

MINING FOR GOLD: THE CONSTITUTIONAL COURT OF SOUTH AFRICA'S  
EXPERIENCE WITH COMPARATIVE CONSTITUTIONAL LAW  
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Abstract

Despite a long history of referring to foreign law in its opinions, the Supreme Court's recent citations to such sources have caused heated controversy. Critics warn of threats to sovereignty as well as serious flaws in the way judges use outside authority. Largely missing from this debate is any probing examination of the actual practice of engaging with foreign authorities. This article attempts to fill the empirical void by analyzing closely one court that has used foreign law extensively: the Constitutional Court of South Africa.

The author conducted interviews with eight former and current justices who discussed both the value gained from the practice of engaging with foreign law and their ways of addressing the concerns expressed by American critics. Whether identifying universal norms, engaging in a dialogue to help clarify an issue, or gaining insight into comparable constitutional provisions, these justices see clear benefits from exploring the opinions of constitutional courts in other parts of the world. Yet they approach such outside sources with great care, fully aware of the potential hazards of transplanting foreign legal concepts and conscientiously avoiding selective citation only to favorable outside authorities. Detailed analysis is provided of several cases containing significant references to foreign law, along with commentary from the justices on how particular opinions were enriched by examination of other courts' treatment of the same issues. These findings bear on the current debate and, in a world where many other high courts engage in constitutional comparativism, suggest that the United States Supreme Court would do well by joining the conversation.

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## *Perspectives*

Well, I don't think that we should look to foreign law to interpret our own Constitution. ... I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.<sup>2</sup>

Judge (now Justice) Samuel Alito

While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.<sup>3</sup>

Justice Clarence Thomas

If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something.<sup>4</sup>

Justice Stephen Breyer

Unless one is at the height of one's arrogance, it must be so that most legal issues are not of exclusive or immediate origin. . . . Even in this country . . . there's been judicial reasoning and adjudication for at least two and a half centuries – and I think as it is helpful to look at domestic jurisprudence, it must surely be helpful to look at what other jurisdictions say. . . .<sup>5</sup>

Deputy Chief Justice Dikgang Moseneke

It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted.<sup>6</sup>

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<sup>2</sup>Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, 109th Cong., 471 (2006) (response to a question by Senator Coburn); available online [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:25429.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:25429.wais).

<sup>3</sup>Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

<sup>4</sup>Transcript of conversation between Justices Stephen Breyer and Antonin Scalia at American University, Washington College of Law, on January 13, 2005, available at [www.freerepublic.com/focus/f-news/1352357/posts](http://www.freerepublic.com/focus/f-news/1352357/posts).

<sup>5</sup>Interview with the author, conducted on March 5, 2007, at the Constitutional Court of South Africa in Johannesburg. The author conducted interviews with justices of the court as follows: at Harvard Law School on February 13, 2007, former Justice Richard Goldstone; at the Constitutional Court in Johannesburg, on February 20, former Justice Johann Kriegler; on February 21, former Chief Justice Arthur Chaskalson; on February 22, Justice Albie Sachs; on February 28, Justices Kate O'Regan and Johann van der Westhuizen; on March 5, Deputy Chief Justice Dikgang Moseneke; and at the University of Cape Town, on March 19, former Justice Laurie Ackermann. Audio tapes and transcriptions of the interviews quoted in this article are on file with the author.

<sup>6</sup>K v Minister of Safety and Security, 2005 (9) BCLR 835 (CC), at ¶ 35.

*The Current Debate*

The United States Supreme Court's recent references to foreign law in high-profile cases have prompted vehement objections, not only by some of the dissenting justices,<sup>7</sup> but by members of Congress<sup>8</sup> and the academy.<sup>9</sup> The outcry generated by this topic is surprising, given the long and generally uncontroversial practice of looking to foreign law, both in United States history<sup>10</sup> and among the high courts of other countries in the world.<sup>11</sup> Moreover, so far the discussion has largely avoided any in-depth analysis of exactly what courts do when they consult foreign authorities. The purpose of this article is to start to fill that gap.

Objections to the consideration of foreign law in constitutional adjudication seem to fall into two main categories. First, as a matter of jurisprudential philosophy, some see constitutions as by their nature tied closely to the particular nation's history, culture, and indeed its very identity. The originalists in this country are perhaps the best example, but even those who do not subscribe strictly to the notion of original intent see a potential danger of diluting the essence of a nation's charter with foreign influences. The premise here is that the foreign law will have a substantive effect on domestic law in a way that is in some way inappropriate and even potentially threatening to national sovereignty.

The second type of criticism focuses primarily on methodology. Critics challenge the way in which courts use outside sources. How do they decide where to look? Aren't they simply "cherry picking," that is searching for an authority that supports their own view while

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<sup>7</sup>The most visible airing of the issue occurred during the debate at American University between Justices Breyer and Scalia. See *supra* note 4; 3 Int'l J. Const. L. 519 (2005); see also *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 624-28 (2005) (Scalia, J., dissenting); *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

<sup>8</sup>Several bills are pending that would prohibit any federal court from using decisions of foreign countries in interpreting the Constitution. See, e.g., American Justice for American Citizens Act, H.R. 1658, 109<sup>th</sup> Cong. § 3 (2005); Constitution Restoration Act of 2005, H.R. 1070, 109<sup>th</sup> Cong. § 201 (2005). During the confirmation hearings for Chief Justice Roberts and Justice Alito, some senators also made clear their objections to the practice of looking to foreign law. See, e.g., Senator John Cornyn, Hearing before the Senate Committee on the Judiciary on the Nomination of John G. Roberts, Jr.; Senator Jon Kyl, Hearing before the Senate Committee on the Judiciary on the Nomination of Samuel A. Alito. See *supra* note 2 and *infra* note 39.

<sup>9</sup>See, e.g., Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 Harv. J. L. & Pub. Pol'y 291 (2005); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 Fordh. Int'l L. J. 507 (2006); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 Conn. L. Rev. 185 (2005).

<sup>10</sup>See Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 Calif. L. Rev. 1335 (2007); Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. Ann. Surv. Am. L. 29 (2007); David J. Seipp, *The Role of the Judge in the Twenty-First Century: Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U.L. Rev. 1417 (2006).

<sup>11</sup>See Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 Am. U.L. Rev. 553 (2007); Diarmuid O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?* 80 Notre Dame L. Rev. 1893, 1894 (2005).

ignoring contrary opinions? And finally, skeptics question whether ideas from other countries can be successfully transplanted in light of the difficulties of understanding other legal systems, particularly when another language is involved.

Some of the critics appear at times to have a political agenda. John Yoo's view, for example, that the United States should pay little or no attention to the opinion of the rest of the world surely reflects an ideology more than a jurisprudential approach to constitutional decision making. Yet the controversy has been the focus of several academic symposia<sup>12</sup> and attracted commentary by a broad array of constitutional scholars.<sup>13</sup>

In an effort to shed an empirical light on the debate, and to assess the significance of the objections raised, this article looks closely at one court that, since its creation fourteen years ago, has had extensive experience working with foreign materials: the Constitutional Court of South Africa. In Part I, the article sets forth the context in which the court works and describes the value that its members see in looking abroad when confronting constitutional issues. Part II focuses specifically on criticisms that have been leveled at such a comparative approach. First, it confronts the claim that consulting foreign authorities exerts an unwarranted influence on substantive domestic law, thereby potentially undermining a nation's sovereignty. This claim arises from a common misconception about the comparative approach, namely that the interpretation found in the foreign source exerts precedential, or at least persuasive, force on the domestic court. The South African court's engagement with foreign law does not, however, treat such sources as "authority," even in the broadest sense of the term.<sup>14</sup> Indeed, a striking aspect of

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<sup>12</sup>See Symposium: "Outsourcing Authority?" Citation To Foreign Court Precedent In Domestic Jurisprudence, 69 Alb. L. Rev. 683 (2006); Symposium: The Role Of The Judge In The Twenty-First Century, 86 B.U.L. Rev. 1335 (2006); International Law And The State Of The Constitution: The Twenty-Fifth Annual National Student Federalist Society Symposium On Law And Public Policy - 2006: Foreign And International Law Sources In Domestic Constitutional Interpretation, 30 Harv. J.L. & Pub. Pol'y 173 (2006); Symposium: To What Extent Should The Interpretation And Application Of Provisions Of The U.S. Constitution Be Informed By Rulings Of Foreign And International Tribunals, 26 Hawaii L. Rev. 335 (2004).

<sup>13</sup>See, e.g., Bruce Ackerman, Essay: The Rise of World Constitutionalism, 83 Va. L. Rev. 771 (1997); Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 UCLA L. Rev. 639 (2005); James Allan & Grant Huscroft, Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts, 43 San Diego L. Rev. 1 (2006); Diane Marie Amann, International Law and Rehnquist-Era Reversals, 94 Georgetown L. J. 1319 (2006); Steven G. Calabresi & Stephanie Dotson Zimdahl, The supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743 (2005); David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539 (2001); David C. Gray, Why Justice Scalia should be a Constitutional Comparativist . . . Sometimes, 59 Stanford Law Review 1249 (2007); Vicki C. Jackson, A New Constitutional Order? The International Migration of Constitutional Norms in the New World Order: Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors, 75 Fordham L. Rev. 921 (2006); Harold Hongju Koh, The Globalization of Freedom, 26 Yale J. Int'l L. 305 (2001); Ronald J. Krotoszynski, Jr., "I'd like to teach the world to sing (in perfect harmony)": International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue, 104 Mich. L. Rev. 1321 (2006); Judith Resnik, Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry, 115 Yale L. J. 1564 (2006); Anne-Marie Slaughter, A Global Community of Courts, 44 Harv. Int'l L.J. 191 (2003).

<sup>14</sup> See Frederick Schauer, Authority and Authorities, forthcoming, November 2008, Virginia Law Review.

this treatment of foreign law is its extensive use of dissenting opinions, particularly when looking to cases from the United States. Obviously the substantive law is not what matters, but rather the reasoning at work in confronting a common problem or issue.<sup>15</sup> The article then goes on to address three commonly raised methodological issues. It describes how the South African court decides what jurisdictions to consider, confronts the charge of “cherry picking,” and discusses the potential pitfalls involved in interpreting foreign law. Finally, Part III analyzes in detail several areas in which the court has referred extensively to foreign law in an attempt to see, in concrete settings, whether the methodology used is in fact as sound and unproblematic as the justices suggest.

### I. *The Value of Comparativism*

One of the goals of this study, through interviews with justices and examination of their opinions, was to learn as much as possible about the benefits to be gained from using the law of other countries. As is always true when taking a comparative view, it is important first to understand the institution being studied. Creation of the Constitutional Court was a critical component of South Africa’s transformation from the apartheid parliamentary regime to a representative constitutional democracy. This court was entrusted with the responsibility of ensuring the broadest possible enforcement of the rights enshrined in the new Constitution by all branches of government, and, indeed, by private persons as well.<sup>16</sup> After considerable debate and negotiation, it was determined that a new court should be created, unburdened by the discriminations that had characterized society, and the judiciary, in the past. That court, along with all other courts and tribunals, was explicitly instructed by the Constitution that, when interpreting the Bill of Rights, it “must consider international law”<sup>17</sup> and it “may consider foreign law.”<sup>18</sup> Deputy Chief Justice Dikgang Moseneke, who had himself spent ten years on Robben Island after a conviction at age 15 for anti-apartheid activity, described these unusual provisions as a “bold move”<sup>19</sup> on the part of a country that had been isolated from the world during the apartheid era, a pariah kept from participating in development of the law around the world.

Conforming to this image of a court open to ideas from all around the globe is the structure of the court itself. The building is airy, light, and colorful, while also retaining

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<sup>15</sup>If American justices finding themselves in dissent saw how their views might be attractive, if not to their colleagues, then to courts in other parts of the world, perhaps they would be less hesitant about referring to foreign sources.

<sup>16</sup>The final Constitution of South Africa provides that provisions of the Bill of Rights bind, not only all branches of the government, but natural or juristic persons to the extent that the provision may be applicable given the nature of the right and the duties imposed. S. Afr. Const. § 8 (1) & (2). The interim constitution had been interpreted as providing for indirect horizontal application of the Bill of Rights through development of the common law. See *Du Plessis v de Klerk*, 1996 (3) SA 850 (CC).

<sup>17</sup>Constitution of the Republic of South Africa, 1996, Section 39 (1)(b). The original interim constitution of 1993 contained similar provisions. See Section 35(1) of the Interim Constitution of South Africa.

<sup>18</sup>Constitution of the Republic of South Africa, 1996, Section 39 (1)(c).

<sup>19</sup>Interview with Justice Moseneke at the Constitutional Court. See *supra* note 5.

reminders of the dark history that gave it birth.<sup>20</sup> The building, which opened in 2004,<sup>21</sup> combines modern architecture with pieces of a century-old prison that had formerly occupied the site. Among many others, Mahatma Gandhi and Nelson Mandela spent time here awaiting their trials. The courtroom where oral arguments are held is also open and welcoming. Despite its location below street level, the room is filled with natural light shining through skylights and a long narrow window offering a view of the feet of pedestrians passing by. This was a deliberate touch by the architects to ensure that a glimpse of ordinary citizens will penetrate the court proceedings, as well as to convey the truth that people appear much the same if you see them only up to their ankles.<sup>22</sup>

The Constitutional Court of South Africa has issued more than 300 judgments over the past fourteen years, of which over half cited to foreign law. While in some cases the foreign law references were tangential and perhaps even incidental, in more than a third of the judgments the court grappled extensively with the opinions of courts in other jurisdictions.<sup>23</sup>

Before turning to the judgments rendered by this court, three preliminary remarks are perhaps in order. As may well have occurred to the reader, modern constitutions such as that adopted in South Africa in the 1990s were inevitably influenced by the many constitutions and charters that preceded them. When establishing the new constitutional order, the South African framers had the benefit of experience around the world in other open and democratic societies that value freedom and equality. They deliberately borrowed structures and procedures to help ensure that the kind of society they envisioned would be fostered and protected.<sup>24</sup> When the Constitutional Court certified the final constitution, it explained, for example, that the notion of separation of powers was important in many countries, and that the South African version was consistent with what Justice Frankfurter had described in the Youngstown Steel case.<sup>25</sup> With regard to a Bill of Rights, South Africa borrowed heavily from Canada in first establishing the fundamental rights of individual persons and then providing a limitations clause to set criteria for situations when those rights may be infringed for the benefit of society. Given these historical facts, it is surely natural for the interpretation of that constitution to take a global perspective in a way that may not be called for in the United States. Nonetheless, the following description of

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<sup>20</sup>The court's terrific web site, [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za), provides a wealth of fascinating details about the process of designing and building this new court.

<sup>21</sup>Until then the court operated temporarily in bare office space in Johannesburg. Bronwyn Law-Viljoen, Light on a Hill: Building the Constitutional Court of South Africa, at 07 (David Krut Publishing 2007).

<sup>22</sup>See Bronwyn Law-Viljoen, Light on a Hill, supra note 21, at 73, quoting Justice Albie Sachs.

<sup>23</sup>The characteristics of the judgments that contained no references to foreign law are such that looking to foreign law would not have been helpful: nearly half of these opinions did not include a discussion of the merits, almost a third dealt with questions of appellate procedure, and about a quarter involved the adjudication of local structural disputes, such as political apportionment. A chart categorizing all the opinions by subject matter, procedural posture, and extent of foreign references is on file with the author.

<sup>24</sup>See, e.g., Francois du Bois & Daniel Visser, The Influence of Foreign Law in South Africa, 13 *Transnat'l L. & Contemp. Probs.* 593, 625-33 (2003).

<sup>25</sup>Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), at ¶ 106 ff.

the South African experience will show that a dialogue among the world's courts can bring valuable perspectives regardless of historical context.

Second, the South African court, a newly created entity in a country whose experience with judicial review had been modeled on the British parliamentary system, giving courts only limited power to ensure compliance with applicable procedures and enforce common law protections of individual rights until Parliament stepped in,<sup>26</sup> seemingly had little choice but to look elsewhere for precedents, at least initially. Some of the justices suggested that the tendency to refer to foreign jurisprudence might decrease with time, as the court not only developed its own precedents, but gained confidence in its constitutional adjudication. And indeed, the frequency of the court's foreign references does appear to have diminished somewhat over the past twelve years.<sup>27</sup> Yet none predicted that the court would stop looking to foreign sources, and the value they saw in the enterprise suggests that most of the justices will continue the practice. Accordingly, the fact that American judges are working with an older document and with a set of established precedents does not negate the benefits to be gained from comparative jurisprudence.

Finally, the South African court in fact had a strong incentive to look to other democracies in light of its recent history as a pariah state. As Justice Johann van der Westhuizen explained, after first noting that under apartheid, international and foreign law were seen as a kind of refuge, a place to find standards higher than the ordinary law defined by Parliament: "By the time the Constitution was drafted, we were very much in the mood of becoming part of the world, because we had been isolated for a long time, and therefore people were quite eager to link up firstly with international law to prompt the government to comply with its obligations, and then with the specific reference in the Bill of Rights to foreign law."<sup>28</sup> Justice Johann Kriegler echoed the same theme, noting that in light of the country's history of isolation, "being aware of what is happening in the mainstream out there is important. We think we were left behind in many ways."<sup>29</sup>

In this regard, American judges do not have a comparable incentive. Yet, while few would describe the United States today as a pariah state, post-September 11 developments have

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<sup>26</sup>See Iain Currie & Johan deWaal, *The Bill of Rights Handbook* (5<sup>th</sup> Ed. Juta & Co. Ltd. 2005), at 2-4. As these authors note, three earlier South African constitutions were not significantly different from ordinary acts of Parliament, and of course Parliament's status as "representative" of the people was severely undermined by its election by the white minority. "If there ever was a constitutional mismatch, it was the application of the British doctrine of parliamentary sovereignty to the racially-divided South African state." *Id.* at 4.

<sup>27</sup>In the Court's first four years, 1995-1998, over 68% of its 101 judgments contained references to foreign law, and most of these were significant references. In the next four years, just over 44% of the Court's 88 judgments included references to foreign law, but only about half of these were significant references. Since 2003, the Court has issued 111 judgments: 43% of these included references to foreign law. See *supra* note 23.

<sup>28</sup>Interview with Justice van der Westhuizen. See *supra* note 5. Margaret Burnham has similarly pointed out that the South African court's use of comparative jurisprudence helped it to claim its place among modern democracies. See Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 *Mich. J. Race & L.* 29, 44 (1997).

<sup>29</sup>Interview with Justice Kriegler at the Constitutional Court. See *supra* note 5.

sharply reduced this country's stature as the beacon of liberty among the nations of the world. Several of the South African justices lamented these developments, expressing great sadness that America no longer stands firmly against all forms of oppression and torture. Justice Richard Goldstone, for example, who had interrupted his tenure on the South African court to serve as chief prosecutor of the United Nations' International Criminal Tribunals for the former Yugoslavia and Rwanda, regretted that courts could no longer look to the United States in evaluating the constitutionality of practices, such as rendition and enhanced interrogation techniques, used against detainees. Justices Arthur Chaskalson<sup>30</sup> and Kate O'Regan<sup>31</sup> expressed similar sentiments, noting their sorrow that the United States, long a key champion for human rights, no longer stood firmly by its principles. To the extent that this country's reputation has suffered in the ways described by these justices, perhaps it could regain its former prominence and respect by joining in the global conversation.

The South African court has set forth in some of its judgments its appreciation that the Constitution encourages regard for foreign law. In a 2005 case<sup>32</sup> involving the question of whether the minister of police should be held vicariously liable for the gross misconduct of three members of the Johannesburg police department, the court engaged in an extensive discussion of authorities from the United Kingdom, Canada, and the United States. The court, in a unanimous judgment authored by Justice O'Regan, the youngest member of the court with experience as a law professor and scholar, explained its reference to such foreign sources:

[I]t is not only our law that has struggled to determine the proper ambit of the principles of vicarious liability and to apply them in a manner that is both consistent and fair. There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own. . . .<sup>33</sup>

Noting, in the quotation cited at the beginning of this article, that it would seem "unduly parochial" not to look for guidance in how others have handled similar issues, Justice O'Regan acknowledged that the "dangers of shallow comparativism must be avoided." Nonetheless, she continued, "[t]o forbid any comparative review because of those risks . . . would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions."<sup>34</sup>

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<sup>30</sup>Justice Chaskalson commented that the United States, once a bulwark for human rights, has failed to sign on to many international agreements protecting fundamental rights, except for those related to protecting its economic interests abroad. He noted that this may well be related to the reluctance of American courts to look to foreign and international law. Interview with Justice Chaskalson at the Constitutional Court. See supra note 5.

<sup>31</sup>In response to a question about whether the court is looking for a baseline of human rights, Justice O'Regan first gave her view that indeed international conventions, often without the support of the United States, have established certain basic civil and political rights, as well as economic and social rights. She then expressed sadness that, given its record at Guantanamo, the United States has wavered even more in its commitment to human rights. Interview with Justice O'Regan at the Constitutional Court. See supra note 5.

<sup>32</sup>*K v Minister of Safety and Security*, 2005 (9) BCLR 835 (CC).

<sup>33</sup>*Id.* at ¶ 34.

<sup>34</sup>*Id.* at ¶ 35.

Each of the justices to whom I spoke echoed this theme: Why *not* look to wherever wisdom may be found regarding a difficult issue of constitutional law? Arthur Chaskalson, the widely respected first Chief Justice of the court, who had founded the Legal Resources Centre which challenged apartheid laws and represented, among many others, Nelson Mandela, thought it foolhardy, if not arrogant, to cut oneself off from intellectual activity in the same field. Noting that in other professional disciplines—medicine, science, literature—people read widely, he failed to see why law should be different. Similarly, Justice Goldstone could see no downsides to the practice: “Nothing but gain. It’s almost irrational to say you shouldn’t look. . . Why cut yourself off from learning?”<sup>35</sup>

In addition to any positive ideas one may glean from looking at other jurisdictions, a critical value pointed out by several of the justices is the challenge provided by different approaches to one’s own preconceptions. As Justice Laurie Ackermann, one of the few judges to resign from the bench as a matter of conscience during the apartheid era, and perhaps the most ardent proponent of comparative jurisprudence who has himself written thoughtfully about the subject,<sup>36</sup> emphasized: “I think the most important quality for a judge in any court, and certainly the highest court, is to be ruthless about his or her own presuppositions. I mean we all have them. The person who says he or she does not have them, I mean is in danger.”<sup>37</sup> Both he and Justice O’Regan see the intellectual approach to foreign law quite differently from that of dealing with domestic precedent. Looking at foreign authorities opens windows otherwise unseen, helps to explore preconceptions, and aids in finding the limits to one’s understandings. Viewing another legal system’s approach to similar problems helps shed light on what the possibilities are, as well as illuminating the reasons for particular developments in the law.

While each of the justices had a somewhat different conception about the use of foreign law, all agreed that the practice has added value to the court’s jurisprudence. As they saw it, courts in open and democratic societies face many common problems, and it makes eminent good sense to look everywhere for ideas on how best to solve those problems. In addition, seeing how another jurisdiction approaches an issue can serve as a mirror to confront one’s own way of dealing with that issue, clarifying one’s assumptions and perhaps leading one to question ingrained practices that no longer serve the interests of society.

## II. *Addressing the Skeptics*

### A. *Sovereignty at Risk?*

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<sup>35</sup>Interview with Justice Goldstone, conducted in February, 2007 at Harvard Law School, where he was then a visiting professor. See *supra* note 5.

<sup>36</sup>See Laurie W. H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke*, 80 *Tulane L. Rev.* 169 (2006).

<sup>37</sup>Interview with Justice Ackermann in March 2007 at the University of Cape Town. See *supra* note 5.

Part of the outcry against citation to foreign law appears to be based on an unstated, but commonly believed, assumption: that American courts are considering such sources as in some way binding, and by following the pronouncements of another country's court, they are ceding their rightful sovereignty or, at a minimum, abdicating their responsibilities of adhering to our own Constitution.<sup>38</sup> This assumption is simply unfounded. None of the numerous references to foreign law decried by critics of the practice has relied on that law as providing *authority* for the conclusion reached,<sup>39</sup> and courts throughout the world that do look to foreign law universally see that law as providing, at most, persuasive reasons for coming to particular decisions.

If having regard for foreign law did indeed threaten the sovereignty of our nation or the Supreme Court, the practice could justly be criticized and shunned. Such a threat would only be plausible, however, if courts felt an obligation to follow the rulings of judges in other jurisdictions. Because judges engaged in comparative jurisprudence around the world, including justices of the United States Supreme Court, feel no such obligation, the threat is an empty one.

Critics of comparative jurisprudence often, whether deliberately or not, raise the specter of United States courts “bowing” to foreign authorities. Asked about the proper role, if any, of foreign law in Supreme Court decisions, nominee John Roberts, for example, expressed concern about relying on decisions of other courts.<sup>40</sup> Yet the concept of “relying” on a foreign decision is far from what those who advocate looking abroad have in mind. Academic opponents of considering foreign law similarly tend to exaggerate the influence of such outside authorities, suggesting a binding quality that simply is not, and should not be, there. One such critic uses a quotation from Justice Oliver Wendell Holmes, evidently believing that it provides support for his position: “There is no mystic over law to which even the United States must bow.”<sup>41</sup> Yet,

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<sup>38</sup>See, e.g., Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 *Fordh. Int'l L. J.* 507, 541-42 (2006).

<sup>39</sup>One commentator argues that the Court's references to foreign law in *Roper v. Simmons*, 543 U.S. 551 (2005), actually do amount to using such law as binding authority. See Ernest A. Young, *Comment: Foreign Law and the Denominator Problem*, 119 *Harv. L. Rev.* 148, 156 (2005). As I have argued elsewhere, Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 *Tul. L. Rev.* 251 (1998), an international perspective is uniquely appropriate for assessing whether the death penalty violates “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). How other maturing societies in the world define standards of decency is, in this context, inherently part of the substantive analysis in ways that is not the case with other areas of constitutional law. This type of reference to foreign law bears little relationship to the kind of engagement with the opinions of other constitutional courts I address in this article. My focus is on “reason-centric” rather than “norm-centric” analysis. See Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 *U. Pa. L. Rev.* 63 (2007).

<sup>40</sup>“If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country. I think that's a concern that has to be addressed.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong., 201 (2005) (response to a question by Senator Kyl); available online [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:23539.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.wais).

<sup>41</sup>Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 *Fordh. Intl. L. J.* 507, 514 (2006),

given the context in which this statement was made,<sup>42</sup> Holmes saw no problem whatever with the use of foreign or international law, which was in fact central to this decision involving maritime jurisdiction, noting that it becomes United States law only by virtue of its adoption by an American court. It is this misconception that appears to pervade much of the opposition to comparative jurisprudence on the basis that it poses a threat to sovereignty. As Justice Stevens remarked in response to a call for impeachment based on his joining an opinion by Justice Kennedy<sup>43</sup> that referred to foreign law:

It does seem to me . . . that there is a vast difference between, on the one hand, considering the thoughtful views of other scholars and judges -- whether they be Americans or foreigners and whether they be state judges, federal judges or judges sitting in other countries -- before making up our own minds, and, on the other hand, treating international opinion as controlling our interpretation of our own law. We should not be impeached for the former; we are not guilty of the latter.<sup>44</sup>

Mark Tushnet speculates that critics fear the slippery slope: if looking to foreign law in legitimate ways, that is as an entirely non-binding source of persuasive reasoning, is allowed, the practice in time will morph into treating foreign law as precedent.<sup>45</sup> This assessment may well be right, but what is surely correct is his explanation of why that fear is logically unfounded given the characteristics of working with precedent.<sup>46</sup> As long as American judges set forth their reasoning, whether or not containing references to foreign law, in rendering their opinions, future judges will have been made explicitly aware of the non-binding nature of the basis for the court's decision.<sup>47</sup>

Among the other conclusions to be drawn from a study of the Constitutional Court of South Africa, it appears that, at least in this particular court, any anticipated slide down the slippery slope<sup>48</sup> into improper or problematic use of foreign law has not occurred. Neither in the court's judgments, nor in any of the interviews with its justices, is there any evidence that it is bowing to foreign authority.<sup>49</sup> Quite often, after surveying extensively the position of other

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quoting *In re Western Maid*, 257 U.S. 419, 432 (1922).

<sup>42</sup>The full quotation is provided in a footnote, *ibid.* at 514, n. 34, but seemingly not read or understood.

<sup>43</sup>*Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>44</sup>Quoted in Diane Marie Amann, Symposium: Just Right?: Assessing the Rehnquist Court's Parting Words on Criminal Justice: International Law and Rehnquist-Era Reversals, 94 *Geo. L.J.* 1319, 1329 & nn. 68-69 (2006).

<sup>45</sup>Mark Tushnet, Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars, 35 *U. Balt. L. Rev.* 209, 305-06 (2006).

<sup>46</sup>See Tushnet, *supra* note 45, at 307-09.

<sup>47</sup>*Ibid.* at 307-08.

<sup>48</sup>See Eugene Volokh, The Mechanism of the Slippery Slope, 116 *Harv. L. Rev.* 1026, 1030-32 (2003), as cited in Tushnet, *supra* note 45, at 307.

<sup>49</sup>All the justices stressed that foreign law does not serve as precedent. Justice Sachs: "We don't look to foreign law, including jurisprudence, for binding precedent. How would you say one United States Supreme Court decision is worth two Canadian, three German, four Namibian, five Indian--it's got nothing to do with that."

jurisdictions, the court simply goes its own way, finding that South Africa and its constitution require a different result. Or, the court may find that a solution offered by a dissenting judge in another country fits well into the South African context. One judge seemed positively put off by argument suggesting that foreign authority should serve as precedent: “It seems to me . . . that very often what happens with counsel, is that they do argue a case as if it is sort of, you know, persuasive, and we should therefore follow it simply because some other court somewhere in the world has adopted it. And I must be honest, I am really unpersuaded by that.”<sup>50</sup> Nowhere is there any hint that the country’s, or the court’s, sovereignty might be undermined because the court looked to see how others were handling a problem. Justice Albie Sachs, who was almost killed by a bomb placed in his car by South African security forces while he was in exile in Mozambique, put it this way:

On the sovereignty aspect, funnily enough I would see it the other way around. What are you so scared of in foreign jurisprudence? Are you so lacking in confidence about the strength of your own system that you can’t absorb and take in and get the best out of what other people have to offer?<sup>51</sup>

#### B. *Concerns about Methodology*

Judge (now Justice) Alito:

I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey. And then it’s often difficult to understand exactly what you are to make of foreign court decisions. All countries don’t set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. . . . So you’d have to understand the jurisdiction and the authority of the foreign courts. And then sometimes it’s misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it’s located. If you focus too narrowly on that, you may distort the big picture. So for all those reasons, I just don’t think that’s a useful thing to do.<sup>52</sup>

Justice Scalia:

Now, should we say, “Oh my, we’re out of step,” so, you know – or, take our abortion jurisprudence, we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why haven’t we changed that, if indeed the court thinks we should use foreign law? Or do we just use foreign law selectively? When it agrees with what, you know,

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<sup>50</sup>Interview with Justice O’Regan. See supra note 5.

<sup>51</sup>Interview with Justice Sachs at the Constitutional Court. See supra note 5.

<sup>52</sup>See Confirmation Hearing before Senate Judiciary Committee, supra note 2.

what the justice would like the case to say, you use the foreign law, and when it doesn't agree you don't use it.<sup>53</sup>

This section explores the potential difficulties encountered in looking to foreign law. First, to which countries should one turn for insight into particular problems? Second, how can one address the charge of “cherry-picking”? And finally, what steps can be taken to minimize the possibility of misinterpreting foreign law or making unwarranted comparisons?

### 1. *Where to Look*

The South African justices are keenly aware of the pitfalls inherent in constitutional comparativism. Specifically on the issue of what foreign jurisdictions are appropriate sources of wisdom, Deputy Chief Justice Moseneke, in the continuation of the statements quoted at the beginning of this article, explained the key elements that must be present: an open, democratic society, preferably with a comparable adversarial system of adjudication in which the issues of a case are formulated, debated, and culminate in a reasoned judgment explaining the outcome. Justice Sachs emphasized the same elements, noting that “far and away the Canadian Supreme Court has become our favorite source of plunder (laughter),” partly because the South African Bill of Rights was modeled on the Canadian charter, with its structure of giving rights and then making them subject to reasonable limitations, and the central role played by the notion of proportionality. Justice Sachs also found the Canadian court to be “a particularly progressive, contemporary and value-driven court that articulates standards and norms for contemporary society in a very special way.”<sup>54</sup>

Noting that where to look depends in part on the nature of the question, Justice Sachs recalled that on economic issues the court found valuable the vision of the role of the Indian Supreme Court in a society, like that of South Africa, of massive inequalities. Justice van der Westhuizen agreed that “for socio-economic rights, we would perhaps look to the Indian Supreme Court.”<sup>55</sup> As the only member of the current court to speak German, Justice van der Westhuizen included that country as one to which the court might well refer with regard to property rights. In terms of areas such as privacy, this justice saw the United States jurisprudence an obvious source, given the high value placed on privacy in our society.

All the justices operated on the assumption that the jurisprudence of other countries would only be helpful to the extent that it reflected the values of open and democratic societies dedicated to freedom and equality. The concern about which countries to consult is also, of course, greatly diminished given the dialogical or analytical approach that is most prevalent in the judgments.<sup>56</sup> Only to the extent that foreign opinions are used as precedent, or even as

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<sup>53</sup>See American University conversation, *supra* note 4.

<sup>54</sup>Interview with Justice Sachs. See *supra* note 5.

<sup>55</sup>Interview with Justice van der Westhuizen. See *supra* note 5.

<sup>56</sup>See the discussion *infra* at notes 86-89.

persuasive authority, would their origin in a country adhering to different principles be problematic.

## 2. *Cherry Picking*

In a case touching on the reach of freedom of the press when it collides with the judiciary's desire to control the courtroom, Deputy Chief Justice Moseneke confronted the issue of cherry-picking, a common criticism by opponents of the practice of looking abroad. The issue in SABC v. National Director of Public Prosecutions<sup>57</sup> was whether the Supreme Court of Appeal had the discretion to reject the broadcaster's application to televise an appellate argument involving the conviction of Schabir Shaik, the financial advisor to Deputy-President Jacob Zuma, on corruption and fraud charges. As Justice Moseneke saw it, the court's discretion was limited by the need to adhere to the tenets of freedom of expression and open justice enshrined in the Bill of Rights. Looking to foreign law, the justice found that Canada permitted live feed of its appellate arguments. When he included this reference in the draft of his dissenting opinion, the majority judgment, which had not included any foreign law in its initial draft, pointed to jurisdictions that refused to allow such live broadcasts. Justice Moseneke admitted candidly: "Yes, we cherry pick all the time when we use authorities, foreign or domestic. . . . The very process of adjudication implies a selection, and a reasoned and rational process to search for the truth by weeding out what's irrelevant and finding what is cohesive and that best answers, you know, the problem before us."<sup>58</sup>

As these comments suggest, the term "cherry picking," although generally used as a pejorative, can also simply refer to the process of selecting authorities that may help to resolve the issue at hand. Chief Justice Chaskalson conceptualized the issue in this way as well, noting that each judgment reflects the author's best effort to arrive at the most reasonable outcome, using whatever opinions provide support for the solution chosen. Simply because a particular court's holdings in one case are persuasive does not require adherence to that court's decisions in the next. It is the reasoning that influences one's judgment, and being open to persuasion is a critical part of that process. Similarly, Justice Sachs considered the search for "cherries" to be part of the learning process that broadens the mind of a judge looking at problems with which others have grappled. He saw little danger in the notion of cherry picking, noting that "it's got to be a cherry that fits. If it doesn't fit, it'll just roll off, and it will actually be destructive of the argument."<sup>59</sup> On the other hand, exploring foreign authorities has great value, as when a case from another jurisdiction goes contrary to a judge's inclinations, "you do sit up."<sup>60</sup> Beyond overcoming parochialism, such research puts judges in touch with soundly based contemporary thinking on common issues.

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<sup>57</sup>CCT 58/06, 2007 (2) BCLR 167.

<sup>58</sup>Interview with Justice Moseneke. See supra note 5.

<sup>59</sup>Interview with Justice Sachs. See supra note 5.

<sup>60</sup>Id.

Of course the critics maintain that rather than canvassing the whole field and honestly describing the state of the law in foreign jurisdictions, justices actually make their selections based purely on their initial subjective conclusions on the matter, using foreign authority to bolster a decision when in fact other authority would have led them to the opposite result. Justice Goldstone saw such objections as demeaning to the judicial profession, suggesting that no judge with any intellectual honesty would engage in such a practice.

Justice Johann Kriegler, who had been a provincial and appellate judge under the old regime, while also active in supporting human rights and public interest organizations fighting against apartheid, was the most sympathetic to the problem of selective citation to foreign authorities. Because of the less ready access to these materials on the part of counsel, he saw a greater risk of the misleading use of such sources. As the sources are not familiar to many readers, it is not always clear whether the law is being stated accurately. Mistakes may be made inadvertently by citing to secondary texts whose reliability may be questionable. Such concerns appear to be based, in part, on the fear that even well-motivated judges may misunderstand foreign authorities. The next section addresses that challenge.

### 3. *Danger of Misinterpretation*

The South African justices acknowledged the difficulties involved in understanding foreign law correctly, as well as the obstacles that must be overcome, particularly when dealing with a system using a different language. Former Chief Justice Chaskalson readily agreed that there are difficulties with understanding other systems, language problems, and risks of misinterpretation. Yet, he concluded, “that doesn’t mean that you mustn’t look, I think you must just be careful, and you’ve got to understand that everything comes in a particular context. What was happening in Canada is not necessarily appropriate to what is happening in South Africa or might happen in Sri Lanka.”<sup>61</sup> He also saw particular problems when using foreign languages, but noted that there is a rich source of jurisprudence in the English-speaking world, including all the Commonwealth countries, America, as well as European courts that translate their judgments into English.

In one case the justices, uncharacteristically, disagreed quite strongly about the appropriateness of referring to foreign law.<sup>62</sup> Plaintiffs claiming police abuse at a certain park brought an action seeking constitutional damages, beyond the compensatory and punitive damages, for infringement of their rights to dignity, freedom and security of the person, privacy, and criminal process rights. The court, noting that the plaintiffs placed considerable reliance on foreign law, looked to how other jurisdictions approached the issue. At the beginning of his survey of foreign law, Justice Ackermann issued this warning:

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<sup>61</sup>Interview with Justice Chaskalson. See supra note 5.

<sup>62</sup>*Fose v. Minister of Safety*, CCT 14/96, 1997(3) SA 786.

More than the usual caution<sup>63</sup> is necessary in the present enquiry since the law of delict/torts differs in various legal systems, certain judicial systems and their legal remedies are divided along federal and state lines, sovereign immunity is not treated identically and the nature and histories of the various constitutional dispensations are not the same.<sup>64</sup>

After this disclaimer, Justice Ackermann went on to provide lengthy descriptions of the law in the United States,<sup>65</sup> Canada,<sup>66</sup> the United Kingdom,<sup>67</sup> among others, closing with a summary of the state of the law in all these jurisdictions.<sup>68</sup> This summary is followed, in turn, with yet another word of caution that significant differences between the law and procedure of these countries and those in South Africa must be kept in mind.<sup>69</sup> The court ultimately concluded that because private and public law provided adequate remedies, there was no need for “constitutional damages” in the case at hand.<sup>70</sup>

While agreeing with the outcome, Justices Kriegler and O’Regan made known their objections to the main judgment’s extensive references to foreign law. In his concurring opinion, Justice Kriegler expressed the view that Justice Ackermann had ranged too broadly, noting specifically: “I decline to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but passing similarity to our [relevant section].”<sup>71</sup> Justice O’Regan’s concurring opinion states, in its entirety:

I concur fully in the order proposed by Ackermann J and I concur in his judgment with one reservation. For the reasons given in paragraph 58 of his judgment, it is my view that the appellant’s reliance on foreign jurisprudence is of little value in interpreting the provisions of our Constitution. Accordingly I wish to express no view upon the law applicable in the jurisdictions discussed by Ackermann J at paragraphs 25 to 57 of his judgment.<sup>72</sup>

Justice Ackermann, while confirming that particular areas of constitutional law, such as the separation of powers doctrine, are more difficult than others, nonetheless thought comparative jurisprudence could be worthwhile even there to challenge assumptions, as long as one kept in

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<sup>63</sup>Footnote reference to *Ferreira v Levin*, 1996 (1) BCLR 1 (CC) at ¶ 72; *Bernstein v Bester*, 1996 (4) 449 (CC) at ¶¶ 132-3.

<sup>64</sup>Fose, at ¶ 24.

<sup>65</sup>Id. at ¶¶ 25-37.

<sup>66</sup>Id. at ¶¶ 38-41.

<sup>67</sup>Id. at ¶¶ 43-45.

<sup>68</sup>Id. at ¶ 55.

<sup>69</sup>Id. at ¶ 58.

<sup>70</sup>The court subsequently upheld an award for constitutional damages in a case where no other remedy was suitable. *President of the RSA v. Modderklip*, 2005 (5) SA 3 (CC).

<sup>71</sup>Id. at ¶ 90.

<sup>72</sup>Id. at ¶ 106.

mind the potential difficulties of transplanting structures with different purposes in various systems. On other occasion, Justice O'Regan made the same point, noting that it is important when engaging in comparative jurisprudence "not to equate legal institutions that are not, in truth, comparable."<sup>73</sup> Yet she there found the approach of other legal systems relevant.

As with the notion of cherry picking, Justice Kriegler expressed the most concern with the difficulties of interpretation inherent in the process of referring to the law in other jurisdictions. He was particularly reluctant to sign on to allusions to German law, although he was somewhat familiar with the language, noting: "It's not an easy language, and it's certainly not technically an easy language, and there are writing styles, techniques, mannerisms in legal writing in German, quite apart from always putting the verb in the wrong place. And people blindly concurred with Laurie [Ackermann]'s judgments. I couldn't do that; if I can't get to the guts of what it's about, if I don't understand what they are really saying, what is built on that, I can't go along with it."<sup>74</sup>

Justice Kriegler questioned the reliability of references in another language, noting that one could easily assume that familiar phrases had the same meaning in different cultures, unaware of their nuances and refinements. "If you don't know what those are I think you are blundering into a workshop where there are machines working the purpose of which and the complications of which you don't understand, so get out of it, stay out of it."<sup>75</sup> With a wonderful mixture of metaphors, Justice Kriegler warned, not only of the potential dangers of blundering into this workshop, but that "If you transplant jacarandas, they'll take over and replace the indigenous plants."<sup>76</sup> For example, while it might be appropriate to give prosecutors discretion to use the law of civil forfeiture in the United States, such discretion might well lead to injustice in Africa, where the right to property is not a root value.

Deputy Chief Justice Moseneke acknowledged concerns about the difficulties in interpreting foreign law, about "getting it right," but emphasized the court's efforts to reduce the impact of the problem. "We rarely go beyond what we know—common law jurisdictions . . . with points of comparison with our own. . . . Many many years of association and historical links makes it quite easy for one to be quite certain that one understands an English judgment. American judgments we understand—we read all the time."<sup>77</sup> He also stressed that the court was aware that there might be unarticulated premises in other legal systems that a foreign eye might not understand, making it important to focus on general principles, rather than getting into specific details.

Justices Goldstone and van der Westhuizen described both informal contacts and institutional support that assist the justices in their practice of looking to foreign law. Justice

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<sup>73</sup>K v Minister of Safety and Security, *supra* note 6, at ¶ 34.

<sup>74</sup>Interview with Justice Kriegler. See *supra* note 5.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>Interview with Justice Moseneke. See *supra* note 5.

Goldstone noted that increasingly there are meetings among judges from all over the world, “what Anne Marie Slaughter calls the invisible college.” It was at one such meeting that he inquired of a German constitutional court judge about the German pardon power in connection with his opinion in the *Hugo* case.<sup>78</sup> Agreeing that some areas of the law pose greater complexity, Justice Goldstone did not see great difficulty here: “You know, if one is looking at a review power, a president’s pardon power—what do you need to know? One looks at their constitutions and you read a little bit around. . .”<sup>79</sup> Justice van der Westhuizen noted that with complex constitutional questions he might well not begin, for example, with a long United States Supreme Court case with five different opinions, but rather look to a respected textbook for a basic understanding of the key principles. Justice van der Westhuizen also mentioned the good relationship between the South African court and members of the German constitutional court.

In addition, Justice van der Westhuizen noted the valuable assistance both from foreign law interns and from counsel. Aside from their two South African law clerks, the justices have the benefit of up to five clerks selected from applicants around the world.<sup>80</sup> Asked about a recent judgment that made extensive references to the American law of administrative searches,<sup>81</sup> he remarked that he was fortunate to have a “very excellent, recently graduated Harvard Law School intern” to work on the opinion. “It helped that I had somebody closely at hand who felt quite comfortable with the details.”<sup>82</sup>

The danger of “getting it wrong” can be reduced substantially when counsel on opposite sides of the case provide their best arguments about why a foreign authority should sway the court in a particular direction.<sup>83</sup> In this sense, engaging with foreign law is no different than citing to domestic authorities that may be subject to conflicting interpretations.

### III. *The Process of Working with Foreign Law*

Once persuaded of the benefits to be gained from looking abroad, and aware of the potential pitfalls, the challenge is to make the best possible use of such outside authorities. This section describes in detail a number of cases addressing various constitutional issues in which the Constitutional Court of South Africa made significant references to foreign law. The discussion explores how engaging with such outside sources may have influenced the court’s decision making, and how the court avoided the kind of superficial or problematic use of such authorities envisaged by critics of this practice. Comments of the justices during their interviews, some of which focused explicitly on specific judgments, supplement the analysis.

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<sup>78</sup>See discussion *infra* at notes 142-147.

<sup>79</sup>Interview with Justice Goldstone. See *supra* note 5.

<sup>80</sup>These clerks are attached to the various chambers in turn. Justice Goldstone mentioned that one year he had an intern from Korea who also spent some time with Justice Kriegler. The interns are not paid by the court, but most are able to receive funding from private sources.

<sup>81</sup>*Magajane v. Chairperson, North West Gambling Board*, 2006 (10) BCLR 1133 (CC).

<sup>82</sup>Interview with Justice van der Westhuizen. See *supra* note 5.

<sup>83</sup>See Mark C. Rahdert, *Comparative Constitutional Advocacy*, *supra* note 11.

When South African justices refer to foreign law, they generally do so in considerable detail, truly grappling with the way the problem at hand was dealt with by others and explaining why that approach should, or should not, be adopted under their own constitution. By contrast, recent references to foreign law by some members of the United States Supreme Court that prompted the current controversy have been quite brief and unilluminating.<sup>84</sup> The methodology of the Constitutional Court of South Africa, which exposes for the reader the thought processes leading to the ultimate conclusion, is critical to the credibility and legitimacy of the practice. Such transparency not only furthers confidence in the court's decisions by setting forth the reasoning in support of particular outcomes, especially when those outcomes are contentious, but also allows any dissenting justices to confront and challenge the rationale being espoused through the foreign materials.

Several of the justices explained how they view the process of engaging with foreign law, stressing the care it takes to use it appropriately. Justice O'Regan, using as an example the issue of how to deal with evidence that may have been illegally obtained, first made clear that one must begin with the constitutional framework. South Africa did not adopt a blanket exclusionary rule, opting instead to prohibit the use of evidence secured in violation of rights only when its use would harm the administration of justice. Questions therefore focus, not simply on whether evidence was in fact illegally obtained, but on what constitutes harm to the administration of justice. Decisions in jurisdictions like the United States, with automatic exclusionary rules, do not have the same relevance as those in Canada, which employs the same two step approach. Yet looking at how American judges address similar problems can still be valuable, as long as it is kept in mind that factors that, in the U.S., would be analyzed in terms of the definition of the right, might more appropriately be considered in terms of justification in the South African context.

This kind of awareness of differences in constitutional text and structure is critical to the proper use of foreign materials. Yet even given such differences, valuable insights can be gained by examining the ways courts approach common problems. As Justice Albie Sachs described it, "we're looking for philosophy, the aptness of an articulation, and . . . how contemporary courts are dealing with similar issues." In his experience, he found that although the constitutional context might be hugely different, "one gets a lot of help from the manner in which courts approach the issues, how they classify the issues, and the factors that lead them to come down in the way that they do."<sup>85</sup>

Judgments in cases involving different areas of constitutional law illustrate the multiple, varied, and sophisticated ways in which the South African court engages with foreign legal resources. Sujit Choudhry's seminal article<sup>86</sup> on the early years of this court's practice of

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<sup>84</sup>See Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *Tex. Int'l L.J.* 353, 362-63 (2004).

<sup>85</sup>Interview with Justice Sachs. See *supra* note 5.

<sup>86</sup>Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional*

looking to foreign law provides a useful categorization of the methodology used by the justices: universalist, dialogical, and genealogical. Under universalist interpretation, constitutional courts are seeking to identify and apply the same set of legal principles that underlie basic constitutional guarantees. When using dialogical interpretation, courts engage with foreign law to cast a mirror on their own jurisprudence, finding either similarities or differences that help to identify the normative and factual assumptions at work. Finally, the genealogical approach considers areas of constitutional doctrine that are tied together through historical relationships.

The following section describes some of the court's judgments,<sup>87</sup> adding the justices' own characterizations of their methodology. Whether addressing criminal procedure issues, the balancing of individual rights against the interests of the state, the liability of the government for the conduct, and omissions, of its agents, or the reach of the powers of the different branches of the government, the court's treatment of foreign law is careful, nuanced, and fully aware of the importance of seeing each jurisdiction's law in its proper context. It appears from this examination that the approach Choudhry calls dialogical, which might alternatively be described as analytical,<sup>88</sup> plays the most significant role, even when the court is seeking to determine whether universalist principles have developed or when it is analyzing provisions tied genealogically to other constitutional instruments. Because such dialogical or analytical use of foreign law can reap the greatest benefits, and because it is also the most legitimate as a jurisprudential matter,<sup>89</sup> it is particularly appropriate to observe this methodology in action in cases involving various subject matter areas.

#### A. *Early Cases Adjusting Criminal Procedure to the New Constitutional Order*

In its first published opinion, the court signaled clearly how seriously and carefully it would take the constitutional invitation to "consider foreign law." In this case, State v Zuma,<sup>90</sup> the court considered a challenge to the constitutionality of the statutory presumption that a written confession to a magistrate was freely and voluntarily made, thereby placing the burden on an accused to prove that it had been made under duress. The court described in some detail the way other jurisdictions had analyzed the issue of when the prosecution could rely on a legal presumption, thereby placing the burden of rebuttal on the defendant, without violating the principle that an accused is presumed innocent. Acting Justice Kentridge, speaking for a unanimous court, found "illuminating"<sup>91</sup> the various solutions offered by courts in the United States, Canada, the Privy Council, and the European Court of Human Rights, concluding that

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Interpretation, 74 Ind. L.J. 819 (1999).

<sup>87</sup>Choudhry's disclaimer is applicable to this study as well, in that the selection of cases is in no way comprehensive or representative. See Choudhry, *supra* note 86, at n. 90. The aim is simply to present examples of comparative constitutional adjudication that may persuade some American judges that the enterprise is worth considering.

<sup>88</sup>See Francois du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, *supra* note 24, at 658.

<sup>89</sup>See Choudhry, *supra* note 86, at 892.

<sup>90</sup>*S v Zuma*, 1995 (4) BCLR 401 (SA).

<sup>91</sup>*Id.* at ¶ 19.

reversing the burden of proof in this way seriously compromised the principle that the prosecution must prove guilt beyond a reasonable doubt.<sup>92</sup>

Given acceptance of the prosecution's burden of proof throughout the history of the common law, Justice Kentridge found that it was inherent in South Africa's constitutional provisions regarding the right to a fair trial.<sup>93</sup> As Choudhry has demonstrated, to this point the court looked to foreign law to discover the universal norms applicable to criminal proceedings. Yet after canvassing that foreign law, Justice Kentridge returned to the words of the South African Constitution and ultimately concluded that, although the Canadian Charter had similar limitations provisions, the differences in language required a somewhat different solution. Accordingly, Justice Kentridge rejected counsel's submission that the court should adopt the criteria developed by the Canadian courts, such as the existence of substantial and pressing public needs met by the impugned statute: "These criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."<sup>94</sup>

In another early case addressing defendants' rights in the criminal context,<sup>95</sup> the court dealt with the constitutional validity of a statutory provision that "compels a person summoned to an enquiry to testify and produce documents, even though such person seeks to invoke the privilege against self-incrimination."<sup>96</sup> In each of the six sections of Justice Ackermann's opinion, he makes substantial references to foreign law. Ackermann asserts that "[i]n construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character."<sup>97</sup> His apparent approach is to anticipate the universalization of legal norms by considering foreign jurisprudence that reflects those norms. Justice Ackermann regards the Supreme Court of Canada's multiple opinions in Thomson Newspapers Ltd. v. Director of Investigation and Research as "instructive both on the issue of the ambit of the right to liberty in section 7 of the Charter (the right to freedom in section 11(1) of our Constitution) and the possible limitation of such right in terms of section 1 of the Charter (section 33(1) of our Constitution)."<sup>98</sup> Ackermann also considers German jurisprudence: "[t]he German Court is more inclined to exercise a stricter form of scrutiny on the basis of [German Basic Law] section 2(1) when the infringement is somehow analogous to the infringement of another right or freedom, not dissimilar to the heightened scrutiny the US Supreme Court employs through the 'fundamental rights' strand of jurisprudence under that part of the 14th Amendment that deals with due process."<sup>99</sup>

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<sup>92</sup>Id. at ¶ 33.

<sup>93</sup>Id.

<sup>94</sup>Zuma, at ¶ 35.

<sup>95</sup>Ferreira v. Levin, Vryenhoek v. Powell, 1996(1) BCLR 1 (CC).

<sup>96</sup>Id. at ¶ 3.

<sup>97</sup>Id. at ¶ 72.

<sup>98</sup>Id. at ¶ 75.

<sup>99</sup>Id. at ¶ 87 (citations to treatises on U.S. constitutional law omitted).

Returning to Canada, Ackermann explains that he “referred somewhat extensively” to the dissenting opinions in *Thomson Newspapers* “because they represent the high-water mark in the judgment for striking down a provision which compels self-incrimination and only affords a direct use immunity.”<sup>100</sup> His explication of the dissenting justices’ reasoning informs his own remedial options, because only their position required that valid “use immunity” provisions bar not only “direct” evidence but “derivative” evidence as well. In the final part of his opinion, Justice Ackermann asserts that the Court is “not obliged to follow the absolutist United States approach,” which is based on “the explicit and seemingly absolute right against self-incrimination found in that country’s Constitution.”<sup>101</sup> Ackermann additionally distinguishes the United States insofar as it “has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, [which] . . . support[s] the adoption of a flexible approach in dealing with the admissibility of derivative evidence.”<sup>102</sup>

As can be seen, while Justice Ackermann’s own justifications for considering foreign law are typically couched in “universalist” rhetoric, much of his actual analysis is properly regarded as dialogical. Despite his disinclination to draw “direct analogies,”<sup>103</sup> Ackermann gleans meaningful insights by comparing foreign constitutions to the South African constitution, distinguishing the factual backgrounds of certain foreign cases, and sometimes even comparing two foreign jurisdictions to each other, without immediate reference to South Africa. Ackermann’s opinion in this case is a full and vivid example of how consultation with comparable foreign jurisprudence may be highly effective when done seriously and comprehensively.

*B. Balancing the Individual’s Right to Religious Expression with Societal Goals; the Right to Human Dignity with a Free Press*

A case presenting the oft-recurring issue of how to balance the individual’s right to practice religion with society’s interests in maintaining general welfare shows the South African court’s careful attention to the way other jurisdictions approach the question. In *Prince v. President of the Law Society of the Cape of Good Hope*,<sup>104</sup> a closely divided nine-member court (with two members not sitting) concluded that the petitioner’s desire to continue to use marijuana as part of the rituals of his Rastafarian religion precluded his acceptance into the legal profession. The three opinions in the case, two in dissent and one for the majority, all made reference to the way similar questions had been handled in other countries, yet ultimately based their decision on what they perceived as the appropriate solution for South Africa.

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<sup>100</sup>Id. at ¶ 109.

<sup>101</sup>Id. at ¶ 150.

<sup>102</sup>Id.

<sup>103</sup>Id. at ¶ 72.

<sup>104</sup>2002(3) BCLR 231 (CC).

On the threshold issue of the proper test to use in analyzing this issue, the justices were unanimous in preferring the approach used in the United States before 1990 and espoused by the minority in Employment Div. v. Smith,<sup>105</sup> rather than the principle announced by Justice Scalia for the majority in that case. The new standard adopted by the United States Supreme Court precludes a successful claim based on the free exercise of religion when the right asserted is prohibited by a “valid and neutral law of general applicability.”<sup>106</sup> The South African justices all found this approach inconsistent with the South African constitution’s strong protection of individual religious freedom, preferring instead the Smith minority’s conclusion that in order to trump a person’s conduct based on an honestly held religious belief, the governmental interest at stake must be compelling and the means used narrowly tailored to achieve it.<sup>107</sup>

When it came to applying the balance of interests to the issue at hand, the majority of the South African court, in a joint opinion by Justices Chaskalson, Ackermann, and Kriegler, found that the strong law enforcement needs with regard to control of marijuana outweighed the individual’s right to use the substance as part of the exercise of his religious beliefs.<sup>108</sup> Here, too, reference to foreign sources played a significant role. The majority noted that the justices in Smith who would have granted an exemption for the use of peyote during Native American church services stressed that the drug, which tastes bitter, was unlikely to be used recreationally by its members outside the church.<sup>109</sup> By contrast, were marijuana to be legalized for sacramental purposes, it would be extremely difficult to control its other uses, particularly as Rastafarians, unlike the Native American Church, are very poorly organized.<sup>110</sup>

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<sup>105</sup>494 U.S. 872 (1990).

<sup>106</sup>*Id.* at 879.

<sup>107</sup>2002(3) BCLR 231 at ¶¶ 122, ¶¶ 47 (Ngcobo, J., dissenting), ¶¶ 155 (Sachs, J., dissenting).

<sup>108</sup>*Id.* at ¶¶ 141-42.

<sup>109</sup>*Id.* at ¶ 122.

<sup>110</sup>The Court also distinguished the instant case from *R v. Parker*, 2000 188 D.L.R. (4th) 385, a Canadian case cited by the appellant, which had held a section of the drug law unconstitutional because, though authorized, no exemption had been created permitting medical use of marijuana. Given the genealogical relationship between the Canadian Charter of Rights and Freedoms and the Constitution of South Africa (particularly with respect to the format which lists rights and limitations on those rights), the majority carefully examined the reasons underlying the decision by the Ontario Appeal Court in *Parker*. The Court found that, unlike religious exemptions, medical exemptions permitting the use of cannabis when deemed medically necessary are both consistent with international protocols and amenable to control. Further, the Court noted that in a subsequent decision, the judges who decided *Parker* rejected a challenge to the criminalization of the possession of cannabis, holding that the prohibition was valid in all respects except for its failure to include an exemption for medical use. The Court’s treatment of *Parker* is particularly noteworthy because of the depth of analysis it demonstrates; the Court carefully distinguishes the cases and even looks to subsequent Canadian jurisprudence for confirmation of its analysis. 2002(3) BCLR 231 at ¶¶ 125, 127. Appellant’s citation to another Canadian decision, *R v. Clay* (2000) 188 D.L.R. (4th) 468, also prompted the court to look at the procedural posture of the case, noting a possible appeal. Similarly, the court was skeptical about a Guamanian case, *People of Guam v Benny Toves Guerrero*, 2000 Guam 26, where the court found the government had not sustained its burden in demonstrating that the prohibition against marijuana served a compelling governmental interest. The South African court again noted that an appeal was pending. *Id.* at ¶ 124. And indeed, the decision was overturned on appeal. See *People of Guam v. Guerrero*, 290 F.3d 1210 (9<sup>th</sup> Cir. 2002).

Justice Sachs, while joining in Justice Ngcobo’s dissent, wrote separately to stress lessons he drew from American jurisprudence that differed from those of the majority. Conceding that the dissent in the Smith case had distinguished peyote from marijuana, he nonetheless concluded that Justice Blackmun’s opinion as a whole would support a narrowly tailored exemption to allow a well-controlled supply of marijuana for sacramental use in South Africa.<sup>111</sup> He then stressed the critical role of the courts in protecting the rights of vulnerable minorities, here citing to an opinion by Chief Justice Burger in which he warned of “requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.”<sup>112</sup> Such “hydraulic insistence,” he continued, “could have a particularly negative impact on the Rastafari, who are easily identifiable, subject to prejudice and politically powerless, indeed, precisely the kind of discrete and insular minority whose interests courts abroad [citing to Tribe’s analysis of the famous Carolene Products footnote] and in this country have come jealously to protect.”<sup>113</sup> In light of these principles, Justice Sachs concluded that, although the petitioners might not be entitled to all that they asked for, the state should be obligated to provide some accommodation to avoid putting them to a choice between their faith and respect for the law.<sup>114</sup>

The South African Constitution obliges all courts, when developing the common law, “to promote the spirit, purport and objects of the Bill of Rights.”<sup>115</sup> In performing this role, the Constitutional Court has not infrequently looked abroad to see how other jurisdictions handle legal issues presenting possible conflicts with constitutional norms. In one such case, the question was whether the common law of defamation was inconsistent with the constitutional protection of freedom of speech and of the press.<sup>116</sup> The newspaper defendant, sued for defamation by a well-known political figure whom it had accused of being under police investigation for involvement with a gang of bank robbers, moved to dismiss the claim on the ground that the plaintiff had not alleged that the defamatory statements were in fact false. The common law in South Africa had not required that plaintiffs allege and prove the falsity of any defamatory statements; rather, the truth of the statement could serve as a defense in such an action. The newspaper claimed that placing this burden on the press infringed on freedom of expression guaranteed under the new constitution by its potential chilling effect, relying heavily on the American principles announced in New York Times Co. v. Sullivan.<sup>117</sup>

The court, speaking unanimously through Justice O’Regan, set forth a lengthy quote from Justice Brennan’s opinion in which he described the dangers of chilling criticism of officials through the onerous burden of establishing the truth of every statement printed, dangers that

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<sup>111</sup>2002 (3) BCLR 231 (CC) at ¶152, n. 138 (Sachs, J., dissenting).

<sup>112</sup>Id. at ¶ 156 and n. 144, citing to Wisconsin v. Yoder, 406 U.S. 205, 217 (1972) (upholding the right of Amish parents to keep their 14 and 15 year old children out of school).

<sup>113</sup>Id. at ¶ 157 and n. 145.

<sup>114</sup>Id. at ¶ 148.

<sup>115</sup>§ 39 (2).

<sup>116</sup>Khumalo v Holomisa, 2002 (8) BCLR 771 (CC).

<sup>117</sup>376 US. 254 (1964). The newspaper used the case solely to require plaintiffs to establish that the defamatory article was false, not to urge adoption of the rule that plaintiffs could succeed only upon proof of actual malice by the publisher. Khumalo, 2002 (8) BCLR 771 (CC), at ¶ 40.

would result in undesirable self-censorship. Characterizing the decision as “the high-water mark of foreign jurisprudence protecting the freedom of speech,” Justice O’Regan noted that many jurisdictions have rejected its approach, citing decisions in Canada, the United Kingdom, Australia, and Germany.<sup>118</sup>

Justice O’Regan then engaged in careful balancing of the need for a robust press and the preservation of other fundamental values. She concluded that requiring a plaintiff to plead and prove that a defamatory statement was false would weigh too heavily against the fundamental value that the new South African society places on individual human dignity.<sup>119</sup> Earlier in the opinion, she had stressed the paramount importance of recognizing and protecting the dignity of every human being in order to contradict a past in which black South Africans were routinely and cruelly denied this right.<sup>120</sup> She noted that placing the burden on the defendant to show that the statements were true was particularly appropriate given two considerations. First, she stressed the difficulty attendant to proving whether a particular statement is true or false, quoting from a dissenting opinion by Justice Stevens in which he described the many factors that might “make it impossible for an honorable person to disprove malicious gossip.”<sup>121</sup> In light of this difficulty, a rule either allowing plaintiffs to prevail without demonstrating falsity or defendants to win when such proof is not required produces, she determined, a “zero sum result” that, no matter who benefits, “fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and human dignity.”<sup>122</sup> Second, the law had been developed to ease the burden placed on media defendants so as to permit them to prevail, even if a statement was false, as long as they could demonstrate that they behaved reasonably and not negligently in the way they handled the publication.<sup>123</sup>

In my conversation with Justice O’Regan, she elaborated on the court’s handling of this issue compared to the way other courts had dealt with it.<sup>124</sup> She explained that in situations where it was not possible to prove the truth or falsity of a statement, rather than permitting the media to win automatically, it was preferable to allow the newspaper to prevail, for example, by showing that publication was in the public interest, and that it had exercised appropriate caution, checking references in accordance with prevailing norms.

Looking at the growth of an increasingly powerful press, Justice O’Regan noted that democratic societies, eager to protect speech yet concerned about the possible harm resulting from extensive media coverage, had arrived at a balance putting greater obligations on the press than the United States. “Giving them a complete carte blanche, where only malice will ground a

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<sup>118</sup>Khumalo, 2002 (8) BCLR 771 (CC), at ¶ 40, n41.

<sup>119</sup>Id. at ¶ 41.

<sup>120</sup>Khumalo, 2002 (8) BCLR 771 (CC), at ¶ 26, citing *Dawood v Minister of Home Affairs*, 2000 (8) BCLR 837 (CC) at Khumalo, 2002 (8) BCLR 771 (CC), at ¶ 35.

<sup>121</sup>Khumalo, 2002 (8) BCLR 771 (CC), at ¶ 38, quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 785-86 (1985).

<sup>122</sup>Id. at ¶ 42.

<sup>123</sup>See *National Media Ltd v Bogoshi*, 1999 (1) BCLR 1(SCA).

<sup>124</sup>Interview with Justice O’Regan. See *supra* note 5.

cause of action on the NY Times case, is actually giving the press too much power, when they really are, as a matter of private power, very powerful.”<sup>125</sup> She suggested that it is appropriate to impose obligations upon the press to establish systems to ensure that what they publish is reasonable, arguing that this does not diminish freedom of the press, but rather protect it from abuse. She emphasized the limited reach of the principles announced by the South African court, noting that they applied only to the institutional media easily capable of abiding by the rules, rather than to private citizens engaged in free speech. Such institutions can readily set in place checks and balances requiring adherence to the ethics of good journalism, such as having two authorities for a proposition and giving the person involved an opportunity to respond.

*C. Liability of Government Entities for Harm Resulting from Their Agents’ Actions or Omissions*

In another set of cases addressing whether the common law should be developed in light of the new constitutional order, the court was confronted with the question of whether the government should be held liable in tort for harm resulting from the conduct of its agents.<sup>126</sup> In Carmichele v. Minister of Safety,<sup>127</sup> a woman had been severely injured by a man who, despite the police and prosecutors’ knowledge that he had a history of violence against women, was released on bail pending his trial on a sexual assault charge. The lower courts had dismissed the woman’s tort claim against the public officials on the ground that they did not owe her a legal duty to protect her from her assailant. In the Constitutional Court, the plaintiff claimed that the common law of torts must be developed to comply with the constitution’s provisions guaranteeing her rights to life, dignity, freedom, security and personal privacy. These constitutional provisions, she asserted, required a finding that the police and prosecutors did owe her a legal duty to protect her from the clear danger posed by her attacker.

Before beginning their analysis under the South African Constitution, Justices Ackermann and Goldstone referred to the controversial American decision on a similar issue, DeShaney v. Winnebago Co. Department of Social Services.<sup>128</sup> In that case, a divided Supreme Court declined to find a duty on the part of the Department of Social Services to take positive action to prevent harm to a child by a father who it had reason to believe was abusive.<sup>129</sup> The South African court quoted a line from Justice Brennan’s dissent: “The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.”<sup>130</sup> Then the Court observed that the South African Constitution pointed in the opposite direction, incorporating a positive entrenchment of the right to life.<sup>131</sup>

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<sup>125</sup>Ibid.

<sup>126</sup>The discussion of this case by Du Bois and Visser, supra note 24, stresses the substantive outcome of this case, lauding South Africa’s expansion of government liability beyond what most other jurisdictions permit. My focus is primarily on the way the justices engage with the foreign authorities to which they refer in their judgment.

<sup>127</sup>2001 (10) BCLR 995 (CC).

<sup>128</sup>489 U.S. 189 (1988).

<sup>129</sup>Id. at 196-97.

<sup>130</sup>Id. at 204, quoted in Carmichele, at ¶ 45.

<sup>131</sup>Carmichele, at ¶45.

The Court went on to show that both the House of Lords and the European Court of Human Rights had recently adopted a flexible approach to tort actions against public authorities for failure to protect individuals from potential harm by another person's criminal acts.<sup>132</sup> The Court remanded the case to the High Court to consider the plaintiff's claim in light of all the evidence, giving due regard to the normative value system of the new Constitution. After trial, the High Court concluded that the police and prosecutors had been negligent, that bail would not have been granted but for their omission, and that the negligence was the cause of the rape, justifying an award of damages.

Four years later, the court was again confronted with the issue of whether a public agency should be held liable in tort, in this case not for failure to act, but for the *ultra vires* conduct of its employees. And again foreign law was found to be, not determinative, but instructive.

In K v. Minister of Safety and Security,<sup>133</sup> three uniformed police officers offered a ride home to a woman stranded in a strange neighborhood at 4 a.m. and brutally raped her in their police car. The Supreme Court of Appeal held that the Minister of Safety and Security was not liable because the officers were pursuing their own interests while on duty, and under the South African law of delict (tort), such conduct was not imputed to the employer. The court rejected arguments that common law rule should be developed in the light of the spirit, purport and objects of the Constitution.

When the plaintiff brought the case to the Constitutional Court, that court determined that, pursuant to § 39(2), the common law of delict had to be interpreted in light of the spirit, purport and objects of the new Constitution. Giving consideration to the plaintiff's right to freedom and security of the person, right to dignity, right to privacy, and right to substantive equality, the court concluded that the Minister should be held vicariously liable for the wrongful conduct of the officers.<sup>134</sup> In arriving at this decision, Justice O'Regan, speaking for a unanimous court, specifically emphasized, in the quotation provided at the beginning of this article, the value gained from looking at how other jurisdictions dealt with this issue.<sup>135</sup>

The court noted that a recent House of Lords decision<sup>136</sup> found the directors of a school liable where a warden in charge of the school's hostel sexually abused boys in his charge. That court held that although the warden's conduct was clearly a gross deviation from his employer's interests, "the conduct itself was sufficiently closely related to the obligations borne by the employer in respect of the children who were abused to render the employer liable."<sup>137</sup> Similarly, in two Canadian cases concerning sexual assaults committed by employees on children within their care, the court found helpful the courts' nuanced formulation of the proper

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<sup>132</sup>Carmichele, at ¶¶ 46-48.

<sup>133</sup>2005 (9) BCLR 835 (CC).

<sup>134</sup>Id. at ¶¶ 54-56.

<sup>135</sup>Id. at ¶ 35.

<sup>136</sup>Id. at ¶ 36, citing *Lister v Hesley Hall* (2002) 1 AC 215 (HL).

<sup>137</sup>Id. at ¶ 37.

test for the vicarious liability of non-profit foundation operating a children's residential care facility.<sup>138</sup>

Looking to American law, the case with the most closely analogous facts produced a closely divided (6 to 5) decision in the Court of Appeals for the Eighth Circuit.<sup>139</sup> In that case, an off-duty officer (unarmed, out of uniform) on his way home from a work seminar in a government vehicle raped a woman after offering her a ride when her car was stuck in a snow drift. The majority held that under the Federal Tort Claims Act the relationship between the rape and the officer's government employment was simply too remote and tenuous to be foreseeable to the employer.<sup>140</sup> A strong dissent focused on the fact that he was authorized to travel in a government car, receiving per diem and mileage and permitted to use red lights, and that he thought it was part of his duties to offer stranded motorist a ride.<sup>141</sup>

Asked about how she "chose" to follow the dissenting opinion, rather than the majority view in the Eighth Circuit case, Justice O'Regan again stressed that it was the reasoning that mattered. When dealing with the factually complex area of imposing vicarious liability on the police department for the wrongful conduct of its officers, line-drawing can be very difficult and must be reasonably principled. She found it helpful to see how every legal system has struggled with this type of line-drawing, and that most had "moved away from a sort of formalistic process of line-drawing, in other words, if they're on duty, there will be liability, and if they're off duty, there won't, or, you know if they committed a crime like rape, which could never be in the interest of the minister, they definitely won't be liable, to a more nuanced understanding of the role of police in a society."<sup>142</sup> Under this approach, it is not surprising that reasonable people arrive at different conclusions given the complicated and varied factual scenarios involved.

#### D. *The Structure of Government: Presidential Prerogatives and Separation of Powers*

As a humanitarian gesture, having in mind the many years he had spent in prison, President Mandela issued an order granting remission of the remainder of their sentences to certain categories of prisoners, including those under 18 and mothers of young children. A prisoner named Hugo, the widowed father of a young child, challenged the order on the basis that it violated the Constitution's guarantee of equality.<sup>143</sup> The first issue for the court was whether the President's order could be subjected to any sort of judicial review at all.

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<sup>138</sup>Id. at ¶ 38. Justice O'Regan noted that liability was imposed by a unanimous court in one case, *Bazley v Curry* (1999) 2 SCR 534, while in the other, in a split decision, *Jacobi v Griffiths* (1999) 2 SCR 570, the court found that the activities of the employer were too tangential to the employee's wrongdoing to warrant imposing vicarious liability under the announced test. Id. at ¶ 39-40.

<sup>139</sup>*Primeaux v. United States*, 181 F 3d 876 (8th Cir 1999) (en banc).

<sup>140</sup>*K v Minister of Safety*, at ¶ 41.

<sup>141</sup>Id. at ¶ 42.

<sup>142</sup>Interview with Justice O'Regan. See supra note 5.

<sup>143</sup>*President of the Republic of South Africa v Hugo*, 1997 (6) BCLR 708 (CC).

In considering the nature of the powers granted to the President by the interim constitution, Justice Goldstone noted that similar powers had been, and continue to be, exercised by heads of state in many countries, and he found it useful to survey how other countries handled the president's power to grant pardons, particularly the issue of whether that power would be subject to judicial review. While traditionally the exercise of prerogative powers of monarchs had not been subject to judicial scrutiny, he observed that "over the past two or three decades there has been a movement, in certain circumstances, in favour of the recognition of such a review jurisdiction - and even in countries without a written constitution containing a bill of rights."<sup>144</sup> Looking to developments in England, New Zealand, Australia, and Canada, it appeared that, depending on their subject matter, some prerogative powers had in fact been found subject to judicial review.<sup>145</sup> Justice Goldstone then reviewed the history of the United States presidential pardon power in some detail, concluding that the courts, while deferential towards the exercise of that power, have at times tested it.<sup>146</sup> In support of his impression that modern constitutional states were moving towards at least some judicial review of such prerogative powers, Justice Goldstone observed that the German constitutional court rendered one of its few tie decisions on the issue of the reviewability of the executive's pardon power, with four justices finding that the Basic Law does not apply to acts of mercy, while four concluded that the constitution would prohibit the arbitrary exercise of the pardon power.<sup>147</sup> Finally, he quoted an Israeli judgment making clear that the President is, like everyone else, subject to the provisions of the law.<sup>148</sup>

Justice Goldstone recalled that looking abroad was particularly helpful to his analysis in this case. It was useful to see the reasoning behind decisions to exercise judicial review of such executive power, or not to permit such review.<sup>149</sup> Similarly, although acknowledging the particular difficulties associated with making comparisons with other jurisdictions regarding the structure of government,<sup>150</sup> Justice Ackermann nonetheless found it helpful to look abroad in a case where a justice of the High Court<sup>151</sup> had declared a statutory provision requiring imposition of a life sentence for certain crimes absent "unusual and exceptional" factors unconstitutional as violative of the separation of powers doctrine.<sup>152</sup> Addressing first the separation of powers provision of the country's new constitution, Justice Ackermann described the court's interpretation as one that would reflect a "distinctly South African model."<sup>153</sup> Here, references in

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<sup>144</sup>Hugo, at ¶ 16.

<sup>145</sup>Id. at ¶¶ 18-22.

<sup>146</sup>Id. at ¶ 24.

<sup>147</sup>Id. at ¶ 25.

<sup>148</sup>Id. at ¶ 26.

<sup>149</sup> Interview with Justice Goldstone. See supra note 5.

<sup>150</sup>See discussion supra at notes 62-72.

<sup>151</sup>The High Court of South Africa, constituted in 1994, inherited the jurisdiction of the provincial and local divisions of the Supreme Court of South Africa. High Court divisions, with jurisdiction over defined geographical areas in which they are situated, conduct trials in the more serious civil and criminal matters, as well as hearing appeals from the magistrate's courts that handle the bulk of litigation.

<sup>152</sup>S. v. Dodo, 2001 (5) BCLR 423 (CC).

<sup>153</sup>Id. at ¶ 15.

prior South African judgments to the words of Justice Felix Frankfurter<sup>154</sup> and a quotation of Professor Laurence Tribe<sup>155</sup> regarding the proper interpretation of the American constitution served generally to negate the idea that separation of powers can ever be complete and to stress the importance of looking at the entire text of a constitution to discern the nature of the separation that was envisaged. As such, foreign law serves simply as a backdrop to careful analysis of what the framers of the South African constitution had in mind when they included a separation of powers provision.

In the context of punishment for crimes, the court determined that both the legislature and the courts had a role to play in deciding the appropriate sentence in a particular case. A decision by the Appellate Division<sup>156</sup> prior to adoption of the constitution stating that criminal punishment is primarily within the discretion of the trial court was found to be of little relevance given that, without any power of review based on a justiciable Bill of Rights, the court had no realistic alternative means of challenging legislative excesses.<sup>157</sup> Accordingly, the constitutional court determined that, under the new order, the legislature's prescription of a life sentence for serious crimes, particularly given the discretion retained by courts to deviate from that sentence when it was in the interests of justice,<sup>158</sup> did not violate the separation of powers doctrine.

The court's conclusion was then reinforced by a survey of the law of the United States, Canada, Australia, Germany, India, New Zealand, and the United Kingdom.<sup>159</sup> Justice Ackermann noted that in all these democracies, which also subscribed to a version, though different in detail, of separation of powers principles, it was permissible for the legislature to set limits to the courts' discretion in imposing sentences. When I asked Justice Ackermann about the court's reference to these foreign sources, he recalled quoting Professor Tribe about the dangers of starting off with a theoretical idea of the separation of powers, rather than viewing it in the context of the whole constitutional document. He stressed that one must be particularly careful when dealing with structural aspects of a constitution, such as issues of federal/state relations, because of the unique balance created by each constitutional document. And even with regard to the interpretation of rights, where comparisons with foreign authorities are generally less problematic, caution is in order. Here, for example, when the court found that the sentence did not violate the proscription of cruel and inhuman treatment, Justice Ackermann noted that citation to certain cases approving sentences against claims of disproportionality in no way signaled that the South African court agreed with the disposition of those cases.<sup>160</sup>

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<sup>154</sup>Id. at ¶ 14.

<sup>155</sup>Id. at ¶ 17.

<sup>156</sup>The Appellate Division was the highest court in South Africa between 1910 and 1994.

<sup>157</sup>*S. v. Dodo*, at ¶ 21.

<sup>158</sup>The court noted that according to a recent Supreme Court of Appeal decision this discretion, although limited, allowed trial courts to take many factors, regardless of whether they diminished moral guilt, into account in deciding whether a reduced sentence was appropriate. *S. v. Dodo*, at ¶ 11, citing to *S. v. Malgas*, SCA Case #117/2000.

<sup>159</sup>*S. v. Dodo*, 2001 (5) BCLR 423(CC), at ¶¶ 27-32.

<sup>160</sup>Id. at ¶ 39.

### E. *Equality Provisions and Affirmative Action*

In the final set of cases, requiring interpretation of the equality provisions of the constitution in two quite different contexts, the South African court also found it helpful to look abroad in analyzing the issues. In Van der Walt v. Metcash Trading Limited,<sup>161</sup> the Supreme Court of Appeal had, on successive days through two different panels, issued contrary orders in cases with identical facts and points of law.<sup>162</sup> In Minister of Finance v. Van Heerden,<sup>163</sup> a pension fund scheme provided a lower level of employer contribution to parliamentarians, largely white, who had held office prior to 1994 than to more recently elected parliamentarians.<sup>164</sup> The losing party in each case argued that the different treatment to which they had been subjected violated the equality provisions of the constitution.

In his opinion for the majority in Van der Walt, Justice Goldstone, citing to Indian authority,<sup>165</sup> held that the outcome did not violate the right of equality, reasoning that inconsistent results arising from the discretion involved in granting appeals does not amount to unconstitutional arbitrariness. In his dissenting opinion, on the other hand, Justice Ngcobo engaged in extensive analysis of the principles involved in the case by using foreign jurisprudence and came to the opposite conclusion. Unlike the majority, he found in Indian case law a strong affirmation of the ideal of equality, specifically the principle that similarly situated litigants should be treated equally. He also looked to American jurisprudence, finding in the retroactivity cases the conclusion that “unless there is a principled reason for acting differently, the different outcomes point to unequal treatment.”<sup>166</sup> In addition, he cited to British jurisprudence in support of the proposition that the Supreme Court of Appeal, as the ultimate court of appeal in non-constitutional matters, may have the power to correct an injustice caused by its earlier decision.<sup>167</sup>

Although the Van Heerden court also rejected the challenge by the disadvantaged parliamentarians, here the justices grappled in detail with the meaning of the South African equality provisions. After observing that the term “equal protection” is present both in Section 9(1) of the South African Constitution and in the Fourteenth Amendment of the United States Constitution, Justice Moseneke, writing for the majority of the Court, distinguished South Africa’s “equality jurisprudence” from that of the United States:

Our respective histories, social context and constitutional design differ markedly. . . . We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent

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<sup>161</sup>2002(5) BCLR 454 (CC).

<sup>162</sup>Id. at ¶ 29.

<sup>163</sup>2004 (11) BCLR 1009 (CC).

<sup>164</sup>Id. at ¶ 57.

<sup>165</sup>2002(5) BCLR 454 (CC) at ¶ 18, n. 22.

<sup>166</sup>Id. at ¶ 38, n.37.

<sup>167</sup>Id. at ¶ 51, n. 46.

jurisprudence American notions of ‘suspect categories of state action’ and of ‘strict scrutiny’. The Afrikaans equivalent “regstellende aksie” is perhaps juridically more consonant with the remedial or restitutionary component of our equality jurisprudence.<sup>168</sup>

Unlike the American requirement of strict scrutiny to justify so-called “reverse discrimination,” the South African equality provisions include a substantive obligation to achieve full and equal enjoyment of rights and freedoms, authorizing remedial measures to attain that goal.<sup>169</sup> Justice Moseneke explained the term “regstellende aksie” and elaborated on this South African concept: “Reg is to restore, to correct. Regstellende aksie is action that seeks to ameliorate past suffering; it’s restorative action. . . . So saying affirmative action does not do service to our notions of equality.”<sup>170</sup>

In a concurring opinion, Justice Sachs also pointed to foreign law in interpreting the constitutional command to “promote substantive equality and race-conscious remedial action”: “The need for such an express and firm constitutional pronouncement becomes understandable in the light of the enormous public controversies and divisions of judicial opinion on the subject in other countries . . . [which] had become particularly pronounced in the United States.”<sup>171</sup> Sachs repeated a lengthy quotation from Justice Thurgood Marshall’s dissent in City of Richmond v. J.A. Croson Co.,<sup>172</sup> emphasizing the distinction between measures to enforce racism and those trying to overcome it, before concluding that the South African Constitution “pre-empted any judicial uncertainty on the matter by unambiguously directing courts to follow the line of reasoning that Marshall J relied on, and that the majority of the U.S. Supreme Court rejected.”<sup>173</sup>

Both Justice Moseneke’s majority opinion and Justice Sachs’ concurring opinion epitomize the dialogical, or analytical, approach to the use of foreign law. Each jurist gleaned valuable insights for interpreting the South African Constitution’s equality provisions by focusing on divergent United States jurisprudence based on a different constitutional text and history. South Africa’s equality jurisprudence is all the richer for its willingness to confront and learn from the experience in another country.

### *Conclusion*

Despite the undeniable and significant differences between the United States and South Africa in terms of constitutional history, the South African experience described here suggests that American courts might well gain valuable insights by looking abroad. When South African

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<sup>168</sup>2004 (11) BCLR 1009 (CC), at ¶ 29.

<sup>169</sup>Const. of South Africa, § 9(2).

<sup>170</sup>Interview with Justice Moseneke. See supra note 5.

<sup>171</sup>2004 (11) BCLR 1009 (CC), at ¶ 147.

<sup>172</sup>488 U.S. 469, 551 (1989) (Supreme Court, by a vote of 5 to 4, struck down a program designed to increase the proportion of municipal contracts awarded to black contractors).

<sup>173</sup>2004 (11) BCLR 1009 (CC), at ¶ 148 (internal footnote omitted).

justices engage in this practice, they are seeking ways of conceptualizing issues and searching for possible solutions to common questions raised by vague and at times conflicting constitutional commands. Never considering foreign law to be binding, or even persuasive apart from the cogency of its reasoning, the court avoids any threat to its sovereignty. The justices consider only open and democratic societies, and they are well attuned to differences among legal systems. They try hard not to lose sight of any historical and cultural context that may counsel in favor of varying responses to similar problems even given superficially comparable language and settings. And far from “cherry picking,” they are particularly conscientious about confronting and distinguishing contrary authorities. Perhaps not coincidentally, courts around the world have in turn referred increasingly to South African judgments.<sup>174</sup> In light of the benefits to be derived from broadened judicial horizons, and the fact that negative consequences can be avoided by honest and thoughtful consideration of what one finds abroad, American courts would do well to join in the global conversation.

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<sup>174</sup>Albie Sachs mentioned with some pride that the court’s decisions are being cited in other parts of the world, hopefully in the same spirit. Interview with Justice Sachs. See *supra* note 5.