

"My Friend Is a Stranger": The Death Penalty and the Global *Ius Commune* of Human Rights

Paolo G. Carozza*

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* Associate Professor of Law, Notre Dame Law School. I have benefited considerably from the comments of A.J. Bellia, Karen Engle, Rick Garnett, Patti Ogden, and Jay Tidmarsh, from discussion with the students in my J.S.D. Research Seminar, and from the research assistance of Patti Ogden and Angela Priest.

*My friend is a stranger, someone I do not know.
 A stranger far, far away.
 For his sake my heart is full of disquiet
 because he is not with me.
 Because, perhaps, after all he does not exist?
 Who are you who so fill my heart with your absence?
 Who fill the entire world with your absence?*¹

I. Introduction: The Foreign Presence in *Atkins v. Virginia*

A stranger is lurking in the background of the United States Supreme Court's death penalty jurisprudence, a foreigner still not quite present but nevertheless filling the heart of the law with disquiet. In *Atkins v. Virginia*, in which the Court recently held that the execution of mentally retarded criminals violates the Eighth Amendment of the United States Constitution,² we get a timid glimpse of the stranger through what might otherwise be an unremarkable footnote. In the main text of the opinion, the Court measures the existence of a national consensus regarding the "evolving standards of decency" that mark the progress of a maturing society.³ Only after reaching a conclusion on the basis of legislative developments in the United States does Justice Stevens add a long footnote to list "[a]dditional evidence" providing "further support to our conclusion that there is a consensus among those who have addressed the issue."⁴ There, almost buried among the opinions of medical associations, religious organizations, and general polling data is this single sentence: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."⁵

While seeming to be rather casual on its own, that sentence becomes much more noticeable because of the vehement rejoinders it provokes from the two dissenters. Both Chief Justice Rehnquist and Justice Scalia go to considerably greater length in condemning any consideration of foreign norms than the majority does in acknowledging them, insisting that "the viewpoints of other countries simply are not relevant" to an assessment of United States standards.⁶ Their response hardly seems proportionate to the majority's bare mention, in very indirect fashion, of the existence of an international consensus; it only makes sense to the extent that the reference to

1. PÅR LAGERKVIST, EVENING LAND AFTONLAND 119 (W.H. Auden & Leif Sjöberg trans., Wayne State Univ. Press 1975). Lagerkvist was the 1951 Nobel Laureate.

2. *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002).

3. *Id.*

4. *Id.* at 2249 n.21.

5. *Id.* (quoting Brief of Amicus Curiae the European Union at 4, *McCarver v. North Carolina*, 532 U.S. 941 (2001) (No. 00-8727)).

6. *Id.* at 2254 (Rehnquist, C.J., dissenting).

global developments is a sign of a larger and more significant presence looming just beyond the current reach of U.S. law. There is more at work here than just the well-known, but minor, running spat among the Justices about the relevance of foreign and comparative law to constitutional adjudication in general.⁷ The dissenters succeeded in highlighting that in its death penalty jurisprudence, the U.S. Supreme Court is on the threshold of participating more fully in a substantial transnational normative community that could, in principle, have a significant impact on U.S. law.⁸

Within just two months, the Court gave us a hint of the potential implications of the stranger's presence, when three of the Justices dissented from a denial of certiorari in a case challenging Texas's execution of a man for a crime committed while he was still a minor. Justice Stevens called for a reversal of *Stanford v. Kentucky*⁹ (in which the Court, thirteen years earlier, had upheld the constitutionality of such executions), noting that "the issue has been the subject of further debate and discussion both in this country and in other civilized nations" and that there is now an "apparent consensus . . . among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender."¹⁰ Justices Ginsburg and Breyer both joined Stevens, and added specifically that *Atkins* has now made it more tenable to revisit *Stanford*.¹¹

However, a much more rich and vivid illustration of the possibilities of transnational normative dialogue could be found in another significant death penalty case decided at almost the same time as *Atkins*, albeit in a very different court. The next day, in fact, the Inter-American Court of Human

7. In the context of other Eighth Amendment cases, this disagreement can be found, for instance, in *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1, 389–90 (1989) (Brennan, J., dissenting), and in *Thompson v. Oklahoma*, 487 U.S. 815, 830–31, 869 n.4 (1988) (Scalia, J., dissenting). The dispute has also arisen outside of the capital punishment context in *Printz v. United States*, 521 U.S. 898, 921 n.11, 976–77 (1997), where Justices Scalia (for the majority) and Breyer (dissenting) differed about the relevance of foreign experience to questions of federalism in the United States.

8. That this much larger issue seethes under the surface of the relatively staid judicial language of *Atkins*, and that the Justices are acutely aware of it, is confirmed by the illuminating background that Harold Koh has provided on the litigation, briefs, and arguments in the case. See Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1118–27 (2002) (discussing the author's reasons for contributing to an amicus brief for American diplomats and his argument that the Eighth Amendment should be read to forbid the execution of the mentally retarded).

9. 492 U.S. 361 (1989).

10. *Patterson v. Texas*, 123 S. Ct. 24, 24 (2002) (Stevens, J., dissenting). Even more recently, the petitioner in the 1989 *Stanford* case—still on death row—again petitioned the Supreme Court for a writ of habeas corpus, arguing that *Atkins* supported reconsideration of the issue. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from the Court's denial of the petition. *In re Stanford*, 123 S. Ct. 472, 472–73 (2002) (Stevens, J., dissenting). On the same day, Justice Breyer, in a dissent from a denial of certiorari, argued that *Atkins*'s consideration of foreign law supported reconsideration of whether prolonged periods on death row constitute per se cruel and unusual punishment. *Foster v. Florida*, 123 S. Ct. 470, 471–72 (2002) (Breyer, J., dissenting).

11. *Patterson*, 123 S. Ct., at 24 (Ginsburg, J., dissenting).

Rights in San José, Costa Rica, ruled in *Hilaire v. Trinidad & Tobago* that a law imposing a mandatory death sentence upon anyone convicted of murder is incompatible with the right to life as protected by the American Convention on Human Rights.¹² While the use of foreign jurisdictions' norms lies half-hidden in the shadows in *Atkins*, in *Hilaire* it emerges fully into the light. Throughout its opinion, the tribunal draws from the judgments of the Human Rights Committee,¹³ the South African Constitutional Court, the Supreme Courts of India and the United States, the European Court of Human Rights, and the Judicial Committee of the Privy Council.¹⁴ It thus reflects, and contributes to, a truly transnational jurisprudence of human rights.

Moreover, the Inter-American Court does not merely cite those foreign cases in a passing, pro forma way, but instead engages their substantive reasoning and judgments. For example, at the heart of its case, the Inter-American Court finds that a mandatory death sentence, by failing to permit consideration of individual circumstances, "compels the indiscriminate imposition of the same punishment for conduct that can be vastly different" and therefore arbitrarily puts the right to life at grave risk.¹⁵ It cites, in support of its position, the U.S. Supreme Court's decision in *Woodson v. North Carolina*,¹⁶ which similarly concluded that mandatory imposition of capital punishment violated basic human rights. But the Inter-American Court does not limit its discussion of the foreign case to the fact that the latter reaches a functionally equivalent result to a common problem. Rather, the Inter-American Court's judgment appeals to the fundamental, underlying premise of the U.S. case, by approvingly incorporating language from the U.S. decision regarding the value of "uniquely individual human beings."¹⁷

As *Hilaire* reveals at its core and *Atkins* does on its margins, the issues surrounding capital punishment provide an especially strong example of the growing globalization of human rights norms.¹⁸ This borrowing from and re-

12. *Hilaire, Constantine, and Benjamin et al. Case*, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002), at <http://www.corteidh.or.cr/index-ingles.html> (last visited Jan. 14, 2003) [hereinafter *Hilaire*].

13. The Human Rights Committee is an entirely separate supranational body established within the United Nations Organization to monitor compliance with the International Covenant on Civil and Political Rights.

14. The Judicial Committee of the Privy Council, a judicial body of the court system of England that is composed of judges from the United Kingdom and other parts of the Commonwealth, hears appeals from courts within certain Commonwealth nations.

15. *Hilaire*, *supra* note 12, para. 103.

16. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

17. *Hilaire*, *supra* note 12, para. 105.

18. This fact has already been recognized in human rights scholarship for a considerable time. See, e.g., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 18–53 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (reporting cases from various national and international courts that discuss the increasingly international perspective taken in death penalty cases); Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a*

liance upon other jurisdictions is much more than a guest for the application of a “higher” positive law, like a formally binding treaty provision. The movement of norms is as much horizontal as vertical, and springs up from below as much as it descends from above. Like a high-stakes game of pinball, these understandings of the requirements of human dignity carom from one place to another at all angles. The paths they travel do not follow a linear order so much as a fluid one, and the end result is not a formal, hierarchical normative structure, so much as a dynamic, inter-connected web of norms marked by multiple intersections.¹⁹

That transfer of norms across jurisdictions has not gone unnoticed, and has been understood in a variety of substantive fields of law to be part of a more general pattern of increasing “transnational judicial communication” or “judicial globalization.”²⁰ Here, however, I would like more specifically to use the context of the death penalty—an especially clear example of the phenomenon—to examine the normative character of this transnational jurisprudence as it emerges from the “pinball-effect” process of cross-

Case Study, 40 ST. LOUIS U. L.J. 699 (1996) (emphasizing the need for normative consistency among the various courts and agencies dealing with human rights law).

19. The analogy is borrowed from JAMES BURKE, *THE PINBALL EFFECT* 3–4 (1996).

20. The starting point for these inquiries is most often the work of Anne-Marie Slaughter. See, e.g., Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000) (examining five areas of judicial interaction that illuminate judicial globalization: (1) relations between European national courts and the European Court of Justice; (2) relations between European national courts and the European Court of Human Rights; (3) the emergence of “judicial comity” in transnational litigation; (4) constitutional cross-fertilization; and (5) face-to-face meetings among judges around the world); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (observing that the European Court of Justice and the European Court of Human Rights have been successful in enforcing their rulings and setting forth a “check list” of factors in that success); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) [hereinafter Slaughter, *Typology*] (classifying the different types of transjudicial communication); see also William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129 (2000) (arguing that a universal system of transnational law (i.e., state enforcement of international human rights law) would be an effective mechanism for the protection of human rights); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999) (noting an expansion in the number of international judicial bodies, providing an overview of their development, and advocating that “international judicial law and organization” become its own discipline of study); Claire L’Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 24 (1998) (discussing both the increasing international use of American interpretation of the Bill of Rights and the Rehnquist Court’s place in international exchange of judicial ideas as they pertain to human rights law); Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL’Y INT’L BUS. 1037 (1997) (suggesting that the use of the transnational communication model is a major factor in the development of any international insolvency plan); *Developments in the Law—International Criminal Law, The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 1943, 2049–73 (2001) (asserting that an “international judicial dialogue” has developed between domestic courts and supranational tribunals and noting its particular pertinence in the context of capital punishment).

jurisdictional dialogue. What is the nature, value, and force of this global normative network? The question is not limited to its status within any particular constitutional system, but relates to the basic discourse of international human rights law taken as a whole. From that perspective, I propose in this Article that we understand the shared global norms regarding the death penalty to constitute an example of the possibilities of a "common law" of human rights in the world—or, rather, a new *ius commune*.

Part II will explain very briefly how the idea of a *ius commune* is used in this Article. The use of the Latin term, aside from helping to keep the complex of norms in question distinct from the Common Law of England and its former colonies, evokes both certain historical associations and also aspects of the current European dialectic between supranational and local law; it is a conscious modern echo of a medieval reality. As a concrete example of the idea's applicability to human rights law, I take up in Part III a detailed descriptive analysis of the global *ius commune* regarding capital punishment and human rights. That discussion shows that the interaction of different national and supranational legal institutions across Asia, Africa, Europe, and the Americas both creates and draws upon a common body of norms that is transnational in practice and grounded in universal principles of human dignity and that exists in an intimate and mutually beneficial relationship with local law. In conclusion, I consider more broadly the possible significance of regarding human rights norms as a global *ius commune*. Within international human rights law, regarding human rights norms through this lens has the potential to strengthen the genuine universality of human rights, to respect the principle of subsidiarity, and offer a way of responding to the dual dynamics of globalization and pluralism in contemporary transnational society. A *ius commune* approach to human rights could also have implications for particular national legal systems as well, especially the United States, that should provoke serious reflection on the role of global norms of human dignity in domestic legal discourse.

II. The Metaphor of the *Ius Commune*

Strictly speaking, of course, the *ius commune* was that combination of Roman civil law and canon law (and, to a lesser extent, certain transnational customary laws²¹) common to most of Europe, over and above the particularities of local law, in the high Middle Ages.²² However, over the last twenty-five years, scholars have revived the term in discussions of con-

21. The *ius commune* included, at least in part, the law merchant, laws regarding piracy, and the rules governing the conduct of war, the treatment of hostages, and the conclusion of peace treaties. O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 109 (2d ed. 1994).

22. See generally MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000-1800 (Lydia G. Cochrane trans., 2d ed. 1995); GIOVANNI SANTINI, MATERIALI PER LA STORIA DEL DIRITTO COMUNE IN EUROPA (2d ed. 1996); ROBINSON, *supra* note 21, at 106-23.

temporary Europe, where the increased presence of supranational law and its significant effect on national jurisdictions have been characterized as giving rise to a new *ius commune* in that region.²³

A lawyer steeped in the Anglo-American common-law tradition might find it hard to understand the persistence of the romantic ideal of the *ius commune* in the Romano-Germanic legal tradition of Continental Europe. Like the founding myth of a culture, the idea represents a past unity and ethical coherence that was lost as territorial sovereignty and legislative positivism fragmented the continent from the seventeenth through the nineteenth centuries. Nostalgia for that past provides a foil for the modern ailments of disunity and conflict, and thus feeds into the modern-day ideology of a united Europe like a longing for paradise lost and a vision of harmony restored.²⁴ As a result, it can sometimes be hard to sort sentimental gestures toward the past from more serious uses of the idea of a *ius commune*.²⁵ It is necessary, therefore, to be a little more precise about the way in which I am proposing its use here, beginning with the actual historical antecedent of the term.

A. *The Historical Precedent of the Ius Commune*

I am not referring in any way to a restoration of the medieval *ius commune* in substance, of course, even if that were possible. The term is in-

23. Among the very large number of sources dealing with this idea, see generally the collections found in THE CLIFFORD CHANCE MILLENNIUM LECTURES: THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW (Basil Markesinis ed., 2000) [hereinafter MILLENNIUM LECTURES]; THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION (Bruno de Witte & Caroline Forder eds., 1992) [hereinafter COMMON LAW OF EUROPE]; and NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE (Mauro Cappelletti ed., 1978) [hereinafter NEW PERSPECTIVES]. See also Bernard S. Jackson, 'Legal Visions of the New Europe': *Ius Gentium, Ius Commune, European Law*, in LEGAL VISIONS OF THE NEW EUROPE 3 (Bernard S. Jackson & Dominic McGoldrick eds., 1993) (evaluating developments in European law in the context of the continent's past).

24. On the European ideal of supranationalism generally, see JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 342-43 (1999). Also, to some extent, comparative lawyers' preoccupation with the idea of *ius commune* simply reflects the core dynamic of their discipline. Any comparison implies a twin preoccupation with similarity and difference: an affirmation of the particularity of laws, legal systems, and legal traditions; and at the same time, the quest for and construction of commonality between them. Both difference and similarity are necessary prerequisites to comparison; without the former, there is nothing to compare while without the latter, no comparison would be possible. The act of comparison itself simultaneously combines the two because by definition it creates a relationship between multiple objects, establishing some commonality between them. Thus, the possibility of a "common law" among the variant legal realities of Europe resonates with the most basic cognitive posture of the comparatist: seeking and creating commonality out of difference.

25. Cf. Marie-France Renoux-Zagamé, *Le Droit Commun Européen entre Histoire et Raison*, 14 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 27 (1991); Jean-Louis Halpérin, *L'approche Historique et la Problématique du Jus Commune*, 52 REVUE INTERNATIONALE DE DROIT COMPARÉ 717 (2000). Both articles argue for a careful distinction between the *ius commune* as historical reality and the *ius commune* as a romantic construction.

stead a metaphor for certain kinds of continuity and commonality, across differences in local laws, that were characteristic of the medieval *ius commune* in Europe.²⁶ A detailed history is therefore not as relevant as are those central, iconic characteristics of the *ius commune* that parallel our present circumstances. For that purpose, even though the *ius commune* was a complex and changing reality that existed in some fashion over the better part of eight centuries of the history of an entire continent,²⁷ three of its enduring features are of particular relevance to the modern condition. The *ius commune* was transnational in practice, it was universal in principle, and it had a multifaceted relationship with local law (the *ius proprium*) that was not limited to the formal hierarchies of positive law.²⁸

In a certain sense it may be anachronistic to describe the *ius commune* as “transnational” since it existed at a time before “nations” as we currently conceive of them. But it did transcend the geographic and political boundaries within Europe in its time. The strength and significance of its presence varied—it was less important to the law of England, Scandinavia, and Poland than elsewhere, for example²⁹—but almost everywhere it was a feature of the legal landscape. In large part, this transnational presence grew out of the strong and vital connection between the *ius commune* and the great universities of the age, from Bologna, Paris, and Oxford to Salamanca and Cologne. The educated elite of all Europe flocked to these centers as “pilgrims of learning,” often at great cost and sacrifice, to study the canon law and the revived Roman civil law that made up the *ius commune*, before returning to their homes.³⁰ That migration of scholars and jurists generated and, in turn, sustained a transnational culture that extended the influence of the *ius commune* throughout the continent and gave it continuity and consistency.

The scope of the *ius commune* was not merely a function of geography, however, and its universality within Europe was not limited to its practical impact. It was also universal in principle, founded on an ideal of justice that was, in the characteristic mentality of the age, seen to be an earthly reflection of both universal natural reason and also eternal and divine justice.³¹ Consequently, the *ius commune* was symbolic of the unity of all law and the

26. Cf. Jörg Friedrichs, *The Meaning of New Medievalism*, 7 EUR. J. INT'L REL. 475, 477 (2001) (remarking that “the neomedieval analogy [of the “New Medievalism”] is neither more nor less than a heuristic device”).

27. See generally BELLOMO, *supra* note 22. For a concise overview of law throughout the whole of medieval Europe, see RAOUL CHARLES VAN CAENEGEM, *Law in the Medieval World*, in LEGAL HISTORY: A EUROPEAN PERSPECTIVE 115 (1991).

28. See ROBINSON, *supra* note 21, at 107–10 (defining and describing the *ius commune*).

29. See *id.* at 107 (noting that geographical and political barriers limited the influence of the *ius commune* “[i]n the further reaches of Europe”); R.H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND* 4–5 (2001) (discussing the limited influence of the *ius commune* in England).

30. See BELLOMO, *supra* note 22, at 82.

31. See *id.* at 153–54.

reference point for the idea of law itself, and its texts were, in a certain sense, analogous to the sacred writings of Scripture and tradition.³² Relative to local law, the *ius commune* was thus necessarily understood to be the model law, the paradigm. Even when the *ius proprium* neglected or departed from the *ius commune*—and in that case the formal hierarchy of positive law required application of the local law—the texts of the *ius commune* retained their validity and necessity in the form of higher principles, ethically superior to ordinary legality.³³

Despite the universal character of the *ius commune*, both theoretical and empirical, it was not the only law present in the different localities of Europe. From our modern perspective, it can be hard to appreciate just how richly heterogeneous the *iura propria* were prior to the advent of the territorial law making monopolies of nation-states. They were differentiated both “horizontally” across geographic areas and “vertically” within them (e.g., according to social roles).³⁴ The *ius commune* thus existed alongside a multiplicity of other laws.

The relationship of the *ius commune* to these varied local laws was mixed, with different localities giving the *ius commune* differing degrees of recognition.³⁵ Formally, in most places the *ius proprium* took precedence over the *ius commune* in the hierarchy of sources of positive law: the *ius commune* applied in the absence of a controlling local law, to fill gaps or otherwise supplement the latter.³⁶ But these formal rules do not tell the whole story of the relationship between the *ius commune* and the *ius proprium*, and they obscure especially the deep systemic connections between the two that far surpass their respective places in the hierarchy of sources of law. As Manlio Bellomo has shown, the *ius commune* and the *ius proprium* interacted so extensively that the former surrounded and grounded the latter; it didn’t just “fill gaps,” but seeped into cracks and crevices, soaking the legal culture of almost all Europe with its principles.³⁷ Jurists usually received no instruction in local law and thus the *ius commune* was what they knew and relied

32. *Id.* at xiii, 95–96, 101.

33. *Id.*

34. VAN CAENEGEM, *supra* note 27, at 117–19; see also John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT’L L. 357, 359–61 (1991) (noting the variety of local laws that coexisted within the ambit of the common law of Europe prior to the rise of nation states).

35. See ROBINSON, *supra* note 21, at 109–22 (describing the interaction between the *ius commune* and local laws in France, Germany, Spain, Italy, and Scotland).

36. In fact, of the multiple laws potentially applicable, the highest priority was usually given to the law that was most directly related to the organs of government, such as royal law. Custom only applied secondarily, and the *ius commune* could be used, along with a general principle of equity in the case, in the absence of either of the first two levels of priority. See BELLOMO, *supra* note 22, at 151.

37. See *id.* at x, 90, 155–56.

upon routinely, becoming the source of the fundamental concepts, methods, language, and mentality of legal professionals.³⁸ Legislators used it, too: the *ius commune* often was the basis for legislative reforms of the *ius proprium*.³⁹ In short, while formally only secondary in the hierarchy of positive law, the *ius commune* in fact inter-penetrated local law and served as a baseline against which the *ius proprium* would be compared, understood, and revised. The idea of the *ius commune* both respected and even presumed the existence of the great variety of local laws, while still serving as a central point of reference among them. As Bellomo puts it: "Plurality was thus part of the 'system,' and the system itself was inconceivable and would never have existed without the innumerable *iura propria* linked to the unity of the *ius commune*."⁴⁰

B. *The Modern Ius Commune of Human Rights in Europe*

Turning from the characteristics of the historical *ius commune* to the reassertion of the idea in contemporary discussions of European law, we find that term's meanings are myriad. Some use it to pertain to a fairly deep and comprehensive unification of the diverse legal systems of Europe.⁴¹ Others are less categorical, speaking of a *ius commune* in the slightly softer tones of "reciprocal rapprochement, coordination and harmonization,"⁴² or of a common core of legal principles, rules, and institutions that the European nations have in common.⁴³ And even more attenuated uses of the idea can be found in references to certain underlying basic values and ethical commitments shared among the diverse legal systems of Europe.⁴⁴ In other cases, the *ius commune* is associated more with a process of convergence, without necessarily envisioning the ultimate endpoint of the trajectory.⁴⁵

Although in different legal contexts certain of these understandings may have more or less applicability than others,⁴⁶ the most relevant under-

38. See ROBINSON, *supra* note 21, at 108 ("In a basic sense Roman and Canon law . . . were common to the habits of thought and basic knowledge of all educated lawyers in Europe . . .").

39. See BELLOMO, *supra* note 22, at 110-11.

40. *Id.* at xiii.

41. E.g., Jean Limpens, *Les Facteurs Propices à l'Écllosion et au Développement d'un Droit Commun Européen*, in NEW PERSPECTIVES, *supra* note 23, at 75, 76.

42. Mauro Cappelletti, *Introduction*, in NEW PERSPECTIVES, *supra* note 23, at 1, 4-5.

43. Hein Kötz, *A Common Private Law for Europe: Perspectives for the Reform of European Legal Education*, in COMMON LAW OF EUROPE, *supra* note 23, at 31, 34, 41.

44. E.g., Rodolfo Sacco, *Droit commun de l'Europe, et composantes de droit*, in NEW PERSPECTIVES, *supra* note 23, at 95.

45. E.g., Thijmen Koopmans, *Towards a New "Ius Commune,"* in COMMON LAW OF EUROPE, *supra* note 23, at 43, 45-50.

46. E.g., John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe*, in NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 147 (Jack Beatson & Takis Tridimas eds., 1998) (discussing the relationship between the national laws and European public law in the administrative law context); Jürgen Schwarze, *Towards a Common European Public Law*, 1 EUR.

standings here are those that are used to capture the character of human rights in Europe. While many interested scholars have considered human rights to be at least a contributor to a broader *ius commune* of Europe,⁴⁷ a few have taken up directly the idea of a *ius commune* of European human rights as such.⁴⁸ None of these latter discussions explicitly address the historical metaphor behind their term, but perhaps for that reason it is all the more noteworthy that they each identify features of European human rights law that parallel the historical characteristics of the medieval *ius commune* discussed earlier. Most obviously, European human rights law is broadly transnational. The sources of the European *ius commune* of human rights go beyond Europe's regional treaties, like the European Convention on Human Rights, or its supranational political and legal institutions, such as those of the Council of Europe and the European Union, to include the constitutional traditions of the different member states and the decisions of their courts.⁴⁹ The national constitutional systems, however, are independent actors in this community and not merely in a subaltern relationship with supranational laws and institutions. The new European *ius commune* of human rights is thus transnational in a way that cannot be confined only to the existence and formal authority of a supranational law in the region. It consists of a multi-

PUB. LAW. 227 (1995) (explaining the link between national constitutional systems and broader European public law); Kötz, *supra* note 43 (addressing private law). In the areas of private law generally, one of the most sophisticated and interesting efforts to explore the possibilities of commonality has been the "Common Core of European Private Law" project of the University of Trento. See MAKING EUROPEAN LAW: ESSAYS ON THE "COMMON CORE" PROJECT (Mauro Bussani & Ugo Mattei eds., 2000); Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1997) (recounting the common core approach and its applicability to the European common public law). For an attempt to gauge the usefulness of the "common core" approach for human rights, see Leslye Amede Obiora, *Reconstituted Consonants: The Reach of a "Common Core" Analogy in Human Rights*, 21 HASTINGS INT'L & COMP. L. REV. 921 (1998).

47. See, e.g., Lord Bingham, *A New Common Law for Europe*, in MILLENNIUM LECTURES, *supra* note 23, at 27, 35 (discussing the existence of a larger European legal community); Koopmans, *supra* note 45, at 43, 50; Limpens, *supra* note 41, at 82.

48. E.g., Cesare Mirabelli, *Preliminary Reflections on Fundamental Rights as the Basis of a Common European Law*, in MILLENNIUM LECTURES, *supra* note 23, at 225 (analyzing the concept of fundamental human rights in the context of the greater European community); Charles Leben, *Is There a European Approach to Human Rights?*, in THE EU AND HUMAN RIGHTS 69 (Philip Alston ed., 1999); François Ost, *La Jurisprudence de la Cour Européenne des Droits de l'Homme: Amorces d'un Nouveau "Ius Commune"?*, in COMMON LAW OF EUROPE, *supra* note 23, at 683; Michel De Salvia, *L'élaboration d'un ius commune des droits de l'homme et des libertés fondamentales dans la perspective de l'unité européenne: l'œuvre accomplie par la Commission et la Cour européennes des Droits de l'Homme*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 555 (Franz Matscher & Herbert Petzold eds., 2nd ed. 1988). An earlier discussion, Dimitrios J. Evrigenis, *Le Rôle de la Convention Européenne des Droits de l'Homme*, in NEW PERSPECTIVES, *supra* note 23, at 341, was written at a time when European human rights law was considerably less developed and therefore is less useful now even though it was in some ways prescient a quarter century ago.

49. Leben, *supra* note 48, at 88-89.

plicity of sources forming an “intersecting network of legal systems” with human rights at its heart.⁵⁰

That common transnational “constitutional space”⁵¹ is not merely a practical, empirical reality. It also depends vitally on the fundamental universality of the underlying principles of law expressed through human rights: the fundamental and “irreducible” principles of human rights essentially define the scope of the *ius commune*.⁵² Cesare Mirabelli, the President of the Italian Constitutional Court, makes the point well, emphasizing that in the European *ius commune*, fundamental rights must necessarily be regarded as having a source “beyond that of positive law.”⁵³ Because they recognize and protect values “at the core of personhood, inherent to human dignity,”

[s]uch rights must be affirmed and protected in legal systems that do not explicitly recognize them and even in systems that expressly reject them. Any other course would deny their very nature and thus the reasons that justify their universal recognition. This approach [of a *ius commune*] emphasizes the important position claimed by fundamental rights, which demand recognition and protection even against authorities that deny their validity.⁵⁴

Thus, Mirabelli notes, the principles of the *ius commune* of human rights guide the basic construction of the separate legal systems and the interpretation of their particular laws, even in systems that differ in history, culture, and legal tradition.⁵⁵

Just *how* they apply across those local differences, however, brings us to the third feature of the European *ius commune* of human rights. Those who have identified and described this phenomenon have consistently emphasized that it is characterized by a continued multiplicity and pluralism of local laws rather than their unification or equivalence, in any strong sense.⁵⁶ The details of the *ius commune* of human rights do not necessarily have formal constitutional status in any one national legal system, and thus even while they serve as a unifying element, they are subject to each national system using its own particular methods of incorporation, interpretation, and implementation.⁵⁷ This point has been developed particularly by François Ost, who describes the European *ius commune* of human rights as having a “polyphonic logic”

50. See Mirabelli, *supra* note 48, at 233, 236. It is perhaps significant that Mirabelli in particular makes this point, as he is the president of a *national* (the Italian) constitutional court.

51. The term is used by, among others, Christian Tomuschat, *Europe—A Common Constitutional Space*, in COMMON LAW OF EUROPE, *supra* note 23, at 133.

52. De Salvia, *supra* note 48, at 556–63.

53. Mirabelli, *supra* note 48, at 233 (referring to fundamental rights as “metapositive”).

54. *Id.*

55. *Id.* at 235.

56. See, e.g., MIREILLE DELMAS-MARTY, VERS UN DROIT COMMUN DE L'HUMANITÉ 61–63 (1996); Mirabelli, *supra* note 48, at 717.

57. Mirabelli, *supra* note 48, at 235.

that entails coordination over subordination and an intertwining of legal orders rather than a mechanical hierarchy between them.⁵⁸ The result, he observes, is a relationship of “dialectical pluralism,” in which “national legal orders and the common legal order are developed *simultaneously*, to the benefit of their continuous interactions, as if... the one could not be understood without the other and vice versa.”⁵⁹

In sum, drawing from both the new *ius commune* of human rights in Europe and also its historical antecedent, the idea as I am using it here refers to a law that is, first, broadly transnational in practice, not only in a hierarchical or “international” sense, but also among a broad variety of actors not necessarily in a hierarchical relationship of positive law with one another. Second, it is universal in principle, again not (necessarily) as hard, positive law, but certainly as a set of fundamental, general principles upon which laws and actors of varying jurisdictions and authorities rely, generating a broad sharing of ideas, vocabulary, and ways of dealing with problems. Third, it is pervasively present with respect to national or local normative structures, so that diverse local contexts interact with it constantly, but nevertheless it remains informal, flexible, and pluralistic in its relationship to local law and culture. Thus, the idea of a new *ius commune* is a metaphor for a complex of human rights norms and legal relationships that combine unity and universality with pluralism and differentiation.

Such a combination was a natural product of the basic values and realities of law in medieval Europe, where the remarkable multiplicity of local authorities and jurisdictions existed alongside the transnational institutions of Church and Empire and against a background of universal Christian religious ideals. And a comparable set of circumstances characterizes law in contemporary Europe. In its combination of supranationalism (both as ideal and as empirical reality) and multiple, overlapping sovereignties and authorities, Europe provides one of the clearer examples of what has been labeled the “new medievalism” of transnational society.⁶⁰ The more intriguing and difficult question here is whether this idea of the *ius commune* can help us describe and understand the character of international human rights law not just in Europe but globally. A close look at the development and character of the normative community of human rights regarding the death penalty can show us that this is, in fact, the case.

III. The Example of Global Death Penalty Jurisprudence

Although a few prominent cases dealing with the death penalty in different national or international settings have received attention in aca-

58. Ost, *supra* note 48, at 717.

59. *Id.*

60. See, e.g., Friedrichs, *supra* note 26, at 475.

demic discussions,⁶¹ the breadth and richness of global jurisprudence on the death penalty is not widely appreciated.⁶² In bringing this body of work to light, there is plenty of evidence from all parts of the world, especially in the form of judicial decisions.⁶³ This Article is not intended to be a comprehensive analysis of global death penalty norms and practices, however, so there is no need (or the space) here to be exhaustive.⁶⁴ To provide more unity and focus to the analysis, I will confine the discussion to selected judicial decisions, rather than treaties, constitutional texts, legislative enactments, or scholarly studies. In addition, I have chosen only cases that address directly the legitimacy of applying capital punishment, rather than ancillary questions of procedural fairness, prison conditions on death row,⁶⁵ or questions

61. For example, the decision of the European Court of Human Rights in *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (ser. A) (1989), and that of the Constitutional Court of South Africa in *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.), are both very familiar in mainstream academic literature. E.g., William A. Schabas, *South Africa's New Constitutional Court Abolishes the Death Penalty*, 16 HUM. RTS. L.J. 133 (1995); Richard Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991).

62. One notable exception, however, can be found in the work of William Schabas, who clearly appreciates the multitudinous sources of death penalty jurisprudence. See generally WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* (1996).

63. Just why judicial decisions strongly dominate the ensemble of evidence of a *ius commune* of human rights poses a question worth addressing more fully and directly elsewhere. In part, no doubt, their formal character makes them easier to transfer or import (from the perspective of someone doing the legal research, it certainly makes them comparatively easy to find), and transnational law generally has had a peculiar gravitation toward formalism. Annelise Riles, *The Transnational Appeal of Formalism: The Case of Japan's Netting Law*, Stanford/Yale Junior Faculty Forum Research Paper 00-03, at 2-3 (2000), available at http://papers.ssrn.com/paper.taf?abstract_id=162588. There are also likely to be deeper reasons, however, potentially related to factors as varied as the place of rights consciousness in the "phenomenology of adjudication" in liberal legal structures to an "awareness of a common enterprise" among judicial actors in different parts of the world. Cf. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997) (arguing that law is properly considered as the product of both adjudicative and legislative institutions, which are influenced by ideology in different ways); see Slaughter, *Typology*, *supra* note 20, at 121-27 (demonstrating how laws from Sunni Islam, Chechen Islam, Chechen customary laws, and Russian laws fused around similar ideals). Nevertheless, to gain a more complete understanding of the character of any *ius commune*, it would be both interesting and necessary also to look carefully for legislative and executive acts.

64. A good place to begin a more complete global survey of cases from national and international courts worldwide (even though now slightly dated because death penalty jurisprudence globally is undergoing rapid and dramatic development) is still the extensive table of cases compiled in SCHABAS, *supra* note 62, at xv-xxvi.

65. Not included in this selection, therefore, are those cases which deal with the problem of the "death row phenomenon" (i.e., the violation of human rights resulting from excessively prolonged periods of detention, often in inhumane conditions, between sentencing and execution), even though such cases have unquestionably contributed to the transnational dialogue on capital punishment. The decision of the European Court of Human Rights in *Soering v. United Kingdom*, 11 Eur. Ct. H.R. at 439, although not the first case to address the problem, focused sharp attention on the issue and helped catalyze a global jurisprudence specific to the death row phenomenon, a substantial portion of which is found in the decisions of the Privy Council. See, e.g., *Mejia v. Attorney General*, No. 296, (Belize, June 11, 2001), available at http://www.belizelaw.org/judgements/no_296_of_2000; *Higgs v. Minister of Nat'l Sec.*, [2000] 2 A.C. 228 (P.C. 1999) (appeal taken from Bah.); *Thomas v. Baptiste*, [2000] 2 A.C. 1 (P.C. 1999) (appeal taken from Trin. & Tobago); *Fisher*

regarding the extradition of fugitives to countries where they could be subjected to violations of their human rights.⁶⁶

These illustrative cases, some more familiar and others far less known, provide a concrete example of the ways in which human rights law can be characterized as a new *ius commune*. By definition, however, the *ius commune* is a phenomenon that must be understood as a collective whole and does not exist in separate, severable units unrelated to the entirety. Accordingly, the discussion that follows here steps back somewhat from the metaphor of the *ius commune* to provide some raw data that I then will use in Part IV to assess the existence and characteristics of the *ius commune* in a more comprehensive way. In this section, I offer for comparison cases from nine different national constitutional systems and from three different transnational judicial or quasi-judicial bodies.

It is not remarkable that so many different legal systems around the world have addressed fundamental human rights issues arising out of the death penalty. What is noteworthy is how many of them have done so by borrowing from, responding to, or otherwise interacting substantially with external sources of law, including foreign sources that do not fit directly into the home system's formal hierarchy of positive legal norms. Examples of this phenomenon can be drawn from almost every region and cultural or legal tradition of the world, as well as from the work of supranational institutions. In the Introduction, I highlighted two of the most recent examples, one (from the United States) relatively marginal to the global dia-

v. Minister of Pub. Safety & Immigration, [2000] 1 A.C. 434 (P.C. 1998) (appeal taken from Bah.); Baptiste v. Thomas, [1998] 3 L. Rep. Commonwealth 297 (Trin. & Tobago); Henfield v. Attorney General, [1997] A.C. 413 (P.C. 1996) (appeal taken from Bah.); Jabar v. Public Prosecutor, [1995] 1 SLR 617; Nemi v. State, [1994] 1 L. Rep. Commonwealth 376 (Nig.); Catholic Comm'n for Justice & Peace in Zimb. v. Attorney General, 1993 (4) SALR 239 (Zimb.), reprinted in 14 HUM. RTS. L.J. 323 (1993); Pratt v. Attorney General, [1994] 2 A.C. 1 (P.C. 1993) (appeal taken from Jam.); Vatheeswaran v. State of Tamil Nadu, (1983) 2 S.C.R. 348 (India); Pawala v. State of Maharashtra, (1985) 2 S.C.R. 8 (India).

66. See, e.g., Minister of Justice v. Burns, (2001) S.C.R. 283; Kindler v. Canada, (1991) S.C.R. 779; Submission by Commissaire du Gouvernement to Conseil d'Etat (Fr.), translated in 100 INT'L L. REP. 665, 668-88 (1995); Conseil d'Etat, Feb. 27, 1987, Recueil Lebon 1987, 81, translated in 100 INT'L L. REP. 662 (1995); Aylor, 76-A Eur. Comm'n H.R. Dec. & Rep. 164 (1994), reprinted in 100 INT'L L. REP. 664 (1995); CDS/Netherlands, HR 30 maart 1990, 22 NYIL 432 (Neth. S. Ct. 1990), reprinted in 96 INT'L L. REP. 384 (1991); STC, Mar. 30, 2000 (S.T.C., No. 91), available at <http://www.tribunalconstitucional.es/STC2000/STC2000-091.html>; Venezia v. Ministero di Grazia e Giustizia, COST., 27 giugno 1996, n.223, Gazz. Uff. (Prima Serie Speciale) 1996, 27 (Italy), reprinted in 79 RIVISTA DI DIRITTO INTERNAZIONALE 815 (1996) and in Venice Commission CODICES database, No. ITA-1996-2-005, available at <http://codices.coe.int>; Kindler v. Canada, Human Rights Comm. Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), reprinted in 14 HUM. RTS. L.J. 307 (1993); Mohamed v. President of Republic of S. Afr., 2001 (3) SA 893 (CC), available at <http://www.concourt.gov.za/cases/2001/mohamedsum.shtml>. Of course, excluding these cases from the discussion in this Article is not to say that they are not important elements of the larger *ius commune*, especially with respect to western European countries. On the contrary, their unavoidably transnational nature has ensured that they also play an important role in the broadening of the *ius commune*.

logue and the other (from the Inter-American Court of Human Rights) fully integrated into it.⁶⁷ Here I will begin with one of the earliest important examples of the phenomenon, from India.

A. *South Asia*

1. *India*.—In 1980, the Supreme Court of India was called upon to rule on the constitutionality of the death penalty in the case of *Bachan Singh v. Punjab*.⁶⁸ Bachan Singh was convicted of murder but appealed the sentence, contending that capital punishment was incompatible with several articles of the Indian Constitution explicitly or implicitly protecting the right to life. Although the Constitution provided that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law,” and thus clearly contemplated that the constitutional right to life was not absolute, the Supreme Court had previously ruled that any legal process by which a person is deprived of life or liberty would have to be “fair, just and reasonable.”⁶⁹ The death penalty, Bachan Singh argued, failed to satisfy these substantive conditions, since it “serves no social purpose and its value as a deterrent remains unproven and it defiles the dignity of the individual so solemnly vouchsafed in the Preamble of the Constitution.”⁷⁰

Four of the five Justices hearing the case rejected Bachan Singh’s petition in a lengthy opinion surveying a diversity of views and data regarding the social purposes of capital punishment. Among the sources that the Court drew from in its discussion are decisions of the United States Supreme Court, especially the two principal death penalty cases of the 1970s, *Furman v. Georgia*⁷¹ and *Gregg v. Georgia*.⁷² The Indian court also considered legislative trends in a broad range of countries, from East Asia, the Soviet Union and Europe, and across to North and South America.⁷³ It went on to address, and reject, arguments that India’s ratification of the International Covenant on Civil and Political Rights should lead the Court to take a more restrictive view of the legitimacy of the death penalty.⁷⁴ The Court’s opinion clearly showed its willingness to explore how the death penalty was being handled in the rest of the world, and this recognition should not be overlooked. Nevertheless, the Court used other countries’ cases and legislative trends in a way that was only supplementary to its

67. See *supra* notes 2–6, 12–17, and accompanying text.

68. (1993) 1 S.C.R. 145. To place the decision in the context of the institutions and traditions of the Indian legal system, see SANWAT RAJ BHANSALI, *LEGAL SYSTEM IN INDIA* (1st ed. 1992).

69. *Id.* at 222.

70. *Id.* at 171.

71. 408 U.S. 238 (1972).

72. 428 U.S. 153 (1976).

73. *Bachan Singh*, (1993) 1 S.C.R. at 216–19.

74. *Id.* at 312–21.

analysis and incorporation of the precedents of Indian law. Even more noticeably, in *Bachan Singh*, the principal use of foreign sources was akin to that of empirical or statistical data. They were not employed as normative propositions to be considered; the Court measured trends but it did not evaluate their substance.

This last point becomes more evident when we turn from the majority opinion to that of the lone dissenter, Justice P.N. Bhagwati, undoubtedly one of the more extraordinary judicial opinions regarding the death penalty ever written, and one that merits more detailed discussion than many of the other cases discussed here.⁷⁵ Bhagwati took two years after the Court announced its decision to deliver his 115-page dissent, attributing the delay (with regret) to “the considerable mass of material which had to be collected from various sources and then examined and analysed.”⁷⁶ Part of the reason for Bhagwati’s concern with such a “considerable mass of material” was his capacious understanding of the appropriate sources for judges to consider in such a case. He took care to dwell on the details of Indian constitutional precedent and the Indian Penal Code, but in addition, the horizon of his judicial gaze incorporated considerably more than we are accustomed to viewing in the constitutional adjudication of any legal system. For instance, he asserted unapologetically that “[t]here is no reason why, in adjudicating the constitutional validity of [the] death penalty, Judges should not obtain assistance from the writings of men like Dickens, Tolstoy, Dostoyevsky, Koestler and Camus.”⁷⁷ Later, he quoted from Plato, Andrei Sakharov, and Mahatma Gandhi and spoke of the characters of Victor Hugo’s *Les Misérables* as if they had lived, historically, in flesh and blood.⁷⁸

Given that wide sea of material within his purview, one cannot be surprised at Bhagwati’s substantial reliance on international and foreign materials in his reasoning. Almost immediately, he placed the question before him into a larger comparative context with a thorough worldwide

75. It is fitting that it should be the work of a truly extraordinary man, as well. Inspired by a chance encounter with Mahatma Gandhi, Justice Bhagwati dedicated his life to furthering social change as both a lawyer and a judge. He went on to become one of the most distinguished jurists of his time and a champion of the rights of workers, women, the poor, the underprivileged, and prisoners. As a Justice of the Supreme Court of India for thirteen years (three of them as Chief Justice), Bhagwati was instrumental in extending the scope of rights embodied in India’s Constitution, enlarging the doctrines of standing to assist those traditionally denied access to the justice system, and developing a system of public interest litigation. His accomplishments have extended into international human rights as well, most notably as a member of the U.N. Human Rights Committee since 1994. In 2001, in his eightieth year, he was elected Chairman of that Committee. See POORNIMA ADVANI, INDIAN JUDICIARY: A TRIBUTE 3–37 (1997) (outlining the life and contributions of Justice Bhagwati); 1st World Judge Forum, Who’s Who at <http://www.ajuris.org.br/fmundialj/english/whos.html> (last visited Nov. 20, 2002) (highlighting the achievements of Justice Bhagwati).

76. *Bachan Singh*, (1993) 1 S.C.R. at 371 (Bhagwati, J., dissenting).

77. *Id.* at 261.

78. *Id.* at 280–281, 307, 312.

survey of countries restricting or abolishing the death penalty.⁷⁹ Relying on information compiled by Amnesty International, he included many more countries in this discussion than the did majority and took into account not only the laws on the books but also how they work in practice (recognizing that countries can provide for capital punishment in their laws without in fact having carried out any executions for many years).⁸⁰ From there, Bhagwati moved to the international sphere, tracing thirty-five years of normative development in the context of the United Nations. From the U.N. Charter and the Universal Declaration of Human Rights, he worked through the drafting of the International Covenant on Civil and Political Rights and discussed various reports and resolutions of the Economic and Social Council, the Secretary General, and the Human Rights Commission from 1959 through the late 1970s.⁸¹ "It will thus be seen that the United Nations has gradually shifted from the position of a neutral observer concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty," he concluded.⁸²

Only at this point did Bhagwati focus specifically on the provisions of the Indian Constitution, concentrating especially on what he refers to as the "golden triangle" of fundamental rights: the right to equality before the law; the right to life; and the basic freedoms of expression, assembly, movement, and occupation.⁸³ All of these rights, he argued, require that state action be reasonable and not arbitrary, and that requirement serves as a touchstone from which to define the demands and limitations of Indian law: "Wherever we find arbitrariness or unreasonableness there is denial of the rule of law."⁸⁴ Even at this point, though, and for the remainder of his discussion, Bhagwati continued to intersperse a rich variety of sources, including the experiences of foreign jurisprudences, into his exposition and analysis of Indian law. Judicial decisions of the United States (at both federal and state levels), Canada, the European Court of Human Rights, as well as legislative inquiries and reports of places such as the United Kingdom and Sri Lanka, feature most prominently.⁸⁵

A simple list of Bhagwati's sources could go on much longer, but the most important aspect of their use is not just the quantity and range of materials, but the way in which he employed them. Significantly, he did not follow the majority's approach and confine his use of foreign and international sources merely to factual data for making empirical

79. *Id.* at 312-21.

80. *Id.* at 262-63.

81. *Id.* at 268.

82. *Id.*

83. *Id.* at 269-75.

84. *Id.* at 269.

85. *Id.* at 299-300.

observations about the trends, practices, and consensus of the community of nations. Instead, he engaged them in a normative dialogue—borrowing from, adapting, and responding to the arguments and observations raised elsewhere. A clear example of this approach is found in the way Bhagwati handled the U.S. cases of *Furman* and *Gregg*. The majority cited them primarily as evidence that the United States, after having taken a step toward restriction and abolition of the death penalty, reinstated the punishment to a substantial degree.⁸⁶ Bhagwati, instead, refused to reduce the meaning of the cases to the rule announced by the majority. He notes that the divergence of opinions among the U.S. Justices in these cases is natural given the “sensitive issue,” but that the same feature also makes it necessary “to examine objectively and critically the logic and rationale behind these observations and to determine for ourselves which observations represent the correct view that should find acceptance with us.”⁸⁷ In eventually siding with *Gregg*’s dissenters (Justices Brennan and Marshall), Bhagwati responded not only to the arguments of his Indian colleagues but to those of his American counterparts as well.

The key to this substantive interaction is Bhagwati’s clearly expressed, and often repeated, conviction that what is at stake is fundamentally an ethical question about the dignity of human persons, not just a formal textual puzzle. On the one hand, “the constitutional validity of the death penalty is not just a simple question of application of constitutional standards by adopting a mechanistic approach,” nor is it merely a “legalistic problem” for which a “formalistic judicial attitude” is adequate.⁸⁸ Instead, Bhagwati’s fundamental premise is a “deep and abiding faith in the dignity of man and the worth of the human person.”⁸⁹ He did stress that his dissent was “based not upon any ground of morality or ethics” but rather on “constitutional issues.”⁹⁰ However, the distinction is certainly blurred by Bhagwati’s subsequent characterization of the Constitution itself: “It is not a mere pedantic legal text but it embodies certain human values cherished principles and spiritual norms and recognises and upholds the dignity of man.”⁹¹ This basic ethical concern for the human person also provides the implicit justification, therefore, for taking into account the views of foreign nations and their jurists, and for choosing to give weight to some of their arguments over others. For example, in discussing *Furman*, Bhagwati accepts and incorporates Justice

86. *Id.* at 216–17

87. *Id.* at 335.

88. *Id.* at 260.

89. *Id.* at 256; *cf. id.* at 311 (noting that “[t]o take human life even with the sanction of the law and under the cover of judicial authority, is . . . [a] travesty of dignity and violation of the divinity of man”).

90. *Id.* at 257.

91. *Id.* at 268; *see also id.* at 303 (“[O]ur Constitution . . . is a humane document which respects the dignity of the individual and the worth of the human person . . .”).

Brennan's view that "the death penalty constituted cruel and unusual punishment as it did not comport with human dignity."⁹²

Very significantly, however, this universalistic ethical root is not an abstraction that severs Bhagwati from the legal, historical, and cultural traditions in which he is situated or that allows him to conveniently escape his context. He took great care to mesh the universal with the particular. Setting out his basic approach to the issue, Bhagwati emphasized the centrality of "[t]he culture and ethos of the nation as gathered from its history, its tradition and its literature" and "the ideals and values embodied in the Constitution which lays down the basic frame-work of the social and political structure of the country."⁹³ Accordingly, he not only delved into the constitutional text and case law of India, but also wove in cultural icons from the ancient epic of the Mahabharata, and the Hindu philosophical treatises of the Upanishad, to the 20th century statesman and humanist Jaiprakash Narain.⁹⁴ He celebrated the compassion of "this land of Buddha and Gandhi, where from times immemorial, since over 5000 years ago, every human being is regarded as embodiment of Brahman" and appealed to "the standards of human decency set by our ancient culture and nourished by our constitutional values and spiritual norms."⁹⁵

In sum, even though the opinions of the *Bachan Singh* majority and of Justice Bhagwati ultimately reached opposite conclusions about the constitutionality of capital punishment in India, the case as a whole provides a fascinating example of the convergence and dynamic interaction of global normative developments, fundamental principles of human dignity, and the local context of India's constitutional law and cultural environment. Not surprisingly, the decision features prominently as a reference point for the discussions in many of the cases from other jurisdictions below, beginning with a case from one of India's regional neighbors soon after *Bachan Singh* was reported.

2. *Malaysia*.—Just a few months after Justice Bhagwati finally issued his dissenting opinion in *Bachan Singh*, the judges of the Federal Court in nearby Malaysia made it clear that they were more sympathetic to the majority's position in the Indian case. In *Public Prosecutor v. Lau Kee Hoo*, the Malaysian Federal Court was presented with a constitutional challenge to the country's Internal Security Act, insofar as it required imposition of the death penalty for violation of its provisions.⁹⁶ The Malaysian Constitution, like the Indian one, includes a qualified guarantee of the right to life: "No

92. *Id.* at 360.

93. *Id.* at 261.

94. *Id.* at 257, 279, 304, 308.

95. *Id.* at 303.

96. *Public Prosecutor v. Lau Kee Hoo*, [1983] 1 M.L.J. 157 (Malay. Fed. Ct. 1982).

person shall be deprived of his life . . . save in accordance with law.”⁹⁷ The defendant in *Lau Kee Hoo* urged the Court to interpret that clause as Bhagwati had done in the Indian decision, to include requirements of reasonableness and fairness. But the Malaysian court quickly distinguished the issue in formal terms: the case in Malaysia involved a mandatory death penalty and the Indian one did not, making the latter one more vulnerable to the defects of arbitrariness. “In any event,” the Court added, “we respectfully prefer the view of the [*Bachan Singh*] majority.”⁹⁸ Finally, lest the constitutional jurisprudence of any other system bear any weight, the Court also took care to distinguish the constitutional protections of its own country from those of the United States Constitution, Trinidad & Tobago, and Rhodesia, with reference to which the defendant was also making his plea.⁹⁹

Obviously, in sharp contrast to *Bachan Singh*, the opinion in this case did not engage in global normative dialogue but instead relied on formalistic differences to reject any suggestion that the Court should do otherwise. Even though the defendant and his attorneys were making an effort to reach out beyond the geographic limitations of the Malaysian legal system, it would take another decade and another continent before other courts would provide strong examples of global dialogue like that seen in *Bachan Singh*.

B. Africa

More than a decade after the *Bachan Singh* and *Lau Kee Hoo* cases, but in close succession to one another, the courts of a number of African countries issued decisions on the legitimacy of the death penalty under their respective constitutions. Collectively, they show a number of parallels to the Indian and Malaysian precedents but also reveal how much the global conversation had developed in the intervening years.

1. *Tanzania*.—In the High Court of Tanzania¹⁰⁰ in 1994, Judge Mwalusanya ruled that infliction of capital punishment constituted an unconstitutional deprivation of the right to life, infliction of inhuman or degrading punishment, and denial of human dignity.¹⁰¹ Each of the rights in question is protected under the Constitution of Tanzania,¹⁰² but before addressing the

97. MALAY. CONST. art. 5(1).

98. *Lau Kee Hoo*, [1983] M.L.J. at 160.

99. *Id.* at 159.

100. Note that the Court of Appeal, not the High Court, is the highest court of the country. See Bureau of African Affairs, U.S. Dep’t of State, *Background Note: Tanzania* (June 2002), at <http://www.state.gov/r/pa/ei/bgn/2843.htm>, for information about the structure of the Tanzanian legal system.

101. Republic v. Mbushuu, [1994] T.L.R. 146, 173 (Tanz. High Ct.).

102. TANZ. CONST. (1977 as amended through June 30, 1995) ch. I, pt. III, art. 13(6)(d) (“human dignity shall be protected . . . in the execution of a sentence”), art. 13(6)(e) (“no person shall be subjected to torture or inhuman or degrading punishment or treatment”), art. 14 (“Every

constitutional arguments directly, Judge Mwalusanya set out certain general principles of interpretation to guide his inquiry. The most significant of these preliminary matters is Mwalusanya's assertion that "international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution and so a judge in my present situation should look to them and draw upon them in seeking a solution."¹⁰³ Interestingly, he justifies this principle in part by reference to a *foreign* decision: "As the Chief Justice of Zimbabwe . . . has pointed out . . . 'A judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many countries, than if it is based upon the parochial experience or foibles of a particular judge or court.'"¹⁰⁴ But he brought the principle home to Tanzania as well, citing the country's Chief Justice, in a prior case, for the idea that "when basic human rights are at stake or the question of interpretation of a constitutional provision[] arises then: 'On a matter of this nature it is always very helpful to consider what solutions to the problems other courts in other countries have found, *since basically human beings are the same though they may live under different conditions.*'"¹⁰⁵ In other words, ultimately a presumption of a common humanity legitimated consideration of foreign experience in human rights matters in that case.

With that premise established, Mwalusanya turned to the substantive arguments. He cited with approval the petitioner's contention that "the emerging consensus of values in the civilized international community as evidenced by the UN human rights instruments, the decision[s] of other courts and the writings of leading academics is that the death penalty is a cruel, inhuman and degrading punishment."¹⁰⁶ In support of the conclusion, Mwalusanya referenced the International Covenant on Civil and Political Rights, the work of the U.N. Commission on Human Rights, Amnesty International, the Council of Europe, the European Court of Human Rights, the examples of other Commonwealth countries abolishing the death penalty, and court decisions from Botswana, Zimbabwe, the United States, and India.¹⁰⁷

After this we can see one of the few clear reactions against a perceived "Western" bias involved in the use of foreign and international materials: the Tanzanian government argued before Mwalusanya that opposition to capital

person has the right to live and to the protection of his life by the society in accordance with the law.").

103. *Mbushuu*, [1994] T.L.R. at 151.

104. *Id.* (quoting Chief Justice Gubbay of Zimbabwe).

105. *Id.* (quoting *AG v. Lesinai s/o Ndeinai* [1980] T.L.R. 214, 222) (emphasis added).

106. *Id.* at 156.

107. *Id.* at 156-57.

punishment “presupposes that only one set of values (liberal Western values) is ‘civilized’. They exclude the values of the Third World. . . .”¹⁰⁸ But in reality, the government contested, criminality, sexual immorality, the degeneration of the family, wars, refugees, and increasing poverty all indicate that “[c]ivilization . . . is going down particularly in the decadent West.”¹⁰⁹ Therefore, the government urged the Court not to consider “the values of a nebulous ‘civilised society’” or the decisions of courts in other countries and the writings of academics, but instead “the contemporary norms operative in Tanzania and the sensitivities of its people.”¹¹⁰

Judge Mwalusanya did not disagree that the views of the Tanzanian people should be central to his assessment but concluded that the cruelties of the death penalty, were they truly to be made known in Tanzania rather than kept hidden behind a secretive process, would “move the heart of even the stone-hearted.”¹¹¹ He concluded, therefore, that capital punishment did constitute cruel, inhuman, and degrading punishment, even by Tanzanian sensibilities.¹¹² Next he considered the right to life. Under the Tanzanian Constitution (or at least, according to Mwalusanya, in the official Swahili version of it), the right to life is not absolute but is “subject to law.”¹¹³ Finding, however, that the state failed to meet its burden to justify the public necessity of the legal limitation on the right to life, Mwalusanya held that the death penalty is not “lawful” within the meaning of the Constitution’s guarantee of the right to life.¹¹⁴ On this issue, Judge Mwalusanya briefly considered a case from Zimbabwe but otherwise evaluated the state’s arguments principally at a moral and practical level, without reliance on foreign sources.¹¹⁵ Given the readiness with which he otherwise looks abroad, it seems certain that Mwalusanya was not familiar with Justice Bhagwati’s dissent in *Bachan Singh*, which forcefully makes similar arguments.

Unfortunately for Judge Mwalusanya, however, the three judges of the appellate court to which his decision proceeded reversed his ruling.¹¹⁶ The Court of Appeals reached that result first by comparing the Tanzanian Constitution’s protection of the right to life with the expression of that right in a half dozen other constitutions and several international human rights instruments.¹¹⁷ The conclusion drawn from its comparative survey is that the right to life, both under the Tanzanian Constitution and as a general

108. *Id.* at 159.

109. *Id.*

110. *Id.*

111. *Id.* at 162.

112. *Id.*

113. *Id.* at 163–64.

114. *Id.* at 173.

115. *Id.* at 164–73.

116. *Mbushuu v. Republic*, [1995] T.L.R. 97, 118 (Tanz.).

117. *Id.* at 108–09.

principle, is “inherent and universal” and yet also subject to the possibility of lawful deprivation.¹¹⁸ Thus, “[t]hat means there can be instances in which the due process of law will deny a person his right to life or its protection.”¹¹⁹

In treating the lower court’s other argument against the constitutionality of the death penalty—that based on the prohibition of inhuman, cruel, and degrading punishment—the Court of Appeals was initially much more sympathetic. Its review of relevant norms included the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration on Torture that preceded it, and precedents of the U.S. Supreme Court and the European Court of Human Rights.¹²⁰ In particular, the Court cited approvingly the U.S. Supreme Court in *Furman v. Georgia*, where, according to the Tanzanian judges:

Brennan, J said at 367 that the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. He warned that members of the human race should not be treated as non-humans, as objects to be toyed with and discarded.

... To him, even the vilest criminal remained a human being possessed of common human dignity.¹²¹

These considerations led the Court to agree with the lower court judge that “the death penalty has elements of torture” and that it is “inherently inhuman, cruel and degrading punishment.”¹²² Their ultimate disagreement with Judge Mwalusanya arose in the examination of a “savings” clause of the Constitution, which as interpreted by the Court of Appeals permits derogations from basic human rights in the public interest, provided that the restrictive legislation is not arbitrary and that it is proportional to the need.¹²³ The state, according to the Court, satisfied those conditions.¹²⁴ The Court’s conclusion on this point is worth quoting in full for the way in which it demonstrates the relationship between local experience and foreign norms:

[W]hat measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual in society. We agree with the learned Trial Judge . . . that court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution. That is what we have done following *Furman [v.] Georgia*, in finding that death penalty is inhuman, cruel and degrading punishment. But

118. *Id.* at 109.

119. *Id.* at 104. Incidentally, the state’s attorney cited the majority opinion in *Bachan Singh* for further support on this point. *Id.* at 106.

120. *Id.* at 110–11.

121. *Id.* at 112 (citing *Furman v. Georgia*, 408 U.S. 232, 270 (1972)).

122. *Id.* at 111–12.

123. *Id.* at 113.

124. *Id.* at 117.

when it comes to what is reasonably necessary to protect our society we have to be extra careful with judicial decisions of other jurisdictions.

. . . In societies where owning a firearm is almost as simple as owning a penknife, the death penalty might not be necessary to protect the public. But in societies like ours, where people go to the extent of sacrificing dear sleep to join vigilante groups, popularly known as *Sungusungu*, in order to protect life and property, the death penalty may still be reasonably necessary.¹²⁵

The point of highlighting this passage is not to evaluate the Court's substantive conclusions, but to look more carefully at the reasoning and justification it offered. First, it is noteworthy that even in ultimately upholding the constitutionality of the death penalty in Tanzania, the Court strongly approved the use of foreign sources in general. Second, it made clear that the point of contact and common reference between the Tanzanian law and those foreign court decisions to which it appeals is the general principle of a shared concern for universal human dignity. And finally, as sympathetic as it may be to external sources, the Tanzanian court is not willing to take a mechanical or hierarchical view of the relationship between them and the Constitution. Formally, it preserves the priority of the Constitutional text—not permitting the borrowed understandings to override the explicit savings clause—but is willing to use foreign norms in its attempt to understand the meaning of “inhuman, cruel and degrading.”¹²⁶ Beyond formality, the relationship between external and local is similar: the Court is attentive to the value of foreign sources but assesses their weight and wisdom in relationship to its perception of important variations in local needs and understandings. In all three respects, the *Mbushuu* case is significantly different from the Malaysian case decided twelve years earlier, even though the formal result was substantially the same. The Malaysian case also upheld the constitutionality of the death penalty but with a very minimal recognition of the existences of foreign norms, no apparent interest in exploring common understandings of the underlying principles of dignity or justice, and a rigidly formal view of the priority of local law.

Nevertheless, even the Tanzanian court's sympathetic engagement of foreign and comparative sources and arguments still seems constrained and tentative by comparison with the decision that followed it only a few months later in the Constitutional Court of South Africa, *State v. Makwanyane*.¹²⁷

125. *Id.* at 115–16.

126. *Id.* at 110–13.

127. *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.). To understand the general legal and institutional context of which this Court is a part, see, e.g., Matthew Chaskalson & Jonathan Klaaren, *National Government*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 3-1 (Matthew Chaskalson et al. eds., 5th ed. 1999) (outlining the South African governmental structure under the interim constitution); Cheryl Loots & Gilbert Marcus, *Jurisdiction, Powers and Procedures of the*

2. *South Africa*.—One of the most widely known and justifiably influential court opinions to address the death penalty, *Makwanyane* presented the South African Court with a challenge to the constitutionality of the death penalty under the then-new (and still transitional) constitution.¹²⁸ Although the constitutional text was completely silent with respect to the question,¹²⁹ the Court considered the compatibility of capital punishment with the Constitution's guarantee of the right to human dignity, the right to life, and freedom from cruel, inhuman, or degrading treatment. In doing so, it offered a paradigm for the incorporation of comparative materials in constitutional adjudication.

One of the reasons that the South African case is more rich with foreign and international law than many other examples discussed here is that article 35(1) of the South African Constitution explicitly gave the Court a license, and to some extent even a mandate, to take those sources into consideration:

In interpreting the provisions of this chapter [on fundamental rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.¹³⁰

Nevertheless, the President of the Court, Arthur Chaskalson, emphasized that even without this textual "hook" it would be necessary to take international and comparative sources into account. The South African Court, he argued, would benefit from analysis by other authorities of similar arguments both in favor of and against capital punishment.¹³¹

In the case of public international law, Chaskalson understood customary international law, treaties, and the decisions of international tribunals dealing with human rights instruments to be interpretive tools, which "provide a framework within which [the fundamental rights chapter] can be evaluated and understood."¹³² With respect to comparative jurisprudence from other constitutional systems, Chaskalson was slightly more cautious, reflecting the distinction in article 35(1) between the mandatory consideration of public international law and the permissive use of foreign

Court, in CONSTITUTIONAL LAW OF SOUTH AFRICA 6-1 (Matthew Chaskalson et al. eds., 5th ed. 1999).

128. *Makwanyane*, 1995 (3) SA at 401.

129. In fact, the Court points out, the framers of the Constitution deliberately refrained from settling the matter, neither sanctioning nor prohibiting the death penalty and knowingly leaving it for the Constitutional Court to decide in the future. *Makwanyane*, 1995 (3) SA at 409.

130. See *Makwanyane*, 1995 (3) SA at 413. That provision, from the transitional 1993 interim constitution, was somewhat reworded and renumbered in the Constitution of 1996. S. AFR. CONST. ch. 2, § 39.

131. *Makwanyane*, 1995 (3) SA at 413.

132. *Id.* at 414.

case law. He noted that comparative constitutional rights jurisprudence can be helpful but not decisive because it may not reflect the text and context of the South African constitutional system.¹³³ With respect to all foreign and international sources, Chaskalson stressed that

[w]e must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.¹³⁴

In particular, from the beginning of his analysis, he recognized that the great majority of international instruments and foreign constitutions differ from the South African Constitution insofar as the former expressly make the right to life subject to law or even sanction the death penalty, explicitly or implicitly.¹³⁵ In contrast, the South African document contains no such limitations or acknowledgments; it is entirely silent on the matter. Despite that distinction and the general note of caution, however, there was obviously no hesitation on the part of any of the Justices to take full advantage of foreign sources. The next twenty-four pages of the Court's opinion and substantial portions of the ten concurring opinions are devoted to international or comparative materials.¹³⁶

The United States is the first foreign jurisdiction that the South African Court scrutinized, and it did so with more care and detail than any other comparative analysis found in a death penalty case. The South African court began with the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and went on from there to a relatively detailed and comprehensive survey of the range of death penalty jurisprudence in U.S. courts.¹³⁷ Going beyond the staple examples of *Furman v. Georgia* and *Gregg v. Georgia*, the Court included U.S. cases addressing mandatory death sentences, arbitrariness in sentencing, inequality in the application of the punishment, and the existence of the death row phenomenon.¹³⁸ It brought in decisions of U.S. state courts as well as federal ones and did not overlook the internal divisions of U.S. law, recognizing explicitly that jurists are fractured over the contentious issue (noting, for instance, Justice Blackmun's dramatic turn from siding with the majority in *Gregg* to passionately denouncing the

133. *Id.* at 414–15.

134. *Id.* at 415.

135. *Id.*

136. *Id.*

137. *Id.* at 415–22, 432, 434–35.

138. *Id.* at 416–22.

“machinery of death” in *Callins v. Collins*).¹³⁹ Instead of just borrowing bits and pieces, in a sort of legal bricolage,¹⁴⁰ the South African Court aimed at more of an overall assessment of the United States’ approach to capital punishment, and it is not a favorable one. Given the U.S. system’s arbitrariness, delay, expense, and litigiousness, Chaskalson concluded that “[t]he difficulties that have been experienced in following this path . . . persuade me that we should not follow this route.”¹⁴¹

Interestingly, though, the one kernel of U.S. constitutional wisdom that did find favor with the South African Court is the idea, drawn from Justice Brennan’s dissent in *Gregg* as well as from prior decisions reaching back to *Trop v. Dulles*,¹⁴² that “the concept of human dignity is at the core of the prohibition of ‘cruel and unusual punishment’ by the Eighth and Fourteenth Amendments.”¹⁴³ This idea provided a clear link to the South African Constitution, which explicitly guarantees the right to human dignity, and it also allowed the Constitutional Court to tie the discussion to the basic legal principles regarding criminal punishment in other jurisdictions as well. The Court borrowed from German and Canadian law to further emphasize the relationship between human dignity and the limits of punishment under the South African Constitution.¹⁴⁴

Next, the Court turned its attention to cases arising within the scope of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The first lent only modest assistance to the South African Court because of the ambivalence of its provisions with respect to the death penalty, but the Constitutional Court’s use of the European Court of Human Rights (ECHR) decision in *Soering*¹⁴⁵ was thoughtful and original. In that case, the United Kingdom was faced with a choice between extraditing a fugitive to the United States (where the homicide was committed and where he could face a possible death sentence) or extraditing him to his home of Germany (where there was no capital punishment) to be tried for the same offence. Thus, the South African Court noted, the U.K. was in a position comparable to that of South Africa: “A holding by us that the death penalty for murder is unconstitutional does not involve a choice between freedom and death; it involves a choice between death . . . and the

139. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

140. Mark Tushnet, borrowing the term from Claude Levi-Strauss, proposes and develops the idea of bricolage as an approach to comparative constitutional law in Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1285–1306 (1999).

141. *Makwanyane*, 1995 (3) SA at 422.

142. 356 U.S. 86, 100 (1958).

143. *Makwanyane*, 1995 (3) SA at 422.

144. *Id.* at 423–24.

145. *See Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 443–48 (ser. A) (1989) (holding that extradition of the defendant from the U.K. to the U.S. rather than Germany would violate the European Convention on Human Rights).

severe penalty of life imprisonment.”¹⁴⁶ In this way, the ECHR’s ruling in *Soering* that extradition to the United States would violate the Convention is made relevant to the South African constitutional context through a careful and creative reading of the foreign case.

After briefly discussing and then distinguishing the opinion of the Indian Supreme Court in *Bachan Singh* (on the grounds that the Indian Constitution, unlike the South African one, specifically contemplated and sanctioned capital punishment), the Court focused its attention more narrowly on the right to life in article 11(2) of the South African Constitution. Because that article frames the right in more categorical, unqualified terms than those found in the constitutions of the United States or India or in international human rights instruments, the Court found those foreign sources to be less relevant and instead turned to a decision of the Hungarian Constitutional Court (a decision I will examine more fully below). Even though the Hungarian Constitution has a (comparatively) qualified right to life, Justice Chaskalson nevertheless viewed the Hungarian Court’s decision to be more pertinent than those of the U.S. or Indian courts or the international tribunals because the Hungarian judgment “stressed the relationship between the rights of life and dignity, and the importance of these rights taken together.”¹⁴⁷

Working with the jurisprudence of Canada, Germany, and the European Court of Human Rights, the Court began another round of comparative analysis in considering the question of the permissible grounds for limiting fundamental rights under South African law.¹⁴⁸ In the Court’s discussion of limitations and derogations, it examined the Tanzanian Court of Appeal decision in *Mbushuu*, discussed above.¹⁴⁹ That case, as noted previously, held that even though the death penalty *does* constitute cruel, inhuman, and degrading punishment, it was still licit because capital punishment fell within the scope of constitutionally permissible limitations of the right.¹⁵⁰ The South African decision first attributed the Tanzanian approach toward the issue to differences in the underlying constitutional texts and argued for an alternative approach to the limitations and derogations clauses of the South African Constitution.¹⁵¹ But recognizing, perhaps, that the formal distinction might not be persuasive, Justice Chaskalson flatly conceded that “if the decision of the Tanzanian Court of Appeal is inconsistent with this conclusion, I must express my disagreement with it.”¹⁵²

146. *Makwanyane*, 1995 (3) SA at 426.

147. *Id.* at 430.

148. *Id.* at 436–39.

149. *Id.* at 440–41.

150. See *supra* notes 116–27 and accompanying text (discussing *Mbushuu*).

151. *Makwanyane*, 1995 (3) SA at 441.

152. *Id.*

Finally, among the wealth of material in the Court's opinion, one other point should be brought out here, even though in Justice Chaskalson's opinion it is only mentioned in passing. Near the end of his discussion, and thus after all of the comparative and international sources have been canvassed, Justice Chaskalson returned home to South Africa. Addressing arguments about the purposes of capital punishment, he appealed to the need for *ubuntu* in South African criminal law as an alternative to retribution.¹⁵³ *Ubuntu*, a Zulu word, refers to an indigenous African world-view containing within it a conception of personhood, humaneness, and morality that is grounded in the solidarity of the community and in the fundamental belief that "a human being is a human being because of other human beings."¹⁵⁴ Though discussed only briefly, it is intriguing, from the perspective of the global norms on human rights and the death penalty, that the Court found a way to pull the far-flung international dialogue back to local ground. As one of the justices who decided *Makwanyane* later remarked in another context, "the values of *ubuntu* . . . if consciously harnessed, can be central to a process of harmonizing indigenous law with the Constitution and can be integral to a new South African jurisprudence."¹⁵⁵

Several of the concurring opinions in *Makwanyane* (there were no dissents) pick up Justice Chaskalson's reference to *ubuntu* and extend it further.¹⁵⁶ Although he does not do so in terms of *ubuntu*, Justice Sachs considerably developed the specifically African historical, cultural, and jurisprudential context of the issue of capital punishment.¹⁵⁷ Perhaps the most interesting feature of these efforts, however, is not simply the way that they strove to understand and articulate a certain "local knowledge," but the way they linked that local knowledge to the same global normative framework set forth by Justice Chaskalson. The one word that most consistently appears in these opinions as the mediating concept between the local and the global is *dignity*. Justice Langa, for example, noted that "[a]n outstanding feature of *ubuntu* . . . is the value that it puts on life and human dignity."¹⁵⁸

153. See *id.* at 446 ("To be consistent with the value of *ubuntu*, ours should be a society that 'wishes to prevent crime . . . [not] to kill criminals simply to get even with them.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring))).

154. Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15, 15-16 (1998) (citing LOVEMORE MBIGI & JENNY MAREE, *UBUNTU: THE SPIRIT OF AFRICAN TRANSFORMATION MANAGEMENT* 1-7 (1995)).

155. *Id.* at 22-23.

156. See *Makwanyane*, 1995 (3) SA at 481-83 (Langa, J., concurring) (emphasizing *ubuntu*'s value of human life and advocating a return to *ubuntu*); *id.* at 484 (Madala, J., concurring) (addressing whether the rejection of rehabilitation conforms to *ubuntu*); *id.* at 488 (Mahomed, J., concurring) (explaining that *ubuntu* is a constitutional ethos of love and humanity); *id.* at 500-02 (Mokgoro, J., concurring) (describing how *ubuntu* transcends South Africa's strife, conflict, and cultural divisions).

157. *Id.* at 516-20.

158. *Id.* at 481 (Langa, J., concurring).

Justice Mahomed's discussion of *ubuntu* led to a discussion of human dignity that borrows liberally from the invocations of dignity in the death penalty opinions of Justices Brennan and Blackmun.¹⁵⁹ And Justice Mokgoro used the concept of human dignity to tie together not only *ubuntu* and references to U.S. case law, but also Hungarian jurisprudence and international human rights instruments.¹⁶⁰

3. *Nigeria*.—Clearly, one of the reasons that the justices of the South African Constitutional Court were so unconstrained in meshing together the many sources of law and fundamental principles in *Makwanyane* was that the South African Constitution itself stated the rights in question without qualification and was otherwise silent with regard to the death penalty. Conversely, when the Supreme Court of Nigeria addressed the constitutionality of capital punishment in *Kalu v. State*,¹⁶¹ the constitutional text was held out as a definitive obstacle blocking the Court from following foreign and international norms favoring abolition.¹⁶² The briefs and arguments before the Court, especially those from some of the half-dozen or so advocates invited by the Court to be *amici curiae*, treated the Justices to extensive discussions of international human rights norms and the jurisprudence of South Africa, Tanzania, Canada, Hungary, the United States, Zimbabwe, Namibia, several Caribbean island nations, and the Privy Council.¹⁶³ In response, the Attorney General of Nigeria emphasized that "it is only our own Constitution, the 1979 Nigerian Constitution, that is relevant for interpretation."¹⁶⁴ An *amicus* Senior Advocate urged the Court to resist "the suggestion by the appellant to transplant foreign notions of decency into a country like Nigeria with diametrically opposite cultural assumptions" and submitted that "the question one must ask is whether a death sentence is inhuman, degrading or shocks the moral conscience of the Nigerian community, not that of the people of the U.S.A., Canada, U.K."¹⁶⁵ However, Justice Iguh, writing for the Court, did not completely adopt either view. He admitted the appropriateness of giving "due regard to international jurisprudence," not limiting the principles of interpretation quite as narrowly as the Attorney General would wish, but at the same time he made known his intent to "accord due weight to our peculiar

159. *Id.* at 488–92 (Mahomed, J., concurring).

160. *Id.* at 501–02 (Mokgoro, J., concurring).

161. *Kalu v. State*, (1998) 12 S.C.N.J. 1 (Nig.).

162. Nigeria adopted a new constitution in 1999, its fourth since gaining independence in 1960. For an overview of the volatile changes in the constitutional structure of the legal system during that period, see John Ademola Yakubu, *Trends in Constitution-Making in Nigeria*, 10 *TRANSNAT'L L. & CONTEMP. PROBS.* 423 (2000) and J.D. OGUNDERE, *THE NIGERIAN JUDGE AND HIS COURT* 1–84 (1994) (chronicling changes up to 1993).

163. *Kalu*, (1998) 12 S.C.N.J. at 17–19.

164. *Id.* at 21.

165. *Id.* at 23.

circumstances, the generally held norms of society and our values, aspirations and local conditions.”¹⁶⁶

In analyzing foreign authorities, Justice Iguh focused heavily on the formal similarities and differences between their constitutional texts and that of Nigeria. Several provisions of the 1979 Nigerian Constitution explicitly recognize the death penalty as an accepted punishment, most notably the guarantee of the right to life: “Every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.”¹⁶⁷ The Nigerian Court divided the decisions of foreign courts into two groups, according to whether they interpret a “qualified” right to life (or in some cases a right to be free from cruel, inhuman and degrading treatment), like the Nigerian provision, or an “unqualified” one. Thus, Justice Iguh finds that the courts of Tanzania (citing *Mbushuu*), Zimbabwe, India (citing *Bachan Singh*), the United States (relying especially on *Gregg*), and Jamaica all have acknowledged that capital punishment is not *per se* unconstitutional (setting aside, for example, the manner in which it is administered) because their respective constitutions all provide that the right to life can be limited by “due process of law” or some comparable language.¹⁶⁸ By contrast, the South African Constitutional Court in *Makwanyane* and the Hungarian Constitutional Court had before them an unqualified right to life and thus held (correctly, according to Justice Iguh) that the death penalty violated the constitutional right.¹⁶⁹ This distinction, for the Nigerian Court, was conclusive, and the Court therefore found nothing in the foreign jurisprudence to dissuade it from deciding that the death penalty does not violate the Nigerian Constitution. Any attempt by the parties to raise the cruel and degrading character of the death penalty was rejected as irrelevant to the case at hand. It can easily be said that of all the interconnected judicial decisions discussed here, *Kalu* represents the most strictly formalist approach.

C. Europe

Because the death penalty has been abolished in most of Europe for some time—in significant part through the work of supranational bodies¹⁷⁰—

166. *Id.* at 29.

167. NIG. CONST. ch. IV, § 30(1) (1979). The other constitutional provisions explicitly recognizing the death penalty involve the jurisdiction of the appellate courts. *Id.* ch. VII, pt. I, §§ 213(2)(d), 220(1)(e).

168. *Kalu*, (1998) 12 S.C.N.J. at 32–37.

169. *Id.* at 32–33, 35.

170. Overviews of the policies and activities of the European Union to help bring an end to the use of the death penalty worldwide can be found at European Union in the US, *EU Policy & Action on the Death Penalty*, at <http://www.eurunion.org/legislat/deathpenalty/deathpenhom.htm> (last visited Nov. 26, 2002) and European Comm’n, *Abolition of the Death Penalty*, at

the available judicial decisions that address the legitimacy of capital punishment as such (rather than indirectly through, e.g., extradition proceedings) have typically involved countries in political transition, having either emerged from periods of repressive communist rule or seeking to be politically and economically integrated into European supranational arrangements (or both). In addition, it is noticeable that the Eastern and Central European countries in which these cases have arisen are more closely linked to the civil-law tradition of continental Europe generally, and therefore their courts would be less accustomed to the techniques of handling judicial precedents than the common-law-influenced Asian and African judiciaries in the cases above.¹⁷¹ Thus, as we will see, their overt reliance on prior cases of other jurisdictions—and even of their own precedents, for that matter—is sometimes minimal, but there are other strong indications of their participation in a global normative dialogue nonetheless.

1. *Hungary*.—The earliest significant example, which we have already seen cited in some of the cases of the African courts discussed above, is from Hungary, where in 1990 the Constitutional Court declared capital punishment to be unconstitutional.¹⁷² The Court did not cite foreign sources in its

http://www.europa.eu.int/comm/external_relations/human_rights/adp/index.htm (last visited Nov. 26, 2002). With respect to the Council of Europe's human rights system, the death penalty has been almost universally abolished through Protocol 6 to the European Convention on Human Rights (and soon also Protocol 13, although as of this writing it has not yet come into force). Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114 (entered into force Mar. 1, 1985); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, *opened for signature* May 3, 2002, Europ. T.S. 187. Because of the Convention's restrictions, the European Court of Human Rights has only had occasion to address the death penalty in a judgment *on the merits in connection with the possible extradition of a criminally accused person from one of the Member States to another country where the accused could face capital punishment for his crime*. See, e.g., *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (ser. A) (1989) (determining whether Article 3 of the European Convention on Human Rights precludes extradition from the United Kingdom, a member state, to the United States, where the extradited accused could face the death penalty). Recently, however, the European Court of Human Rights came much closer to considering the death penalty directly when it was petitioned in the case of Abdullah Öcalan to declare a death sentence in Turkey to be a violation of the Convention's right to life. The Court found the petition admissible, see *Öcalan v. Turkey*, App. No. 46221/99 (Eur. Ct. H.R. Dec. 14, 2000), at <http://www.echr.coe.int/eng>, but it probably will not have occasion to rule on the merits given that Öcalan's sentence was commuted to life imprisonment when Turkey abolished the death penalty in August 2002 as part of a legislative reform package aimed at complying with the requirements for entry into the European Union. See Hande Culpan, *Democracy Reforms Edge Turkey Closer to EU*, AGENCE FRANCE PRESSE, Aug. 3, 2002, available at LEXIS, Nexis Library, World File ("Kurdish rebel leader, Abudullah Öcalan, on death row for treason, will now escape the gallows but remain in jail [for the] rest of his life with no chance [of] amnesty.").

171. Regarding the differences between common-law and civil-law patterns of using precedents generally, see KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 256–65 (3rd rev. ed. 1998).

172. *Alkotmánybíróság* [Hungarian Constitutional Court], Dec. No. 23/1990 (X.31) AB (Oct. 24, 1990), translated in 1 E. EUR. CASE REP. CONST. L. 177 (1994) [hereinafter Hungarian

opinion (although it does briefly refer to some international human rights instruments), but we do know that the petitioner in the case, the League Against Capital Punishment, presented the Court with a long study that set out in detail both the Hungarian and European history of the abolitionist movement and that offered a survey of the treatment of capital punishment globally.¹⁷³ The Minister of Justice, who opposed upholding the constitutionality of the death penalty, also based his argument to the Court in part on information about capital punishment in other European countries.¹⁷⁴ The short judgment of the Court, nevertheless, relied instead very simply and directly on the absolute and fundamental character of the rights to life and to human dignity.¹⁷⁵

The Hungarian Constitution specifies that “[t]he Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.”¹⁷⁶ More specifically, it provides that “[i]n the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.”¹⁷⁷ Life and dignity are among the selected rights that may not be suspended or restricted even during a state of national crisis or state of emergency.¹⁷⁸ Although under one provision a “non-arbitrary” deprivation of life might be permissible,¹⁷⁹ under a different provision the law “shall not impose any limitations on the essential contents of fundamental rights.”¹⁸⁰ Because capital punishment does not just impose a “limitation on the essential content”¹⁸¹ of the fundamental rights to life and human dignity but is by definition directed to their “entire and irreparable elimination,”¹⁸² the Constitutional Court concludes:

Constitutional Court]. For the place of this court in the constitutional structure of Hungary, see LÁSZLÓ SÓLYOM & GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 65–102 (2000) (describing structure and proceedings of the court); Attila Rácz, *Constitutional Law*, in *INTRODUCTION TO HUNGARIAN LAW* 23 (Attila Harmathy ed., 1998) (explaining government structure generally).

173. See Tibor Horvath, *Abolition of Capital Punishment in Hungary*, 33 *ACTA JURIDICA HUNGARICA* 153, 155 (1991) (noting that the League Against Capital Punishment’s Study “set forth in detail the European traditions of the movement against capital punishment, offered a survey of the state of capital punishment and its abolition, respectively, in the world, treated the history of capital punishment in Hungary, and discussed the reason for its abolition”).

174. Hungarian Constitutional Court, *supra* note 172, at 120.

175. *Id.* at 122.

176. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 8(1) (Hung.).

177. *Id.* art. 54.

178. *Id.* art. 8(4).

179. *Id.* art. 54(1); see also Hungarian Constitutional Court, *supra* note 172, at 122 (noting that “the wording of this prohibition, however, does not exclude the possibility that someone shall be deprived of life and human dignity in a non-arbitrary way”).

180. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 8(2) (Hung.).

181. Hungarian Constitutional Court, *supra* note 172, at 122.

182. *Id.*

[h]uman life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the condition for several other fundamental rights. A state shall regulate fundamental rights stemming from the unity of human life and dignity with respect to the relevant international treaties and fundamental legal principles The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State.¹⁸³

This portion of the opinion has gone on to gain the widest attention and to have the longest life in foreign courts. Several of the other Justices added erudite and eloquent elaborations on the values of life and dignity.¹⁸⁴

Of the separate opinions in the case, however, the one most relevant to our discussion here is that of the President of the Court, Justice Sólyom. He argues that the Constitutional Court should consider international approaches to capital punishment to be an aid in correcting, or balancing, that inevitable subjectivity of the judges that is due to their being situated in a specific historical and cultural context.¹⁸⁵ Accordingly, his opinion referenced foreign and international trends against the death penalty, remarking tellingly that the historical context of Hungary to which these developments help provide an objective response was that of “a political system that sacrificed human life, without restraint, for its political purposes.”¹⁸⁶

2. *Lithuania*.—Both the political history to which Justice Sólyom referred and the substantive reasons offered by the Hungarian court parallel those of a more recent European case, in which the Constitutional Court of the Republic of Lithuania ruled in December 1998 that the death penalty was unconstitutional.¹⁸⁷ Unlike the Hungarian Constitutional Court, however, the Lithuanian one (with the benefit of eight more years of intervening developments) noted much more openly that attitudes and trends in the international community, and the international obligations of Lithuania, are important aspects of the inquiry, as is the historical experience of the country.¹⁸⁸ Thus, to assess the Constitution’s guarantee that “[t]he right to life of individuals shall be protected by law,” the Court traced the development of the right to life in universal human rights instruments from the

183. *Id.* at 182.

184. *See, e.g., id.* at 185 (Lábady & Tersztyánszky, JJ., concurring); *id.* at 194–96 (Sólyom, J., concurring).

185. *Id.* at 189 (Sólyom, J., concurring).

186. *Id.*

187. Lithuanian Constitutional Court, Valstybes Zinio 109-3004 (Dec. 11, 1998), *translation available at* <http://www.lrkt.lt/1998/n8a1209a.htm>.

188. *Id.* at 13.

Universal Declaration of Human Rights in 1948 through the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1989.¹⁸⁹ The Court then narrated the parallel process of growth at the regional level, from the 1950 European Convention on Human Rights.¹⁹⁰ Based on these surveys, the Court concluded that “the abolition of the death penalty is becoming a universally recognized norm” and that “there is an evident trend in contemporary criminal law of European countries: a criminal punishment ought to combine punishment with preservation of humaneness, respect towards an individual and his dignity.”¹⁹¹ That Court’s recognition of the international community’s heightened concern for dignity and human life led it to address capital punishment directly by reference to those values, in terms very strongly similar to those of the Hungarian court eight years earlier:

Human life and dignity constitute the integrity of a personality and they denote the essence of an individual Therefore they may not be treated separately. . . . They constitute that minimum, that starting point from which all the other rights are developed and supplemented, and which constitute the values which are unquestionably recognised by the international community. . . . Thus human life and dignity, as expressing the integrity and unique essence of the human being, are above law. Taking account of this, human life and dignity are to be assessed as exceptional values.¹⁹²

A more abbreviated, but similar, analysis followed with respect to the right to be free from torture and other degrading treatment—a survey of international instruments, both global and regional, led the Court to assess the provisions of the Lithuanian constitution in terms of the essential dignity of the prisoner:

The cruelty manifests itself by the fact that after the death sentence has been carried out, the human essence of the criminal is negated as well, he is deprived of any human dignity, as the state in that case treats the person as a mere object to be eliminated from the human community.¹⁹³

In short, the Court concluded that capital punishment is incompatible with the rights to dignity and life, understood in the light of global norms.

3. *Albania and Ukraine*.—One year later, in 1999, two other European courts, the Supreme Court of Albania and the Ukrainian Constitutional

189. *Id.* at 13–15.

190. *Id.* at 15–17.

191. *Id.* at 16–17.

192. *Id.* at 19.

193. *Id.* at 23.

Court, issued similar rulings in their respective countries.¹⁹⁴ The two are worth discussing together briefly because they both reveal a different sort of connection to global normative developments than we have seen until now. In addition to their parallels of history, geography, timing, and outcome, the two cases also share a tie to one another and to other foreign and international jurisprudence through the Venice Commission. Known more formally as the European Commission for Democracy Through Law, the Venice Commission was established under the auspices of the Council of Europe after the fall of the Berlin Wall to monitor and assist in constitutional reforms aimed at strengthening democracy, human rights, and the rule of law.¹⁹⁵ The Venice Commission describes its activities generally as serving “to strengthen ‘trans-constitutionalism’, the search for a common basis for different countries’ case-law, which in turn promotes further development of a common constitutional heritage throughout Europe.”¹⁹⁶ For example, it publishes and disseminates leading constitutional case law from about fifty countries and supranational institutions as a way of encouraging judges and academics to exchange information and experiences in addressing difficult and sensitive constitutional issues.¹⁹⁷ With respect to individual countries, the Venice Commission also consults with member countries (usually at those countries’ request) on questions of constitutional drafting or revision or regarding the constitutionality of certain legislation. This process led to the Venice Commission’s undertaking studies and adopting formal opinions on the constitutionality of the death penalty under the constitutions of Albania and Ukraine.¹⁹⁸

194. Constitutional Court of Ukraine, *Ophitsynyi Visnyk Ukrayiny* [The Official Bulletin of Ukraine], No. 11-rp99 4/2000 (Dec. 29, 1999) (unofficial English translation of text, kindly provided by Dr. Stanislav Shevchuk, on file with author) (English summary available in Venice Commission CODICES database, No. UKR-2000-1-003, available at <http://codices.coe.int>) [hereinafter Ukrainian Constitutional Court] (holding that capital punishment violates the Constitution which “does not contain any provision whatsoever stating that the death penalty is an exception to the provisions of the Constitution on an integral right to life”); Albanian Constitutional Court, *Fletorja Zyrtare*, 33, 1301 (Dec. 12, 1999), translated in Venice Commission CODICES database, No. ALB-1999-3-008, available at <http://codices.coe.int> [hereinafter Albanian Constitutional Court] (holding that under the Albanian Constitution, “[T]he right to life is a fundamental personal right, the essence of which would be violated by the application and enforcement of the death penalty”).

195. See generally Gianni Buquicchio & Pierre Garrone, *Vers un Espace Constitutionnel Commun? Le Role de la Commission de Venise*, in *LAW IN GREATER EUROPE 3* (Bruno Haller et al. eds., 2000).

196. Venice Commission, *Introduction*, at http://www.venice.coe.int/site/main/introduction_e.htm (last visited Nov. 26, 2002).

197. Venice Commission, *Publications*, at <http://www.venice.coe.int/site/interface/english.htm> (last visited Jan. 26, 2003).

198. Venice Commission, *Opinion of the Venice Commission on the Constitutional Aspects of the Death Penalty in Ukraine*, CDL-INF (1998) 1 (Dec. 12–13, 1997), at [http://www.venice.coe.int/docs/1998/CDL-INF\(1998\)001rev-e.html](http://www.venice.coe.int/docs/1998/CDL-INF(1998)001rev-e.html) [hereinafter *Venice Commission Ukraine Opinion*]; Venice Commission, *Opinion on the Compatibility of the Death Penalty with the Constitution of Albania*, CDL-INF (1999) 4 (Mar. 22–23, 1999), at <http://www.venice.coe.int/docs/1999/-e.html>

In its Ukraine opinion, the Venice Commission first noted as a general interpretive matter that international law should be taken into account, not only because it has a recognized status within the Ukrainian Constitution, but also because of “the intensive osmosis between domestic and international law,” adding that “[i]n the European legal area it is becoming more and more unnatural, where fundamental human rights are concerned, to make separate categories of the obligations to be met by a State under its constitutional law and under public international law.”¹⁹⁹ The constitutional language in question provides that “[e]very person has the inalienable right to life. No one shall be arbitrarily deprived of life. The duty of the state is to protect human life.”²⁰⁰ In response to the argument that the word “arbitrarily” implies the possibility of capital punishment, the Commission referenced cases from the Supreme Court of the United States and the Constitutional Court of Hungary in support of the view that the imposition of the death penalty is unavoidably arbitrary.²⁰¹ It further articulated the “constitutional context” in which it believed that the Ukrainian case should be interpreted as necessarily including the activities and treaties of the Council of Europe, resolutions of the U.N. Human Rights Commission and of the European Parliament, the right to life jurisprudence of the European Court of Human Rights, and the previously discussed Hungarian Constitutional Court decision.²⁰² The longest and most prominent citation, however, was drawn from *Makwanyane*, and highlighted the South African Court’s conclusion that the death penalty “is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”²⁰³ As a result of its analysis of this expanded “constitutional context,” the Venice Commission deemed capital punishment to be inconsistent with the Constitution of Ukraine.²⁰⁴

The Venice Commission’s Albanian opinion followed a very similar pattern, even though the constitutional text at issue was slightly different, specifying only that “[t]he life of a person is protected by law.”²⁰⁵ Comparing the Albanian constitutional language to provisions in interna-

(last visited Nov. 26, 2002) [hereinafter *Venice Commission Albania Opinion*]. The Venice Commission opinions, it may be noted, are purely advisory and in no way formally binding. In fact, the organization emphasizes generally that it “does not set out to impose solutions but adopts a non-directive approach based on dialogue.” Venice Commission, *Constitutional Assistance*, at http://www.venice.coe.int/site/main/constitutional_assistance_e.htm (last visited Nov. 26, 2002).

199. *Venice Commission Ukraine Opinion*, *supra* note 198, para. 5.

200. UKR. CONST. art. 27.

201. *Venice Commission Ukraine Opinion*, *supra* note 198, para. 12 & n.6 (quoting extensively from Justice Blackmun’s dissent in *Callins v. Collins*, 510 U.S. 1141, 1148–48 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari) and citing the 1990 Hungarian Constitutional Court decision, including the latter’s two concurring opinions).

202. *Id.* paras. 7, 14, 16–19 & nn.8–9 & 11.

203. *Id.* para. 14 (citing *Makwanyane*, 1995 (3) SA 391, 409–10 (CC) (S. Afr.)).

204. *Id.* para. 23.

205. See ALB. CONST. art. 21 (establishing the right to life).

tional human rights treaties and, especially, to the parallel provisions of the Constitution of Lithuania, the Commission drew upon the Lithuanian Constitutional Court's decision discussed above—which held that the death penalty violates the constitutional guarantee of the right to life—and advocated applying the same reasoning in the Albanian case.²⁰⁶ The Venice Commission went on to cite the same constellation of sources that it discussed in the Ukraine Opinion as necessary parts of the context of constitutional interpretation, and even quoted the same text from *Makwanyane* regarding the value of human dignity.²⁰⁷ As in its Ukrainian opinion, the Venice Commission concluded that capital punishment should be deemed inconsistent with the Albanian Constitution.²⁰⁸

The Ukrainian Constitutional Court did not rule on the constitutionality of the death penalty until nearly two years after the Venice Commission issued its opinion,²⁰⁹ while the Albanian Constitutional Court rendered its decision on the matter within nine months. Both decisions, however, reflect the influence of the Venice Commission. In the Ukrainian case, the Court openly acknowledged its reliance on the Venice Commission.²¹⁰ The Albanian Constitutional Court did not acknowledge its reliance on the Venice Commission explicitly, but it paid great attention to the country's relationship with the Council of Europe in general, and its reasoning and analysis closely followed that of the Venice Commission experts.²¹¹ In particular, the Albanian Court emphasized, like the Venice Commission and the 1990 Hungarian case before it, that the rights to life and dignity together provide a fundamental constitutional value, and “its neglect would bring elimination of all other human rights.”²¹²

D. *The Caribbean*

The presence of three transnational legal arrangements have contributed to an open, cosmopolitan jurisprudence of human rights in the Caribbean

206. *Venice Commission Albania Opinion*, *supra* note 198, at 3; *cf. supra* notes 187–93 and accompanying text (discussing the Lithuanian Constitutional Court's reasoning in holding the death penalty unconstitutional and emphasizing the court's open consideration of international law and norms as a part of its constitutional interpretation).

207. *Venice Commission Albania Opinion*, *supra* note 198, at 4–7.

208. *Id.* at 7–8.

209. It should also be noted that these were two years in which Ukraine faced intense pressure and criticism from the Council of Europe regarding its delay in eliminating the death penalty. See Lily Hyde, *Ukraine: Council of Europe Pressure Results in Abolition of Death Penalty*, RADIO FREE EUROPE/RADIO LIBER. WEEKDAY MAG., Jan. 24, 2000, at <http://www.rferl.org/nca/features/2000/01/f.ru.000124134513.html> (reporting that prior to the decision, Ukraine's failure to abolish the death penalty motivated the Council of Europe to once again consider annulling Ukraine's membership in the European Union).

210. See Ukrainian Constitutional Court, *supra* note 194, § 2.

211. See Albanian Constitutional Court, *supra* note 194, at 1301.

212. *Id.*

region, distinguishing its courts from many of the others discussed in this Article. All three arrangements have very recently led to decisions that bear witness to the global dimensions of the judicial discourse regarding the death penalty.

1. *The Inter-American Human Rights System.*—In the Introduction, we had occasion to observe the Inter-American Court of Human Rights' active, engaged role in the transnational dialogue on capital punishment and human rights norms in *Hilaire v. Trinidad & Tobago*.²¹³ The Inter-American Court's ability to integrate itself fully into that discourse in *Hilaire* was undoubtedly due in vital respects to the prior work of the Inter-American Commission on Human Rights.²¹⁴ Although the Commission had addressed death penalty issues for almost twenty years, in 2000 and 2001 it considered a series of petitions that mark the Inter-American system's first serious recognition of global legal developments. Like *Hilaire*, the petitions all dealt with the laws of Caribbean island nations requiring the imposition of capital punishment upon anyone convicted of murder.²¹⁵

Decided within a year of each other, all of these cases unsurprisingly followed almost identical patterns of reasoning. First, the Commission articulated certain interpretive principles applicable to death penalty cases. These principles establish capital punishment as an exceptional practice to be strictly limited, an approach for which the Commission finds support in the jurisprudence of the U.N. Human Rights Committee and the Supreme Court of the United States.²¹⁶ Then the Commission more specifically considered whether mandatory death sentences violate Article 4 (the right to life), Article 5 (the right to humane treatment), and Article 8 (due process rights)

213. *Hilaire*, *supra* note 12; *see also supra* notes 12–17 and accompanying text.

214. The Inter-American Commission on Human Rights is an organization created under the Charter of the Organization of American States that also has responsibilities under The American Convention on Human Rights. Among its multiple functions, it serves as a quasi-judicial body, with the competence to consider individual petitions alleging violations of human rights, and it also has a mandate as a party in any case before the Inter-American Court of Human Rights. *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, WHAT IS THE IACHR?, at <http://www.cidh.org/what.htm> (last visited Jan. 26, 2003).

215. Cases 11.826, 11.843, 11.846 & 11.847, Inter-Am. C.H.R., No. 49/01 (2001), at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Jamaica.11.826.htm> (last visited Nov. 26, 2002) [hereinafter Lamey]; Cases 12.067, 12.068 & 12.086, Inter-Am. C.H.R., No. 48/01 (2001), at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm> [hereinafter Edwards]; Cases 12.023, 12.044, 12.107, 12.126 & 12.146, Inter-Am. C.H.R., No. 41/00 (2000), at <http://www.cidh.org/annualrep/99eng/Merits/Jamaica12.023.htm> [hereinafter McKenzie]; Case 11.743, Inter-Am. C.H.R., No. 38/00 (2000), at <http://www.cidh.org/annualrep/99eng/Merits/Grenada11.743.htm> [hereinafter Baptiste].

216. Baptiste, *supra* note 215, paras. 74–78; McKenzie, *supra* note 215, paras. 187–90; Edwards, *supra* note 215, paras. 131–32, 139–40; Lamey, *supra* note 215, paras. 119–22, 129–30 (all reciting substantially identical language to this effect).

of the American Convention on Human Rights.²¹⁷ The right to life under the Convention provides in part that “[n]o one shall be arbitrarily deprived of his life.”²¹⁸ Because murder can be committed in ways that vary greatly in gravity and culpability, the Commission concluded that a mandatory sentence that does not contemplate the possibility of mitigating circumstances is arbitrary and therefore violates Article 4.²¹⁹ The requirement of an individualized sentence was made even more stringent when the Commission considered the right to life in conjunction with the due process guarantees of Article 8; together they require that a defendant in a capital case have an opportunity to present evidence pertaining to the appropriateness of the punishment.²²⁰ Finally, mandatory death sentences also violate the right to humane treatment, according to the Commission, because they contradict the underlying premise of the Convention as a whole, and Article 5 in particular, that the rights guaranteed are derived from the dignity of the human person; in other words, capital punishment violates “the essential respect for the dignity of the individual” by depriving the accused of life without considering the particular circumstances of that person’s case.²²¹ The stress on dignity is particularly strong in holding together the overall approach of the Commission: “In the Commission’s view, consideration of respect for the inherent dignity and value of individuals is especially crucial when determining whether a person should be deprived of his or her right to life.”²²²

The important features of the Commission’s reports in these cases, for the purposes of our study here, are not the details of its substantive arguments but the fact that the Commission supports each step with citation and discussion of other authorities that lend substance and strength to the Commission’s approach. Among international institutions and processes, the jurisprudence of the U.N. Human Rights Committee plays a prominent role here, especially the case of *Lubuto v. Zambia*, which concluded that the ab-

217. American Convention on Human Rights, Nov. 22, 1969 arts. 4, 5, 8, 1144 U.N.T.S. 123, 145–48. In the case of *Edwards*, however, the Commission made an equivalent argument with reference to the corresponding articles of the 1948 American Declaration of Human Rights because the Bahamas is not a party to the American Convention.

218. *Id.* at art. 4(1).

219. Baptiste, *supra* note 215, paras. 82–87; McKenzie, *supra* note 215, paras. 195–98; Lamey, *supra* note 215, paras. 124–28; cf. *Edwards*, *supra* note 215, at 135–38 (making an equivalent argument with reference to the American Declaration).

220. Baptiste, *supra* note 215, paras. 81–93; McKenzie, *supra* note 215, paras. 200, 204–05; Lamey, *supra* note 215, paras. 132, 136–37; cf. *Edwards*, *supra* note 215, paras. 148–49 (making an equivalent argument with reference to the American Declaration).

221. Baptiste, *supra* note 215, paras. 88–90; McKenzie, *supra* note 215, paras. 201–03; Lamey, *supra* note 215, paras. 133–35; cf. *Edwards*, *supra* note 215, paras. 145–47 (making an equivalent argument with reference to the American Declaration).

222. McKenzie, *supra* note 215, para. 202; Lamey, *supra* note 215, para. 134; *Edwards*, *supra* note 215, para. 146.

sence of sentencing discretion in capital cases can contravene the right to life as it is guaranteed by the International Covenant on Civil and Political Rights.²²³ The Commission also draws from the work of the United Nations Special Rapporteur on Extra-Judicial, Summary, or Arbitrary Executions.²²⁴ Among domestic jurisdictions, the Commission refers to a variety of U.S. Supreme Court decisions, especially (and not surprisingly) to *Woodson v. North Carolina*, which found a mandatory death sentence to violate the Eighth Amendment to the U.S. Constitution.²²⁵ In addition, the Commission quotes extensively from the South African Constitutional Court in *Makwanyane*²²⁶ and the Indian Supreme Court in *Bachan Singh*.²²⁷ Even though those cases do not directly deal with the mandatory imposition of capital punishment, they both indirectly support the principle that the judiciary's guided discretion in imposing the death penalty can help to reduce the arbitrariness of the sentence.²²⁸ In sum, the Commission finds that:

The experience in other international and domestic jurisdictions therefore suggests that a Court must have the discretion to take into account the particular circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the minimum requirements of due process.²²⁹

Returning to the *Hilaire* judgment discussed in Part I above, after having examined the Commission's foundations for it, puts the transnational

223. Baptiste, *supra* note 215, para. 99; McKenzie, *supra* note 215, para. 213; Lamey, *supra* note 215, para. 145; Edwards, *supra* note 215, para. 156; see *Lubuto v. Zambia*, U.N. HRC, 55th Sess., para 7.2; Comm. No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995).

224. Baptiste, *supra* note 215, para. 100; McKenzie, *supra* note 215, para. 214; Lamey, *supra* note 215, para. 146; Edwards, *supra* note 215, para. 157.

225. Baptiste, *supra* note 215, para. 100; McKenzie, *supra* note 215, para. 215; Lamey, *supra* note 215, para. 147; Edwards, *supra* note 215, at 158; see *Woodson v. North Carolina*, 428 U.S. 280 (1976) (reviewing the history of the death penalty in the United States and the reasons why the Supreme Court concluded that mandating death sentences violates due process rights and constitutes cruel and unusual punishment).

226. Baptiste, *supra* note 215, para. 102; McKenzie, *supra* note 215, para. 216; Lamey, *supra* note 215, para. 148; Edwards, *supra* note 215, para. 159. It is also interesting that the long quotation from *Makwanyane* itself cites the U.S. Supreme Court in *Furman*, so that the Inter-American Commission, by keeping the *Furman* citation within the *Makwanyane* quote, heightens a sense of there being multiple layers of international jurisprudence on the question.

227. Baptiste, *supra* note 215, paras. 103-04; McKenzie, *supra* note 215, paras. 217-18; Lamey, *supra* note 215, para. 149; Edwards, *supra* note 215, para. 160.

228. The *Bachan Singh* Court's support for the principle of judicial discretion was one of the central reasons why the majority in that case did not find capital punishment to be unconstitutional per se. See *Bachan Singh v. State of Punjab*, (1993) 1 S.C.R. 145, 509-10, 516, 534 (upholding the constitutionality of capital punishment in India and rejecting the argument that a law which gives uncontrolled and unguided discretion to a jury to choose between a sentence of death or imprisonment is inherently arbitrary).

229. Lamey, *supra* note 215, para. 151; Edwards, *supra* note 215, para. 162; McKenzie, *supra* note 215, para. 219; Baptiste, *supra* note 215, para. 105.

dimensions of the latest Inter-American Court case into sharper relief. The ruling highlights the vital role of international and foreign law to the development of local norms. In *Hilaire*, the Court follows parallel reasoning with respect to many of the Commission's points, and most significantly, it incorporates and relies upon the same subset of cases within the larger body of transnational jurisprudence of human rights and capital punishment. One notices, for example, the comparable roles of the Human Rights Committee decision in *Lubuto v. Zambia*, the U.S. Supreme Court judgment in *Woodson*, the Indian Supreme Court opinion in *Bachan Singh*, and the decision of the Constitutional Court of South Africa in *Makwanyane*.²³⁰

2. *The Eastern Caribbean Court of Appeal*.—A second regional institution that has recently entered into the Caribbean's regional discussion regarding human rights and the death penalty is the Eastern Caribbean Court of Appeal (ECCA), an appellate court created to serve the Organisation of Eastern Caribbean States.²³¹ In 2001, the ECCA rendered a judgment in *Spence v. The Queen* in which the Court ruled that the mandatory death penalty provided by the laws of St. Vincent and the Grenadines was unconstitutional.²³²

The naturally transnational character of the ECCA may help to explain why Chief Justice Byron began his opinion in *Spence* with a forceful affirmation of the relevance of international norms to constitutional interpretation generally and to the problem of capital punishment in particular:

The provisions of the Constitution that are relevant to this case are part of the fundamental rights and freedoms which have sought to entrench and guarantee that citizens enjoy the rights and dignity associated with humanity. These rights fit into the universal pattern as evidenced by declarations and covenants to which nations around the world, including our own, have subscribed. . . . The issue in this case, related as it is to the question of capital punishment, is part of a developing area of legal thought and jurisprudence on the value of human life.²³³

This principle of construction does not mean that international norms override domestic legislation or constitutions, the Court pointed out, so long

230. *Hilaire*, *supra* note 12, para. 103 n.110, para. 105 n.111.

231. The Organisation of Eastern Caribbean States is comprised of Antigua and Barbuda, Dominica, Grenada, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, and three British Overseas Territories (Anguilla, the British Virgin Islands, and Montserrat). Appeals from the Eastern Caribbean Court of Appeal are taken by leave to the Privy Council. For more information on the function and composition of the Court, see Organisation of Eastern Caribbean States, *Eastern Caribbean Supreme Court*, at http://www.oecs.org/inst_ecsc.htm (last visited Aug. 25, 2002).

232. *Newton Spence v. The Queen*, Criminal Appeal No. 20 of 1998 and No. 14 of 1997, para. 61 (Eastern Caribbean Court of Appeal) (Apr. 2, 2001), at <http://www.ecsupremecourts.org/lc/index.htm>.

233. *Id.* paras. 7–8.

as the domestic law is clear, but it does require the Court to interpret domestic law in ways that conform with international obligations insofar as possible.²³⁴

Chief Justice Byron remained true to his stated intentions. His opinion drew on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and especially the American Convention on Human Rights as interpretive tools.²³⁵ He also relied on cases from foreign jurisdictions, including *Woodson* from the United States, *Makwanyane* from South Africa, and *Bachan Singh* from India.²³⁶ On the one hand, he tried to distinguish other foreign cases that tolerate capital punishment, both on formal grounds (noting differences in the constitutional language at issue) and also by appealing to the evolution of “internationally accepted norms of humanity” over time.²³⁷ But on the other, he made no comparable effort to assess the formal similarities of constitutional or statutory language in the foreign cases that tend instead toward restriction or abolition of the death penalty. His implicit approach, in other words, recognized an informal presumption in favor of abolition and treated exceptions restrictively by limiting them as much as possible to their formal language and narrow temporal or geographic context.

In conclusion, the Chief Justice borrowed (although without acknowledging its source) a formula familiar to us from the reports of the Inter-American Commission:

The experience in other domestic jurisdictions, and the international obligations of our states, therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.²³⁸

3. *The Privy Council and Belize*.—The third prominent judicial body that has been very centrally engaged in developing a global death penalty dialogue is the Judicial Committee of the Privy Council. Although that body is not concerned solely with Commonwealth countries in the Americas, it has had occasion to address capital punishment issues especially in its relation-

234. *Id.* paras. 36–37.

235. *Id.* paras. 38–45.

236. *Id.* paras. 12–13, 32–33.

237. *Id.* paras. 23, 31.

238. *Id.* para. 42; *cf. supra* note 229 and accompanying text (citing the Inter-American Commission’s use of identical language in its rulings).

ship to various Caribbean island nations.²³⁹ Almost all of the opinions in the Privy Council's many death penalty cases have to do with ancillary issues such as the death row phenomenon,²⁴⁰ but one of its most recent cases took up the same issue addressed in the Inter-American cases we just discussed. In *Reyes v. The Queen*, the Privy Council considered a challenge to the constitutionality of the death penalty as a mandatory sentence for murder in Belize.²⁴¹ Lord Bingham's judgment delivered for the Council is a rich reflection of and contribution to the ongoing transnational exchange in this area, in both practice and principle.

From the beginning, Lord Bingham effectively framed the issue in transnational terms. He contrasted the Belize law under review with the practices of countries that have recognized the need to differentiate among degrees of culpability in murder cases. For instance, he specifically noted how Justice Sarkaria in the *Bachan Singh* judgment emphasized that the constitutionality of capital punishment in India depended upon the ability of judges to use their discretion to limit the death penalty to only the most serious and exceptional cases.²⁴² While Lord Bingham acknowledged that the question of differentiation has historically been subject to variant approaches in the practices of different legal systems, he observed that two developments in the last half-century have had an important impact on the evaluation of laws like those of Belize. The first was the advent of international legal instruments to protect human rights. Drawing from the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, he highlighted especially the protection in these instruments of the right to life, the freedom from torture or cruel, inhuman, or degrading treatment, and the right to a fair trial.²⁴³ The significant second development, argued to Lord Bingham, is the constitutionalization of fundamental rights in the laws of former colonies as they advanced to independence. Belize, like many other former British

239. For information on the individual and regional judicial systems in the Commonwealth Caribbean and their relationship to the Judicial Committee of the Privy Council, see generally Velma Newton, *The Legal Systems of the Commonwealth Caribbean*, in 7 MODERN LEGAL SYSTEMS CYCLOPEDIA 7.80.30, 7.80.36–7.80.44 (Kenneth Robert Redden & Linda L. Schlueter eds., 1988); Judicial Comm. of the Privy Council Office, *Legislation—Relevant Statutes*, at <http://www.privacy-council.org.uk/output/Page33.asp> (listing relevant constitutional and statutory provisions from various countries governing appeals to the Judicial Committee of the Privy Council).

240. See cases cited at note 65, *supra*.

241. *Reyes v. The Queen*, [2002] 2 W.L.R. 1034 (P.C. 2002) (appeal taken from Belize).

242. *Id.* para. 14 (citing *Bachan Singh v. State of Punjab*, (1993) 1 S.C.R. 145).

243. The European Convention applied to Belize as a dependent territory of the British Crown until 1981. Since then, Belize has been a member of the United Nations (thus the Universal Declaration, as a resolution of the U.N. General Assembly, applies), and in the 1990s it became a party to both the American Convention and the International Covenant. See *id.* paras. 18–23, 24.

colonies, relied heavily on the rights articulated in the European Convention on Human Rights in order to draft its constitution.²⁴⁴

In light of these two developments, Lord Bingham decided that the international instruments to which Belize has subscribed are relevant to interpreting the Constitution's requirements.²⁴⁵ He stressed more than once that it is the domestic constitutional law of Belize that was at issue in the case, and that Belize may of course choose not to incorporate international standards into its fundamental rights law.²⁴⁶ But the way that Lord Bingham laid a foundation of international norms before examining the Constitution means implicitly that the former becomes a baseline against which the Constitution will be interpreted unless the latter clearly and explicitly diverges from the international standards. From there it is a small step to include the examples of other countries in order to interpret phrases such as "cruel, inhuman or degrading treatment," or to justify the need for a principle of proportionality, and Lord Bingham did borrow liberally from a number of other countries. The most extensive reliance on foreign jurisprudence can be seen with cases from the United States (*Woodson*, naturally, but also other decisions), the Eastern Caribbean Court of Appeal (in *Spence*), South Africa's *Makwanyane* judgment, and decisions from Canada, India, and England.²⁴⁷ Among the opinions of international human rights institutions, Lord Bingham relied on several of the recent Inter-American Commission reports discussed above and also on decisions of the Human Rights Committee and the European Court of Human Rights.²⁴⁸

Taken together, this body of normative pronouncements form the basis for the Privy Council's conclusion that the mandatory sentence of death in that case would subject the accused to inhuman or degrading treatment because "to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity."²⁴⁹ While that conclusion does depart from determinations that the Privy Council had made in prior cases, Lord Bingham explained the limited applicability of the earlier judgments by noting, simply and significantly, that they were "made at a time when international jurisprudence on human rights was rudimentary."²⁵⁰ Similarly, in response to the Attorney General's argument that the United States Supreme Court's decision in *Woodson* included an account of the

244. *Id.* para. 23.

245. *Id.* para. 27.

246. *Id.* paras. 28, 30.

247. *Id.* paras. 30-39.

248. *Id.* paras 40-42.

249. *Id.* para. 43.

250. *Id.* para. 45.

United States' historical developments and therefore "cannot automatically be transferred to Belize,"²⁵¹ Lord Bingham noted that "[t]he judgment delivered by Stewart J. [in *Woodson*] was not wholly based on the domestic history of the United States, and there is now an international body of decisions entirely consistent with his reasoning quoted above."²⁵²

IV. Conclusions: The Global *Ius Commune* of Human Rights

After a dozen countries and twenty years on this world tour, we have not yet combed the entire landscape of human rights and the death penalty. Nevertheless, we have seen enough of it to step back from the cases—to observe the patterns and characteristics of the global jurisprudence taken as a collective whole, and to consider some of its possible implications for both international human rights law generally and for domestic constitutional law, especially that of the United States.

A. *The Ius Commune and the Death Penalty*

In Part II of this Article I proposed that the idea of a *ius commune* could help us understand and explain the nature and function of global human rights norms regarding the death penalty. The data of the cases confirm the presence of the principal features of the *ius commune*: the transnational and universal character of the discourse and the pervasive yet multifaceted relationship between the global discourse and local legal and political systems.

1. *A Transnational Normative Network.*—As an empirical observation, the transnational element of the normative discourse is obvious. The interconnected actors and cases in the limited sample discussed here cover four continents and an even greater number of diverse cultural contexts. In each place and time, there are national courts interacting with a broad array of other institutions, both national and international (we can refer to both as "foreign"). It is clear, too, that the number of cases in the global network is increasing considerably.²⁵³

Sometimes, the links between the various institutions reflect formal legal relationships, like the Central and Eastern European countries showing solicitude for the human rights system of the Council of Europe, of which they are relatively new members. Much more often, however, and more significantly, the interconnections are not among institutions that are even remotely connected by any formal ties of legal system or normative

251. *Id.*

252. *Id.* para. 47 (citation omitted).

253. Of the cases discussed in Part III (though they do not present a systematically selected sample by time, they nevertheless roughly represent the universe of cases), there were two from the 1980s, five from 1990 to 1997, and thirteen from 1998 to June 2002.

hierarchy—they form a purely “horizontal” relationship among partners in dialogue who are otherwise wholly independent of one another. Similarly, in some cases we could observe that the dialogue favors interaction with institutions and countries where some other political or geographic tie exists as well. For instance, among countries of the Commonwealth one can observe somewhat greater solicitude for the decisions of other Commonwealth countries or the Privy Council. In Africa, the decisions of nearby states seem to receive subtly greater attention than those from outside of the region. Finally, among the European cases, there is a very explicit emphasis on common European approaches. But it is even more remarkable how *small* a role, overall, those sorts of ties seem to play. By and large, the political, historical, cultural, and geographic links among states provide the basis for, at most, slightly different accents and emphases, but they do not appear in any way to limit or control the otherwise global scope of the discourse.

Moreover, the transnational character of the discourse is not only measurable by geography. The ways that courts use foreign sources also reflect the global scope of the norms as a whole. Most frequently, the courts we observed drew from and relied upon the foreign sources in a positive way to explain and support a particular approach to the issue, thus providing additional justification and legitimacy to the decision by linking it to external experience. In the cases of Malaysia, South Africa, Tanzania, Nigeria, and the Eastern Caribbean Court of Appeal, however, we saw the court in question consciously distinguish certain foreign approaches and decline to follow them. Yet, in some ways this latter example is even stronger evidence of the transnational character of the discourse. If the foreign sources were not being brought in to help provide justification for the course to be followed (and given that they do not have formal authority as sources), then why did the courts take care to respond to and reject foreign judgments? It is as if the distinctly transnational presence of the discourse itself demands a response.

In fact, the last point brings us to the recognition that the transnational character of the discourse here is not only an empirical fact but also one that tacitly carries with it a certain normative force. In other words, it is implicit in many of the courts’ practices of justification that foreign jurisprudence warrants consideration *because* it is a global reality. The more that it is composed of elements from widely differing geographic areas and cultural traditions, the more weight it carries. That is not to say that any of the courts, openly at least, are willing to acknowledge foreign norms merely by the authority of consensus among other states in the world. In fact, we saw several efforts to explicitly disavow the authoritative force of international trend or consensus as such. That is entirely appropriate. Mere numerical consensus does not, *per se*, provide a sufficient foundation for making conclusive

judgments regarding the content of human rights norms.²⁵⁴ Nevertheless, broad international trends and global developments may be evidence of the recognition of a compelling human value that transcends differences in civilizations—one can think of the gradual emergence of global norms against slavery as a significant historical example of this phenomenon.²⁵⁵ At the very least, such a widespread dialogue suggests a shared awareness of being part of a single human family in spite of the divisions and differences among nations.

2. *An Expression of the Universality of Human Dignity.*—Although the transnational character of the dialogue does attribute some weight to foreign sources in the cases, clearly the real center of gravity of the global jurisprudence is in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity. In every region, and in almost every case, the courts' language shows that their capacity to compare with, and to borrow and benefit from, the jurisprudence of foreign legal systems has the most traction when it grips the ground of human dignity. Cases comparing the formal language of constitutions and statutes, or comparing the pragmatic experiences of criminality and deterrence, for instance, stand out because they are exceptions to that rule. Instead, when the courts invoke foreign sources, we see a familiar pattern, a movement from the formal aspects of the case to the general principles in play and specifically to the concept of human dignity. Thus, those cases within the global jurisprudence that most fully and directly invoke the foundational principle of human dignity tend to be relied upon more frequently and fully by other courts. Furthermore, those passages that most directly discuss human dignity are far and away the ones that courts most often pick up and pass along from case to case. From the perspective of the United States, for instance, it is striking to see that of all the case law, state and federal, regarding the death penalty in America, those portions that we re-encounter most frequently when "traveling" among foreign jurisdictions are not the formal readings of the U.S. Constitution and its history, nor the assessment of national consensus for or against particular punishments. They are not necessarily the views of the courts' majorities in particular cases. They are the instances in which U.S. courts and individual judges, even if only in dissent, have been willing to speak in the globally recognizable language of human dignity.

254. I have developed this argument further in Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1226–34 (1998).

255. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 38–45 (1998) (chronicling the manner in which the international discourse among thoughtful and vocal minorities eventually became the 19th century anti-slavery movement).

More generally, then, we can reasonably say that the normative force of the transnational jurisprudence we have examined is premised upon the recognition of the common humanity of all persons. The universality of this sentiment, in principle, complements and supports the transnational character of the discourse in practice, and consistently provides a justification for courts to take foreign sources into account despite constraints of constitutional form, historical context, or political and social practice. The courts treat the idea of human dignity as the common thread to be followed across all those contingencies. In doing so, they never suggest that a dignified, human life means anything fundamentally different in the otherwise variable contexts of different cases. To put this idea another way, it is very clear that one of the strongest, most central foundations of the transnational jurisprudence of human rights in these cases is the recognition of our common humanity, our shared human nature.²⁵⁶

The universality in principle of human dignity is not, of course, the *only* justification for courts' discussing, borrowing, and responding to foreign sources. In one of the few studies of the normative character of the transnational judicial dialogue on human rights, Christopher McCrudden has usefully mapped a variety of other justifications for the uses of foreign law in domestic human rights adjudication.²⁵⁷ Among the factors that contribute to the use of foreign sources, he discusses such circumstances as historical or institutional similarities between systems, the need to substitute for a still-nascent indigenous jurisprudence, the political orientation of the foreign norms in question, and underlying theories of law and legal interpretation.²⁵⁸ All of these, and the others he identifies, are helpful and relevant considerations, but as McCrudden himself acknowledges,

simply to emphasize these factors . . . would miss a significant element in the emerging debate about when foreign *human rights* decisions are used, and about the appropriateness of this development. So far, in trying to explain what I think is going on, I have not identified any factor that is other than applicable to the use of foreign law *generally* as persuasive precedent. Is there something specific to *human rights* that explains the apparently greater use of foreign case law in human rights cases?²⁵⁹

McCrudden asks just the right question. Unfortunately, though, he only gets the answer partially right. He correctly, in my view, identifies judges'

256. It is for this reason that I am only concerned here with the possibility of human rights norms forming a global *ius commune*. Other types of jurisprudential principles that may be transnational in practice, such as an economic concern for "efficiency," generally do not share the principled universality described here.

257. Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000).

258. *Id.* at 516-29.

259. *Id.* at 527.

“sense of sharing a common enterprise with judges in other jurisdictions” as one principal explanation (borrowing from Anne-Marie Slaughter).²⁶⁰ This explanation is essentially functionalist, based in the shared task of seeking solutions to common problems. But there is more than functionalism present in the ethical premise of the value of human dignity so widely shared among the different courts involved in the transnational jurisprudence of capital punishment. In fact, on many occasions we see judges specifically abstracting from and eschewing comparisons in the functional terms of “common solutions to common problems” and speaking much more in terms of “common principles for a common humanity.” It is, more often than not, the judge who wants to *avoid* foreign influences who takes a functionalist approach focusing on the unique, pragmatic aspects of the problem at home.

Where I believe McCrudden to have made a mistake is in too easily rejecting what he refers to as “some form of new natural law.”²⁶¹ The problem is that he uses a crude caricature of what natural law is and how it works, limiting it to “‘discovering’ already laid down meanings” and “laying down a discovered truth.”²⁶² Noting that judges “recognize, indeed *insist*, on the constructed and (to some extent) contingent nature of decision-making on issues of contemporary human rights,” McCrudden finds the judicial practice not reflective of what he believes to be a natural-law explanation.²⁶³ This Article is not the place for an extended explanation and reflection on the nature of natural law and its relationship to human rights.²⁶⁴ It is sufficient here to point out that any reasonably sophisticated understanding of natural law, modern or ancient, fully recognizes that moving from universal principles of justice (like basic human rights norms) to positive law involves the exercise of human reason in the contingent contexts of practical possibility, culture, history, and so forth.²⁶⁵ The concrete specification of the principles of natural law, therefore, necessarily admits a variety of reasonable solutions to most problems. In other words, McCrudden’s contentions regarding what judges are actually *saying* that they do does not at all contradict the idea that

260. *Id.* at 528–29 (quoting Slaughter, *Typology*, *supra* note 20, at 123, 127). It should be noted, however, that Slaughter herself is, I believe, saying something more than McCrudden attributes to her. Even in the passages McCrudden quotes, she refers to the “premise of universalism” and comments that “recognition of a global set of human rights issues to be resolved by courts around the world in colloquy with one another . . . flows from the ideology of universal human rights.” *Id.* at 528–29.

261. *Id.* at 528.

262. *Id.*

263. *Id.*

264. Such account, at least within the context of modern legal theory, would begin with JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). See also *NATURAL LAW* (Robert P. George ed., 2001); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (1999) (defending and applying a natural law theory of reasons for choice and action).

265. See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. (forthcoming 2003).

there are some implicit natural law premises operative in the phenomenon of cross-judicial discourse on *human rights* (as distinct from other substantive areas of law). At the same time, the tendency of courts in the death penalty cases discussed here to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity is a paradigmatic example of naturalist foundations at work. Despite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable. The “common enterprise” that McCrudden identifies is, first and foremost, the working out of the practical implications, in differing concrete contexts, of human dignity for the rights to life and physical integrity.²⁶⁶

3. *A Symbiotic Relationship with Local Law.*—The dynamics of the relationship between the universal principle of human dignity and its concrete specification also helps account for a third feature of the death penalty cases: the unique relationship that the global jurisprudence has with local legal systems. It is in this dynamic interplay between a broadly transnational jurisprudence grounded in universal principles and their concrete domestic appropriation and application that the global jurisprudence of human rights has its distinct normative edge.

On one level, one has to recognize that in *every* legal system we discussed, the foreign norms that courts consider have *no* formally recognized, binding authority as sources of law. In only one case, that from South Africa, was there even any formal mandate to consider foreign norms in a persuasive but nonbinding way. A few other courts, such as those in the Caribbean countries, Nigeria, and Ukraine, had more tenuous connections to foreign norms through the historical influences on their constitutional documents by international human rights documents, but only in the Caribbean is that connection offered as a basis for justifying the relevance of foreign law.

Like in the case of the medieval *ius propriae*, however, focusing narrowly on the local law’s formal priority in the hierarchy of positive law does more to obscure than illuminate its rich relationship with the *ius commune*. To begin with, the global jurisprudence of human rights and the death penalty serves generally in these cases to create a pervasive environment within which the cases are reasoned and decided. Where the domestic

266. McCrudden, *supra* note 257, at 528. Incidentally, this also helps explain why, in many of the cases I discuss here, the courts do not appear to have or to invoke any other basis for the “license” to engage in comparative exercises that Mark Tushnet has argued is necessary to make such exercises conventionally acceptable. See Tushnet, *supra* note 140, at 1231–39 (arguing that comparative analyses only constitute cogent legal arguments when they address constitutional provisions for which the court has “licensed” or adopted a policy accepting comparative arguments).

law is completely silent with respect to the problem at hand—like in the case of South Africa—then the surrounding foreign law can seep into the empty space to provide some normative material from which to work. Similarly, when the local law has broad requirements and open-ended possibilities expressed through terms like “arbitrariness,” foreign law provides the foundation for interpretation, a background against which courts gave the local provisions their meaning. In the cases addressing the relationship between the Venice Commission and the Inter-American Commission on Human Rights and the constitutional adjudication of Albania, Ukraine, and the Eastern Caribbean Court of Appeals, the presumptive baseline provided by the global jurisprudence was evident.²⁶⁷

Only in two cases (in Nigeria and the Tanzanian Appellate Court) did we observe courts flatly asserting the priority of positive local law, and it is revealing that even then the judges made significant efforts to acknowledge and discuss the foreign norms. In the Tanzanian case, the court even admitted that global understandings of capital punishment were correct in principle but that the constitutional text precluded it from conforming local law to the requirements of human rights. In other words, the *ius commune* provides a standard against which courts judge and justify even contrary local law. Whether directly or indirectly, then, the *ius commune* can be said to be one of the constitutive factors of local law, even though courts most often formally justify their decisions on *ius propiae* grounds.

Nevertheless, there are also two important ways that the *ius commune* is dependent on and subordinate to local law. First, the formal priority of positive local law means that the *ius commune*, even when it is recognized as in some sense ethically superior, needs to be interpreted as existing in a constructive dialogue with local law; the former cannot presume to simply displace the latter. Second, and even more important, simultaneous with the presumption of global jurisprudence as the background against which local law is understood and evaluated, there is a nearly converse relationship between the two. The global *ius commune*, after all, does not simply exist in the abstract; it is not a transcultural “given” existing outside of its relationship with the ensemble of local jurisdictions. It is, instead, itself constituted by the multiplicity of local laws that contribute, add, and give concrete substance to the global jurisprudence. In addition, its strength and nourishment depend on not only a few local law elements to compose it but a real multiplicity of compositional elements. The unity and vitality of the *ius commune* and the genuine plurality of its constituent parts are in a relation-

267. It is interesting to speculate how legislation and the processes of legislative reform may also reflect this relationship. Of course, that question requires a substantially different (and more difficult to gather) set of research data than the data used in this Article, but it would significantly enrich our understanding of the global *ius commune* of human rights.

ship of "dialectical pluralism," to recall the phrase that François Ost used to describe the *ius commune* of human rights in Europe.²⁶⁸ Or to borrow a biological term, we could say that the two are in symbiosis, each in intimate association with the other and contributing to the life of the other.

B. *Implications of a Ius Commune Approach to Human Rights*

To understand human rights as a *ius commune* requires a great deal of time, comparative research, and global communication at the very least. It will be even more difficult with human rights issues that do not directly implicate such a core, irreducible value as human life the way that capital punishment does. Thus, however clearly the preceding discussion may show that global norms have come to constitute a *ius commune* of human rights regarding the death penalty, it is still another thing to ask whether international human rights law more generally can be described the same way. Part of the question, however, is more than merely practical: is it good and helpful to think of global human rights in terms of a *ius commune*, so that we should not only identify it but encourage it and help make it a reality? To conclude this Article I would like to suggest a few reasons why the answer is "yes," by considering very briefly some possible implications of a *ius commune* approach, both in international human rights law and also in the domestic constitutional law of the United States.

1. *The Ius Commune and International Human Rights.*—Before going any further with the discussion, it is important to emphasize that approaching international human rights in terms of a *ius commune* is in no way a substitute for a substantial body of international human rights law and institutions with direct responsibility for the effectiveness and enforcement of human rights. It does not replace international supervision because there are innumerable sets of circumstances that can make serious violations of human rights incapable of resolution through the more localized, flexible, and cooperative dynamics of a *ius commune*. Outside of such situations, however, and in any event as a complement to an international (in the strict sense) human rights system, it is possible and desirable to nurture a global *ius commune* approach to human rights, for at least three important reasons.

First of all, by encouraging cross-cultural communication and exchange, a global *ius commune* approach fosters a much deeper and more genuine universality of human rights, founded on the recognition of the requirements of human dignity. Our all-too-human temptation to relapse into authoritarianism and ideology can encourage well-intentioned but mistaken assertions that culturally specific expressions of human rights are universal. The *ius*

268. See *supra* note 58 and accompanying text (discussing Ost's theory of the manner in which legal systems become intertwined).

commune, instead, subjects human rights to the test of recognition and internalization among all the peoples of the world. Similarly, in the place of facile and wishful attempts to declare the universality of human rights by diplomatic fiat²⁶⁹ or by virtue of the ideologies of transnational elites, the *ius commune* acknowledges and assists the difficult, complex work of building up shared understandings across the differences of local context. Thus, it encourages a flexible adaptation of common principles to local differences in the *service* of universality, rather than in *opposition* to it. The result has the potential to be a universality that is both truer and more accountable to its real reference points, the dignity of the human person and the common good of the human family.

In that way, it can be said that a *ius commune* approach respects the structural principle of subsidiarity in international human rights law—that is, the principle that each social and political group must be given the freedom to accomplish its ends by itself insofar as it is able and must be given assistance by larger, more comprehensive groups when it is not.²⁷⁰ The *ius commune* can provide that sort of combination of assistance and nonintervention. It strongly promotes universal principles and understandings of the requirements of human dignity, but it does so by leaving local and regional decisionmakers room to articulate and internalize the principles for themselves. We saw many examples of this throughout the discussion of the global jurisprudence on the death penalty. In India and South Africa, judges sought ways to integrate cross-cultural understandings of the requirements of human dignity with the traditions of Hinduism and African *ubuntu*. In Central Europe, courts responded to their local political history with the non-directive assistance of the Venice Commission. In the Caribbean, regional juridical entities like the Inter-American Commission and the Eastern Caribbean Court of Appeal have helped mediate between global understandings of the right to life and physical integrity and local obstacles to their realization. The result, as any approach that is harmonious with subsidiarity should be, is an overall structure that is more consistent with comprehensive freedom, cultural integrity, and the effectiveness of human rights.

Finally, the *ius commune* is an approach to human rights that responds to the peculiar way that contemporary transnational society is being challenged by forces of both globalization and pluralism. It is a commonplace (though no less true because of its banality) to observe that we live in an era where global economic, financial, and cultural forces, catalyzed by technology, communications, and mass media, are reshaping the world into

269. See, e.g., *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993) (calling for increased coordination of human rights enforcement within the United Nations system).

270. See generally Carozza, *supra* note 265.

an ever more interdependent whole.²⁷¹ Paradoxically, however, it is also the case that the current global condition is punctuated by resurgent localisms: a preoccupation with nationalism, cultural identity, sub-state actors, and civil society.²⁷² The simultaneous integration and fragmentation of an international society still organized formally along classical state-centered concepts poses real conceptual dilemmas for international politics²⁷³ and for law.²⁷⁴ It is no less a problem for human rights, even though human rights law and scholarship have hardly begun to grapple with it systematically. In international relations, some theorists have turned to the Middle Ages as a possible source of concrete historical analogies for understanding better the post-international transnational reality now before us.²⁷⁵ Identifying the *ius commune* of human rights is a parallel effort. By bringing together the local with the transnational with the universal with the particular, the *ius commune* seeks to preserve and protect the recognition of human dignity in a changing, interdependent, yet pluralistic world.²⁷⁶

2. *The Ius Commune and U.S. Constitutional Law.*—A vigorous excursion in comparative law should always have the capacity to make us return home with a more reflective understanding of ourselves. Exploring the global *ius commune* of human rights is no exception. The glimpse of foreign law in *Atkins* may have seemed filled with suggestive potential when we were just setting out, yet upon revisiting the decision, it appears more diffident than it did initially. Despite its reference to “international consensus,” the U.S. Supreme Court neither acknowledges the richness of available global experience, nor engages in any way the *substance* of any foreign decisions, treating the existence of international norms merely as empirically

271. See WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 4 (2000) (citing the occurrence of various indicators of increasing international interconnectedness and its implications for legal study); Friedrichs, *supra* note 26, at 477–78.

272. TWINING, *supra* note 271, at 5; Friedrichs, *supra* note 26, at 478.

273. See Friedrichs, *supra* note 26, at 478. Friedrich synthesizes the problem in this way: [W]hen talking about globalization, one is in danger of being blind to the opposite trend of fragmentation; when shifting to the discourse of fragmentation, one can hardly grasp the evidence of globalization; and both the discourse about globalization and the discourse about fragmentation are blind to the fact that the nation-states system continues to monopolize the lion's share of legitimate action in world politics; however, when turning back to the familiar discourse of sovereign nation-states, one becomes unable to capture the evidence of either globalization or localization.

274. See generally TWINING, *supra* note 271.

275. See, e.g., Friedrichs, *supra* note 26.

276. It may also be noted that at the level of academic legal disciplines, it tends toward a much-needed dissolution of traditional boundaries between public international law and comparative law. Cf. Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1114 (2001) (arguing that the notion of international law as the coexistence of different systems constitutes an oversimplified view that harms the understanding of students, scholars, and practitioners).

observable facts rather than expressions of considered judgments.²⁷⁷ Of course, merely observing the existence and the nature of the *ius commune* of human rights does not by itself provide a fully elaborated and independent justification for using foreign sources and comparative analysis in domestic constitutional adjudication. That task has already been accomplished in the recent work of a number of constitutional law scholars who have carefully considered the legitimacy and potential benefits of comparative constitutionalism for the United States and who have offered a multitude of reasons for our courts to retreat from their provincialism.²⁷⁸ What we have seen here of the global *ius commune* of human rights does, however, suggest some additional, complementary considerations regarding the current disengagement of U.S. law from that reality.

First, appreciating how strongly transnational the *ius commune* of human rights is and how its global character contributes to its normative weight confirms that the disengagement of the United States from the phenomenon of the *ius commune* is more than just a local legal idiosyncrasy. It poses the danger of isolating the United States from full participation in the family of nations. Insularity on the issue of the death penalty alone has helped to ostracize the United States from meaningful and constructive engagement with much of the rest of the world.²⁷⁹ Those barriers to dialogue affect not only the effectiveness of diplomatic demarches but also the capacity of U.S. constitutional law to serve as anything but an “anti-model” for other nations.²⁸⁰

Of even greater concern to the tenor and quality of our law—and what the law may express about who we are as a nation, and what it does to educate us as citizens and moral agents—is the U.S. disengagement from the

277. Cf. Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 226, 247 (2001) (“Unlike the use of comparative experience in other nations’ constitutional courts . . . references to foreign constitutional experience in the US Reports rarely concern the reasoning of other constitutional courts.”); McCrudden, *supra* note 257, at 526 (“Foreign law, including foreign judicial decisions, is currently interesting to US courts, if at all, largely as data rather than as statements of legal or moral values in their own right.”).

278. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Jackson, *supra* note 277; Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597; Tushnet, *supra* note 140; Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (all arguing that American judicial disinterest in comparative constitutional jurisprudence isolates the United States from growing international dialogue, hinders the growth of American pragmatic and normative insight, and inhibits the development of shared legal norms).

279. See Koh, *supra* note 8, at 1105–06 (noting that “the United States’ adherence to the death penalty has become a growing irritant with other nations”).

280. See Klug, *supra* note 278, at 616 (stating “this failure to engage threatens increasingly to marginalize the experience of the constantly evolving United States Constitution that was once the inspiration of all constitutionalists”).

second aspect of the *ius commune*, its principled universality and its foundation in an affirmation of human dignity. The dis-integration of United States legal discourse from the dignitarian foundation of human rights threatens to become the disintegration of our capacity to understand and reason about the moral dimensions of the human person and the common good. Severing the ideal of dignity from the law is a reduction of rights to positivism and historicism. The perspective gained from the *ius commune* helps us become aware of just how bizarre and sterile those understandings can become.

The failure to acknowledge and engage the universal human values that underlie human rights does more than deprive us of the most important language for cross-cultural dialogue about the requirements of justice in the world. Ultimately, it diminishes our ability to understand ourselves and our own moral resources. One small but revealing example of this can be seen in a recent lecture Justice Scalia delivered at the University of Chicago, in which he dismisses the abolitionist movement as merely a recent manifestation of the values of Europe's secularized democratic society, in contrast to those of "the Church-going United States."²⁸¹ Justice Scalia's comments betray an astonishing unfamiliarity with the moral sources of the abolitionist cause, both abroad and at home. While it is certainly true that within the Christian tradition, including the teaching of the Catholic Church, capital punishment has historically been considered licit, the anti-death penalty movement in Europe and elsewhere is far more than a political manifestation of "post-Christian" values. On the contrary, for many centuries it has been nourished substantially by Christian religious commitments and communities, and it still is.²⁸² Beyond Europe, as well, Justice Scalia's speculation that "the more Christian a country is the less likely it is to regard the death penalty as immoral"²⁸³ could only be explained by a radical disengagement with the world around us.²⁸⁴ The price of that insularity is a self-satisfaction that can blind us to our own humanity.

281. Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17–21.

282. See generally JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997) (discussing treatment of the death penalty from the medieval church to the twentieth century). More current European abolitionist efforts are exemplified by the work of the International Federation of Action by Christians for the Abolition of Torture (FIACAT), an ecumenical network for the abolition of torture and the death penalty that includes national associations in France, Germany, the Netherlands, and Switzerland. See FIACAT website, at <http://www.fiacat.org/GB/Cadre1.htm> (last visited Nov. 21, 2002).

283. Scalia, *supra* note 281, at 18.

284. For example, according to Amnesty International, 90% of all known executions in 2001 took place in only four countries: the United States, China, Iran, and Saudi Arabia. For the same year, Amnesty International recorded just three executions of juvenile offenders—one in Iran, one in Pakistan, and one in the United States. Amnesty International, *Facts and Figures on the Death Penalty*, at <http://www.web.amnesty.org/rmp/dplibrary.nsf/> (last visited Nov. 21, 2002). And prior to *Atkins*, the United States was the *only* country that still executed the mentally retarded. Koh, *supra* note 8, at 1124.

Encountering the discourse of human dignity in the *ius commune*, instead, can be like meeting an old friend whose companionship reminds us who we are meant to be. At present, like Pär Lagerqvist's poem quoted in the epigraph to this Article,²⁸⁵ U.S. death penalty jurisprudence seems to be saying that that friend is a distant stranger, and even wondering whether he exists. Perhaps the door left ajar in *Atkins* will lead us to look out and to see that the stranger at our threshold does exist, fills the entire world with his presence, and is a friend.

With respect to Justice Scalia's comment more generally, it may also be noted that opposition to and abolition of the death penalty has a long heritage in the human rights tradition of Latin America, which in turn has been deeply influenced for over 500 years by its Catholic intellectual and moral roots. See Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. (forthcoming 2003); Paolo G. Carozza, "They Are Our Brothers, and Christ Gave His Life for Them": *The Catholic Tradition and the Idea of Human Rights in Latin America*, 6 LOGOS (forthcoming 2003).

285. See text accompanying note 1.