialogic models of comparative constitutional interpretation.

On the particularist conception, the migration of constitutional ideas, and the use of comparative jurisprudence in particular, stand at odds with one of the dominant understandings of constitutionalism: that the constitution of a nation emerges from, embodies, and aspires to sustain or respond to that nation's particular circumstances, most centrally its history and political culture. As Jürgen Habermas has explained, the citizens of a nation often use constitutional discourse

⁵⁰ A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd Ed. (Yale University Press: New Haven, 1986).

⁵¹ Constitution of the Republic of South Africa, Section 39(1).

as a means to 'clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, [and] how they want to deal with their history'.⁵² Indeed, for some countries, particularly those with a diverse citizenry, lacking a prior or pre-political bond of ethnicity, religion, or race, constitutions are an integral component of national identity and reflect one way in which those nations view themselves as different from others. It is fair to say that constitutions continue to be widely understood in such a particular and local way.

The particularist conception of the nature and character of constitutions has implications for how those documents should be interpreted, and the use of comparative constitutional materials as interpretive aids. According to the particularist view, constitutional interpretation should be situated or particular, and should rely on sources internal to specific political and legal systems. The use of local and particular sources in constitutional reasoning secures the legitimacy of judicial review. Comparative jurisprudence, by contrast, is of no assistance at all, precisely because it comes from outside a given legal system. At best, it represents a foreign curiosity of strictly academic interest and little practical relevance. At worst, its use is a foreign imposition or even a form of legal imperialism.

One possible challenge to this position is the increased convergence of constitutional texts, and, in particular, bills of rights. In particular, there is a core set of rights—for example, the right to life and the Right to Equality—that are found in most bills of rights. Moreover, the precise language of the provisions that entrench these rights is often very similar, reflecting the fact that the process of constitution-drafting is deeply comparative and draws on common models. In the face of this textual similarity, the particularist assertion of constitutional difference may be hard to sustain. However, committed particularists emphasize differences where there appear to be none. On their account, the similarities between constitutions are rather superficial, and conceal profound differences not apparent

⁵² J. Habermas, 'Struggles for Recognition in the Democratic Institutional State' in A. Guttman (ed.), *Multiculturalism: Examining the Politics of Recognition*, 2nd Ed. (Princeton University Press: Princeton, 1994), p.125.

at first glance. Particularists argue that in a post-realist world, it is beyond dispute that legal texts are inherently ambiguous and require reference to extra-textual sources for their interpretation and application in concrete cases. Moreover, although overarching principles of political morality provide some assistance, these arguments quickly run out, because the question then arises of which political morality to choose. For example, in choosing between the appropriate background principle against which to interpret a constitutional Right to Equality—found in many contemporary bills of rights—libertarian and egalitarian theories of justice would counsel divergent interpretations of the scope of the provision in the context, for example, of challenges to reservations or affirmative action. This disagreement on fundamental principle may explain the divergent approaches of the Indian and American supreme courts on precisely this issue.

Significantly, particularists claim that courts, as a matter of empirical fact, do not look outward to foreign experiences to facilitate the choice among these different theories; rather, they turn inward to sources that are internal to a particular country—variously described as the ‘rhetoric and consciousness of those abroad...[that is,] what people believe that they are doing’, the ‘self-characterizations and self-perceptions’ of actors within those legal systems (William Alford),⁵³ cultural and political history (Fred Schauer),⁵⁴ or ‘the legal culture in which the [constitutional] dispute is embedded’ (George Fletcher).⁵⁵ The reliance on a variety of internal sources leads particularists to be deeply sceptical of the viability of transplanting constitutional doctrine from one country to another. For example, Schauer argues that a German court may be able to distinguish between Nazi sympathizers and other peripheral political actors and uphold severe restrictions on the political activities of only the former, whereas an American court could not. This leads him to ‘doubt the recent ease with which constitutional transplantation seems now to be embraced’, because ‘so long as cultural differences are reflected in categorical differences,...[there are

⁵³ W.P. Alford, ‘On the Limits of “Grand Theory” in Comparative Law’, *Wash. L. Rev.*, (1986), 61(3): 947.

⁵⁴ F. Schauer, ‘Free Speech and the Cultural Contingency of Constitutional Categories’, *Cardozo L. Rev.*, (1993), 14(3–4): 865–80.

⁵⁵ G.P. Fletcher, ‘Constitutional Identity’, *Cardozo L. Rev.*, (1993), 14(3–4): 737.

likely] to be pressures militating against the cross-cultural assimilation of cultural categories'.⁵⁶ But the differences that drive particularists need not be cultural, and may reflect instead deep disagreement over the fundamental values underlying the basic structure of political and economic rules and institutions. Thus, a constitution may reflect a commitment to a certain understanding of the relationship between politics and markets, which may in turn undergird the interpretation of constitutional rights to private property.

Next, consider universalists, who stand at the opposite end of the spectrum from particularists. They posit that constitutional guarantees are cut from a universal cloth, and that all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles. Unlike particularists, who emphasize the differences among legal systems, universalists see unity in the midst of diversity. They exhort courts to pay no heed to national legal particularities when engaging in constitutional interpretation. Courts working in the universalist mode regard themselves as interpreting constitutional texts that protect rights that transcend national boundaries. The legitimacy of the reliance on comparative case law is buttressed by the empirical fact of convergence across constitutional systems. An emerging consensus among foreign legal systems—including foreign constitutional courts—is proof of a particular constitutional interpretation's truth or rightness. The law is something to be discovered or apprehended through a process of interpretive reflection; comparative jurisprudence offers a fund of similar reflections by courts and tribunals worldwide as an aid in that process.

In concrete legal terms, universalist interpretation may focus on both the interpretation of rights and their limitation. With respect to the former, universalists would hold that particular rights, such as freedom of expression, freedom of religion, or freedom of association, could each be based on political theories of what interests those rights are designed to protect. Universalists argue that these theories are the same for every constitution in which those rights are found. These theories flow from liberal political morality, which entails that respect for rights is a condition for the legitimate exercise of public power. Comparative jurisprudence becomes a repository of principles to be

⁵⁶ Schauer, 'Constitutional Categories', pp. 867, 879.

relied on as valuable articulations, explanations, and commentaries on the political theories underlying particular constitutional rights. Additionally, foreign judgments suggest how those rights are to be implemented through the crafting of constitutional doctrine, and then applied in concrete cases. A court no longer has to engage in the burdensome and time-consuming task of formulating the theories underlying particular rights, operationalizing those abstract guarantees through constitutional doctrine, or even applying those rights with respect to specific issues, since comparative case law offers a convenient shortcut to attaining these goals.

A parallel logic applies to the question of justifiable limitations. It is a common feature of contemporary constitutional adjudication that rights are not absolute. Constitutional rights may be limited, but those limitations must meet a test of justification. An emerging model for framing the judicial inquiry into justifiable limits on constitutional rights is provided by the doctrine of proportionality. According to this doctrine, rights can be justifiably limited if the limitation is undertaken for a sufficiently important reason, if the means chosen to vindicate this objective actually achieve the objective, if there are no other means available that are equally effective in pursuing the objective and impair the right less than the means chosen, and if the deleterious effects on the right are outweighed by the salutary effects of the rights-infringing measure. On the universalist account, this common template is integral to rights-based adjudication. How one court conceptualizes the notion of proportionality itself, frames the specific legal test that implements it, and applies it in specific cases should guide other courts because they are engaged in a common enterprise.⁵⁷

In sum, following the universalist view, a court's reliance on comparative materials deliberately situates it as part of a transnational discussion among judicial tribunals about the interpretation and application of transcendent legal norms, which takes place through a universal legal language that shares a common grammar and underlying theoretical structure. The implicit image here is that of an international community of states and citizens that shares a basic commitment to a vision of constitutionalism based on the rule of law and the rights of individuals. The legal principles of universalist

⁵⁷ D. Beatty, *The Ultimate Rule of Law* (Oxford University Press: Oxford, 2004).

interpretation are the principles which animate constitutionalism in this community of nations.

Finally, consider the dialogical conception of constitutionalism. In its strongest form, legal particularism regards the mutual unintelligibility or incompatibility of legal systems as a fundamental barrier to the use of comparative jurisprudence. However, this position stands against the widely held—but often unarticulated—view that comparative constitutional law is an important tool for understanding one's *own* legal system, by serving as a stimulus to constitutional self-reflection. Dialogical interpretation proceeds by interrogating what a claim to constitutional difference actually means. Difference is an inherently relative concept; a constitution is only unique because it possesses some characteristic or feature which other constitutions do not. Moreover, since difference is defined in comparative terms, it follows that a keener awareness and a better understanding of difference can be achieved through a process of comparison. In this way, the use of comparative jurisprudence in the correct way, far from being in tension with a commitment to constitutional difference, may in fact both acknowledge it and even enhance an awareness of it.

Dialogical interpretation achieves this goal through three interpretive steps. The first step is to use comparative jurisprudence as a means to identify important assumptions, both factual and normative, that underlie the interpreting court's own constitutional order. There are a number of moves to this argument. The court begins by examining comparative jurisprudence, not primarily to gain an accurate picture of the state of the law in the other jurisdiction, but rather to identify the assumptions that lie underneath it. In the process of articulating the assumptions of comparative jurisprudence, a court will inevitably uncover its own. By asking why foreign courts have reasoned a certain way, a court will ask itself why it reasons the way it does; comparative jurisprudence serves as an interpretive foil.

At the second step, the court compares the assumptions underlying domestic and comparative jurisprudence, and engages in a process of justification. If the assumptions are different, the question becomes why they are different. It is now possible to ask this question because the court's own constitution and jurisprudence has been made 'strange' to it, by contrasting it with a different constitutional world.

Comparative constitutional law exposes the practices of one's own constitutional system as contingent, circumstantial, and mutable; not transcendent, timeless, and inevitable. If the assumptions are similar, one can still ask why—that is, whether those assumptions ought to be shared. A similarity in constitutional assumptions should not be considered fixed and immutable.

At the final stage, the court is faced with a set of interpretive choices. In cases of constitutional difference, if the court rejects foreign assumptions and affirms its own, the value of this exercise has been to heighten its awareness and understanding of constitutional difference, which in turn will shape and guide constitutional interpretation. A constitution can be interpreted not only by reference to what it is, but also in relation to what it is not. Negative anti-models can shape and drive constitutional interpretation, as illustrations of the path to be avoided. Conversely, in cases of constitutional similarity, if similarity once identified is embraced, dialogical interpretation grounds the legitimacy of importing comparative jurisprudence and applying it as law, on the basis of shared normative commitments. In either case, even if comparative constitutional reasoning does not lead to legal change, it nonetheless serves as a device to identify and affirm a constitutional identity. Dialogical interpretation, in other words, leads to a heightened sense of legal self-awareness through interpretive confrontation and clarification.

But the identification and attempted justification of constitutional assumptions through comparison may lead a court to challenge and reject those assumptions and search for new ones. From a starting point of constitutional similarity, a court may reject shared assumptions and stake out a new interpretive approach proceeding from radically different premises. Dialogical interpretation precipitates a shift from constitutional similarity to constitutional difference. Where the *status quo* is constitutional difference, a court may determine that difference to be unfounded. This new-found similarity, in turn, makes comparative jurisprudence a resource for constitutional interpretation. The process of dialogic interpretation can lead the court to fundamentally re-assess its previous judgments, and to use comparative jurisprudence as a means to initiate legal change. Comparison with a different constitutional perspective exposes one's assumptions as contingent, a first step to interpretive

change. Comparative constitutional reasoning facilitates and enables constitutional choice.

Under dialogical interpretation, the constitutional premises that a court identifies, clarifies, and challenges fall into different categories.

Some premises set out the basic mission of the constitutional order as a whole. Consider an illustrative example from South Africa. Under the Interim Constitution, an important question was whether the Bill of Rights applied to the common law-governing relationships between private parties. In *Du Plessis v. De Klerk*,⁵⁸ a majority held that it did not, following the alleged trend among liberal democracies for bills of rights to apply only vertically against the State, not horizontally against private parties. Justice Johann Kriegler filed the leading dissent. He began by identifying the assumption underlying this supposed consensus. That consensus proceeded from the basis that the principal threat posed to individual rights comes from the repressive use of State power. Kriegler argued, however, that the assumption underlying the South African Bill of Rights was different, because the sources of oppression historically in South Africa were both public and private. He identified this assumption by reference, *inter alia*, to the Interim Constitution's Preamble, that gestured to a South African past which was not 'merely one of repressive use of State power[,]...[but] one of persistent, institutionalized subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority'.⁵⁹ In the process of identifying that assumption, he justified it, both in terms of South Africa's racist past as well as the current 'stark reality of South Africa and the power relationships in its society'.⁶⁰ As a consequence, the interpretive choice was clear, and Kriegler held that the Bill of Rights applied both vertically and horizontally, expressly declining to follow the alleged consensus. But even though Kriegler reached this conclusion based on a recognition that the Interim Constitution was unique or different, he defined this difference in comparative terms. Although this premise shaped the interpretation of the provision governing the application of the Bill of Rights, because it was rooted in an

⁵⁸ 1996 (3) SALR 850 (CC).

⁵⁹ Interim Constitution, Preamble.

⁶⁰ *Du Plessis v. De Klerk*, 1996 (3) SALR 850 (CC) at 912.

underlying conception of the purpose of the entire constitutional order, it potentially had a bearing on other questions—for example, the degree of deference to be shown to political institutions that seek to redress power imbalances through measures targeted at private entities.

Other premises constitute part of the political theory underlying specific constitutional provisions, as opposed to the constitution as a whole. Justice Albie Sachs' judgment in another South African decision, *State v. Solberg*—which considered a constitutional challenge to the prohibition of liquor sales on Sundays—provides a useful example.⁶¹ One ground of challenge, that the law amounted to an unconstitutional endorsement of Christianity, relied on American jurisprudence under the Establishment Clause. The argument was that this body of case law stood for the proposition that the very idea of freedom of religion encompassed the notion of State non-endorsement, and hence, that the specific South African provision guaranteeing freedom of religion should be interpreted accordingly. The majority judgment rejected this argument, and turned back the constitutional challenge. Although not fully theorized, the implicit argument in the majority judgment is that the combination of a specific constitutional permission for religious services in public facilities, and the discipline imposed by the equality guarantee on government activity, yields the principle of non-preferentialism rather than non-endorsement. Justice Sachs' dissent relied on American constitutional doctrine to challenge this unstated but central assumption. For Justice Sachs, the normative claim underlying the American Establishment Clause case law was the notion of political equality. However, he did not accept this principle in the manner of universalist interpretation. Rather, he used it as an invitation to peer into South African history and determine whether political equality was bound up with the freedom of religion in a way that justified its incorporation into the interpretation of the constitutional provision expressly guaranteeing the latter. This history betrayed a deliberate and express state preference for Christianity in public policy, based on the view that other faiths were not only different, but also deviant and inferior. Against this backdrop, the social meaning of any

⁶¹ 1994 (4) SALR 1176 (CC).

contemporary preference for Christianity is to serve as a reminder of the historically subordinate position of other faiths. As a consequence, Justice Sachs concluded that prohibiting State endorsement as a means to political equality through an idea drawn from American jurisprudence had 'special resonance in South Africa' and therefore was a South African constitutional assumption too.⁶² Doctrinally, the notion of political equality translated into a bar on the enactment of laws for religious reasons under the constitutional guarantee of freedom of religion.

Finally, the premises may concern the application of constitutional guarantees in specific cases. Consider Mayo Moran's contrast of the American and Canadian constitutional jurisprudence on hate speech targeted at racial and religious minorities.⁶³ American constitutional doctrine bars the criminal prohibition of hate speech, while Canadian constitutional doctrine permits it. Moran argues that the diametrically opposed conclusions of the American and Canadian courts—both adjudicating rights-protecting constitutional instruments in countries that are widely acknowledged to be liberal democracies and enjoy a high degree of political freedom—cannot be explained by differences between the relevant constitutional texts. Rather, this difference turns on divergent background assumptions about the nature of hate speech, the interests at stake in its regulation, and the nature of the State, which are exposed through constitutional comparison. In the American constitutional tradition, hate speech is regarded as a form of extreme political expression, whereas in Canada it is the verbal manifestation of racial and religious discrimination. This difference in turn leads to differing accounts of the interests at stake. In the United States, the criminal regulation of hate speech pits the individual against the coercive State, which is the only source of threat to individual freedom. In Canada, the targets of hate speech are conceptualized as victims, meaning that the criminal regulation of hate speech is a contest between differing private interests, which the State must balance. Through criminalizing hate speech, the State acts to protect the freedom of its victims. Moreover,

⁶² Ibid., at 1229.

⁶³ M. Moran, 'Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech', *Wisconsin Law Review*, (1994), 6: 1425–514.

in the Canadian view, there are important public interests at stake, because hate speech impedes equal participation in political debate and democratic decision-making by its victims. Finally, the State is viewed with relatively greater suspicion as a potential source of political repression in American constitutional doctrine than under Canadian jurisprudence, where the state is more likely to be regarded as a trustworthy custodian of public interest.

Dialogical interpretation can reinforce moments of constitutional difference, but can also fuel convergence across different constitutional systems. Since convergence is also the outcome of universalist interpretation, this raises the question of how the dialogical and universalist interpretive modes are related—indeed, whether they are different modes at all. Consider two different accounts of dialogical interpretation. One view would hold that universalist interpretation is nested *within* the dialogical model. Under this view, arguments for convergence necessarily rely on universalist premises. Thus, a blanket prohibition on torture, which one court has interpreted as entailing a corresponding prohibition on deportation to torture, should lead another court to reach the same result, on the basis of a shared commitment of the two constitutional systems to a universal principle of liberal political morality. Conversely, the absence of universal norms would open the space for—but not require—constitutional difference. The identity-affirming aspects of dialogical interpretation, on this account, could only operate within the space left over by a universal principle. The notion of the ‘margin of appreciation’, central to European human rights law, captures this idea. Now, to be sure, the space for national constitutional difference in fact is fairly large. The rights with respect to which universalist interpretation can be invoked are relatively limited in scope. The central case may be those rights that affect the physical security of the individual. By contrast, even the traditional liberal freedoms (such as expression, religion and conscience, association, and assembly), although enshrined by many constitutions, are more normatively contentious. Though courts of various jurisdictions agree on the importance of these rights, they have differed sharply on their interpretation. These differences in interpretation manifest themselves in different ways. In some cases (for example, the interpretation of rights to equality), courts might diverge on the scope of the right. But in many others, courts may

diverge in proportionality analyses, with respect to the range of legitimate reasons for which rights can be violated, the degree of deference to be shown to the state, and so on.

But there is a second view of dialogical interpretation that sharply distinguishes it from the universalist interpretation. This view takes distinct national constitutional identities seriously, but nonetheless charts a path to constitutional convergence in the teeth of such difference. It proceeds from the starting point that constitutional interpretation is a form of reasoning within a distinct national constitutional tradition that must occur on its own terms. National constitutional traditions are distinctive in three ways. First, a constitutional tradition consists of the total set of outcomes of constitutional interpretation. This set of outcomes will differ across systems, because of the contingency of the range of constitutional issues that arise under each system, and the inevitability of divergent interpretations on some common issues. Second, national constitutional traditions will be necessarily distinct if a court habitually relies on interpretive methods that incorporate by reference particular features of a nation's constitutional practice—its constitutional text, the particular historical circumstances that surrounded the adoption of the document, and the views of its framers on the meaning and applications of the constitutional text.

The third dimension of the distinctiveness of national constitutional traditions is methodological distinctiveness. To be sure, methodological diversity does not mean that the kinds of arguments that are acceptable in constitutional systems are radically different. On the contrary, as Jeff Goldsworthy has recently argued, courts in Australia, Canada, Germany, India, South Africa, and the United States rely on a shared set of interpretive methods. These include textual (including intra-textual methods), originalist (both original intent and original meaning), teleological or purposive, doctrinal or precedent-based, structuralist (drawing inferences from a single provision or sets of related provisions), prudential, and ethical or moral approaches to constitutional interpretation.⁶⁴ But each national constitutional tradition differs in the relative emphasis and interrelationship they

⁶⁴ J. Goldsworthy, 'Conclusions', in J. Goldsworthy (ed.), *Interpreting Constitutions* (Oxford University Press: Oxford, 2006), pp. 325–45.

accord to those methods. The methodological matrix of a national constitutional tradition defines an argumentative space within which acceptable forms of constitutional argument occur. For example, in the United States, Mark Tushnet argues that precedent and considerations of administrability are the most important components of constitutional interpretation, followed in descending order of importance by constitutional text and original intent and meaning, structure, and ethical or moral considerations.⁶⁵ By contrast, Donald Kommers suggests that structural, purposive, and ethical reasoning are of much greater relative importance in Germany.⁶⁶

So where does this leave dialogical interpretation? Within a given constitutional tradition, a particular constitutional outcome may be demanded by the combination of local sources and by the methodological distinctiveness of that tradition. But in most cases, those contingent features of a constitutional tradition merely rule out, and do not require, specific constitutional decisions. Rather, they create an argumentative space within which a tradition is open to elaboration, reinterpretation, contestation, and change. Comparative constitutional materials can figure into this process and lead to constitutional convergence. They do so by dispelling the illusion of false necessity, and by illustrating concretely other constitutional possibilities. The possibility of convergence is greatest in those constitutional spaces where ethical or moral arguments hold sway. But under the dialogical model, historical, teleological/purposive, structural, and prudential arguments also benefit from comparative materials.

Consider again the distinction between specific prohibitions on Nazi speech and the right to engage in other forms of advocacy of extreme political opinions. This distinction is permissible under German constitutional law but prohibited under American constitutional law. To Schauer, the sustainability of this distinction in Germany is dependent on the experience of Germany with Nazi rule, which subverted democracy from within.⁶⁷ The absence of

⁶⁵ Mark Tushnet, 'US: Eclecticism in the Service of Pragmatism', in Goldsworthy, *Interpreting Constitutions*, pp. 7–54.

⁶⁶ D. Kommers, 'Germany: Balancing Rights and Duties', in Goldsworthy, *Interpreting Constitutions*, pp. 161–211.

⁶⁷ Schauer, 'Constitutional Categories'.

such an experience in the United States explains the unsustainability of this distinction in American constitutional doctrine. However, a third jurisdiction may have experience with a past totalitarian regime similar to Germany's that seized power from within, which may serve to support the constitutionality of a parallel distinction. Constitutional convergence would proceed not from universal principles but from a combination of teleological and historical analogy. The interpretive power of the analogy is contingent on a comparable historical experience.

Under the dialogical model of comparative constitutional interpretation, reasoning by analogy can play an important role. Legal argument—especially in the common law world—often proceeds by analogy.⁶⁸ The use of analogy captures the basic intuition that like cases should be treated alike. To state that two cases are analogous accordingly requires the identification of the underlying rationale that explains and justifies the treatment of the first case and argues that the second case should be treated in the same way. The response to an argument from analogy is to counter that the cases are in fact unlike, again by reference to this underlying rationale. Arguments from analogy figure prominently in the incremental development of legal doctrine under common law systems. In the adjudication of rights-protecting instruments, arguments by analogy can figure into each stage of analysis. An argument from analogy can figure into the interpretation of the scope of a right (for example, what activities fall within the scope of the Right to Liberty or privacy or what kind of treatment is prohibited by the Right to Equality), and under proportionality analysis (for example, what kinds of speech are sufficiently harmful to justify their criminal prohibition).

Arguments from analogy can draw on comparators that are internal or external to a legal system. Internal analogies emerge from within a legal order. They accordingly combine arguments from principle with arguments from authority, since the first case exerts some binding force on the adjudication of the second case, captured by Ronald Dworkin's notion of 'articulate consistency'.⁶⁹ However, an

⁶⁸ C. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press: New York, 1996), Chapter 3.

⁶⁹ R. Dworkin, *Taking Rights Seriously* (Duckworth: London, 1977).

argument from analogy can proceed without a claim to authority—that is, by an appeal to principle alone. This is how an analogy that is external to a legal system functions in legal argument. On this model, the first case compels a court to explain and justify why the second case should be treated any differently, without any legal obligation to treat the two cases identically. Thus described, arguments from analogy are an important tool in dialogical interpretation, since they facilitate the process of interpretive confrontation and clarification by forcing courts to explicitly identify the premise to a doctrinal position. Moreover, analogies are not restricted to historical ones, as I will argue below by reference to *Naz Foundation*.

NAZ FOUNDATION AND DIALOGICAL INTERPRETATION

Do these analytical models for the use of comparative constitutional law in constitutional interpretation shed light on *Naz Foundation* and the debates it has spawned? I think that they do. The argument against the role of comparative constitutional law offered by the Union of India before the Delhi High Court (it has since dropped its opposition to the challenge to Section 377) is clearly a particularist argument, which I term as *cultural nationalism* for the sake of convenience. Albeit highly compressed and devoid of any extended defence, it entails the following claims: (a) the Constitution should be interpreted to be consistent with Indian cultural norms; (b) when interpreting the fundamental rights provisions of the Constitution, courts should prefer interpretations that are consistent with Indian cultural norms and reject interpretations that are inconsistent with them; (c) when determining whether violations of rights are justifiable, courts should defer when legislation reflects Indian cultural norms; and (d) comparative materials are an irrelevant and illegitimate aid to constitutional interpretation, since by definition they come from outside the Indian cultural context.

In *Naz Foundation* itself, the asserted cultural norm was the disapproval of homosexuality. Within the particularist framework, the rejection of comparative constitutional law therefore meant that: (a) the Constitution should be interpreted in a manner that is consistent with the rejection of homosexuality; (b) the right to privacy should not be interpreted as protecting the right to sexual

intimacy among homosexuals, and the Right to Equality should not be interpreted as prohibiting distinctions drawn on the basis of sexual orientation because that would be inconsistent with Indian cultural norms that disapprove of homosexuality; (c) if those rights have been violated, the court should defer because Section 377 reflects an Indian cultural norm that disapproves of homosexuality; and (d) comparative jurisprudence which holds to the contrary on one or more of these points is irrelevant.

Naz Foundation placed comparative constitutional law at the heart of its reasons. So it must have rejected the argument from cultural nationalism. But how did it do so? There are in fact two ways to read the judgment: one that applies the universalist model, another that applies the dialogical model. I will consider each in turn.

The most straight-forward reading of *Naz Foundation* is that it endorses and applies a universalist understanding of the place of comparative jurisprudence in the adjudication of rights-protecting instruments. The universalist response to cultural nationalism in *Naz Foundation* would consist of the following propositions: (a) the Constitution should be interpreted to be consistent with the principles of liberal political morality; (b) Article 21 should be interpreted as protecting the right to privacy, which in turn entails the right to sexual intimacy, including for homosexuals, and Articles 14 and 15 should be interpreted as prohibiting discrimination on the basis of sexual orientation; (c) even if Section 377 reflects an Indian cultural norm that disapproves of homosexuality, courts should not defer to Section 377 simply because it reflects Indian cultural norms; and (d) the court should cite and apply comparative materials that stand for one or more of these propositions as if they were law.

Much of *Naz Foundation* fits this account. Consider the following examples. In its analysis of the scope of the right to privacy under Article 21, the court shuttles back and forth between Indian and American jurisprudence and in effect treats the two as if they were one integrated body of case law. To reiterate, it was the American decisions, not the Indian decisions, which historically located sexual intimacy in the right to privacy (although its current constitutional foundation is the Right to Liberty). The American cases are cited as establishing propositions for what privacy means, and those propositions are applied to the interpretation of Article 21, without

any apparent regard for the fact that those decisions emerged from a foreign constitutional system and involved the interpretation of a different constitutional rights-protecting instrument. Thus, the court begins its analysis of the right to privacy with American cases, including those on sexual intimacy (*Griswold*, *Eisenstadt*, *Roe*, and *Casey*), which are taken to set out the parameters of American privacy constitutional doctrine; the court then turns to the Indian case law on privacy (*Kharak Singh*, *Govind*, *Rajagopal*, and *Canara Bank*), and then sums up that the right to privacy encompasses

...a sphere of private intimacy...which allows it to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually without harming the other, invasion of that precinct will be a breach of privacy.⁷⁰

The conclusion implicitly assumes that this proposition holds true for any constitutional bill of rights that guarantees the right to privacy. The right to privacy is wrenched out of its jurisdictional context and appears to be a transcendent constitutional norm that is implemented in specific national bills of rights.

Another example of universalist interpretation at work in *Naz Foundation* appears in its response to the question of reasonable limits on rights. Recall that the Court held that moral disapproval was an inadmissible reason to justifiably limit constitutional rights. How did the Court derive this doctrine? It began with *Govind*, which, it stated, held that only a compelling state interest could justify the limitation of a fundamental right. It then stated that the mere enforcement of public morality was insufficiently important to rise to the level of a compelling state interest. As support for this development of the compelling state interest doctrine, it cited *Lawrence*, *Dudgeon*, and *Norris v. Ireland*⁷¹ (another decision of the European Court of Human Rights), which all took this view in challenges to criminal prohibitions on anal intercourse, but within the context of interpreting and applying the American Constitution

⁷⁰ *Naz Foundation*, at para 40.

⁷¹ 142 Eur. Ct. H.R. (ser. A) (1988).

and the European Convention on Human Rights. It then concluded: 'Thus popular morality or public disapproval of certain Acts is not a valid justification for restriction of the fundamental rights under Article 21'.⁷² Unlike the right to privacy, where there was at least some Indian case law, the precedents cited and applied here were entirely comparative. Once again, this principle appears to float above the Indian constitutional system, as part of a trans-jurisdictional body of constitutional doctrine.

I suspect that this is how both *Naz Foundation's* proponents and opponents would characterize it. However, this reading of *Naz Foundation* cannot explain one of the most striking features of the judgment—its invocation of the ideals animating the adoption of the Indian Constitution, as described by scholars and reflected in the writings and speeches of its most important framers. For example, at the end of its treatment of Article 21, the court noted that the 'fundamental rights had their roots deep in the struggle for independence' and referred to Granville Austin's explanation that 'they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India'.⁷³ In a parallel fashion, after the court concluded that public morality could not justify the limitation of rights, it referred to Austin's argument that one of the basic purposes of the Indian Constitution was to achieve or foster a 'social revolution', which the court defined as the creation 'of a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately'.⁷⁴ Finally, at the end of its reasons, after it had addressed all the constitutional issues—including the appropriate remedy—the court invoked Jawaharlal Nehru and his speech on the Objective Resolution in the Constituent Assembly to argue that one of the underlying themes in the Indian Constitution is 'inclusiveness'. It continued:

This Court believes that [sic] Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The

⁷² *Naz Foundation*, at para 79, citing Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press: New Delhi, 1966).

⁷³ *Naz Foundation*, at para 52.

⁷⁴ *Naz Foundation*, at para 80.

inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately.⁷⁵

This material on the point and purpose of the Indian Constitution is a world away from the constitutional cosmopolitanism that sets the character and tone of the rest of the judgment. It is a direct and decisive response to the argument from cultural nationalism, as I will explain below. However, two aspects of how the court situated this material in its judgment undermine its power. First, the passages that raise these arguments occur *after* the court reaches the legal conclusion to which they relate. Their location suggests that their absence would have made no legal difference to the judgments; they did not do any work, but were afterthoughts. Moreover, the sections that did do the work were framed around comparative constitutional law. This leads to a second and more fundamental point. The judgment, in a very basic sense, speaks in two voices: a global voice that draws heavily on constitutional jurisprudence from abroad, and an Indian nationalist voice that gives pride of place to the political project underlying the adoption of the Indian Constitution. In addition to failing to justify its use of comparative constitutional law, the court also fails to provide any explanation for how the externally and internally driven parts of its reasons are connected. Given the location of its treatment of Indian constitutional history, it seems that the external sources mattered more than the internal ones.

However, there is a more complex reading of the judgment that shows how the apparently divergent parts of the reasons are in fact closely linked. Here is the key passage:

The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India

⁷⁵ *Naz Foundation*, at paras 130–1.

estimates the MSM number at around 25 lacs. The number of lesbians and transgenders is said to be several lacs as well. This vast majority (borrowing the language of the South African Constitutional Court) is denied 'moral full citizenship'. Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in *The Indian Constitution: Cornerstone of a Nation*, 'they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India'.⁷⁶

The passage combines a reference to South African constitutional jurisprudence with one to the purposes animating the adoption of the Indian Constitution. The link between the two, however, is not set out. Moreover, the quote is unattributed. As it turns out, it is a slight misquote. The original reads 'full moral citizenship', and comes from the separate concurring judgment of Justice Albie Sachs in *National Coalition*, the South African analogue to *Naz Foundation*.⁷⁷ One of the issues raised in *National Coalition* was the relationship between the Right to Equality and the right to dignity, which are two textually distinct rights under the South African Constitution. It had been argued that the textual distinction between the two meant that the two rights should be doctrinally distinct—in particular, that equality be interpreted without reference to dignity. Justice Sachs rejected this position, and held instead that to treat someone in a way that is dignity-demeaning is the very essence of unequal treatment. He wrote:

In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group. ... Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group, pressurized by society and the law to remain invisible; their identifying

⁷⁶ *Naz Foundation*, at para 52.

⁷⁷ *National Coalition*, note 31 at para 127.

characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. ... At the heart of equality jurisprudence is the rescuing of people from a *caste-like status* and putting an end to their being treated as lesser human beings because they belong to a particular group.⁷⁸

The analogy drawn by Justice Sachs in *National Coalition* between sexual orientation and caste is highly suggestive of the possible influence of his reasons on *Naz Foundation*. An illuminating source of insight is an edited transcript of the hearing.⁷⁹ Although the transcript is not verbatim, this limitation is counter-balanced by the fact that the transcript is actually a narrative description of the oral argument that describes the interplay between the bench and counsel. Here is the account of the portion of the proceedings during which *National Coalition* was raised in argument:

As Mr. Grover [counsel for *Naz Foundation*] was reading from the South African decision, the visibly moved judges began conferring amongst themselves.... Chief Justice Shah, noticing that the Additional Solicitor General was not present in court, remarked, 'I don't know what assistance we are going to get from the government. The ASG is not here. He should have been here to listen to this'. He [Grover] then compared discrimination based on sexual orientation to discrimination based on caste. 'If you belong to the "untouchable" category, you suffer a disadvantage in every aspect of life. The effect of criminalisation (of homosexuality) is like treating you as a member of a scheduled caste', he said. ... The judges asked Mr. Divan [counsel for *Voices Against 377*] if it was possible to link the petitioners' arguments to the constitutional provisions in Article 17 and 23 that deal with untouchability.⁸⁰

Thus, the missing link between the comparative jurisprudence on same-sex rights and the basic premises of the Indian Constitution is the analogy between sexual orientation and untouchability. The

⁷⁸ *National Coalition*, at paras 127–9 (emphasis added).

⁷⁹ 'Edited Transcripts of Day-to-Day Proceedings before the Delhi High Court in the Matter of *Naz Foundation v. Union of India*', in A. Narrain and M. Eldridge (eds), *The Right that Dares to Speak Its Name—Naz Foundation v. Union of India and Others: Decriminalising Sexual Orientation and Gender Identity in India* (Alternative Law Forum: Bangalore, 2009), p. 48.

⁸⁰ *Ibid.*, p. 54.

Indian Constitution singles out untouchability for special and selective condemnation. Article 17—mentioned by the Bench in *Naz Foundation* in oral argument—lies at the heart of this constitutional project. Article 17 provides in full: “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law’.” This is a unique constitutional provision. The other provisions of Part III (‘Fundamental Rights’) apply to government, and direct it to act or refrain from acting in certain ways. Article 17, by contrast, purports to abolish a social status, and the social practices that revolve around that status, which exist apart and independent from State action. In other words, Article 17 applies horizontally. Moreover, it goes much further, and mandates that the private breach of this constitutional duty must be punishable by criminal sanction. Article 17 is accordingly the constitutional underpinning of the Anti-Untouchability Act, 1955 and the Scheduled Castes and Scheduled Tribes Act, 1989, which criminalize the preaching and practice of untouchability.

Article 17 reflects the view, as Gopal Guru puts it, that ‘dignity may not easily come forth from the upper castes; it will have to be forcibly extracted from the recalcitrant members of twice-born civil society’.⁸¹ The whole constitutional architecture of reservations for Scheduled Castes—found in Articles 15(4), 16(4), 29(2), 330, and 332—which aim to fundamentally redistribute economic, political, and social power towards the Scheduled Castes, is designed to compensate for millennia of neglect and exploitation. As Guru explains, the nationalist movement was not just about the advocacy of self-government to oppose ‘the colonial configuration of power’, but also about the promotion of social justice to challenge ‘local configurations of power’.⁸² Indeed, it was ‘one of the central organizing and mobilizing principles of the nationalist movement’.⁸³

What analogy did the court see between untouchability and sexual orientation? Unfortunately, the court does not say. Indeed, it does

⁸¹ G. Guru, ‘Constitutional Justice: Positional and Cultural’, in R. Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford University Press: New Delhi, 2008), pp. 230–48.

⁸² *Ibid.*, p. 232.

⁸³ *Ibid.*

not refer to Article 17 at all in its judgment, notwithstanding its significance during the hearing. But perhaps the argument is this. *Naz Foundation* held that the effect of Section 377 was to create a status offence—to ‘be classified as criminal as such’.⁸⁴ Since Section 377 criminalizes ‘these sexual acts which...are associated more closely with one class of persons, namely the homosexuals...Section 377...has the effect of viewing all gay men as criminals’.⁸⁵ Section 377 effectively brands homosexuals as outlaws who do not enjoy the law’s protection. The court described the effects of this status offence:

Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as ‘unapprehended felons’, thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. There is extensive material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise [the] MSM and gay community.⁸⁶

But what is the link between sexual orientation and untouchability? The treatment which homosexuals experience today is similar in kind to that which ‘untouchables’ experience and which prompted the adoption of Article 17, and likewise flows from their social status. As was noted during the Constituent Assembly Debates, the purpose of Article 17 was ‘to save one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace’.⁸⁷ This manifest injustice was delivered not by the hands of the State, but ‘by a vast mass of Hindu population which is hostile to them and which is not ashamed of committing any inequity or atrocity against them’.⁸⁸

Where does this leave us? The comparative jurisprudence on the criminal prohibition of anal intercourse was not simply applied as

⁸⁴ D. D’Souza, *Branded by Law: Looking at India’s Denotified Tribes* (Penguin: New Delhi, 2001), p. 57.

⁸⁵ *Naz Foundation*, at para 94.

⁸⁶ *Naz Foundation*, at para 50.

⁸⁷ Voices Against 377, ‘Note on the Constituent Assembly Debates and Equality’, supplemental submission in *Naz Foundation*, at p. 2 (quoting speech of Monomohan Das).

⁸⁸ *Ibid.*, at p. 3.

the universalist model of comparative constitutional interpretation would suggest. The picture is more complex. Comparative materials led the court to revisit and update the premises of the Indian Constitution. The engine of this change is the analogy between untouchability and sexual orientation. The court may have reasoned that the two were indeed analogous, and accordingly that the Indian Constitution should condemn discrimination on the latter basis as much as on the former. This mode of comparative constitutional reasoning is dialogical. External legal sources were used as a foil to constitutional self-reflection, and to nourish and reframe the judges' reading of internal constitutional sources. The question was whether comparative constitutional law resonated with pre-existing Indian constitutional premises. *Naz Foundation* held that it did.

The doctrinal implications of this reading of *Naz Foundation* are unclear, and remain to be worked out, perhaps by the Supreme Court of India, when it renders its judgment on appeal. It may be that Article 17 has a constitutional significance beyond its express prohibition on untouchability. *Naz Foundation* could stand for the proposition that there is a constitutional doctrine that grows out of Article 17, whereby groups that experience disadvantage analogous to that experienced by 'untouchables' are entitled to the highest degree of constitutional protection. This disadvantage occurs along multiple dimensions—social, economic, and political—which are mutually reinforcing. This doctrine may be analogous to the suspect class doctrine under American constitutional law, which on one interpretation enables those groups that experience disadvantage analogous to that experienced by African-Americans to deploy the full force of the Equal Protection Clause. With respect to such groups, for example, this doctrine might counsel a particularly stringent approach to equality claims brought under Articles 14 and/or 15 that does not shy away from the prohibition of indirect discrimination, which is often proof of legislative animus towards the most disadvantaged. It could render inadmissible public morality as the justification for the infringement of constitutional rights of such groups, because public morality is particularly likely to reflect a bare naked preference to harm those groups. Finally, it may mean that the interpretation of other fundamental rights is infused with equality, so that a court is particularly alert to the importance of the interests

protected by those rights to the group in question, and ensures that the scope of the right is defined accordingly. For example, against the backdrop of pervasive cultural disapproval of homosexuality in terms of sexual perversity, this doctrine provides an additional reason for including sexual intimacy within the right to privacy under Article 21, which, of course, is the main holding in *Naz Foundation*.

Naz Foundation refers to the Indian Constitution as an instrument of 'social revolution'.⁸⁹ The idea of a constitution as a dynamic, evolving instrument of social change is arguably the principal influence of the Indian constitutional experience on the way that South Africans understand the purpose of a constitution, and the task of its constitutional court. This understanding of the mission of a constitutional system is captured by the notion of 'transformative constitutionalism'.⁹⁰ The Constitutional Court of South Africa recently stated that the legal implication of this theory of constitutionalism is that 'the founding values' of the new constitutional order should inform 'the assessment of the prevailing boni mores of our society'.⁹¹ This is precisely what *Naz Foundation* did. It is therefore fitting that South African constitutional jurisprudence should now inspire the Indian courts to revisit and reinforce this dimension of the Indian constitutional experience.

CONCLUSION: THE POLITICS OF COMPARATIVE CONSTITUTIONAL LAW

So here is the argument in brief. The use of comparative constitutional law was central to *Naz Foundation*. On the particularist model, this reliance on comparative legal materials was irrelevant and illegitimate. There are two ways to respond to the particularist challenge. The universalist model holds that the citation and application of comparative constitutional law was necessary and appropriate. The dialogical model holds that comparative materials were a means to revisit and extend the premises of the Indian Constitution. Both

⁸⁹ *Naz Foundation*, at para 80.

⁹⁰ K. Klare, 'Legal Culture and Transformative Constitutionalism', *S. Afr. J. Hum. Rts.*, (1998), 14: 146–88.

⁹¹ *Hassam v. Jacobs*, (2009) ZACC, at para 28.

the universalist and dialogical accounts of *Naz Foundation* fit the judgment imperfectly. But which is the better approach?

Universalists hold that constitutional guarantees are cut from a universal cloth, and that all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles. Comparative jurisprudence serves an evidentiary function, providing valuable articulations of the political theories underlying particular rights and how those rights are to be applied in concrete cases. This may be particularly attractive to a newly established constitutional court, in jurisdictions with little or no prior experience of constitutional judicial review. The use of comparative constitutional law anchors the legitimacy of the court's decisions, and counters the impression that by looking to foreign sources, the court is looking outside the law. In countries beginning their experience with constitutional judicial review, the use of comparative law makes normal and routine what would otherwise appear revolutionary and dramatically new. Moreover, universalist interpretation will internationalize a nation's constitutional culture, by working the assumption that a nation's particular constitutional guarantees are shared with other countries and transcend borders into the culture of constitutional argument. Tying these points together, universalist interpretation posits that within the family of liberal democracies committed to the rule of law and human rights, comparative jurisprudence offers guidance and wisdom to newer constitutional democracies that are beginning their journey on how best to proceed down the road ahead.

But universalist interpretation is vulnerable to serious criticism. Recall that universalist interpretation relies on the empirical fact of convergence—on the theories underlying constitutional provisions, on the doctrinal tests which implement those theories, and on particular outcomes on specific issues—as proof of the correctness of those legal propositions. Empirical convergence is proof of moral truth, which is a reason for a court to follow foreign jurisprudence. Universalist interpretation is therefore open to criticism on the ground of cultural relativism, which holds that moral and political values are not universal but are tightly connected to particular cultural contexts. Whatever the merits of this criticism, it means that universalist interpretation is fraught with controversy.

As a consequence, universalist modes of comparative constitutional reasoning will constantly be put into question. This poses the additional danger that the universalist methodology may in fact corrode the legitimacy of constitutional interpretation itself.

Moreover, the strong normative claims underlying universalist interpretation limit its scope of application to those rights which are truly universal. The most universal of human rights are those that affect the physical security of the individual, such as the right to life and physical liberty. By contrast, even the traditional liberal freedoms—such as expression, religion and conscience, association and assembly—although enshrined in many constitutions, are more normatively contentious. Though courts of various jurisdictions agree on the importance of these rights, they have differed sharply on their interpretation. In the face of such normative diversity, universalist arguments become difficult to make.

Dialogical interpretation, by contrast, does not require the kind of consensus across jurisdictions that universalist interpretation does. Indeed, far from being an obstacle to the use of comparative jurisprudence, normative disagreement drives dialogical interpretation, because it forces courts to identify and justify the sources of that disagreement as a means to developing a sharper awareness of constitutional difference. Moreover, for dialogical interpretation to be possible, there need only exist corresponding provisions and jurisprudence in two or more jurisdictions. More fundamentally, dialogical interpretation makes no normative claims regarding comparative jurisprudence. It uses comparative case law instrumentally, as a means to stimulate constitutional self-reflection. Dialogical interpretation is more a legal technique than a theory of constitutional interpretation. Comparative materials are not asserted to be true or right; rather, they reflect a particular way of articulating underlying values and assumptions. The reliance on comparative constitutional materials does not necessarily assimilate constitutional actors into a larger transnational conversation about rights, courts, and democracy. A sophisticated and literate comparativism need not be tantamount to universalist conceptions of constitutionalism. It does not raise the spectre of illegitimacy in the manner that the universalist interpretation does. Rather, it facilitates and enables the development of, and reasoning within, an established constitutional tradition.

At a moment of high political controversy over the merits of a constitutional dispute—such as the one presented by *Naz Foundation*—dialogical interpretation offers significant political advantages to a court. But the very source of its strength also limits its reach, because it is subject to the vagaries of the contingent nature of the space of acceptable constitutional argument, which creates the possibility for dialogical interpretation. My interpretation of *Naz Foundation* suggests that the court drew an analogy between untouchability and sexual orientation. The drawing of this analogy turned on a contingent feature of the Indian Constitution—Article 17. Were Article 17 absent, the judgment would have to be defended on a different basis.

Let me conclude with this thought. In *Gopalan v. Madras*,⁹² the Supreme Court of India declined to interpret the phrase ‘procedure according to law’ in Article 21 as encompassing substantive limits on the deprivation of the interests—life and personal liberty—protected by the provision. It did so through dialogical reasoning, in this case arguing that the deliberate rejection by the Constituent Assembly of the phrase ‘due process of law’ was specifically designed to avoid the American doctrine of substantive due process.⁹³ *Maneka Gandhi* overruled this aspect of *Gopalan*. But is it possible to accept that *Gopalan* is no longer good law while valuing its interpretative methodology, in which comparative constitutional experience can serve as a negative model and provide the impetus for, and resources to strengthen, moments of constitutional difference? This too is an instance of dialogical interpretation. Indeed, it may help to explain the role of American constitutional doctrine on affirmative action in the Indian jurisprudence on reservations—for example, in *Indra Sawhney v. Union of India*—as an anti-model of comparative constitutional experience.⁹⁴ How this could play out in the Indian context—while preserving the correctness of *Naz Foundation*—is a topic for another occasion.

⁹² 1950 SCR. 88 (hereinafter *Gopalan*).

⁹³ In particular, see the judgment of Chief Justice Kania, *Gopalan*, at 108.

⁹⁴ AIR 1993 SC 447.