

## IN SEARCH OF A COMPARATIVE METHODOLOGY IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

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*This article examines whether a judicial methodology to the use of comparative law has developed in the jurisprudence of the South African Constitutional Court. It does so by examining 10 recent cases where the Constitutional Court has considered foreign law. The author finds that a clear legal methodology to the use of foreign law has not developed in the jurisprudence of the South African Constitutional Court. Foreign law is often relied on in a piecemeal fashion and these examples are often “cherry picked” with little or no justification provided by the Court. The Court still shows a preference for considering “Global North” experiences. In addition, the Court has mostly failed to consider the social realities and cultural considerations of the comparator countries vis-à-vis those of South Africa.*

*Keywords: South African Constitutional Court; comparative interpretation; legal methodology; comparative/transnational legal theory.*

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## Introduction

Comparative law must play an increasingly important role in our progressively globalized world. The internet has transformed the world into a global village, and with the advent of the fourth industrial revolution, it is foreseen that legal scholars will gain unprecedented access to resources that are needed to conduct comparative research. More information than ever before on foreign legal systems is available. Comparative law investigates how a different jurisdiction's solution to a legal problem can be used to address a domestic legal problem.<sup>1</sup> Comparative law, therefore, is problem orientated. It seeks to address the question of how a *functional* problem can be solved in a comparable way in another jurisdiction.<sup>2</sup> The aim of comparative interpretation is essentially to increase the persuasiveness of legal arguments.<sup>3</sup> The comparison should not be limited to rules of law but must also include considerations of legal culture and social realities.<sup>4</sup> It is not sufficient to merely consider the black-letter law of a foreign provision. Law is a cultural construct. To better understand what the law is and how it works in a society, one must dig deeper into the fundamental structure of the law.<sup>5</sup> One must learn to analyze a foreign country's law with caution, and one must transcend one's own cultural prejudices.<sup>6</sup>

According to section 39(1)(c) of the Constitution of the Republic of South Africa, 1996, "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... *may* consider foreign law."<sup>7</sup> This means that although courts can use foreign law to interpret domestic law, there is no obligation to do so. Foreign law does not bind South African courts as South African courts are required to administer law only within its own jurisdiction.<sup>8</sup> Foreign law, therefore, is non-binding and can only be used as a form of argumentation. As Ackerman has noted,

<sup>1</sup> Thomas M.J. Möllers, *Legal Methods* 99 (2020).

<sup>2</sup> *Id.* at 284.

<sup>3</sup> *Id.* at 285. See also *K. v. Minister of Safety and Security*, 2005 (6) S.A. 419 (CC), at 437, para. 35 (S. Afr.).

<sup>4</sup> Möllers 2020, at 285.

<sup>5</sup> Edward J. Eberle, *The Methodology of Comparative Law*, 16(1) Roger Williams U. L. Rev. 51, 52 (2011).

<sup>6</sup> *Id.* at 53.

<sup>7</sup> Own emphasis.

<sup>8</sup> Möllers 2020, at 104.

the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.<sup>9</sup>

In addition, comparative law can help identify legal and societal problems and it can also be an important tool to allow judges to confront their own biases and prejudices.<sup>10</sup>

In South Africa, as in other jurisdictions,<sup>11</sup> comparative law is regarded as but one element of interpretation alongside the other four traditional forms of interpretation.<sup>12</sup> That is grammatical,<sup>13</sup> systematic,<sup>14</sup> historic<sup>15</sup> and teleological<sup>16</sup> interpretation.<sup>17</sup> Teleo-

<sup>9</sup> Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke*, 80(1) Tul. L. Rev. 169, 184 (2005).

<sup>10</sup> *Id.* at 185.

<sup>11</sup> Möllers 2020, at 104; Pierre-André Côté, *The Interpretation of Legislation in Canada* 193 (1984).

<sup>12</sup> Ellison Hahlo & H.R. Kahn, *The South African Legal System and its Background* (1973) first called for due consideration of these elements and it was based on the methods of interpretation advanced by von Savigny for the interpretation of pandectarian Roman law. Later, in contemporary discourse the fifth element of comparative interpretation was added. This is not to say, however that comparative law is an entirely new phenomenon. As Michal Bobek, *Comparative Reasoning in European Supreme Courts* § 2.1 (2013) has pointed out, comparative interpretation was regularly engaged in even prior to the formation of modern nation-states.

<sup>13</sup> Grammatical interpretation acknowledges that in all interpretation the statutory text should serve as a starting point and that the richness of the textual environment can assist the interpreter in determining the meaning of a statutory provision. Interpreters are required to observe the conventions of the natural language in which the provision is couched. See Lourens du Plessis, *Interpretation in Constitutional Law in South Africa* 32-208 (Stu Woolman et al. eds., 2008).

<sup>14</sup> Systematic interpretation requires that legislative provision be understood in light of the intra-textual and extra-textual environment of which the provision forms. Systematic interpretation requires that we understand a legislative provision in the light of the text of the Act (i.e. the Constitution) as a whole (the "intra-textual environment") and of principles outside of the Act (the "extra-textual environment"). The "intra-textual environment" includes the Preamble to the Act, the long title, the definition clause, the objects of an Act and interpretation provisions, headings above chapters and articles, and annexures. The "extra-textual environment" refers to the "wider network of enacted law and other normative law-texts such as precedents" as well as to "the political and constitutional order, society and its legally recognized interests and the international legal order." When these intra-textual and extra-textual text-components are not integrated with the particular statutory provision, it becomes disintegrated from the rest of the legal system and will be understood in isolation from each other. See du Plessis 2008, at 32-159–32-166; Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 21–30 (1991).

<sup>15</sup> Historical interpretation requires interpreters to consider the tradition from which a provision emerged, allowing the interpreter to consider materials relevant to the text's genesis and other historic events. Historical interpretation requires that the interpreter identify the historical situation that gave rise to the law, although it is sufficient that the spirit of the history be taken into account. See du Plessis 2008, at 32-160, 32-170.

<sup>16</sup> Teleological interpretation requires that statutes must be understood in light of their purpose. It is presumed that the purpose of all legislation is to advance broader societal purposes. Teleological interpretation endeavors to advance the values of the legal order. Du Plessis 2008, at 32-160–32-168.

<sup>17</sup> According to Lourens du Plessis, *The (Re)-Systemization of the Canons and Aids to Statutory Interpretation*, 122(3) S. Afr. L.J. 591, 611 (2005): "statutes ... ought not to be understood as 'entities' composed of, for instance, grammatical, systematic, purposive or historical 'elements': these 'elements' should rather be seen as simultaneously given, co-equal modes of existence or being that are 'on the move', overlapping and interacting." According to Wessel le Roux, *Directory Provisions, Section 39(2) of the Constitution*

logical interpretation is the dominant approach to the interpretation of law which has been adopted in South Africa by the Constitutional Court, and this approach seeks to animate the values and rights in the Constitution. Teleological interpretation requires that legal provisions must be understood in light of their purpose and in light of relevant constitutional rights and values.<sup>18</sup> The comparative method is supplementary and protective of teleological interpretation.<sup>19</sup> Constitutional rights and values are often drafted in vague terms, requiring that their exact scope and meaning are left to be determined by the judiciary. However, much guidance can be sought from other jurisdictions to give light to the provisions of the Constitution. The comparative dimension therefore is an important element of meaning and form of interpretation which can do much to assist interpreters to find the “best” meaning that is to be afforded a common law or statutory provision.

Whilst the earlier judges of the Constitutional Court have been described as “constitutional law enthusiasts,”<sup>20</sup> it is questionable whether the same could be said of the most recent occupants of this bench. In what follows, the article considers recent Constitutional Court cases in which the Court made use of comparative interpretation so as to deduce the trend in the Court’s treatment of such examples. Although constitutional cases where the Court has utilized comparative interpretation are few and far between, it appears that there has not been a decline in the pace of judgments in which comparative law at least was partially determinative of the outcome of a matter. During the first decade of the existence of the Constitutional Court there were at least 26 such cases.<sup>21</sup> In the last five years the Constitutional Court has extensively utilized foreign law in at least 14 cases. However, it will be shown that, within this time frame, the Court has dealt with foreign law in a piecemeal, superficial

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*and the Ontology of Statutory Law: African Christian Democratic Party v. Electoral Commission*, 21(2) S. Afr. Pub. L. 382, 398 (2006) this means that “a statutory norm can never finally come to rest on any one of its potential modes of being.” Du Plessis therefore highlights the “structural complexity” and “many-sidedness” of legislative provisions and points out that their interpretation and the linguistic, systematic, teleological, historical and comparative elements of legislation should be weighed against one another without attributing a superior status to any one of these elements (at 612).

<sup>18</sup> See Christo J. Botha, *Waarde-aktiverende Grondwetuitleg: Vergestaltung van die Materiële Regstaat*, LLD thesis, University of South Africa (1996) (May 6, 2021), available at <http://uir.unisa.ac.za/handle/10500/15624>. The approach was best described in *African Christian Democratic Party v. Electoral Commission*, 2006 (3) S.A. 305 (CC), at 320, para. 34 (S. Afr.): “[I]n approaching the interpretation of provisions of ... legislation, courts ... must understand those provisions in the light of their legislative purpose within the overall ... [legislative] framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.” See also *Department of Land Affairs v. Goedgelegen Tropical Fruits Pty Ltd.*, 2007 (6) S.A. 199 (CC) (S. Afr.). According to le Roux 2006, at 386 this “[b]roader approach” favoured by the Court has four distinct steps: First, the purpose of the provision must be established. Second, it should be asked if “that purpose would be obstructed by a literal interpretation of the provision.” If that is the case, thirdly, “an alternative interpretation of the provision that ‘understands’ its central purpose” must be adopted. Fourthly, it must be ensured “that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.”

<sup>19</sup> Möllers 2020, at 105.

<sup>20</sup> Du Plessis 2008, at 32–185.

<sup>21</sup> Ackerman 2005, at 187–190.

and insufficient manner, often using comparative law superficially as support rather for clarification of South African legislative or common law provisions. In addition, there is still a clear preference for comparisons with the “Global North.”<sup>22</sup> No clear methodological approach has developed in relation to the identification and use of comparative law.

First, the article considers the jurisprudential limits of the use of comparative law from a theoretical perspective and proposes a methodological approach to the use of comparative law. Second, the article considers and critically analyzes ten recent cases in which the Constitutional Court made use of foreign law. Thereafter, the article makes recommendations how comparative interpretation should proceed. Although the focus of the article is on the jurisprudence of South Africa’s apex court, the findings and recommendations made herein will ultimately have implications for the judiciary and legal science at large. As the cases considered range from topics such as reproductive rights to intellectual property law, care has been taken not to impose any value judgment on the correctness of these judgments, but to consider only the Court’s use of foreign law, although certain implications may flow from these findings.

## 1. Limitations and Methodology of Comparative Interpretation

Comparative law has been criticized for lacking a clear canon of methods. Instead, the courts and legal scholars have sought to delineate the limits of this method of interpretation. The first such limitation flows from the nature of the interpretive exercise. The task of the interpreting court is to interpret the South African legal provision and not, in the words of the Constitutional Court, “the wholesale importation of foreign doctrines and precedents.” This is so because the comparative dimension is but one element of interpretation together with the grammatical, historical, systematic and teleological dimensions. The comparative dimension should be an element of persuasion, but it can never be conclusive. In addition, a national court is tasked with interpreting domestic law, and the wholesale importation of foreign law, therefore, may be seen as undemocratic, and it may encroach upon the legislative powers of Parliament.<sup>23</sup>

There is also agreement that it is dangerous to seek common ground between jurisdictions where it does not exist. The Constitutional Court has warned about the dangers and limits of comparative research. In *K. v. Minister of Safety and Security*<sup>24</sup>

<sup>22</sup> The “Global North” refers to constitutional order in the Euro-American tradition, whilst the “Global South” refers to constitutional orders in Asia, Africa, and Latin America. See Philipp Dann et al., *The Southern Turn in Comparative Constitutional Law in The Global South and Comparative Constitutional Law 1* (Philipp Dann et al. eds., 2020).

<sup>23</sup> Jo E.K. Murkens, *Comparative Constitutional Law in the Courts: Reflections on the Originalists’ Objections*, 41 *Verfassung und Recht in Übersee* 32, 34 (2008).

<sup>24</sup> *K.*, *supra* note 3, at 419.

the Constitutional Court warned that it is important not “to equate legal institutions which are not, in truth, comparable.”<sup>25</sup> The Court, however, went on to hold that “the approach of other legal systems remains of relevance to us” and that “[i]t 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>26</sup> The Court found that the responses of other legal systems might enlighten the understanding of our law and assist us in developing it further.<sup>27</sup> In *H. v. Fetal Assessment Centre*<sup>28</sup> the Constitutional Court held that

[w]here a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions.<sup>29</sup>

The Court, however, warned that in making such a determination, it is necessary to consider the context in which these problems have arisen and their similarities and differences to the South African context.

Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution’s normative framework and our social context.<sup>30</sup>

So, too, the Constitutional Court in *S. v. Makwanyane*<sup>31</sup> warned that

[i]n dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.<sup>32</sup>

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<sup>25</sup> *K.*, *supra* note 3, at 437, para. 34.

<sup>26</sup> *Id.* at 437, para. 34.

<sup>27</sup> *Id.* at 437, para. 35.

<sup>28</sup> 2015 (2) S.A. 193 (CC) (S. Afr.).

<sup>29</sup> *Id.* at 204–205, para. 32.

<sup>30</sup> *Id.*

<sup>31</sup> 1995 (3) S.A. 391 (CC) (S. Afr.).

<sup>32</sup> *Id.* at 415, para. 39.

Möllers has identified a pertinent reason why a court in Germany would, generally, refrain from using comparative law.<sup>33</sup> Courts and lawyers may have insufficient knowledge about foreign law. In Germany, section 293 of the *Zivilprozessordnung* or Code of Civil Procedure allows the court to order a report to be drawn up by an expert witness. As the use of comparative law, therefore, would be too costly and time-consuming, the use of comparative law in relatively straightforward cases generally is avoided. As the use of comparative law by the courts are voluntary, the parties to a case will have to justify to the courts why foreign law should be utilized.<sup>34</sup> The author, however, has identified three instances where so-called “non-binding” comparative law<sup>35</sup> (*freiwillige Rechtsvergleichung*) is utilized by German courts. First, foreign law is often used when no comparable case has previously been decided on the matter and there is therefore no precedent in national law. So, too, the South African Constitutional Court in *Sanderson v. Attorney-General, Eastern Cape*<sup>36</sup> acknowledged that

[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies.<sup>37</sup>

Second, foreign law may be used when judges want to deviate from previous precedents. Although the United States Supreme Court rarely utilizes foreign law in interpreting U.S. law, the Court has utilized foreign law when justifying a divergence from a previous approach.<sup>38</sup> Third, according to the author, the German Federal Constitutional Court (*Bundesverfassungsgericht*) “always uses a comparative approach when substantiating fundamental rights.” This is so as constitutional provisions are generally drafted in vague and open-ended terms that require substantiation and are ideally suited for comparative interpretation. A wider viewpoint is particularly helpful if there is a lack of sufficient national experience.

A pertinent question in comparative interpretation relates to the selection of appropriate legal systems with which to compare. Möllers considers the question of whether a court must utilize a legal solution that is most common or must search for the best possible solution (even if most jurisdictions hold the opposite position).<sup>39</sup>

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<sup>33</sup> Möllers 2020, at 103–104.

<sup>34</sup> *Id.* at 104.

<sup>35</sup> In the German context, courts are obligated to take account of comparative law during interpretation under European law, uniform international law and international law.

<sup>36</sup> 1998 (2) S.A. 38 (CC) (S. Afr.).

<sup>37</sup> *Id.* at 53, para. 26.

<sup>38</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002), at 316, n. 21; *Roper v. Simmons*, 543 U.S. 551 (2005), at 561, 575.

<sup>39</sup> Möllers 2020, at 285.

While some argue that the most common legal solution should be favored as these positions are more convincing, others argue that the legal position of those countries with which South Africa shares common values should be favored. It is the second approach which best resonates with teleological interpretation. This approach is also in line with the approach of the South African Constitutional Court that the interpretation which *better* reflects the structural provisions of the Constitution should be adopted.<sup>40</sup>

The methodological concern about “forum shopping” or “cherry-picking,” in which a court decides a preferred outcome and simply surveys international courts to find a source to achieve the desired goal, is one of the most common objections to the use of foreign research.<sup>41</sup> There are three important and distinct reasons why an interpreter should consider the comparative experience of other countries in dealing with a specific problem. First, it may be argued that norms and principles relevant to legal problems are cut from a universal cloth and that all courts are engaged in dealing with the same sets of problems.<sup>42</sup> Those norms are understood as universal legal principles.<sup>43</sup> According to this view,

different legal systems give the same or very similar solutions to the same problems of life, despite the great differences in their historical development, conceptual structure and style of operation.<sup>44</sup>

Second, it is argued that legal systems are often bound by complicated historical relationships and that those relationships are sufficient justification to import and apply foreign law norms.<sup>45</sup> Courts favor comparisons with judicial systems that share our legal tradition, and which historically have had an impact on their understanding of the problem.<sup>46</sup> Although it is trite that this form of genealogical comparative

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<sup>40</sup> *Wary Holdings (Pty) Ltd. v. Stalwo (Pty) Ltd.*, 2009 (1) S.A. 337 (CC), at 356, para. 46.

<sup>41</sup> Andrew Friedman, *Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence*, 44(4) *Suffolk U. L. Rev.* 873, 875 (2011).

<sup>42</sup> Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74(3) *Ind. L.J.* 819, 825 (1999).

<sup>43</sup> *Id.* at 841.

<sup>44</sup> *Id.* In *Bernstein v. Bester*, 1996 (2) S.A. 751 (CC), at 811, para. 133 the Constitutional Court held that “particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us ... it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.”

<sup>45</sup> *Id.* at 838 & 866.

<sup>46</sup> In *K.*, *supra* note 3, at 437, para. 34 the Constitutional Court acknowledged the importance of such genealogical comparators: “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. Counsel for the respondent argued that because our common-law principles of delict grew from the system of



interpretation is exceptionally useful and relevant, it may, however, be problematic from a decolonization of legal thought perspective, as the countries with which South Africa shares historical connections often are colonizer countries or other colonized countries.<sup>47</sup> So, too, it has become common place for countries (including South Africa) to “borrow” a legal solution from another state. In these cases, it may be necessary for a court to look to the law and its interpretation in the country of origin to shed light on the purpose of such a legal provision.<sup>48</sup> Courts must still consider these purposes in light of South African constitutional and public values and courts must be careful not to also “borrow” legal interpretation, but to engage with all elements of interpretation to come to a South African understanding.

Third, courts identify the normative and factual assumptions that underlie their understanding of any given legal problem by engaging with comparable jurisprudence in other jurisdictions.<sup>49</sup> According to this view, comparative law exposes the practices of one’s own legal system as contingent and circumstantial, not transcendent and timeless. It’s “dialogical” because courts take this approach to engage in dialogue with comparative jurisprudence in order to better understand their own constitutional system and jurisprudence. It also furthers legal self-understanding as it invites the comparer to compare those assumptions against the assumptions that legal doctrine in its own system both reflects and constitutes.<sup>50</sup>

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Roman-Dutch law applied in Holland, a province of the Netherlands, in the 17<sup>th</sup> century, we should not have regard to judgments or reasoning of other legal systems. He submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable.” In *Fose v. Minister of Safety and Security*, 1997 (3) S.A. 786 (CC), at 833, para. 90 the Court declined “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 a passing similarity to our section 7(4)(a).”

<sup>47</sup> See part 4 hereof and the discussion of decolonization of legal thought in the context of comparative interpretation therein.

<sup>48</sup> Bobek 2013, para. 2.2.

<sup>49</sup> Choudhry 1999, at 835, 855. Authority for this method of comparison may also be found in the judgment of *K*, supra note 3, at 437, para. 35 where the Constitutional Court held that “[i]t 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. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law.”

<sup>50</sup> *Id.*

On this view, comparisons with jurisdictions that have opposite, or different legal principles or social realities are useful exactly because such a comparison exposes assumptions that underly national legal understanding. Here, legal solutions may be convincing even if the outcome is opposed because the interpreter points out differences in law, values, facts or social realities.<sup>51</sup>

Ultimately, however, the goal of comparative interpretation is to search for “the same order of tasks under comparable social circumstances, and not for isolated traits of one or the other system.”<sup>52</sup> According to Friedman, “[o]ne cannot discount the extraordinary way in which the society that surrounds the court both influences and is influenced by the decisions made within its walls” and that, therefore, it is “imperative to consider factors other than the law as it exists on paper.”<sup>53</sup> The author notes that

[o]ften, decisions made by societies with high economic power and great resources would not have the same effect in countries with less economic strength.<sup>54</sup>

So, too, courts will have to take cognizance of social realities such as race, ethnicity and religion. What the above highlights is that in searching for the same order of tasks under comparable social circumstances it may be useful to consider not only functional problems from a universalist perspective or genealogical perspective, but also to consider opposite and different experiences so as to shine a light on our own legal assumptions. This is possible, because ultimately what is of importance is not the outcome in foreign jurisdictions but the legal reasoning that was employed in those jurisdictions. As du Plessis noted,

[w]here the differences between systems go to their historical and conceptual roots, one must simply be careful to avoid the dangers of shallow comparativism and determine – on the merits – whether the foreign jurisprudence is valuable and persuasive.<sup>55</sup>

In order to operate as a legal science, comparative law must have a sound methodology. However, the South African judiciary has given little guidance as to how foreign law research is to be undertaken. Eberle has suggested a four-part comparative law methodology that can be applied “carefully, neutrally, and vigorously.”<sup>56</sup>

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<sup>51</sup> Möllers 2020, at 286.

<sup>52</sup> *Id.* at 284.

<sup>53</sup> Friedman 2011, at 889.

<sup>54</sup> *Id.*

<sup>55</sup> Du Plessis 2008, at 32-187.

<sup>56</sup> Eberle 2011, at 57-58.

The first part (Rule 1) is acquiring the skills of a comparativist in order to evaluate law clearly, objectively and neutrally. The second part (Rule 2) is an evaluation of the law as it is expressed concretely, in words, action or orality. We can refer to this as the external law. Once we get an understanding of the law as actually stated, we can move on to the third part (Rule 3) of the methodology, namely, an evaluation of how the law actually operates within a culture. We might refer to this as law in action or internal law. Law in action is quite important, even in Western culture, as the words in the text often take on a different meaning as applied. Law in action is even more important for non-Western cultures, as here the law may be more a result of tradition, custom or orality.

To do this, we need to examine the underlying substructural elements within the culture that drive and influence the law. After we have evaluated the law as stated and the law in action, we can assemble our data (Rule 4) and conclude with comparative observations that can shed light on both a foreign and our own legal culture.

What the first rule advocates is that legal practitioners should be adequately trained in the skills essential to conduct comparative research. Sadly, this aspect often is neglected by South African law schools and by the bar and sidebar. The second rule highlights the importance of finding and understanding the doctrinal matrix within which a legal provision is contained in a foreign comparator's legal system. The third rule highlights the importance of considering such a doctrinal position within the context of extra-legal factors such as cultural, factual, structural and societal considerations that underlie the doctrinal position. The fourth rule, where we assemble "data" and make comparative observations, inevitably will involve considering such comparative "data" together with the other elements of meaning (grammatical, systematic, historical and teleological). This rule again highlights the fact that the comparative dimensions may never be decisive but that it could be important to shed light on both a foreign and our own legal culture. Unfortunately, this proposal neglects the question of how foreign law comparators should be chosen. This article will ultimately attempt to make certain suggestions as to how courts should approach this question.

What this proposed methodology also neglects is what Markesinis and Fedtke have referred to as the "mental disposition as a factor impeding recourse to foreign law."<sup>57</sup> The authors start by identifying several pragmatic impediments for the use of comparative law such as "judge's lack of time, lack of expertise, lack of materials in his own language, inability to be up-to-date, deep differences in the background of each system" and so on.<sup>58</sup> Some judges have been openly opposed to the use of foreign law at all because of jurisprudential reasons.<sup>59</sup> According to the authors, judicial mentality

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<sup>57</sup> Basil Markesinis & Jorg Fedtke, *Judicial Recourse to Foreign Law – A New Source of Inspiration?* 173 (2006).

<sup>58</sup> *Id.*

<sup>59</sup> In *Roper v. Simmons*, 125 S.Ct. 1183, 1229 (2005) Justice Scalia stressed that he did not think that "approval by 'other nations and peoples' should buttress our commitment to American principles."

is the biggest obstacle to using comparative law.<sup>60</sup> Comparative interpretation has been described as a way of suspending “self-centric and self-satisfied normality.”<sup>61</sup> This, however, will require a change in the mental presupposition of many jurists.

## **2. South African Constitutional Court Cases with Consideration of Foreign Law**

### **2.1. *A.B. v. Minister of Social Development***

In *A.B. v. Minister of Social Development*<sup>62</sup> the Constitutional Court referred to Indian, Canadian and United States law in determining the constitutionality of section 294 of the Children’s Act. In this case a single woman considered a surrogate motherhood agreement but, being incapable of donating a gamete, she could not legally enter into a surrogacy agreement as section 294 of the Children’s Act required that the gametes of at least one commissioning parent be used in the conception of the child contemplated by the surrogacy agreement.<sup>63</sup> The majority of the Court found that the requirement of donor gamete(s) in the context of surrogacy indeed served a rational purpose of creating a bond between the child and the commissioning parent or parents.<sup>64</sup> It was argued that section 294 of the Children’s Act violated the right to bodily integrity.<sup>65</sup> The majority, however, used the Indian, Canadian and United States experiences to strengthen the finding that “security of the person encompasses personal autonomy involving control over a person’s bodily integrity.”<sup>66</sup> The majority noted the relevant legal positions in these jurisdictions as follows:<sup>67</sup>

- In Canada, individual autonomy and dignity are not freestanding rights but they are encompassed in the right protected in section 7 of the Canadian Charter of Rights and Freedoms.<sup>68</sup>

<sup>60</sup> Markesinis & Fedtke 2006, at 173.

<sup>61</sup> Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65(suppl\_1) Am. J. Comp. L. 1 (2017).

<sup>62</sup> 2017 (3) S.A. 570 (CC) (S. Afr.).

<sup>63</sup> 38 of 2005 (S. Afr.).

<sup>64</sup> *A.B.*, *supra* note 62, at 652, para. 287.

<sup>65</sup> S. Afr. Constitution, 1996, § 12(2) provides that “[e]veryone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.”

<sup>66</sup> *A.B.*, *supra* note 62, at 661–662, para. 314.

<sup>67</sup> *Id.* at 661, note 305.

<sup>68</sup> The Constitution Act, 1982 (Can.). The provisions provide that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.”

• The Supreme Court of Canada has held that the sections of the Criminal Code which restrained access to abortion interfered with the liberty and security of the person and that security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference.<sup>69</sup>

• The Supreme Court of Canada has also held that the notion was said to extend to an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.<sup>70</sup>

• The Supreme Court of Canada also confirmed that underlying the rights to liberty and security of the person is a concern for the protection of individual autonomy and dignity.<sup>71</sup>

• Article 21 of the Indian Constitution provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."

• The Supreme Court of India applied Article 21 to mean that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India and that reproductive choices can be exercised to procreate as well as to abstain from procreating. The Court found that the crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected and that there should be no restriction in the exercise of reproductive choices.<sup>72</sup>

• In the United States of America there is constitutional right to bodily or psychological integrity. Cases which have addressed issues related to these aspects have generally been grounded in the rights that no person shall be deprived of life, liberty or property without due process of law. In addition, the Supreme Court has developed the rights to liberty and privacy in cases involving substantive due process.<sup>73</sup>

The majority, therefore, found that the argument that the donor gametes decision entails a decision regarding the woman's reproduction thus is misconceived. The majority found that the right to reproductive autonomy is on the individual woman's own body and not the body of another woman.<sup>74</sup>

The minority of the Court, however, disagreed and showed that the very cases on which the majority of the court relied in fact favored a broader interpretation. The minority stated that the cases referred to allowed for an interpretation of the right to reproductive autonomy to include not only a physical dimension but also a psychological component. The minority of the Court however criticized the majority's use of comparators because of the following factors:<sup>75</sup>

<sup>69</sup> *R. v. Morgentaler* [1988] 1 S.C.R. 30 (Can.).

<sup>70</sup> *New Brunswick (Minister of Health and Community Services) v. G (J)* [1999] 3 S.C.R. 46 (Can.).

<sup>71</sup> *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331 (Can.).

<sup>72</sup> *Suchita Srivastava v. Chandigarh Administration*, A.I.R. 2010 S.C. 235 (Ind.).

<sup>73</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (U.S.) and *Eisenstaedt v. Baird*, 405 U.S. (1972) (U.S.).

<sup>74</sup> *Id.* at 660–661, para. 313.

<sup>75</sup> *Id.* at 596–597, para. 80.

- The Canadian, Indian and United States authorities referred to by the majority all identify the psychological harm of preventing the decision in question. However, none of these cases held that the interests were protected only because it is the person's physical corpus that is affected.

- None of the jurisdictions which were referred to by the majority has a specific, constitutionally protected right to make decisions concerning reproduction.

- The Canadian and Indian Constitutions protect personal liberty and security of the person in a manner akin to our section 12(1).

- The comparative law thus does not support the interpretation that only physical harm to a person's body can give rise to a violation of section 12(2)(a).

The minority of the Court found that section 294 violated the right to make decisions concerning reproduction.<sup>76</sup>

It is puzzling that the two differing opinions were able to rely on the very same authority to come to two very different conclusions. Of course, this may simply be a function of language in which meaning cannot always be fully conveyed within the text use by an original author. The texts of judgments (as is the case with all law texts) are always open to interpretation. Indeed, as Endicott has pointed out, "there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made."<sup>77</sup> A more compelling argument, however, may be that both the majority and the minority judgments used comparative examples as support rather than clarification. This argument is highlighted by the fact that both judgments fail to identify any reasonable justifications as to why these three jurisdictions had been chosen as comparators. Were these examples the only ones that counsel presented to the Court? In fact, these examples were not mentioned in the parties' pleadings.<sup>78</sup> Is it because the right to reproductive autonomy is cut from a universal cloth or rather because all three comparators are from within the Anglo-American legal fraternity which makes access to and comprehension of these legal materials more palatable to South African jurists?

Potentially, these comparators could also have been used to show why the South African interpretation of the right to reproductive autonomy should be different, especially as none of the jurisdictions referred to have a specific, constitutionally-protected right to reproductive autonomy (as in fact the minority judgment pointed out). What is also highly problematic in addition to the fact that the cited jurisdictions

<sup>76</sup> *Roe*, *supra* note 73, at 629, para. 214.

<sup>77</sup> Timothy A.O. Endicott, *The Value of Vagueness in Philosophical Foundations of Language and Law* 14, 16 (Andrei Marmor & Scott Soames eds., 2013).

<sup>78</sup> However, in the *amicus curiae* submissions of the Centre for Child Law (Mar. 21, 2021), available at <http://www.saflii.org/za/cases/ZACC/2016/43hoa.pdf>, the law of Sweden, the United Kingdom, Switzerland, Austria, New Zealand, Iceland, several Australian states and the Netherlands was used as these countries protect the rights of the child to know the identity of their biological parents so as to support the argument that, because South African laws has not yet formalized the right to know one's genetic parents, section 294 is constitutionally defensible based on the right of children to know the identity of their biological parents.

function within different rights-based contexts, is the fact that the case law referred to deals with vastly different contexts (abortion rights as supposed to surrogacy rights). What both judgments attempt to do is to abstract general principles from these cases when these cases were applicable to very specific factual scenarios. It is problematic to deduce from these judgments' general principles when the findings of the courts referred to perhaps never sought to specifically answer the question of whether or not the right to reproductive autonomy incorporates a psychological component.

Instead, it would have been more insightful if the judgments would have considered case law that was delivered specifically on surrogacy requirements as well as the legislative requirements for surrogacy in other countries. It would have been insightful to note if other countries impose similar limitations as in South Africa. Unfortunately, an investigation into this matter is beyond the scope of this article. The court *a quo* (the High Court)<sup>79</sup> referred to "extensive literature regarding the statutory or regulatory framework in numerous foreign legal dispensations."<sup>80</sup> The High Court referred to several examples where foreign jurisdictions require a genetic link for surrogacy agreements (such as in the United Kingdom,<sup>81</sup> several Australian states<sup>82</sup> and The Netherlands)<sup>83</sup> but also to examples where foreign jurisdictions do not require a genetic link for surrogacy agreements (such as Greece,<sup>84</sup> Canada<sup>85</sup> and the Australian state of Tasmania).<sup>86</sup> Interestingly, the High Court noted that different U.S. states diverged in respect of their approach.<sup>87</sup> It is curious that the Constitutional Court would consider the nature of a constitutional right in both Canada and the United States without also considering if specific legislative provisions within these countries accord with the view of the constitutional right or are seen as a justifiable limitation thereto. For example, the fact that Canadian law does not require a genetic link for surrogacy agreements therefore tends to conform with the minority's view that the right to reproductive autonomy includes a physical and psychological component. It would have been more useful had the Court made reference to both the constitutional right within a foreign jurisdiction and the legislative provisions that impact upon it or which give effect to that right.

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<sup>79</sup> *A.B. v. Minister of Social Development*, 2016 (2) S.A. 27 (GP) (S. Afr.).

<sup>80</sup> *Id.* at 40–41, para. 47.

<sup>81</sup> *Id.* at 41–42, para. 49.

<sup>82</sup> *Id.* at 42, para. 50.

<sup>83</sup> *Id.* at 42, para. 51.

<sup>84</sup> *Id.* at 42, para. 52.

<sup>85</sup> *Id.* at 43, para. 54.

<sup>86</sup> *Id.* at 43, para. 55.

<sup>87</sup> *Id.* at 43, para. 53.

## **2.2. *Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation***

Another Constitutional Court case where the contextual correctness of reference to foreign legal systems was highlighted was that of *Ascendis Animal Health (Pty) Limited v. Merck Sharpe Dohme Corporation*.<sup>88</sup> In this matter Ascendis instituted patent revocation proceedings against Merck and Merial's patent, claiming that a certain patent was invalid as it lacked novelty and inventiveness. Merck and Merial instituted proceedings claiming damages against Ascendis, in which they claimed that Ascendis had infringed Merck and Merial's patent. The Court had to consider whether a matter, having been heard by the Commissioner of Patents, was *res judicata*, or if further appeal was possible. In the so-called second judgment (which it is more prudent to consider first) it was held that a previously unsuccessful revocation applicant generally, though not invariably, is precluded from raising the validity of the patent as a defense to a subsequent damage claim. In coming to this conclusion, the second judgment referred to three foreign jurisdictions:<sup>89</sup>

- Validity challenges and damages claims are strictly separated in Germany. Specialist courts are in charge of deciding either issue. This raises the possibility of erroneous validity determinations. However, under German law, validity challenges in damages proceedings are prohibited.

- In the United States, a unitary system is in place, with challenges and damages claims being heard in the same court. Inter parties review is now permitted before the Patent and Trademark Office (PTO), signaling a shift to a more bifurcated system. Defendants were shielded from the expense and risk associated with patent proceedings by establishing a separate forum for expedited validity challenges. The penalty, on the other hand, was duplicated validity challenges. As a result, the legislation included a statutory form of estoppel. An unsuccessful challenger is thus barred from raising any previously relied-upon or reasonably raiseable ground during the challenge.

- In Japan, patent validity can be raised as a defense in infringement proceedings, but the court that awards damages has no authority to revoke or declare the patent invalid.

The first judgment held that it would be improper for the Court to conclude that the findings in the revocation proceedings have a final effect and considered the second judgment's reference to the three jurisdictions cited as wholly inappropriate.

The second judgment relies on an analysis of patent laws in three foreign jurisdictions primarily – Germany, the United States and Japan. In essence, the argument put forward is that in each of these three jurisdictions statutes have been written to prevent a litigant from litigating over the validity of a patent in a revocation application and then subsequently in a separate infringement or damages dispute between the same parties. I do not agree with the conclusion from this analysis. The

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<sup>88</sup> 2020 (1) S.A. 327 (CC) (S. Afr.).

<sup>89</sup> *Id.* at 362–364, paras. 125–127.



argument in the second judgment, that all of these jurisdictions deemed it necessary to legislate to create an explicit rule, lends support to the fact that under common law, the applicant's defense of invalidity based on new causes of action is not prohibited by *res judicata*. More importantly, these foreign jurisdictions are all examination states. This means that by the time the first revocation proceeding between the two parties begins the State has already tested and at least initially verified the validity of the patent on all of the statutory grounds creating causes of action against validity.<sup>90</sup>

What the first judgment highlights is that comparisons with other jurisdictions that have different legal dispensations are inappropriate. The second judgment therefore seemingly falls foul of the warning in *K.* not to equate legal institutions that are not comparable. Legislative provisions are adopted to cure some real or perceived societal mischief. The fact that other jurisdictions had adopted legislation to deal with patent revocation appeals highlights the fact that the South African legislature might need to consider adopting similar legislation. However, in the absence of such legislation in South Africa, it would be wrong to deduce that such adopted legal principles elsewhere also reflect the South African situation. The first judgment therefore was right to point out that the fact that these jurisdictions adopted specific legislative measures to deal with the matter which had changed the common law position in those countries means that the South African position (in the absence of any similar legislative measures) probably is akin to the common law position in those countries prior to legislative intervention. Barring the courts' powers to develop the common law and to provide constitutional remedies in certain strict circumstances, South African courts cannot source legal principles from elsewhere. This would be an encroachment on the legislative powers of Parliament. At most, our courts can only use foreign law to shine a light on and to clarify the interpretation of South African law.

Again, it may be questioned why the Court chose the three jurisdictions in question as comparators. No justification for these foreign examples was provided by the Court and especially the example of Japan with which South Africa has no historic ties seems questionable. The parties did not point the Court to any comparative experience in their heads of argument.<sup>91</sup> The court *a quo* also made no reference to any foreign law.<sup>92</sup>

### **2.3. Centre for Child Law v. Media 24 Limited**

In *Centre for Child Law v. Media 24 Limited*<sup>93</sup> the Constitutional Court considered the scope of protection provided by section 154(3) of the Criminal Procedure Act (CPA)<sup>94</sup>

<sup>90</sup> *Ascendis Animal Health (Pty) Limited*, *supra* note 88, at 354, paras. 99–100.

<sup>91</sup> Case No. CCT 212/2018 (Mar. 22, 2021), available at <http://www.saflii.org/za/cases/ZACC/2019/41hoa.pdf>.

<sup>92</sup> See *Cipla Agrimed (Pty) Ltd. v. Merck Sharp Dohme Corporation*, 2018 (6) S.A. 440 (SCA) (S. Afr.).

<sup>93</sup> 2020 (4) S.A. 319 (CC) (S. Afr.).

<sup>94</sup> 51 of 1977 (S. Afr.).

for the anonymity of child victims, witnesses and accused in criminal proceedings. The provisions provide that

[n]o person shall publish in any manner whatever any information which reveals or may reveal the identity of an *accused* under the age of 18 years or of a *witness* at criminal proceedings who is under the age of 18 years.<sup>95</sup>

In this case the Centre for Child Law sought to protect a victim of kidnapping from media onslaughts. The first judgment held that the exclusion of child *victims* in section 154(3) was unconstitutional as it limited the right to equality, privacy and dignity and also infringes the best interests of the child. These limitations could not be justified. The Court also held that a person who is subjected to such protection does not forfeit the protections upon reaching the age of 18 but may consent to the publication of their identity after reaching adulthood or may approach a competent court. In coming to its conclusion, the Court primarily looked to the Indian and Canadian experiences.<sup>96</sup> The Court noted that the Indian judiciary held that it was clear that the intention of the Indian legislature was to ensure that child victims should not be identifiable, so that they do not face hostile discrimination or harassment in the future.<sup>97</sup> The Supreme Court of Canada has held that the prohibition on the disclosure of identifying content represented only minimal harm to the media's rights.<sup>98</sup> The Court however held that the media could publish non-identifying content.<sup>99</sup> In acknowledging the importance of reporting rape and sexual offences in the media, the Indian Supreme Court in *Saxena* emphasized that the media can still fulfil this important duty without disclosing the name and identity of the child victim. The Court also referred to legislative provisions of India, Canada, New Zealand and the Australian state of New-South Wales.<sup>100</sup>

In commenting on the principle of "open justice," which the Court found to be a recognized principle in foreign law,<sup>101</sup> the Court looked to the United Kingdom to find that "[t]he media respondents have overlooked the nuances of the principle."<sup>102</sup>

<sup>95</sup> Emphasis added. However, the provision states that "the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."

<sup>96</sup> *Centre for Child Law*, *supra* note 93, at 335, para. 34, 342, para. 58.

<sup>97</sup> *Nipun Saxena v. Union of India* [2012] 565 W.P. (C) (Ind.), para. 11 and *Aju Varghese v. The State of Kerala* [2017] 5247 M.C. (Ind.), para. 8.

<sup>98</sup> *Canadian Newspapers Co. v. Canada (Attorney General)* [1988] 2 S.C.R. 122 (Can.), at 123-4.

<sup>99</sup> *A.B. v. Bragg Communications Inc.* [2012] S.C.R. 567 (Can.), para. 26.

<sup>100</sup> *Id.* at 335, note 30.

<sup>101</sup> *Id.* at 353-354, para. 94.

<sup>102</sup> *Id.* at 354-355, para. 99.

The Court also referred to the Canadian Supreme Court<sup>103</sup> who held that while freedom of the press is an important value which should not be hampered lightly, it must be recognized that it has limits.<sup>104</sup>

In relation to the matter of ongoing protection, the Court proceeded to “gauge what options are available elsewhere, and to consider if they would work in South Africa’s unique context.”<sup>105</sup>

To this end, the Court referred to Australia, Canada, the United Kingdom, New South Wales, England and Wales.<sup>106</sup>

The two partially dissenting judgments made no reference to foreign law at all. The Court was significantly assisted in using foreign law as the parties’ heads of argument contained detailed references to foreign law.<sup>107</sup> There is no doubt that the majority’s approach was contextually more appropriate and therefore more sound from a legal-scientific perspective. Nevertheless, in its choice of comparators, the Court only made use of examples from within the Anglo-American legal fraternity and indeed they were only referred to these examples by the parties. The Court referred only to the law of a former colonial master and countries colonized by that colonial master. Of course, there is no doubt that due to the genealogy of the South African legal system, the analysis of the law of countries within the European and Anglo-American systems remains entirely relevant due to South Africa’s historic relationship with these countries. However, the topic under consideration is not one that is particular to the Anglo-American or European legal tradition and surely is one that is cut from a universal cloth.

In the context of decolonization of legal thought, it may be argued that the Court’s use of examples only from within the Anglo-American legal tradition is inappropriate. Munshi has proposed three legal strategies for comparative legal scholars in general to decolonize legal thought which could have been utilized by the Court.<sup>108</sup> First, the author argues that comparators could abandon the practice of comparison itself, instead adopting a worldly orientation and embracing “the notion that all study is comparative.”<sup>109</sup> An example of such a practice would be the way in which neighboring Southern African countries refer to the law of South Africa, as if South African law is applicable to that country and without distinguishing

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<sup>103</sup> *Canadian Newspapers Co.*, *supra* note 98, at 123–124.

<sup>104</sup> *Centre for Child Law*, *supra* note 93, at 356–357, para. 106.

<sup>105</sup> *Id.* at 357–358, para. 110.

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

<sup>107</sup> Case No. CCT 212/2018, *supra* note 91.

<sup>108</sup> Sherally Munshi, *Comparative Law and Decolonizing Critique*, 65(suppl\_1) Am. J. Comp. L. 207 (2017). The fourth, that comparative law could move to a “relational” approach to race and racism so as to uncover the colonial roots of contemporary nation-state and racial forms (232), is inapplicable to the current factual context.

<sup>109</sup> *Id.* at 223.

between their own domestic law and South African law.<sup>110</sup> Although this phenomenon may be attributed to the fact that most legal scholars of South African neighboring countries are educated in the South African legal tradition and not because of any demonstrable cognitive choice. The wording of the constitutional provision that interpreters *may* have regard to foreign law in addition to nationalist sentiments, will in all likelihood be a serious impediment to the South African judiciary adopting such an approach. In addition, such an approach will arguably allow the courts to create law as they “import” legal principles from elsewhere into South African law and therefore encroach on the powers of Parliament.

Second, comparators could decenter Europe from the focus of their enquiry and broaden the “cultural scope” of the discipline.<sup>111</sup> This arguably is the most achievable of the strategies. The Court could easily have considered foreign law examples from jurisdictions other than those in the Anglo-American and European traditions. Of particular reference could be a consideration of the law of other developing countries and African countries. It is also of importance to consider countries such as Brazil, Russia, India and China with whom South Africa has economic, political and social ties.<sup>112</sup> Third, comparators could explore “the foreignness that lies within a nation’s borders.”<sup>113</sup> To this end, the Court could, for example, have asked how traditional African kinship societies dealt with cases of childhood victims of crimes. An analysis of the practices and structures of traditional African kinship societies may provide insight into human nature that is unencumbered by the complexities of the modern world. Analyzing older cultures that existed prior to the development of legal systems can provide valuable insight into the fundamental elements and function of modern societies.<sup>114</sup>

#### **2.4. Competition Commission of South Africa v. Standard Bank of South Africa Limited**

In *Competition Commission of South Africa v. Standard Bank of South Africa Limited*<sup>115</sup> the Competition Commission of South Africa (Commission) referred

<sup>110</sup> See, e.g., the Zimbabwean Constitutional Court case of *S v. Chokuramba Justice for Children’s Trust* [2019] Z.W.C.C. 10 (3 April 2019) (Zim.) where the Court referred to South African cases as if it is domestic law. For example: “It is important that the rule be strictly complied with to ensure that the orders that need to be confirmed are brought to the attention of the Court timeously. This is of particular importance in cases where litigants are not represented.” Indeed, the majority of cases referred to by the Zimbabwean Constitutional Court are South African cases and the Court also referred to South African legal textbooks.

<sup>111</sup> Munshi 2017, at 221.

<sup>112</sup> See Lucia Scaffardi, *BRICS, a Multi-Centre Legal Network*, 5 Beijing L. Rev. 140 (2014).

<sup>113</sup> *Id.* at 224.

<sup>114</sup> Eberle 2011, at 55.

<sup>115</sup> *Competition Commission of South Africa v. Standard Bank of South Africa Limited*; *Competition Commission of South Africa v. Standard Bank of South Africa Limited*; *Competition Commission of South Africa v. Waco Africa (Pty) Limited and Others*, 2020 (4) B.C.L.R. 429 (CC) (S. Afr.).

complaints to the Competition Tribunal (Tribunal) for anti-competitive behavior. After complaints against the companies were referred, the companies sought to access certain information held by the Commission. The Constitutional Court was called upon to consider if a party can access the Commission's record of investigation after a complaint has been referred to the Tribunal but before the party has answered the complaint. The majority of the Court examined the Tribunal Rules and held that, with regard to complaints that have been referred to the Tribunal, the Tribunal Rules do not envisage the production and discovery of documents before the close of pleadings and the pre-hearing conference. The Court held that the Tribunal Rules were not designed to enable disclosure of information to litigants before the Tribunal. The majority of the Court, however, had to deal with the fact that litigants are entitled to discovery immediately after complaint referral in other jurisdictions. In the European Union, companies that receive a complaint referral are allowed to access the European Commission's file. In the United Kingdom the Competition and Markets Authority will also give the respondent an opportunity to inspect the file. According to the Court, the fact that certain foreign jurisdictions grant access before the close of pleadings suggests that this approach is workable.<sup>116</sup>

The Court nevertheless made no further mention of these examples and instead chose to give an opposite interpretation to South African provisions. It should be noted that, unlike the South African position, specific legislative provisions of the European Commission and the United Kingdom Competition and Markets Authority explicitly allow for discovery immediately after complaint referral.<sup>117</sup> Although one of the respondents relied on the fact that other jurisdictions allow for discovery immediately after complaint referral, it therefore seems that this fact should rather have been detrimental to the respondent's case. Whilst the provisions in these jurisdictions allowed for such discovery, South African provisions do not. Such a comparator would have been more beneficial to the respondent's case if South Africa had a similar provision. At most, the reference to the United Kingdom and the European Union could be authority for the conclusion that the approach of those jurisdictions is workable (as in fact the majority of the Court finds). To import a legal position into South African law when South African legislation does not provide therefore would be an encroachment of the law creating powers of the judiciary *vis-à-vis* that of the legislature. The task of the courts is to interpret law and not to "source" or "find" law from elsewhere. The majority, therefore, was correct not to give these considerations the time of day. It would have been more insightful had the Court's attention been drawn to jurisdictions that share the same or similar legislative provisions. Again, it is also lamentable that the Court considered only the Eurocentric world view.

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<sup>116</sup> *Competition Commission of South Africa*, *supra* note 115, at 429, para. 94.

<sup>117</sup> Article 17 of the European Commission (EC) Regulation No. 802/2004 and Rule 6 of the United Kingdom Competition and Markets Authority's Competition Act 1998 Rules.

### 2.5. *D.E. v. R.H.*

In *D.E. v. R.H.*<sup>118</sup> the Constitutional Court utilized a thorough comparative analysis in considering the continued existence of a spouse's right to claim damages for adultery against a third party. The Court started by considering the historic Anglo-American origin of the private law claim and the fact that the claim had been abolished in several of these jurisdictions, such as England, New Zealand, Australia, Scotland, Canada, the Republic of Ireland, Barbados, Bermuda, Jamaica and Trinidad and Tobago.<sup>119</sup>

The Court also noted that

[w]hile at one time adultery was punishable as a criminal offence in France, The Netherlands, Germany and Austria, it no longer exists as a crime in any of these countries; nor do civil claims exist in these jurisdictions.<sup>120</sup>

The Court also referred to a case before the German *Bundesgerichtshof*, which rejected a plea for the development of German law to recognise the claim.<sup>121</sup>

In what can only be described as a triumph for the decolonization of legal thought, the Court also considered the position on private law claims for adultery in several African countries. The Court, however, did note that the exercise was not meant to be comprehensive but that a sufficient number of countries were considered to give us an idea of the trends.<sup>122</sup> The Court referred to Cameroon, Kenya, Zimbabwe, Namibia, Botswana, Seychelles,<sup>123</sup> and Namibia.<sup>124</sup> From the countries surveyed the Court identified that

the general trend is towards the abrogation of a civil claim following on the heels of the even faster paced international disposal of the crime of adultery.<sup>125</sup>

The Court also noted that "the retention of the claim by some countries is not necessarily an indication that these countries would not abolish it even if called upon to do so," as the question of abolition might not have arisen.<sup>126</sup>

<sup>118</sup> 2015 (5) S.A. 83 (CC) (S. Afr).

<sup>119</sup> *Id.* at 94, para. 29, 95, para. 32.

<sup>120</sup> *Id.* at 94, para. 30.

<sup>121</sup> *Bundesgerichtshof* (Sixth Civil Senate) on 22 February 1973 (JZ 1973, 668) (Ger.), quoted by the Constitutional Court at 95, para. 31.

<sup>122</sup> *D.E.*, *supra* note 118, at 95, note 62.

<sup>123</sup> *Id.* at 96, paras. 34–35.

<sup>124</sup> *Id.* para. 26, at 96, para. 36.

<sup>125</sup> *Id.* at 97, para. 37.

<sup>126</sup> *Id.* at 97, para. 38.

## 2.6. *Gavrić v. Refugee Status Determination Officer, Cape Town*

In *Gavrić v. Refugee Status Determination Officer, Cape Town*<sup>127</sup> the Constitutional Court had to determine whether to grant a Serbian national refugee status in terms of section 3 of the Refugees Act.<sup>128</sup> In order to hide his identity while fleeing his native country, the Serbian national seeking refugee status entered South Africa illegally in 2007. He used a fake name and passport to enter the country. The Refugee Status Determination Officer (RSDO) refused to grant the Serbian national refugee status and the High Court confirmed the decision of the RSDO. The Serbian national had fled because he feared for his life following the assassination of the commander of a paramilitary unit for which murder the Serbian national was convicted and sentenced. He applied for refugee protection in terms of section 3 of the Refugees Act on the grounds that he had been falsely believed to be a member of the political group that orchestrated the assassination and had a well-founded fear of being killed. South Africa's exclusion clause is contained in section 4(1) of the Act,<sup>129</sup> and is drawn almost exclusively from Article 1F of the Convention Relating to the Status of Refugees, 1951.<sup>130</sup> The Court turned first to the comparative experience in Europe. Specifically, the Court referred to the Court of Justice of the European Union and to the Czech Republic, Austria and Switzerland.<sup>131</sup> Next the Court turned to some African examples. The Court referred to the Commission on Human and Peoples' Rights (African Commission) and the laws in Senegal and Algeria.<sup>132</sup>

<sup>127</sup> 2019 (1) S.A. 21 (CC) (S. Afr.).

<sup>128</sup> 130 of 1998 (S. Afr.). The section provides that "a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or (c) is a dependant of a person contemplated in paragraph (a) or (b)."

<sup>129</sup> The provision reads as follows: "A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or (c) has been guilty of acts contrary to the objects and principles of the United Nations Organization or the Organization of African Unity; or (d) enjoys the protection of any other country in which he or she has taken residence."

<sup>130</sup> The article reads as follows: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purpose and principles of the United Nations."

<sup>131</sup> *Gavrić*, *supra* note 127, at 55–56, paras. 96–99.

<sup>132</sup> *Id.* at 56–57, paras. 100–102.

The Court's use of not only the European perspective, but also the African worldview is laudable, especially in the context of the decolonization of knowledge. Again, however, no justification for the use of these specific examples was mentioned. This failure is problematic as it prohibits the judiciary from developing tests to determine when foreign law is to be utilized, under which circumstances it may be used and how to choose foreign comparators. It is laudable that the Court also considered the social realities within which both the Senegalese and Algerian legal position came about. It also laudable that the Court considered not only foreign legislative provisions but also a test that has been developed by a court (in the case of Switzerland) to determine the matter.

### **2.7. Minister of Justice and Constitutional Development v. Prince**

In *Minister of Justice and Constitutional Development v. Prince*<sup>133</sup> the Constitutional Court, in a unanimous judgment, declared that section 4(b) of the Drugs and Drug Trafficking Act<sup>134</sup> (Drug Act) was unconstitutional and invalid to the extent that it prohibits the use or possession of cannabis by an adult in private for that adult's personal consumption in private; that section 5(b) of the Drugs Act was constitutionally invalid to the extent that it prohibits the cultivation of cannabis by an adult in a private place for that adult's personal consumption in private; and that section 22A(9)(a)(i) of the Medicines and Related Substances Control Act (Medicines Act)<sup>135</sup> was constitutionally invalid to the extent that it renders the use or possession of cannabis by an adult in private for that adult's personal consumption in private a criminal offence. The Constitutional Court held these statutory provisions to be constitutionally invalid to the extent indicated as they infringed the right to privacy entrenched in section 14 of the Constitution. In coming to this conclusion, the Court relied heavily on the law of the United States of America and Canada. Interestingly, however, the Court looked to its own earlier jurisprudence<sup>136</sup> where the legal positions had already been considered and simply referred to this prior interpretation.<sup>137</sup>

The Court held that it should be left to Parliament to decide on the quantity of cannabis that an adult person may use, possess or cultivate in order for it to amount to "personal use" as it would infringe the doctrine of separation of powers if the Court determined the amount. In coming to this conclusion, the Court noted that, in other jurisdictions where legalized or decriminalized possession of cannabis in small

<sup>133</sup> *Minister of Justice and Constitutional Development and Others v. Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v. Rubin; National Director of Public Prosecutions and Others v. Acton*, 2018 (6) S.A. 393 (CC) (S. Afr.).

<sup>134</sup> 140 of 1992 (S. Afr.).

<sup>135</sup> 101 of 1965 (S. Afr.).

<sup>136</sup> *Bernstein v. Bester*, 1996 (2) S.A. 751 (CC) (S. Afr.).

<sup>137</sup> 44 to 47 (S. Afr.).



quantities for personal consumption had taken place,<sup>138</sup> different amounts have been fixed as “small amounts.”<sup>139</sup> Had a common trend emerged from these jurisdictions, it therefore is conceivable that the Court itself may have made an order as to what amounts to a small amount for personal use.

Two important points may be discerned from the Court’s approach. First, it is imperative that courts must do their utmost to ensure that the comparative law relied on is accurately reflected in its judgment, as it may become concretized in South African domestic law. In this case the Court merely referred to U.S. and Canadian law as previously utilized by the same Court, albeit within a different context. Second, the use of comparative law may be inappropriate where no common denominator could be identified. It remains lamentable that the Court did not consider *how* the jurisdictions decided on the quantity of cannabis that an adult person may use. From here common principles could have been discerned.

### **2.8. Paulsen v. Slip Knot Investments 777 (Pty) Limited**

In *Paulsen and Another v. Slip Knot Investments 777 (Pty) Limited*<sup>140</sup> the Constitutional Court was tasked to consider whether, once litigation has commenced, a debtor can be held liable for accumulated interest greater than the capital amount of the loan. The Supreme Court of Appeal held in the matter that the *in duplum* rule ceases to operate once litigation commences.<sup>141</sup> According to the rule, when the cumulative amount of arrear interest has accumulated to an amount equal to the remaining principal indebtedness, interest on the debt will stop running.<sup>142</sup> The main judgment found that the *in duplum* rule should be applicable during the litigation process as it ignored debtors’ right of access to courts. The main judgment, however, disavowed that it developed the common law by overturning the decision of the Supreme Court of Appeal because the separation of powers precluded it from adapting the common law in this case.<sup>143</sup> The dissenting judgment, however, agreed with the outcome and reasoning of the main judgment, but found that the *in duplum* rule is a common law norm that has always been under the oversight of the courts, and its development thus will not encroach on any exclusive terrain of the legislature.<sup>144</sup> The dissenting judgment, however, found that there was no reason to tamper with

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<sup>138</sup> These include Austria; Capital territory in Australia; Northern territory in Australia; Canada; Chile; Czech Republic; Portugal; Switzerland; California; Uruguay; Spain and New York.

<sup>139</sup> *Prince*, *supra* note 133, at 422, para. 80.

<sup>140</sup> 2015 (5) B.C.L.R. 509 (CC) (S. Afr.).

<sup>141</sup> *Paulsen v. Slip Knot Investments*, 2014 (4) S.A. 253 (SCA) (S. Afr.); relying on *Standard Bank of South Africa Ltd. v. Oneanate Investments (Pty) Ltd. (in liquidation)*, 1998 (1) S.A. 811 (SCA) (S. Afr.).

<sup>142</sup> *Paulsen*, *supra* note 140, at 512, para. 5.

<sup>143</sup> *Id.* at 511–542, paras. 1–102.

<sup>144</sup> *Id.* at 542–548, paras. 103–119.

the interpretation that the Supreme Court of Appeal had given to the common law provision, as the purpose of the *in duplum* rule is to protect debtors from creditors who allow interest to run without taking steps to recover the debt.<sup>145</sup>

In the main judgment, the Court referred extensively to the Zimbabwean judiciary for its interpretation of the common law principle, as the *in duplum* rule entered both jurisdictions via the two countries' Roman-Dutch heritage. Insightfully, the Court did not refer to these Zimbabwean judgments in a comparative manner, but instead, in a series of footnotes, seemingly as authority for its interpretation as to what the correct common law position is. The Court used these cases as authority for the meaning of the rule,<sup>146</sup> to show that the interpretation that the *in duplum* rule continued to operate *pendente lite* had been followed by other courts,<sup>147</sup> to show that purpose of the *in duplum* rule was to enforce sound fiscal discipline upon creditors by serving to disincentivize lending money to a bad risk;<sup>148</sup> to show the possibility of creditors exploiting the suspension of the rule so as to avoid it entirely;<sup>149</sup> to show that the rule should not have been developed by the Supreme Court of Appeal in the first place;<sup>150</sup> to confirm that the rule permits interest to run anew from the date of judgment;<sup>151</sup> and to confirm the common law position that the post-judgment interest is the agreed upon contractual rate and not the prescribed default rate.<sup>152</sup> It is clear that the Court's choice of comparator was inspired by genealogical factors and not by any factors related to decolonization of knowledge of shared social realities. The Court's use of Zimbabwean authority in such a manner nevertheless is remarkable and it is clear that the Court is not concerned with nationalist sentiments.

## **2.9. Rural Maintenance (Pty) Limited v. Maluti-A-Phofung Local Municipality**

In *Rural Maintenance (Pty) Limited v. Maluti-A-Phofung Local Municipality*<sup>153</sup> it was considered whether there had been a transfer of business by Rural Maintenance (Pty) Ltd. to the Maluti-A-Phofung Local Municipality in terms of section 197 of the

<sup>145</sup> Paulsen, *supra* note 140, at 548–554, paras. 120–150.

<sup>146</sup> *Id.* at 525, note 64: "In fn 1 of *Commercial Bank of Zimbabwe Ltd. v. MM Builders & Suppliers (Pvt) Ltd.*, 1997 (2) SA 285 (ZHC) (*Commercial Bank of Zimbabwe*), Gillespie J gives an interpretation of the original Justinian maxim: 'Interest, and interest on interest ... can neither be stipulated for nor recovered beyond twice the amount, and if paid, may be recovered.'"

<sup>147</sup> *Id.* at 528, note 85; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300D-F.

<sup>148</sup> Paulsen, *supra* note 140, at 536, note 121; *Commercial Bank of Zimbabwe*, *supra* note 146, at 321F-I.

<sup>149</sup> Paulsen, *supra* note 140, at 537, note 124; *Conforce (Pvt) Ltd. v. City of Harare*, 2000 (1) Z.L.R. 445 (H) 458C-F (Zim.); *Zimbabwe Development Bank v. Salons* [2006] Z.W.H.H.C. 43 (Zim.).

<sup>150</sup> Paulsen, *supra* note 140, at 538, note 127; *Commercial Bank of Zimbabwe*, *supra* note 146, at 9–10.

<sup>151</sup> Paulsen, *supra* note 140, at 539, note 132; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300B–C.

<sup>152</sup> Paulsen, *supra* note 140, at 541, note 138; *Commercial Bank of Zimbabwe*, *supra* note 146, at 300G–301A.

<sup>153</sup> (2017) 38 I.L.J. 295 (CC) (S. Afr.).

Labour Relations Act (LRA).<sup>154</sup> The consequence of section 197 is that all employment contracts that existed immediately prior to the transfer are automatically transferred to the new employer. The Municipality originally entered into an agreement with Rural to manage, operate, administer, maintain and expand the municipal electricity distribution network. The municipality transferred 16 employees to Rural. Rural started to perform under the agreement and increased its workforce to 127 employees. Later, however, the Municipality informed Rural that it considered the contract to be null and void because the erstwhile municipal manager did not have the requisite authority to conclude such a contract. Rural contended that there had been a transfer of business as a going concern by it to the Municipality and, therefore, that the employment contracts of the 127 employees should be transferred to the Municipality.

It has been settled law that the inclusion of “service” in the definition of “business” means that it is the business that supplies the service, and not the service itself, that must be transferred.<sup>155</sup> Rural, however, argued that

local and international developments in relation to so called “service provision changes,” as opposed to standard transfer of businesses, necessitated the reformulation or development of our law.<sup>156</sup>

Rural submitted that

European jurisprudence has in effect developed two different tests for transfers, one for transfer of a business or undertaking and another for service provision changes.<sup>157</sup>

The term “service provision change” was introduced into the British Transfer of Undertakings (Protection of Employment) Regulations (TUPE Regulations) in 2006.<sup>158</sup> As such, Rural submitted that the courts should develop our law to take cognizance of such developments in the United Kingdom, as our courts have previously looked to these Regulations to interpret our own provisions relevant to the transfer of undertaking.<sup>159</sup> They submitted that these Regulations had therefore been incorporated into South African law.<sup>160</sup>

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<sup>154</sup> 66 of 1995 (S. Afr.).

<sup>155</sup> See, e.g., *City Power (Pty) Ltd. v. Grinpal Energy Management Services (Pty) Ltd.*, 2015 (6) B.C.L.R. 660 (CC) (S. Afr.).

<sup>156</sup> *Rural*, *supra* note 153, at 303, para. 21.

<sup>157</sup> *Id.* at 303, para. 22.

<sup>158</sup> 246 of 2006 (S. Afr.).

<sup>159</sup> See *National Education Health and Allied Workers Union (NEHAWU) v. University of Cape Town*, 2003 (3) S.A. 1 (CC) (S. Afr.).

<sup>160</sup> *Rural*, *supra* note 153, at 306, para. 32.

The majority of the Court refused to do so. First, the majority pointed out that the term is not one used in section 197 of the LRA. The inclusion of “service” in the definition of “business” in the LRA was enacted in 2002. It precedes the 2006 TUPE Regulations and differs in both wording and context from the latter.<sup>161</sup> Second, the majority pointed out that although a court had previously referred to these Regulations, it does not mean that our courts “accepted them as now constituting a separate test for service provision changes.”<sup>162</sup> Indeed, as the Court pointed out, courts also referred to the decisions of the European Court of Justice (ECJ) in interpreting the Acquired Rights Directive of the European Union (EU Directive)<sup>163</sup> to interpret the South African provisions,<sup>164</sup> and that the approach of the ECT also corresponded to the South African legal interpretation of provisions relevant to transfer of undertakings.<sup>165</sup> As such, the majority of the Court found that there was no basis to develop the South African law so as to comply with developments in the United Kingdom.<sup>166</sup>

In a dissenting judgment per Zondo J, the Court justified reference to both the EU Directive and the TUPE Regulations. It was held that, although “mindful of the difference in language between section 197 and those instruments and the legal context in which each occurs, our courts should seek to benefit from the jurisprudence of other courts.”<sup>167</sup> The minority judgment considered several decisions dealing with the EU Directive and the TUPE Regulations to reach the conclusion that the contracts of employment of all 127 employees had been transferred from Rural to the Municipality, with the result that they became the Municipality’s employees.<sup>168</sup> According to the minority, the test to determine whether there has been a transfer of business as a going concern, according to the third judgment, is whether, after the transfer, the business retains the *identity* it had prior to the transfer.<sup>169</sup> This test is wholly inspired by the jurisprudence of the ECJ.<sup>170</sup>

From the above it is clear that the Court has endorsed the view that reference to comparative legal examples and the use thereof to interpret South African provisions is not tantamount to the incorporation of those principles into our domestic law. This can be explained by the fact that the comparative dimension is but one of the

<sup>161</sup> *Rural*, *supra* note 153, at 305, para. 26.

<sup>162</sup> *Id.* at 306, para. 33.

<sup>163</sup> 77/187/EEC.

<sup>164</sup> *Id.* See *Carlito Abler and Others v. Sodexho MM Catering Gesellschaft GmbH* [2004] I.R.L.R. 168 (E.C.J.).

<sup>165</sup> *Rural*, *supra* note 153, at 307, para. 34.

<sup>166</sup> *Id.* at 310, para. 40.

<sup>167</sup> *Id.* at 334, para. 141.

<sup>168</sup> *Id.* at 336–337, 333, paras. 146–147, paras. 149–150, note 64.

<sup>169</sup> *Id.* at 310, paras. 147, 149.

<sup>170</sup> See *Spijkers v. Gebroeders Benedik Abbatoir v. Alfred Benedik en Zonen* [1986] 2 C.M.L.R. 296 (E.C.J.); *Oy Liikenne Ab v. Pekka Liskojärvi, Pentti Juntunen* [2001] I.R.L.R. 171 (E.C.J.).

textual elements that courts must consider giving meaning to legislative provisions. In this case, the text of South African legislative provisions did not warrant a change of meaning and there also was no consensus from the jurisdictions considered that such a change was necessarily warranted. It is insightful that the minority justified the use of the EU Directive and the TUPE Regulations by the Court and that the Court highlighted the genealogical link between our provisions and the comparative instruments.

### **2.10. *United Democratic Movement v. Speaker of the National Assembly***

In *United Democratic Movement v. Speaker of the National Assembly*<sup>171</sup> the Constitutional Court was tasked to consider if the Constitution requires, permits or prohibits votes by secret ballot in motions of no confidence in the President. The Constitutional Court held that a motion of no confidence serves the purpose of enhancing the effectiveness of regular accountability mechanisms and of safeguarding the best interests of the South African people. It also held that the Speaker of Parliament has the power to prescribe that a motion of no confidence in the President be conducted by secret ballot under appropriate circumstances. The Constitutional Court referred to the Constitutions of the Republic of Korea, Singapore, Kenya and Germany in finding that

constitutions of *comparable democracies* prescribe a vote by secret ballot only for the general elections, the election of the President, the equivalent of the Speaker and her counterpart in the second House.<sup>172</sup>

For example, the Constitution of the Republic of Korea requires a secret ballot for general elections for the National Assembly and the President explicitly in Articles 41 and 67 respectively. However, when it comes to impeachment of the President, Article 65 is silent on the voting method and only requires it to be “approved by two thirds or more of the total members of the National Assembly,” while it is Article 130 of Chapter XI of the National Assembly Act of the Republic of Korea that indicates that “a secret vote shall be taken to determine whether a motion for impeachment is adopted.” Similarly, Article 22L(4) of the Constitution of the Republic of Singapore, which deals with the impeachment of the President, only requires the motion to be adopted by “not less than half of the total number of Members of Parliament,” while remaining silent on the voting method. In Kenya, Articles 144 and 145 of the Constitution, which deal with the removal of the President on grounds of incapacity and by impeachment, both remain silent on the voting method. Further, in the German Basic Law, Article 61, which deals with impeachment, remains silent on the voting method and only states that

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<sup>171</sup> 2017 (5) S.A. 300 (CC) (S. Afr.).

<sup>172</sup> *Id.* at 318, para. 62. Emphasis added.

[a] decision to impeach requires a majority of two thirds of the members of the House of Representatives or of two thirds of the votes of the Senate.<sup>173</sup>

In considering the purpose of a secret ballot, the Constitutional Court referred to a European convention, and to judicial pronouncements in Botswana and Zimbabwe.<sup>174</sup>

The use of comparative examples from Asia and Africa in this case is refreshing. Although the Court does not wholly justify its choice of comparators, the reference to “comparable democracies” is insightful. However, it is not clear why Singapore, the Republic of Korea, Germany, Botswana and Zimbabwe are comparable. Certainly, it is not because of socio-economic considerations. Arguably, they are comparable because these countries have similar constitutional provisions and because these countries have justiciable constitutions. The parties in their heads of argument referred only to the legal positions from Zimbabwe and Botswana.<sup>175</sup>

### Findings and recommendations

From the above it is clear that several problems may be discerned from the approach of the Constitutional Court to the use of comparative law in recent cases. First, the impression is often created in the jurisprudence of the Court that comparable examples are “cherry picked” with little or no justification provided by the Court. Whilst it may be immediately obvious to the Court as to why comparisons with certain countries are chosen, it is not always obvious to the reader of the Court’s judgment. This is especially problematic from a legal scientific perspective as a methodology that may be utilized to decide which jurisdictions should be considered in any given case, and which should not be, has not developed in the jurisprudence of the Constitutional Court. Of course, it is the obligation of the parties to legal proceedings and their legal practitioners to advocate the use of a certain legal experience and to justify why such a legal solution should be preferred.

Second, and following from the above, the Court still shows a preference for considering “Global North” experiences.<sup>176</sup> The Constitutional Court favors interpretive comparisons with so-called “premier” courts such as the United States Supreme Court, the United Kingdom Supreme Court, the Canadian Supreme Court, and the Federal Constitutional Court of Germany.<sup>177</sup> While attempts have in certain instances

<sup>173</sup> *United Democratic Movement*, *supra* note 171, at 318, note 52.

<sup>174</sup> *Id.* at 320–321, paras. 71–73.

<sup>175</sup> Case No. CCT 212/2018, *supra* note 91.

<sup>176</sup> This trend is also present in other constitutional democracies where viewpoints from the “Global South” are generally underrepresented in “global constitutional debates, teaching materials, publications, and conferences.” See Dann et al. 2020, at 1.

<sup>177</sup> David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86(3) Wash. L. Rev. 523 (2011).

been made by the Constitutional Court to move beyond such experiences, reference to African or the “Global South” viewpoint has often only been added after first considering the “Global North” viewpoint. The “Global North” viewpoint has often not been contradicted by references to “Global South” viewpoints. Again, much of the blame should be placed at the feet of parties to cases and their legal practitioners who, having been trained in the Anglo-American and Roman-Dutch legal traditions, often are unwilling and probably unable to look to other legal families. Such arguments, however, can only go so far as other sub-Saharan countries are also members of the same legal families. In addition, as Daly has noted,

the [Constitutional] Court appears far more open to citing other international courts ... especially the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).<sup>178</sup>

As Dann, Riegner and Bönnemann have averred,

[t]hinking about and with the “Global South” denotes a specific epistemic, methodological, and institutional sensibility that reinforces the ongoing move towards more epistemic reflexivity, methodological pluralism, and institutional diversification in comparative constitutional scholarship generally.<sup>179</sup>

Third, it is clear from the cases surveyed herein that the Court has mostly failed to consider the social realities and cultural considerations of the comparator countries *vis-à-vis* those of South Africa. In none of the cases considered above has the Court considered the contextual environment in which the law of a foreign comparator functions. This is problematic as it is incumbent upon the comparator to justify the choice of comparator and as the contextual environment within which a law functions should be directly related to the choice of comparator. Again, the “Global North”/“Global South” divide is particularly relevant here. As Dann, Riegner, and Bönnemann argue, there is a

distinctive context that emerges from the history of colonialism and the peripheral position of the South in the geopolitical system, placing Southern constitutionalism in a dialectical relationship with its Northern counterpart.<sup>180</sup>

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<sup>178</sup> Tom G. Daly, *Kindred Strangers: Why Has the Constitutional Court of South Africa Never Cited the African Court on Human and Peoples’ Rights*, 9(1) Const. Ct. Rev. 387, 401 (2019).

<sup>179</sup> Dann et al. 2020, at 3.

<sup>180</sup> *Id.*

Several recommendations can be deduced from the above in order for the South African judiciary to fully unlock the potential of comparative research. First, it is imperative that lawyers should be adequately trained in the skills of a comparativist. As can be deduced from the cases considered, the comparative legal position was often not placed before the Court at all by the parties and their legal practitioners. When legal practitioners rely on comparative law, it often is without any societal or cultural facts wherein the law abides. Erroneous interpretations of foreign law may also be magnified due to the doctrine of precedent. Courts will also be more likely to use foreign law if the legal position of the comparator is easily obtainable. Recent technological trends and open-information movements have made it easier than ever to obtain such information, but courts will be more inclined to look to consider foreign law if it has been considered in peer-reviewed legal articles.

Second, all comparative interpreters (including judges and legal practitioners) bear the onus of providing a justification as to why a specific legal comparator should be used. The choice of comparator may not be arbitrary, and a comparator must be chosen because a functional problem has universal application and has been dealt with extensively in the case law of a foreign comparator, because the foreign comparator has specific historical ties with South Africa which makes such a comparison highly relevant or valuable, or because the legal position is so different within the foreign comparator that a comparison may reveal underlying extra-legal and cultural assumptions that may be highly relevant in resolving the functional problem in South Africa.

Third, comparative interpreters must consider the social realities and cultural considerations of the comparator countries. It is not sufficient to merely consider the black-letter law of a foreign comparator. As law is a cultural construct that functions in the contexts of certain social realities, we must seek to understand the fundamental structure of the law. In this regard, it is also imperative that judges should actively search for comparative examples from the "Global South."

It is clear that a definitive methodology to the use of comparative law has not developed in the jurisprudence of the Constitutional Court. Comparative law is used by the Court in a piecemeal fashion and there still is an over-reliance on the law of South Africa's colonizers or other colonized countries. The willingness of the Court to consider foreign legal positions nevertheless is laudable and the Court may be regarded as a comparative law leader in comparison with other apex courts. The development of a clear methodological approach in the jurisprudence of the Court, therefore, could also be beneficial to legal science as a whole and assist other apex court in utilizing comparative law. As a precondition to the emergence of such a methodology, the Constitutional Court will have to reflect on and enunciate the conscious and unconscious decisions that are made in the selection and use of comparative law. Although in so doing the Court would inevitable open itself to internal and external criticism, this will allow for a clear methodology to emerge and develop in the context of our constitutional order.



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