

CONSTITUTIONAL COMPARATIVISM IN SOUTH AFRICA*

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Ulpian's search for a philosophy underpinning the law is not surprising. Around AD 200 intellectuals were becoming dissatisfied with the view that whatever is traditional or customary in a society is automatically right. They were looking in both politics and religion for something more universal, rational, and philosophical . . . [but] . . . [p]hilosophically minded lawyers are not members of this or that school of philosophy. It is a mistake to attribute to a lawyer a system of philosophy rather than a set of values.

Tony Honoré¹

The mere formulation of a problem is often far more essential than its solution, which may be merely a matter of mathematical or experimental skill. To raise new questions, new possibilities, to regard old problems from a new angle requires creative imagination and marks real advance in science.

Albert Einstein²

DISCLAIMER

This contribution is written exclusively from the South African perspective. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*³ the South African Constitutional Court (the 'Constitutional Court') declared the common law offence of sodomy, as well as a number of statutory provisions criminalizing sexual conduct between adult males, to be constitutionally invalid. In argument extensive reference was made to comparative law in, amongst others, the United Kingdom, Ireland, Canada, Australia, New Zealand, Germany and the European Union, and to the judgments of the United

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¹ *Ulpian: Pioneer of Human Rights* 2ed (2002) 78 at 80.

² Albert Einstein & Leopold Infeld *The Evolution of Physics* (1938) 95, as quoted on a memorial pillar at the Nobel Museum, Stockholm.

³ 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 106.

States Supreme Court (the ‘US Supreme Court’) in *Bowers v Hardwick*⁴ and *Romer v Evans*.⁵ Reference was also made to the sustained criticism of *Bowers v Hardwick* in the United States. Despite being invited to do so, the Constitutional Court declined,⁶ properly so, to express itself on such criticism or the current standing of *Bowers v Harwick* in the United States in the light of *Romer v Evans*.

I shall, similarly, limit myself strictly to the validity and importance of comparative law for the interpretation and enforcement of the South African Constitution and do not comment on the criticisms leveled in the Markesinis/Fedtke article⁷ against certain judges in the United States of America who denounce the use of any foreign comparative material. Those who look for something new out of Africa must draw their own inferences.

In discussing comparative law in the South African context I shall limit myself (in the main) to the comparative discipline as applied to post-1994 constitutional and public law. I do not thereby distance myself from the comparative approach to private law; far from it. I merely indicate the (necessary) logistical limits of my contribution. For similar reasons I shall focus on fundamental rights jurisprudence, without thereby implying that a comparative approach is unsuitable for other areas of constitutional or public law. If I am to write honestly on the judge as comparative lawyer I shall, I fear, at times have to obtrude my own personal experience. I write as one who has spent his legal life primarily⁸ as an advocate and a judge.

CONTEXT

A proper understanding of the justification for and the importance and significance of a comparative jurisprudential approach to the interpretation and application of both the South African 1993 interim Constitution (‘the interim Constitution’) and the 1996 Constitution (‘the 1996 Constitution’ or ‘the Constitution’), the latter being *preordained* and *controlled* by the former, requires a fine understanding of the South African context. It is impossible, in a contribution such as this, to furnish such context satisfactorily, and in the brief sketch that follows I am guilty both of selectivity and oversimplification. For a fuller exposition, which explains, inter alia, what the concepts ‘preordained’ and ‘controlled by’ mean, and also describes the unique task of the Constitutional Court (imposed by the interim Constitution) to ‘certify’ the validity of — and thereby give operative force to — the 1996 Constitution by evaluating it against, inter alia, the thirty-four so-called ‘Constitutional Principles’ in the interim Constitution (which constituted the key to unlocking the impasse in the constitutional negotiations),

⁴ 478 US 186 (1986).

⁵ 134 L Ed 2d 855 (1996).

⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (supra) paras 53–6.

⁷ Op cit note 1.

⁸ From 1987 to 1992 I braved the daunting world of academe as the inaugurating incumbent of the Harry Oppenheimer Chair in Human Rights Law at Stellenbosch University.

reference can be made to my published lectures 'The legal nature of the South African constitutional revolution'.⁹ The legal revolution brought about by the above two constitutions, although a substantive revolution, was not — in Kelsen's sense — a procedural one.¹⁰ One of the consequences is that all law, common and statutory, in existence immediately prior to the interim Constitution coming into force, continued with full force and effect thereafter, subject to its consistency with the interim and later the 1996 Constitution.¹¹

The South African common law is not Anglo-Saxon but Roman-Dutch, introduced in 1652 by the Dutch East Indian Company's settlement in the Cape. The received Roman-Dutch law was the common law of Holland prior to the latter's codification in the first decade of the nineteenth century. Neither the Cape, nor the united South Africa thereafter, codified its common law in the continental manner, and the Roman-Dutch common law continued to be developed in South Africa through the judgments of the courts. Since 1806 English law, more particularly in the fields of company law, evidence and criminal procedure, has exercised considerable influence. But when difficult questions of substantive criminal law (which has remained Roman-Dutch) and private law arise that are not closely covered by South African precedent, regard is still had to the pre-codification Dutch and other European commentaries on Justinian's Digest, and even — where necessary — to the Digest itself.

The system of South Africa's common law is currently regarded as mixed, with its tap-root in the deep soil of the Roman-Dutch law, and its side roots nourished by the Anglo-Saxon system. This enables us to benefit from the best of both worlds. The principled, deductive analysis of the continent can be tested against the inductive, empirical, case-by-case methodology of the Anglo-Saxon system.

On the other hand, the constitutional law of South Africa, after unification in 1910, was closely modelled on that of the British Westminster system. The legislator was omni-competent and supreme; no supreme law (by way, for example, of an entrenched bill of rights) existed against which the validity of parliamentary legislation could be tested in the courts.¹² There was of course

⁹ Published in 2004 *New Zealand LR* 633.

¹⁰ *Ibid* at 646.

¹¹ Section 229 of the interim Constitution and item 2(1) of Schedule 6 to the 1996 Constitution.

¹² It is interesting to note that the 1854 Constitution of the Orange Free State (one of the independent Boer states that was annexed by Britain after the Anglo-Boer War of 1899–1902 and which subsequently became one of the four provinces of the Union of South Africa in 1910) was significantly influenced by the United States Constitution. It was written, onerous procedures were prescribed for its amendment, the legislature was not supreme, certain rights — including equality before the law — were entrenched and the power of judicial review accepted as a feature of the Constitution, following the US Supreme Court judgment in *Marbury v Madison* 5 US (1 Cranch) 137 (1803). 'This right, however, was of as little assistance to Messrs Cassim and Solomon in their dispute with the state [*Cassim and Solomon v S* (1892) 9 *Cape LJ* 58] as judicial review was to Mr Dred Scott [in *Dred Scott v Sandford* 60 US (19 How) 393 (1857)] some thirty-five years earlier on the other side of the Atlantic'. (L W H Ackermann 'Constitutional protection of human rights: Judicial review in (1989) 21 *Columbia Human Rights LR* 59 at 61.) For constitutional developments in South Africa prior to 1910, see also L M Thompson 'Constitutionalism in the South African Republics' 1954 *Butterworths South African LR* 49; John Dugard *Human Rights and the South African*

one serious flaw in the model. Even after the suffrage was extended to women, the vast (black) majority of the population remained unenfranchised. Before 1994 South Africa could be described as a white racial oligarchy in which whites enjoyed a form of parliamentary democracy. Even the civil rights of whites became seriously attenuated by the passing of draconian security legislation and the promulgation of successive states of emergency in the 1980s.

The judge's task of 'finding', 'developing', and 'making'¹³ the common law in a mixed system of necessity requires a comparative legal approach. It was in fact the approach of the pre-codification Roman-Dutch academic writers¹⁴ themselves. For well over a century our courts have, with a minimum of fuss — and mostly without specific mention that they were doing so — adopted a comparative law approach. For the most part¹⁵ this has been done with care and discretion, particularly since 1910. A striking example of wholly appropriate cross-pollination has been the introduction from English law of the principles of repudiation (anticipatory breach) in the law of contract, a form of contractual breach unknown in Roman-Dutch law.¹⁶ It has been expressed thus: '[Repudiation as a species of breach of contract] is essential for the proper regulation of contractual relationships, and does not conflict with the fundamental principles of our law.'¹⁷

The South African Supreme Court of Appeal¹⁸ has since 1910 consistently sought guidance from the judgments of the higher courts and from academic writers in, amongst others, the United Kingdom and the rest of the Commonwealth, the United States of America, the Netherlands, and Germany; quite apart from relying on the 'old authorities' in Holland and the rest of Western Europe where reception of Roman Law had taken place.

A unique contribution to analytical and comparative law methodology in South Africa was made by that colossus Professor J C de Wet (1912–1990). His genius encompassed the South African law of contract, criminal law, water law and legal history, and his writings¹⁹ exerted a remarkable influence on the jurisprudence of the Supreme Court of Appeal since 1950. There has

Legal Order (1978) 14–25, and generally H R Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960).

¹³ It is, for present purposes, unnecessary to debate the precise jurisprudential nature of the judicial function involved.

¹⁴ Often referred to as 'the old authorities' (Afrikaans: 'die ou skrywers').

¹⁵ An exception to this was the period of several decades after 1815 when judges, from England, or trained mainly in English law, would, at the drop of a hat, introduce English legal principles without any real attempt to satisfy themselves that they were compatible with the Roman-Dutch law.

¹⁶ Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 816n228 and J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg* 4ed (1978) 153, Professor J C de Wet having been responsible for section 1, the Law of Contract. This was the last edition under the hand of Professor De Wet. (See now J C de Wet & A H van Wyk *Die Suid-Afrikaanse Kontrakereg en Handelsreg* 5ed by A H van Wyk & G F Lubbe (1992).)

¹⁷ De Wet op cit note 16 at 153 (my translation from the Afrikaans).

¹⁸ From 1910 until 1994 the highest court in South Africa and known as the 'Appellate Division'; and since 1994 the highest court in non-constitutional matters and known as the 'Supreme Court of Appeal'.

¹⁹ His main writings include his work on the law of contract, op cit note 16, first published in 1947, his revolutionary and liberalizing work on criminal law, *Die Suid-Afrikaanse Strafreig*, jointly authored — as far as specific offences are concerned — by H L Swanepoel (first published by Butterworths, Durban in 1949),

never been an impediment to dialogue between the courts and living academics, although courts have not been consistently scrupulous in acknowledging the sources of their inspiration. JC (as he was affectionately known to all) 'has done more than anybody else in the course of the [twentieth] century to mould and invigorate the South African *usus modernus* of Roman-Dutch Law',²⁰ and was 'the true pioneer of a critical comparative approach in South Africa'.²¹ In the field of criminal law, in particular, he extrapolated, for the benefit of South African law, important new and humane developments in German law. He would not dream of lecturing or writing in a manner other than comparatively, and in his books he refers not only to the Roman-Dutch 'old authorities', but to modern law in the United Kingdom, the Netherlands, Switzerland and Germany. Those of us who were fortunate to study under him did not at the time realize we were experiencing something unique; we naively thought (at least I did initially) that this was the way every good jurist taught criminal law and contract. But the comparative approach was imbibed by many of us.

I set out this comparative law background to counteract the possible misconception that the comparative law approach of the Constitutional Court has been due, in the main, to the provisions in the two constitutions, alluded to in the Markesins/Fedtke article, referring to the discretionary use of foreign law. I have not the slightest doubt that, because of the comparative law ethos in South Africa, the Court would have placed the same reliance on foreign law even had there been no such provision in the constitutions. This emerges clearly from the judgment in *S v Makwanyane*²² (the second judgment of the Constitutional Court and the one in which the death penalty was declared invalid) where Chaskalson P,²³ delivering the judgment of the Court and after referring generally to the value of international and foreign authorities, comments that '[f]or *this reason alone* they require our attention' and then observes that '[t]hey *may* also have to be considered because of their relevance to section 35(1) of the [interim] Constitution.' (Emphasis added.)

For the same historical, normative and analytical reasons it was natural, both in constitutional creation and adjudication, to turn for guidance also to Germany. In *Du Plessis v De Klerk*²⁴ the Court held, in a majority judgment,

and in regard to legal history, *Die Ou Skrywers in Perspektief* ('The Old Writers in Perspective') (also published by Butterworths, Durban in 1988).

²⁰ Reinhard Zimmermann in his dedication to Professor De Wet of 'Stipulatio poena' in 1987 (104) *SALJ* 399. See also the fuller appreciation by Reinhard Zimmermann and Charl Hugo 'Fortschritte der Südafrikanischen Rechtswissenschaft im 20. Jahrhundert: Der Beitrag von J C de Wet (1912–1990)' in 1992 (60) *Tijdschrift voor Rechtsgeschiedenis (The Legal History Journal)* 157.

²¹ Barend van Niekerk in his brilliant and insightful 'J C noster: A review and a tribute to Professor J C De Wet' (1980) 97 *SALJ* 183 at 187.

²² 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 34.

²³ At the time the head of the Constitutional Court was designated 'President' and the head of the Supreme Court of Appeal was the Chief Justice. Subsequently the position of Chief Justice was transferred to the head of the Constitutional Court. A corresponding transfer occurred with regard to the Deputy Chief Justice and the Deputy President of the Constitutional Court.

²⁴ 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

that the interim Constitution's Bill of Rights applied vertically only. Kriegler J wrote for the minority. In a concurring majority judgment the following was said:²⁵

'It is certainly true that our interim Constitution is textually unique and that the historical circumstances in which constitutions are adopted are never identical. In certain cases these circumstances may, for the most part, only differ in degree. Many constitutions, particularly those which come in the wake of rapid and extensive political and social change, are reactive in nature and often reflect in their provisions a response to particular histories and political and social ills.

Kriegler J has, in his judgment, referred eloquently to the duration, acceleration and gravity of the human rights denials and abuses to which the interim Constitution is a response and which it seeks, amongst other things, to redress. Without wishing to over-simplify the nature and extent of these abuses and denials it is, I think, fair to say that they related in general to the core values of dignity, freedom and equality. There are other constitutions which have been a response to tragic histories or episodes in the national histories of particular countries during which gross abuses of human rights have occurred.

I do believe that the German Basic Law (GBL) was conceived in dire circumstances bearing sufficient resemblance to our own to *make critical study and cautious application of its lessons to our situation and Constitution warranted*. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution. Few things make this clearer than Art 1(1) of the GBL, [2] particularly when it is borne in mind that the principles laid down in Art 1 are entrenched against amendment of any kind by Art 79[3].' (Emphasis added.)

CONSIDERATION OF FOREIGN CONSTITUTIONAL LAW BY SOUTH AFRICAN COURTS

(a) Before dealing with the arguments in favour of such consideration it must be pointed out that the Constitutional Court has rejected all attempts to determine or rely on so-called original intent. The stage was set in its first judgment, *S v Zuma*, where Kentridge AJ said the following:²⁶

'I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. . . . I would say that a constitution "embodying fundamental rights should *as far as its language permits* be given a broad construction."

The Court has consistently adopted a purposive (teleological) approach to the interpretation of the Constitution and has approved²⁷ the following passage in the Canadian Supreme Court case of *R v Big M Drug Mart Ltd*:²⁸

'The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

²⁵ Ibid paras 90–2. Footnote 1 to the text has been omitted but footnotes 2 and 3 read: '[2] The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.' (For English renderings of provisions of the GBL the official translation of June 1994 issued by the Press and Information Office of the Federal Government has been used). [3] It is generally recognised that Art 1 constitutes an unmistakable rejection of totalitarianism and the ideology of national socialism ('you are nothing, your nation is everything'). See, for example, von Münch/Kunig *Grundgesetz-Kommentar* Band 1 (1992) 4 Aufl Art 1 Rn 6.'

²⁶ 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) paras 17–18 (emphasis in the original).

²⁷ Ibid para 15 and *S v Makwanyane* supra note 22 para 9.

²⁸ (1985) 18 DLR (4th) 321 at 395–6.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.'

In order to ascertain this purpose it is permissible to have regard to the background of the constitutions and various materials in relation thereto,²⁹ but not to the subjective intentions or understandings of the persons who took part in the negotiations or in the enactment of the Constitution. In *S v Makwanyane*, the Constitutional Supreme Court quoted with approval³⁰ the following passage from a Canadian Supreme Court judgment:³¹

' . . . the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors . . . the comments of a few federal civil servants can in any way be determinative',

and then itself observed as follows:³²

'Our Constitution is also the product of a multiplicity of persons, some of whom took part in the negotiations, and others who as members of Parliament [33] enacted the final draft. The same caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played.'

The determination of a single collective original intention on the part of persons enacting a constitution is, in my view, a legal fiction and a dangerous one at that. A fiction, because the exercise is an impossible one. Logically the moment for determining such intention is when the constitution is passed; not before and not after. In relation to constitutional enactment, memory is particularly deceptive, influenced (however genuine the recollection) by sanguine hopes of the period before enactment and the political disputes after enactment. But even if, hypothetically, it were possible to determine the true intention of each enactor at the time of enactment, this would be insufficient to rescue the fiction. It is simply impossible that all consenting minds would have a coherently similar understanding, particularly of those provisions that give rise to subsequent dispute. A dangerous fiction, because it permits (or tempts) subsequent interpreters of the constitution to inject their own subjective understanding of its meaning.

When a constitution, finally enacted, goes out into the world it acquires — in a manner of speaking — a meaning which results from a dialogue which the interpreter has with the constitutional text, taking into account

²⁹ See *S v Makwanyane* supra note 22 paras 12–20.

³⁰ Ibid para 18.

³¹ *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)* (1986) 18 CCR 30 at 49.

³² Para 18.

³³ It must be remembered that in *Makwanyane's* case, it was the interim Constitution that was being scrutinized. The interim Constitution was enacted by the old pre-April 1994 Parliament, whereas the 1996 Constitution was enacted by the Constitutional Assembly provided for by, and elected under, the provisions of the interim Constitution.

the interpretative aids referred to above. There must be few judges who have not had this experience with the texts of their own judgments, once delivered. No matter how painstaking the efforts of judges may be to express as accurately as possible their meaning in judgments, such judgments are not understood by the reader in exactly the same manner as the author intended. One experiences this quite dramatically, and at first hand, on a collegiate court such as the Constitutional Court, where all eleven justices sit en banc in all cases. Even where there is agreement on the outcome of a case and on the reasoning leading to such conclusion, careful attention has still to be given to the wording of the judgment in order to achieve agreement between colleagues as to its 'exact' meaning. Even when this has been achieved, subsequent disagreements still occur as to what individual members of the Court understood the judgment to mean at the time.

Moreover, in the case of a constitution, which is designed to last for (at least) a very substantial period of time, the meaning of values, rights and norms cannot be fossilized in the form they may have been at the time of enactment. This is particularly so in the case of a bill of rights, no matter how all-embracing, and how extensive the formulation of these rights might be. Any attempt at such petrification would amount to an exclusion of the subsequent flow of the history of philosophy. Foundational constitutional concepts such as dignity, equality and freedom are not self-defining. Even after all relevant historical materials and other legitimate aids to interpretation have been properly consulted and exhausted, there are innumerable questions which can still arise in the interpretation and application of these concepts, which cannot be solved (or fully or satisfactorily solved) by looking backwards.

Mahomed AJA (as he then was) was surely right when, delivering the judgment of the post-independence Namibian Supreme Court,³⁴ he said the following:

'The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court . . . which requires objectively to be articulated and identified, regard being had to contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the merging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.'

How unfortunate it would be if one's understanding of dignity, equality and freedom were locked into John Locke's views on these matters around 1689, no matter what falsification of them might have taken place in the nineteenth century and thereafter. What an inestimable loss it would be if one were precluded from having regard to the views of the greatest moral philosopher of the past (at least) two hundred years on such fundamental

³⁴ *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) 86H-I; and compare the judgment of the Constitutional Court in *S v Williams* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) para 22.

matters, simply because Immanuel Kant's *Groundwork of the Metaphysics of Morals* was published subsequent to the enactment of a (hypothetical) constitution or bill of rights.³⁵

(b) The Marquesins/Fedtke article deals with a number of explanations for the influence of German constitutional law on the interim and 1996 Constitutions. Mention is made in this context, quite rightly, of the contribution by Professor Francois Venter. It would be remiss of me not to mention two further names. The one is that of Professor Gerhard Erasmus of Stellenbosch University,³⁶ whose comprehensive knowledge of constitutional law (including comparative constitutional law) in general, and of German constitutional law in particular, was put to constructive use as an advisor in the drafting of the post-independence Namibian Constitution and subsequently as one of the expert advisors in the drafting of the interim and 1996 Constitutions. The second is that of Prof Dr Jochen Frowein³⁷ who, together with other German lawyers, kept contact with South Africa throughout the 1980s and early 1990s and in a number of ways supported the move to a new constitutional democracy in South Africa.

THE NECESSARY CIRCUMSPECTION THAT SHOULD ACCOMPANY THE USE OF COMPARATIVE CONSTITUTIONAL LAW

(a) Perhaps a discussion of the caution to be used when using foreign constitutional law logically follows, rather than precedes, a justification of its use, but from another perspective the two considerations are interdependent. Moreover, fear of the dangers often obfuscates discussion of the benefits of comparative legal usage. I believe it is conducive to greater clarity if one first deals with the care to be used in employing foreign constitutional law. Such caution (arising, amongst other things, from national differences relating to history, constitutional form, legal system, and culture — legal and otherwise) should itself be contextualized and not be used to discredit generally the use of foreign law. As I hope in due course to show, the main justifications for the

³⁵ Hypothetical, and with no reference to the US Constitution or 'Bill of Rights', because one knows that Kant's work in question was published in 1785, whereas the US Constitution was adopted by the Constitutional Convention on 17 September 1787, was ratified by the states at the end of June 1788, and the first ten amendments were ratified and became part of the Constitution on 15 December 1791. It is, as an aside, a fascinating question whether this — or any other work — of Kant was known to anyone involved in the National Convention, the ratification process, or the adoption of the first ten amendments. In my limited reading on US constitutional history, I cannot recall any mention of Kant in the above context, but this is a matter on which one must (obviously) defer to US legal historians.

³⁶ Professor Erasmus was from 1993 to 2003 the second Harry Oppenheimer Professor of Human Rights Law at Stellenbosch University. During the early 1980s he had already introduced a course in comparative constitutional law in which the German Basic Law was one of the systems examined.

³⁷ Professor Frowein, apart from his German qualifications, also studied at the Michigan Law School, was for a number of years Vice-President of the European Human Rights Commission, and a director of the Max Planck Institute for Comparative Public and International Law, and could contribute this wide-ranging experience to the South African constitutional discussions.

appropriate use of foreign law have a value that transcends such national differences.

(b) In what follows, my argument assumes that constitutional law in the twentieth century — quite apart from the influence of binding international law — is not a wholly nationalistic and exclusively historical enterprise, but embodies a certain universally normative minimum core, or at least aspires thereto. There are, of course, limits to the impact of rationality and ethical persuasion that make further discourse impossible. As Isaiah Berlin points out, the acceptance of some irreducible minimum of common values was not only intrinsic to human communication but grounded our conception of a normal human being,³⁸ and that the possibility of understanding humans at any time depends on the existence of some common values; a person

‘who . . . literally cannot grasp what conceivable objection anyone can have to . . . a rule permitting the killing of any man with blue eyes . . . would be considered about as normal a specimen of the human race as one who . . . thinks it probable that he is Julius Caesar’.³⁹

One senses the same feeling of weariness with absurdity in Bernard Williams,⁴⁰ when he points out that

‘[t]he principle that men should be differently treated in respect of welfare merely on the grounds of their colour is not a special sort of moral principle, but (if anything) a purely arbitrary assertion of will, like that of some Caligulan ruler who decides to execute everyone whose name contained three ‘R’s.’

(c) The Constitutional Court has been fully alive to the potential dangers of the use of comparative constitutional law. In considering the approach of the Constitutional Court one must constantly bear in mind the long-established use of comparative law in South Africa alluded to above. The fact that in a particular case, the caution which should accompany the use of foreign constitutional law is not explicitly repeated, does not warrant the inference that due care was not taken. The proper caution with which comparative law should be approached was explicitly recognized in one of the Court’s early judgments, *Ferreira v Levin NO*.⁴¹ One of the issues faced by the Court was what the constitutionality would be of a statutory provision that compelled the giving of self-incriminating evidence, if the only protection to be offered by the statute was an immunity against the direct use of such evidence in a

³⁸ ‘Introduction’ to *Four Essays on Liberty* (1969) at xxxi — xxxii.

³⁹ *Ibid* at xxxi.

⁴⁰ ‘The idea of equality’ in Peter Laslett & Walter Garrison Runciman (eds) *Philosophy, Politics and Society* (Second Series) (1967) 110 at 113. Williams (at 113) further advances the following compelling argument: ‘This point is in fact conceded by those who practice such things as colour discrimination. Few can be found who will explain their practice merely by saying, “But they’re black: and it is my moral principle to treat black men differently from others”. If any reason at all is given, they will be reasons that seek to correlate the fact of blackness with certain other considerations which are at least candidates for relevance to the question of how a man should be treated: such as insensitivity, brute stupidity, ineducable irresponsibility, etc. Now these reasons are very often rationalizations, and the correlations claimed are either not really believed, or quite irrationally believed, by those who claim them. But this is a different point; the argument concerns what counts as a moral reason, and the rationalizer broadly agrees with others about what counts as such — the trouble with him is that his reasons are dictated by his policies, and not conversely. The Nazis’ “anthropologists” who tried to construct theories of Aryanism were paying, in very poor coin, the homage of irrationality to reason.’

⁴¹ *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

subsequent criminal trial of the person compelled to give such evidence, but not an immunity against the derivative use of such evidence.⁴² Immunity limited to direct use, subject to certain further safeguards, was sufficient in Canada but not in the United States, which requires indirect use immunity as well. In the course of the judgment extensive reference was made, inter alia, to United Kingdom, Canadian and United States jurisprudence, but the following was also stated:⁴³

'In embarking on this enquiry regarding derivative use immunity, it is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources — political, social, economic and human. The fact that a particular obligation may be placed on the criminal investigative and prosecutorial authorities in one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less resources. One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it. The aphorism proclaims that it is better for ten guilty accused to go free than to have one innocent accused wrongly convicted. Does the same hold true if the proportion is stretched to a hundred to one or to a thousand to one? And must a system, which only produces one in a hundred wrong acquittals in one country, be maintained in another if it would consistently give rise to three in five wrong acquittals in the latter?'

The Court, in deciding to follow the flexible Canadian approach, and holding that a direct use immunity, with the trial court having a judicial discretion to exclude derivative evidence — if that were necessary to ensure a fair trial — would pass constitutional muster, stated the following:⁴⁴

'Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate, which one can take judicial notice of, currently prevalent in South Africa. This in my view gives added weight to the considerations of efficiency, economy of time and the most prudent use of scarce resources, highlighted by La Forest J in *Thomson Newspapers* and to which I have already referred, and supporting the adoption of a flexible approach in dealing with the admissibility of derivative evidence. The flexible approach is narrowly tailored to meet important state objectives flowing from the collapse and liquidation of companies and the resulting duties of liquidators to protect the interests of creditors and the public at large, while at the same time interfering as little as possible with the examinee's right against self-incrimination. It is balanced and proportional and, in my view, fully justifiable in an open and democratic society based on freedom and equality.'

THE JUSTIFICATION FOR THE USE OF COMPARATIVE CONSTITUTIONAL LAW IN SOUTH AFRICA

(a) At the outset I emphasize what ought to be trite but, it seems, requires repetition — because of its use as a red herring in the debate about the use of foreign constitutional law — namely, that foreign law is not in any sense binding on the court that refers to it. There seems to be the fear that in referring to foreign law one is bowing to foreign authority and thereby endangering the national sovereignty of one's own legal system. This is manifestly not so. One may be seeking information, guidance, stimulation, clarification or even enlightenment, but never authority binding on one's

⁴² Ibid paras 20 and 131–3.

⁴³ Ibid para 133 (footnotes omitted).

⁴⁴ Para 152.

own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, and solutions.

(b) Einstein's views, quoted in the header to this contribution, are relevant to the justification for comparative constitutional adjudication. Without the correct formulation of a constitutional problem, it is hardly possible to come up with the right constitutional answer. *Of course* 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. I say this both from personal experience and as a matter of epistemology.

In my own experience I have been struck by how often, when difficulties were experienced in finding the right answer in a case, this was caused by an incorrect or inadequate identification of the problem presented by the case. Recourse to foreign law often helped me (at least) to identify the correct problem, or to identify it properly, and I am at a loss to see what danger can lurk herein. There are, after all, few human and societal problems that are not, in their essence, universal. It is also useful to see how foreign courts have solved the problem, what methodology has been used to this end, what the competing considerations have been, and whether any potential dangers were identified in the process.

(c) The above approach and Einstein's observations are also epistemologically sound. Hume's 'problem with induction', arose from his discovery that it is impossible to justify a law by observation or experiment, and 'that there is no such logical entity as an inductive inference; or', differently put, 'that all so-called inductive inferences are logically invalid'.⁴⁵ Popper's well-known solution to Hume's problem points to a logical asymmetry between verification and falsification. While accepting the validity of Hume's problem, as far as it goes, Popper contends that 'we *are* justified in reasoning [deductively] from a counter-instance to the falsity of the corresponding universal law (that is, of any law of which it is a counter-instance).'⁴⁶ Popper's famous explanatory example is rendered thus by Bryan Magee:⁴⁷

'[A]lthough no number of observation statements reporting observations of white swans allows us logically to derive the universal statement "All swans are white", one single observation statement, reporting one single observation of a black swan, allows us logically to derive the statement "not all swans are white".'

Popper presents his four-stage model as follows:⁴⁸

1. *the old problem;*
2. *formation of tentative theories;*

⁴⁵ Karl Popper *Conjectures and Refutations* as quoted in David Miller (ed) *A Pocket Popper* (1983) 103. The validity of Hume's problem with induction has been shared by some of the other great thinkers of the past hundred years, including Bertrand Russel, Max Born, Peter Medawar, and John Eccles.

⁴⁶ Op cit note 45 at 110 and compare 102.

⁴⁷ *Popper* 12th impr (1985) 22. This introduction by Magee to the work of Popper is the most accessible and lucid of which I am aware.

⁴⁸ Karl Popper *All Life is Problem Solving* (1999) 14.

3. *attempts at elimination* through critical discussion, including experimental testing;
4. *the new problems* that arise from the critical discussion of our theories.⁴⁹

(d) I believe that the same, or a similar approach, is applicable to judicial reasoning. At some stage in a judge's process of reasoning, which contains inductive as well as deductive elements, the judge will come to a preliminary conclusion (hypothesis) as to what the result should be and why. I suggest that the best way to test such preliminary conclusion is to attempt rigorously to falsify it. However, my experience — both of myself and other lawyers — has been that in judicial problem-solving one can easily become trapped into a sort of tunnel vision, from which it is difficult to escape, or to see other or lateral answers. One's thinking becomes unimaginative. One often ends up by rehearsing the same line of reasoning or — in a type of inductive process — by trying to find additional authority for the provisional conclusions one has already reached. It is in this context that foreign law can play a particularly valuable role. It may be that, when one commences the enquiry into foreign law, one is (psychologically) hoping to find confirmation for one's hypotheses, but if one remains alive to falsifying possibilities, the foreign law can be of particular value. In any event foreign law may stimulate, in Einstein's words, 'creative imagination' by 'rais[ing] new questions, new possibilities, . . . regard[ing] old problems from a new angle.' In this context I should like to acknowledge my own great indebtedness to the American example and to American constitutional and human rights scholarship.

(e) In a recent judgment, *K v Minister of Safety and Security*, O'Regan J, writing for the Court, stated the following:⁴⁹

'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. Yet in my view, the approach of other legal systems remains of relevance to us.

It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. 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. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.'

(f) The Markesinis/Fedtke article has referred to certain observations by Krieglger J which may, possibly, create the impression that he was opposed in principle to the use of comparative law. While not referring to foreign law as frequently as other judges, his failure to do so — he made plain — was 'not in a spirit of parochialism' but because, on those occasions when he did not do

⁴⁹ *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC) paras 34–5.

so, or when he did not concur with such part of a colleague's judgment as referred to comparative law, he either felt that he had insufficient personal mastery of the foreign material, or that he could safely reach a conclusion, or concur in a colleague's conclusion, without reliance on the foreign material. Nor did he criticize the way in which a colleague had used comparative law.⁵⁰ While rightly condemning the *uncritical* use of foreign material by counsel, he supported the use of the comparative method by the courts:⁵¹

'Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision.'

Furthermore, he did not hesitate to employ it when he considered it appropriate.⁵²

(g) Comparative law has proved instructive and helpful in the jurisprudence of the Constitutional Court in many different areas:

- (i) The analysis of legal arguments, similar to those advanced in our courts.⁵³
- (ii) When dealing with unconstitutional punishment, whether such be described as 'cruel and unusual', or as 'inhuman or degrading' or as 'cruel, inhuman or degrading', because foreign law is instructive as it helps determine a common thread, namely 'the identification and acknowledgment of society's concept of decency and human dignity'.⁵⁴
- (iii) A review of the jurisprudence of both commonwealth and non-commonwealth countries, when considering the approach to be adopted in determining the competence of Parliament to delegate powers to the executive.⁵⁵
- (iv) Canadian (and sometimes United States) jurisprudence regarding the constitutionality of reverse onus (burden of proof) provisions in criminal cases and whether, and to what extent, such a provision could be justified under the Constitution's limitation provision.⁵⁶
- (v) The general rule in criminal matters that persons not at fault should not be deprived of their freedom by the state.⁵⁷
- (vi) The Court's consistent equality and unfair discrimination jurispru-

⁵⁰ See, for example, *Bemstein v Bester* NO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) paras 132–3.

⁵¹ *Ibid* para 133.

⁵² *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC), dealing with the common law offence of scandalizing the court.

⁵³ *S v Makwanyane* supra note 22 para 34.

⁵⁴ *S v Williams* supra note 34 para 35.

⁵⁵ *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) paras 61–3.

⁵⁶ See, for example, *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) paras 12–24; *S v Coetzee* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) paras 32–46 and 91–8.

⁵⁷ *S v Coetzee* supra note 56 paras 166–76.

- dence based on Kantian concepts and, inter alia, Canadian jurisprudence.⁵⁸
- (vii) The Court's conclusion, as a matter of fundamental jurisprudence, that the objective doctrine of constitutional invalidity should be adopted, following — at a basic analytical level — Canadian and German law.⁵⁹
 - (viii) Adopting a particular form of constitutional interpretation, namely of giving a statutory provision a meaning in conformity with constitutional validity, if the provision in question is reasonably capable of bearing such meaning, rather than a construction leading to unconstitutionality, even if such latter construction is also reasonable.⁶⁰
 - (ix) Distinguishing clearly between
 - (aa) giving a more limited meaning⁶¹ or a more extensive meaning⁶² to a provision, as a matter of constitutional *interpretation*; and,
 - (bb) the literal elimination of a provision, or part of a provision as a constitutional *remedy*; or the literal reading in of words into an existing provision, as a constitutional *remedy*; following on a declaration of constitutional invalidity.⁶³
 - (x) The vitally important one of constitutional remedies —
 - (aa) generally;⁶⁴
 - and,
 - (bb) the literal reading in of provisions.⁶⁵
 - (xi) Privacy, in various aspects of its applications.⁶⁶
 - (xii) The distinction between 'inconsistency' and 'invalidity' in a clash between the powers of Parliament and provincial legislatures.⁶⁷
 - (xiii) Pornography.⁶⁸

⁵⁸ For example, *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708; *Harksen v Lane* NO 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (10) BCLR 1211 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC); *Volks NO v Robinson* 2005 (2) BCLR 446 (CC).

⁵⁹ *Ferreira v Levin* NO supra note 41 paras 26–30.

⁶⁰ *De Lange v Smuts* NO 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 85; *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO, 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 23–4.

⁶¹ Sometimes, but misleadingly and confusingly, called 'reading down'.

⁶² Sometimes, but even more misleadingly and confusingly, called 'reading in'.

⁶³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 24.

⁶⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

⁶⁵ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 63 paras 64–82.

⁶⁶ *Bernstein's case* supra note 50 para 65; *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) paras 91–4.

⁶⁷ *Speaker of the National Assembly, Ex Parte: In re Dispute Concerning The Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) paras 13–20.

⁶⁸ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* supra note 66.

- (xiv) The ‘horizontal’ or ‘vertical only’ application of a Bill of Rights. In *Du Plessis v De Klerk*⁶⁹ German jurisprudence, in particular, was of great value in understanding the ways in which the horizontal operation of a Bill of Rights can operate and what potential problems inhere in a vertical application of its provisions.⁷⁰ The court found that under the interim Constitution the Bill of Rights had solely vertical application. The drafters of the 1996 Constitution, in a sense overruling the majority judgment in *Du Plessis v De Klerk*, made express provision in s 8(2), 8(3) and 9(4) for the Bill of Rights to have horizontal application as well.⁷¹ Having regard to the innovative and nuanced way these provisions, and in particular s 8(3), are formulated, it is clear that the framers benefited from and relied on the Court’s analysis in *Du Plessis v De Klerk*. Perhaps this can also be described as a form of constitutional ‘dialogue’.
- (xv) The care with which the principle of the separation of powers and checks and balances should be interpreted and given content in a particular constitution.⁷²
- (xvi) The separation of powers issue, and the test of gross disproportionality in deciding whether a statutorily prescribed penal provision is unconstitutional.⁷³
- (xvii) The common-law offence of scandalizing the court.⁷⁴
- (xviii) Deportation or extradition and the death penalty,⁷⁵ where the discussion of foreign authority by the Court concludes as follows:⁷⁶

‘It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*: “In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . Government is the potent, omni-present teacher. For good or ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.”’

⁶⁹ Supra note 24. See also the text to notes 22 and 23.

⁷⁰ *Du Plessis v De Klerk* supra note 24 paras 39–44 and 93–108.

⁷¹ Section 8: ‘. . . (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court — (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).’ Section 9: ‘. . . (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.’

⁷² *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) paras 106–13; 1996 (10) BCLR 1253 (CC); *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) paras 15–17.

⁷³ *Dodo’s* case supra note 72 paras 22–34 and 35–41, respectively.

⁷⁴ *S v Mamabola* supra note 52.

⁷⁵ *Mohamed v President of the Republic of South Africa* (Society for the Abolition of the Death Penalty in South Africa intervening) 2001 (3) SA 893 (CC); 2002 (7) BCLR 685 (CC).

⁷⁶ *Ibid* para 68.

- (xix) Amnesty in respect of criminal liability.⁷⁷
- (xx) A father's consent to the adoption of an 'illegitimate' child.⁷⁸
- (xxi) The meaning of the concept 'no law may permit arbitrary deprivation of property' in s 25(1) of the Bill of Rights.⁷⁹
- (xxii) The concept of succession and the rule of male primogeniture in indigenous African law.⁸⁰
- (xxiii) The construction by the Constitutional Court (in a judgment delivered on 11 March 2005 that had not come to the attention of the authors when the Marquesinis/Fedtke article was drafted) of s 22 of the Constitution, guaranteeing the right to 'choose [a] trade, occupation or profession freely'.⁸¹
- (xxiv) Fundamental normative principles of vicarious liability.⁸²
- (xxv) Whether a South African citizen has an enforceable right against the state for diplomatic protection.⁸³
- (xxvi) Whether prisoners can be excluded from voting.⁸⁴

The above review is, perforce, selective and epigrammatic, and refers only to judgments of the Constitutional Court. It may, however, whet the appetite of some readers to investigate the cases further, and in so doing contribute to the debate on the use of comparative law.⁸⁵

CONCLUSION

(a) A feature that I have, as yet, not referred to is one that has (possibly) wider application than just to the South African context. Most, if not all, courts exercising extensive powers of review over the legislature and executive face problems of credibility (if not legitimacy). It is of little avail to point to the transformation that the concept of democratic government has undergone over the past centuries; that bills of rights (and their enforcement by an independent judiciary) are essential to prevent majority tyranny; that comprehensive 'rule of law' constitutions, embodying the supreme law of the land, apply to such courts as well; that judges cannot be held 'accountable' *in the same way* as the legislature or the executive, without

⁷⁷ *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) paras 16–32.

⁷⁸ *Fraser v The Children's Court, Pretoria North* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) paras 31–43.

⁷⁹ *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC). It is crucially important to have due regard to the comprehensive nature of s 25 which deals, inter alia, with expropriation against compensation and remedies for the dispossession of property after 19 June 1913.

⁸⁰ *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as amicus curiae); Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) paras 156–211.

⁸¹ *The Affordable Medicines Trust v Minister of Health of the Republic of South Africa* (6) BCLR 529 (CC) paras 64–5; 87–93. Section 22 is almost identical to s 12(1) of the German Basic Law.

⁸² *K v Minister of Safety and Security* supra note 47 paras 34–43.

⁸³ *Kaunda v The President of the RSA* 2004 (10) BCLR 1009 (CC).

⁸⁴ *Minister of Home Affairs v NICRO* 2004 (5) BCLR 445 (CC) paras 54–67.

⁸⁵ I trust that I will not be accused either of chauvinism or of incitement to treason, if I mention the Constitutional Court's website www.constitutionalcourt.org.za on which all judgments of the Constitutional Court, and the Supreme Court of Appeal; the constitutions; and much else, are available online.

destroying their independence; or that the judges, by their judicial oath of office, undertake, inter alia, to ‘uphold and protect the constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’.⁸⁶

Suspensions nonetheless remain, despite attempts to devise appointment procedures for judges that seek to strike a balance between government, minority political parties, the judiciary itself, and the independent legal profession.⁸⁷ This is of course not surprising, given South Africa’s apartheid history and all that went with it. But the problem is substantial in all pluralistic societies and will not disappear for as long as multi-party democracy continues to exist.

No judge is a ‘Hercules’⁸⁸ or an ‘Athena’. The best one can do is to strive consciously to become aware of *all* one’s prejudices, to be aware that, this exercise notwithstanding, one will still have subliminal predispositions, and to toil as honestly as one can in the vineyard. I have, personally, found the comparative legal approach not only rewarding, but salutary — even admonishing — in the South African context, quite apart from all the benefits I have alluded to previously. The Markesinis/Fedtke article refers to various types of dialogue. I should like to introduce a further one, the dialogue which judges have (or ought to have) with themselves. I exclude those who, through some form of genius or some oracular affiliation, are able to produce instant solutions, without having to engage in the intellectual wrestling process. It is in the course of this internal dialogue that hypotheses emerge, that intellectual, cultural and other predispositions compete, that critical rationalism can come into play to test and adapt hypotheses. It is at this stage, consciously or not, that one’s philosophical, economic, and jurisprudential Gestalt enters the picture. At this stage I have found comparative legal concepts to be most helpful. Is this, as part of one’s Gestalt, any different from its other components? I believe that there is as little justification for proscribing comparative investigation, as there is for censuring a judge for reading Kant, or Rawls, or Dworkin, or law and economics, or going to church.

(b) Linked to the above is my belief in the Constitution as a living reality, an objective normative corpus.⁸⁹ The answers to problems should, ideally, be found within this system; a dialogue with it should, eventually, produce the right constitutional answer; and the judge should intrude his own personality

⁸⁶ Constitution Schedule 2, item 6.

⁸⁷ For South African attempts in this regard reference may be made to the composition (s 178 of the Constitution) and role of the Judicial Service Commission in the appointment of Constitutional Court judges (s 174(1)-(5) of the Constitution).

⁸⁸ With apologies to Ronald Dworkin; see *Law’s Empire* (1986) 337–54 (advocating a ‘Herculean’ method for interpreting the law).

⁸⁹ Compare *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 54.

and predilections as little as possible. I am aware that this is a counsel of the impossible, but nevertheless a constant loadstar worth pursuing. An important way of testing one's hypotheses, of preventing the unwarranted intrusion of one's personal preferences, of dangerous intuitions, is the constant search for 'neutral principles of constitutional law'. This concept cannot be explicated here, but is one coined and fully developed by some of the finest United States legal scholars.⁹⁰ It is in the search for such neutral principles that comparative law comes into its own, as a critical testing tool and a source of new solutions to old questions.

(c) Lastly, I would justify the comparative enterprise for a more embracing reason. One is now, more than ever, haunted by the cry in the preamble to the Universal Declaration of Human Rights in 1948 that the 'inherent dignity' and the equality of 'all members of the human family' belong to those values and human rights that constitute 'the foundation of freedom, justice and peace in the world', whose contemptuous disregard has 'resulted in barbarous acts which have outraged the conscience of mankind'. The Declaration's appeal is that the protection of these rights by 'the rule of law' (which in my view includes the concept of the constitutional state or 'Rechtsstaat') is essential, if humans are not 'to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression'. Human societies throughout the world have, in the nearly sixty years since the Universal Declaration, failed lamentably to turn this appeal into reality. Any attempt to present fundamental human rights in terms that may lead to greater global understanding and acceptance of these core concepts and values, and that may contribute to the elimination of 'barbarous acts which . . . outrag[e] the conscience of mankind' is worthwhile. One should try, as far as is possible, to avoid these rights being rejected on the basis of cultural relativism, one of its arguments being that these rights are not universal, and the entitlement of all humankind, but relative to the cultures and political philosophies of only certain communities. I would suggest that by adopting a comparative legal approach, one would at least start a process of greater understanding of the fundamental values of other legal systems and, in the resulting dialogue, work towards a greater universalizing of these values as enforceable rights. This may, in the long term, help diminish the continuing and widespread assault on human dignity, which appears no longer to outrage the conscience of humankind to the same extent as previously.

⁹⁰ I have in mind, inter alia, the following: Herbert Wechsler 'Towards neutral principles of constitutional law' (1959) 73 *Harvard LR* 1; and 'The nature of judicial reasoning' in Sidney Hook (ed) *Law and Philosophy* 2ed (1970) 290; Louis Henkin 'Some reflections on current constitutional controversy' (1961) 109 *University of Pennsylvania LR* 637; idem 'Shelley v Kraemer: Notes for a revised opinion' (1962) 110 *University of Pennsylvania LR* 473; idem 'Infallibility under law: Constitutional balancing' (1978) 78 *Columbia LR* 1023; and Kent Greenawalt 'The enduring significance of neutral principles' in (1978) 78 *Columbia LR* 982.