A Juridical Voyage of “Essential Practices of Religion” From India to Malaysia and Pakistan

Shylashri Shankar

Abstract
The article follows the voyage of the concept of “essential practices of religion,” which was created in India and later borrowed by judges in Pakistan and Malaysia. It explores whether concepts and the way they are used by judges transnationally, can be identified systematically to illuminate types of contestations over the nature of constitutional identities. It uses a tool of conceptual history, onomasiology, which refers to the tracing of all names and terms for the concept of “essential practices” in these judgments, to identify the network of concepts in the constitution within which “essential practices” is situated by each judgment to create a particular meaning and outcome for religious freedom in that country. State, religion, and rights are the three pivots for the debates. It demonstrates that it is possible to transcend the problem of translatability, by asking not whether “essential practices” (or any other concept) has the same meaning in all contexts (it does not), but whether a judge who wants to privilege a particular constitutional identity uses essential practices in a particular way within a network of concepts. This approach treats judges as interpreters who are embedded within specific social, historical, and political contexts, and who strategically use foreign case-law to impose their vision of the nation’s constitutional identity. The article’s conclusions problematize the transferability of concepts such as democracy, religious freedom, authority, and so on to Iraq, Afghanistan, and Syria, among others.

Keywords
religious freedom, jurisprudence, conceptual history, essential practices, onomasiology

1Centre for Policy Research, New Delhi, India

Corresponding Author:
Shylashri Shankar, Centre for Policy Research, Dharma Marg, Chanakyapuri, New Delhi 110021, India.
Email: shylashris@gmail.com
Introduction

It is not surprising for a common law judge to look to foreign courts for answers to the tricky problem of balancing religious freedom with other fundamental rights. Religion, after all, has a transnational dimension, and where better to find inspiration for resolving a particularly thorny matter than in the docket of a sister-judge who has already faced a similar clash. Transjudicial meetings, human rights networks, and multilateral and bilateral concerns with the rule of law have created a salubrious environment for more exchanges between judges, lawyers, constitutional experts, academics, and civil society activists. However, figuring out what is in fact being exchanged is much more difficult. For instance, in 1962, the Supreme Court of India ruled that excommunication was an “essential practice” of Ismaili Shia religion. Two decades later, the Supreme Court of Pakistan referred to the Indian case to argue that the use of Islamic symbols and public ceremonies were not an essential part of the religion of the Ahmadis who had been legally categorized as “not Muslim” by the constitution. In 2006, the Malaysian Court of Appeals (the high court) drew on the Indian case to argue that wearing a serban (turban) was not an essential practice of Malaysian Muslims, and struck down the lower court verdict. Did “essential practices of religion” mean the same thing to the judges in the three contexts?

Tracing the voyage of a concept is important for several reasons. First, by examining how a judge uses the concept, we can answer whether a concept has a similar meaning when it migrates to foreign shores, what aspect of the meaning changes, and why such changes occur. Second, it allows us to engage with those who argue for a convergence of outcomes either because of a “one size fits all” approach (the World Bank) or owing to the impact of international agreements (Slaughter & Burke-White, 2006) and comment on the exportability of concepts such as “secularism,” “democracy,” “human rights,” and “religious freedom.” And third, finding a way to assess the concept’s meaning allows us to understand the extent of the transformative impact of foreign and international laws on national sociopolitical questions.

There are three issues involved in examining the migration of a concept. First, is the concept translatable? Apparent similarities or differences among constitutional norms may prove misleading—for instance, while constitutions may provide “freedom of religion” or “freedom of speech” as a basic right, there may be major discrepancies in how these concepts are construed (Rosenfeld, 2003). This is the translation/culture objection (does the concept meant the same thing in other contexts). If rules, as Legrand (2006) argues, are inseparably connected with local cultures, then how can they be transplanted to other cultures? In the same vein, Justice Antonin Scalia of the U.S. Supreme Court, while pointing out that foreign law is very useful in devising a constitution, questions the usefulness of such law for a judge engaged in interpreting the constitution.¹ Justice Scalia’s objection to the use of foreign law is twofold—(a) in principle, judges ought not to use foreign law to interpret the meaning of their own constitutions, which were designed for local conditions, people, and morals; (b) he objects to the manipulable nature of such usage, saying it was not “the job of the Constitution to change things by judicial decree; change is brought about by democracy” (Debate). But this
view sees societies as relatively isolated and insular communities, which is not the case today, or even earlier, since societies did and have borrowed institutions and their underlying rationale from abroad (Michaels, 2013).

In contrast, formalists such as Alan Watson (1974) argue that if we view law as a rule, then rules can and do travel; but Watson is less interested in whether the rule would produce similar outcomes in the new setting. As Ralph Michaels (2013) points out, Legrand’s critique is less applicable to formalists if law is read as an artifact, rather than as an empty rule, and when transplanted, provides societies with instruments that help them transform themselves.

Second, even if the concept is translatable, ought judges be the vehicles for transformation? The concern here is whether judges are capable of comprehending the meaning correctly. Scalia, as we saw above, does not think it behoves the judge to apply foreign case law. The problems of analyzing transjudicialism are further complicated by questions on how to distinguish between principled reasoning and opportunistic reasoning, and how to ascertain if the judge was merely cherry-picking, or had a principled goal in mind while borrowing a concept, and whether cherry-picking ought to be reviled especially if judges use foreign cases to clarify the issues in their own jurisdictions.

Third, even if these ideas are translatable and applied by judges or constitutionframers/amenders, will the outcomes be similar in the new settings? The World Bank and the “rule of law” reformers in the international community view transplanted law as having the capability to produce similar outcomes. But as culturalists point out, if law acts as a mirror to reflect the spirit of the community (Montesquieu, 1989), does not law’s rich “nomos” (Cover, 1983) make convergence impossible? With all these issues, why bother to investigate the travel of a concept?

Not so fast, say other scholars. Investigating the use of foreign precedents would allow judges to understand how someone else in a different country tackled a similar issue (Breyer, 2015), expose constitutional identity and disharmonies within (Jacobsohn, 2010), and enable a dialogical approach to using comparative materials as a foil to expose factual and normative assumptions underlying the court’s own constitutional order (Choudhry, 2006). Instead of rejecting transjudicialism, it would be fruitful, therefore, to examine what a concept means in different contexts (i.e., the translatability question) by analyzing how a concept is used by the judges (the judicial behavior question) to illuminate the contestations over the nature of the country’s constitutional identity(ies) (the outcome question). Such an approach avoids a binary viewpoint (e.g., is transjudicialism good or bad, are judges capable/incapable, or is the use of the concept principled/opportunistic) and helps us to understand the nuances of judicial usage of imported concepts and gauge the impact of foreign laws on domestic arrangements.

Judges, then, in this approach are not simply those who always privilege the secular position (contra Hirschl, 2011, on the propensity of constitutional court judges in India, Pakistan, and Malaysia to tilt toward the secular), or simply opportunistic actors. Rather, they are interpreters embedded within specific social, historical, and political contexts, who strategically negotiate with foreign case-law to impose their vision of
the nation’s constitutional identity. Here, my argument coheres with Gary Jacobsohn (2010; Jacobsohn & Shankar, 2013) and Sujit Choudhry (2006), particularly with their notion of dialogical articulation. If we understand identity “dialogically,” that is, as an interactive process in which a person develops a self in response to an environment consisting of religion, family, state, and so on, we can apply this notion to the way a judge deals with the concept, that is, as an embedded negotiator (Shankar, 2009). I am not saying that only the judiciary is capable of such dialogical reasoning, and neither am I proposing a juricentric model. What I propose is to use conceptual history as a method to study the process by which a judge assigns meaning to a concept.

First, we need a concept that has travelled. A keyword search in Manupatra identified a set of judgments in Malaysia and Pakistan that used a ruling from the Supreme Court of India on an issue pertaining to religious freedom. The concept “essential practices of religion” has been used by the three sets of courts. India, Malaysia, and Pakistan are bound by a common colonizer (Great Britain), familiarity with one another’s cultures (the colonial period saw large numbers of Indian Hindus and Muslims migrating to Malaysia; and before Partition of India in 1947, Pakistan and India were one country), a common law legal system and a similar educational and class profile of judges, and religiously polarized societies. Islam is the religion of the majority in Pakistan and Malaysia, while India, with a Hindu majority, also has the second largest population of Muslims. In addition, the trio have strong links, particularly in relation to the framing of the religious freedom articles in their constitutions. But above all, what the three countries share is similarity in the type of questions posed to the court on the nature of religious freedom when it clashes with individual rights or the rights of other groups, and the appropriate distance the state ought to maintain from religion.

Since the focus is on “what” travels, the first section outlines the way in which we can use conceptual history to unpack “what travels,” and by doing so also answer the questions of translatability, judicial behavior, and outcomes. It tests this claim in the three countries in the sections that follow.

The Uses of Conceptual History

Conceptual history is a method of interrogating the history of concepts and their use. Its methodological principles make its use in decoding legal jurisprudence promising in three ways. First, conceptual history has a broad conception of the concept and its meaning. A concept, according to Reinhart Koselleck, is more than a word, and unlike a word, which in use can become unambiguous, a concept must remain ambiguous to be a concept. For instance, the concept of “state” includes domination, jurisdiction, army, bourgeoisie, and so on (Koselleck, 2004, p. 84). A concept therefore is a concentrate of several substantive meanings, and for conceptual history, concepts such as state, government, and democracy and the debates around them are pivots and indicators of key social and political changes. Second, it offers a concrete methodology for tracing these meanings: onomasiology, which refers to the tracing of all names and terms for the concept; and semasiology, which refers to the tracing of all meanings of
the word. It also emphasizes an investigation synchronically (in one period of time) and diachronically by tracing the concept’s use historically. The concept’s utilization is viewed through a network approach (detailed in the next paragraph). Third, conceptual history is deeply conscious of the context—texts must be interpreted and decoded in terms of their contemporary conceptual boundaries, and the self-understanding on the part of past constitution framers and writers. In other words, there is a dynamic interaction between conceptual change and social change (Richter, 1996).

To trace the meaning(s) of “essential practices of religion,” I use the “network” approach advocated by Reinhart Koselleck to analyze the following: (a) where and how a judge places the borrowed concept within a network of concepts drawn from her/his own constitution and (b) how and why the assignment of the concept to a particular network creates a particular meaning and (if it is the majority opinion) an outcome for religion–state relations. By doing so, we can see if conceptual history allows us to coherently address the issues of translatability and the impact on outcomes.

Parts of this method cohere with content analysis, a research technique for making replicable and valid inferences from texts to the contexts of their use (Krippendorff, 2004). Conceptual history provides us with a bridge between methodological tools that answer the “what” question (content analysis) and those that answer the “why” question (legal interpretive technique). The strength of content analysis, as Hall and Wright (2008) point out, is to provide an objective understanding of a large number of decisions where each decision has roughly the same value. However, it is less useful when decisions have different values—for example, an apex court judgment or a majority judgment has more value than a lower court or minority ruling. In contrast, interpretive methods make no empirical claims about a body of law, but are able to delve deeper and uncover the reasons for a particular judgment. Conceptual history, I argue, can do both.

1. The “what” question: To answer the “what” question, a textual analysis will reveal the building blocks of concepts used by a judge to arrive at a particular conclusion. I will construct the network of concepts for each judgment by analyzing the process of a judge’s reasoning and the concepts he/she uses in constructing the argument. For example, in the Syedna judgment (tackled in the next section), the majority opinion’s network contains religious toleration, secular, democracy, disciplinary power of religion, while the minority opinion’s network consists of social welfare, human dignity, and modernity.

2. The “why” question: For conceptual history, agents (judges) will always insert their own historical experiences in the way they comprehend and use the concept. A valuable insight offered by Koselleck is that modernity sees a sharp divergence between experience and expectation, unlike the premodern era where experience and expectation overlapped. It is the tension between experience and expectation, which in ever-changing patterns, that brings about new resolutions and through it, generates historical time, says Koselleck. A judge’s understanding of a case will be analyzed through the application of Koselleck’s space of experience and horizon of expectations. Each network identified in
Point 1 will be classified in terms of a judge’s privileging of experience or expectation. For instance, in the Syedna judgment, the majority opinion focused on the experience of the country—religious conflict and bloodbath surrounding India’s partition in 1947—and emphasized the importance of providing minorities with religious freedom. The minority opinion emphasized the expectation, that is, the aspirational goal that the state would deliver social justice to its citizens by removing sources of discrimination.

3. **Combining the “what” and the “why”:** The claim is that conceptual history can offer us an objective understanding of patterns of networks that would produce a particular outcome for a clash between religious freedom and other human rights. I therefore, will analyze whether judges in different contexts, in their framing of a particular expectation of the state, use similar networks to surround the concept of essential practice. For instance, do a Pakistani judge and a Malaysian judge who want their countries to privilege an Islamic national identity use similar networks? As mentioned earlier, in the absence of a large number of cases, this is primarily an exploratory exercise. We have very few judgments to be able to establish the replicability and validity the way that content analysis would be able to do. However, my contention is that the conceptual history method contains the possibility of doing so.

To recap, the methodology should enable us to identify a network of concepts within which each judge situates “essential practices of religion” to privilege experience or expectations, and should also give us pointers on which configuration is used for a particular type of expectation/experience.

**“Essential Practices of Religion” in India**

In 1962, the head priest (Dai ul Mutlaq) of the Dawoodi Bohras (an Ismaili Shia community) challenged the Bombay Prevention of Excommunication Act (1949) on grounds that excommunication was “an integral part of the religion and religious faith and belief of the Dawoodi Bohra community.” In his petition, the Dai connected the concepts of “religious freedom,” “autonomy,” and “religious discipline” with the fundamental right to practice religion (Article 25) and to manage religious denominations (Article 26). Meanwhile another petition was lodged by a Dawoodi Bohra who challenged his own excommunication by the Dai prior to the passage of the Act. The Supreme Court of India was asked to decide on whether the Act contravened the rights guaranteed under Articles 25 and 26 of the Constitution.

Agreeing with the Dai, the majority opinion said that the religious freedom articles in the Constitution protected religious belief and practices that were integral parts of the religion. Integrality, said the court, had to be assessed in light of doctrine and what the Bohra community regarded as integral. In other words, the premise of the court was that religions have fundamental characteristics evident in the practices and discoverable by those practicing it (self-assertion test), and by an external agency (evidentiary test), and a combination of the two methods would produce an answer. For our purposes,
what is more striking is that the judgment highlighted two tensions within the constitution—religious freedom versus social justice; and religious freedom versus civil liberties. After categorizing the issue as a clash with civil liberties (of the excommunicated Bohra), the court held that the practice of excommunication was an “essential practice” of Dawoodi Bohras. One of the judges (Justice Ayyangar) pointed out that Articles 25 and 26 “embody the principle of religious toleration that has been the characteristic feature of Indian civilization . . . [and] emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the Constitution.”

The minority opinion, on the other hand, specified three reasons for supporting the validity of the Act. First, the case was justiciable and was not a purely religious matter because of a precedent (Privy Council case, Hasanali v Mansoorali ILR [1947] Ind Ap 1), and alluded to the unsatisfactory nature of the evidence. Second, the right to practice religion was not absolute but subject to limitations of criminal laws. And third, the Act fulfilled the “individual liberty of conscience guaranteed by Article 25(1)” and was a logical corollary of the Indian Constitution’s ban on untouchability (Article 17) since an excommunicated person “becomes an untouchable in his community.”

An onomasiology (tracing different terms used to refer to the concept) of “essential” in the majority opinion reveals that the terms integral, part of, strength, central, foundation, basic, very life, and core were used for the concept of “essential.” In the minority opinion, integral was used frequently. Thus far, the two opinions do not diverge. But when we turn to the network of concepts surrounding essential practices, the stories diverge. For the majority opinion, the network includes secular, Indian democracy, religious toleration, disciplinary power of religion, community, civil liberties, “not social justice.” For the minority opinion, it includes social welfare, human dignity, individual liberty/freedom, public order, modern, civil rights, and secular. I will return to the network and how it influenced the outcome after we understand the source of the concept and why it was coined.

Koselleck’s advice is to understand the substantive meaning of a concept; we must first situate its use within a historical and political context. “Essential practice” is not mentioned in the Indian constitution. Article 25 gives all persons equal rights to freedom of conscience and to profess, practice, and propagate religion subject to the usual caveats of public order, morality, and health. In addition, it hedges the right for those practicing Hinduism (includes Sikhs, Jains, and Buddhists) by allowing the state to reform unequal practices in Hindu religion to fulfill the constitutional guarantee of social welfare and reform, while also permitting the state to regulate the secular aspects associated with religious practices of all religious groups.

So where did the judge find the concept of essential practice? It appears in a discussion on the scope of Article 26(b)—management of its own affairs in matters of religion—in the Shirur Mutt case that pertained, among others, to the property rights and protections offered by Articles 25 and 26 to the head of a Hindu religious endowment.

The question is, where is the line to be drawn between what are matters of religion and what are not?” . . . The learned Attorney-General lays stress upon Clause (2)(a) of the
Article [Article 25] and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.\(^{10}\)

The term “essential” was coined because Indian courts had to make a distinction between matters of religion and matters of secular activity amenable to state regulation. Here, we see the practical implications of the twin constitutional injunctions on the Indian state. This was to undertake ameliorative actions to address the historical inequities meted out to the lowest caste of Hindus (scheduled castes) and to the indigenous tribes (scheduled tribes), while pursuing a vision of interreligious bonhomie through the guarantee of religious freedom and secularism. The fulfillment of social justice meant that the state had to answer legal challenges to its intervention in reforming the religious practices of Hindus such as allowing entry of the lowest castes into temples and abolishing untouchability. The fulfillment of interreligious bonhomie called for caution in dealing with the large Muslim minority who remained after the Partition, and took the form of nonintervention in the religious practices of Muslims and Christians.

Subsequently, the concept of “essential” surfaced in two other cases on the regulation of religious charitable trusts. The apex court held that the protection of Article 26 (right of religious denominations to establish, maintain, and manage its own matters in matters of religion) only extended to such religious practices that were essential and integral parts of the religion.\(^{11}\) In another case where Muslim butchers challenged an Act banning cow slaughter (sacrificing a cow was a religious practice during Bakr Id, they said), the court pointed out that the “materials before us are extremely meager” to substantiate the claim that the sacrifice of a cow was enjoined or sanctioned by Islam.\(^{12}\)

While neither opinion challenged the meaning of “essential” as integral, they did differ on how it was to be interpreted by the state in conjunction with a constitutional command. In the Syedna judgment, the groupings of concepts around state, religion, and rights display the difference between the two conceptions of essential practices and the judges’ emphasis on a particular element of the constitutional diktat. The majority opinion, when viewed through the lens of a tension between experience and expectation, emphasizes the experiential aspect of Indian constitutional identity. The space of experience—the bloodbath and religious polarization between Hindus and Muslims during the Partition of India in 1947 and the subsequent attempts to make religious minorities feel “at home” in a Hindu majority India—meant that if a non-Hindu religious doctrinal text could show that a practice (even a discriminatory one like excommunication) was an important part of their religion, the group would be allowed to retain it because the state “cannot reform a religion out of existence” (Figure 1). In contrast, the minority judgment emphasizes the horizon of expectation—that practices (excommunication) antithetical to human dignity and civil liberties ought to be reformed by the state in accordance with the constitutional directive to deliver social justice (Figure 2). Hence the comment about excommunication being a form of untouchability.
The networks surrounding the concept in the majority and the minority judgments in *Syedna*, thus become comprehensible when viewed through the lens of conceptual history. In its first appearance in the docket of the Supreme Court, the concept was placed in a configuration that included “secular activities,” “property,” and “state regulation.” Only the doctrine of a religion could say what was “essential,” but the wording was such (“to be ascertained with reference to the doctrines”) that it left open the possibility that an external actor (the Court) could ascertain the essentialness. In the next use, the network included “social welfare,” “part of religion,” “reform,” “Hindu religious institutions,” and highlighted the ameliorative aspect of the constitution. In the subsequent case, the network included “religious charitable trust,” “integral part,” “Sufi,” “property,” “duties of Khadim.” Now we begin to get a picture of when the concept of “essential practices” crops up in the court—on issues where the state has to regulate the secular functions of a religious group (applies to all religions), or when the state has to undertake social reform among Hindus, or when a religious practice is at odds with a constitutional directive to the state. Essential, in relation to Hindu practices such as untouchability and temple entry that contravened a constitutional command, was treated differently (i.e., the state’s interventions were allowed) by the court as compared with Muslim practices (such as excommunication) that did not contravene a constitutional command.\(^\text{13}\)

While neither the majority nor the minority opinions challenged the meaning of “essential” as integral, they did differ on how it was to be interpreted by the state in conjunction with a constitutional command. The groupings of concepts around state, religion, and rights display the difference between the two conceptions of essential practices and the judges’ emphasis on a particular element of the constitutional diktat.

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\textbf{Figure 1.} India: Majority judgment network.
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This aspect will be tackled again in the final section. Let us now move to Malaysia and assess how “essential practices” is used by the judges.

**“Essential Practices of Religion” in Malaysia**

In the year 2000, the Malaysian Court of Appeals (the court below the highest court) drew on the Syedna case to decide whether the expulsion of three primary school pupils for wearing a *serban* (a turban) to school as part of their religious practice, but in contravention of a school regulation, was lawful. The lower court (the High Court) had agreed with the parents of the school pupils and ruled that the school regulation (prohibiting the *serban*) violated the federal constitution. The Ministry of Education, it said, was the only authority that could decide on the policy on school uniforms. The judge focused on the first part of Article 3(1)—“Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation”—to argue that Islam was preeminent in Malaysia and the *serban*, as a part of the preeminent religion, ought to be allowed in the school.

In the Court of Appeals, Justice Gopal Sri Ram established a similarity between India’s Article 25 and Malaysia’s Article 11(1)—every person has the right to profess and practice his religion and, subject to Clause (4) [public order, public health or morality] to propagate it. He drew on an observation in the Syedna case that the protection provided by India’s Article 25 included rituals, observances, ceremonies, and modes of worship regarded as integral parts of the religion. The forms and observances also extended to food and dress. What would constitute an “integral” part of religion? Justice Sri Ram referred to another case from India for the test: whether the nature of religion would be changed without that impugned part or practice. The implication of
the test, Justice Sri Ram noted, is that only the permanent essential part is protected by the constitution, and this part is perceived to be mandatory. Who would decide on what constituted an essential part of religious practice? The courts would, “with reference to the doctrine of a particular religion and include practices, which are regarded by the community as a part of the religion.”

Justice Sri Ram drew two principles from the Syedna case: (a) freedom of religion included practices that were integral to that religion; (b) these practices could be determined as a fact based purely on relevant and admissible evidence. He then applied a test of integrality, saying that one could adduce from evidence whether wearing a serban formed an integral part of the religion of Islam. The Court of Appeals found that there was not a shred of evidence to prove that it was mandatory for a Muslim to wear a serban, and issued a judgment in favor of the school authorities.

The onomasiology of “essential”—integral, essential, permanent, and mandatory—was similar to the Indian case, as was the way the judge applied the evidentiary test. But, as we shall see shortly, the network within which he placed the concept highlights a different type of contestation over constitutional identity in the Malaysian case.

The parents of the pupils appealed to the apex court, the Federal Court of Justice (FCJ), which also dismissed their appeal, but on different grounds. The judgment noted that the Court of Appeals had been criticized for being heavily influenced by Indian authorities in interpreting Article 11(1), when the two constitutions are so different . . . especially because of the differences between the provisions of the Indian Constitution and the Federal Constitution, in particular, the preamble to the Indian Constitution declares India to be a secular state and no religion of the state is provided. It is also said, who is to decide whether a particular practice is an integral part of a religion or not?

From this criticism, Justice Abdul Hamid Mohamad developed his argument without relying on foreign citations. Rejecting the concept of “essential practice” (who is to decide what is essential, he asked), Justice Mohammad laid out the steps in his reasoning. One must prove that there is a religion (Islam is a religion, he said), then it must be established that there is a practice and the practice is a practice of Islam. From this, one might infer that the judge had discarded the concept of “essential.” But no.

This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or “an integral part” of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it.

Here, the judge first used the term “compulsory” to mean “integral,” and then reduced the intensity of “integral” by referring to “degree of its importance.” The appropriate test was whether the wearing of the serban was an important practice, and to determine it, the judge used a distinction between commendable and mandatory in Islam.
Islam is a religion . . . As far as I can ascertain, the Al-Quran makes no mention about the wearing of turban . . . the wearing of turban is “sunat” . . . the “practice” is of little significance from the point of view of the religion of Islam, what more, in relation to under-aged boys . . . Moving to the second factor which, in my view, should be considered i.e. the extent of the “prohibition” . . . We are not dealing with a total prohibition of wearing of the turban . . . [only] during school hours . . . Coming now to the third factor that in my view, should be considered i.e. the circumstances under which the “prohibition” was made . . . Whether we like it or not, we have to accept that Malaysia is not the same as a Malay State prior to the coming of the British. She is multi-racial, multi-cultural, multi-lingual and multi-religious. It is difficult enough to keep the 14 States together. By any standard, Malaysia’s success has been miraculous in terms of unity, peace and prosperity. Whatever other factors that had contributed to it, we cannot ignore the educational system that had helped to mould the minds of Malaysian boys and girls to grow up as Malaysians . . . Our educationists, with their experience in dealing with students on the ground, should be given some respect and credit when they formulate some regulations applicable in their schools for the general good of all the students, the society and later the nation.

The FCJ too dismissed the parents’ appeal. It rhetorically eschewed the use of foreign (Indian) law, but deployed the concept of essential practice de facto in balancing a multicultural Malaysian without undercutting the importance of Islam. So though the meaning of “essential practices” in Malaysia included integral and fundamental, the substantive meaning of the concept acquired a different flavor because of the historical, political, and social characteristics. To understand the flavor, we would have to conduct a diachronic study of the role of Islam in defining Malaysian constitutional identity (was Malaysia an Islamic state or a secular state?), the contestations between secular groups and religious ones over freedom to and from Islam, the majority/minority divide, the contestations on whether the “Islam” of Malaysia shares fundamental similarities with Islam elsewhere (see Moustafa, 2014, who argues that it does not), the disparities between the words of the first Malaysian prime minister and a more recent one on the relationship between the Malaysian state and religion (particularly Islam), the increasing shrillness of those championing an Islamic identity for the country, the consolidation of Islam’s hegemony in the personal law of Malay-Muslims (Moustafa, 2014; Neo, 2014), the contestations over its impact on human rights, and the orientations of the different levels of the judiciary in arbitrating these conflicts. These factors transformed the Indian story of a struggle over religion’s autonomy from state intervention into a Malaysian story of a struggle for the control of the state by the religion (Islam) of the majority.

Unlike the High Court judge who privileged the first part of Article 3(1), the Appeals Court and the FCJ refer to Article 11 (freedom to profess and practice religion) but not Article 3. In fact, the FCJ admonished the High Court for its statements on the preeminent position given to Islam. From this, one might infer that the FCJ was demonstrating the veracity of Ran Hirschl’s argument about a secular tilt of constitutional courts. But to generalize from one case is not tenable, since as we shall see shortly, other cases show a contrary tilt. Instead, it would be more instructive to view
the admonishment, and the network within which the FCJ situated the wearing of the serban through the lens of a previous judgment. In Che Omar bin Che Soh v Public Prosecutor [1988] 2 MLJ 55, a five-judge bench unanimously weighed in on the interpretation of Article 3(1). After tracing the history of Islam in Malaysia and noting that British colonial rule had established secular institutions, the court outlined the legal contours of Islam in independent Malaysia.

“Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only . . . it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word “Islam” in the context of Article 3.” Had it been otherwise, “there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void . . . the law in this country is still what it is today, secular law.”

Other pronouncements capture this dichotomy. The first Prime Minister of Malaysia, Tunku Abdul Rahman Putra wrote in 1986:

I mentioned that this country is a secular state. It means that it is not a Muslim state. Islam is the official religion of the country, but other religions have a right to play their part as far as religion is concerned. This is about it—but it is not absolutely a secular state because if it were so, there would be officially no religion. So it is the state which give freedom to all religions to carry out their worship. The Constitution has more or less set out the point. (p. 25)

We can understand the link between the use of the concept and judicial strategies in trying to impose a particular strand of constitutional identity only after we understand the relationship between the concepts of “Islam” and “religious freedom” and the concepts of “nation” and “Malaysian.” The High Court judge connected “Islam” with “preeminence,” “Malaysian” and “nation” and allowed the pupils to wear a serban. The Court of Appeals linked the right to “religious freedom” with only the “mandatory practice” of a religion, and used Article 11 rather than Article 3, thereby avoiding the question of the connection between Islam and Malaysian. The apex court too focused on Article 11, but connected “multi-racial, multi-cultural, multi-lingual and multi-religious” with “Malaysian,” “nation,” and “general good.” While a tilt toward a “secular and multicultural” Malaysia is discernable in the apex court’s majority judgment, a subsequent case does not demonstrate such a tilt (Figure 3).16

Applying the frame of experience and expectations, the High court’s network highlighted the aspirational expectations of one part of the constitutional right—Islam as a preeminent religion; while the apex court (FCJ) emphasized the aspirational expectation of creating a multicultural/multireligious Malaysian who transcended religious affiliations; and the Court of Appeals emphasized the experiential aspect of retaining a non-Islamic, multireligious constitutional identity (see Figures 4 and 5). The networks used by the High Court and the Court of Appeals would overlap with some concepts in the majority ruling in the Indian Syedna case with one crucial difference—Hinduism is not privileged in India the way Islam is in Malaysia. The FCJ’s network
would overlap with parts of Syedna’s minority ruling network—both emphasized the construction of an aspirational constitutional identity as secular, multicultural Malaysians and secular and modern, socially just Indians. We, however, need more...
cases in these categories to be able to pick recurring configurations. Let us turn to Pakistan to see if a similar scenario plays out there.

“Essential Practices of Religion” in Pakistan

In 1988, four Ahmadis were convicted under the Penal Code after it was amended by Ordinance XX, for wearing badges with the Kalima (Islamic declaration of faith) and “for claiming to be Muslims” when a constitutional amendment had categorically defined them as “not Muslim.” Two other Ahmadis were banned from celebrating their centenary with public displays including processions, use of loudspeakers, and so on. Ahmadis are a small minority whose self-identification as Muslims is disagreeable to some other Muslims because of claims made by Mirza Ghulam Ahmed, the 19th century Indian founder of the Ahmadi faith who saw himself as a reformer akin to, if not, a prophet of God.

On appeal, the question for the Supreme Court of Pakistan was: Does Ordinance XX constitute a restriction on the Ahmadis’ fundamental “freedom to profess religion” under Article 20? Let us begin with the majority opinion, the bulk of which was devoted to establishing that Ahmadis were not Muslims because their beliefs were at variance with Islam (Mahmud, 1995). The problem for the court was how to categorize the religion of the Ahmadis who had been legally prohibited from calling themselves Muslims under Article 260(3). The court avoided the “naming” of the religion and used the “essential practices” test from Indian case law to assess whether the appellants’ practices were indeed integral to their religion. Here, we see the use

Figure 5. Malaysia Federal Court of Appeals network.
of Indian cases to construct the rules of deploying the concept in a legal formalist sense. It referred to cases (Shirur Mutt, Durgah Committee) where the Indian Supreme Court defined religion as a doctrine of belief and rituals and observances, and delineated the protection offered by the constitution for only those practices that were essential and integral, and prescribed the self-assertion test (the religion had to assert that these were essential) as evidence for the integrality. But had they left it there, the Ahmadis would have won the appeal on the basis of their self-assertion. The court then drew on another case from India (Jagdishwaranand v Police Commissioner, Calcutta) where the court had appropriated the power to determine the validity of the assertion by a religion that a rite was an essential part thereof. Armed with this reasoning, the apex court of Pakistan ruled that the Ahmadis had not demonstrated sufficient evidence that would have satisfied the court that the practices were indeed integral to their religion. He linked the Act’s prohibitions on Ahmadis actions to the constitution’s special relationship with Islam and decreed that it was now positive law. Tayyab Mahmud (1995) notes that the court collapsed any distinction between state and private acts when it designated the declaration of Ahmadis as non-Muslims by the Pakistan Constitution as an excommunication. Did this mean that the state through the anointing of Islam as the official religion had become the religious head or the high priest of Islam in Pakistan? That certainly seems a valid reading if we look at the majority opinion’s use of the Syedna judgment.

[T]he right to oust dissidents has been recognized, in favor of the main body of a religion or a denomination, by the courts, and a law prohibiting such an action was declared ultra vires of the fundamental rights, by the Indian Supreme Court.

The majority opinion characterized the tussle as one between public order and freedom to practice religious beliefs that are integral to that religion.

So whenever or wherever the state has reasons to believe, that the peace and order will be disturbed or the religious feelings of others may be injured, so as to create law and order situation, it may take such minimum preventive measures as will ensure law and order . . . even fundamental rights . . . must not violate the norms of Islam . . . even the essential religious practices have been sacrificed at the altar of public safety and tranquility [in foreign cases].

References to the Syedna case were made to invoke legitimacy for the rule that a law imposing civic duties could not be characterized as a law infringing religious freedom. “We have referred to the above view from other countries, which claim to be the secular and liberal, and not religious or fundamentalists.”

The majority opinion’s network included “ideological state,” “Muslim believer,” “defiling,” “non-Muslim minority,” “heretic,” “law and order,” “public peace,” “constitutional injunctions of Islam,” “Muslims on a different pedestal,” and “no covenant with minority” (see Figure 6).

The minority judgment, on the other hand, agreed with the Ahmadis on grounds that invitation to one’s faith when it is not accompanied by other objectionable features cannot
be condemned (see Figure 7). Moreover, posing involved voluntary representation whereas here the appellants were questioned, so their response was “under duress.” More strikingly, for purposes of this article, the judge characterized the issue as a clash between inconsistency with the injunctions of Islam and inconsistency with fundamental rights, and favored the latter. As Mahmud points out, Justice Shafiur Rahman rejected the position that due to the incorporation of the Objectives Resolution as a substantive part of the Constitution by virtue of Article 2-A, the whole constitution including the fundamental rights were controlled by and subordinate to the injunctions of Islam. He quoted a previous chief justice’s statement that the citizens should receive a liberal interpretation of the constitution particularly on issues of freedom of conscience. The network of concepts in the minority judgment reveals that the freedom to practice was linked to “historical usage” (of the terms by the Ahmadis), “unobjectionable conduct,” “duress,” “belief,” “own faith,” “fundamental rights” (freedom of expression, equal protection of the law), “religious freedom,” “liberal,” and “citizen.”

If we simply focus on the text in this case without situating it within a context, we would conclude either that the judge’s goal in referring to the Indian case was “cherry-picking” and “opportunistic,” simply to gain legitimacy for a judgment that prohibited a religious group from practicing its religion. But if we approach the Zahiruddin case diachronically and go back to three previous judgments issued in the 1960s, 1970s, and 1980s on the issue, the shift in the perspective of the judges becomes apparent as does the employment of the concept of “essential practices.” In the first judgment (Kashmiri case) in the 1950s, when there was no law against the Ahmadis, the Lahore High court ruled that the Ahmadi right to religious practice trumped the appellant’s
right to freedom of expression, and that the Qadianis (Ahmadis) were citizens. The year 1974 saw the passage of the constitutional amendment (Article 260), which classified all those who did not believe in the finality of the prophet-hood of Muhammad as non-Muslims. Though it was aimed at the Ahmadis, it did not name them. Subsequently, in the Mobashir case on whether the Ahmadis ought to be banned from using the Muslim Azan (call to prayer), the apex court followed the precedent of the Kashmiri case, and handed down a liberal interpretation (Lau, 2006). The Court held that civil law could only be used to protect rights of a legal character. In both cases, as Sadia Sayeed points out, individual rights trumped the moral order of the group and occurred against the background of a fierce struggle between the religious establishment and the state.

Not so, in Rahman and Zahiruddin. Here, the religious lobby had triumphed as a result of political and legal changes propelled by protests on the streets, the initiation of an Islamization process by the democratic regime of Bhutto, and subsequently intensified by the military regime of Zia-ul-Haq, who introduced several changes to the Penal Code between 1984 to 1986, which ensured that it was no longer religious vigilantes who were seen by the law as disturbing public order; it was, rather, the Ahmadis who were seen as the culprits. A further constitutional amendment added a new subclause (b), which stated that

“non-Muslim” means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Quadiani group
or the Lahori group (who call themselves “Ahmadis” or by any other name), or a Bahai, and a person belonging to any of the scheduled castes.

The constitutional changes (298(b) and (c)) made it a criminal offense for an Ahmadi to pose directly or indirectly as a Muslim, to call people to prayer by reciting the Azan, to refer to his place of worship as a masjid, and so on.

In Rahman, the Federal Shariat Court was asked to decide (among other issues) whether Ahmadis were Muslims (no, said the court). The judgment highlighted its understanding of the main tenets of Islam, particularly the notion that Muhammad was the last Prophet. It upheld the validity of the Ordinance arguing that Ahmadis were not Muslims according to the tenets of Islam and that therefore any restrictions imposed on the Ahmadis’ claim to be Muslims would not be repugnant to Islam as laid down in Quran and Sunnah. The ruling now took the reverse view from the earlier judgments. Now the moral order/ethos of Muslims in Pakistan trumped the right to religious freedom of the Ahmadis. Interviews with the main actors (the judges, the political actors, and the clergy) suggest that the judiciary was responding to changes in the political arena (Sayeed, 2007). In Rahman, the Chief Justice was summarily removed, and perhaps it was because his judgment did not reflect this shift, says Sayeed. The new Chief Justice revised the judgment, perhaps to reflect the new reality as perceived by those in power.

The network of concepts—“law and order,” “public peace and tranquility,” “Islam,” “civic duties,” “constitution’s special relationship”—within which the judge situated “essential practices” in the Zahiruddin case makes sense when we are made aware of this history. “Essential practice” involving Ahmadi practices meant something different to a Supreme Court judge dealing with the case in 1988, as compared with the earlier periods in Pakistan because he linked the concept differently to Pakistan’s constitutional identity, which had, by now, acquired an overt Islamic face.

Conclusion

Had we simply focused on the textual comparison of the meaning of the term essential in the two sets of judgments—originating and the borrowing—we would have gone down the path of stating either that the judges in Malaysia and Pakistan borrowed instrumentally, cherry-picked, or were talking about the same concept. Had we used the content analysis software, we would have counted the number of times a term appeared in the text, and the frequency with which some terms were juxtaposed, but sometimes terms such as Malaysian could appear very infrequently but could have a major impact on influencing the meaning of a particular configuration of networks (as we saw in the FCJ judgment).

By using the methods of conceptual history, we have been able shift the question to the uses of the concept of “essential practices of religion.” The concept of “essential practices,” which is deployed in a struggle over religion’s autonomy from state intervention in India, is transformed in Malaysia and Pakistan into the struggle over the control of the state by the religion (Islam) of the majority. The answers give us a more
complex and nuanced view of how the concept functions within specific networks of concepts in the Malaysian and Pakistani landscapes, and how the choice of a network allows the judge to fight the battle for his or her side. The pro- and anti-secularist answers from the three sets of cases challenge Ran Hirschl’s contention that constitutional courts worldwide “have become key agents” of “relative secularism and modernism” (Hirschl, 2011, p. 24). The use of a concept in the above cases cannot be simply attributed to a judge’s whim. If judges do not necessarily exhibit a secularist tilt, then the motivations underlying the choice of a specific network by a judge needs to be probed further. It cannot be answered in this article since it is very hard to theorize about a judge’s motivations without referring to a large number of cases. A few conjectures might be worth testing. For instance, it may not be a coincidence that a judge of Indian origin (i.e., non-Malay origins) in Malaysia referred to Indian cases in many of his judgments and also formulated the concept in ways that answered in the negative to privileging Islam over religious freedom of minorities. Nor that the new Chief Justice in Pakistan who had been appointed in the mid-1980s after the summary dismissal of his predecessor had to show his loyalty to the regime’s interests by dismissing the appeal of the Ahmadis. The tools of conceptual history have allowed us to visualize and understand the tribal nature of a concept—that its meaning is created in juxtaposition to a network of concepts within a context.

Can we uncover similar configurations based on the judge’s championing of experience or expectations? We have only seven examples, so all I can indicate here are overlaps rather than recurring configurations.

The three pivots around which the debates occur in these countries are state, religion, and rights. If the state is perceived as secular, democratic, multicultural, and working for the general good or social welfare or some form of nonpolarization and deliver the rights (human dignity, individual liberty, civil liberties), either through enforcing discipline (through education) or through reforming religion, an “essential practice of religion” can be subordinated to these goals. The judges test the religious practice for its mandatory or integral nature or its degree of importance and find it deficient. The judgments of the Malaysian FCJ (Figure 5), the Malaysian Court of Appeals, and the minority opinion of the Indian Supreme Court (Figure 2) are similar on these aspects.

If the secular and democratic nature of the state is emphasized in conjunction with religious toleration, and with the power of religion to discipline and to bind a cohesive community, along with the rights to religious freedom and civil liberties, the judgments would support religious freedom by privileging the self-affirmation by the Believer (Ahmadis in Pakistan), religious toleration, and religious communities (Dawoodis in India). The networks of the Indian majority ruling (Figure 1) and the Pakistan minority judgment (Figure 7) overlap. If religion is associated with Islam, and if it is seen as preeminent or on a pedestal vis-à-vis other religions, and the state is entrusted with the task to forge an Islamic nation and provide public peace and tranquility, Islamic religious practices would be given precedence. The majority judgment’s network (Figure 6) in Pakistan has many similarities with the Malaysian High Court network (Figure 3). We, however, need more cases to establish a systematic pattern emerging from these networks.
Conceptual history as a method has several problems, chiefly the problem of anachronism. See Skinner’s famous prohibition of anachronism in Meaning and Understanding: “No agent can eventually be said to have meant or done something which he could never be brought to accept as a correct description of what he had meant or done” (Koikkalainen & Syrjämäki, 2002). In the examples I gave a few sentences earlier, the Malaysian judge of Hindu–Indian lineage would never accept that his ethnic characteristics determined the tenor of his judgment. But he might accept that the network of concepts within which he framed the question of essential practices included the ones I highlighted from the text of the judgment, and perhaps he might accept that he had chosen that network to counter the increasing shrillness of voices calling for an Islamic Malaysia.

A second issue is whether the method of pinpointing the concepts in a network is replicable, that is, would another legal scholar pick the same concepts from the judgments. Since the choice of the concepts was determined not by its frequency but by its use in the rationale of the judgment, I would argue that it is replicable and can be tested. It would be useful to compile a list of networks and see if judges arguing for a balance that tilted toward an Islamic Malaysia or Pakistan, or a socially just India, would use a similar network described in this article. Even though the terms may differ, the meaning could be the same, and can be established by conceptual history’s onomasiology—tracing all names for the concept. If so, conceptual history would be able to provide a bridge between legal formalism and culturalism by answering both the “what of a case” and the “why of a case.”

The recent debates on the transferability of concepts such as democracy, religious freedom, authority, and so on to Iraq, Afghanistan, and Syria, among others, and whether Islamic countries are capable of accommodating the Western meanings of the term forget the fact that many of what we consider to be characteristically Western values of freedom and justice, along with conceptions of “human rights” and “religious freedom,” may not have been exported from the West to the East, but were rather exported in the other direction (Springborg, 1992). If we use conceptual history to study the use of foreign constitutional jurisprudence in other areas, we may find that there are more elements that are common between jurisdictions.

Returning to the legal debates, the above analysis demonstrates that it is possible to transcend the problem of translatability posed by the culturalists, by asking not whether the term essential practices (or any other concept) had the same meaning in all contexts (it does not), but whether a judge who wants to privilege a particular constitutional identity uses essential practices in a particular way within a network of concepts. By doing so, one can perhaps illuminate a type of outcome that flows from such use. This is different from the instrumentalist (one size fits all) approach because here different sizes fit different types; the size and type of outcome depend on the wearer (user, in this case the judge/or the political elites if the judge is dependent on them). I make no claims about judicial infallibility or capability. Scalia may well be right, and some of the judgments discussed above demonstrate it, but since we live in a world where more and more issues are being transferred to the judicial arena, it is important to understand the orchestration of societal and governmental actions by the main
actors on the legal stage. The voyage of the concept across borders and the manner of its use within a network of concepts by the judges (through the encounter between his experience and expectations) holds out the promise that it can be systematically plotted to illuminate types of contestations over the nature of constitutional identities.

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Notes
2. See Ralph Michaels (2013) for an exposition of these debates.
3. Manupatra is a legal database that contains all the high court and supreme court cases of the Indian and Pakistani courts, and is similar to Lexis Nexis that contains the high court, appeals court, and federal court cases in Malaysia.
4. In India, a Supreme Court judge comes from a middle class, Hindu, professional family, armed with an LLB, and some experience as a lawyer for a state (regional) government before entering the High Court (Shankar, 2009). In Pakistan, a Supreme Court judge’s socioeconomic and educational profile is similar to his/her Indian counterpart, except that almost all of them would be Muslim. In Malaysia, a judge of the higher judiciary would have been a lawyer in those courts for at least 10 years prior to his appointment.
5. Sir Ivor Jennings was influential in the design of the Malaysian and the first Pakistani constitutions and was instrumental in including an Indian judge and a Pakistani judge on the advisory committee to the framers of the Malaysian constitution. The first Pakistan Constituent Assembly members had deep ties with India from which Pakistan had been carved out in 1947.
6. I am not “doing” conceptual history, which would have required me to refer to all texts—pamphlets, speech manuscripts, political tracts—but am merely using some of the tools of conceptual historians to understand the use of foreign sources in domestic jurisprudence.
7. In Koselleck’s (2004) theory, the idea of history underwent a decisive shift between 1750 and 1850, when the past no longer threw light on the future, and the future had a radicality that had not existed before. The concept that propelled this move was the concept of “progress,” which estranged the past and privileged the unknown future against the past.
9. Syedna, para 56.

13. Cow slaughter is an interesting example because the Muslim practice contravened the state’s promise to prohibit such slaughter in the nonjusticiable part of the constitution (Article 48).


15. See Tie Fatt’s (2008) analysis of the judiciary’s decisions, which highlights a complicated juggle between affirming the secularity of the constitution and advocating a pro-Islamic vision of the state.

16. *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ78. The judge, who was of Chinese origin, drew on the evidentiary test outlined in the Court of Appeals’ *Serban* judgment to conclude that the use of “Allah” was integral part of Christian religion in Malaysia. The ruling was reversed by the Court of Appeals, and the apex court agreed on procedural grounds. In this case, one cannot point to a pro-secular tilt of the apex court. For a discussion of the Appeals Court judgment and the shift to a conception of Islam as an ethnic identity (from a universalistic religion) and for an analysis of the judgment’s negative impact on minority religious freedom, see Jaclyn Neo (2014).

17. Article 20: provides the right to profess, practice, and propagate religion to every citizen, and the right to establish, maintain, and manage its religious institutions to every religious denomination and every sect thereof.

18. “The appellants, however, have not explained how the epithets etc., and the various planned ceremonies are essential part of their religion and that they have to be performed only in public or in the public view, on the roads and streets or at the public places?” *Zaheeruddin v the State*, 26 SCMR (S.Ct.) 1718 (1995) Pak.

19. *Abdul Karim Shorish Kashmiri v The State of West Pakistan*, 1969 (“Kashmiri”). The case concerned an order passed by the Punjab provincial government that banned the Urdu weekly journal *Chattan* from publishing anti-Ahmadi literature. *Chattan*’s editor Abdul Karim Shorish Kashmiri, a highly vocal anti-Ahmadi member of the Ahrar, challenged the order on the grounds that it infringed on his right to freedom of speech. The petition was dismissed by the hearing judges and the religious right of Ahmadis to freely proclaim their religious identity was given legal precedence over Kashmiri’s right to freedom of expression, with the latter likened to “religious persecution” of Ahmadis (Extracted from Sadia Sayeed, 2011, *The Nation and Its Heretics*).


21. Justice Gopal Sri Ram has been called “activist” for his rejection of the “pedantic” approach toward reading the Constitution, for seeing the Constitution, a “living piece of legislation” and “prismatically” to discern implied rights from the text (pp. 439-440; See Li-Ann, 2006).

**References**


**Author Biography**

**Shylashri Shankar** is Senior Fellow at the Centre for Policy Research in New Delhi. She is the author of *Scaling Justice: India’s Supreme Court, Anti-Terror Laws and Social Rights* (Oxford University Press, 2009), and co-author of *Battling Corruption: Has NREGA Reached India’s Rural Poor* (Oxford University Press, 2013).