In Pursuit of "the Common Illumination of our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia

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> "[T]he intense consciousness of the separateness of one's own people from others...inevitably leads to ceaseless conflicts...Let us be rid of all false pride and rejoice at any lamp being lit at any corner of the world, knowing that it is a part of the common illumination of our house..."
>
> *Rabindranath Tagore*

> "I hope I am as great a believer in free air as the great Poet [Tagore]. I do not want my house to be walled on all sides, and my windows to be stuffed. I want the cultures of all the lands to be blown about my house as freely as possible. But I refuse to be swept off my feet by any."
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> *Mohandas K. Gandhi*[1]

I. Introduction

The focus of this article is on the use of foreign decisions in domestic constitutional adjudication. Although the use of foreign decisions by judges is common in other branches of the law, as this article will seek to demonstrate, the issue raises (or is perceived as involving) special concerns in the area of constitutional law.

Courts have been making references to, and relying upon, judicial decisions from foreign jurisdictions dating back to the beginning of the

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1. The Mahatma and the Poet: Letters and Debates Between Gandhi and Tagore, 1915-1941 (Sabyasachi Mukherjee, ed., National Book Trust, New Delhi: 1997). For a revealing and insightful analysis of the background of this famous exchange, *see* Ramachandra Guha, *The Independent Journal of Opinion,* 481 Seminar (Sep. 1999), *available at*: http://www.india-seminar.com/1999/481/481%20guha.htm (last visited April 1, 2008).

modern era. Though there is evidence of this practice among countries in Continental Europe dating back to the 18th century,[2] it appears to have gained widespread currency during the period of British colonialism and in territories that were subjected to the common law.[3] It is now well documented that the principal exporters of law and legal theory in the modern era – the United Kingdom, France, Germany and the United States – had substantially derived inspiration from foreign models during the crucial stages of the development of their legal systems, and judges in these jurisdictions had played an active part in such processes.[4]

A number of descriptive terms are used in the vast literature that has developed around this phenomenon: "borrowing", "transplants", "cross-fertilization", "transnational judicial conversations", etc. I use the term *trans-judicial influence* to describe and analyse this practice. In adopting this term, I follow the lead of the U.S. scholar Kim Lane Scheppele who points out that the more commonly used term "borrowing" has confusing implications in the realm of constitutional law. Scheppele notes that in its literary sense, borrowing implies that a borrowed good is in one's possession temporarily and that one should attempt to restore it to its owner in the condition in which it was originally lent. Constitutional borrowing, however, is usually not temporary, nor is the issue treated as if it were the property of another. In fact, Scheppele asserts, the borrowed concept or doctrine is usually modified at will, and either developed or improved upon. Using the term 'influence' allows a broader range of possibilities – positive, negative, direct and indirect – to be included under the rubric of the phenomenon to be studied. While Scheppele uses the term "cross-constitutional influence", I have modified it slightly to indicate my focus on judiciaries.[5]

This article seeks to make a contribution to the debate in the contemporary literature over the practice of trans-judicial influence by

2. H. Patrick Glenn, *Persuasive Authority*, 32 McGILL L.J. 261, 275 (1986) (noting that judges in 18th century Italy resorted to this practice) [hereinafter Glenn, *Persuasive Authority*].
3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).
4. Glenn, *Persuasive Authority, supra* note 2, at 263.
5. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models,* 1 INT'L J. CONST. L. 296, 297, 300 (2003) [hereinafter, Scheppele, *Aversive Constitutionalism*]. I am also persuaded by the analysis of the dynamics of influence by the English scholar, Neil Duxbury, who asserts that the term 'influence' is related but not identical to causality. Duxbury, like Scheppele, notes that influence is a much broader concept, and is capable of encompassing a vast number of phenomena. NEIL DUXBURY, JURISTS AND JUDGES: AN ESSAY ON INFLUENCE 5-6 (Hart Publishing, UK: 2001). Other scholars have preferred different metaphors to describe and analyse the practice. In a recent work, Sujit Choudhry – who has written insightfully about the practice for over a decade – has argued that the metaphor of migration is best suited to describe this phenomenon. *See generally*, THE MIGRATION OF CONSTITUTIONAL IDEAS 19-25 (Sujit Choudhry, ed., Cambridge University Press: Cambridge, 2006).

drawing attention to certain special facets of the practice in South Asian nations. Some contemporary judges in jurisdictions as varied as the U.S., Australia and Singapore have expressed their opposition to the use of foreign decisions in constitutional adjudication in absolute terms.[6] While such judges are increasingly in a minority globally, what is striking about those judges who do endorse the use of foreign judicial insights in extra-judicial remarks, is that their actual record does not bear out a strong and consistent reliance upon such sources.[7] I seek to show that judicial practice in South Asian nations (both historically and in the present) departs from such trends, and must be studied closely to fully appreciate the complexity of the phenomenon of trans-judicial influence. My claim is that in their consistent use of foreign decisions, South Asian judiciaries have engaged with the practice of trans-judicial influence in ways that are considerably more bold and imaginative than the attitude displayed by more established courts, especially those in the U.S., U.K. and Australia.[8]

In this article, I focus upon the manner in which South Asian[9] judiciaries have engaged with the practice of trans-judicial influence.[10] In particular, I focus on some early cases which cumulatively led to the

6. In the United States, Justice Antonin Scalia has been the most forceful judicial advocate of this position. In a series of cases going back to the late 80s, Justice Scalia has stated his opposition to the use of foreign decisions in extreme terms. For an overview of these decisions and Justice Scalia's stated reasons, *see generally*, David M. O'Brien, *More Smoke than Fire: The Rehnquist Court's use of comparative judicial opinions and law in the construction of constitutional rights*, 22 JOURN. L. & POL. 83 (2006). In Australia, the hostility to the use of foreign decisions in constitutional adjudication has a long heritage. For an overview of the historical and current trends, see generally, Michael Kirby, *The Seventh Annual Grotius Lecture: International Law – the Impact on National Constitutions, available online* at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar05.html (last visited April 1, 2008). For the position in Singapore, see the recent decision of the Singapore Court of Appeal by Justice V.K. Rajah in the case of Chee Siok Chin v. Ministry of Home Affairs, [2005] SGHC 216 at paragraph 132. For an overview of judicial trends more generally, *see* Victor V. Ramraj, *Comparative Constitutional law in Singapore*, 6 SING. J. INT'L & COMP. L. 302-334 (2002).

7. This is particularly true of judges in the U.S., such as Justices Breyer, Ginsburg and O'Connor, each of whom has consistently championed the use of foreign decisions in extra-judicial speeches. As David O'Brien has recently demonstrated, this has not led them to use such sources with greater frequency in actual opinions authored by them. *See generally*, O'Brien, *id.*, at 108-110 (tabulating the results of an empirical study of actual decisions of the Rehnquist Court that rely upon foreign judicial decisions).

8. I do not address, in this paper, the debate over whether such boldness or imagination is necessarily a good thing, beyond referencing the broad terms of the debate. Though this debate is a crucial one, the paper focuses instead on the quantitative aspects of the practice, which is undoubtedly more in evidence in the jurisdictions under focus.

9. The term 'South Asia' generally refers to several nations within the subcontinent. For the purposes of this piece, however, I use the term to include references only to India, Pakistan and Bangladesh. This is by no means meant to suggest that these nations encompass the term 'South Asia'; nor do I mean to slight other nations which justifiably consider themselves to be part of South Asia. However, as any good comparatist knows, seeking to cover too many jurisdictions within a single piece is a hazardous activity, and

innovative jurisprudence of the Supreme Court of India that has become known as the Public Interest Litigation (PIL) movement.[11] The PIL jurisprudence of the Supreme Court of India is generally regarded as one of the distinctive contributions of that judicial institution to the corpus of comparative constitutional law.[12] Without seeking to challenge the correctness of this view, I attempt to demonstrate that even in carving out this distinctive contribution, the lawyers and judges who were part of the PIL movement continued the long tradition of cosmopolitanism that Indian constitutionalism has traditionally displayed, and sought guidance from foreign judicial decisions and academic works on the methods by which to execute their ideals through practical innovations. Later, other judicial institutions in South Asia (principally the judiciaries in Pakistan and Bangladesh) built upon the case-law of the Supreme Court of India to develop their own forms of PIL jurisprudence. Using this specific instance, I seek to demonstrate how judges in South Asian nations have robustly engaged with the practice of trans-judicial influence.

The argument of the article is developed over six sections. In the section which follows this introductory part, I provide details about the extent of the practice of trans-judicial influence, and briefly analyse the growing academic debate on the practice. Section 3 provides the general backdrop of the Indian Supreme Court's history of engagement with foreign decisions in constitutional cases. In Section 4, after analysing the distinctive nature of the Indian Supreme Court's PIL jurisprudence, I focus on early PIL cases in India where foreign decisions and academic works were relied upon for crucial innovations. Section 5 briefly sets out how the spread of PIL jurisprudence in South Asia more generally is itself an illustration of the impact of the practice of trans-judicial influence, and is followed by a brief concluding section.

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that is the principal reason for confining my survey to these three jurisdictions. In addition, PIL jurisprudence is most famously identified with the three South Asian jurisdictions that I have chosen to study.

10. This paper is part of a larger research project which seeks to document the extent and nature of the practice of trans-judicial influence in comparative constitutional law. My focus in the larger project is on issues of constitutional interpretation and I seek to advance models of constitutional theory that capture judicial attitudes towards constitutional adjudication across several jurisdictions.

11. Since this article is written with a primary audience of Indian constitutionalists in mind, I will presume a basic familiarity with Indian constitutional jurisprudence. For recent accounts which provide an overview of the PIL jurisprudence of the Indian Supreme Court, *see generally*, Ashok H. Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE 159 (B.N. Kirpal et al eds., Oxford University Press: New Delhi, 2001); and S.P. SATHE, JUDICIAL ACTIVISM IN INDIA (Oxford University Press: New Delhi, 2002).

12. Though generally accepted within Indian constitutional circles, this is also the conclusion reached by one foreign observer of the Indian Supreme Court's overall record since independence: Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476 (2003).

II. The Practice of Trans-Judicial Influence and a Brief Review of the Academic Debate Over its Normative and Practical Aspects

Colonialism and imperialism have had a great impact on the legal transplantation of laws, and on judge-made law in particular. It is arguable that colonial habits of referring to judicial decisions from other countries have seeped into the legal cultures of former colonies and have lingered beyond the age of empire, with the result that judges in a number of former colonies continue to make extensive use of foreign law in their contemporary decision-making.[13]

In respect of colonies, the historic reasons favouring trans-judicial influence have been counteracted by the pressure to cast off the imperialist past to establish strong foundations of indigenous constitutionalism. Nevertheless, two factors have ensured that the many nations which became independent from colonial rule in the mid-twentieth century have remained connected with 'global dialogues' about constitutionalism. First, a predominant majority of the countries which obtained freedom from colonial rule adopted the constitutional models and structures of their former colonial masters (often at the behest of the colonial powers, who of course believed that their own forms of government were the best).[14] Secondly, many of these former colonies adopted language from the emerging corpus of international human rights law in the aftermath of the Second World War directly into their independence constitutions, thereby creating more opportunities for dialogues among judges from different countries. After this phase of constitution-writing in the aftermath of decolonisation, at least four distinct phases of constitution-making occurred in South America, Latin America, South Africa and Eastern Europe over the course of the second half of the 20th century.[15] The last of these phases was directly affected by the end of the Cold War, and in the 1990s, many countries in Eastern Europe became constitutional democracies. Of these, several instituted new

13. Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 Ind. J. Glob. Leg. Stud. 1 (2006).

14. Although this appears to have proved viable in a few countries (India is one such example), in the majority of postcolonial states, such efforts proved disastrous, and the independence constitutions had to be subsequently revised to account for local political, social and economic conditions and structures. Julian Go, *A Globalising Constitutionalism? Views from the Postcolony, 1945-2000*, 18 Int'l Sociology 71(2003) (noting that "at least 91 countries" became free from western colonial rule in the 20th century, all of which went on to adopt constitutions of their own, usually based on that of their former colonial masters - as many as 65% of these countries had to substantially rewrite and revise their constitutions in later years).

15. Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, Law and Courts 5, 13 (Spring 2003). The article provides a broad-ranging, historical survey of the spread of constitutionalism from pre-modern times till the early part of the 21st century.

constitutional courts that sought to draw upon the jurisprudence of their more established counterparts, often with a view to emulate their achievements.

The phenomenon of trans-judicial influence has to be understood in the context of the growing increase of the power of judiciaries consequent to the adoption of judicially enforceable bills of rights in the period beginning from the end of the Second World War and continuing until the beginning of the current century.[16] It is therefore not surprising that the practice of trans-judicial influence in the specific area of constitutional adjudication is now widespread.

The existing scholarship on trans-judicial influence has made important contributions to understanding significant aspects of the phenomenon. Like the practice itself, its most insightful commentators have come from many different countries, reinforcing the extensive nature of the phenomenon. Several scholars have rendered descriptive accounts, documenting the extent of the practice in various jurisdictions. Some of this scholarship dates back to the mid-twentieth century and is useful for tracking historical trends in the practice. Writing in 1954, the Indian scholar P.K. Tripathi analysed how U.S. decisions have been received in Australia, Canada, India, and Israel. Tripathi's analysis led him to conclude that courts in the mid-Twentieth century made instrumental use of foreign decisions to find additional justifications for the preconceived results that they sought to reach in their judgments.[17] Tripathi's article documents how the source of influence had, by 1950, shifted from the UK to the US, even in former British colonies, particularly in the area of constitutional adjudication.

Revisiting Tripathi's analysis nearly half a century later in 2000, the English academic Christopher McCrudden's detailed study of the practice of trans-judicial influence is even more extensive than that conducted by Tripathi, covering Australia, Canada, India, Ireland, Israel, New Zealand, South Africa, Zimbabwe and the U.S. McCrudden concluded that in 2000, it was no longer possible to agree with Tripathi's assertion that the use of foreign decisions was completely subject to judicial whim and subjective proclivities. McCrudden emphasised that the practice had grown in magnitude and certain informal rules of relevance had grown around it,

16. For trenchant criticism of the forces that have shaped this consensus on global constitutionalism, *see generally*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (Harvard University Press, Cambridge: 2004). For a detailed, country-wise critical analysis of the spread of bills of rights, *see*, Mac Darrow and Philip Alston, *Bills of Rights in Comparative Perspective,* in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 465 (Philip Alston ed., Oxford Univ. Press: 1999).

17. P.K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319 (1957).

resulting in situations where judges sometimes felt obliged to distinguish foreign decisions.[18]

The American scholar Anne-Marie Slaughter has been one of the earliest to highlight the significance of trans-judicial influence in recent times, and her scholarly work has done much to describe the full extent of the practice as well as explore many of its facets.[19] In her earliest piece, Slaughter surveyed a number of cases which displayed the full ambit of trans-judicial influence in the early 1990s, and offered detailed classifications which help understand the phenomenon at the level of its details. Her analysis delineates the functions that the practice serves, the preconditions for it to flourish, the factors which contribute to it, as well as the important consequences of the practice. In later pieces, Slaughter has continued to forcefully advocate for an increase in the practice of trans-judicial influence, and has been one of the most ardent, largely uncritical supporters of the practice. Being one of the leading scholars to have written on this issue, Slaughter's works have been analysed extensively, and the criticisms offered on her analysis are also insightful. A persuasive criticism of her work is that she places too much emphasis on the autonomous character of judges, and their ability to act independently. This critique notes that in every jurisdiction, a number of factors work to constrain the ability of judges to engage with foreign decisions: institutional strength, esteem, wider social goals, the prevailing attitude in the political and popular sphere about particular foreign regimes, etc.[20]

Many commentators have pointed out that the practice of trans-judicial influence in its most recent incarnation has many distinguishing features, and is also driven by more complex motivations and global forces than before. Justice Claire L'Heureux-Dube of the Canadian Supreme Court has argued that the present form of the practice differs from the one-way traffic of decisions from the centre of the British empire to its

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18. Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20(4) Oxf. J. Leg. Studies, 499-532 (2000).
19. Anne-Marie Slaughter, *A Typology of Transjudicial Communication,* 29 U. Richmond L. Rev. 99-137 at 99 (1994); Anne-Marie Slaughter, *Judicial Globalisation*, 40 Va. J. Int'l L. 1103 (2000); Anne-Marie Slaughter, A Global Community of Courts, 44 Harv. Int'l L.J. 191 (2003); Anne-Marie Slaughter, A New World Order (Princeton Univ Press: Princeton, 2004); and Anne Marie Slaughter, *A Brave New Judicial World*, in American Exceptionalism and Human Rights 275 (Michael Ignatieff, ed., Princeton Univ. Press: 2005).
20. Adam Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,* 24 Berkeley J. Int'l L. 218, 228-31 (2006). Another criticism, referring to the fact that Slaughter clubs the practice of trans-judicial influence with the 'vertical' influence of supranational courts among domestic courts, finds her attempt at "explain[ing] comparative constitutional interpretation with reference to international relations theory" problematic. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,* 74 Indiana L.J. 819, 828 (1999).

extremities. She has argued that the new trend is increasingly becoming a dialogue between different national courts, and to a greater and greater extent, national courts are mutually reading and discussing each other's jurisprudence.[21] This assertion has been doubted by some commentators, who have noted that courts are not as independent and powerful as the analysis of Slaughter and L'Heureux-Dube suggests. They note that courts are often subject to larger societal and political pressures which guide their reactions to foreign decisions as well. So, some states may join the 'global community of courts' that Slaughter so enthusiastically endorses, not of their free will, but to obtain the approval of the states that lead the global community.[22] The latter is more likely to explain why smaller and weaker nations engage in the practice of trans-judicial influence.

In a similar vein, the American scholar Frederick Schaeur has provocatively posited some other instrumental reasons why nations might choose to engage in trans-judicial influence. He has noted how external pressures to harmonise apply to contexts such as to the nations who wish to join Europe and seek to "look European" by citing decisions from established courts in Europe, especially from Germany.[23] Describing the goal of such pressures as "harmonisation for the sake of harmonisation," Schaeur further asserts that the South African constitutional provision that requires reference to international law and recommending references to comparative law, is only partly motivated by the desire to have South African judges learn from elsewhere. According to Schaeur, this provision is better understood as reflecting "a South African desire to have its judges bring South Africa into harmony with international standards, independent of a normative judgment about the intrinsic desirability of those international standards."[24] Schaeur also notes that in a variety of contexts in the 1990s, "avoiding American influence" appears to have been a driving force, and is manifested in the many instances where foreign courts have refused to follow the reasoning of American decisions.[25] Schauer's overall point is that understanding "the patterns of migration of constitutional ideas in the twenty-first century requires that we recognise that mechanisms of political influence, economic incentives, regional cooperation" are among other factors that play a vital and influential role.[26]

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21. Claire L'Heureux-Dube, *The Importance of Dialogue: Globalisation and the International impact of the Rehnquist Court*, 34 TULSA L.J. 15-40 at 21 (1998).
22. Hannah L. Buxbaum, *From Empire to Globalisation…and Back? A Post-Colonial view of Transjudicialism,* 11 INDIANA J. GLOB. LEG. STUD. 183 (2004).
23. Frederick Schauer, *The Politics and Incentives of Legal Transplantation,* in GOVERNANCE IN A GLOBALISING WORLD 253, 256 (Joseph Nye, John Donahue, eds, Brookings Institution Press: 2000).
24. *Id.* at 260.
25. *Id.*
26. Frederick Schauer, *On the Migration of Constitutional Ideas,* 37 CONNECTICUT L. REV. 907, 916 (2005).

Schauer's arguments also remind us that the issue of trans-judicial influence is itself part of a much broader phenomenon – the movement of laws and legal institutions between states, recorded examples of which date back to at least the 17th century B.C. (in the body of the Code of Hammurabi), and have become particularly prominent in the current age of globalisation. Broadly referred to as 'legal transplants,' the phenomenon has generated a vast literature which reveals interesting insights for trans-judicial influence, though owing to constraints of space, I do not focus directly on that literature here.[27]

Reverting to the more specific phenomenon of trans-judicial influence, virtually every scholar who has studied the practice has commented on the potential and actual benefits[28] and pitfalls[29] of the practice. It has been noted that some areas (such as human rights law[30]) are more conducive to trans-judicial influence than others (such as federalism[31]).

The largest proportion of the literature on trans-judicial influence, by a fair margin, is focused on the normative desirability of the practice within

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27. Much of the debate in comparative law in recent years has centred around the stimulating but controversial views on legal transplants advanced by the Scottish comparatist, Alan Watson. A close analysis of the debate between Watson and his critics on legal transplants is beyond the scope of this paper. For a very good summary of the debate, as well as an excellent analysis of some of the latest literature on this issue, *see generally*, Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine examples to Explain the Transplant Process*, 51 Am. J. Comp. L. 839 (2003).
28. The following, among others, have been identified as benefits of trans-judicial influence. The practice: i) Enhances persuasiveness, authority, reasoning and legitimacy of individual decisions while fostering collective judicial deliberation and building a coalition of judges across liberal democracies; ii) Improves the quality of deliberation by expanding the range of arguments (legal, moral and philosophical) to be considered; iii) Allows legal systems to learn from the mistakes of previous legal attempts to resolve issues in other jurisdictions, and prevents "reinventing of wheels"; iv) Leads to the development of a common comparative framework towards specific issues such as human rights law or competition law; v) Allows insiders of a legal system to benefit from the study of their systems by outsiders, yielding vital insights into the working of the system that remain unnoticed by insiders as they take them for granted.
29. The following, among others, have been identified as pitfalls of trans-judicial influence: i) Excessive reliance on foreign precedents can lead to imitative jurisprudence which curbs the development of an indigenous constitutional/legal tradition; ii) Scholars focusing on third world approaches note that the practice raises concerns about intellectual hegemony, and neo-imperialism; iii) The borrowing of ideas requires expertise in both the borrowing and recipient systems, and careless transplants can result in disastrous consequences; iv) Constitutional concepts travel badly from one specific cultural context to another, and such transplants may not be sensitive to timeframes; v) The practice undermines the ideals of 'democratic self-governance' and 'popular sovereignty' which are fundamental to constitutionalism (this last line of attack is particularly predominant among conservative scholars in the US).
30. This has been noted by several scholars, including Christopher McCrudden, Claire L'Heureux-Dube, Anne-Marie Slaughter, and Vicki C. Jackson.
31. Vicki Jackson has repeatedly asserted this claim in several of her articles on trans-judicial influence. *See, for e.g.,* Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse,* 2 Int'l J. Const. L. 91-138 (2004).

American constitutional law. In many respects, this is a very US-centred debate, and its extremely "rancorous and vituperative"[32] nature seems puzzling even to seasoned observers of American constitutional discourse. One intriguing aspect of this debate is that it centres around the use of foreign decisions on the current Supreme Court (specifically on cases decided since 1989). These references have been of an extremely limited nature, and it is therefore all the more difficult to appreciate the intensity and heated nature of the debate, especially given the relatively robust engagement with foreign decisions in earlier eras of the Supreme Court's history.[33] The U.S. judges who have made these scant references have been threatened, implausibly, with impeachment (by elected members of the House of Congress and Senate no less)[34] and, bizarrely, with death threats.[35] The academic debate on this issue in the U.S. is also quite lopsided: the majority of published articles seem to strongly oppose the practice,[36] while some scholars have approved of mild and moderate usage of foreign laws for limited purposes.[37] Strong academic voices in favour of engagement with foreign decisions are relatively rare, while scholarship which actually

32. Osmar J. Benvenuto, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent,* 74 FORDHAM L. REV. 2695 (2006).

33. This aspect has been documented quite extensively by now. *See generally,* Steven G. Calabresi & Stephanie Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty,* 47 WM. & MARY L. REV. 743 (2005) (analyzing several cases, ranging from the late 18th century to the 2005 decisions of the U.S. Supreme Court, where foreign judicial decisions played an integral part in the reasoning of judgments). For references to international law during the early period, *see generally,* Sarah Cleveland, *Our International Constitution,* 31 YALE J. INT'L L. 1 (2006).

34. S. Res. 92 (109th Cong. (2005); H.R. 97, 109th Cong. (2005).

35. Ruth Bader Ginsburg, *"A Decent Respect to the views of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Speech delivered at the Constitutional Court of South Africa, February 7, 2006, *available at*: http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html (last visited July 21, 2006).

36. *See, e.g.,* Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-04 Term: Some Skeptical Observations,* 12 TULSA J. COMP. & INT. L. 23 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Joan Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation,* 65 OHIO L.J. 1283 (2004); Ken Kersch, *The New Legal Transnationalism, the Globalised Judiciary, and the Rule of Law,* 4 WASH. UNIV. GLOB. LEG. STUD. L. REV. 345 (2005); Roger Alford, *In Search of a Theory of Comparative Constitutionalism,* 52 UCLA L. REV. 639 (2005); Kenneth Anderson, *Foreign Law and the U.S. Constitution,* POL. REV. 33 (June, 2005); Ernesto J. Sanchez, *A Case against Judicial Internationalism,* 38 CONNECTICUT L. REV. 185 (2005); Ernest Young, *The Trouble with Global Constitutionalism,* 38 TEX. INT'L L.J. 527 (2003); Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005); John O. McGuinniss, *Foreign to our Constitution*, 100 NW. U. L. REV. 303 (2006).

37. This group of scholars includes David Fontana, Vicki Jackson, and Mark Tushnet. For Fontana's views, *see generally, Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) and *The Next Generation of Transnational//Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet,* 38 LOY. L. A. L. REV. 445 (2004).

provides a catalogue of ways of using foreign decisions in constructive and useful ways, is rarer still.

My view of the contemporary debate on trans-judicial influence is that it is overly dominated by the terms set out by American scholars, who in turn articulate their positions on the basis of the relatively meagre use of foreign constitutional decisions in American constitutional adjudication. I am therefore of the view that before one can have a proper debate on the phenomenon of trans-judicial influence, it is important to appreciate the full extent and character of the practice. This is particularly important because, in common law jurisdictions outside the U.S., there is considerably greater use of foreign decisions in constitutional adjudication. It is partly for this reason that my focus in this paper is on the broad features and trends in the process by which judges on the Supreme Court of India in particular, and South Asia more generally, have engaged with, and responded to, the practice of trans-judicial influence.

III. The Indian Supreme Court's Engagement with Trans-Judicial Influence

The Constitution of independent India was adopted in 1950 after considerable debate over a three-year long deliberative process. It represents a fascinating exercise in constitutional transplantation, and was influenced by a number of existing constitutions as well as the emerging body of international human rights law. It is at least somewhat surprising that the use of foreign precedents in Indian adjudication has not been the subject of systematic study given the general perception that "[t]he citation of American judicial opinions is almost a standard, everyday practice in India."[38] There are very few detailed studies of the phenomenon, with most forays into this issue consisting of firm conclusions stated after analyzing only a handful of cases. In this section, I seek to provide an overview of trends of use of foreign cases in Indian constitutional law.

The early Supreme Court engaged in the use of foreign law in several cases, in part because of the absence of its own experience and record with constitutional jurisprudence.[39] Writing in 1957, PK Tripathi, an eminent Indian constitutional scholar, detailed several instances where Indian judges had both adopted and rejected U.S. cases, depending on the subject involved. He emphasized that "the most cogent references to American law are made

38. P.K. Tripathi, *Foreign Precedents, supra* note 17 at 319.

39. At the time, there were very few existing models of constitutional review in the world, and it is not surprising that most of the references were to the U.S. Supreme Court. It must be remembered that the direct inspiration for the constitutional jurisdiction of the Indian Supreme Court had come from the U.S. model.

in the field of civil liberties."[40] Another constitutional scholar, DD Basu, has asserted that the rejection of U.S. cases in some early decisions was a reflection of unthinking prejudice and ignorance of foreign decisions and constitutional law.[41] However, this reasoning ignores the reality that in several areas of constitutional interpretation – such as equality analysis – the early Supreme Court justices did pay close attention to foreign jurisprudence. In my view, therefore, Basu's characterization is overstated, though he was right in noting that at least in some cases, foreign decisions were dismissed quite peremptorily.

At the same time, there are many examples where judges in India have carefully considered foreign decisions and refused to apply them because of differences in text, social context and other factors. One instance of this is to be found in the forthright manner in which a judge of one of the leading High Courts of India dismissed U.S. decisions, even during the early years of India's independence when such reliance seemed more justified (given the absence of a body of domestic precedents to rely upon). In *Mahadeb Jiew v. Dr Sen* (1951)[42] Justice P.B. Mukharji of the Calcutta High Court, in deciding a case based on the right of equality of women, refused "to be guided in this case by the American precedents." He noted that there were textual differences between the 19th Amendment to the U.S. Constitution (on whose interpretation the U.S. cases cited before him were based) and Article 15 of the Indian constitution, which made the U.S. cases inapplicable in India. Having so held, he added the following pithy comment:

> "The craze for American precedents can soon become a snare. A blind and uncritical adherence to American precedents must be avoided or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution. We are interpreting and expounding our own Constitution."[43]

There are similar examples in the jurisprudence of the Supreme Court from the early years after Independence where it refused to follow foreign decisions.[44] One can, however, argue that this was a good trend, and not something to be deplored (which was Basu's reaction).

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40. Tripathi, *supra* note 17 at 334.
41. See, DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 13-22 (Prentice Hall: 1984).
42. AIR 1951 Cal. 563.
43. *Id.* at 569.
44. State of Travancore-Cochin v. Bombay, Co. Ltd., AIR 1952 SC 366 (refusing to apply U.S. decisions on inter-state commerce to the interpretation of Article 286 because of differences in text and conditions); Dwarkadas v. Sholapur Spinning Co., (1954) SCR 674 at 731-2; State of Bombay v. RMD Chamarbaugwala, AIR 1957 SC 699 (refusing to apply US and Australian decisions to Articles 19(1)(g) and 301 in India because of

The few scholarly works that have studied trans-judicial influence in India have reached divergent conclusions about the phenomenon. Rajeev Dhavan, in a 1985 article, observed that "[v]ery few lawyers and judges used American precedent imaginatively."[45] Here, Dhavan alludes to the fact that Indian judges have used foreign cases and jurisprudence to bring about startling innovations, such as reading in entirely new rights that are absent in the constitutional text. Dhavan's primary line of attack appears to be that Indian judges had adopted "imitative cosmopolitan habits" which led them to approach "very many issues before them from the alien standards of western jurisprudence."[46] This is an important line of attack that cosmopolitan judges everywhere have to contend with. In their zeal to incorporate the best of learning from foreign shores, they may well find themselves open to the attack that they haven't paid sufficient attention to their domestic national contexts and jurisprudence.[47]

Adopting an opposite view, Gobind Das begins his book assessing the historical impact of the Supreme Court as follows:

> "The Supreme Court of India has no jurisprudence of its own, no language of its own. Each concept is borrowed, every doctrine adopted. There is nothing original about the Supreme Court, not even the architectural design. It is a credit to Indian genius that it has assimilated such an institution, made it its own and has nourished it with trust, faith and reverence during the last thirty-seven years."[48]

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differences in schemes of the constitutions as well as social conditions); and Sundararamier & Co. v. State of Andhra Pradesh, AIR 1958 SC 468 at 495 (refusing to apply American and other foreign decisions because the actual provisions adopted were different from foreign constitutional provisions).

45. Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 Am. J. Comp. L. 505 (1985). Dhavan surveyed the patterns of use of foreign law by individual judges, commenting acerbically on what he considered careless use, and concluded by emphasizing the importance of remembering that "most Indian lawyers have no detailed knowledge of American law or the development of American doctrine." In advancing his assessment of a quarter century's experience with trans-judicial influence, Dhavan used language which can only be described as polemical: "Twenty-five years of Anglo-American precedent had concealed much, taught little, and glazed judicial innovation in a splurge of half-understood legal drivel. … the impact of American precedent lay in creating a jargon-laden literature which looked nice and had mystical and mystifying uses even if it was only half-understood."
46. This assessment is contained in an earlier work. Rajeev Dhavan, The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques 461 (N.M. Tripathi: Lucknow, 1977).
47. Similar criticism has also been directed at the manner in which judges in Argentina have approached the task of constitutional interpretation, making this a powerful argument that has to be addressed in order to establish the legitimacy of the practice of trans-judicial influence. Carlos Rosencrantz, *Against Borrowings and other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269 (2003) (asserting that massive borrowing of U.S. constitutional doctrines and cases has stunted the development of indigenous Argentinean constitutionalism and prevented the full development of a robust spirit of constitutionalism in Argentina).
48. Gobind Das, Supreme Court in Quest of an Identity 1 (Eastern Book Company: Delhi, 1987).

Although it is doubtful if in 2008 the Supreme Court could reasonably be accused of not having created its own unique jurisprudence, what is striking about this grandiose statement is that the author sees what Dhavan calls "imitative cosmopolitan habits" as a virtue rather than a vice.

The most detailed study of the use of foreign case-law in India is to be found in a recent study by an American scholar.[49] The study of the use of foreign law conducted by Adam M. Smith covers 14,000 odd cases decided by the Supreme Court of India between 1950 and 2005.[50] The study details the use of cases from the U.S., England, Canada, Australia and other Commonwealth nations. Smith divides his study of the use of foreign law by the Indian Supreme Court into three phases approximating to different time periods (1947-77, 1978-1991, and 1992-present) which accord with his broad categorization of the interpretive philosophies that were in vogue on the Court.[51] Smith's interpretations of his findings are controversial, and subject to debate, and this is not the appropriate place to enter into the discussion of intricate issues of Indian political and constitutional that such a debate will necessarily involve. However, his raw data reveals interesting patterns. Smith found references to foreign law in 24.6 % of the total number of cases he surveyed (i.e. in 3629 out of 14,778 cases).[52] Of these, 22.3% were to English law (including Privy Council cases) and 6.9% were to U.S. cases.[53] Smith also notes that references to English law have been steadily dipping, whereas references to U.S. cases have remained constant by and large on an annual basis. Even a casual study of more recent cases decided by the Supreme Court of India reveals that contemporary judges continue to cite and rely upon foreign cases. The Supreme Court of India can thus be said to have had a long and continuous tradition of robust engagement with the practice of trans-judicial influence.

IV. Trans-Judicial Influence and PIL Jurisprudence in India

Here, my focus is on the use of foreign cases by the Indian Supreme Court in the early PIL cases. This section begins with an examination of the views of two personalities who were pivotal actors in the PIL movement in India: Upendra Baxi and Justice P.N. Bhagwati. In 1985, at a time when the

49. Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,* 24 BERK. J. INT'L L. 218 (2006).
50. One problem that becomes immediately apparent with Smith's study is the low number of judgments that he claims have been issued by the Supreme Court, and formed the basis of his statistical analysis. Smith asserts that this total amounts to 14,778 over a period of 55 years. However, this seems an extremely low figure, especially when we consider the fact that the number of cases pending before the Supreme Court in 1994 alone was 120,000.
51. Smith, *id.* at 246, 246-259.
52. Smith *Id.* at 239.
53. *Id.*

PIL movement was still in its early stages, each of them had strongly argued that the PIL movement in India was unique in many ways. Their analysis has significance not just for revealing what principal actors saw the PIL movement as being focused upon, but also for their views on trans-judicial influence.

In a celebrated article which has achieved iconic status in the literature on PIL jurisprudence in India, Upendra Baxi argued that the "establishment revolution" brought about by Indian Supreme Court judges in the late 70s was clearly distinguishable from the earlier "public interest" movement that had occurred in the U.S., reaching its pinnacle during the Warren Court era.[54] Relying upon the scholarly work of some of the most astute commentators of the public interest movement in the U.S., Baxi argued that the Indian phenomenon was directed against "state repression or governmental lawlessness" and was focused "pre-eminently on the rural poor."[55] By contrast, Baxi asserted, the U.S. movement had been focused on "civic participation in governmental decision making" and was directed towards securing "greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society."[56] Baxi argued that the U.S. phenomenon sought to represent "interests without groups" such as consumerism or environment, and was critical of its ability to generate "pressures for structural changes in law and society." Baxi relied upon the work of U.S. academics to assert that the U.S. movement "ended up servicing the much exposed ideology of interest group pluralism and legal liberalism" and had resulted in enhancing the "legitimacy of processes that may not really change."[57]

It is important to emphasise that Baxi was not making an argument *against* comparative learning. Indeed, he highlighted the above critique of the public interest movement in the U.S. as he felt that Indian social action groups should be aware of the shortcomings of the U.S. experience. He also conceded that the U.S. public interest movement had brought about "fruitful innovations in legal doctrine and technique" and identified the following strategies in particular: "liberalisation of locus standi, growth of techniques of judicial review over administrative action and regulatory agencies" among others. Yet, he felt that the American PIL movement had largely been a

54. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* THIRD WORLD LEGAL STUDIES 107 (1985). Perhaps reflecting the impact this article has had, it is available in several publications, and in different versions. The version I cite and rely upon here is substantially similar to the one published in a book edited by Neelan Tiruchelvan and Radhika Coomaraswamy in 1987, which is usually the standard cite for this work.
55. *Id.* at 109.
56. *Id.*
57. *Id.*

"failure." Famously, Baxi argued that the Indian phenomenon should be called "social action litigation" to emphasise its distinctiveness. He felt that this was necessary in order to counteract "the hold of colonial legal imagination" which according to him would lead to a lack of appreciation of "the vital political cultural differences between the two societies" and to "a loose-minded importation of notions" from the U.S.

In an oft-cited article published in the same year, Justice P.N. Bhagwati asserted that the public interest litigation movement in India was very distinct from its U.S. counterpart. In expanding on this theme, Justice Bhagwati appears to have adopted not just the thrust of Baxi's argument but also his exact words.[58] Justice Bhagwati was more assertive than Baxi, and categorically asserted that, "[t]he substance of public interest litigation in India is much wider than that of public interest litigation in the United States" as the Indian practice encompassed all the issues embraced by the U.S. movement, and went beyond to focus on the concerns of "the disadvantaged and other vulnerable concerns."[59] After emphasising the limitations of "Anglo-Saxon law" and emphasising the need to "evolve a new jurisprudence,"[60] Justice Bhagwati also endorsed Baxi's reasoning in respect of the proper name for the Indian practice, and referred to it as 'social action litigation.'

The two pieces, together with others published by the same authors around the same time,[61] identify the following as the distinctive and innovative features of the Indian experience: i) Epistolary jurisdiction (consisting of relaxing the traditional rules of locus standi to enable disadvantaged groups to approach courts by sending postcards, and enabling others to represent them in court); ii) "Creeping"[62] jurisdiction (where the courts sought to make long term improvements to public administration by keeping cases pending and issuing interim directions and orders); iii) the

58. P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 569 (1985) ("The United States model is, I believe, *concerned more with civic participation in governmental decision-making, and it seeks to represent "interests without groups," such as consumerism or environmentalism.* These, no doubt, form the issues of public interest litigation in India also, but the *primary focus is on State repression, governmental lawlessness,* administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements.") (Emphasis added). The italicised words are those employed by Baxi in his own article discussed above. Justice Bhagwati cites the Baxi piece for another reference, but does not attribute the specific language he borrowed to the Baxi piece.

59. *Id.* at 569.

60. *Id.* at 570.

61. P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, in THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 20 (Neelan Tiruchelvam & Radhika Coomaraswamy, eds., Frances Pinter: London, 1987).

62. Baxi, *supra* note 54 at 122.

appointment of socio-legal commissions of inquiry to assist the Court in ascertaining facts and deciding upon solutions; iv) evolution of new remedies and strategies of enforcement.

At least one scholar has disputed the claim advanced by Baxi and Bhagwati. SK Agarwala has argued, taking issue with these claims, that the Indian PIL experience was inspired both in spirit and in its methods by the activism of the Warren Court era in the U.S.[63] In the later part of this section, I will demonstrate that Indian judges had made extensive use of U.S. cases and academic literature in the early PIL cases. This would suggest that the claims of Baxi and Bhagwati about the distinctive nature of Indian PIL jurisprudence must be tempered by the arguments offered by Agarwala.

Although my purpose in this paper is not to conduct a full-scale assessment of the achievements and failures of the Indian PIL experience, I will sketch some of my preliminary thoughts on the phenomenon, relying on later assessments of the practice by other scholars. Reading this analysis nearly twenty years later makes one think of how the nature of PIL has transformed since its early years. Arguably, the contemporary Indian PIL movement more closely resembles Baxi's description of the U.S. public interest movement, given its focus on issues of consumerism, the environment, and other concerns of the middle classes. As PIL has developed over the past three decades, it has largely lost its pro-poor orientation, and some recent PIL cases have seen a reverse trend of judgments being issued that are against the interests of some of the most oppressed and disadvantaged sections of society.[64] Given the time at which the pieces were written, I take Baxi as seeking to prescribe the manner in which he hoped the Indian experience would develop, and to that extent, I believe his act of naming the movement SAL was motivated more by aspirational considerations than by those of descriptive accuracy. The Indian PIL movement also never fully took on the character of "social action litigation" as most PILs continued to be initiated at the instance of select individuals or particular NGOs. Indeed, when genuine social movements have actually tried to invoke the PIL

63. S.K. Agarwala, Public Interest Litigation in India: A Critique 8 (N.M. Tripathi and Indian Law Institute: Bombay) (1987).

64. Usha Ramanathan, *Of Judicial Power*, 19(6) Frontline, (March 16-29, 2002) *available at*: http://www.frontlineonnet.com/fl1906/19060300.htm. (last visited April 1, 2008). Other scholars who have developed similar ideas include Prashant Bhushan, Balakrishnan Rajagopal and Surya Deva. *See generally*, Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives under Liberalisation*, Economic and Political Weekly, (May 1, 2004); Balakrishnan Rajagopal, *Judicial Governance and the Ideology of Human Rights*, in Human Rights, Justice and Constitutional Empowerment 200-236 (C. Raj Kumar et al, eds., Oxford Univ. Press: Delhi, 2007); and Surya Deva, *Globalisation and its Impact on the Realisation of Human Rights*, in Human Rights, Justice and Constitutional Empowerment 237-63, 255 (C. Raj Kumar et al, eds., Oxford Univ. Press: Delhi, 2007).

jurisdiction, their efforts, more often that not, seem to have resulted in failure.[65]

Against this backdrop, I now seek to analyse some of the cases which are generally considered as having played a significant role in heralding the changes brought about by the PIL movement. Before I explore the details of the process by which foreign judicial decisions, as well as academic articles by foreign scholars, influenced PIL jurisprudence in India, it is important to emphasise that I am not suggesting that Indian judges were simply mimicking or slavishly following the actions of foreign judges or academics. As I will demonstrate, the process was far more complex.

i. Pre-PIL cases that had a significant impact on later PIL cases

Some scholars have asserted that the creative approaches adopted by the Indian Supreme Court in the mid to late 70s would not have been possible but for the manner in which the Supreme Court expanded its own jurisdiction and powers in previous significant cases such as *Kesavananda Bharati v. Union of India* (1973)[66] and *Maneka Gandhi v. Union of India* (1978).[67] What is interesting for our purpose is that both in *Kesavananda* and in *Maneka*, trans-judicial influence played a significant role, and foreign judicial decisions were cited by counsel and adopted by the Court for justifying various conclusions.

In this sub-section, I examine the use of foreign cases in these two landmark judgments. I begin with an analysis of the decision in *Kesavananda*. The following statement in Justice Chandrachud's judgment gives a sense of the variety of foreign decisions cited by counsel before the Court in *Kesavananda*:

> "I thought when arguments began ... that the judgments of this Court will form the focus of discussion, foreign decisions making a brief appearance. But in retrospect, I was wrong. Learning, like language, is no one's monopoly and counsel were entitled to invite us to consider how heroically courts all over the world had waged battles in defence of fundamental freedoms and on the other hand how, on occasions, the letter of law was permitted to prevail in disregard of evil consequences... We were taken through an array of cases decided by the Privy Council, the Supreme Court of the United States of America, the Supreme Courts of the American States, the High Court of Australia, the

65. Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.
66. AIR 1973 SC 1461.
67. AIR 1978 SC 597.

> Supreme Court of Ireland, the High Court of Ireland, the Supreme Court of South Africa, and of course our own Supreme Court, and the High Courts."[68]

Many of these comparative sources were relied upon in the eleven judgments to support varying viewpoints. For instance, a decision of the Privy Council in a Ceylonese case, *Liyanage v. The Queen* (1967),[69] was relied upon by the majority judgments of Sikri C.J., Shelat & Grover JJ. and Hegde & Mukherje JJ. In that case, the Privy Council had, while interpreting Ceylon's Independence Constitution, held that although there was no explicit provision in the Constitution to that effect, judicial power was exclusively vested in the Ceylon Judiciary. Similarly, two of the minority judgments – those of Ray J. and Palekar J. – refer to the Irish case of *The State (Ryan) v. Lennon* (1935),[70] where the Irish Supreme Court upheld an amendment to the amending provision, Article 50, of the Irish Constitution of 1922. In doing so, the Irish Court provided support for the view that an amendment which authorises the abrogation of "essential features" may nevertheless be passed.

Many commentators have also noted the important role played by the scholarly work of the German academic, Dieter Conrad, whose writings were expressly relied upon by Justice Khanna as justification for adopting the concept of a 'basic structure' of a constitution.[71] As these commentators note, the very idea of 'basic structure' or 'basic features' may itself be an adaptation of a foreign (German) concept.

In *Maneka,* the majority judgment of Justice Bhagwati relied heavily upon English case-law, foreign academic works and general common law principles to support the central holding of the case. This was the proposition that Article 21 of the Constitution contained a substantive due process right, which had been violated in the case by not providing a hearing to the petitioner before impounding her passport, thereby violating her natural justice rights. The separate concurring judgments of Chief Justice Beg, and Justices Krishna Iyer and Kailasam also reached the same conclusion.

All the judges reiterated the existence of a right to travel abroad, which they reasoned was to be found in the guarantee of personal liberty provided in Article 21. The Court also referred to earlier precedents where such a right to travel abroad had been judicially endorsed.

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68. Kesavananda, *id.* at para 2007-8 (separate judgment of Chandrachud, J.).
69. [1967] AC 259.
70. [1935] IR 170.
71. *See, for e.g.,* A.G. Noorani, *Behind the 'Basic Structure Doctrine',* Vol. 18 (Iss. 9) FRONTLINE (April 28-May 11, 2001) *available at* http://www.hinduonnet.com/fline/fl1809/18090950.htm (Last visited on April 1, 2008).

The judgments in *Maneka* were witness to an interesting and unusual difference of opinion between Justices Bhagwati and Iyer on an issue which also involved the different ways in which they construed the applicability of foreign judicial decisions. One of the central issues in the case was whether a fundamental right to travel abroad could be read within the right to freedom of speech and expression in Article 19(1)(a), and to establish this right in India, the counsel for the petitioners relied upon several decisions of the U.S. Supreme Court. Although Justice Bhagwati concluded that the right to travel abroad, following earlier precedents, did exist in India as part of the liberty rights guaranteed by Article 21, he emphatically rejected the argument that the right to travel abroad could be read into the right to freedom of speech and expression. In doing so, he specifically distinguished and rejected the applicability of three U.S. Supreme Court decisions to the Indian context.[72] In his separate concurrence, while agreeing with the rest of Justice Bhagwati's reasoning and conclusion, Justice Iyer raised some doubts about this part of Justice Bhagwati's judgment. He quoted extensively from American legal scholars and also used arguments from the three cited decisions. He then laid out some hypothetical scenarios where, even in India, there could be situations where a ban on foreign travel could have implications for the freedom of speech and expression. Justice Iyer did not follow through on this reasoning, and having mentioned his doubts, decided to go along with the rest of Justice Bhagwati's judgment.[73]

The foregoing analysis indicates how extensively judges of the Indian Supreme Court have engaged with the reasoning employed in foreign constitutional decisions in seeking to find solutions to the complex problems thrown up in domestic constitutional litigation. The next two sections focus on more such examples in two specific areas of the law.

ii. Cases involving relaxation of traditional standing requirements

As we have seen, the relaxation of traditional principles of *locus standi* was one of the most important innovations of the PIL jurisprudence in India, and heralded the massive changes that followed. The basis for this move was carefully laid out by Justice Krishna Iyer in a series of four cases decided in the mid 1970s – *Bar Council of Maharashtra v. M.V. Dabholkar*(1975),[74] *Nawabganj Sugar Mills*(1975),[75] *Mumbai Kamgar Sabha v. Abdulbhai*(1976)[76] and *Maharaj Singh v. State of U.P.*(1976)[77] – where he incrementally built up

72. Maneka, *supra* note 67 at paras 27-34 (majority judgment of Bhagwati, J.).
73. Maneka, *id.* at paras 97-112 (separate judgment of Krishna Iyer, J.).
74. AIR 1975 SC 2092.
75. AIR 1976 SC 1152.
76. AIR 1976 SC 1455.
77. AIR 1976 SC 602.

the basis for construing ideas of standing more liberally. From both explicit and implied references to U.S. cases and public interest strategies, it is clear that Justice Iyer was very familiar with developments in that jurisdiction, and that American decisions and academic literature played a significant role in influencing the manner in which Justice Iyer sought to bring about changes in standing in India.

In *Dabholkar,* the issue of *locus standi* was front and centre before a 7-judge bench of the Supreme Court. The case required an analysis of the capacity of the Bar Council to appeal against a disciplinary order issued against errant lawyers. Although he concurred with Chief Justice Ray's judgment for the Court, Justice Krishna Iyer wrote separately, focusing on the need to construe standing liberally. He cited a number of foreign academic works to make the central point that changing conditions and the particular needs of a developing country required a different, expansive interpretation of standing requirements in India. He also expressly relied upon U.S. examples by asserting that:

> "Traditionally used to the adversary system, we search for individual persons aggrieved. *But a new class of litigation public interest litigation–where a section or whole of the community is involved (such as consumers' organisations or NAACP–National Association for Advancement of Coloured People–in America), emerges.* In a developing country like ours, this pattern of public oriented litigation better fulfils the rule of law if it is to run close to the rule of life."

Asserting that he derived support for this approach towards standing "from academic and judicial opinion in England and America," Justice Iyer cited the U.S. Supreme Court's decision in *Baker v. Carr* (1962)[78] (as it had been interpreted in a law review article), law review articles detailing changes in the U.S. designed to enable consumers to overcome standing restrictions, a judgment of Lord Denning in a Privy Council case,[79] and academic texts by English authors to buttress his argument that strict rules of standing should be jettisoned.

In *Nawabganj,* Justice Iyer spoke for a two-judge bench of the Supreme Court which was confronted with a situation where traditional notions of judicial process would have required the Court to act with restraint, and allow an unjust situation to continue because there was no legal remedy under the existing law. The case involved sugar mill owners who had, pursuant to a High Court order, managed to levy prices much higher than

78. 369 U.S. 186 (1962).
79. Attorney-General of the Gambia v. Pierra Sarr N. Jie, 1961 AC 617.

the 'control' price fixed by the government. When the High Court later concluded that the price fixed was unjustifiably above the 'control' price fixed by the government, the issue of unjust enrichment arose as a result of the difficulty in identifying the individual consumers. Justice Iyer acknowledged the difficulty posed, but held that "[t]he difficulty we face here cannot force us to abandon the inherent powers of the Court to act." In an implicit nod to the American legal system, he stated as follows:

> "*Had India had a developed system of class actions or popular organisation taking up public interest litigation,* we could have hoped for relief otherwise than by this Court's order. We lag in this regard, although people are poor and claims are individually trivial. Legal aid to the poor has a processual dimension. As things stand, if each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small, a suit too prohibitive in time and money and the wrong would go with-out redress. If there is to be relief, we must construct it here by simple legal engineering."[80]

Justice Iyer than proceeded to issue a set of innovative and unusual set of directions which sought to ensure that the sugar mill owners did not benefit from their actions, and that efforts were made to enable individual consumers who had paid the highly inflated prices to be able to recover them. The directions issued would be considered a typical example of PIL cases in the 1980s, but it is important to emphasise that this case occurred in 1976, and is not generally regarded as an example of PIL inspired activism.

In *Mumbai Kamgar Sabha*, Justice Iyer once again wrote the judgment for a two-judge bench of the Supreme Court in a labour dispute. Rejecting the argument that a Labour Union had no *locus standi* to raise issues in a dispute between workers and the management, Justice Iyer held as follows:

> "We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough and ready and invites a liberal approach. Procedural prescriptions are handmaids, not mistresses, of justice and failure of fair play is the spirit in which Courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mid descriptions and deficiencies in drafting pleadings and setting out the cause-title create a secret weapon to non-suit a party.

80. Nawabganj, *supra* note 75 at para 6.

> Where foul play is absent, and fairness is not faulted, latitude is a grace of procession justice. *Test litigations, representative actions, pro bono public and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural, shortcomings.* Even Article 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus stand in our socio-economic circumstances and conceptual latté dinarianism permits taking liberties with individualization of the right to invoke the higher Courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law. Therefore, the decisions cited before us founded on the jurisdiction under Article 226 are inept and themselves somewhat out of tune with the modern requirements of jurisprudence calculated to benefit the community."[81]

To support these propositions, Justice Iyer specifically cited his judgments in *Dabholkar* and *Nawabganj,* where, as we have noted, foreign judicial and academic opinions played a central role in his argument that standing rules in India should be relaxed.

In *Maharaj Singh*, Justice Iyer writing for a two-judge bench, in a case involving interpretation of the words "person aggrieved" in a statute, held as follows:

> "[A] larger circle of persons can move the court for the protection of defence or enforcement of a civil right to ward off or claim compensation for a civil wrong, even if they are not proprietarily or personally linked with the cause of action ...'A person aggrieved' is an expression which has expanded with the larger urgencies and felt necessities of our times. Processual jurisprudence is not too jejune to respond to societal changes and challenges. ...[T]he amplitude of 'legal grievance' has broadened with social compulsions. The State undertakes today activities whose beneficiaries may be the general community even though the legal right to the undertaking may not vest in the community. The State starts welfare projects whose effective

81. Mumbai Kamgar Sabha, *supra* note 76 at para 7.

> implementation may call for collective action from the protected group or any member of them. New movements like consumerism, new people's organs like harijan or mahila samajams or labour unions, new protective institutions like legal aid societies operate on the socio-legal plane, not to beat 'their golden wings in the void' but to intervene on behalf of the weaker classes. Such burgeoning of collective social action has, in turn, generated gradual processual adaptations. Test suits, class actions and representative litigation are the beginning and the horizon is expending, with persons and organisations not personally injured but vicariously concerned being entitled to invoke the jurisdiction of the court for redressal of actual or imminent wrongs."[82]

Justice Iyer then reiterated his judgment in *Dabholkar*, and specifically cited in full the American and English judicial and academic authorities he had relied upon in that judgment to conclude that: "Locus standi has a larger ambit in current legal semantics than the accepted, individualistic jurisprudence of old. The legal dogmas of the quiet past are no longer adequate to assail the social injustices of the stormy present."[83]

It is therefore clear that even in carving out its distinctive approach to standing, Indian courts relied, at least initially, on foreign decisions and academic literature.

iii. Cases involving rights of prisoners and reform of the criminal justice system

This sub-section focuses on five decisions relating to prison and criminal justice reform, where foreign decisions and literature were an important part of the justifications advanced by the judges.

In *M.H. Hoskot v. State of Maharashtra* (1978),[84] Justice Krishna Iyer, speaking for a three-judge bench of the Supreme Court, held that indigent persons (or those who could for justifiable reasons not afford legal services) were entitled to be provided free legal services at the expense of the State, especially in cases where a prison term could follow. Justice Iyer read such a right into the general liberty of persons guaranteed by Article 21. In doing so, Justice Iyer relied on English and American cases and academic works on the following reasoning:

> "Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel

82. Maharaj Singh, *supra* note 77 at paras 24-25.
83. *Id.* at para 27.
84. AIR 1978 SC 1548.

> the collaboration of lawyer power for steering the wheels of equal justice under law."[85]

After noting that "[f]ree legal services to the needy is part of the English criminal justice system," Justice Iyer relied on U.S. academic publications to make his case for a right to free legal aid in the Indian context. He also cited passages in support of the right of counsel from the judgments of Justice Black in *Gideon v. Wainright*(1963),[86] and Justice Douglas in *Argersinger v. Hamlin* (1972).[87] Summarising the position in the U.S., Justice Iyer stated:

> "Thus, in America, strengthened by the *Powell, Gideon* and *Hamlin* cases, counsel for the accused in the more serious class of cases *which threaten a person with imprisonment* is regarded as an essential component of the administration of criminal justice and as part of procedural fair play."[88]

Interestingly, in framing the scope of the right to free legal services in India, Justice Iyer appears to have followed the American cases to hold that the right would be available on demand for cases where imprisonment was a possibility.

Until now, I have focused on judgments delivered by Justice Iyer. I now turn to two judgments delivered by Justice Bhagwati, which similarly relied on foreign cases for crucial parts of the analysis and justifications that were ultimately offered.

In *Hussainara Khatoon v. Home Secretary, Bihar* (1979),[89] Justice Bhagwati wrote a judgment which sought to address several glaring problems in the criminal justice system in India. He first referred to Justice Krishna Iyer's judgment in *Hoskot*, and reiterated the essential need for providing free legal services to indigent persons accused of crimes. After noting that several undertrials in the State of Bihar had been detained for periods longer than the maximum terms of imprisonment that could have been awarded to them upon their having been tried and convicted, Justice Bhagwati ordered their immediate release. Finally, Justice Bhagwati deplored the long periods of delay in conducting trials, and emphasised that the right to speedy trial was constitutionally mandated in India. He then held that the Court would be justified in seeking to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the

85. *Id.* at para 14.
86. 372 U.S. 335, at 344 (1963).
87. 407 U.S. 25 (1972).
88. Hoskot, *supra* note 84 at para 18.
89. AIR 1979 SC 1369.

investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial.[90]

What is fascinating for our purposes is that in order to justify the taking of such proactive measures, Justice Bhagwati looked towards decisions of lower courts in the U.S.:

> "We find that in fact the courts in the United States have adopted this dynamic and constructive role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through decisions such as *Holt v. Sarver* (supra), *Jones v. Wittenberg*, 330 F Supp 707; *Newman v. Alabama*, 349 F Supp 278 and *Gates v. Collier*, 349 F Supp 881. The Court in the last mentioned case asserted that it 'has the duty of fashioning a decree that will require defendants to eliminate the conditions and practices at Parchman hereinabove found to be violative of the United States's constitution' and in discharge of this duty gave various directions for improvement of the conditions of those confined in the State Penitentiary. The powers of this Court in protection of the constitutional rights are of the widest amplitude and *we do not see why this Court should not adopt a similar activist approach* and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial."[91]

Again, the reference to foreign decisions is not merely for broad guidelines, but also for emulating specific decisional strategies invoked in those foreign decisions. A few years after the decisions in *Hoskot* and *Hussainara Khatoon*, the Supreme Court revisited the issue of free legal services in *Khatri v. State of Bihar* (1981).[92] In *Khatri*, Justice Bhagwati wrote the judgment for a two-judge bench of the Supreme Court, and in response to an argument made on behalf of the government citing lack of financial resources to provide free legal services, held as follows:

> "The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure

90. *Id.* at para 10.
91. *Id.*
92. AIR 1981 SC 928.

> but, as pointed out by the court in *Khem v. Malcolin* 377 F. Supp. 995, 'the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty' and to quote the words of Justice Blackmum in *Jackson v. Bishop* 404. F. Supp. 2d, 571: 'humane considerations and constitutional requirements are not in this day to be measured by dollar considerations.'"[93]

Again, foreign decisions were invoked, not merely for stating broad principles, but for finding support to reach very specific findings.

In *Sunil Batra v. Delhi Administration (II)* (1979),[94] Justice Iyer issued several directions designed towards improving conditions in prisons. These included directing District Magistrates to conduct weekly inspections of prisons, while also setting up systems for ensuring that legitimate grievances of prisoners could be attended to, and ensuring that principles of natural justice were adhered to before revoking benefits due to prisoners. Once again, several lower court decisions from the U.S. were cited in support of these specific measures.

The last case I examine as illustrative of this line of PIL cases is the decision in *Francis Coralie Mullin v. Administrator, Delhi* (1981).[95] In this case, Justice Bhagwati held that a prison regulation laying down strict limits on the time and manner in which prisoners could consult with their legal counsel violated Articles 14 and 21 of the Constitution. After noting prior decisions of the Indian courts that had held that prisoners did not lose other fundamental rights upon being imprisoned, Justice Bhagwati cited several decisions of the U.S. Supreme Court which pointed to this issue, quoting specific passages from judgments of Justices Douglas, White and Thurgood Marshall. He then stated:

> "What is stated by these learned Judges in regard to the rights of a prisoner under the Constitution of the United States *applies equally in regard to the rights of a prisoner or detenu under our constitutional system.* It must, therefore, now be taken to be well-settled that a prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration, and if any of these rights are violated, the Court ... will immediately spring into action and run to his rescue."[96]

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93. *Id.* at para 5.
94. AIR 1980 SC 1579.
95. AIR 1981 SC 746.
96. Francis Coralie Mullin, *id.* at para 5.

More significantly for the future development of PIL jurisprudence, which in later years developed by expansively interpreting the language of Article 21, Justice Bhagwati relied upon a long passage from the U.S. Supreme Court's decision in *Weems v. U.S.* (1910)[97] to assert the following statement:

> "This principle of interpretation [referring to the quoted language in *Weems*] which requires that a Constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the Constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. ... Now, obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival."[98]

Those familiar with the later development of PIL jurisprudence in India will recognise the fundamental importance of this interpretive strategy. This interpretive technique gained considerable significance in subsequent years, when this passage from *Francis Coralie Mullin* was quoted to justify reading into the language of Article 21 several of the Directive Principles mentioned in Part IV of the Constitution, as well as other more general societal goals. What is significant is that for stating this proposition in *Francis Coralie Mullin*, which became a leading authority for imparting an expansive interpretation to Article 21, Justice Bhagwati arrived at this crucial reasoning by relying upon a foreign judicial decision.

There are several other significant PIL cases where foreign decisions played a significant role in shaping the methodology and result adopted by the Supreme Court of India, which I do not analyse at length due to constraints of space.[99] I hope, however, that this short survey emphasises the extent of trans-judicial influences in the early PIL jurisprudence in India.

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97. 217 U.S. 349 (1910).
98. Francis Coralie Mullin, *supra* note at paras 6-7.
99. For some more examples, see the following cases: Fertilizer Corp. Kamgar Union v. Union of India, (1981) 1 SCC 568 (establishing the right of workers to challenge legality of sale of plant); PUDR v. Union of India, (1982) 2 SCC 253, (applicability of

V. Trans-Judicial Influence and South Asian PIL Jurisprudence

Most observers track the origins of the PIL movement in India to the mid-to-late 1970s. Since then, PIL jurisprudence has spread across South Asia, and appears to have gained footing particularly in Pakistan and Bangladesh. However, most commentators suggest that India continues to be the jurisdiction where PIL has flourished most extensively, albeit in forms that are quite different from the original conceptualisation. This is of course partly to do with the fact that both Pakistan and Bangladesh have had tumultuous experiences with martial law, and democracy has appeared in intermittent phases in these two countries. At the time of writing, both these countries are experiencing difficulties in maintaining the basic elements of a democratic system. Obviously, the capacity of judiciaries to exist and perform basic functions under these circumstances, let alone cite foreign judicial authorities, is bound to be diminished. This is what makes the cases described in this section even more dramatic. I seek, in this section, to document the development of PIL jurisprudence in Pakistan and Bangladesh, focusing on the influence of foreign judicial decisions, principally from India, on that process.

i. Pakistan

Scholars who have focused on Pakistan's PIL jurisprudence[100] appear to agree that the first PIL case in Pakistan was *Benazir Bhutto v. Federation of Pakistan* (1988).[101] That case was initiated by the opposition politician, Benazir Bhutto, who sought to challenge the constitutional validity of a legislative amendment which imposed certain additional restrictions that would apply to political parties which sought to contest elections. The State raised a preliminary objection as to the *locus standi* of the petitioner, Benazir Bhutto, on the ground that the political party was not the "aggrieved party." Relying specifically on the Indian Supreme Court's decision in *S.P. Gupta v. Union of India* (1982),[102] the Supreme Court of Pakistan rejected the objection of

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labour laws to Asian Games construction projects); National Textile Workers Union v. P.R. Ramakrishnan, AIR 1981 SC 344 (Right to workers to oppose winding up petition); S.P. Gupta v. Union of India, AIR 1982 SC 149 (Relaxation of rules of locus standi). In all these cases, judges of the Indian Supreme Court relied typically on U.S. cases and academic writings to support their reasoning and conclusions.

100. I rely principally upon three accounts. Dr. Pervez Hassan and Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L. J. 215 at 232 (2004); WERNER MENSKI ET AL., PUBLIC INTEREST LITIGATION IN PAKISTAN 122-123 (Platinum and Pakistan Law House: London and Karachi) (2000); and NAIM AHMED, PUBLIC INTEREST LITIGATION: CONSTITUTIONAL ISSUES AND REMEDIES (Bangladesh Legal Aid and Services Trust: Dhaka, 1999).

101. PLD 1988 SC 416.

102. AIR 1982 SC 149.

the State and held that in circumstances where the fundamental rights of a class or group of persons had been violated, and they could not seek redress from a court on account of technical objections, the Court would dispense with the traditional rule of *locus standi*.[103]

Although *Benazir Bhutto* was the first PIL case in Pakistan, some observers have asserted that the classification does not "sit well with the background of the case, inasmuch as the petitioner was a wealthy person and one of the country's most powerful politicians."[104]They point to the decision in *Darshan Masih v. State* (1990)[105] as being a more rightful claimant to the distinction of being "the first genuine public interest litigation case in Pakistan."[106] In *Masih,* a group of brick kiln bonded labourers and their families succeeded in obtaining a relaxation of the strict rule of *locus standi*, enabling the Court to grant them relief. Werner Menski, who has followed the development of PIL in Pakistan for several years, notes that the judges who decided *Darshan Masih* cited Indian decisions and adopted the reference in the *S.P. Gupta case* to enabling access to "little Indians in large numbers" to hold that "little Pakistanis in large numbers" would, through the Court's PIL jurisprudence, be able to seek remedies for rights violations in Court.[107]

Four years after the decision in *Masih*, the Supreme Court of Pakistan delivered a landmark ruling in the case of *Snehla Zia v. WAPDA* (1994),[108] when it held that the right to life guaranteed by Article 9 of the Constitution of Pakistan included the right to a healthy environment. This enabled environmental activists to overcome the problem of the lack of a textual basis for environmental rights in the Pakistani constitution. The Supreme Court held that the petitioners, who were residents of an area where a high voltage grid station was proposed to be constructed, could - on the basis of their constitutional right to a healthy environment - obtain a stay on the construction until further studies were carried out to establish the nature and extent of the threat posed to the residents by electro-magnetic radiation. The lawyer for the petitioners asserts that to make his argument he drew on "the extensive environmentally-related case law in India regarding the constitutionally-protected "right to life" as including and embracing a "quality" of life."[109] In *Zia*, apart from adopting the argument of the Indian Supreme Court for establishing a fundamental right to a healthy environment, the Pakistan Supreme Court also followed the lead of the

103. Bhutto, *supra* note 101 at 490-91 as quoted in Hassan & Afzar, *supra* note 100 at 233.
104. Hassan & Afzar, *id.* at 233.
105. PLD 1990 SC 513.
106. Hassan & Azfar, *supra* note 100 at 233.
107. MENSKI ET AL., *supra* note 100 at 118-9.
108. PLD 1994 SC 693.
109. Hassan & Azfar, *supra* note 100 at 236-7. Hassan was the lawyer in the *Shehla Zia* case.

Indian Supreme Court in setting up a commission of experts to study the technical dimensions of the case and also directed it to submit a report to the Court.[110] The decision in *Zia* has led, over time, to a series of decisions by the Pakistan Supreme Court on various issues relating to the environment.[111]

Based on the analysis of these three important cases, it is clear that Indian cases did have a significant influence on the early PIL cases in Pakistan. What is surprising is the extent of explicit reliance on Indian decisions, even at times when political relations between the two nations were quite troubled. In later years, political factors that caused a lessening of actual judicial independence have affected the evolution of PIL jurisprudence in Pakistan, though courts have, during times of relative peace and stability, attempted to assert their powers.

ii. Bangladesh

Although there were attempts to incorporate PIL jurisprudence in Bangladesh in earlier decades,[112] most observers seem to agree that PIL in Bangladesh became viable only after the return of democracy, and even then, not until the mid-1990s. Menski argues that "[j]udges in Bangladesh obviously knew much earlier about the developments of public interest litigation both in India and Pakistan but, for various reasons, they delayed implementing it until the pressure from established legal quarters became overwhelmingly strong."[113] As in the case of Pakistan, those reasons include the absence of factors that facilitated the creation of a robust atmosphere of judicial independence, especially for the lower judiciary in Bangladesh – a problem that continues to this day.

One of the hurdles for the development of PIL in Bangladesh, as in India and Pakistan, was the way courts in Bangladesh, following the lead of common law courts elsewhere, construed rules of standing narrowly. During the 1970s, in a series of cases, courts in Bangladesh rejected attempts to liberalise rules of standing.[114] However, in one celebrated case (which has later been interpreted as paving the way for the liberalisation of the rule of *locus standi* in future cases), the Appellate Division of the Supreme Court did relax the rule to give standing to a citizen to challenge the validity of a treaty entered into by Bangladesh with India. The decision in *Kazi Mukhlesur*

110. Hassan & Afzar, *id.* at 239.
111. For details of these later cases, *see* Hassan & Afzar, *id.* at 240-2.
112. Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh 39-40 (Kluwer Law Int'l: London) (2004); Ahmed, *supra* note 100 at 20-22.
113. Menski et al., *supra* note 100 at 125.
114. Razzaque, *supra* note 112 at 289-292 (providing details of cases).

Rahman v. Bangladesh (1974)[115] has often been invoked in PIL cases in Bangladesh as being the first South Asian case that relaxed rules of standing, even before courts in India had initiated similar approaches. Some Bangladeshi scholars and judges assert that this fact is not given its due recognition, but at least some of the force of this assertion is diminished by taking into account the larger picture, and recalling that the decision in *Kazi Rahman* was a singular exception in a body of cases which otherwise exhibited great hostility to the idea of relaxed standing.[116]

One scholar identifies the return of guided democracy under General Ershad in the mid-80s as the era when PIL began in Bangladesh.[117] Naim Ahmed argues that a series of decisions handed down by the Supreme Court in non-PIL cases in the 80s paved the way for the later adventurism in PIL cases in the 90s. This is similar to the argument employed by some Indian constitutional scholars who point to the decisions in *Kesavananda* and *Maneka* (both of which were non-PIL cases) as having laid the legal and populist foundation upon which the Indian PIL cases were later developed. However, most other scholars seem to trace the beginning of PIL in Bangladesh to the early 1990s, when democracy had a more robust presence in Bangladesh.[118] Although there have been significant PIL cases in other areas of constitutional and general law,[119] PIL in Bangladesh has developed most spectacularly in the arena of environmental rights, with the Bangladesh Environmental Lawyers Association ("BELA"), which was established in 1991, having played a pivotal role in this process.[120] BELA had been involved in various environmental causes, and in the early 1990s, its secretary general, Dr. Mohiuddin Farooque, who was a lawyer, began filing writ petitions to find the backing of courts for its campaigns. In 1994, he sought to persuade a bench of the High Court Division of the Supreme Court of Bangladesh to intervene and address the perceived ill-effects of a government plan for controlling flood relief. The High Court Division rejected his petition on the ground that he lacked standing. On appeal, the Appellate Division of the Supreme Court of Bangladesh held, in the case of *Dr. Mohiuddin Farooque v. Bangladesh* (1997)(more commonly referred to as the *FAP 20 case*),[121] that he and BELA had the requisite capacity to initiate a PIL in the matter. The

115. 26 DLR (SC) 44 (1974).
116. This point was fairly conceded by a constitutional scholar from Bangladesh in a recent publication. Ridwanul Hoque, *Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh,* 15 (4) CONTEMPORARY SOUTH ASIA 399, 401 (December, 2006).
117. AHMED, *supra* note 100 at 25-28.
118. Hoque, *supra* note 116 at 400.
119. Naim Ahmed provides details of significant politically controversial cases where courts in Bangladesh intervened in PIL cases. *See generally*, AHMED, *supra* note 100 at 30-48.
120. Hassan & Azfar, *supra* note 100 at 243-4; Razzaque, *supra* note 112 at 303-6.
121. 17 BLD (AD) (1997).

five-judge bench in the *FAP 20 case* focused solely on the question of *locus standi*, and laid down general principles under which rules of standing could be relaxed in public interest cases to conclude that Dr. Farooque did have sufficient interest and standing to bring forth his petition. The principal judgment was delivered by Justice Mustafa Kamal, though each of the judges wrote separately to agree with his conclusions, reiterating the importance of the case. Justice Kamal relied extensively upon foreign trends in public interest cases, as did the other judges who wrote on the issue. Justice Kamal's judgment referred to the public interest movement in the U.S. in the 60s, cited English authorities from the 70s which had relaxed traditionally strict rules of standing, reiterated the importance of the Bangladeshi case of *Kazi Rahman*, and also relied upon cases from India, Sri Lanka and Pakistan to conclude that similar strategies should be adopted in Bangladesh. Justice Kamal cited the Indian Supreme Court's decision in *S.P. Gupta v. Union of India* (1982) as authority for a liberal approach to rules of standing, and included a long quotation from that judgment. He also cited passages from the Pakistani cases of *Benazir Bhutto* and *Shehla Zia* (which we examined in the previous subsection).

When the case brought about by Dr. Farooque was, pursuant to the Appellate Division's ruling, taken forward and decided finally, the High Court Division also relied upon foreign judicial decisions to shape its final conclusion. In that case, which is reported as *Dr. Mohiuddin Farooque v. Bangladesh* (1998),[122] the High Court Division concluded that there were indeed substantial irregularities with the government plan to control floods, and directed that specific laws and regulations be complied with to correct such errors, in accordance with the suggestions advanced by BELA. In justifying its intervention, the High Court construed the 'right to life' provisions of the Constitution of Bangladesh liberally to include within their ambit the protection and preservation of the environment. For this interpretive move, the High Court cited the Indian Supreme Court's decision in *Olga Tellis v. Bombay Municipal Corporation* (1986)[123] as well as the decision of the Pakistan Supreme Court in *Shela Zia* (1994).[124] In both these cases, the Indian and Pakistani courts had extended a wide interpretation to their respective 'right to life' provisions to include environmental protection concerns.

Another case which bears mentioning in this category of cases is an earlier decision of the High Court Division in *Dr. Mohiuddin Farooque v.*

122. 50 DLR (1998) 84. The main judgment for the court was delivered by Justice AK Badrul Huq.
123. AIR 1986 SC 180.
124. PLD 1994 (SC) 693.

Bangladesh (1996).[125] This case, as the name suggests, was also initiated by Dr. Farooque as a PIL challenging a governmental decision to allow imports of milk powder that had been contaminated by radiation. The High Court Division held that the right to life guaranteed by Articles 31 and 32 of the Constitution of Bangladesh included a right to health, which required protection by active means. To arrive at such a conclusion, the judgment cited and relied upon passages from the several Indian cases where the Indian Supreme Court had similarly construed the Indian constitutional provision relating to life in an expansive manner.[126]

Besides BELA, other NGOs, such as the Bangladesh Legal Aid Services Trust ("BLAST"), Bangladesh National Women Lawyers' Association, and the Bangladesh Nari Progati Sangha have also played important roles in developing PIL in Bangladesh. Many of these NGOs have closely followed the development of PIL in India and Pakistan and regularly cited decisions from those jurisdictions in cases that they brought before the judiciary in Bangladesh, which in some cases has resulted in explicit references to foreign decisions in Bangladeshi court decisions.

Decisions from India have been cited in other types of constitutional cases in Bangladesh. In *Bilkis Akhter Hossain v. Bangladesh* (1997),[127] the High Court Division of the Supreme Court of Bangladesh held that in clear cases of unlawful detention, the victims were entitled to the constitutional remedy of seeking monetary compensation from governmental authorities. To arrive at this conclusion (which was not textually mandated by the Constitution of Bangladesh), the High Court Division relied upon several decisions of the Indian Supreme Court, where a similar interpretive move had been resorted to.[128] Interestingly, the High Court also took pains at pointing out that courts in Pakistan and Sri Lanka had also adopted such reasoning to justify the award of monetary compensation in cases of illegal detentions.[129] The High Court Division ultimately awarded the sum of one

125. 48 DLR (1996) 438. The judgment of the Court was delivered by Justice Kazi Ebadul Hoque. The full text of this judgment is *available at*: http://www.elaw.org/resources/text.asp?id=208 (last visited April 1, 2008).

126. The following cases were relied upon: Francis Coralie Mullin, *supra* note 95; Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161; Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180; Vincent v. Union of India AIR 1987 SC 990; Vikram Deo Singh v. State of Bihar AIR 1988 SC 1982; and Subash Kumar v. State of Bihar AIR 1991 SC 420.

127. 17 BLD (1997) 395.

128. *Id.* at 408-10 (citing and quoting from the decisions in Rudul Shah v. State of Bihar, AIR 1983 SC 1086; Bhim Singh v. State of Jammu and Kashmir, AIR 1986 SC 494; R.L.E.K. v. State of U.P., AIR 1991 SC 2216; Nilabati Behera v. State of Orissa, AIR 1993 SC 1960; and Paschim Banga Samity v. State of West Bengal, AIR 1996 SC 2426).

129. *Id.* at 410-11 (citing the decisions of the Pakistan Supreme Court in Govt. of East Pakistan v. Roushan, 18 DLR SC 214; and Govt. of West Pakistan v. Karim Shorish

lakh taka to the person who had been illegally detained (although this part of the decision was, on appeal, indefinitely postponed by the Appellate Division). This case also reveals another tendency of courts in Bangladesh: of trying to refer to decisions from across South Asia, instead of from any one country (even though decisions from India appear to have been particularly influential, especially in PIL cases). In this, the Bangladesh judiciary may well be exceptional, given that the judiciaries in India, Pakistan and Sri Lanka seem averse to referring to each others' judicial contributions, perhaps out of a feeling that their audience would not appreciate reference to countries with whom their governments are often at odds in the political sphere. This situation applies of course even to Bangladeshi judges, but they seem to be able to put aside such parochial considerations more easily than their judicial counterparts in other countries in South Asia.

Significantly, Indian cases have not had only a *positive* influence in Bangladesh. In some cases, they have had a *negative* or *aversive* influence. A good example of this trend is the decision of the Appellate Division of the Supreme Court of Bangladesh in *Sajeda Parvin v. Govt. of Bangladesh* (1988).[130] In this case, a politician whose preventive detention had been politically motivated approached the courts for relief and for securing his freedom. In granting him relief, and ordering his release, the Appellate Division of the Supreme Court of Bangladesh showed both courage and steely determination. Asserting that in reviewing cases of preventive detention, what a court should be concerned with "is to see that the executive or administrative authority had before it sufficient materials upon which a reasonable person could have come to the conclusion" that there were sufficient grounds for preventively detaining an individual.[131] The Court ultimately found the detention to be illegal, and ordered the release of the detainee. In adopting this 'objective' standard, the Supreme Court rejected the 'subjective satisfaction' standard that several decisions of the Indian Supreme Court had advanced as the proper measure in preventive detention cases. The Appellate Division of the Supreme Court of Bangladesh cited several such Indian cases,[132] but held that "in view of the difference of approach of the Indian decisions, with great respect, they have no application" in Bangladesh. What the Court did not say, perhaps as an attempt at judicial diplomacy, was that the Indian approach was actually quite indefensible,

Kashmiri, 21 DLR SC 1, as well as the decision of the Supreme Court of Sri Lanka in Amaratunge v. Police Constables, SAARC Law Journal (Sep. 1993)).

130. 40 DLR (1988) 178.

131. *Id.* at 183.

132. *Id.* at 183-4. (citing the following cases, each of which had endorsed the 'subjective satisfaction' test in preventive detention cases: Godavari v. State of Maharashtra, AIR 1966 SC 1404; Ram Bali Rajbhar v. State of West Bengal, AIR 1975 SC 623; Masood Alam v. Union of India, AIR 1973 SC 897; and Saraswathi v. State of Kerela, (1982) 2 SCC 310.

given the similar wording of the constitutional provisions in the two countries. What makes the irony richer is that the Supreme Court of Bangladesh cited decisions of the Pakistan Supreme Court endorsing the 'objective' approach in such cases.[133]

The purpose of this brief survey was to document how extensively – and openly – judges in Pakistan and Bangladesh relied on foreign cases from the subcontinent in giving birth to their own versions of PIL jurisprudence.

VI. Conclusion

My attempt in this paper has been to focus on the impact of trans-judicial influence on South Asian constitutional jurisprudence, specifically on PIL jurisprudence. Based on the analysis conducted in the foregoing pages, it is clear that South Asian judiciaries have relied extensively upon foreign judicial decisions (both from the U.S. as well as other South Asian jurisdictions) in shaping the contours of the PIL jurisprudence they have evolved for their countries.

Even though the article focused on a narrow range of cases, one can hazard some generalizations about the way foreign decisions have been used in India, Pakistan and Bangladesh. It is clear that in India, foreign decisions have been used regularly by the Supreme Court since its inception. However, as the Smith study shows, the sources referred to have generally been from the West, and more specifically, from England and the United States. Although not focused upon here, Indian judges have at times relied upon cases from other South Asian jurisdictions. Nevertheless, it is true that this happens rarely. By contrast, other courts in South Asia seem more inclined to citing each other, and at least in the area of PIL, India's influence appears to have been a major consideration.

As set out in the initial parts of the paper, the debate over the normative and practical aspects of the practice of trans-judicial influence has been predominantly concerned with cases and issues in the U.S. and other jurisdictions whose constitutional jurisprudence is more typically discussed in comparative law literature. Given the high rates of traffic in foreign judicial decisions in South Asian constitutional jurisprudence, it is time that scholars focused on the practice of trans-judicial influence in these jurisdictions in order to obtain a better sense of the complexity of the practice, as well as its actual and potential impact.

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133. *Id.* at 183-4 (citing the decisions in Mir Abdul Baluch v. Government of Pakistan, 20 DLR SC 249; and Government of West Pakistan v. Begum Abdul Karim, 21 DLR SC 1).

I believe that conducting such an exercise will, apart from adding to the debate on trans-judicial influence, also enhance understanding of constitutional jurisprudence in South Asia. This in turn may lead to the recognition of the need for greater exchanges between the societies of South Asia, which despite their many differences also share many commonalities.

The quotations from Tagore and Gandhi that appear at the beginning of this article summarise the challenges posed by this process. While each South Asian nation can benefit from learning from experiences in its neighbours, the challenge will be to do so in a way that does not compromise or undermine its own unique constitutional culture, but instead adds value and depth to its constitutional tradition. Given India's disproportionate size and tendency to cast a long shadow over the subcontinent, judges and jurists in other South Asian nations are understandably wary of accepting ideas evolved by judges in India uncritically. However, these obstacles are not insurmountable, and judges in other South Asian jurisdictions may look at how nations like Canada have despite similar concerns, been able to constructively engage with decisions from the U.S. without diluting the essence of Canadian constitutionalism.[134]

Equally, Indian scholars and judges would do well to pay close attention to legal developments in their neighbours. My hope is that more such exchanges between scholars and judges in South Asia will lead to a revival of interest in South Asian constitutionalism more generally. This is a goal which, I have no doubt, the great Poet and the Mahatma would certainly have approved of.

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134. In the 80s, when Canadians decided to adopt a written bill of rights in the form of the Canadian Charter, there were concerns that adopting such a US-style instrument would 'Americanise' Canadian constitutionalism. A raging debate ensued among those who opposed such trans-country influences, and those who believed that a written bill of rights would enhance Canadian constitutionalism without necessarily leading to it becoming a poor mimic of the US model. Over time, Canadian constitutionalism has developed with its own distinctive contributions, and is today regarded as an influential source of inspiration, rivalling that of US constitutional law. For a good overview of this debate, and the view of the respected former Chief Justice of Canada who oversaw the implementation of the Canadian Charter in its first few years, *see* Brian Dickson, *Has the Charter "Americanised" Canada's Judiciary? A Summary and Analysis,* 26 U. Brit. Colum. L. Rev. 195 (1992) (answering the question posed in the title of his article in the negative).