

SOME REFLECTIONS ON A DECADE OF INTERNATIONAL AND COMPARATIVE INFLUENCE ON THE RIGHTS JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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Modelling is a term used in the social sciences to describe a process by which one actor observes, interprets and copies the actions of another. The term signifies more than mere imitation or mimicry. It involves intelligent adaptation to ensure that the exotic plant can take root in native soil.¹

In deciding [what is]...justifiable in an open and democratic society based on freedom and equality, we need to locate ourselves in the mainstream of international democratic practice.²

1 INTRODUCTION

The South African constitution-making process itself represented a remarkable ‘intelligent adaptation’ and modelling of mainstream democratic and human rights ideals and practice to local conditions. A decade after this difficult but inspiring process, the ideals and practice of the international order and of open, democratic societies are still of considerable relevance to the interpretation, growth, socialisation and embedding of the Constitution.

¹ Opeskin, B., ‘Australian Constitutional Law in a Global Era’ in French, R., Lindell, G., & Saunders, C., (eds.) *Reflections on the Australian Constitution* (Federation Press, Sydney, 2003), 176.

² Sachs J, *Coetzee v Govt of RSA* 1995 (4) SA 631 (CC); 1995 (10 BCLR 1382 (CC), [51].

In recognition of this, section 39 of the Constitution states that, in interpreting Chapter III (the Bill of Rights), courts and other forums must consider international law (s. 39(1)(b)) and may consider foreign law (s. 39(1)(c)). It is a fair reading of the section that these provisions are primarily directed towards enabling a court, as it must, to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ (s. 39(1)(a)), by having recourse in interpretation to global standards and experiences so as to discern what such an ideal society might require, and how to embody that in a statement about the meaning and scope of fundamental rights in particular cases.³

As a reflection on the first decade of the Constitution and the Constitutional Court,⁴ this chapter does not seek to exhaustively catalogue the very many instances in decisions of the Constitutional Court of reliance on foreign and international sources.⁵ The chapter records the accepted place of international and comparative law in interpretation by the South African courts (and situates this in the frenetic growth in the field of comparative constitutional law generally), but what is perhaps more appropriate in a publication looking back across the decade (and casting forward into the future), is to comment on aspects of the *legacy* of this reliance for the growth of a South African jurisprudence. It is argued that, unlike some other jurisdictions, concerns of legitimacy and appropriateness of reliance on foreign sources are somewhat alleviated by the effect of section 39. However, the *manner* in which foreign sources are used, (and the *purpose* for using them), is significant for the local legitimacy and persuasiveness of the courts’ decisions. Resort to foreign sources by South African judges must not become an enthusiastic reflex at the expense of

³ De Waal, J., *et al The Bill of Rights Handbook* 4th ed (Juta, 2001), 140 note that the ‘open and democratic society’ referred to in the interpretative clause is an abstract and ideal one.

⁴ In this chapter, I refer to the Constitutional Court given its special guardianship of the Constitution, but of course the ideas, such as they are, are applicable to all courts, tribunals and forums in the South African legal system, as the terms of section 39 are.

⁵ Two further caveats require mention. *First*, section 39 refers only to interpretation of Chapter III (the Bill of Rights). While comparative sources may be of relevance to other aspects of constitutional interpretation (for example, the separation of powers doctrine, see Jackson, n 9, below), and it may be open to courts to rely on these, this chapter is concerned only with aspects the use of outside sources in rights-based jurisprudence. Given that many aspects of it are deeply problematic, by reference in the first paragraph to the values of the ‘international order’, I mean the international human rights system and its standards. *Secondly*, I have not endeavoured to catalogue or analyse the use or citation by foreign and international courts and tribunals of South African rights jurisprudence, although (as I comment below) South African constitutional jurisprudence (perhaps because of the courts’ ability and willingness to consider a range of sources) is held in high regard and is ever more frequently used as a source of comparison in other jurisdictions.

transparency on value-judgments and properly reasoned decisions grounded in and directed to issues and outcomes that are locally relevant (and perceived as such). While remaining open to outside sources, the Court must continue to build an indigenous jurisprudence, and do so in terms that foster public interest in and identity with the values of a rich South African constitutionalism.

2 BACKGROUND: 'A GLOBAL TEXT'? TRENDS IN CONSTITUTIONAL LAW

Any reflections upon the use by South African courts of international and foreign law take place against the background of the making of the Constitution itself, situated as it was in a period of intense world-wide constitution-making and reform using foreign models and experience. Relevant to the South African experience, too, is what can be observed by way of a general trend towards recourse to international and comparative law in domestic courts in many countries of the world (whether or not their constitutional instrument provides for this).

The common law has always welcomed the sounding board or indeed persuasiveness of comparative sources.⁶ However, since law is 'very much a part and product of the political and institutional environment in which it functions,'⁷ and since constitutions serve to constitute a particular history and politics, the idea of comparative constitutional law is to some extent counter-intuitive. Constitutions and constitutional law are, on this view, inherently inward-looking,⁸ which is given as a reason not to import or defer, in giving content to constitutional rights and values, to the collective choices taken by other societies for their own purposes.⁹ For this

⁶ Lord Goff, 'The Future of the Common Law' (1997) 46 *ICLQ* 745. Of course cultures, regimes and systems more generally borrow or adapt institutions and practices from each other, consciously or not.

⁷ Silverstein, G., 'Globalisation and the Rule of Law: "A Machine that Runs of Itself?"' (2003) Vol 1 (3) *International Jnl of Constitutional Law* 427, 455.

⁸ Opeskin, n 1 above, 171. See also Rosenkrantz, n 73 below, 282-4, on the relative 'heterogeneity' of constitutional law, and the reason why the comparative exercise is more appropriate in private law than constitutional law.

⁹ With certain areas of law, such as codes of commercial law, the transplant concerns that accompany constitutional modelling are arguably less immediate: Posner, R. (1998) 'Creating a Legal Framework for Economic Development' *World Bank Research Observer* 13 (1) 1 (1998); cf Messick, R. (1999) 'Judicial Reform and Economic Development: A Survey of the Issues' *World Bank Research Observer* 14 (1) 117 (1999), although experience suggests that importation of foreign law should draw heavily on local content and expertise: Aron, J. (2002) 'Building Institutions in Post-Conflict African

reason, a body of opinion would suggest that '[c]omparative analysis [is] inappropriate to the task of interpreting a constitution.'¹⁰

At a more basic level, it might be doubted that one can feasibly or justifiably take and apply law of any sort away from its particular social setting. This idea underlies Otto Kahn-Freund's broad, Montesquieu-based objection to the workability in general of transferring law from one country to another.¹¹ However, the South African experience, a constitution modelled locally on norms, concepts and institutions drawn selectively from a number of sources, not only illustrates the workability (in certain conditions) of 'borrowed' law, but also suggests that it is proper (it may be necessary for full workability) that reference be made to comparative and international sources in the ongoing operation (and not just the establishment) of that new system. Indeed, even if the Constitution did not contain section 39, there is little doubt that South African courts would have felt entitled to make some resort to international law and to comparative constitutional law in giving meaning to rights provisions and concepts contained and elaborated upon in these other systems.¹² As Currie *et al* have observed, while the South African Constitution is 'inward-looking' to the extent that it was a reaction to the particular grave realities that marked the society in the pre-constitutional era, the timing of this coincided with a post-Cold War pattern of democratic constitution-making, and of course explicitly

Economies', World Institute for Development Economics Research (WIDER), Paper No 124, 2002 (United Nations University / WIDER, Helsinki); Ford, J., 'Developing into What? Constitutional Reform, Legitimacy and Economic Development in Developing Asian Countries' Conference proceeding, *The Role of Law in Developing Asia*, Launch of the Asian Law Institute, National University of Singapore, 27 May 2004. Opeskin, n 1 above, 182, comments that 'the modelling of constitutional law between countries is likely to be less robust than the modelling of other laws'. See also Tushnet's description (and critique) of the 'expressivist' conception of the comparative project in constitutional law: n 17 below (as each nation constitutes itself differently, what can be learned from other nations?). Choudry, n 17 below, n 11 and 36. In the same way that it is said that constitutional law is perhaps the least amenable to transplant, it may be that decisions on some constitutional issues (such as human rights) are more translatable than those on others (such as those on federalism, since all federations are political compromises reached in particular situations): Jackson, n 52 below, 226, although she curiously would appear to consider constitutional law more amenable to transplant, as it is 'autonomous from culture, historical contingencies, politics', at 255.

¹⁰ *Printz v United States* 521 US 898 (1997), 921 (Scalia J): '...though it was of course quite relevant to the task of writing one.'

¹¹ Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 7. Montesquieu wrote (*De L'esprit des Loix* (1748)) that it would be pure chance if the laws of one nation could meet the needs of another. This is so, if the laws are simply transferred, rather than adapted. Montesquieu's explanation, however, was of course one which this author would adopt – that the political and civil laws of each nation should be closely tailored to the people for whom they are made.

¹² See Dugard, J., 'Public International Law' in Chaskalson *et al* (eds.), *Constitutional Law of South Africa* (Juta, 1996), 13.

drew on foreign sources and international normative standards: it was sought not so much to capture South African history in constitutional form, but to constitute and model the new society entirely differently.¹³ The recourse to North American and other constitutional models was a deliberate attempt to move away from past patterns or practices. The Constitution is outward-looking to the extent that it was intended to provide for the restructuring of South African law and society by reference to certain ideals, in a way that made international and foreign experience of particular assistance and relevance.

In the making and establishment of new constitutions, then, one can trace a process of modelling brought about by local perceptions of the ideal constitutional framework (based on what is seen as a successful constitutional experience). However, as Klug has pointed out, not all aspects of the idealised external model will necessarily be adopted in such a construction process. Klug has demonstrated how the construction of new rules, including new constitutions, is nowadays ‘both unique and ubiquitous’, since these processes involve attempts both to address particular localized problems, and to reflect comparative experiences in a globalised world (and respond to the perceived demands of these).¹⁴ These general observations about constitution-making are apposite also to the question of external influences on later and further constitutional development and interpretation, in the continuous re-constitution of a society: like the establishment process, the interpretive process is selective and creative when it comes to making use (or not) of a range of external sources. As this chapter attempts to argue, it is precisely this selectivity that raises methodological and transparency concerns, even in a system with a provision like section 39.

¹³ Currie, I., & De Waal, J., *The New Constitutional and Administrative Law* Vol 1 (Juta, Cape Town, 2003), 22-3. For a full account, see Klug, H., *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge Univ. Press, 2000); also Davis, M., ‘East Asia after the Crisis: Human Rights, Constitutionalism and State Reform’ (2004) Vol 26(1) *Human Rights Quarterly* 126, 148. Of course, the inclusion of multiple references to human rights protections in post-Cold War constitutions has not necessarily guaranteed their protection, without a strong culture of judicial independence and a culture of constitutionalism. The authors describe a pattern of uniformity emerging after 1989: new constitutions (of which the Constitution is one) modelled on liberal principles and incorporating judicial review as a prerequisite for ‘international constitutional respectability’. It is thus possible, says Klug, to identify ‘a thin, yet significant, international political culture, which is shaping the outer parameters of feasible modes of government’ (at 6).

¹⁴ Klug, H., ‘Hybrid(ity) Rules: Creating Local Law in a Globalised World’ in Dezalay, Y., & Garth, B., (eds.), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Univ. Michigan Press, 2002).

Finally by way of background, related to the phenomenon of post-Cold War constitution-making, and perhaps partly as a function of an increasing degree of uniformity in many constitutional provisions (at least those dealing with individual rights), scholars have described the emergence of a 'global community' of national and international courts, and a 'transnational judicial constitutional discourse'.¹⁵ This now quite familiar notion is seen as a function of globalisation processes and some value-convergence, whereby courts and individual judges are, or consider themselves to be, involved in a global dialogue, in this case on constitutionalism and constitutional standards and concepts. This mega-conversation is described as being assisted by the easier access to comparative and international legal resource materials via the internet, by judicial conferences and exchanges, by increased acceptance of the role of researchers in judgment production, and so on. The phenomenon is both descriptive and normative; that is, some of the literature is directed not simply to observing this conversation, but to arguing that it should take place, in order to enrich and elevate constitutional standards and argument, and so in this context (it is hoped), citizens' constitutional experiences: 'the more varied the participants in the [constitutional] conversation, the richer it will be and the more satisfactory will be its results.'¹⁶

In the field of comparative constitutional law, the idea of a transjudicial discourse leading to increased 'borrowing' of constitutional experiences in interpretation (beyond the construction phase), has attracted a wealth of attention and commentary, supposedly reflecting the fact of increased use by national courts of international and foreign law in constitutional interpretation.¹⁷ It is against this background that we can assess the legacy of South African courts' use of external sources.

¹⁵ The most important accounts are as follows: Slaughter, A-M., 'A Typology of Transjudicial Communication' (1995) 29 *Univ of Richmond Law Review* 99, 121-3, also 'Judicial Globalisation' (2000) 40 *Virginia Jnl of International Law* 1103 and see (2003) 44 *Harvard International Law Journal* 191. See also L'Hereux-Dube, Justice C., 'The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15; for an overview of the debate, see 'Developments in the Law – the International Judicial Dialogue: When Domestic Constitutional Courts join the Dialogue' (2001) 114 *Harvard Law Review* 2049.

¹⁶ Powell, H. J., 'Rule for Originalists' (1987) 73 *Virginia Law Review* 659.

¹⁷ For a comprehensive account of the borrowing of constitutional norms and arguments and concepts, see the special issue 'Constitutional Borrowing' (2004) 2:1 *International Jnl of Constitutional Law*. The most helpful and comprehensive contributions include Ackerman, B., 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771; Choudry, S., 'Globalisation in Search of

In one sense, international law is not an ‘external’ source for the purposes of constitutional rights interpretation in South Africa. This is not simply because section 39(1)(b) is a compulsory directive. The history, spirit, purpose and object of the Bill of Rights would appear to be premised on the sense that the South African legal system, so long a pariah in the eyes of international law, was to consciously be brought (consistent with the proper parameters of judicial review established) within, or in alignment with, the overall ideals and framework of the United Nations Charter and the international human rights system. It can be understood to be intended partly to represent a faithful national attempt to orientate the legal system within a global legal order. This view of a proper approach is supported by other textual references to international law in the Constitution.¹⁸

However, this is not to say that the judicial task of ascertaining relevant applicable international norms and standards is easy; nor that it is obvious to judges exactly what form of obligation is entailed by the injunction to ‘consider’ international law (do the consequences of a lower court not doing so include that this provides a ground of review?). The process is attended by uncertainty as to the effect of norms (once found) in concrete cases, and by a great deal of selectivity and choice,

Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *Indiana Law Journal* 819; Tushnet, M., ‘The Possibilities of Constitutional Law’ (1999) 108 *Yale Law Journal* 1225; Jackson, V. C., & Tushnet, M., (eds) *Comparative Constitutional Law* (Foundation Press, New York, 1999) and *Defining the Field of Comparative Constitutional Law* (Praeger, Westport Conn., 2002); see Nussbaum, M. C., ‘Introduction to Comparative Constitutionalism’ (2002) 3 *Chicago Jnl of International Law* 429; Barak, Chief Justice Aharon, ‘A Judge on Judging: the Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 16 (Foreword); Williams, Sir D., ‘Courts and Globalisation’ (2004) 11 *Indiana Jnl of Global Legal Studies* 57. The debate over the use of international and comparative law has raged strongest in the country whose constitutionalism is perhaps historically the greatest source of inspiration in the globalisation of rights-conscious constitutionalism, the United States (see recent divergent views in the US Supreme Court over the place of international sources in US constitutional interpretation: *Atkins v Virginia* (2002) 70 USLW 4585, 4589 (maj) 4591, 4598 (min) see also *Lawrence v Texas* (2003) 539 US 1, 16. The literature is immense. For an authoritative recent overview, see Justice Ruth Ginsberg, ‘Looking Beyond our Borders: the Value of a Comparative Perspective in Constitutional Adjudication’ (2003) 40 *Idaho Law Review* 1 and Moon, C., ‘Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?’ (2003) 12 *Washington Jnl of Law and Policy* 229; also Harding n 75, below.

¹⁸ Section 232 provides that customary international law is part of the law of South Africa unless inconsistent with the Constitution or an Act of Parliament. Section 233 provides that every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

so that the methodological and legitimacy concerns of my argument are also applicable.

Section 39(1)(a) might on its own have made international (human rights) law relevant to the extent that it compels a court to adopt an interpretation that is likely to implicate principles of fundamental human rights. As it is, section 39(1)(b) is a mandatory interpretive direction.¹⁹ Again, one can understand section 39(1)(b) and its jurisprudence as part of a wider trend. There has been a wave of introducing references to international law (including a clear tendency towards *de jure* recognition of the primacy of international law) in new national constitutions.²⁰ Even where no such provisions exist, domestic courts can be observed to display an increasing openness to international law and in particular to make increasing reference to international law in constitutional cases.²¹ Bahdi has comprehensively considered the justifications given by courts (or attributable to them) for drawing on or resorting to international law in such cases.²² While in a formal sense South African courts do not need to justify such use (indeed the court *must* consider international law), where the court is not simply adopting or reflecting upon the *reasoning* of an international tribunal but is considering or applying international law to support a particular interpretation, the selectivity inherent in the process and the need to provide a legitimate and persuasive outcome means that of course a degree of justificatory reasoning is required.

¹⁹ Compare *AZAPO v President*, RSA 1996 (4) SA 671 (CC); (8) BCLR 1015 (CC) on the effect of the somewhat equivalent section 35(1) of the Interim Constitution 1994; for an external appraisal of the relationship between sections 35 and 39, see Stemmet, A., 'The Influence of Recent Developments in South Africa on the Relationship between International Law and Municipal Law' (1999) 33 *International Lawyer* 47.

²⁰ Vereshchetin, V., (Justice of the International Court of Justice) 'New Constitutions and the Old Problem of the Relationship between International Law and National Law' (1996) 7 *European Jnl of International Law* 1. Vereshchetin discusses mainly post-1989 constitution-making in Eastern Europe. Note that the post war constitutions of the Federal Republic of Germany, Italy, and Japan: Article 25 of the Basic Law of the Federal Republic of Germany 1949; Article 10(1) of the Italian Constitution 1947; Preamble and Article 98 of the Japanese Constitution 1947. Of course, these were constitutions imposed, in effect, by the Allied occupiers of these three countries. On the trend towards incorporating international human rights standards into new national constitutions in post-conflict societies, see Buergenthal, T., 'Modern Constitutions and Human Rights Treaties' (1997) 36 *Columbia Jnl of Transnational Law* 211.

²¹ See Bahdi, R., 'Globalisation of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 *George Washington International Law Review* 555, and very full references at n 1 therein. Also Opeskin, B., 'Constitutional Modelling: the Domestic Effect of International Law in Commonwealth Countries' [2000] *Public Law* 607 (Part 1), [2001] *Public Law* 97 (Part 2).

The first decade reveals an apparently settled accepted interpretation of section 39(1)(b)'s scope and requirements. It permits South African courts interpreting rights to refer to or consider not just to treaties and other instruments actually binding on South Africa, but to international law in general.²³ What is less clear is whether the reference to international 'law' means reference only to the norms or standards considered in international law to be rules of international law (even if not binding on South Africa), or whether the term 'law' is used loosely to include what is often called 'soft' law, and the principles, interpretive devices, decisions and reasoning of international tribunals and committees that are not themselves statements of law. The problem of the recent proliferation of international tribunals and forums (and the associated fragmentation of international law) is well documented. Discussing the degree of deference of US courts to decisions of international tribunals, Roger Alford has noted that the sheer quantity of tribunals and the lack of any canonical definition as to what constitutes an international tribunal complicates the degree of consistency (and, no doubt, confidence) of local courts in using international decisions in their decision-making process.²⁴ Other scholars have noted a blurring or bundling²⁵ of international law into comparative law. This may be of less concern in South Africa, where the Court has interpreted both binding and non-binding international law as

²² The justifications / reasons given are effectively concern for the Rule of Law and the desire to promote (and cast one's own principles as representing) universal values, and to be seen to be doing so.

²³ *S v Makwanyane* 1995 (3) SA 391 (CC) (paras [35-6]). At para [35] n 46 of the judgment, Chaskalson P approves of John Dugard's opinion in 'The Role of International Law in Interpreting the Bill of Rights' (1994) 101 *SAJHR* 208, that the sources of international law given in Article 38 of the Statute of the International Court of Justice should be considered sources of 'international law' for the purposes of s 39. Nevertheless the Court approved the use of decisions of a range of international tribunals (such as the European Court of Human Rights) dealing with instruments comparable to the Bill of Rights, including even less authoritative sources such as 'reports of specialised agencies such as the ILO'. See also De Waal *et al*, n 3 above, 141. As De Waal *et al* note (at 141 n 61), however, binding international law has greater persuasive force than international law which does not impose obligations on the Republic: *AZAPO v President RSA* 1996 (4) SA 671 (CC), [26].

²⁴ Alford, R. P., 'Federal Courts, International Tribunals, and the Continuum of Deference' (2003) 43 *Virginia Journal of International Law* 675, 676-7. The result, Alford says, is a 'haphazard' approach to how much deference (weight may be the more appropriate term) to pay to decisions of international tribunals. He gives as a working definition of 'international tribunal' (on the basis of US statutory definitions) 'an objective and impartial adjudicative body established by or with the imprimatur of two or more governments with the power to make a decision as to law of facts'. The comments apply beyond the US. See also on the 'illegitimacy of haphazard comparativism' and how courts are 'unduly susceptible to selective and incomplete presentations of the true state' of international legal affairs: Alford 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Jnl of International Law* 57; see also Neumann (2003) n 33 below, 1871, and discussion below generally.

²⁵ Knop, K., 'Here and There: International Law in Domestic Courts' (2000) 32 *New York Univ Jnl of International Law & Politics* 501, 525 and Bahdi, n 21 above, 587 respectively.

being within reach.²⁶ However, the status of the norm or tribunal in international law is clearly important where the South African judge is using (or deciding whether to use) the source to give authority to a proposition, as opposed to a situation where the judges is only making use of, say, the reasoning of a tribunal for the light that it sheds on the content or scope of a right.

The practice of the Court reveals that while it perceives that courts ‘must’ consider applicable binding and non-binding norms of international law, the courts may in their discretion otherwise draw upon international decisions and the reasoning of international forums. When they do so, it is apparent that international sources are being referred to by courts not only for their pedigree and inner authority, but for their persuasive or comparative reasoning value.²⁷ Two observations can be made: the court will readily refer to the reasoning of tribunals, and in considering instruments it often seeks nothing more than the overall tone of the instrument in support of its own interpretation. An example of the first point is Yacoob J’s judgment in *Grootboom*²⁸ where the Court did not simply refer to the provisions (text) of a treaty giving expression to international law, but also considered how the relevant treaty body (here the Committee on Economic, Social and Cultural Rights) had interpreted the provision. Secondly, the Court uses international jurisprudence much like it does comparative foreign law. Bahdi has argued that even where international law is not used to bring new concepts or values into the domestic order, it operates ‘like a rhetorical literary device’ – where the function of the constitutional judge is to discern values inherent in the national order, the device forces national values out into the open, it ‘facilitates a process of introspection and self-discovery, [and]...acts like a mirror that helps show up the values already inherent in the national order’, which

²⁶ In *Govt Republic of South Africa & Ors v Grootboom & Ors* 2001 (11) BCLR 1169; 2001 (1) SA 46 (CC), 63, the Court observed that ‘the weight to be attached to any particular principle or rule of international law will vary.’

²⁷ De Waal *et al* have observed that the Court has only relatively seldom referred to international law (although it does make considerable use of the jurisprudence of the European Court of Human Rights), and opine that even where it does so, it appears to consider comparative foreign case law as more persuasive: n 3 above, 141-2, suggesting either uncertainty with the status of some international law, or an acceptance that the purpose of drawing on it is for its persuasive, rather than its authoritative, value.

²⁸ Note 26 above. Bahdi makes this point in relation to the earlier *Grootboom v Oostenberg Municipality & Ors* 2000 (3) BCLR 277 (CC): Bahdi, n 21 above, 567: this shows a desire not only to show respect and recognition for the substance of international law, ‘but also for the institutions that comprise the international system’. The Court considered the Committee-developed concept of ‘minimum core obligation’ in provision of services in fulfilment of socio-economic rights. However,

will often involve looking for the purpose or spirit of a treaty rather than a detailed examination of its terms.²⁹ She notes that in both *S v Williams* and *Mohamed v President of RSA*, the Court sought guidance from the international instruments it referred to only at the level of general principle, since it was seeking the thrust of these international instruments (perhaps what was described in *S v Williams* as any ‘growing consensus’ or ‘clear trend’) and not the detailed rules of international law they set out. Since rationale for looking at these sources is primarily their persuasive value and not their technical pedigree or bindingness, this general level of enquiry was sufficient.³⁰

Knop has pointed out that the traditional model of international law in domestic courts revolves around law that ‘applies in an all or nothing fashion’, as if there is no judicial discretion at any stage, no uncertainty or choice in interpretation or as to what qualifies as a source or statement of international law, a view that what is involved is simply transmittal of the international, rather than its translation into the national.³¹ She argues that domestic judges applying international law need to be more conscious of this need for translation, and also the relationship between that process and the persuasiveness of their judgments to the local (and international) community: international law not only has authority, but has persuasive value, including in ‘its function as a signifier of community.’³²

the Court preferred to cast the question as one of whether, under the Constitution, measures taken by the State to realise the rights in question were reasonable measures or not [33].

²⁹ Bahdi, n 21 above, 575-8. See also how in *Baker v Canada* [1999] 2 SCR 817, Justice L’Heureux-Dube demonstrated how international law ‘showed up’ the values already present in the national legislation.

³⁰ Bahdi n 21 above 578-80; *Mohamed v President, RSA* 2001 (7) BCLR 685 (CC) and *S v Williams* 1995 (7) BCLR 861; 1995 (3) SALR 632 (CC). The Canadian Supreme Court in *Baker*, n 29 above, dwelt on the persuasiveness rather than the strict authority of the relevant international instrument.

³¹ Knop, n 25 above.

³² *Ibid*, 502-7; 520. There may be legitimacy concerns in the use of international law, too, as Knop notes. While it might be thought a coherent reference to international law increases the legitimacy of any judgment, it is not obvious that international law, with its colonial imprints, and constructed by particular hegemonies, is always perceived as legitimate and locally unthreatening, but this is perhaps less of a concern when international law declares the existence of fundamental human rights. See also Bahdi, n 21 above, 235; related to this is the strategic or tactical question of both counsel and judgment-writer, concerning whether reference to international law is counter-productive in that it may ‘become a mark of desperation’ (281) and serve to highlight that the norm, etc, is nowhere to be found in national law: see Thomas J *Knight v Florida* 120 SC 459 (1999), 549 ‘were there any such support in our jurisprudence, it would be unnecessary to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Privy Council, etc’). Of course this begs the question of whether the local law should be developed in the light of it not containing such a norm.

Arguably, South African courts have not acted simply as conduits of international law into the domestic system; nevertheless, Knop's point is useful as reminder of the need to clearly justify selective uses of international legal authority (where it is used as such) or, if adopting any reasoning, to translate this into terms that are locally relevant and persuasive. A related point is that the co-existence of two positive legal systems for the articulation and protection of rights (international and constitutional human rights) may result in normative conflict or inconsistency, and it cannot be assumed that certain interpretations of international human rights norms are suitable, without more, for analogy with constitutional rights, and it may be necessary to investigate further the particular make-up and function of the international institutions that produce these interpretations.³³

4 FOREIGN LAW AND CONSTITUTIONAL INTERPRETATION

Before the last decade, the jurisprudential source for the ongoing development of South African constitutional law was Diceyan English constitutionalism, centred on the doctrine of parliamentary sovereignty.³⁴ However, South African judges were well familiar with the comparative exercise: before the new Constitution, there was extensive comparative reference, albeit mostly in private law matters, in South African courts: 'the role of comparative law was always going to be prominent because of the prevailing legal culture'.³⁵

More directly, it was of course foreseen (and section 39(1)(c) reflects this) that decisions of foreign courts (especially those of the Canada, the United States, Germany and India) would have a significant potential influence on the then new enterprise of interpreting and applying the new Bill of Rights. The drafting of the

³³ Neuman, G., 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863, and more recently 'The Uses of International Law in Constitutional Interpretation' (2004) 98 *American Jnl of International Law* 82, 84: 'normative reasoning borrowed from international human rights sources will not necessarily prevail in the process of constitutional interpretation. Other normative considerations may be relevant there, and consensual and institutional factors may also come into play'. It is surely the fact of difference between the norms of the two systems, as much as similarity, which enriches, if not indeed defines, comparison.

³⁴ Van Wyk D., *et al*, *Rights and Constitutionalism: the New South African Legal Order* (Juta, Cape Town, 1994 and Clarendon, Oxford, 1996), 1ff. See also Johann van der Vyver 'Depriving Westminster of its Moral Constraints: A Survey of Constitutional Development in South Africa' (1985) 20 *Harvard Civil Rights – Civil Liberties Law Review* 291.

Interim and Final Constitutions (and the various instruments taken to negotiations by various stakeholders) and the great extent of influence of foreign models, concepts and structures is well known and well chronicled. It is not surprising that courts have taken advantage of section 39(1)(c)'s express invitation.³⁶ The first decade of comparative influence shows acknowledgment by the Court of the potential utility and significance (in general, and in South Africa's case in particular) of recourse to foreign experience.³⁷ Thus in *S v Makwanyane*, Chaskalson P endorsed use of section 39, stating that comparative jurisprudence would be of great importance in the early years of the transition to democracy under the Constitution.³⁸ The resulting 'rainbow jurisprudence' has been due to the willingness (or perhaps perceived necessity, early on) of South African courts to view comparative constitutional rights law as 'a storehouse of principles that can be raided to provide guidance where this is considered appropriate'.³⁹

In reflecting on their experience it is useful to again situate the South African courts' use of comparative law in the context of wider debates and trends. General conscious and unconscious borrowing of ideas for institutional design from other cultures is of course not new,⁴⁰ nor is this limited only to the establishment (as opposed to the continuous re-construction) of institutions such as constitutional orders. Before considering the advantages of drawing on foreign law, it is necessary to note that the 'storehouse of principles' idea, for example, is only one of a variety of ways of conceptualising the nature and purpose of the comparative exercise in constitutional law and, as the final part of this chapter explains, the purpose for which

³⁵ *Ibid*, 192.

³⁶ *Ibid*; also Davis, D. M., 'Constitutional borrowing: the influence of legal culture and local history in the reconstitution of comparative influence: the South African experience' (2003) 1:2 *International Journal of Constitutional Law* 181, 192.

³⁷ For a comprehensive external appraisal of the first few years after 1994, see Webb, H., 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 *University of Pennsylvania Jnl of Constitutional Law* 205. See also in the same volume, Sarkin, J., 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 *University of Pennsylvania Jnl of Constitutional Law* 176. Also worthy of attention is Burnham, M. A., 'Cultivating a Seedling Charter: South Africa's Court Grows its Constitution' (1997) 3 *Michigan Journal of Race and Law* 29.

³⁸ *S v Makwanyane*, n 23 above, [37]; see also *Sanderson v AG Eastern Cape* 1998 (2) SA 38; 1997 (12) BCLR 1675, [26]: '[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'. These generally positive statements about the role of comparative law were qualified, as is discussed below.

³⁹ Cockrell, A., 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1, 26.

⁴⁰ See generally 'Symposium: Constitutional Borrowing', n 17 above, (editors' comments, 178).

recourse is made to external sources by South African courts may prove significant: what kind of guidance is being sought? In a widely-cited and acclaimed argument, Choudry investigates what is at stake when courts (like South African courts, not bound to refer to or apply foreign law), consciously decide to engage with foreign jurisprudence. As he observes, much commentary and practice on comparativism reveals a tendency not to ‘unpack’ the different ways in which comparative authority might be used. Choudry distinguishes the various (analytically distinct) ways (or interpretative methodologies) in which comparative jurisprudence is used in constitutional adjudication, each mode having distinct normative justifications.⁴¹ A judge conceiving of the process in the ‘universalist’ mode accepts ‘constitutional guarantees are cut from a universal cloth’ so that ‘all constitutional courts are involved in the...interpretation of the same set of norms...comprehended as transcendent legal principles.’ The ‘genealogical’ interpretation occurs where ties of history and descent link the interpreter’s constitution to another, so that ‘entire areas of constitutional doctrine’ have authority and validity. ‘Dialogical’ interpretation involves courts identifying the ‘normative and factual assumptions underlying their *own* constitutional jurisprudence’ by engaging with foreign jurisprudence ‘through a process of interpretative self-reflection’, which is more a manifestation of a legal technique than any coherent theory of constitutional interpretation.

⁴¹ Choudry, n 17 above. Mark Tushnet, in his essay on ‘The Possibilities of Comparative Constitutional Law’ (n 17 above) discerns three ways in which comparing constitutional experience elsewhere might be conceived: ‘functionalism’, ‘expressivism’ and ‘bricolage’. The need for ‘licence’ to refer to comparative experience is not comparable with the South African situation, although the need to decide the function of comparison is. Functionalism: particular constitutional provisions serve particular functions in governance, and comparative study can help show how different provisions serve the same function in different systems, considering foreign experience might improve the way a specific function is performed locally, but the interpreter generalises from one to the other without requiring comprehensive comparison. Expressivism: constitutions help constitute the nation, offering each nation’s people a way of understanding themselves as political beings; it is generally thought on this conception that there is little to be learned from other experiences here, although Tushnet disputes this: an approach generally dismissive of the need for comparative recourse, on the basis of distinctive national character, is fine (he suggests), provided the interpreter accepts that the content of national character is always subject to renegotiation. ‘Bricolage’: this approach downplays the worry attending the other two whether it is sensible or workable to appropriate selected portions of other constitutional traditions. It does not have concerns about proper borders between systems. This conception questions our assumption of a high degree of constructive rationality on the part of judges in the borrowing process, emphasising the contingency of the human action involved (*ibid* 1228ff). Of course, Tushnet is writing for a US audience, advocating increased use of foreign sources, but the conceptualisation of why South African judges consider foreign law is of interest.

The practice of South African courts in the last decade reveals that all three modes have been used.⁴² Certainly, a dominant conception in South Africa has been that foreign law can help identify and flesh out the universal values and core concepts (such as ‘dignity’) seen to be enshrined in the Bill of Rights. What courts see themselves as involved in, then, is seeking the proper meaning of terms seen as ‘having...a transnational meaning’.⁴³ So Van Wyk *et al* observe that the history of comparative constitutionalism ‘reveals a considerable ideological and jurisprudential struggle to develop a coherent set of constitutional values...which can act as reliable signposts *en route* to a decision’.⁴⁴ This reflects Mokgoro J’s explanation that the Bill of Rights represents common values of human rights protection the world over and foreign precedent may be ‘instructive’ in developing rights in terms of ‘a cohesive set of values ideal to an open and democratic country.’⁴⁵ Recently, Dennis Davis has summarised the advantage of the comparative exercise in similar terms, as follows:

‘The closer the structure of a municipal text is to a comparative regime, the more likely [and more defensible, and necessary] it is that courts will seek guidance from the jurisprudence of that country...[also], where similar values are identified [eg dignity]...the likelihood is that more extensive constitutional borrowing will take place...when the text includes a limitations clause...a court is, in effect, invited in each case to examine comparative authority in order to ascertain whether the limitation in question is justified in terms of the values that are found in other open and democratic societies.’⁴⁶

Quite apart from the actual influence of foreign legal systems on the structure and text of Chapter III, the Court has demonstrated a keen sense of the wider advantages of

⁴² Choudry notes that the modes are not mutually exclusive and ‘can be employed by the same judges, on the same courts, with respect to the same issues.’

⁴³ Jackson, V. C., ‘Narratives of Federalism: of Continuities and Comparative Constitutional Experiences’ (1999) 51 *Duke Law Journal* 223, 224, 257.

⁴⁴ N 34 above, 4. The underlying suggestion, that as a matter of approach one searches for a single objective and immutable set of values underlying all constitutional norms, is perhaps open to question. While the Court speaks of the need to discover an objective value system and shows signs of conviction of the existence or need for a ‘master historical narrative’ within which to find meaning for the text, there is a need to conceive of the Constitution (and the foreign sources used in interpreting it from time to time) as continually contested and open: De Vos, P., ‘A Bridge too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 *SAJHR* 1, 33; Davis, n 36 above, 194 n 55.

⁴⁵ *S v Makwanyane*, n 23 above, [302].

drawing on comparative resources, which include the benefits of a ‘dialogical’ mode of interpretation. These advantages (qualified by the caution expressed below) will hopefully be borne in mind as South African jurisprudence evolves.⁴⁷ There is room for comparative sources since it is implausible that a constitution is completely theorised.⁴⁸ Apart from the relative authority of its source, the reasoning of a foreign court can be considered ‘whether as logic to adopt as persuasive, to distinguish as inapplicable, or to reject as mistaken’.⁴⁹ Drawing on other sources and experiences expands a judge’s awareness and knowledge, giving them a wider range of options, new perspectives and ideas, and acts (in South Africa, as time goes by) as ‘a counter to the natural, parochial tendencies of national constitutional theory, method, law’.⁵⁰ Comparative learning can be a substitute for actual social experience. In a context where lawyers lack ‘social laboratories in which to experiment’,⁵¹ comparative decisions suggest ‘ways of reasoning about common areas of human experience...[providing] an illuminating mirror and a set of alternative visions...[that can] help identify the consequences of different reasonably justifiable interpretations plausibly open to the decision-maker’.⁵² It should be remembered that borrowing can be ‘aspirational’ but also ‘aversive’ in the sense that the phenomenon must be understood to include also the positive rejection of foreign constitutional ideas and influence, as a means of reaching an outcome.⁵³

⁴⁶ Davis, n 36 above, 195. As Davis points out, however, ‘indigenous history plays a mediating role’ in this process (see discussion below).

⁴⁷ I refer to advantages rather than other reasons – such as a desire to increase the internal and external reputation of the Court or of the individual judges – for referring to foreign law.

⁴⁸ Fontana, D., ‘Refined Comparativism in Constitutional Law’ (2001) 49 *UCLA Law Review* 539.

⁴⁹ Jackson, n 43 above, 261.

⁵⁰ Symposium, n 17 above, 178. For an excellent summary of the benefits of ‘comparative constitutional learning’, see Jackson, V. C., ‘Comparative constitutional federalism and transnational judicial discourse’ (2004) 2:1 *International Jnl of Constitutional Law* 91, 92-3; see also discussion of Bahdi’s description of the function of external sources as a ‘rhetorical literary device’, external ideas forcing *national* values ‘out into the open’: Bahdi, n 21 above.

⁵¹ Rosenkrantz C. F., ‘Against borrowings and other non-authoritative uses of foreign law’ (2004) 2:1 *International Jnl of Constitutional Law* 269, 280, 287.

⁵² Jackson, n 43 above, 258, drawing on Breyer J’s dissenting judgment in *Printz v United States* 521 US 898 (1997) 976-7: comparative constitutional law is useful for the ‘empirical light [it may shed] on the consequences of different solutions to common legal problems’ that is ‘as a basis for predicting the factual consequences of the suggested [solution] and as evidence of whether those consequences are compatible with the commitments of a free society’ (Kadish, S., ‘Methodology and Criteria in Due Process Adjudication (1957) 66 *Yale LJ* 319, 354 in Jackson, 258).

⁵³ See Epstein, L., & Knight, J., ‘Constitutional Borrowing and Non-Borrowing’ (2003) 2:1 *International Journal of Constitutional Law* 196; see also in the same volume of that Symposium issue of the journal, Scheppele, K. L., ‘Aspirational and aversive constitutionalism: studying cross-constitutional influence through negative models’, at 296-324, noting also that ‘borrowing’ is not an ideal term, since the thing copied now belongs, it is not simply borrowed; in the same volume, Osiatynski, W., ‘Paradoxes of constitutional borrowing’ at 244-268 echoes the ‘non-borrowing’ point,

While one might observe the generally positive and enthusiastic approach of South African courts to foreign law (De Waal *et al* observe that the Court almost always refers to the position in other societies, and many of the Constitutional Court's decisions 'read like works of comparative constitutional law'),⁵⁴ the Court has not been blind to certain disadvantages inherent in the use of foreign law. Very early on, the Court cautioned against the wholesale use of foreign authority. In *Makwanyane*, Chaskalson P noted that the particular importance of comparative jurisprudence in the early stages of the transition was against an assumption that an indigenous jurisprudence would (need to) be developed in time, such that comparative sources would diminish in importance. His Lordship noted that 'it is important to appreciate that [foreign law] will not necessarily offer a safe guide' to the interpretation of the Bill of Rights, since 'we must bear in mind that we are required to construe the South African constitution...and 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'. Likewise in *Sanderson* the Court stated that 'the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management'.⁵⁵ As Kriegler J forcefully stated in *Bernstein v Bester*:

'Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us...But that is a far cry from blithe adoption of alien concepts or inappropriate precedents'.⁵⁶

adding that attention needs to be given to the often inadvertent distortion, as opposed to borrowing or rejection, of comparative concepts. In his contribution, Rosenkrantz n 51 above notes that comparison can liberate – 'helping us to jettison the conviction of false necessity' (288). In a similar vein, Jackson (n 50 above, 92-3) notes that comparison may show that concepts 'that seemed essential to constitutionalism are, rather, choices made by particular polities not necessary for other reasonable forms of constitutionalism' (although perhaps this does not apply as strongly where one is dealing with constitutional rights). As she also notes, actual comparative influence is not always reflected in citation: at 100 n 37. See also Elster, J., 'Constitutionalism in Eastern Europe' (1991) 58 *Univ. of Chicago Law Review* 447, 476: references to other experiences are not just to 'models to be imitated' but also 'disasters to be avoided (or simply evidence of certain views about human nature.'

⁵⁴ Note 3 above, 142, referring as an example to Ackermann J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), the utility of whose extensive ranging across comparative decisions on civil damages as a constitutional remedy was questioned by Kriegler J in the same case.

⁵⁵ *Makwanyane*, n 23 above, [37]; *Sanderson*, n 38 above, [26]. See also the High Court cases referred to by De Waal *et al*, n x above, 142 n 65, in particular *Park-Ross v Director, Serious Economic Offences* 1995 (2) SA 148 (C) 160H.

⁵⁶ *Bernstein v Bester* 1996 (2) SALR 751 (CC) [133].

It will continue to be important for judges in South Africa to explain the purpose of their use of foreign law. The thrust of cautionary statements by the Court, and the lesson of analyses such as Choudry's (above), is the need for more nuanced approach to the use of comparative law.⁵⁷ However, there is little by way of clarity on the proper methodology to adopt, perhaps reflecting the combination of rationales for resort to foreign law.

It is arguable that while impractical to always provide an explication of one's methodology, the absence of a settled, appropriate comparative method puts the tenability and usefulness of the comparative exercise at risk.⁵⁸ What is meant by 'consider' and 'law' in 39(1)(c)? There is no injunction to do more than 'consider' other sources,⁵⁹ and indeed the provision itself is not compulsory. The provision ('law') is wider than, say, 'the decisions of foreign courts'. Properly, as De Waal *et al* note, what is being sourced is substantive reasoning in support of one's own conclusion (or perhaps trends and developments in the law generally), and not the jurisdictional authority of the court being referred to. The learned authors say that since it is the reasoning being sourced, the relative place of the court referred to in that other country's hierarchy, or even whether the judgment relied upon is a majority or minority decision, is irrelevant.⁶⁰ However, it is fair to say that the Court has used foreign sources as much for their reasoning, logic and experience as it does for the 'precedential', pedigree or authoritative value of foreign cases. It is difficult to completely separate the persuasiveness of a case's reasoning from the relative authority of the court that gave it. Part of the purpose (section 39(1)(a)) of referring to foreign decisions is to locate South African decisions within the ideals of free and democratic societies on which its constitution is modelled. Clearly, on this view, the reasoning of a unanimous Supreme Court of Canada may have a different quality and gravity than that of a dissenting judge of a lower court, even if it is not the pedigree

⁵⁷ See Davis, n 36 above, 191.

⁵⁸ Venter argues that it is not particularly clear how all of the comparative material referred to in the Court's judgments actually impacts on the eventual findings of the Court: Venter, F., 'Utilizing Constitutional Values in Constitutional Comparison' *Seminar Reports*, Konrad Adenauer Stiftung, at (www.kas.org.za/Publications/SeminarReports/Constitution&LawIV/venter.pdf)

⁵⁹ See *Makwanyane*, n 23 above, [37] (in relation to section 35(1) of the Interim Constitution, which used the phrase 'have regard to' instead of 'consider').

⁶⁰ Note 3 above, 142 n 65. This reflects Slaughter's view that generally the authority of the foreign case is not significant, since it is simply being used as a source of persuasive or non-persuasive reasoning.

but the reasoning that the South African judges seek to avail themselves of. At least if the purpose of referring to foreign sources is to draw on the authority or pedigree of the case in its own setting, there is a need for sensitivity to the particular cultural forces that inform the making and operation of another legal system,⁶¹ and to avoid the danger that a foreign decision is given a certain significance without acknowledgment of the relative institutional importance of that decision in the place where it is given.⁶² Related to this is the caution to be adopted generally in adopting, say, American constitutional jurisprudence, because of the different origins, nature and structure of the relevant provisions: *S v Mamabolo*.⁶³ It is from these various cautionary sentiments of the last decade that I turn, likewise with a cautionary tone, to consider certain aspects of the legacy of extensive comparative borrowing, with an eye to the next ten years of South African constitutionalism.

5 THE LEGACY OF COMPARISONS: REASONING AND LEGITIMACY

Lord Goff has said (in relation to the future of the common law) that ‘comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome, rather than fear, its influence.’⁶⁴ However, and even if our judges wish to (or cannot avoid) seeing the issues before them ‘through the world’s eye’,⁶⁵ this does not remove the need to adopt a reasoning process, and reach an outcome, that has the local as its start and end point. Of course, in South Africa

⁶¹ D. Visser ‘Cultural Forces in the Making of Mixed Legal Systems’ (2001) 78 *Tulane Law Review* 41.

⁶² ‘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’ *Bernstein v Bester*, n 56 above, per Kriegler J (min., Didcott J concurring) at [133].

⁶³ *S v Mamabolo* 2001 (3) SALR 409 (CC), [40]. A good example of clearly explained and cautious use of foreign precedent is Sachs J’s judgment in *S v Solberg* 1997 (10) BCLR 1348, 1390-2, where his Lordship, mindful of the problems of ‘simplistic transplantation’ of US constitutional doctrine and the need to account for South Africa’s ‘specific situation’ (as well as the problems ‘shared with all humanity’), explained that his treatment of US cases was not as precedents, but ‘because their dicta articulate in an elegant and helpful manner problems which face any modern court’ dealing with the issue there (church /state relations) and that ‘though drawn from another legal culture they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.’

⁶⁴ N 6 above, 748. See also Bingham, Rt. Hon LCJ, ‘The Future of the Common Law’ (1999) 18 *Civil Justice Quarterly* 203.

⁶⁵ Kirby, Justice M., *Through the World’s Eye* (Federation Press, Sydney, 2000): ‘Once we saw issues and problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world’s eye.’ (Preface).

the legitimacy problem of selective judicial reliance on decisions reached in other places for other peoples is reduced, since the Constitution authorises use of foreign sources.⁶⁶ But this is not the whole story. While most use of comparative authority is positive, sensitive and nuanced, South African courts must guard in future against allowing resort to comparative sources to displace actually reasoning through the problem on local terms, and explaining that reasoning in a way that reveals value-based assumptions attending it and is persuasive in the local community.⁶⁷ Moreover, one needs to be aware of the tone of self-congratulation implicit in many accounts of the phenomenon under discussion. Heinz Klug, writing on 'Hybrid(ity) Rules: Creating Local Law in a Globalised World' notes that participation of South African courts in an international 'community' of jurisprudence will not necessarily lead to solutions to the problems that still deeply divide South African society.⁶⁸

The various cautions expressed by the Court about the use of comparative law openly express the need for the development of an indigenous jurisprudence, partly since public identification with this local character will enable the growth of a sustainable constitutionalism. It is possible to question the merits of extensive or monolithic comparativism, particularly once one acknowledges the link between simplistic comparison and unpersuasive judgments that do not receive a level of empirical legitimacy. As the boundaries of legal argument become increasingly porous, as we describe increasing 'convergence' or 'interpenetration' of norms and systems, as more authority becomes 'persuasive', so it is that 'the tasks of justification and judgment become critical...legitimacy will [come to] rest more on the ability to persuade than to command or coerce.'⁶⁹ Comparative law is only ultimately useful to the extent that it enables this development by assisting in the resolution of local issues by the development of a locally legitimate body of law (while also enabling the local

⁶⁶ See generally Tushnet, M., 'The Possibilities of Constitutional Law' (1999) 108 *Yale Law Journal* 1225.

⁶⁷ As we have written elsewhere, the legitimacy and thus the capacity of the courts for their rights-transformative role, is partly determined by the persuasiveness of the reasoning justifying particular outcomes and newly defined rules: Du Plessis, M., & Ford, J., 'Developing the Common Law Progressively: Horizontality, the Human Rights Act, and the South African Experience' [2004] *European Human Rights Law Review* (forthcoming).

⁶⁸ Klug, H. (2002), n 11 above, 276.

⁶⁹ M. Moran 'An Uncivil Action: the Tort of Torture and the Cosmopolitan Private Law' in C. Scott (ed.) *Torture as Tort* (Hart Publishing, Oxford, 2001), 683-4. As Moran notes, 'the rule of law...may thus [come to] have more to do with justification than pedigree'. She also notes (666 n 32) the irony is

system to keep abreast with developments in open, democratic societies elsewhere). At the same time, use of foreign law should not be allowed to undermine the development of a national constitutional discourse at all levels of society, which the courts are well placed to foster, leading to a dynamic, participatory and so more secure and valid constitutionalism.⁷⁰

Arguably, the ‘dialogic’ conception of comparativism advanced by Choudry is the most appropriate one for judges in South Africa to adopt, notwithstanding the advantages and symbolism of accompanying elements of a ‘universalist’ mode of thinking, and the effect of genealogical and genetic ties to other systems. The ‘dialogic’ mode sees comparativism as an instrument or tool only, for identifying and justifying the premises underlying one’s own order, and ‘enables a court to learn from foreign experience without assimilating its constitutional jurisprudence’ to any wider discourse, unless this is seen as appropriate and desirable. In this sense it has more legitimacy than other conceptions, since it ‘makes no normative claims’ about comparison, comparative materials are ‘not asserted to be true or right’, nor necessarily valid or authoritative outside their source system. To a remarkable degree in constitutional rights cases, the court’s exercise of power is in its reasons.⁷¹ The significance of reason-giving as a mechanism for accountability is obvious. It can often be that resort to comparative sources enables, rather than obscures, the articulation of the judge’s reasoning. Jackson has explained this as follows:

‘Confronting the power of others’ ideas about common problems or concerns can contribute to a better intellectual product and can also impose the discipline of explanation upon the decision-maker...Confrontation with and reasoning about the relevance and persuasive value of significant foreign decisions on analogous problems adds to the mechanisms of accountability, through reason-giving...even if the reasoning of a foreign court ultimately is

that the comparative project is only comprehensible in a world of legal systems that are not converging, whose sharp boundaries of binding and not binding are not eroding.

⁷⁰ This reflects James Tully’s idea that ‘a constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary society negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity’: Tully, J., *Strange Multiplicity* (Cambridge Univ. Press, 1995), 30.

⁷¹ Fried, C., ‘Scholars and Judges: Reason and Power’ (2000) 23 *Harvard Jnl of Law and Public Policy* 807.

rejected, explaining why it is inapplicable or wrong could improve the quality of the court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators, and citizens.⁷²

However, reliance on comparative resources can, as Rosenkrantz has noted, lead to the 'problem of validation': undue reliance on foreign sources determined by other societies for other purposes may decrease the legitimacy of the constitution and the court, to the extent for example that there is a divergence between constitutional norms and national values, and may also inhibit the develop the local development of an indigenous constitutional culture. Rosenkrantz's study of Argentinian constitutional jurisprudence revealed:

'[E]ach time Argentine legal authorities had to confront a new and difficult problem, instead of looking at their own experiences, traditions, and legal values, the attention was on foreign law...[this makes it] unlikely that any country will forge a constitutional identity and culture.'⁷³

Rosenkrantz opines that courts should look inwards, not outwards, in their search for constitutional arguments, and so would disapprove of purely 'dialogic' uses of comparative law (where the purpose is not to adopt foreign law for its inner authority, but simply to inform oneself or the audience of others' experiences). For Rosenkrantz such usage adds unnecessary complexity to judgment production and reception:

'[T]he survival of the democratic fiber in a modern society is intimately associated with the possibility that all citizens interact with courts, which can only occur in the required way when courts speak in a language that all

⁷² Jackson, n 43 above, 254-60: 'how do the court's decisions and reasons fare among the public?'. There is a good deal of work to be done on increasing the accessibility of constitutional jurisprudence. Paul Kahn argues critically that 'constitutional court judges around the world often seem to believe that they are engaged in a single, transnational conversation with their counterparts [and] write opinions as much for each other...as for their own citizenry' 'Comparative Constitutionalism in a New Key' (2003) 1010 *Michigan Law Review* 2677, 2679.

⁷³ Rosenkrantz, n 51 above. His purpose is to 'pause and reflect upon the predominant enthusiasm with which...foreign constitutional law' is treated and discussed, and shows the danger of recourse to comparative sources becoming perceived as a means of justifying indefensible judicial creativity. He quotes George Fletcher ('Constitutional Identity' in Rosenfeld, M (ed.), *Constitutionalism, Identity Difference and Legitimacy: Theoretical Perspectives* (Duke Univ. Press, 1994), 223): 'the acceptable way to resolve disputes and to explain results is to turn 'inward' and reflect upon the legal culture in which the dispute is embedded.'

citizens can easily understand...clarity is not served by constant reference to foreign law...Courts will better promote their interaction with litigants and citizens if they keep their rulings as simple as possible...instead of saddling their arguments with references to foreign law [they should] display clearly the reasons they have for deciding as they do.’⁷⁴

This argument is tied explicitly to the possibility that excessive comparativism might prevent the development of an indigenous jurisprudence, and the sense that the local court has unique authority over local issues. Rosenkrantz notes that constitutional culture is ‘entirely dependent upon constitutional law being conceived and experienced as a unique and final umpire,’ and recourse to foreign law ‘deprives the courts that refer to it of the [necessary] sense of uniqueness and finality of their rulings.’⁷⁵ McCrudden has been acknowledged that appeals to foreign constitutional law may undermine the perceived integrity and autonomy of law and the legitimacy of the court.⁷⁶ In discussing this communicative role of the courts in establishing constitutional legitimacy, Jackson also notes that overt discussion of foreign constitutional practice might detract from the authority of the court’s decisions in the view of important domestic onlookers, for example by undermining the idea that the law is indigenously autonomous: the use of foreign authority might suggest that the local system provides no answers and so is not to be accorded the respect otherwise due to the law.⁷⁷ There is thus perhaps a tension, in a ‘perceived legitimacy’ sense, between a court being seen to speak with clear indigenous authority (reinforcing the idea of law as locally-based and discoverable uniquely by judges) and yet not perpetuating the idea that, especially in human rights hard cases, courts do not make

⁷⁴ *Ibid* (Rosenkrantz), 292.

⁷⁵ *Ibid* 294. For a thorough, somewhat contrasting view, preferring a ‘dialogic’ approach to comparative constitutional reasoning (horizontal, transnational, interdependent decision-making) over an ‘enforcement’ model (local, independent, final decision-making) see Harding, S. K., ‘Comparative Reasoning and Judicial Review’ (2003) 28 *Yale Journal of International Law* 409. Harding she seeks to show that this external-focussed dialogic approach still requires ‘encouragement of a local interpretative legal process’ 463. However, her account does not give sufficient weight to the idea that a locally-focussed process is the starting point, and any grand dialogue with other courts that may occur is perhaps incidental.

⁷⁶ McCrudden, C., ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *Oxford Jnl of Legal Studies* 499. Compare Slaughter, A-M., ‘A Typology of Transjudicial Communication’ (1995) 29 *Univ of Richmond Law Review* 99, 121-3 (that referring to foreign law bolsters the legitimacy of the court doing so).

⁷⁷ Jackson, n 43 above, 262, 265. There has been a symbolic effect of the use of comparative law whether or not the logic of foreign cases was useful: reference to it has helped, like Chapter III itself, to provide a form of deliberately created distance from the legacies and practices of the past.

value-based decisions. Jackson has thus called for judges citing foreign authority to acknowledge with humility the choice inherent in interpretation and so display ‘a touch of self-awareness, a consciousness of interpretative choices’ in their reasoning.⁷⁸ This tension imitates the difficulty of presenting properly reasoned judgments without adding unnecessarily to the length and preparation time of these.

In a way that supports this cautionary argument, Ward has questioned trends towards macro-comparativism and comparative constitutionalism becoming an alternative to actual reasoning with the issues and the development of local jurisprudence.⁷⁹ A more nuanced treatment of international authority may be required, even if it is only the reasoning there that is drawn upon. For example, Neumann has showed how the reasoning of many international rights bodies is not suitable for adoption since institutional concerns (for example, political compromise) often greatly influences the format of its opinions or statements of interpretation: many international rights bodies produce ‘compromise formulations that are conclusory, opaque, or equivocal’.⁸⁰ Choudry has also questioned the use of ‘window-dressing,’ citations of foreign judgments without much discussion or analysis.⁸¹ Aleinikoff, noting the link between the inadequate reasoning and poor legitimacy of courts, has traced how the US Supreme Court’s decisions ‘lost their ability to persuade.’⁸² This danger, I suggest, is heightened where the temptation might be to insert comparative references in place of transparent lines of thinking, so that comparative ‘reasoning’ becomes ‘an eclectic, irrelevant academic exercise,’⁸³ which again directs attention to the purpose for which comparative analysis is

⁷⁸ *Ibid*, 241.

⁷⁹ I. Ward ‘The Limits of Comparativism: Lessons from the UK-EC Integration’ (1995) 2 *Maastricht Journal of European and Comparative Law* 23, 31. In the somewhat the same tone, see also Kreimer, S., ‘Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing’ (199) 1 *Univ of Pennsylvania Jnl of Constitutional Law* 640.

⁸⁰ Neumann (2003), n 33 above, 1871, referring (at n 22) to Henry Steiner ‘Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?’ in Alston, P., & Crawford, J., (eds.) *The Future of the UN Human Rights Treaty Monitoring* (2000), 15: the Human Rights Committee’s reasoning remains ‘covert, secreted within formal opinions that merely state rather than argues towards conclusions,’ with the need for compromise ‘purging’ reasons of disagreement on controversial issues.

⁸¹ See n 17 above.

⁸² ‘The sort of reasoning that gives answers...but fails to persuade’: Aleinikoff, T. A., ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale LJ* 943.

⁸³ Van Zyl, Justice D., ‘Constitutional Development of the Common Law’ *Seminar Reports*, Konrad Adenauer Stiftung, (www.kas.org.za/publications/SeminarReports/Constitution&LawIV/vanzyl.pdf), 169, 171, in relation to constitutional development of the common law by inappropriate methodology.

undertaken: ‘aimless comparison tends to result in meaningless and inconclusive juxtaposition.’⁸⁴ This undermines the courts’ respectability.

Arguably, South African courts generally examine and engage with comparative law rather than simply accessing and deploying it haphazardly in their decisions. Justice Mokgoro in *Makwanyane*, referring to the use of foreign judicial precedent for ‘guidance...in the cultivation of a human rights jurisprudence for South Africa’ stated that by doing so the Court would be avoiding ‘undue subjectivity’ and ‘articulating rather than suppressing values which underlie our decisions...[setting out] in a transparent and objective way the foundations of our interpretive choice and [making] them available for criticism.’⁸⁵ Again, the need is for accountability and fidelity to the judicial role.⁸⁶ As Motlala and Ramaphosa note, at the heart of constitutional theory is ‘an attempt to ensure that judicial review [and adjudication generally] is performed in a principled manner using reasoned standards’, including analysis and reasons that transcend the immediate result in the case before the court.⁸⁷ As the authors point out, Owen Fiss has written of the institutional authority of the ‘interpretive community’ of which judges are a part, and that where judges deny (or undermine) the authority (and legitimacy) of that community, by departing from its ‘disciplining’ interpretive standards, ‘they relinquish their authority to speak on what constitutes the law’ and undermine the legitimacy of the institution generally.⁸⁸ I suggest that while the idea or observation of the ‘transjudicial communication’ phenomenon is useful, arguably the local legitimacy imperative requires judges to conceptualise their ‘interpretive community’ as a South African one, and not a wider global group, although the approaches of other communities may be worthy of consideration.

These observations are tied to a wider point about legitimacy and effectiveness of law and legal institution in democratic transitions, and the need for foreign models

⁸⁴ Venter, n 58 above.

⁸⁵ *S v Makwanyane*, n 23 above, [304].

⁸⁶ To paraphrase Kentridge AJ in *S v Zuma* [6] 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (SA), [18], the Constitution ‘does not mean whatever we might wish it to mean’ and a general resort to [foreign law] would be divination not interpretation.

⁸⁷ *Constitutional Law* (Oxford Univ. Press Sthn Africa, Cape Town, 2002), 15; Wellington, H., *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (Yale Univ. Press, New Haven, 1990), 30.

⁸⁸ *Ibid.* Fiss, O., ‘Objectivity and Interpretation’ (1982) 34 *Stanford Law Review* 739, 745.

or ideas to be mediated on or into local terms.⁸⁹ The lessons from constitution making (using foreign models) are apposite for ongoing constitutional development (using foreign jurisprudence). While many new constitutions today have become ‘standardised documents’ rather than ‘the product of national ingenuity’,⁹⁰ local input, process and content is vital for longer-term legitimacy. As Dezalay and Garth confirm, ‘law must be produced at the national level to make national sense’:

‘Internationally-generated imports succeed only where the local situation allows them to be nationalised – made part of the indigenous structures and practices. Local histories determine what can be assimilated into local settings and how what is assimilated will affect long-standing local practices...while we tend to think of the rule of law as an international concept, law must be produced at the national level to make national sense’.⁹¹

Local variation is an essential feature of constitutionalism, and ‘constitutional indigenisation enables the phenomenon to reach and be reached by the grassroots level.’⁹² Articulating any use of comparative law in locally-digestible and palatable format so that it has ‘domestic salience’ allows the new constitution to become part of the shared history of the people, so that constitutionalism can become a tradition.⁹³

⁸⁹ Macro-development policymakers have emphasised this: the World Bank’s study on ‘Building Institutions for Markets’ notes that reforms and innovations to institutional (constitutional) design have been most effective, unsurprisingly, when they meet needs ‘in ways compatible with country conditions’ World Bank, *World Development Report 2002* (Oxford Univ. Press, New York, 2002). The report noted that learning from other countries’ experience in institutional design can provide valuable guidance, but cautioned against mere copying or an approach based on transplanting ‘best practice’ on the bald assumption that ‘one size fits all’. Significantly, the study notes that ‘supplying’ institutions is not enough: demand for these needs to be created, ‘people must want to use them too’. In the constitutional sense, this means ensuring that people identify with and accept as legitimate the new constitutional framework and desire that it endure and prevail.

⁹⁰ Fleiner, T., ‘The Age of Constitutions’ in French, Lindell & Saunders *Reflections on the Australian Constitution* (Federation Press, 2003), Ch. 13 (n 1 above), 242-3.

⁹¹ Dezalay & Garth, n 11 above, 326.

⁹² Davis, M., (2004), n 13 above, 145. Davis writes: ‘constitutionalism must take on indigenous institutional elements and practices that better attach it to local social conditions and concerns. It is not enough to simply copy liberal institutions. For a society to make constitutionalism work, the society must understand how these institutions work in the local conditions and how they may contribute to economic development and its consolidation’: at 128. Also writing on constitution-making and reform, Deng has explored ways in which African constitutions can be ‘better oriented to the indigenous cultural values and institutions of African societies’. Again, the same goes for the interpretative process.

⁹³ Ford, J., ‘The ‘Age of Constitutions’? Reflections on Constitution-Making in the EU, Afghanistan and Iraq’ *National Europe Centre, Canberra, 2004* (Paper 132 www.anu.edu.au/NEC/Ford_paper.pdf). In their study of why states obey some international norms and not others, Cortell and Davis posit that a norm is more likely to be respected the more salient it is to the structure and discourse of a society:

Adjami's study of the use of comparative and international case law by African courts reminds us (when considering a turn to foreign law) not to overlook indigenous value systems and the traditions, beliefs and values of all sectors of South African society when developing the Court's jurisprudence.⁹⁴

The point about avoiding mere citation or copying of foreign jurisprudence is made succinctly by Neumann: 'ventriloquist jurisprudence may not be conducive to social respect for the constitutional court, or its own self-respect'.⁹⁵ Thus what is desirable is that local history and experience and requirements act as the filter for the relevancy of foreign concepts and ideas, a use or borrowing of comparative law increasingly mediated by the political and economic conditions prevailing in the country. It is a positive sign that this has indeed been the experience in South Africa, as Dennis Davis has recently written:

'Judicial references to the country's history, in terms of which interpretation must take place, indicate a determination to have the use of comparative law mediated by indigenous history. The consequence is that, as the Constitutional Court began to develop a jurisprudence of its own, it sought to rely less on the direct use of comparative law for the determination of the meaning and scope of the rights entrenched in Chapter 3.'⁹⁶

the idea of 'normative fit'. Cortell and Davis' thesis is about the legitimacy of international norms: the more domestically salient a norm is, the more likely it is to be regarded as legitimate by the government and by the population at large; used here the idea includes not simply that some norms will have more local resonance, but that they actively need to be made domestically salient if they are 'suitable' for the society: Cortell, A., & Davis J. W., 'Understanding the Domestic Impact of International Norms: A Research Agenda' [2000] 2 *International Studies Review* 65. In a rights-strategic sense, a comparison with the United States reinforces the need for rights discourse to be conducted in local tongue, even if it is drawing on international sources, in order to take purchase in the local soil. Harvard human rights academic Michael Ignatieff has shown that, given the general resistance of US courts to international human rights in the interpretation of the US Constitution, activists there should focus on the support that America's own traditions about rights lend to the adoption of major international instruments: 'these rights will become strong in America [and seen, like constitutional rights, as 'self-evident'] only when there advocates speak in the American vein.'

Ignatieff, M., 'No Exceptions?' (2002) *Legal Affairs* 59.

⁹⁴ Adjami, M. 'African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?' (2002) 24 *Michigan Jnl of International Law* 103. Adjami also notes the lack of use by non-African forums of African courts' rights jurisprudence (other than South African jurisprudence) and the difficulty of researching African case law. On the relevance of pre-external indigenous value sources, see also *Makwanyane*, n 23 above, per Mokgoro J [304-6], Madala J [258], and Sachs J [361 – 373]; a related point is that for ease of research we would tend to look for English language materials and little beyond.

⁹⁵ Neumann, n 33 above, 1895.

⁹⁶ Note 36, above, 194. See also Sarkin, n 37 above, 204-5.

While the opening quote of this chapter implies a tendency toward adopting or adapting foreign ideas to the local, of course it may be that a primary reason for referring to comparative sources is to show why their solutions or ideas are not appropriate for South Africa. To continue, in the next decade and beyond, to build a South African jurisprudence that can justify, explain and legitimate decisions in ‘hard’ constitutional cases, the courts must use comparative sources carefully, and mainly in order to inform and enrich determinations made in locally meaningful terms.⁹⁷

6 CONCLUSION: THE BOTANIC CONSTITUTION?

Notwithstanding the Court’s express constitutional or democratically-based directive (subsections 39(1)(b)) and mandate (subsection 39(1)(c)) to resort to ‘external’ sources, I have attempted to show that there might be a possible democratic legitimacy concern in the *manner* of the Court’s use of such sources in resolving Bill of Rights disputes. For the sake of a locally-salient constitutionalism, and the Court’s empirical public and institutional legitimacy, and in order to develop a rich, inclusive, engaging national constitutional discourse, the resort (otherwise both valid and commendable) to international and foreign jurisprudence must not come at the expense of (or be a substitute for), properly justified local outcomes. That is, conclusions reached and principles developed with the use of external sources must be supported by transparent, value-conscious reasoning based in and directed to local issues, and their resolution on local terms. Any value-based principles or solutions from other jurisdictions or systems that are beyond being simply ‘of interest’ and are deemed suitable for actual borrowing must be translated into a South African ‘language’, mediated by reference to local history and conditions.⁹⁸

Much of the thrust of my argument is well captured, for the purposes of reaching conclusion, by the following concise but pithy observation of Currie *et al*:

⁹⁷ For an analysis of the Court’s practice in conceiving of itself as ‘a teacher in the national discourse’ on rights in South Africa, see Burnham, n 37 above, at 50.

‘While in South Africa we may look to the jurisprudence of Canada, Germany, India, the United States and other more recent constitutional democracies as a vast historical text from which to draw examples and arguments, **the principles of constitutionalism adopted by our courts will achieve acceptance only if they address local problems.** It is the shaping of these principles in the context of applying them to local issues – in effect their hybridization – which will give them a unique South African character and life. **Our new experiment with constitutionalism will only bear fruit to the extent that these principles become ingrained into the hopes, dreams and practices of our society.**’⁹⁹

This publication contains reflections on the first ten years of the new dispensation in South Africa. In looking forward to the next decade of South African constitutionalism (and while I would submit that the caution expressed in the final part of this chapter is well-founded), the fact is that the Court *has*, in the course of using external sources and situating our practice within international law and mainstream practice, generally endeavoured to articulate a locally-relevant, engaging public constitutionalism.¹⁰⁰ Considering the Court’s performance in use of comparative law its first few years (to 1998), Webb showed how the Court had been effective in complying with or using the section 39 provision, while ‘maintaining a sensitivity to the more subjective elements of South Africa’s social, economic and political reality,’ sufficiently ensuring ‘the “South Africanisation” of international references’ so as to have developed ‘a modern constitutional jurisprudence of unique and rigorous sincerity’ through the adoption of a ‘hybrid...approach [that is] only natural in the historical context.’¹⁰¹ As Webb then commented, and subject to the concerns expressed here of reasoning, transparency and legitimacy, it is surely still too early, ten years on, to ‘[turn] off the beacon of external authority that guides the judiciary by revealing both the successes and mistakes of other jurisdictions.’¹⁰²

⁹⁸ Of course, the local context determines the suitability - the enquiry into whether a foreign concept, device, principle or value is suitable is a prior idea to the need (if suitable), to then render the idea locally relevant and applicable.

⁹⁹ Note 13 above, 24, emphasis added.

¹⁰⁰ Burnham, n 37 above, 57-8, likewise opined (in 1997) that a review of the Court’s jurisprudence established that reliable methods of adjudication – transparency, contextualisation and comparative study – were already firmly entrenched.

¹⁰¹ Note 37 above, 278.

¹⁰² *Ibid* 210-11, 278, 280-3.

South African jurisprudence has in turn become part of the global text from which others may draw lessons, examples and arguments, shaping them to meet their own circumstances.¹⁰³ Indeed, the quality of the South African jurisprudential product (given in particular that its artisans have peculiarly free access to varied ingredients) is such that in the coming decades, when recourse is made by South African judges to the global historical text, it will be found that South African authority has in turn assumed an influential place in that body of principle and reasoning.

Finally, the botanic concepts, vocabulary and themes characteristic of this topic – of a living document, the taking-root in local soil of exotic or alien plants, the cultivation of home-grown jurisprudence from a ‘seedling charter’, of hybridization, of transplantation and cross-pollination experiments bearing local fruit – all create (I suggest) a picture of the Constitution as a national public botanic garden, dutifully guarded and nurtured by the judges, but open to the participation and comprehension of all.¹⁰⁴ It is not a garden rigidly set out by rows of separate species, but growing in an abundant, teeming, entwined but peaceful splendour. Here the evolving, precious national heritage of a new South Africa is continuously being developed, using both local and global best practices and knowledge. Foreign transplants, or hybrids of these, are fragile in their new environment and require careful management and nurturing; the scope for creativity in the planting, grafting or hybridization process brings heavy responsibility on the experts. It is a place, this botanic constitution, where we may see evidence that the dry white season indeed has passed; a colour-filled place dedicated to preserving and protecting what is uniquely South African, but open to the influence and interest of the outside world. Much difficult work remains

¹⁰³ See Currie *et al.*, n 13 above, 24. See also Klug (2002), n 11 above, 277: ‘the local agency deploys global forms and is both reshaped in the process and contributes to the continuing reformulation of global alternatives among the available options...viewed as norms or as stories of success or failure.’

¹⁰⁴ An influential study is Watson, A., *Legal Transplants: An Approach to the Study of Comparative Law* (Univ. of Virginia Press, 1974). One might use many metaphors to describe the combination of local and foreign in the constitutional (re)formation and development of a nation, and perhaps the linguistic one of translation is the most apposite to an activity that is ultimately about words and meanings and articulations. One weakness in the ‘botanic constitution’ idea is that it might be preferable to see the Constitution as one single plant, with local roots and foreign grafting, only that this fails to fully represent that the very root, *grundnorm*, of the South African constitutional system is (and had to be) new and displacing of the previous. I am grateful to Professor Helen Irving for her comments. Irving’s description of the Australian Constitution (modelled on US and Westminster influences) as similar to the Australian platypus (a unique, autochthonous local creature displaying features of a number of species) is apposite to the concept of local law with foreign influence: *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1997).

to be done, to be sure. But here, in this place and process, we can see the influence and representation of mainstream global ideals, fashioned and articulated locally by caring hands, in a living embodiment of our own diversity and common growth.