

ARTICLES

THE EFFECT OF CONSTITUTIONAL BORROWINGS ON THE DRAFTING OF SOUTH AFRICA'S BILL OF RIGHTS AND INTERPRETATION OF HUMAN RIGHTS PROVISIONS

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I. INTRODUCTION

One can only understand the extent and effect of constitutional borrowing in a particular state if the historical and socio-legal context of that country is understood.¹

The early 1990's saw the unprecedented negotiation of a new dispensation in South Africa, resulting in profound changes to the country's social, political and economic structures.² Many of these changes are codified in the interim Constitution (the "IC"), including an entrenched justiciable Bill of Rights,³ which became the supreme law of the land on April 27, 1994.⁴ The inclusion of justiciable rights was a unique event since the constitutions adopted in 1910, 1961 and 1983 all provided for parliamentary supremacy.⁵ Another

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¹ For some background discussion of the legal and social structures of South Africa, see LAWRENCE BOULLE, ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW: BASIC PRINCIPLES 101-113 (1989); Jeremy Sarkin & Howard Varney, *Traditional Weapons, Cultural Expediency and the Political Conflict in South Africa: A Culture of Weapons and a Culture of Violence*, 6 S. AFR. J. CRIM. JUST. 2, 2-4 (1993); Jeremy Sarkin, *Preventive Detention in South Africa*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 210, 210-20 (Andrew Harding & John Hatchard eds., 1993).

² See generally Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa*, 20 HUM. RTS. Q. 628 (1998) (discussing the development of the two constitutions and the restructuring of the government infrastructure including the court and criminal justice system).

³ See Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 33 (1994); see also S. AFR. CONST. of 1993 (IC), ch. 3 (delineating numerous "Fundamental Rights").

⁴ See David Welsh, *Negotiating a Democratic Constitution*, in CHANGES IN SOUTH AFRICA 25 (J.E. Spence ed., 1994).

⁵ See Dion A. Basson, *The Legislative Authority: The Relationship Between Parliament and the Courts: Parliamentary Sovereignty (Section E)*, in SOUTH AFRICAN CONSTITUTIONAL LAW 169-200 (Christina Van der Walt trans., 1988).

feature of the interim Constitution was the creation of a Constitutional Assembly tasked with drafting the final Constitution between 1994 and 1996.⁶ This Constitution was adopted at the end of 1996 and came into force on February 4, 1997.⁷

In drafting the Constitution, South Africa followed the recent trend discernible elsewhere of borrowing from international instruments, national constitutions and international and foreign decisions in order to benefit from the lessons learned by others.⁸ This international trend toward comparative analysis and borrowing is particularly prevalent where new democracies emerging from years of domination and repression seek to entrench democracy and provide protection from human rights abuses. Constitutional borrowing occurs because the drafters of new constitutions often seek the assistance of lawyers from states with constitutions and a history of constitutional adjudication, since domestic experience in such endeavors is usually limited. These lawyers bring with them their own experiences of constitutional systems, which are then incorporated, to some degree, in the constitution that they are helping to draft.⁹

International and foreign experience substantially affected the process of constitutional drafting in South Africa and has already had a major effect on the constitutional and human rights adjudication that has taken place since 1994.¹⁰ Lessons learned in the international arena are evident throughout both the interim and final Constitutions. Areas influenced included the structure of the state, the structure of the court system, and, most prominently, the content and language of the two bills of rights.¹¹ In addition to the indirect effects of international and comparative laws and decisions, both the interim and final Constitutions have explicit provisions that impact the reception and role of international and comparative law in constitutional adjudication.¹² This article examines the extent to which interna-

⁶ See S. AFR. CONST. of 1993 (IC), ch. 5, §§ 68-74.

⁷ See Proc. No. R. 6, 1997 (making February 4, 1997 the date of effectiveness pursuant to Section 243 of the final Constitution).

⁸ See John Claydon & Jennie Hatfield, *The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms* 2 CONN. J. INT'L L. 349, 354-59 (1987) (discussing the use of international sources to interpret the meaning of the Canadian Bill of Rights, which like the South African Bill of Rights, was influenced by external legal sources).

⁹ For example, two American constitutional lawyers played a direct role in drafting the Inkatha Freedom Party's Bill of Rights. The influence of the United States legal system is also found in many places in the KwaZulu Bill of Rights.

¹⁰ See, e.g., *State v. Makwanyane and Another*, 1995 (3) SALR 391, 436-39 (CC) (considering numerous sources of foreign law when deciding the constitutionality of the death penalty); see *infra* Section IV (discussing a number of seminal cases decided under the interim Constitution).

¹¹ See S. AFR. CONST. of 1996, ch. 2 ("Bill of Rights"); S. AFR. CONST. of 1993 (IC), ch. 3 ("Fundamental Rights").

¹² The most significant of these provisions in the final Constitution are Sections 39 and 231 that mandate the use of foreign and international sources in certain circumstances and determine the legal status of international agreements. See S. AFR. CONST. of 1996, ch. 2, § 39(1)(b-c) (defining the use of the foreign and public international law); *id.* at ch. 14, § 231 (defining

tional and foreign law impacted the drafting of the interim Constitution and how the expanded role of international and comparative law has impacted the South African legal system.¹³ Only the interim Constitution is evaluated and not the final Constitution, as part of the evaluation examines the role of the Constitutional Court in the development of the final Constitution. The effect of international experience is also examined to determine why a separate and distinct Constitutional Court was introduced into the domestic court system.¹⁴

The particular socio-political context in South Africa accounts to some degree for South African acceptance, in theory at least, of international law and comparative experience.¹⁵ Therefore, this article reviews a few selected Constitutional Court decisions where this body of law could, and did, play a critical role to examine whether reliance on these bodies of law substantially shaped the interpretation of the South African interim Constitution and Bill of Rights.¹⁶

While the Constitution enjoins the courts to consider international law and makes it permissible to apply foreign law,¹⁷ the courts may depart from these laws. Thus, while there has been a great deal of reliance on international and comparative law in South Africa, with the courts extensively citing such laws and decisions, the courts have also often departed from these positions or quoted from them selectively in support of the decision being handed down.¹⁸

II. THE INTERIM CONSTITUTION

The shift from parliamentary to constitutional supremacy is probably the most critical shift to occur during the transition to democracy in South Africa.¹⁹ Until the introduction of a justiciable constitution in April 1994, Parliament was sovereign and there was no check on state power.²⁰ Thus, the legislature could adopt any law and

the mechanisms used to determine the legal status of international agreements). As will be discussed, *see infra* text accompanying notes 39 and 41, the interim Constitution included similar provisions. *See* S. AFR. CONST. of 1993 (IC), ch. 3, § 35(a); *id.* at ch. 14, § 231.

¹³ *See infra* section II.

¹⁴ *See infra* section III.

¹⁵ *See* Johan D. van der Vyver, *Comparative Law in Constitutional Litigation*, 111 S. AFR. L.J. 19 (1994) (using a judgement under the Declaration of Fundamental Rights in the Bophuthatswana Constitution Act of 1977 to argue for the value of understanding the intricacies of comparative law in constitutional litigation).

¹⁶ *See infra* section IV. This section considers *State v. Makwanyane and Another*, 1995 (3) SALR 391 (CC), *In re Gauteng Education Bill of 1995*, 1996 (3) SALR 165 (CC), and *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SALR 671 (CC).

¹⁷ *See infra* note 61 and accompanying text.

¹⁸ *See infra* text accompanying notes 177 and 189.

¹⁹ *See* S. AFR. CONST. of 1993 (IC), ch. 7, § 98(2) (granting the Constitutional Court jurisdiction over all matters concerning Constitutional interpretation).

²⁰ *See* Basson, *supra* note 5, at 169-200 (explaining that South African constitutional law developed out of English constitutional law and, therefore, judicial authority has traditionally

the courts had only a procedural reviewing function.²¹

The legal system in apartheid South Africa was a mixture of statute and hybrid common law, largely comprised of Roman-Dutch law and elements of English law.²² During the apartheid years, South Africa had little regard for international or comparative law. The country was seen by many, including the United Nations and other international bodies, as a pariah.²³ Similarly, the South African government considered the United Nations an enemy and accorded scant regard to the various decisions and documents emanating from that organization.²⁴

In 1989, the South African Law Commission explained the irrelevance of international law and its inability to impact the South African situation:

It cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part - let alone a significant part - in the decision of the protection of group and individual rights in South Africa. Safety does not lie in the hope that our courts will apply the norms of international law.²⁵

This view was grounded in the fact that for almost half a century the apartheid state had defied the United Nations and dismissed its Universal Declaration of Human Rights as communist propaganda.²⁶ The regime also vilified the declarations and resolutions of various United Nations agencies.²⁷

As a result of South Africa's isolation and resistance to international law, South African lawyers and judges generally lacked knowledge and experience about the meaning of these documents,²⁸ about

been subordinate to legislative authority); W. J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 597-634 (1977) (discussing in great detail the South African constitutional structure and its historical influences).

²¹ See Basson, *supra* note 5, at 190-91.

²² See, e.g., WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 20-37 (Dale Hutchison et al. eds., 8th ed. 1991) (explaining that Roman-Dutch law was used to create the South African legal system which was later influenced in the early nineteenth century by English law).

²³ See AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID 48-54 (1995) (discussing how the United Nations used a wide range of diplomatic, military and economic sanctions to punish the apartheid regime).

²⁴ See CHRIS ALDEN, APARTHEID'S LAST STAND: THE RISE AND FALL OF THE SOUTH AFRICAN SECURITY STATE 49 (1996) (pointing out that for white South Africans, the United Nation's passage of a mandatory arms embargo against South Africa represented a "multi-dimensional onslaught" against the country).

²⁵ South African Law Commission, *Working Paper 25 Project 58 Group and Human Rights* at 182 (1989).

²⁶ For an extensive discussion of the tense relationship between the United Nations and South Africa, see LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA 63-170 (1994); KLOTZ, *supra* note 23, at 3-12, 39-55.

²⁷ However, it is noteworthy that South Africa remained a member of the United Nations, which it joined on November 7, 1945. See UNITED NATIONS, MEMBER STATES (visited December 7, 1998) <<http://www.un.org/Overview/unmember.html>>.

²⁸ Lawyers from the exiled liberation movements, however, had studied abroad and had

how they came to be adopted, and about how they could shape and influence the content of South African law once a constitutional system became the order of the day.²⁹ This created an opportunity for lawyers from other countries to participate in different ways in the drafting of both the interim and final Constitutions.³⁰

Various draft versions of bills of rights were published between 1990 and 1994.³¹ Although most emanated from political parties, one was drafted by the South African Law Commission and another, A Charter for Social Justice, was authored by a group of independent progressive lawyers from the Western Cape.³² All these proposals borrowed from the international experience. This is especially true of the Charter for Social Justice, whose drafters were mainly academic lawyers, mostly with foreign study backgrounds, who extensively studied other constitutions and bills of rights.³³

The impact of these various draft bills of rights has been noted by the drafters of the interim Bill of Rights, particularly in relation to its structure and grammar.³⁴ They noted that, in regard to specific wording, the technical committee relied on proposals framed in "suitably broad language" and thus looked to the Charter for Social Justice, the Democratic Party's draft bill of rights and various sections of the

been schooled in international and foreign law. These lawyers attended law schools in different parts of the world including the United Kingdom, the United States, Germany, Canada, Poland, Mozambique, Zambia, Lesotho and Russia. South African academic lawyers had also studied abroad. The tradition, however, was for those graduating from the Afrikaans law schools to study mainly in Europe, specifically in Germany, Belgium and the Netherlands. Those graduating from English law schools generally pursued graduate studies in the United Kingdom although some went to the United States.

²⁹ In South Africa there was a debate in the mid-1980's on the need for a bill of rights. Outside the country, conferences and other forums were held to debate what a future South African Constitution and Bill of Rights ought to contain. One such conference was held at Columbia University entitled, "Human Rights in the Post-Apartheid South African Constitution." See 21 COLUM. HUM. RTS. L. REV. (1989) (reprinting select papers from the conference).

³⁰ See Jeremy Sarkin, *The Role of the Legal Profession in the Promotion and Advancement of a Human Rights Culture*, COMM. L. BULL. 1306 (1995) (describing the influential role of international lawyers in the drafting process due to their much greater familiarity with a constitutional structure).

³¹ For example, the African National Congress, the South African Law Commission, the South African Government, the Democratic Party, the Inkatha Freedom Party, the Association of Law Societies of the Republic of South Africa, and the Equality Foundation all provided drafts. See LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 48-51, 192-94 (1994) (providing an in-depth discussion of the constitutional drafting process and an overview of each group's main goals).

³² See HUGH CORDER ET AL., A CHARTER FOR SOCIAL JUSTICE (1992). The draft was written by Hugh Corder, Steve Kahanovitz, John Murphy, Christina Murray, Katherine O'Regan, Jeremy Sarkin, Henk Smith and Nico Steytler. Hugh Corder subsequently became a member of the technical committee responsible for drafting the interim Constitution's Bill of Rights, Katherine O'Regan became a Constitutional Court judge, and Christina Murray became a member of the panel of experts responsible for drafting the final Constitution.

³³ See *id.* at 13-67 (providing discussion of the Charter's provisions and indicating the foreign influences on each provision).

³⁴ See DU PLESSIS & CORDER, *supra* note 31, at 48 (discussing the influences behind the Bill of Right's "structure").

African National Congress's draft bill.⁵⁵ The drafters also noted that, in addition, the technical committee also looked to analogously framed bills of rights in other countries, including the German Basic Law and the Canadian Constitution.⁵⁶ Similarly, the impact of international human rights documents and the experiences of other countries were also examined.⁵⁷

As the democratic state of South Africa rejoined the community of nations, previously scorned international covenants and other documents have been signed and ratified.⁵⁸ Thus, this body of law has taken on greater significance than before, although the extent of its practical role can be questioned.

The expanded role of international law is explicitly addressed in section 231(4) of the interim Constitution, which provides, "The rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."⁵⁹ Thus, a particular human rights standard, which has become accepted as a rule of customary international law, must be implemented by a South African court in a decision, unless this rule is incompatible with the Constitution or an Act of Parliament. The proviso sets an important limit, permitting parliamentary supremacy in this area as in the past. As then-Chief Justice Rumpff stated in 1978 in *Nduli and Another v. Minister of Justice*

⁵⁵ See *id.* at 48-49.

⁵⁶ See Hugh Corder, *Toward a South African Constitution*, 57 MODERN L.R. 491, 514 (1994) (noting that these foreign models were useful because they emphasized that rights should be expressed simply and broadly, while remaining limitable and suspendable).

⁵⁷ See DU PLESSIS & CORDER, *supra* note 31, at 47-48.

⁵⁸ South Africa signed three major human rights treaties in 1994. These were the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, and the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. Three documents were ratified by South Africa in 1995: the Convention on the Rights of the Child, G. A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989); the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/36 (1980); and the three Protocols to the Geneva Convention. Parliament recommended ratification of two more, the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and the Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45. Although these latter two documents were formally lodged in 1996, there has been little apparent further movement on this front. Only two instruments were ratified in 1996: The African Charter on Human and 'Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58, and the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. It appears, however, that neither the administrative arm of government nor Parliament has a strategy for reviewing international human rights instruments or for determining whether to sign any others. Instruments have been signed and ratified without adequate examination as to whether South African law complies with them. Thus, reservations were not made and no review has occurred which might identify laws that should be amended to bring them into line with ratified international treaties and the Government does not really understand South Africa's present obligations.

⁵⁹ S. AFR. CONST. of 1993 (IC), ch. 4, § 231(4); see also JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 339-41 (1994) (discussing the relevance of 231(4)).

and Others, "[c]ustomary international law must give way to South African legislation if that legislation is clear."⁴⁰

International treaties also play a role in domestic South African law since both constitutions provide that the President can negotiate and sign international agreements.⁴¹ However, as a check on presidential power, the interim Constitution provided that until a treaty was incorporated into South African law by an Act of Parliament, it was not legally binding within the country or domestically enforceable.⁴² Furthermore, the signed agreement may not be inconsistent with the Constitution.⁴³ Thus, the few human rights agreements to which South Africa is party,⁴⁴ will play a direct role in the law only after Parliament so provides.⁴⁵ The final Constitution provides that international agreements, except for agreements which are technical, administrative or executive in nature, are binding on the Republic only after they have been approved by resolution in both houses of Parliament, the National Assembly and the National Council of Provinces.⁴⁶ In addition, an international agreement becomes law in South Africa only "when it is enacted into law by national legislation."⁴⁷ However, a self-executing provision of an agreement approved by Parliament is law unless inconsistent with the Constitution or an Act of Parliament.⁴⁸ Likewise, customary international law is binding on South Africa unless inconsistent with the Constitution or

⁴⁰ *Nduli and Another v. Minister of Justice and Others*, 1978 (1) SALR 893, 898 (A).

⁴¹ See S. AFR. CONST. of 1993 (IC), ch. 6, § 82(1)(i) ("The President shall be competent to . . . negotiate and sign international agreements."); see also S. AFR. CONST. of 1996, ch. 14, § 231(1) ("The negotiating and signing of all international agreements is the responsibility of the national executive.").

⁴² See S. AFR. CONST. of 1993 (IC), ch. 15, § 231(2-3). Section 231(2) qualified the President's power under Section 82(1)(i). See *id.* at § 231(2). Section 231(3) stated: "Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution." *Id.* at 231(3).

⁴³ See *id.*

⁴⁴ Before 1993, South Africa was party only to the United Nations Charter. It was only at the beginning of 1994 that South African signed a number of conventions. These include the Convention on the Political Rights of Women, July 7, 1954, 193 U.N.T.S. 135; the Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65; the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018, U.N. GOAR, 20th Sess., Supp. No. 14, at 36, U.N. Doc. A/60141 (1965); the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 44/25, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985); and the Convention on the Rights of the Child, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989).

⁴⁵ See Dermott J. Devine, *The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution Act 1993*, 44 INT'L & COMP. L.Q. 1, 6-7 (Jan. 1995).

⁴⁶ See S. AFR. CONST. of 1996, ch. 14, § 231(2).

⁴⁷ See *id.* at § 231(4).

⁴⁸ See *id.*

an Act of Parliament.⁴⁹ The courts are required, when interpreting the Bill of Rights to, "consider international law,"⁵⁰ and "may consider foreign law."⁵¹

International influences also impacted the debate over which rights ought to be incorporated into the interim Bill of Rights. This controversial issue was fiercely debated by two main camps - the minimalists and the optimalists.⁵² The minimalists, represented mainly by the African National Congress (ANC), argued that the power to decide on inclusions or exclusions in an interim bill of rights should not be in the hands of negotiators who had not been elected and were therefore lacking democratic legitimacy.⁵³ The optimalists, on the other hand, represented mainly by the white government, wanted as many rights included, with maximum detail, before majority rule began.⁵⁴ As a result of necessary compromise, the interim Bill of Rights contained only those fundamental rights which negotiators could agree warranted protection during the transitional period before a final constitution was adopted. While controversial subjects such as abortion and the death penalty were discussed during negotiations, they were avoided during the drafting of the interim Bill of Rights on the basis that such issues should be left for resolution in the drafting of the final Constitution.⁵⁵

In addition, according to two of the technical drafters of the interim Bill of Rights, Lourens du Plessis and Hugh Corder, international instruments such as the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) served as sources of inspiration.⁵⁶ Moreover, when there was controversy about the form of provisions, the Technical Committee responsible for drafting sought compromise in the wordings of these instruments.⁵⁷ Thus, for example, Section 8(3) (a), dealing with affirmative action, is styled after a comparable provision in Article 1(4) of the International Convention on the Elimination of all Forms of Racial Discrimination.⁵⁸

The drafters also referred to the Bills of Rights of other coun-

⁴⁹ See *id.* at ch. 14, § 232.

⁵⁰ See *id.* at ch. 2, § 39(1)(b).

⁵¹ See *id.* at § 39(1)(c).

⁵² See DU PLESSIS & CORDER, *supra* note 31, at 40-41 (discussing extensively the ideological debates between the minimalists and the optimists).

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at 47.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*; AZAR CACHALIA, ET AL., FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION 24-32 (1994) (discussing Section 8).

tries,⁵⁹ specifically the German Basic Law (1949), the Canadian Charter of Rights and Freedoms (1982), and the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia (1990).⁶⁰ Thus many sections of the interim Bill of Rights have origins, or at least comparable sections, in other bills of rights.

However, even more important to constitutional adjudication in South Africa, was Section 35(1) of the interim Constitution:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.⁶¹

Thus, public international law is directly implicated in the South African legal system. The role that it plays is governed by the wording of this section, which states that a court "shall, where applicable" have regard to these standards.⁶² The phrase both imposes an obligation and confers discretion onto the courts to refer to and utilize these legal principles when performing their interpretive task.⁶³ Since many of the rights provided by Chapter 3 of the interim Constitution, and Chapter 2 of the final Constitution, have internationally comparable provisions, public international law, as applied by means of Section 35(1) of the interim Constitution, assumes broad significance.⁶⁴

Like all other bills of rights, the interim Bill of Rights adopted in South Africa is a written text transmitting meaning by way of language. In the South African constitutional setting, as in arguably all settings, the language of a legal text can be meaningless in the absence of context. Policy questions and value judgements are the keys to interpreting and understanding judicial decisions, given the wide scope of judicial review. Language, itself, is only one factor to be weighed in evaluating constitutional decisions, and these decisions cannot be understood unless considered in relation to the values subscribed to by the judges who themselves interpret the constitution. This kind of interpretation is not exact and is often about making political choices.⁶⁵

⁵⁹ See DU PLESSIS & CORDER, *supra* note 31, at 47-48.

⁶⁰ See *id.* at 47.

⁶¹ S. AFR. CONST. of 1993 (IC), ch. 3, § 35(1). Section 35(1) has been replaced in the final Constitution by Section 39. See S. AFR. CONST. of 1996, ch. 2, § 39. Section 39 seems to strengthen the mandate to consider public law. The section states that a court "must consider international law." *Id.* at § 39(1)(b).

⁶² See *id.*

⁶³ See John Dugard, *The Role of International Law in Interpreting the Bill of Rights*, 10 S. AFR. J. HUM. RTS. 208, 212 (1994).

⁶⁴ See *id.* at 212 (observing that "it is difficult to imagine situations where public international law will not be applicable under 35(1)," of the interim Constitution).

⁶⁵ See T. Vallinder, *The Judicialization of Politics: Meaning, Forms, Background, Prospects*, ACTA

To determine the meaning of certain words, the courts might look to the ends they seek to achieve.⁶⁵ The limited usefulness of actual language is expressed by Section 35(2), which has its origins in Canadian and German law.⁶⁷ Section 35(2) states:

No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.⁶⁸

Section 35(2) thus constitutionalizes the procedure known as "*verfassungskonforme Auslegung*" in Germany and "reading down" in Canada.⁶⁹ This procedure provides that no law shall be invalid solely because a *prima facie* reading of the words used suggests that it exceeds the limits imposed in the Bill of Rights as long as a more limited interpretation is possible.⁷⁰

The impact of international and comparative law is also found in the limitation section, Section 33, of the interim Constitution. Section 33(1), reads:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

(a) shall be permissible only to the extent that it is—

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality⁷¹; and

(b) shall not negate the essential content of the right in question

and provided further that any limitation to—

(aa) a right entrenched in section 10, 11, 12, 4(1), 21, 25 or

SOCIETATIS JURIDICAE LUNDENSIS 267 (1992) (providing a critically important discussing of the reciprocal relationship between politics and the judiciary); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992) (arguing that neutrality is a key principle in constitutional law and theory); Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 30 (1983); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237 (1990).

⁶⁵ See Nic Haysom, *The Bill of Fundamental Rights: Implications For Legal Practice*, DE REBUS 125, 128 (Feb. 1994).

⁶⁷ See DU PLESSIS & CORDER, *supra* note 31, at 47, 121.

⁶⁸ S. AFR. CONST. of 1993 (IC), ch. 3, § 35(2).

⁶⁹ See DU PLESSIS & CORDER, *supra* note 31, at 121.

⁷⁰ See *id.* at 123.

⁷¹ See Catherine Albertyn & Janet Kentridge, *Introducing the Right to Equality in the Interim Constitution*, 10 S. AFR. J. HUM. RTS. 149, 175 (1994) (observing that "[t]he inquiry under this section considers whether incursions into the freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end which they seek to achieve").

30(1) (d) or (e) or (2); or
 (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.⁷²

The requirement that a limitation must be accomplished through law of general application reflects Article 19(1) of the German Basic Law.⁷³ Similarly, the stipulation in Section 33(1)(b) that limitations on rights "shall not negate the essential content of the right in question" is reminiscent of Article 19(2) of the German Basic Law,⁷⁴ which states that in "no case may the core element of a basic right be encroached upon."⁷⁵

The limitation clause also owes a debt to Section 1 of the Canadian Charter. Section 1 states, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁷⁶ The drafters of the interim Constitution critically examined the Canadian case of *Regina v. Oakes*⁷⁷ to extract the criteria for determining what is reasonable and demonstrably justified in a free and democratic society. *Oakes* considered the values at the core of Section 1.⁷⁸

The *Oakes* decision profoundly impacted the drafting of the interim Constitution. In *Oakes*, the Canadian Supreme Court decided it would follow a two-stage process as the method of judicial review.⁷⁹ The first stage requires the applicant to show how the legislation in question infringes upon the rights and freedoms enshrined in the Charter, both as a matter of interpretation and also as a matter of fact.⁸⁰ In the second stage, the Court determines whether the law adopted is reasonable and demonstrably justifiable.⁸¹ This allows the

⁷² S. AFR. CONST. OF 1996 (IC), ch. 3, § 33(1).

⁷³ See DU PLESSIS & CORDER, *supra* note 31, at 123. Article 19(1) of the German Basic Law states, "[i]n so far as a basic right may, under the Basic Law, be restricted by or pursuant to a law. The law shall apply generally and not merely to one case. Furthermore, the law shall specify the basic right and relevant Article." GRUNDGESETZ [Constitution] [GG] art. 19(1) (F.R.G.) (Basic Law). The Basic Law was adopted by the parliamentary council of West Germany in 1949, following World War II, in an attempt to create a democratic political and social atmosphere.

⁷⁴ See CACHALIA, ET AL., *supra* note 58, at 115 (stating, however, that this provision of South Africa's interim Constitution is actually, "drawn from article 19(1) of the German Basic Law [which] gives explicit recognition to the fact that what is at stake . . . is legitimate circumscription of rights, not their evisceration," which is reiterated by Section 19(2) of the basic law).

⁷⁵ GRUNDGESETZ [Constitution] [GG] art. 19(1) (F.R.G.).

⁷⁶ CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms) § 1.

⁷⁷ *Regina v. Oakes*, [1986] 1 S.C.R. 103.

⁷⁸ See *id.* at 135-40 (applying the limitations test and explaining its application).

⁷⁹ See *id.*

⁸⁰ See *id.* at 135 ("any § 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms").

⁸¹ See *id.* at 136 (stating that the court should only allow exceptions to the Charter's guaran-

state to justify the law by reference to its purpose and also its concurrence with a three-part proportionality test. To pass this hurdle in *Oakes*, the state had to show the following:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."⁸²

These principles were absorbed into the interim Constitution, particularly in the limitation clause.⁸³

The limitation section also has some roots in the European Convention on Human Rights. In making the *Sunday Times*⁸⁴ decision, the European Court of Human Rights noted that:

The following are two of the requirements that flow from the expression "prescribed by law." Firstly, the law must be adequately accessible: The citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: He must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: Experience shows this to be unattainable.⁸⁵

Section 33(1)(a) further demands that a law, when it impinges on a right, must meet the test of being "reasonable" and "justifiable in an open and democratic society based on freedom and equality."⁸⁶ Thus, the interim Constitution called for proportionality: The various rights and laws impinging on those rights must be balanced.

The principle of proportionality is found in various international and national contexts. It has been used to interpret the European

tees where the provision is "reasonably and demonstrably justified" for a "free and democratic society").

⁸² *Id.* at 139.

⁸³ See S. AFR. CONST. of 1993 (IC), ch. 3, § 33; see also CACHALIA, ET AL., *supra* note 58, at 105-16 (describing international case law that influenced the construction of Section 33); DU PLESSIS & CORDER, *supra* note 31, at 122-33 (discussing limitation clause analysis).

⁸⁴ The *Sunday Times* Case, 30 EUR. CT. H.R. (ser. A.) 1 (1979).

⁸⁵ *Id.* at 31.

⁸⁶ S. AFR. CONST. of 1993 (IC), ch. 3, § 33(1)(a).

Convention so limits can be placed on rights "only when it is necessary in the light of the interests advanced as weighed against the requirements of a democratic society."⁸⁷ Proportionality is a testing principle in a number of other countries in Europe,⁸⁸ and requires striking a balance between the competing interests by weighing the advantages and disadvantages of the measure.⁸⁹ In Germany, for example, when an individual's rights are to be affected, the state has to meet three requirements—suitability, necessity and proportionality.⁹⁰ The courts, in that country, have incorporated proportionality within the principle of the "least detrimental settlement."⁹¹

The European experience is also evident in the inclusion in the interim Constitution's limitation clause of the term "democratic society."⁹² Sieghardt points to the need for attention to

the needs or objectives of a democratic society in relation to the right or freedom concerned; without a notion of such needs, the limitations essential to support them cannot be evaluated. For example, freedom of expression is based on the need of a democratic society to promote the individual self-fulfillment of its members, the attainment of truth, participation in decision-making and the striking of a balance between stability and change. The aim is to have a pluralistic, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian "greater good of the majority." But democratic societies approach this problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom.⁹³

⁸⁷ P. VAN DIJK & G. J. H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 583 (2nd ed. 1990).⁸⁸ See Jeffrey Jowell & Anthony Lester, *Proportionality. Neither Novel nor Dangerous*, in *NEW DIRECTIONS IN JUDICIAL REVIEW* 51 (J.L. Jowell & D. Oliver, eds. 1988) (discussing the role of proportionality in English law through a historical analysis of proportionality in Europe); Harmut Gerstein & David Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 *EMORY L.J.* 849 (1976) (describing the Constitutional Court's application of the principle of "least detrimental settlement" to preserve the central constitutional value of human dignity in the context of abortion rights where individual rights—those of the mother and fetus—compete).

⁸⁹ See *id.* at 53-54.

⁹⁰ See *id.* at 52-54 (defining the requirements for encroaching on individual freedom).

⁹¹ See Gerstein & Lowry, *supra* note 88, at 865.

⁹² S. AFR. CONST. of 1993 (IC), ch. 3, § 33(1) (a) (iii).

⁹³ PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 93 (1983) (discussing the European Court of Human Rights' interpretation of the phrase, "necessary in a democratic society," in *Handyside v. United Kingdom*, 24 *EUR. CT. H.R.* (ser. A)).

Comparative jurisprudence was also used to determine whether the term "necessary" should be included in the clause. "Necessary" was defined by the European Court in the *Handyside* case⁹⁴ as distinct from "indispensable," "useful," "reasonable," or "desirable."⁹⁵ The court held that the context had to be looked at to determine what was necessary within the "reality of the pressing social need."⁹⁶

Similarly, the drafters borrowed from American jurisprudential concepts in drafting the limitations clause. The drafters introduced strict scrutiny to the limitations section through a clause of the interpretation provision.⁹⁷ As a result, certain rights in the interim Constitution were protected by the strict scrutiny standard found in American constitutional jurisprudence.⁹⁸

III. THE CONSTITUTIONAL COURT

The view prevailed during negotiations that most of the judges appointed prior to the transition were unsuited to decide constitutional issues because of their training, experience and temperament.⁹⁹ Historically, the judiciary had been drawn from a very small segment of the population.¹⁰⁰ With the exception of one recent appointment, all of the approximately 130 Supreme Court judges were white and all except one were male.¹⁰¹ At the end of 1988, all of the

⁹⁴ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A.) (1976).

⁹⁵ *See id.* at 22.

⁹⁶ *Id.*; *see also* SIEGHART, *supra* note 93, at 66.

⁹⁷ *See* S. AFR. CONST. of 1993 (IC), ch. 3, § 33; *id.* at § 35; DU PLESSIS & CORDER, *supra* note 31, at 126-27 (discussing the relationship between these clauses and the application of the American strict scrutiny test despite the limitation clauses roots in the Canadian and European constitutions).

⁹⁸ *See* DU PLESSIS & CORDER, *supra* note 31, at 127-28 (listing the rights subject to strict scrutiny review).

⁹⁹ *See* Jeremy Gauntlett, *Appointing and Promoting Judges: Which Way Now?* CONSULTUS (South Africa) 23 (1990) (on file with author); Jeremy Sarkin, *Judges in South Africa: Black Sheep or Albinos?*, in 24 CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS BULLETIN (of the International Commission of Jurists) (Geneva, Switzerland) 34, 37-38, 40-44 (1989) (on file with author) (questioning whether judges' roles in perpetuating an unjust and illegitimate system has tainted the credibility or that the good they can now do justifies their remaining on the bench).

¹⁰⁰ *See* Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR. L.J. 134, 134-36 (1997) (considering the extent to which political parties may use Court to fight their political battles); G. Barrie, *The Challenge of the South African Judiciary in the 1990s* TYDSKRIF VAN SUID AFRIKAANSE REG 515 (1989) (on file with author).

¹⁰¹ *See* D.D. Mokgatle, *The Exclusion of Blacks from the South African Judicial System*, 3 S. AFR. J. HUM. RTS. 44, 45-46 (1987). The first person of color to sit on the Supreme Court was Hassan E. Mall, who was an acting judge for one month in 1987. *See* Michael Parks, *South Africa Names First Non-White to Judicial Post*, L.A. TIMES, Jan. 18, 1987, at 8. In August of 1991, Mr. Ismail Mahomed became the first person of color appointed full time to the Supreme Court bench. *See First Black Appointed to South Africa Supreme Court to Speak at Penn*, LEGAL INTELLIGENCER, Jan. 23, 1992, at 2.

144 regional court magistrates were white, while of 782 district court magistrates, 768 were white, 10 were Indian, 4 were colored and none were black.¹⁰² Undoubtedly, the fact that the legal system was faced with a crisis of legitimacy was due in part to its composition.¹⁰³ Whatever their personal political preferences, judges had spent their years on the bench submitting to the heavy hand of the executive.¹⁰⁴ In the past judges attempted to explain their role in the positivist tradition, as declarers of the law and not its makers.¹⁰⁵ However, criticism of the judges has often been predicated on a wider view of the judicial function.¹⁰⁶ The Law Commission favored a constitutional court based in the Appellate Division,¹⁰⁷ while the Association of Law Societies of the Republic of South Africa—the attorneys—proposed that the Supreme Court be granted jurisdiction to hear constitutional and human rights matters.¹⁰⁸ The Appellate Division would then hear appeals on constitutional and human rights matters and other appeals on points of law only.¹⁰⁹ The African National Congress, however, supported the creation of a constitutional court above the Appellate Division to adjudicate on constitutional and human rights issues only. International experience was also invoked in support of the need for a constitutional court.¹¹⁰

The belief was that to leave the judiciary as then composed—exclusively white and almost exclusively male—while conferring on it the added powers of judicial review, would be to allow law democratically enacted by the majority to be overturned by a court composed of a partisan and insulated minority.¹¹¹ Some argued for the decen-

¹⁰² See Parliament of South Africa, *Hansard*, 28 Apr. 1989 cols. 7097-98.

¹⁰³ See Charles R.M. Dlamini, *The Influence of Race on the Administration of Justice in South Africa*, 4 S. AFR. J. HUM. RTS. 37, 53-54 (1988) (arguing that blacks distrusted the system in part because of its white composition).

¹⁰⁴ See David Beatty, *The Rule (and Role) of Law in New South Africa: Some Lessons Learned From Abroad*, 109 S. AFR. L.J. 408, 422 (1992).

¹⁰⁵ See DU PLESSIS & CORDER, *supra* note 31, at 67.

¹⁰⁶ *Id.*, at 67-72 (describing in brief the establishment of a criticism of the South African judiciary as an scholarly discipline in South Africa and the major theories of criticism.).

¹⁰⁷ See SA LAW COMMISSION, 3 CONSTITUTIONAL MODELS (PROJECT 77) 1200-01.

¹⁰⁸ The full Association of Law Societies proposal is reprinted in *ALS Proposes New Legal Dispensation for South Africa* 1990 DE REBUS 587.

¹⁰⁹ See *id.*

¹¹⁰ The Conference on a Constitutional Court took place in 1991 with a range of international speakers evaluating different court models. See V. Moreina, *The Portuguese Constitutional Court*, (1991) (paper delivered at the Conference on a Constitutional Court) '(on file with author); see also Kader Asmal, *Constitutional Courts - A Comparative Survey*, 24 COMP. & INT'L L.J. S. AFR. 315, 337-40 (1991); J. Van der Westhuizen, *The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, With Reference to the German Experience*, DE JURE 1 (1991) (on file with author).

¹¹¹ See Johan D. van der Vyver, *The Randolph W. Throver Symposium, Comparative Constitutionalism: Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 802-4 (1991) (discussing proposals for a constitutional court and the arguments made in support of different structures).

tralization of the constitutional powers of the courts.¹¹² Within this model, as in the United States, all courts would have constitutional testing powers and would be able to strike down legislation or administrative acts that overstepped constitutional boundaries.¹¹³

South African critics of the decentralized model argued that even if more new judges were appointed, the old judges would still benefit from the enhanced judicial powers for which they were ill suited.¹¹⁴ Proponents of a constitutional court therefore argued that only one court, meticulously selected and well balanced, should have the powers of constitutional review.¹¹⁵ Criticism of the central court idea came from those who believed that such appointments would be more politically inspired than the elevation of judges from other courts.¹¹⁶ These critics argued that granting all courts review powers would ensure that a human rights culture would permeate the entire legal order.¹¹⁷ They further argued that judges deciding constitutional issues should not be insulated from the cut and thrust of daily courtroom litigation, as this is an essential element of judicial experience and provides the necessary training and proficiency for constitutional adjudication.

In terms of the interim Constitution, the outcome of this debate was the creation of the Constitutional Court, above the Appellate Division, to adjudicate on constitutional and human rights issues only.¹¹⁸ Under the interim Constitution, the Appellate Division was denied jurisdiction "to adjudicate any matter within the jurisdiction of the Constitutional Court."¹¹⁹ In the final Constitution, however, all the higher courts are given powers of constitutional review.¹²⁰ The power to strike down a parliamentary statute, however, resides only with the Constitutional Court, which must affirm the decision of the lower court before the lower court's decision has the force of law.¹²¹

The procedure for appointing judges to the Constitutional Court

¹¹² See Arthur Chaskalson, *A Constitutional Court: Jurisdiction, Possible Models and Questions of Access*, 95 (1991) (paper delivered at the Constitutional Court Conference) (on file with author).

¹¹³ See Haysom, *The Bill of Fundamental Rights*, *supra* note 66, at 126.

¹¹⁴ See Sarkin, *supra* note 100, at 134. *But see* M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss*, 3 S. AFR. J. HUM. RTS. 177, 195 (1987).

¹¹⁵ See van der Vyver, *supra* note 111, at 802 (reviewing the views of the Olivier Commission and the African National Congress); *see generally* DU PLESSIS & CORDER, *supra* note 31, at 191-200 (discussing the proposals for the enforcement mechanisms needed to protect the fundamental rights provided in the interim Constitution).

¹¹⁶ See van der Vyver, *supra* note 111, at 802.

¹¹⁷ *See id.*

¹¹⁸ See S. AFR. CONST. of 1993 (IC), ch. 7, § 98.

¹¹⁹ *Id.* at ch. 7, § 101.

¹²⁰ See S. AFR. CONST. of 1996, ch. 8, §§ 168, 169.

¹²¹ *See id.* at § 167(5). Section 167(5) states, "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm to any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force." *Id.*

is set out in the interim Constitution.¹²² Discussions over the procedure generated great controversy during the multi-party talks that preceded finalization of the Constitution. The controversy reflected recognition that the judicial appointments might determine the outcome of constitutional decisions. To protect the judicial structure and maintain public confidence in the legitimacy of the Court's decisions, the drafters sought to avoid a politicized appointment system. Thus, the drafters departed from the highly political appointment procedure followed in the United States.¹²³

The interim Constitution provided that the President of the Constitutional Court and the ten other judges¹²⁴ are appointed for a non-renewable period of seven years,¹²⁵ and must be South African citizens,¹²⁶ who are "fit and proper person[s]."¹²⁷ Further, the interim Constitution required that candidates either be judges of the Supreme Court, have been advocates, attorneys or law lecturers for a minimum of ten years,¹²⁸ or, as a result of training or experience, have expertise in the field of constitutional law.¹²⁹ Not more than two judges could be chosen from this latter category of persons.¹³⁰ In fact all eleven judges appointed were lawyers. The composition has, and will continue to have, profound repercussions for the type of decisions handed down. Non-lawyers on the Court might have ensured a movement away from a strict legalistic approach.

Under the Constitution, the President of the Court must be appointed by the President of South Africa, "in consultation with the cabinet and after consultation with the Chief Justice."¹³¹ The President, however, must choose the President of the Court from a list of four names supplied by the Judicial Services Commission. The first appointment to the office of President of the Court was exempted

¹²² See S. AFR. CONST. of 1993 (IC), ch. 7, § 99.

¹²³ See LAWRENCE BAUM, *THE SUPREME COURT* 30-60 (6th ed. 1998) (reviewing the selection process of the United States Supreme Court justices).

¹²⁴ See *id.* at § 98(1) ("There shall be a Constitutional Court consisting of a President and 10 other judges appointed in terms of Section 99.").

¹²⁵ See *id.* at § 99(1) ("[T]he judges of the Constitutional Court shall be appointed by the President for a non-renewable period of seven years.").

¹²⁶ See *id.* at § 99(2)(a) ("No person shall be qualified to be appointed President or a judge of the Constitutional Court unless he or she - (a) is a South African citizen.").

¹²⁷ *Id.* at § 99(2)(b) ("No person shall be qualified to be appointed President or a judge of the Constitutional Court unless he or she . . . (b) is a fit and proper person to be a judge of the Constitutional Court.").

¹²⁸ See *id.* at § 99(2)(c)(i). This section requires that a candidate "is a judge of the Supreme Court or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified, practiced as an advocate or an attorney or lectured in law at a university." *Id.*

¹²⁹ See *id.* at § 99(2)(c)(ii). Section 99(2)(c)(ii) allows for a Justice to be "a person who, by reason of his or her training and experience, has expertise in the field of constitutional law relevant to the application of this Constitution and the law of the Republic." *Id.*

¹³⁰ See *id.* at § 99(4).

¹³¹ *Id.* at § 97(2)(a).

from this requirement,¹⁵² and the President was left free to appoint any person who met the requirements laid down for appointment.¹⁵³

Arthur Chaskalson was appointed first President of the Constitutional Court. Four more of the judges of the Court were appointed from the ranks of existing judges by President Mandela, "in consultation with the Cabinet and with the Chief Justice."¹⁵⁴ Sitting judges, therefore, make up a large component of the Court, but those selected represented the more progressive sector of the existing judiciary.

Following the interim Constitution's requirements, the remaining six judges of the Constitutional Court were appointed by the President, "in consultation with the cabinet and after consultation with the President of the Constitutional Court."¹⁵⁵ For the first set of appointments, the six were selected from a motivated list of ten submitted by the Judicial Service Commission.¹⁵⁶ Had Mandela not wanted to appoint any of the nominees, he would have had to furnish reasons to the Commission,¹⁵⁷ and the Judicial Service Commission would have been required to provide another list of names from which the President would have been obliged to appoint six judges.¹⁵⁸

In 1994, the Judicial Service Commission had seventeen members, who were:

- (1) the Chief Justice, who shall preside at meetings of the Commission (Judge M. Corbett);
- (2) the President of the Constitutional Court (Judge A. Chaskalson);
- (3) one Judge President designated by the Judge Presidents of the various divisions of the Supreme Court (Judge J. A. Howard of Natal);
- (4) the Minister responsible for the administration of justice or his or her nominee (Advocate D. Omar);

¹⁵² See *id.* at § 99(6).

¹⁵³ *Id.*

¹⁵⁴ S. AFR. CONST. of 1993 (IC), ch. 7, § 99(3). These judges were: Laurie Ackerman, judge of the Cape Provincial Division and formerly Professor of Human Rights at the University of Stellenbosch, Ismail Mohammed, judge of the Transvaal Provincial Division, Richard Goldstone, judge of the Appellate Division and chairperson of the Goldstone Commission, and Thole Madala of the Transkei Supreme Court. See Patrick Lawrence & Gail Irwin, *Watchdogs of the Constitution*, STAR (South Africa), Feb. 13, 1995, at 13.

¹⁵⁵ S. AFR. CONST. of 1993 (IC), ch. 7, § 99(4).

¹⁵⁶ See *id.* at § 99(5)(a) ("In respect of the first appointment after the commencement of the Constitution of the six judges referred to in subsection (4), the Judicial Service Commission shall submit a list of ten nominees.").

¹⁵⁷ See *id.* at § 99(5)(b) ("If the appointing authorities decide not to accept any or some of such recommendations, the Judicial Service Commission shall be informed thereof and be furnished with reasons therefore.").

¹⁵⁸ See *id.* at § 99(5)(c) ("After having been informed in terms of paragraph (b), the Judicial Service Commission shall, in accordance with paragraph (a), submit further recommendations, whereafter the appointing authorities shall make the appointment or appointments from the recommendations as supplemented in terms of this paragraph.").

(5-6) two practicing advocates designated by the advocates' profession (Advocate Trengrove and Advocate Moerane);
 (7-8) two practicing attorneys designated by the attorneys' profession (Mr. L. van Zyl and Mr. N. Mojapelo);
 (9) one professor of law designated by the deans of all the law faculties at South African universities (Professor E. Mureinik of the University of the Witwatersrand);
 (10-13) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of all its members (I. Direko, E. Mchunu and B. Ngcuka, all of the ANC, and R. Radue of the National Party); and
 (14-17) four persons, two of whom shall be practicing attorneys or advocates, who shall be designated by the President in consultation with the Cabinet (D. Gordon SC, G. Bizos SC, K. Moroka, and J. Erentsen).

On the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the Judge President of the relevant division and the premier of the relevant province are included as part of the Commission as well.¹³⁹ Crucially, the Commission is and will continue to be composed largely of members of the legal profession.¹⁴⁰

The process of appointment to the Constitutional Court has played and will play a pivotal role in determining the character of the bench, marking a distinct departure from the judiciary of the apartheid order. The dominance of older white men has given way to a diversity in age, gender, religion and outlook.¹⁴¹ This has had a major effect on the type of decision handed down by the Court, although the narrow spectrum of political leanings among the Justices of the Constitutional Court is of crucial significance.¹⁴² It is not surprising, therefore, that a high level of concurrence has characterized the decisions of the court to date.¹⁴³ In addition, several of the rulings indicate that the Court will permit Parliament to decide policy and govern with very limited judicial hindrance.¹⁴⁴

However, many of the decisions of the Court are victories for de-

¹³⁹ See *id.* at § 105(1).

¹⁴⁰ See Beatty, *supra* note 104, at 425 (1992) (explaining that the Judicial Services Commission in South Africa "tend[s] to be dominated (either numerically or interpersonally or both) by senior members of the judiciary and the legal profession—the two groups with the strongest connections and (psychological) commitments to the past").

¹⁴¹ See Lawrence & Irwin, *supra* note 134, at 13 (providing biographical information about each of the eleven justices). *But cf.* Bob Drogin, *11 Activists Sworn in for New S. African Court*, L.A. TIMES, Feb. 15, 1995, at A8 (noting that some "critics have called the new court too white, too male and too stacked with partisans of the ANC").

¹⁴² See Drogin, *supra* note 141, at A8.

¹⁴³ Since the Constitutional Court first convened, it has decided most of its cases without dissent. See, e.g., *State v. Makwanyane*, 1995 (3) SALR 391 (CC) (containing 10 concurring opinions).

¹⁴⁴ See *infra* notes 189-200 and accompanying text.

mocracy and human rights. Decisions handed down include the abolition of the death penalty¹⁴⁵ and juvenile corporal punishment as sentencing options,¹⁴⁶ the outlawing of civil imprisonment for debt,¹⁴⁷ and the recognition of a right of access to police dockets and to consult state witnesses.¹⁴⁸ Additionally, many decisions were related to the right to a fair trial, as well as to issues of equality,¹⁴⁹ privacy,¹⁵⁰ freedom of expression,¹⁵¹ provincial powers,¹⁵² and the application of the Bill of Rights.¹⁵³

IV. COMPARATIVE AND INTERNATIONAL LAW IN THE CONSTITUTIONAL COURT

¹⁴⁵ See Makwanyane, 1995 (3) SALR 391 (holding that capital punishment violates the right to life, dignity, and to be free from cruel, inhuman or degrading punishment guaranteed by the South African constitution).

¹⁴⁶ See *State v. Williams and Another*, 1995(3) SALR 632 (CC) (holding that juvenile corporal punishment violates various sections of the interim Constitution).

¹⁴⁷ See *Coetzee v. Government of the Republic of South Africa; Matiso and Others v. Commanding Officer, Port Elizabeth Prisons and Others*, 1995 (4) SALR 631 (CC) (holding that the imprisonment of debtors might violate the Constitution); Danie Olivier, *Civil Imprisonment Held To Be Unconstitutional?*, DE REBUS, Nov. 1995, at 701 (discussing *Coetzee*).

¹⁴⁸ See *Shabalala and Others v. Attorney-General of Transvaal and Another*, 1996 (1) SALR 725 (CC) (finding that the interim Constitution contained the right for defendants to access police dockets and witnesses); Danie Olivier, *Recent Constitutional Cases*, DE REBUS, Jan. 1996, at 35-36 (discussing *Shabalala*).

¹⁴⁹ See *In re The School Education Bill of 1995 (Gauteng)*, 1996 (3) SALR 165 (CC) (upholding disputed sections of the School Education Bill of 1995 relating to the use of language and religion to segregate schools); *Nel v. Le Roux*, 1996 (3) SALR 562 (CC); *Case and Another v. Minister of Safety and Security and Others*; *Curtis v. Minister of Safety and Security and Others*, 1996 (3) SALR 617 (CC); *Du Plessis and Another v. De Klerk*, 1996 (3) SALR 850 (CC); *Besserglik v. Minister of Trade, Industry and Tourism*, 1996 (4) SALR 331 (CC) (holding that leave to appeal is constitutional); *Brink v. Kitshoff*, 1996 (4) SALR 197 (CC) (affirming right to equality before the law).

¹⁵⁰ See *Case and Another*, *supra* note 149; *Curtis*, *supra* ; *Du Plessis and Another*, *supra* note 149 ; *Key v. Attorney-General, Cape of Good Hope*, 1996 (4) SALR 187 (CC) (defining a "fairness standard" for the admission of evidence obtained by search and seizure); *Bernstein and Others v. Bester NO and Others*, 1996 (2) SALR 751 (CC); *Rudolph and Another v. Commissioner for Inland Revenue*, 1996 (4) SALR 552 (CC) (holding that the interim Constitution does not apply to search and seizure issues arising before the constitution came into force); *In re Kwazulu-Natal Amakhosi and Iziphakanyewa Amendment Bill of 1995*, 1996 (4) SALR 642 (CC); *In re Payment of Salaries and Other Privileges to Ingonyama Bill of 1995*, 1996 (4) SALR 653 (CC) (holding that bills prohibiting or limiting remuneration of traditional leaders to those required by provincial law or custom do not violate the constitution).

¹⁵¹ See *Case and Another*, *supra* note 149 ; *Curtis*, *supra* note 149 ; *Du Plessis and Another*, *supra* note 149 ; *Gardener v. Whitaker*, 1996 (4) SALR 337 (CC); *Bernstein and Others*, *supra* note 150 ; *In re Kwazulu-Natal Amakhosi and Iziphakanyewa Amendment Bill of 1995*, *supra* note 150; *In re Payment of Salaries and Other Privileges to Ingonyama Bill of 1995*, *supra* note 150.

¹⁵² See *Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others*, 1995 (4) SALR 877 (CC) (clarifying the boundaries of central and provincial government authority); *In re Kwazulu-Natal Amakhosi and Iziphakanyewa Amendment Bill of 1995*, *supra* note 150; *In re Payment of Salaries and Other Privileges to Ingonyama Bill of 1995*, *supra* note 150; *In re School Education Bill of 1995 (Gauteng)* 1996 (3) SALR 617 (CC); *In re National Education Policy Bill No 82 of 1995*, 1996 (4) BCLR 518 (CC).

¹⁵³ See, e.g., *Du Plessis and Another v. De Klerk*, *supra* note 149.

General international experience indicates that national courts often look to international human rights instruments, foreign law and foreign judicial opinions for assistance in interpreting their domestic human rights documents. Therefore, the relevance and usefulness of international and comparative law in the context of South African judicial interpretation—as opposed to constitutional creation—merits examination.¹⁵⁴

This comparative process assists judges in defining the meaning of various clauses that have counterparts in international law, assessing what is reasonable, and in determining reasonable limitations on rights.¹⁵⁵ The use of these bodies of law by the Constitutional Court can be determined by examining the role they have played in various decisions by the Court.

The death penalty case of *State v. Makwanyane and Another*,¹⁵⁶ was the first case heard by the Constitutional Court.¹⁵⁷ Argument took place before the Court between February 15 and February 17, 1995.¹⁵⁸ The judgment, handed down on June 6, 1995, considered Section 277 of the Criminal Procedure Act and unanimously declared the death penalty unconstitutional.¹⁵⁹ The main judgment, with which all the other justices concurred, although sometimes for differing reasons, was written by the Court's President, Justice Arthur Chaskalson.¹⁶⁰

The Court determined that use of the death penalty would violate Section 11(2) of the Constitution, which reads: "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."¹⁶¹ Various other provisions of the Constitution were also found relevant to the inquiry, including the right to life, which reads: "Every person shall have the right to life,"¹⁶² and the right to dignity which reads: "Every person shall have the right to re-

¹⁵⁴ See, e.g., Claydon & Hatfield, *supra* note 8, at 354-59 (discussing the use of international sources to interpret the Canadian Bill of Rights, which like the South African Bill of Rights, was influenced in its construction by external legal sources).

¹⁵⁵ See *id.* at 354-55.

¹⁵⁶ 1995 (3) SALR 391 (CC).

¹⁵⁷ See *id.*; see generally Jeremy Sarkin, *Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment*, 113 S. AFR. L.J. 71 (1996) (discussing the Constitutional Court's opinions in *Makwanyane* and *State v. Williams & Others*, 1995 (3) SALR 632 (CC)); P.M. Maduna, *The Death Penalty and Human Rights*, 12 S. AFR. J. HUM. RTS. 193 (1996) (providing a detailed discussion of the *Makwanyane* decision and its social context); G. Carpenter, *Constitutional Court Sounds the Death Knell for Capital Punishment*, 59 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 145 (1996) (on file with author); J. Milton, *Demise of the Death Penalty: The Constitutional Court Pronounces*, 8 S. AFR. J. CRIM. JUST. 188-204 (1995).

¹⁵⁸ See *Makwanyane*, 1995 (3) SALR at 391.

¹⁵⁹ It is still possible for the death penalty to be imposed where an individual is convicted for treason while South Africa is at war.

¹⁶⁰ See *Makwanyane*, 1995 (3) SALR at 401-53.

¹⁶¹ *Id.* at 451; see also S. AFR. CONST. of 1993 (IC), ch. 3, § 11(2).

¹⁶² *Makwanyane*, 1995 (3) SALR at 429-32; see also S. AFR. CONST. of 1993 (IC), ch. 3, § 9.

spect for and protection of his or her dignity."¹⁶³ The Court also investigated arbitrariness and inequality in the imposition of the death penalty.¹⁶⁴

In arriving at its decision, the Court considered foreign law on the topic. The Court considered the decisions of the courts of Hungary, Tanzania, the Privy Council and the European Court of Human Rights.¹⁶⁵ In *Makwanyane*, the Court stated that both binding and non-binding public international law may be used as tools of interpretation:

International agreements and customary international law provide a framework within which Chap[ter] 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions.¹⁶⁵

The Court also held in *Makwanyane* that comparable bills of rights and their jurisprudence would have enhanced importance until South Africa developed its own indigenous jurisprudence.¹⁶⁷

The Constitutional Court has stated, however, that foreign cases will not provide clear answers to questions around the interpretation of the South African Bill of Rights. In fact, various statements from the court have warned against the use of foreign law because of the "different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being."¹⁶⁸

In a case which went to the Constitutional Court on abstract review, the court was asked to rule on the constitutional validity of the controversial Gauteng School Education Bill.¹⁶⁹ The argument put to the Court was that certain sections of the law conflicted with various rights entrenched in the interim Constitution.¹⁷⁰ The possibly offending sections of the local bill prohibited public schools from conducting language-competence tests as an admission requirement, and placed a duty on schools to promote a policy which fostered respect

¹⁶³ *Makwanyane*, 1995 (3) SALR at 422-24; see also S. AFR. CONST. of 1993 (IC), ch. 3, § 10.

¹⁶⁴ See *Makwanyane*, 1995 (3) SALR at 417-22.

¹⁶⁵ See *id.* at 425-27.

¹⁶⁶ *Id.* at 414.

¹⁶⁷ See *id.*

¹⁶⁸ *Park-Ross v. Director, Office of Serious Economic Offenses*, 1995 (2) SALR 148, 160 (CC).

¹⁶⁹ See *In re Gauteng Education Bill of 1995*, 1996 (3) SALR 165 (CC).

¹⁷⁰ See *id.* at 170-71.

for different religious tenets and protected the right of pupils not to attend religious instruction classes.¹⁷¹

Reviewing the Constitution and interpreting the relevant sections, the Court found that the law was not unconstitutional in respect of the objections raised by the petitioners. Justice Mahomed wrote the main opinion in which he referred to the Canadian Charter of Rights and Freedoms and cases decided by the Canadian courts, considering Charter provisions and French and English language requirements in Canadian schools.¹⁷² Justice Sachs wrote a concurring decision investigating the applicability and relevance of international human rights law to minority rights in South Africa, in particular whether minorities have the right to state educational institutions based on a common culture, language, or religion.¹⁷³ Justice Sachs examined the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Universal Declaration of Human Rights, the role of the League of Nations and the United Nations in promoting and protecting human and minority rights as well as decisions of the Permanent Court of International Justice.¹⁷⁴ His conclusion was that, "the central theme that runs through the development of international human rights law in relation to protection of minorities, is that of preventing discrimination against disadvantaged and marginalised groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination."¹⁷⁵ Thus, in Justice Sachs' opinion, the principles of international law counseled against the Petitioners' claim for continual preference of the "functional majority" to maintain "language exclusivity in relatively affluent schools."¹⁷⁶

Among the Court's more controversial decisions was the ruling upholding the validity of the amnesty provisions of the Truth Commission legislation,¹⁷⁷ despite strong arguments that they violated the right of access to court as well as norms of international law. At the crux of the battle over the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995, Act 34,¹⁷⁸ was whether

¹⁷¹ See *id.*

¹⁷² See *id.* at 175-76 (distinguishing Section 32(C) of the interim Constitution from Section 23 of the Canadian Charter because the Canadian Charter places an explicit affirmative duty on the Canadian Government to provide education in both English and French).

¹⁷³ See *id.* at 186 n.6, 190-208 (Sachs, J., concurring).

¹⁷⁴ See *id.* at 190-97.

¹⁷⁵ *Id.* at 206.

¹⁷⁶ *Id.*

¹⁷⁷ See *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SALR 671 (CC); see generally Jeremy Sarkin, *The Trials and Tribulations of the South African Truth and Reconciliation Commission*, 12 S. AFR. J. HUM. RTS. 617 (1996); Jeremy Sarkin, *The Truth and Reconciliation Commission in South Africa*, COMM. L. BULL. (1997).

¹⁷⁸ Parliament enacted the Promotion of National Unity and Reconciliation Act in 1995 pursuant to the authority contained in the epilogue of the interim Constitution. See *AZAPO*, 1996

removing civil remedies from victims of human rights abuses was in conflict with the provision in the Constitution reading: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."¹⁷⁹ The applicants relied partly on the argument that the Act violates a peremptory norm of international law which provides rights to individual victims of war crimes regardless of the attitude of the state.¹⁸⁰

The decision of *Azanian People's Organization and Others v. The President of the Republic of South Africa and Others* was handed down on July 25, 1996, with the Court unanimously upholding the validity of Section 20(7) of the Promotion of National Unity and Reconciliation Act.¹⁸¹ The main issues the court examined were whether the interim Constitution permitted amnesty and, if so, whether it permitted amnesty from criminal prosecution only or from civil liability as well.¹⁸²

The Court began its evaluation of the constitutionality of the relevant section by agreeing that unless there is some provision in the Constitution which authorized violations of rights protected in the Constitution, then any law which violates those rights would be unconstitutional.¹⁸³ The Court then indicated how both the post-amble and Section 33(1) of the interim Constitution (the limitations clause) permitted rights protected by the Constitution to be circumscribed.¹⁸⁴ In evaluating whether amnesty is permissible for criminal acts, the Court noted that:

The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead, to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of re-

(4) SALR at 677; see also S. AFR. CONST. of 1993. The commission was conceived as a method of healing the wounds of apartheid. See *AZAPO*, 1996 (4) SALR at 677, 684.

¹⁷⁹ S. AFR. CONST. of 1993 (IC), ch. 3, 22(1).¹⁸⁰ See *AZAPO*, 1996 (4) SALR at 687-88.

¹⁸¹ Deputy President Mahomed wrote the main opinion. Justices Chaskalson, Ackermann, Kriegler, Langa, Madala, Mokgoro, O'Regan and Sachs concurred. Justice Didcott agreed with the findings of Justice Mahomed but wrote separately.

¹⁸² For an evaluation of the most important prosecution for human rights abuses committed, see Howard Varney & Jeremy Sarkin, *Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial*, 10 S. AFR. J. CRIM. J. 141 (1997).

¹⁸³ See *AZAPO*, 1996 (4) SALR at 681.

¹⁸⁴ See *id.* at 682-83. The Court explained that the epilogue gave Parliament the power to grant amnesty. See *id.* Section 33(1) allows laws of general application to limit rights granted by the interim Constitution as long as the law does not negate the "essential content" of the right and is reasonable, justified and, depending on the right in question, necessary. See S. AFR. CONST. of 1993 (IC), ch. 3, § 33(1).

pression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order.¹⁸⁵

Noting further that Parliament "not only has the authority in terms of the epilogue to make a law providing for amnesty . . . it is in fact obliged to do so,"¹⁸⁶ the Court opined that the granting of amnesty is both necessary to achieve reconciliation and to "facilitate the consolidation of new democracies."¹⁸⁷ Moreover, this approach had been accepted in various other countries which also set up truth commissions to ameliorate similar historical difficulties.¹⁸⁸

Unfortunately, in considering whether international law permits South Africa to grant amnesty, the Court narrowly found that the Constitution permits an Act of Parliament to override international law,¹⁸⁹ and that international law does not become enforceable in South Africa until it is "incorporated into the municipal law by legislative enactment."¹⁹⁰ However, despite this holding, the Court did find that, regardless of whether international law is trumped by domestic law, international law, particularly in the Geneva Protocols, did not outlaw amnesty, particularly with regard to the types of circumstances that existed in South Africa during the period under scrutiny.¹⁹¹ The Court noted that international acceptance of truth commissions was based on a

distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other con-

¹⁸⁵ *AZAPO*, 1996 (4) SALR at 684.

¹⁸⁶ *Id.* at 682-83.

¹⁸⁷ *Id.* at 686.

¹⁸⁸ *See id.* at 686-87 (discussing the countries of Chile, Argentina and El Salvador which also formed truth commissions to help repair the damage created by a history of subjugation).

¹⁸⁹ *See id.* at 688-89. The Court supported this argument with reference to Section 231 of the interim Constitution. *See id.*

¹⁹⁰ *Id.* at 686.

¹⁹¹ *See id.* at 690 (discussing article 6(5) of the Protocol II of the Geneva Convention of 1949).

flicts which take place within the territory of a sovereign State in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a State on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which [sic] would ordinarily be characterized as serious invasions of human rights.¹⁹²

Proceeding to consider whether the granting of amnesty in respect to civil liability is an infringement of constitutionally protected rights, the Court agreed that while amnesty is capable of being construed in the limited sense of immunity borrowed from criminal law, it is also capable of a much broader interpretation.¹⁹³ In arriving at the conclusion that amnesty includes immunity from civil liability, the Court stated:

Central to the justification of amnesty in respect of the criminal prosecution for offenses committed during the prescribed period with political objectives is the appreciation that the truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There is nothing in the language of the epilogue which persuades me that what the makers of the Constitution intended to do was to encourage wrongdoers to reveal the truth by providing for amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for civil damages. It appears to me to be more reasonable to infer that the legislation contemplated in the epilogue would, in the circumstances defined, be wide enough to allow for an amnesty which would protect a wrongdoer who told the truth from both the criminal and the civil consequences of his or her admissions.¹⁹⁴

Regarding the civil liability of the state for these wrongdoings, the Court asserted that constraints on resources are key to a determination of whether the state ought to bear responsibility for the harm

¹⁹² *Id.* at 689-90.

¹⁹³ *See id.* at 692-93 (defining amnesty and its Greek origin as being an "act of oblivion").

¹⁹⁴ *Id.* at 693.

and damages suffered by victims.¹⁹⁵ Evident here is the tendency for the Court to act reluctantly rather than robustly in certain matters. This tendency is apparent in at least eight highly political decisions,¹⁹⁶ including the Court's decision relating to the certification of the final Constitution.¹⁹⁷ These cases highlight the limited degree to which the Court has been willing to play an interventionist role and reflect the Court's extreme caution about interfering with political choices made by the government. A similar caution has been made evident in cases relating to resource allocation,¹⁹⁸ and it seems that resource prioritization will depend solely on government determination. In addition, various Constitutional Court opinions indicate the Court's inclination to allow Parliament to determine policy and govern with very little judicial interference. The following comment from the decision under discussion serves as illustration

Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonizing problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the state be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the state, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made be-

¹⁹⁵ See *id.* at 694-95 ("The resources of the State have to be deployed imaginatively, wisely, efficiently, and equitably to facilitate the reconstruction process.").

¹⁹⁶ See, e.g., *Executive Council, Western Cape Legislature v. Presidents of the Republic of South Africa*, 1995 (4) SALR 877, 904-905 (CC) (allowing Parliament to take action without following Constitutional procedures in exceptional circumstances); *Premier, Kwazulu-Natal v. President of the Republic of South Africa*, 1996 (1) SALR 769, 783-84 (CC) (establishing a liberal check on constitutional amendments); Sarkin, *supra* note 100, at 149-50 (discussing the Court's deference to Parliament regarding policy determinations which allows Parliament to "govern with very little judicial interference").

¹⁹⁷ The interim Constitution mandated that the Constitutional Court determine the validity of the final Constitution. See S. AFR. CONST. of 1993 (IC), ch. 5, § 71(2). The Court had to determine whether the text fell within the political pact negotiated before the 1994 elections and recorded in thirty-four constitutional principles in the interim Constitution. Again, the Court interpreted its brief narrowly, displaying a reluctance to be seen as interfering with and upsetting a carefully crafted political compromise. See *Ex parte Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SALR 744 (CC) (noting that the judicial certification of the Constitution was unprecedented). Its ruling determining the constitutionality of the KwaZulu-Natal Constitution was more bold, with the Court emphatically declaring that the text might be seen as an attempt by the province to usurp more power than it was granted under the interim Constitution. See *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996, 1997 (2) SALR 97, 162 (CC).

¹⁹⁸ See, e.g., *State v. Vermaas; State v. du Plessis*, 1995 (3) SALR 292 (CC); Jeremy Sarkin, *The Constitutional Court's Decision on Legal Representation: State v. Vermaas; State v. du Plessis*, 12 S. AFR. J. HUM. RTS. 55 (1996); Jeremy Sarkin, *Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment*, 113 S. AFR. L.J. 71 (1996).

tween competing demands inherent in the problem.¹⁹⁹

In the same vein, the Court later stated that Parliament could have chosen to insist that a comprehensive amnesty manifestly involved an inequality of sacrifice between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families. . . . They could have chosen to differentiate between the wrongful acts committed in defense of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which [sic] did not make this distinction. Again they were entitled to make the latter choice. The choice of alternatives legitimately fell within the judgement of the lawmakers. The exercise of that choice does not, in my view, impact on its constitutionality.²⁰⁰

V. CONCLUSION

The expanded role of international and comparative law has had a marked impact on the South African legal system. The particular context of South Africa's Bill of Rights will remain crucial and imitative approaches that fail to account for South Africa's unique situation are unlikely to be successful. Nevertheless, international law and comparative lessons on constitutional adjudication and interpretation will play a key role until a truly South African constitutional jurisprudence emerges.

Constitutional decisions in South Africa and other countries suggest that the language of a bill of rights is only one among many factors guiding its interpretation. Words in a bill of rights are often vague, and the interpretation of expressions such as "life," "liberty," "equality," "security," and "equal protection" by individual judges is greatly affected by the judge's economic, political, and social values.²⁰¹ While the most important factor determining interpretation is the composition of the adjudicating court, factors such as public opinion also play a role. In Canada, for example, the Court has not focused on the words of the Charter and seldom on the legislative intent of the framers, but rather has adopted a "balancing approach."²⁰²

In spite of such reservations about the meaningfulness of the specific phraseology of a constitution and bill of rights, it is obviously true that language must be an important factor in judicial interpretation.²⁰³ For this reason, both constitutional language and the manner

¹⁹⁹ AZAPO, 1996 (4) SALR at 695.

²⁰⁰ *Id.* at 698.

²⁰¹ See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 653 (1985).

²⁰² *Id.* at 646.

²⁰³ See JOHAN BRIGHAM, CONSTITUTIONAL LANGUAGE: AN INTERPRETATION OF JUDICIAL

in which various clauses have been interpreted in other domestic constitutions and international instruments are important in the South African context. How other courts have interpreted the rights to life, equality, dignity, freedom, security of the person, and so on, are important as a guide to South African courts. At the same time, when predicting the outcome of a decision, one cannot ignore the South African policy factors which will play their part. Thus, the context within which a matter is adjudicated, the politics of the country, as well as such factors as judicial appointment procedures, must be examined.