

FORSWEARING “FOREIGN MOODS, FADS OR FASHIONS”? - CONTEXTUALISING THE REFUSAL OF KOUSHAL TO ENGAGE WITH FOREIGN LAW

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The judgment of the Supreme Court in Suresh Kumar Koushal v. Naz Foundation engages only minimally with foreign and comparative law. This is in stark contrast to the Delhi High Court’s judgment in Naz Foundation v. Union of India that was consequently overruled. This essay focuses on this lack of engagement with foreign law in Koushal from three perspectives. First, it critically examines the reasons advanced and the domestic precedents cited in Koushal to justify the outright rejection of foreign law. Second, it focuses on the record of the principal author of the judgment – Justice Singhvi – to assess whether the learned judge has been consistent in his attitude towards comparative law in other adjudicatory contexts. Finally, it contextualises the treatment of foreign law in Koushal against the Indian Supreme Court’s longer historical record of engaging with foreign and comparative law. The essay draws attention to inconsistencies in Koushal’s internal logic and to larger problems raised by the failure to critically engage with foreign and comparative law.

I. INTRODUCTION

The focus of this essay is on the role that foreign and comparative law played in the reasoning and judgment of the Supreme Court of India in *Suresh Kumar Koushal v. Naz Foundation* (‘Koushal’).¹ In Koushal, the Supreme Court overruled a decision of the Delhi High Court and upheld the constitutionality of § 377 of the Indian Penal Code (which criminalises sexual conduct that is against the order of nature).

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¹ (2014) 1 SCC 1.

The Delhi High Court's overturned decision in *Naz Foundation v. Union of India* ('Naz')² was marked by an extensive discussion of foreign law. Naz cited and relied upon decisions of the Supreme Courts of the United States of America and Canada, the Constitutional Court of South Africa, the European Court of Human Rights, the United Nations Human Rights Committee, the High Court of Hong Kong, the High Court of Fiji and the Supreme Court of Nepal.³ In Koushal, lawyers cited foreign and comparative law at length both in the petitions and written submissions filed before the bench,⁴ and in the course of the oral hearings.⁵

However, in the actual judgment in Koushal, foreign and comparative law plays a minimal role. My purpose in this paper is to subject the Koushal judgment's engagement with foreign law to closer scrutiny. My focus is on the reasoning advanced by the Court for its conclusion that none of the foreign case-law cited before it was applicable to the Indian context. I seek to draw connections between the Court's reasoning on this issue and the judgment's overall approach to the task of reason-giving and justification, which are crucial for maintaining the legitimacy of judicial decisions. In focusing on the Koushal judgment's aversion to foreign law, I follow the lead of the U.S. scholar Kim Lane Scheppele, who has insightfully argued that the rejection of foreign models can sometimes reveal more about the constitutional sensibilities and conceptions of constitution-makers and judges than their positive choices, and ought to be the focus of more serious study.⁶

This paper also focuses on two other aspects of Koushal's (lack of) engagement with foreign law. As I set out in the third part of this paper, the Indian Supreme Court has a long history of engaging with foreign and comparative law. This paper aims to contextualise and analyse the use of foreign

² (2009) 160 DLT 277; 2010 Cri LJ 94.

³ *Id.*, ¶¶ 53-59 (This section of the judgment is titled 'Global trends in protection of privacy and dignity rights of homosexuals'); See generally Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 AM. J. COMP. L. 909 (2010); Shylashri Shankar, *The Substance of the Constitution: Engaging with Foreign Judgements in India, Sri Lanka, and South Africa*, 2 DREXEL LAW REVIEW 372 (2010); Robert Wintemute, *Same sex love and Indian Penal Code § 377: An important human rights issue for India*, 4 NUJS L. R. 31 (2011); Sujit Choudhry, *How To Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation* in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45-85 (2013).

⁴ The written submissions filed by some of the parties before the Supreme Court are available at <http://orinam.net/377/supreme-court-case-background-material/> (Last visited on February 22, 2014). See, in particular, the written submissions of the Attorney General who argued for the Union Government (at pages 5-6) and that of Voices Against 377 (who refer to South African and Canadian decisions at pages 50-51).

⁵ I rely on an unofficial transcript prepared by some of the lawyers who argued before the Supreme Court, which is available at http://orinam.net/377/wp-content/uploads/2013/12/SC_Transcripts_Hearings.pdf (Last visited on February 22, 2014).

⁶ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 298 (2003).

law in the two-judge bench's Koushal decision against this longer tradition of what I term 'rooted cosmopolitanism'. In the fourth part, I seek to show that Justice Singhvi, the principal author of the Koushal judgment, has displayed far less aversion to foreign law in other judgments delivered by him during his tenure as a Supreme Court judge. I also draw parallels between Justice Singhvi's judgment in Koushal and that of Justice Antonin Scalia (in dissent) in the U.S. Supreme Court's judgment in *Lawrence v. Texas* ('Lawrence').⁷ In the concluding part, Part V, I seek to draw attention to some of the broader implications of the ruling in Koushal.

II. THE KOUSHAL JUDGMENT'S DISCUSSION OF FOREIGN LAW

The judgment in Koushal delivered by Justices GS Singhvi and Mukhopadhyaya discusses the issue of engaging with foreign and comparative law in three paragraphs (paragraphs 77-79), towards the end of their overall judgment that extends to 82 paragraphs (in the SCC report). After setting out two preliminary sentences on this issue, Justice Singhvi quotes extracts from three prior decisions of the Supreme Court, two of which rejected the application of foreign authorities to the specific issue at hand. In what follows, I first set out – largely without commentary – the reasoning and logic of Justice Singhvi's judgment in rejecting foreign authorities. In doing so, I hope to provide a complete account of the logic on its own terms. Thereafter, I examine the reasoning more closely to focus on what is problematic about the judgment's explicit and implicit assumptions.

In the first paragraph of the judgment that deals with the issue of the applicability of foreign law, Justice Singhvi begins his analysis with the following two sentences:

“In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 Indian Penal code violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature”.⁸

⁷ 539 US 558 (2003).

⁸ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, 78 (¶ 77).

In the remaining part of that paragraph, Justice Singhvi cites passages from *Jagmohan Singh v. State of U.P.* ('Jagmohan Singh')⁹ where a five judge Constitution Bench of the Supreme Court upheld a murder conviction and death sentence imposed by a lower court. Justice Singhvi extracts two paragraphs from the judgment of Justice Palekar¹⁰ in which the Court dismissed the attempted reliance on U.S. cases that struck down the death penalty. In the quoted portion, Justice Palekar reasoned that the social context in India was quite different from that of the U.S. on this issue, making American cases on the unconstitutionality of the death penalty unsuitable for application in India. In another quoted portion, Justice Palekar expressed doubts about the "expediency of transplanting Western experience in our country"¹¹. Justice Singhvi then refers to the fact that in his judgment, Justice Palekar sought to rely upon the landmark case of *State of Madras v. V.G. Row*¹² ('V.G. Row') for the proposition that courts must show self-restraint and defer to the decisions of elected representatives in the legislature. Thus, VG Row, which considered the constitutionality of a criminal law amendment, seems to act as an independent precedent for supporting Justice Singhvi's reasoning, as counselling restraint and deference to the decisions of legislatures.

In the third and final paragraph of his judgment on this issue, Justice Singhvi cites the judgment of a three judge bench of the Supreme Court in *Surendra Pal v. Saraswati Arora* ('Surendra Pal').¹³ This case involved a dispute over a will, where one of the heirs alleged that the testator had been unduly influenced by his second wife, and sought to rely on propositions of English law to make good this claim. Justice Jaganmohan Reddy's judgment for the Court rejected foreign law in relation to undue influence both because the law in England had changed considerably, and because social circumstances relating to marriage in India were quite different. While concluding his discussion of this issue, Justice Singhvi includes a crucial sentence from Justice Jaganmohan Reddy's judgment: "While we should seek light from whatever sources we can get, we should however guard against being blinded by it"¹⁴.

This constitutes the entirety of Justice Singhvi's discussion on foreign law in Koushal. The implicit suggestion, conveyed especially in the final quoted sentence from Justice Reddy's judgment in *Surendra Pal*, is that

⁹ (1973) 1 SCC 20 (the 5 judge Constitution bench deciding the case consisted of Chief Justice SM Sikri and Justices DG Palekar, ID Dua, MH Beg and AN Ray. The unanimous judgment of the Court was delivered by Justice Palekar).

¹⁰ *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20, 28-29 (¶13-14).

¹¹ *Id.*, (¶ 14).

¹² AIR 1952 SC 196 (the judgment of the Court was delivered by Chief Justice Patanjali Sastry who spoke for a 5 judge Constitution bench consisting also of Justices MC Mahajan, BK Mukherjea, SK Das and Chandrasekhara Aiyar).

¹³ (1974) 2 SCC 600 (Justice Jaganmohan Reddy delivered the judgment of the 3 judge bench that comprised also of Justices A. Alagiriswami and MH Beg).

¹⁴ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, 81 (¶ 79).

the extensive foreign law cited at the bar was inapplicable to the Indian context. This amounts to little by way of direct engagement with foreign law, especially when contrasted with the expansive manner in which the judgment under appeal – that of the Delhi High Court in *Naz* – engaged with foreign and international law. Interestingly, nowhere does Justice Singhvi mention the actual cases and foreign authorities that were explicitly cited before the Court as relevant for determining the question of the constitutionality of § 377. Even as Justice Singhvi reached the determination that the foreign law cited before the Supreme Court and that relied upon by the Delhi High Court in *Naz* was inapplicable, one does not find individual and context-specific reasons advanced for setting out why this was so. It is also clear that none of the three precedents cited in *Koushal* had direct application to the issue of the constitutionality of § 377 of the IPC. Nevertheless, it is the rhetoric included in the extracts which is important and needs emphasis if one is to understand Justice Singhvi's unstated argument.

I begin my analysis of Justice Singhvi's refutation of foreign law by focusing on the stated reasons. The first sentence of paragraph 77, quoted above, has drawn criticism from commentators for using the phrase "so-called rights of LGBT persons". Justice Singhvi appears to be insinuating that lesbian, gay, bisexual and transgender ('LGBT') persons cannot or should not have rights. Indeed, one consequence of *Koushal* is that LGBT populations are deprived of important rights, including those conferred upon them for four years preceding its disposal, as a consequence of *Naz* having held § 377 to be unconstitutional. For present purposes, what is significant about the sentence in full is the suspicion of foreign law it displays. In doing so, Justice Singhvi joins forces with judges in several other jurisdictions who have exhibited similar scepticism towards the overall project of engaging with foreign law, an issue we will return to in a later section.

What Justice Singhvi ignores here is that the Delhi High Court relied extensively also on its interpretation of provisions within the Indian Constitution and applicable Indian precedents to support every single constitutional argument that it advanced in *Naz*. Indeed, *Naz* relied on a combined analysis of provisions relating to equality, dignity and privacy and a number of relevant precedents to arrive at its conclusion that § 377 ran afoul of the Indian Constitution's requirements.¹⁵ The misleading suggestion here is that the foundation of the High Court's reasoning for its holding that § 377 was unconstitutional was built either solely or 'extensively' upon "the judgments of other jurisdictions". Justice Singhvi, in characterising *Naz* as being built upon foreign law, is making an important move to delegitimise its foundation.

¹⁵ For an assessment of the varied contributions of the *Naz* judgment to distinct areas of constitutional law, see the twelve articles covering a range of issues in the special issue of the NUJS Law Review devoted to discussing *Naz*: 2 NUJS L.R. 361-552 (2009).

In the second sentence, Justice Singhvi begins by briefly acknowledging the value of foreign and comparative law for its capacity to “shed considerable light on various aspects” of the rights and ‘plight’ of LGBT persons. Despite this acknowledgment, he proceeds to imply that the judges of the Delhi High Court, in applying foreign judgments to support their reasoning in *Naz*, did so in a ‘blindfolded’ manner. This is a slightly different critique, one which suggests that although applying foreign law by itself may not be a bad thing, its ‘blindfolded’ application must be avoided. This hints at domestic judges being overawed by foreign authority - and therefore being misled in conducting constitutional analysis of laws passed by the Indian legislature - when their focus should be elsewhere, on important issues of national and constitutional sovereignty. This misses the point, emphasised by some of the early commentaries on *Koushal*, that § 377 was enacted not by the post-colonial, post-independence legislature created by the Constitution of India, but by the colonial legislature to which the presumption of constitutionality applies rather differently.¹⁶ The irony is that Justice Singhvi seeks to defray the persuasive authority of foreign law by citing to the fact that the law in question was imposed by a foreign (or at least colonial) power.

Justice Singhvi appears to hold the view that the issue of decriminalization of homosexuality is one that has to be decided only by looking to Indian conditions and Indian law. His broad references to the difficulty with “transplanting Western experience” in India and the caution against “being blinded” by foreign law, point towards this tendency. However, his reasoning is problematic even when viewed from within its own logic and the sources upon which he relies. In the following paragraphs, I focus on each of the three cases Justice Singhvi seeks to rely upon, to show how they may be open to other readings than the one adopted by Justice Singhvi.

Justice Palekar’s judgment in *Jagmohan Singh*¹⁷ is not, as Justice Singhvi’s judgment suggests, a screed against foreign or comparative law. Nor is it a clarion call for autochthonous approaches to Indian constitutionalism. While Justice Singhvi is correct in noting that Justice Palekar’s judgment rejected U.S. decisions, a reading of the judgment as a whole shows that its approach to foreign authorities is characterised by nuance and circumspection. Justice Palekar begins his discussion of the American decision in *Furman v. State of Georgia*¹⁸ in paragraph 9 of his judgment. Over the next four paragraphs, he pays close attention to the majority judgments delivered by Justices Brennan, Marshall, Douglas, Stewart and White, and conducts a close

¹⁶ See e.g., Shreya Atreya, *Of Koushal v. Naz’s several travesties: Discrimination and Democracy*, *Oxford Human Rights Hub*, December 12, 2013, available at <http://ohrh.law.ox.ac.uk/of-koushal-v-naz-foundations-several-travesties-discrimination-and-democracy/> (Last visited on April 24, 2014).

¹⁷ *Jagmohan Singh v. State of U.P.*, (1973) 1 SCC 20.

¹⁸ 33 L Ed 2d 346; 408 US 238 (1972).

examination of them. Justice Palekar concludes that of the five judges in the majority, only two found the laws in question to be unconstitutional. The other three judges took more moderate positions on this question and were troubled more by sentencing practices than the threshold question of unconstitutionality of the law itself. Thereafter, Justice Palekar conducted a close examination of the situation in India before concluding that the death penalty could not be said to be unconstitutional. Thus, by engaging with foreign law closely and extensively, Justice Palekar did not dismiss outright the relevance of foreign or U.S. law in *Jagmohan Singh*. Indeed, his engagement with U.S. law fits well with what Sujit Choudhry has termed 'dialogical',¹⁹ in that he used the engagement with U.S. law to explicate the constitutional situation in India by drawing relevant contrasts.

Justice Singhvi's reliance on *V.G. Row*²⁰ is problematic on two counts. *First*, *VG Row* did not refer to foreign authorities at all, and it is not clear how it fits the purposes for which Justice Singhvi relies upon it. If he does so for the proposition that judges should exhibit self-restraint while dealing with legislative choices and judgments, then his attempted reliance on this case is even more problematic. Justice Singhvi quotes from paragraph 16 of Chief Justice Patanjali Sastri's judgment, and the words used here do give the impression that he was counselling some measure of restraint. However, the *VG Row* decision is famous for being one of the early judgments where the Supreme Court exercised its power of judicial review to strike down a statute (namely, the Indian Criminal Law Amendment (Madras) Act, 1950) for violating the freedom to form associations or unions guaranteed by Article 19(1)(c) of the Constitution of India. In doing so, Chief Justice Patanjali Sastri explained the duty of Indian courts in clear and poignant terms which have since become a classic statement on how courts are to strike a balance between guarding fundamental rights and granting due deference to legislative authority:²¹

"[O]ur constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution unlike as in America where the Supreme Court has assumed extensive power of reviewing legislative acts under cover of the widely interpreted 'due process' clause of the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights" as to which this court has been assigned the role of a sentinel on the 'qui vie'. Whilst the Court naturally

¹⁹ Choudhry, *supra* note 3.

²⁰ *State of Madras v. V.G. Row*, AIR 1952 SC 196.

²¹ *Id.*, 199 (¶ 13).

attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in this country.”

It is therefore particularly ironic that Justice Singhvi seeks to rely on VG Row in support of his judgment in Koushal where the notion of legislative deference plays a considerable role for rejecting a constitutional challenge to § 377. VG Row is in fact a precedent for the proposition that courts are justified in abandoning legislative deference when called upon to protect and defend fundamental rights.

As to the third case that Justice Singhvi relies upon, it is striking that Justice Singhvi quotes the following passage from the judgment of Justice Jaganmohan Reddy in Surendra Pal as part of his own judgment (without apparent appreciation of its significance):²²

“No doubt an objective and rational deduction of a principle, if it emerges from a decision of a foreign country, rendered on *pari materia* legislative provisions, and which can be applicable to conditions prevailing in this country, will assist the Court in arriving at a proper conclusion.”

While Justice Reddy’s judgment uses rhetoric that may seem opposed to the use of foreign law altogether, this is an important and salutary concession, which comparative law scholars will find wholly agreeable. After all, no actual participant in the debate is arguing for whole scale adoption of foreign law. Judges and scholars who have urged courts to look to the experience of other judiciaries have always counselled caution and restraint in terms that are similar to the sentiments expressed by Justice Reddy’s quoted statement.²³ The problem with Justice Singhvi’s judgment in Koushal is that it does not apply this standard laid down in Surendra Pal at all. Note that unlike in the other cases he seeks to rely upon (where the judges discussed the foreign law cited as persuasive authority carefully before rejecting it), Justice Singhvi’s judgment does not even mention the foreign cases cited before the bench. One may well ask whether this would make any difference, if the outcome – of rejecting foreign law – is the same. The difference is indeed one that is significant : both Justices Palekar and Reddy felt obliged to provide reasons for rejecting the foreign law cited before them perhaps because they recognised that,

²² Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, 81 (¶ 79).

²³ See, e.g., *ENGAGING WITH FOREIGN LAW* (B.S. Markesinis & Jörg Fedtke ed., 2009) (consisting of essays by judges and scholars drawn from many jurisdictions, several of whom make this point).

in appropriate cases, foreign law may amount to persuasive authority that has compelling logic which should be followed. These judges were clearly familiar with the Indian Supreme Court's long tradition of constructive engagement with foreign law that I will briefly describe in the next section. By contrast, Justice Singhvi seems not to have felt any obligation to provide any such reasons. Beyond the question of accepting or rejecting foreign law, this points to a more fundamental problem with Justice Singhvi's approach to reason-giving and the responsibility of providing full justifications in judgments, which I shall return to subsequently.

A reading of the Delhi High Court's judgment in *Naz*²⁴ shows that it did indeed rely upon foreign decisions that were dealing with similar anti-sodomy statutes, thereby fulfilling the first condition that Justice Reddy's judgment in *Surendra Pal* mentions. *Naz* considered the decisions of the U.S. Supreme Court in *Bowers v. Hardwick* ('*Bowers*')²⁵ and *Lawrence*,²⁶ as well as the decision of the Supreme Court of Canada in *Vriend v. Alberta*.²⁷ These jurisdictions had anti-sodomy laws that could indeed be considered *in pari materia* with § 377. What is significant for the purposes of the broad line of reasoning adopted by Justice Singhvi in rejecting much of the foreign law cited before the Court is the fact that *Naz* also relied on case law from nations such as Fiji, Nepal and Hong Kong, thus stepping beyond the confines of the 'Western' law that Justice Singhvi appears to find most objectionable.²⁸ This would satisfy the second condition – suitability for application in India – that Justice Reddy sets out. It would seem, therefore, that Justice Singhvi falls afoul of the requirements of the authorities he himself relies upon.

III. THE INDIAN SUPREME COURT'S HISTORICAL RECORD OF 'ROOTED COSMOPOLITANISM'

Courts in India have relied upon foreign authorities dating back to the colonial period. Although there have been many judges and scholars who have expressed scepticism about undue reliance on foreign authorities, the objections of the more thoughtful among them are framed carefully, to avoid the inculcation of insular approaches to the law which was recognised as the other extreme to be avoided. Thus, for instance, in the very first judgment delivered in 1939 by the Federal Court (the predecessor to the Supreme Court), Chief Justice Maurice Gwyer had this to say on the issue at hand:²⁹

²⁴ *Naz Foundation v. Union of India*, (2009) 160 DLT 277 (Del).

²⁵ 92 L Ed 2d 140: 478 US 186 (1986).

²⁶ *Lawrence v. Texas*, 539 US 558 (2003).

²⁷ (1998) 1 SCR 493 (Can SC).

²⁸ Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS L. R 402 (2009).

²⁹ Central Provinces and Berar Act no. XIV of 1938, In re, 1939 FCR 18, 37-8.

“The decisions of the Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate to find itself in agreement with them, it will deem its own opinion strengthened and confirmed.”

In 1957, writing during the first decade of the working of the Indian Supreme Court, the constitutional scholar PK Tripathi noted that “the citation of American cases is almost a standard, everyday practice” before the Court and counselled a moderation in this trend.³⁰ In the preface to the first edition of his influential commentary on the Indian Constitution published in 1967, the constitutional lawyer H.M. Seervai referred to the heavy reliance on American cases adverted to by Tripathi and asserted that “few things are more misleading than the citation of cases on Constitutions very different from our own”.³¹ His objection, however, was to uncritical acceptance of foreign authorities rather than to their acceptance at all. This is apparent from his assertion that “American authorities must first be viewed against the background of relevant constitutional provisions in order to ascertain whether they are really applicable”.³² DD Basu, the author of another influential commentary on the Indian Constitution, differed from Tripathi and Seervai and argued 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.³³ Scholars such as Rajeep Dhavan have been critical of the “imitative cosmopolitan habits” of Indian judges. Others such as Gobind Das concede that what the Indian Supreme Court lacks in originality, it makes up for by adapting and assimilating older foreign ideas to suit Indian conditions.³⁴

An American scholar who conducted a study of the use of foreign law in reported judgments of the Indian Supreme Court between 1950-2005 asserted that fully one quarter of these decisions referred to foreign and comparative law.³⁵ In earlier work, I have tried to flesh out how the Indian Supreme Court developed its distinctive contributions in the area of public interest litigation by drawing upon comparative law even as it made creative adaptations

³⁰ P.K. Tripathi, *Foreign Pre* inverted comma should be completed.nce. Are we not showing that Singhvi is also not averse to using foreign law in other contexts *cedents and Constitutional Law*, 57 COLUM. L. REV. 319 (1957).

³¹ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA vi (1967).

³² *Id.*

³³ DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW 13-22 (1984).

³⁴ GOBIND DAS, SUPREME COURT IN QUEST OF AN IDENTITY 461 (1987).

³⁵ Adam M. Smith, *Making Itself a Home - Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L LAW 218 (2006).

to foreign insights.³⁶ Such creative adaptation is apparent even in the body of work that is generally regarded as amongst the most distinctive contributions of Indian constitutional law: the basic structure doctrine, as laid down in the landmark case of *Kesavananda Bharati v. State of Kerala*.³⁷ At the same time, however, it is worth noting that the record of the Indian Supreme Court cannot be characterised as one of simplistic borrowing of foreign and comparative law insights. Even where it has applied foreign law, the range of categories of usage shows that the Court has engaged with these sources in diverse and sophisticated ways. The Indian Supreme Court has employed foreign law insights for the following among other purposes:³⁸

- For guidance on broad principles of constitutional interpretation³⁹;
- For developing evaluative and doctrinal frameworks⁴⁰;
- For drawing analogies from factually and/or legally similar situations⁴¹;
- For enriching an understanding of the domestic legal issues at stake even while distinguishing foreign decisions⁴²;
- For 'reading in' implied and other un-enumerated rights⁴³ and

³⁶ Arun Thiruvengadam, *In Pursuit of the Common Illumination of Our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 INDIAN J CONST. L. 67 (2008).

³⁷ (1973) 4 SCC 225; AIR 1973 SC 1461; See Douglas McDonald & Arun Thiruvengadam, *Comparative law and the role of the Judiciary: An Australia-India comparison* (forthcoming 2014) (setting out the details of the foreign influence in the evolution of this doctrine).

³⁸ See generally Arun K Thiruvengadam, 'The Common Illumination of our House?': Foreign Judicial Decisions and Competing Approaches to Constitutional Adjudication (November 2006) (unpublished JSD dissertation, New York University School of Law (on file with author)) (setting out the varied purposes for which courts in India, South Africa, Canada, Australia, the United States and Singapore have engaged with foreign cases across a sample set of 120 judicial decisions).

³⁹ See, e.g., *Charanjit Lal Chowdhury v. Union of India*, (1950) 1 SCR 869 (the Indian Supreme Court relied on judicial tests evolved by the US Supreme Court to frame its overall approach towards 'equal protection' and 'police power').

⁴⁰ See, e.g., *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *State of Gujarat v. Shri Ambica Mills Ltd.*, (1974) 4 SCC 656; AIR 1974 SC 1300 (in these cases, the Indian Supreme Court applied US cases to develop its own maturing doctrinal tests for equality and equal protection).

⁴¹ See, e.g., *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632; AIR 1995 SC 264 (the Indian Supreme Court applied tests developed in the US and the UK to decide upon the right of the press in India to publish material that may be defamatory to public officials).

⁴² See, e.g., *Basheshar Nath v. Commissioner of Income Tax*, AIR 1959 SC 149 (here, the Indian Supreme Court rejected US decisions that held that fundamental rights could not be waived, but in doing so, sought to gain a deeper understanding on the creation and nature of fundamental rights guaranteed by the Constitution of India).

⁴³ See, e.g., *Romesh Thappar v. State of Madras*, AIR 1950 SC 124, *Express Newspaper (P) Ltd. v. Union of India*, AIR 1958 SC 578; *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305 (in these cases, the Indian Supreme Court progressively read in and reiterated a right to freedom of press within the constitutional right to freedom of speech).

- For guidance on innovating judicial remedies for unconventional situations⁴⁴

To describe the attitude of the Indian Supreme Court towards foreign and comparative law, I draw upon the work of the contemporary philosopher Kwame Appiah.⁴⁵ Writing in the early part of this century and analysing erstwhile trends of globalisation, Appiah cautioned against extreme forms of cosmopolitanism, which he argues can be both imperial and deracinating.⁴⁶ Instead, he proposes a framework of ‘rooted cosmopolitanism’ which simultaneously celebrates universal ideas of humanity and values, while emphasizing the importance of national and local identities.

As I argued in the previous section, even the precedents cited by Justice Singhvi in his judgment in *Koushal* adhere to this conception of ‘rooted cosmopolitanism’ in that they do not propose a complete and outright rejection of foreign authority but rather a careful, nuanced engagement with cases from other jurisdictions.

IV. JUSTICE SINGHVI’S OVERALL RECORD OF ENGAGEMENT WITH FOREIGN LAW

Justice Singhvi’s approach to foreign law in *Koushal* detracts not just from the overall record of the Indian Supreme Court, but also from his own previous record of judgments delivered during his tenure on the Supreme Court. Constraints of space preclude a fuller analysis, but it is clear from even a cursory analysis of Justice Singhvi’s record as a judge that he has frequently cited foreign cases as authority for points of law on which sufficient precedents existed within Indian law. If Justice Singhvi was a consistent and adamant opponent of foreign law, his stance in *Koushal* might have some force. In his own practice, however, Justice Singhvi has cited foreign authorities with frequency and without previously expressing any reservations or doubt.

Justice Singhvi was elevated to the Supreme Court from his position as a judge of the High Court of Rajasthan in 2007, and consequently served on the Supreme Court for a period of nearly six years before his retirement on the day he pronounced the judgment in *Koushal* in December 2013. Even

⁴⁴ See, e.g., *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (the Indian Supreme Court adopted the US doctrine of ‘prospective overruling’ to mitigate the effects of overturning precedents across two decades).

⁴⁵ KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005) (Chapter 4 of this book is devoted to exploring in full his formulation of “rooted cosmopolitanism”); KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006). See Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez Machain*, 74 UNIV. CINCINNATI L. REV. 105 (2005) (similarly applying Appiah’s views to the domestic application of international law).

⁴⁶ APPIAH, *id.*, 214.

without an examination of the entire record of Justice Singhvi's tenure, it is apparent that he demonstrates no aversion, in principle, to the use of foreign precedent. I rely upon two of his judgments to illustrate this claim.

In the first of these, *All India Anna Dravida Munnetra Kazhagam v. L. K. Tripathi*,⁴⁷ Justice Singhvi's judgment dismissing a petition for contempt of court relies upon Lord Denning's judgment in *Bramblevale Ltd., In re*,⁴⁸ to clarify the nature of the burden of proof in such cases. Justice Singhvi then cites a number of domestic cases to the same effect. This shows that if he had wanted to avoid making reference to this particular foreign decision, he could easily have chosen to do so.

Similarly, in *Central Bank of India v. State of Kerala*,⁴⁹ while deciding an issue of statutory interpretation relating to a *non obstante* clause, Justice Singhvi relies upon the judgment of Lord Steyn in *R. (Westminster City Council) v. National Asylum Support Service*⁵⁰ for the proposition that a word in a statute must be interpreted in its proper context. This citation is striking because, as Justice Singhvi's judgment proceeds to detail immediately thereafter, the proposition is fairly commonplace and has been laid down in a number of Indian decisions. It is not clear why a foreign authority had to be cited for it in the first place. The approach to and actual use of foreign precedent in both of these cases stand in stark contrast to Justice Singhvi's judgment in *Koushal* where he counsels judges "not to be blinded" by light from foreign shores. I have focused on just two examples here, but there are many more instances where Justice Singhvi has relied on foreign authorities in judgments authored by him as a Supreme Court judge.⁵¹ The number of such cases expands if we account for judgments by other judges of the Court that Justice Singhvi signed onto, and whose reliance on foreign authorities he can be understood to have implicitly approved.⁵²

It is important to be clear about what I am claiming in relying upon Justice Singhvi's citation of foreign authorities in previous cases. My claim is not that Justice Singhvi was a great and vigorous exponent of the use of

⁴⁷ (2009) 5 SCC 417; AIR 2009 SC 1314.

⁴⁸ (1969) 3 All ER 1062 (CA).

⁴⁹ (2009) 4 SCC 94.

⁵⁰ (2002) 4 All ER 654 (HL).

⁵¹ *Radhy Shyam v. State of U.P.*, (2011) 5 SCC 553 (citing two English cases as authority for interpreting principles of natural justice under Art. 14 of the Constitution of India); *Govind Yadav v. New India Insurance Co. Ltd.*, (2011) 10 SCC 683 (citing an English decision as authority for assessing the cost of compensation); *P.D. Dinakaran (I) v. Judges Inquiry Committee*, (2011) 8 SCC 380 (citing an English case to enunciate the requirements of natural justice).

⁵² *R.K. Anand v. Delhi High Court*, (2009) 8 SCC 106 (Justice Singhvi joined a judgment authored by Justice Aftab Alam that relied on an English decision to assess the threshold of contempt of court); *Mumbai International Airport (P) Ltd v. Golden Chariot Airport*, (2010) 10 SCC 422 (Justice Singhvi joined a judgment authored by Justice A.K. Ganguly that cited several English decisions for the principle that a licence does not amount to easement).

comparative law in other settings. Indeed, the record shows that he used foreign law occasionally and not for grand, substantive purposes. My claim, instead, is that he never displayed a strong aversion to foreign law, and did not seem to find its mere presence problematic, as is evident from his casual ease in referring to foreign law prior to the Koushal ruling.

The reference in the title of this article to “foreign moods, fads or fashions” adverts to a phrase that appears in Justice Antonin Scalia’s searing dissent against the U.S. Supreme Court’s majority judgment in *Lawrence* which struck down an anti-sodomy statute from Texas as unconstitutional. The relevant portion of Justice Scalia’s judgment is as follows:⁵³

“Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. ... The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court ... should not impose foreign moods, fads, or fashions on Americans.” *Foster v. Florida*, 537 US 990, n., 123 S Ct 470, 154 L Ed 2d 359 (2002) (THOMAS, J., concurring in denial of certiorari).

It is striking how similar Justice Singhvi’s reasoning is to that of Justice Scalia’s dissent. Justice Scalia suggests here that Justice Kennedy’s majority judgment held that the constitutional rights of LGBT Americans sprang into existence because foreign nations decriminalised specific conduct. This ignores the fact that the majority judgment uses as its main foundation an interpretation of the due process clause in the Fourteenth Amendment of the U.S. Constitution. Foreign law played a relatively minor role in Justice Kennedy’s opinion, serving only to correct the misreading of ‘Western’ experience in the case that was overruled (*Bowers*) with respect to its condemnation of homosexuality. As we have noted above, Justice Singhvi similarly asserted that the Delhi High Court’s judgement relied ‘extensively’ on foreign authorities to demonstrate the unconstitutionality of §377, giving short shrift to its rich and substantial discussion of Indian constitutional law and precedents.

Justice Scalia draws attention to the fact that many countries in the world retain criminal prohibitions on sodomy. During the oral hearings

⁵³ *Lawrence v. Texas*, 539 US 558, 598.

before the Supreme Court, Justice Singhvi too relied on this fact to defray the persuasive force of case law from countries that did repeal such laws.⁵⁴

And finally, similarly to Justice Scalia, Justice Singhvi also appears to hold the view that issues affecting the constitutional rights of citizens of a nation should not be decided by reliance on what Justice Clarence Thomas termed “foreign moods, fads or fashions”. That having been said, there are judges across the common law world who have consistently maintained an opposition to the citation of foreign authority. These include Justices Thomas, Alito and Roberts on the U.S. Supreme Court⁵⁵ and Justice Heydon, formerly of the High Court of Australia.⁵⁶ Several of these judges have expressed their opposition to foreign sources of authority as being a necessary consequence of a principled approach to constitutional interpretation which privileges domestic legal tradition and sources over those from outside, and also grants great deference to the views of elected representatives and legislatures. There is a rich body of scholarship which maps how a judge’s basic approach to issues of constitutional interpretation and adjudication affects whether that judge will be inclined to be for or against reliance on foreign, comparative and international sources of authority.⁵⁷

What is problematic about Justice Singhvi’s judgment in *Koushal* is that it seems to be a singular exception even within the judge’s own record. Given that Justice Singhvi has never previously expressed such vigorous opposition to foreign authorities, he does not seem to have a principled objection to its application.

Commentators have observed other notable contradictions between this particular judgment and Justice Singhvi’s earlier record. Sahil Kher has noted, for instance, that it is difficult to reconcile Justice Singhvi’s

⁵⁴ Orinam, *Unofficial Oral Transcript of SC Hearings on Koushal*, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_Transcripts_Hearings.pdf. (Last visited on February 24, 2014) (At p. 28, Justice Singhvi is noted to have said: “Laws of other countries may not be of great help. If we start making research on that count, there will be some countries that have and some that don’t”).

⁵⁵ In their respective confirmation hearings before the United States Senate, Chief Justice Roberts and Justice Alito expressed grave concerns on the practice of relying on foreign authority while judging domestic law cases. VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL AGE* 17-18 (2010).

⁵⁶ JACKSON, *id.*, 18.

⁵⁷ See generally Lorraine Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3 (2002); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Dialogue*, 65 MONTANA L. REV. 15 (2004); Paul Kahn, *Comparative Constitutionalism in a New Key*, 101 Mich. L. Rev. 2677 (2003). See Arun K. Thiruvengadam, *Comparative Law and Constitutional Interpretation in Singapore: Insights from Constitutional Theory* in *EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION* 114-152 (2009) (here, I have tried to develop two competing models of constitutional adjudication which help explain when a judge would be inclined to accept or reject foreign authority).

newfound attachment for granting deference to the views of the legislature on §377 with his much more robustly articulated approach to questioning executive and legislative judgments in *Centre for Public Interest Litigation v. Union of India* (more popularly known as the 2G case).⁵⁸

Justice Singhvi's discussion of foreign and comparative law in the Koushal judgment has the following qualities: it displays a visceral opposition to foreign authority combined with a failure to even acknowledge the foreign authorities cited. It is also at variance with the practice of the Supreme Court as an institution and with his own earlier practice in relation to engagement with foreign authorities. What is most problematic is the judgment's abject failure in seeking to provide justification for its reasons for rejecting outright the foreign law cited before it. In the absence of such fully articulated reasons, one is left to speculate on these reasons. Inevitably, some observers will turn to what the 'American Realist' scholar Jerome Frank referred to as the "hidden, unconscious biases" of law persons which make it difficult to prophesise how courts will rule in particular cases. This in turn will create doubts about the propriety, soundness and legitimacy of the judicial process.⁵⁹ This may well be the most disturbing legacy of Koushal.

V. CONCLUSION

Ours is an age when - increasingly, and across a number of jurisdictions - important questions affecting social, economic and political policies are being decided by courts.⁶⁰ This has led some scholars to focus on the need for judges to turn from their traditional role of conducting legal interpretation of documents (where they engaged in applying rules or interpreted principles) to a public-reason oriented justification. The argument is that such a move is necessary to ensure that "the activity of courts adjudicating human rights claims can be seen as an attempt to give public expression to and help institutionally stabilise a commitment to a reason-driven political process of justice-seeking".⁶¹

⁵⁸ Sahil Kher, *Justice Singhvi: From 2G to Koushal*, December 3, 2013, available at <http://barandbench.com/content/justice-gs-singhvi-2g-koushal> (Last visited on February 24, 2014). See generally Sudhir Krishnaswamy, *The Supreme Court and 2G: Signal and Noise*, February 2013, available at http://india-seminar.com/2013/642/642_sudhir_krishnaswamy.htm (Last visited on February 21, 2014) and Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as Crucial Actors in Regulatory Systems of the Global South: the Indian Judiciary and Telecom Regulation (1991-2012)* in *THE RISE OF THE REGULATORY STATE OF THE SOUTH* 151-156 (2013) (debating the merits of Justice Singhvi's judgment in the 2G case).

⁵⁹ JEROME FRANK, *LAW AND THE MODERN MIND* xxv (1949).

⁶⁰ See generally Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANNUAL REVIEW OF POLITICAL SCIENCE*, 93-118 (2008).

⁶¹ Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *LAW & ETHICS OF HUMAN RIGHTS* 2 157 (2010).

Koushal is a vivid illustration of this in the Indian context, as the constitutionality of § 377 is an issue that was specifically avoided by the Cabinet and the Legislature in India, which then 'passed the buck' to the Supreme Court. Given this background, it is distressing that a common criticism of Koushal has been of the way the judgment approaches the task of providing reasons and justification for its specific conclusions.⁶² A typical assessment has been the assertion that the judgment is characterised by "an utter inadequacy of reason."⁶³

As I have sought to show in this paper, such criticism can also be advanced towards the manner in which Koushal engages with foreign and comparative law. In adamantly refusing to even mention the various cases that were cited before it and in the Naz judgment that it overruled, the judges who authored Koushal failed to provide persuasive and substantive reasons for their failure to engage with what has traditionally been an important, though non-binding, resource for judges of the Indian Supreme Court. Even on the terms of the authorities they cite, foreign and international law was at the very least relevant to the issues being considered in Koushal. The Court's reluctance towards any meaningful engagement with foreign and comparative law seems troubling also because its principal author had shown no such qualms in engaging with foreign authorities in judgments authored across his six year tenure on the Supreme Court. While there are judges who have cited principled reasons for refusing to engage with foreign law, Justice Singhvi seems an unlikely candidate for that category of judges. Ironically, given its aversion to foreign law, the Koushal judgment ends up mirroring the logic and result of a foreign decision: that of Justice Scalia's dissent in the U.S. Supreme Court's decision in Lawrence.

Justice Singhvi's overriding concern in dealing with foreign law appears to be – using the words and metaphor of Justice Jaganmohan Reddy that he quotes – to avoid being blinded by the light of foreign sources. I conclude this paper by recalling the words of Rabindranath Tagore, who used a similar metaphor to opposite effect. Writing nearly a century ago, and reacting to what he saw as a disturbing parochialism in Gandhi's non-cooperation movement, Tagore penned these poignant words:

"I feel that the true India is an idea and not a mere geographical fact. ... The idea of India is against the intense consciousness of the separateness of one's people from others, [...] which inevitably leads to ceaseless conflicts. Therefore my one prayer is: let India stand for the cooperation of all peoples

⁶² Orinam, *Articles on the Verdict*, available at <http://orinam.net/377/supreme-court-verdict-2013/articles-analysing-verdict/> (Last visited on February 24, 2014) (a collation of the early commentary on the Koushal judgment).

⁶³ Danish Sheikh & Siddharth Narrain, *Struggling for Reason: Fundamental Rights and Wrongs of the Supreme Court*, XLVIII EPW 52 (2013).

of the world. The spirit of rejection finds its support in the consciousness of separateness, the spirit of acceptance in the consciousness of unity. Our present struggle to alienate our heart and mind from those in the West is an attempt at spiritual suicide. ...

Let us be rid of 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. When we have the intellectual capital of our own, the commerce of thought with the outer world becomes natural and fully profitable. But to say that such commerce is inherently wrong, is to encourage the worst form of provincialism, productive of nothing but intellectual indigence”.⁶⁴

In the seventh decade of the existence of India as an independent nation, the Indian Supreme Court is regarded as one of the stellar and influential judicial institutions in the contemporary world. Judges of the Supreme Court, being possessed of their own “intellectual capital”, should confidently strive to engage in “commerce of thought with the outer world”. Arguably, in thoughtfully and productively engaging with comparative law across the past six decades, the Indian Supreme Court has indeed embraced Tagore’s advice. Hopefully, Koushal’s display of ‘provincialism’ and “intellectual indigence” will remain an exception to that general trend.

In the short time that has elapsed since Koushal was decided in December 2013, the Supreme Court has delivered two landmark judgments which provide cheer to those who harbour hopes for a rooted cosmopolitan approach to constitutional adjudication. The judgments in the cases of *Shatrughan Chauhan v. Union of India*⁶⁵ and *National Legal Services Authority v. Union of India*⁶⁶ deal, respectively, with the issues of the constitutionality of the death penalty when there is delay in carrying out executions, and the rights of transgendered persons in India. Both these judgments engage creatively and productively with comparative and international law while grounding their results firmly in principles and textually guaranteed rights of the Constitution of India.

As this article goes to print, the Supreme Court has taken steps towards potentially reconsidering the merits of the Koushal ruling. Such a review should include, at a narrower level, a focus on Koushal’s approach to comparative and international law and at a broader level, its approach to the more fundamental issue of providing reasoned justifications for its conclusions.

⁶⁴ *Tagore’s Reflections on Non-cooperation and Cooperation* in THE MAHATMA AND THE POET: LETTERS AND DEBATES BETWEEN GANDHI AND TAGORE 1915-41, 61-62 (1997).

⁶⁵ (2014) 3 SCC 1.

⁶⁶ (2014) 5 SCC 438.