Foreign Precedents and the Global Cannon: A Preliminary Exploration

Noga Morag-Levine and Barbara Bean

Michigan State University College of Law

Draft

Frequent citation to foreign constitutional precedents tends to be associated with founding and transitional moments in the life of constitutional regimes. In a 2006 article, Adam M. Smith documents the working of this phenomenon through analysis of the Indian Supreme Court's citations to foreign precedents across its history. Foreign precedents, Smith argues, will tend to peak in two sets of circumstances. The first are constitutional founding eras when, in response to the scarcity of applicable constitutional precedents and other legitimating legal materials, judges within such nascent constitutional orders will be compelled to import precedents from elsewhere. Once a sufficiently comprehensive repertoire of domestic constitutional cases is put in place, foreign citations will tend to taper off. In addition to founding constitutional eras, Smith argues, periods of "state transformation" tend to bring increased reliance on foreign citations to buttress internal constitutional change.

The correlation between periods of constitutional founding and state transformation on the one hand, and increased citations to foreign cases on the other, provides an opening where the search for a "global constitutional canon" is concerned. If founding eras and moments of constitutional change are periods when courts search for constitutional "building blocks," then the citations that emerge from those eras can help identify the perceived needed foundational elements of constitutional regimes, and the extent of shared cross-national understandings as to what those elements might be. With this assumption in mind, we are in the early stages of a study geared at the substantive content of foreign cases cited by courts during periods of constitutional founding and transition.

The study is in its early stages, and we are a long way from being able to offer conclusions of any type. Here, our goal is to discuss the various research design questions we are contemplating in the course of planning this study, and share some (very) preliminary impressions and observations based on a pilot study we've begun to develop. Most importantly,

1

¹ Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 241, 268 (2006).

² The tapering off phenomenon, as Smith notes, has been observed both in the citations patterns of early American Supreme Court decisions, as well as, much more recently, the Canadian and South African courts. *See* Shael Herman, *Review*, 63 Tul. L. Rev. 1249, 1251 (1989) (reviewing Peter R. Pazzaglini & Catharine A. Hawkes, Consilia: A Bibliography of Holdings in the Library of Congress and Certain Other Collections in the United States (1989)). Shannon Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 Comp. Pol. Stud. 1188, 1199-1200 (2001).

we hope to draw on the collective wisdom of this group regarding both the theoretical and methodological questions involved.

II. Selection of Courts

The primary criterion we employed in the selection of courts whose citations were to be included in the database was a recent history of constitutional founding and/or transition along the type alluded to above. Easy access to searchable English language versions of the opinions of the courts was likewise a requirement. Both considerations pointed us towards the courts of Hong Kong, India, Israel and South Africa. All four of these countries experienced foundational and/or transformative constitutional moments since the mid-twentieth century, extensively relying on foreign precedents in the process.

Hong Kong: Sovereignty over Hong Kong was transferred from the United Kingdom to the People's Republic of China in 1997. In the immediate aftermath of this "handover" and the designation of Hong Kong as a Special Administrative Region (SAR) under Chinese control, the Hong Kong Court of Final Appeal issued a set of landmark decisions broadly interpreting the Hong Kong Basic Law. These decisions put the Court of Final Appeal on a collision course with the Standing Committee of the National People's Congress (NPRC) regarding the correct interpretation of the Basic Law, and institutional jurisdiction in this regard. In the course of this conflict, the Court of Final Appeal made frequent use of foreign citations with the goal of aligning the emergent Hong Kong constitutional regime with western constitutional models.

<u>India:</u> The history of the Indian Supreme Court includes distinct periods of constitutional transformation, in addition to a relatively recent constitutional founding. The pertinent founding period followed the ratification of the Indian Constitution in 1950. In a series of cases handed down soon thereafter, the Court articulated the boundaries of freedom of religion, protection of property and other rights under the Constitution. ⁵ In the course of these decisions the Indian Court engaged with a wide array of foreign constitutional cases and sources (nearly 65% of the

³Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152, 169 (2005)); Albert H.Y. Chen, "One Country, Two Systems" from a Legal Perspective, in THE FIRST DECADE: THE HONG KONG SAR IN RETROSPECTIVE AND INTROSPECTIVE PERSPECTIVES 171 (Yue-man Yeugn ed., Chinese University Press 2007); Waikenung Tam, *Political Transition and the Rise of Cause Lawyering: The Case of Hong Kong*, 35 LAW AND SOC. INQUIRY 663,679 (2010).

⁴ Hualing Fu, Lison Harri, & Simon N.M. Young, *Introduction* to Interpreting Hong Kong's Basic Law: The Struggle for Coherence1-11 (Hualing Fu, Lison Harri, & Simon N.M. Young eds., Palgrave Macmillan 2007).

⁵ Gobind Das, *The Supreme Court: An Overview, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 18-47, 38-39 (B.N. Kirpal, Ashok H. Desia, Gopal Subramanium, Rajeev Dhavan, Raju Ramachandran eds., Oxford University Press 2000). Regarding citations to Australian law during that era, see Michael Kirby, *The Supreme Court of India and Australia Law, id.* at 69-70..

Court's decisions during this initial period included references to foreign sources). Beginning in the 1960s in esponse to political pressure from the leadership of the Congress Party, the Indian Court withdrew into a prolonged period of subordination with an attendant decline in foreign court citations. Following the Emergency period in 1975-1977, the Indian Court greatly expanded the range of Constitutional protections in an effort to, "bring Indian law into conformity with global trends in human rights jurisprudence." Particularly notable in this respect has been a series of "Public Interest Litigation" decisions that relied on "non-domestic notions of freedom and access to courts" in support of multiple challenges to governmental corruption and abuse of power. The Indian Court incorporated foreign case law in almost all its major decisions during this period. Particularly notable in this major decisions during this period.

Israel: The history of constitutional adjudication in Israel bears some similarity to that of India. The Israeli Court, like that of India, issued a set of foundational constitutional decisions during the 1950s, soon after the creation of the State. In the absence of a written constitution, these decisions relied on the state's Declaration of Independence for the existence of quasiconstitutional protections for freedom of speech and other political rights. In tandem, the Israeli Court looked to foreign, often American, constitutional precedents for the meaning and substance of these rights. It was only during the 1990s, following the passage of two new Basic Laws, that the Israeli Court claimed the authority to invalidate legislative enactments. In the wake of what Israel's then Chief Justice Aharon Barak quickly dubbed a "Constitutional Revolution", the Supreme Court broadly expanded its reach. Between 1988 and 1996, the number of cases heard by the Court more than doubled. Among these was a long list of landmark decisions touching on key religious, economic, military and political controversies in Israel. Almost invariably these decisions included a heavy dose of citations to foreign cases and other constitutional sources.

_

⁶ Smith, *supra* note 1 at 240.

⁷ *Id.* at 252.

⁸ *Id.* at 252.

⁹ *Id.* at 253.

¹⁰ Uriel Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955); PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANT AND THE ZIONIST CENTURY (1997).

¹¹ The laws, both of which were enacted in 1992, are the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. For an English translation of Israel's Basic Laws, see http://www.knesset.gov.il/description/eng/eng mimshal yesod1.html (last visited Feb. 18, 2012).

¹² See Aharon Barak, A Constitutional Revolution: Israel's Basic Laws, 4 CONST. F. 83, 83-84 (1993). ¹³ Ran Hirschl, The Struggle for Hegemony: Understanding Judicial Empowerment Through

Constitutionalization in Culturally Divided Polities, 36 STAN. J. INT'L L. 73,79 (2000); Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard University Press 2004).

¹⁴ *Id*. at 99.

South Africa: Finally, South Africa satisfies our primary selection criterion, a recent history of constitutional founding and/or transformation, in the most obvious manner. In the transition from an "apartheid parliamentary regime to a representative constitutional democracy", the Constitutional Court was entrusted with extensive enforcement powers under the 1996 Constitution. Section 39 (1) of that Constitution specifically authorized all South African courts to consider foreign law in the interpretation of the Bill of Rights. The Constitution's explicit authorization in this regard exemplifies what Heinz Klug has identified as the defining element of South Africa's constitutional transition: "[D]ialectical interaction between a global 'text'... and 'local' struggles and processes." The result has put South Africa "at the very top end of the scale as far the use of comparative law is concerned."

III. Data Collection and Coding

Our plan is to include within the database we are constructing all non-domestic cases cited in the constitutional decisions of the highest constitutional adjudication tribunal in the four countries mentioned above. In its current state, the database includes citations to decisions of the following courts: Australia (High Court), Canada, European Court of Human Rights, European Court of Justice, Germany, India (Supreme Court), Israel (Supreme Court), South Africa (Constitutional Court), United States (Supreme Court). In the next round of data collection, we intend to add citations to the Judicial Committee of the Privy Council and the (recently established) Supreme Court of the United Kingdom, as well as to decisions of lower courts of the United States. We'll also add citations to any other foreign court not appearing in the list above. At present, the database includes what (we hope) are all the foreign constitutional citations for the Israeli and Hong Kong courts. In addition, it includes citations appearing in a sample of 40 South African Constitutional Court decisions, and citations appearing in Indian Supreme Court decisions from 1999 to the present. (Earlier Indian decisions are not available on Lexis and were consequently postponed to a later phase in the project).

We are in the (early) process of coding the citations along two dimensions. The first is substantive (e.g., criminal procedure-exclusionary rule). The second pertains to the attitude of the citing court towards the cited decision (i.e. positive, neutral, or negative). Both appear necessary for the purpose of characterizing the body of cited cases.

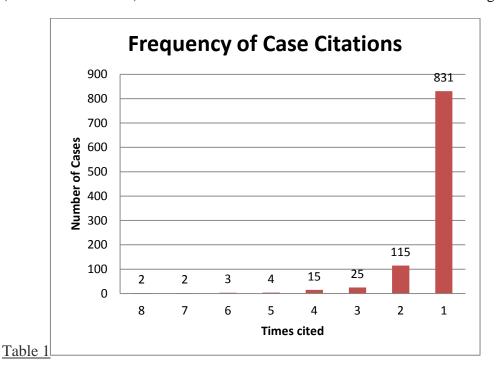
¹⁵ Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law*, 73 GA. INT'L & COMP. L. 219, 226 (2008-2009). ¹⁶ S. AFR. CONST., § 39(1) (1996).

¹⁷ HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 48 (Cambridge Univ. Press 2000).

¹⁸ SIR BASIL MARKESINSIS & JORG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 85 (UCI Press 2006).

IV. Preliminary Analysis

In view of the incomplete state of our database it is too early for us to provide anything but some highly impressionistic observations. The observation we feel most confident about is the very limited degree of repetition among the cases cited. In starting the project we expected a much larger degree of convergence around "canonical" cited decisions. But this expectation did not pan out. As shown below, of the 982 cases currently in our database, 831 were cited only one time. Eight citations is the maximum number for any of the cases in the current database (two Canadian cases). The remainder of the distribution is described in the graph below:



Of the 982 cases, six were cited by three of the courts in the sample (none by four). Of these, three are American (*Brown v. Board of Education*¹⁹, *Ashwander v. Tenn. Valley Auth.*²⁰, and *New York Times v. Sullivan*²¹), two are Canadian (*R. v. Oakes*²² and *R. v. Butler*²³) and one is a decision of the European Court of Human Rights (*Sunday Times v. The United Kingdom*²⁴).

¹⁹ 347 U.S. 483 (1954).

²⁰ 297 U.S. 288 (1936).

²¹ 376 U.S. 254 (1964).

²² 1986 O.A.C. LEXIS 613 (1986).

²³ 1992 N.R. LEXIS 1023 (1992).

²⁴ 2 E.H.R.R. 245 (1979).

It is likely, that when completed, the list of cases cited by three or even four of the courts will grow substantially. At the same time, based on the experience so far, we expect that most of the cases to be added to our database will appear only once. The conclusion we can reach is thus that rather than focusing on selected "canonical" foreign precedents, the courts we are studying tend to cite broadly and rather indiscriminately, often to relatively obscure foreign cases.

Where there may well exist a greater degree of convergence is in the constitutional subjects with which cited foreign precedents are concerned. Rather than because of their inherent significance, most foreign precedents are cited as referents for a larger constitutional narrative, issue, or dilemma that emergent constitutional regimes wish to adopt. Within this context the quantity, rather than the "quality", of the precedents cited might matter most since the primary objective is to establish the rootedness and pedigree of the constitutional thread the citing court wishes to import. Examples of categories of this type (drawn from coded citations from the Israeli Supreme Court) include: principles of constitutional interpretation; equal protection and levels of judicial scrutiny, proportionality, freedom of speech, freedom of religion and the right to privacy, among others. To the extent that the same substantive "threads" are replicated across our courts via reference to foreign citations, our key conclusion might be that the global "building blocks" relevant in the development of emergent constitutional regimes are better defined in reference to subject area and content, rather than a specific set of cases.

In the course of introducing foreign debates of the type described above, the courts we study cite some lines of doctrines and particular precedents only to reject them as inappropriate models. A few of these negative citations treat the rejected precedents with the level of opprobrium associated with "anticanonical" legal references. The following case (all American) are singled out in this fashion by one of the courts in the sample: *Bradwell v. State* Buck v. Bell²⁷; Korematsu v. United States²⁸; Lochner v. New York (1905)²⁹ and Plessy v.

_

²⁵ On constitutional "anticanons", see J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018-19 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

²⁶ 83 U.S. 130 (1872). In Miller v. Minister of Defence Justice Dorner of the Israeli Supreme Court offered the following regarding the finding in *Bradwell* that a woman has no constitutional right to be a lawyer: "All of this has changed greatly. In the State of Israel, as in other democratic states, the rule forbidding discrimination against women because of their sex is continually winning ground as a basic legal principle..." HCJ 4541/94 Miller v. Minister of Defence (1995).

²⁷274 U.S. 200 (1927). In Shefer v. Israel, Justice Elon of the Israeli Supreme Court said of Justice Holmes' "Three generations of imbeciles is enough" language in *Buck*: "These words are terrible and perplexing, and they stand in direct contrast to basic approaches in Jewish thought and in our society." CA 506/88, Shefer v. State of Israel (1993).

²⁸ 323 U.S. 214 (1944). In Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior, Justice Cheshin, writing in dissent, referred to *Korematsu* as, "A ruling that is considered by many one of

Ferguson. ³⁰ As the data fills out we may locate repeated anti-canonical references to the same set of cases across a number of our courts. If this holds, it may be possible to conclude that, irrespective of the emergence of a global constitutional canon, a global anti-canon is in the making.

V. Foreign Precedents and the "Court-Centered" Canon

Any conclusions to be drawn from the collected foreign citations regarding the existence and content of a global constitutional canon will depend on sequential analysis of two separate questions. The first pertains to the presence of a sufficient degree of convergence in the cases and topics cited by the various courts. The second relates to whether, even given such convergence, cited foreign cases provide a proper indicator of canonicity, global or otherwise.

Where the latter question is concerned, an important critique is the concern that like other court-centered-constructions of legal canons, a canon deduced from the universe of cited cases will exclude extra-judicial constitutional texts, debates and other materials. ³¹ Indeed, it could well be argued, that even a study confined to cited constitutional sources should include the multiplicity of comparative constitutional material, other than judicial decisions, to which courts cites. These include not only constitutional documents and provisions, but treatises, books, articles and other writings. Even, however, if we were to include in our analysis foreign

the darkest episodes in the constitutional history of western countries." HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of HCJ [2006].

²⁹ 198 U.S. 45 (1905). In Ferreira v. Levin, the South African Constitutional Court referred to *Lochner* as a, "misguided understanding of what liberty actually required in the industrial age [and]was decided in 1905 at a time and in a socio-economic context completely different from [South Africa's] in 1995." Para. 65. A concurrence agreed with this sentiment, stating that *Lochner* is a "pitfall" that does not stand for "judicial intervention to protect liberty," but rather a "trespass upon the terrain that is not rightly [the judiciary's]." Para. 182-83. *Ferreira v. Levin* 1995, 1996 (1) BCLR 1 (CC); 1995 SACLR LEXIS 298.

³⁰ 163 U.S. 537 (1896). (2006). In the context of a decision that held that failure to provide same-sex couples a right to marry amounted to denial of unfair discrimination by the State, the South African Constitutional Court (Sachs J., writing for the majority) mentioned *Plessy* as a "notorious case" and contrasted its "separate but equal doctrine" with *Brown* v. *Board of Education. Minister of Home Affairs and Another v Fourie and Others*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and others* 2005 (3) BCLR 355 (CC); 2005 SACLR LEXIS 34.

³¹ J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1002 (1998); Mark Graber, *Hollow Hope and Exaggerated Fears: The Cannon/Anticannon in Context*, 125 HARV L. REV. F. (2011), http://www.harvardlawreview.org/issues/125/december11/forum_778.php. (last visited Feb. 18, 2012).

constitutional sources beyond court cases, our results would remain court-centered because the choice to cite certain materials and not others was judicial. In legitimating their own constitutional projects courts are unlikely to invoke legislative or social movement-based constitutional debates. Concerns regarding the limits of "court-centered" constitutional cannons are based in a prescriptive perspective regarding "the question of canonicity." Within that perspective court-centered formulations of the canon are deficient because they result in confined legal pedagogy and constitutional debate. Our interest in this project is strictly descriptive. We hope to learn something about whether there exists today a shared body of constitutional ideas, themes or cases across national courts. By focusing on the citations of domestic courts in the process of constitutional founding or transition we hope to get at the key constitutional concepts judges engaged in the construction of such constitutional regimes find necessary to acquire. Whether the term canonical can be properly applied to any such constitutional building blocks is something we are ultimately agnostic about.

_

³² Balkin & Levinson, *supra* note 31, at 963,