Chapter 10

The Great Trek to Human Rights: The Role of Comparative Law in the Development of Human Rights in Post-reform South Africa

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INTRODUCTION AND GENERAL MATTERS

A. History and Ground Rules

The causes of the 1830s 'Great Trek' of Afrikaner farmers from British rule in the Cape of Good Hope were complex but probably would have been perceived by them to be a matter of the 'human rights' of a people with roots in the country going back close to two centuries. South African history until the very late twentieth century is a long chapter of the assertion of perceived rights to land, wealth and opportunity with the 'human rights' of twenty-first century discourse hardly known.[2] South Africa's 1990s moral and social revolution was, of course, primarily to do with the gross and manifest denial of human rights to a majority people by their minority national fellows. The title of this chapter is a trite reminder that the solution sought by South Africa reflects the country's history; the present treatment, however, aims to do no more than comment on 'the here and the now' regarding the role of comparative law in the development of human rights in post-reform South Africa.

Since the advent of the 1996 Constitution[3] (hereafter 'the Constitution'), complete with its Bill of Rights and new Constitutional Court, South African law has been on a voyage of discovery in the field of human rights.

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[2] See TRH Davenport, *South Africa: a Modern History*, 4th edn (London: Macmillan, 1991), 44 and generally.

[3] The Constitution of the Republic of South Africa Act 108 of 1996.

The South African Courts have been entrusted with the demanding task of steering the new constitutional democracy on a true and safe passage down the road to the values reflected in an ambitious constitution. On this journey, the courts—and, in particular, the Constitutional Court—have had to decide on a wide range of difficult issues. While a domestic factor—sometimes strong—is often present, South Africa's relatively late commencement on the human rights' journey means that a useful choice of foreign route map of precedents is available. In this regard the Constitution itself gives scope for comparisons, not only by changing the foundations of the law, but also by setting out ground rules on its own interpretation

An interpretation section provides that, a court, tribunal or forum, in interpreting the Bill of Rights, 'must consider International law' and 'may consider foreign law'.[4] This section's wording replaces the more specific but less appropriate wording of the interim Constitution which stated that an interpreting court 'shall, where applicable, have regard to public international law' and 'may have regard to comparable foreign case law'.[5]

The Constitution's tacit invitation to courts to apply a comparative method is consistent with an approach which came to be reflected in the formative twentieth-century development of South African law. The 'mixed system' character of the law—inherent in its Roman-Dutch and English law primary chemistry—represents a starting-point, which makes it natural to think in terms of possible alternative solutions rather than to regard law as an institution which must be accepted for 'better or worse'. As early as 1962, TB Smith, the noted Scots exponent of comparative law, observed that '[t]he jurisprudence of South Africa is of particular interest to the genuine student of comparative law . . .'[6] While one may criticise the apparent emphasis of South African law on its European heritage largely to the exclusion of the thinking of Africa and African law,[7] this is not to deny the system's established capacity in comparative law, in large measure developed in the context of a tension involving civilian and Anglo-American common law solutions.[8]

[4] Section 39(1)(b)&(c).

[5] Section 35(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

[6] *Studies Critical and Comparative* (Edinburgh: W Green, 1962), xxxii. South African law is prominent in a recent major template-based work on mixed systems; see V Palmer (ed), *Mixed Jurisdictions Worldwide* (Cambridge: Cambridge University Press, 2001).

[7] See the preface comments of Professor TW Bennett in his *Sourcebook of Customary Law for Southern Africa* (Cape Town: Juta, 1991), v; see also, generally, TW Bennett, *The Application of Customary Law in Southern Africa*, (Cape Town: Juta, 1985); see also my comment in 'South Africa: a World in one Country on the Long Road to Reality', in A Harding and E Örücü (eds), *Comparative Law in the 21st Century* (The Hague/London: Kluwer, 2002), 281, 283–4.

[8] See the introduction of R Zimmermann and D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa*, (Oxford: Oxford University Press, 1996), 24.

B. Prescribed Routes and Signposting

The founding provisions of the Constitution represent overriding aims in the sense of what must be achieved to meet the new entrenched values. The first-stated value of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'[9] is especially significant. In a subsequent section the Constitution provides for the application of the Bill of Rights by a court, the following provisions being critical: '(a) in order to give effect to a right in the Bill, [a court] must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).'[10] The interpretation clause, already referred to, reiterates this message in unambiguous terms: 'When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.[11] Considering these two sections together one commentator has noted that 'there are no legal question left in South Africa to which the Bill of Rights is simply and inherently irrelevant'.[12]

The significance of the Bill of Rights being beyond doubt, it is important for present purposes to observe that the 'may consider foreign law'[13] provision is part of the section which establishes the basis of the approach to the Bill's interpretation. The South African debate concerning the protection of human rights has been very much informed by developments in other states. The pages of the *South African Journal of Human Rights* testify to the extent of this influence of foreign jurisprudence which, of course, is associated with subscription to a number of relevant international treaties.[14]

The mixed character of South African law throughout its formative development has engendered judicial receptiveness to foreign jurisprudence and juristic writings.[15] Now, with a positive mandate to take forward the

[9] Section 1(a).

[10] Section 8(3); in providing for the possible limitation of rights provided for in the Bill of Rights s 36(1) lays down that limitation may be 'only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . .'.

[11] Section 39(2).

[12] S Ellmann, 'A Constitutional Confluence: American "State Action" Law and he Application of South Africa's Socio-economic Rights Guarantees to Private Actors', in P Andrews and S Ellmann, *Post-Apartheid Constitutions* (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, (OH) 2001), 457.

[13] Section 39(1)(c).

[14] See J Sisk and A Pronto 'The International Human Rights Norms in South Africa: the Jurisprudence of the Human Rights Committee' (1995) 11 *SAJHR* 438.

[15] See HR Hahlo and E Kahn, *The South African Legal System and its Background* (Cape Town: Juta, 1968), 324–5.

norms of the Bill of Rights, the courts are likely to be more proactive in finding relevant material and, of course, the pool to be trawled is far more extensive than what tended to be perceived as appropriate sources before the advent of a bill of rights.

The Constitutional Court, in ruling on the death penalty, noted the significance of comparative human rights jurisprudence pending the development of a body of domestic jurisprudence but added a qualification:

> Comparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by s 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation ... of our Constitution. This has already been pointed out in a number of decisions ... and is implicit in the injunction given to the Courts in s 35(1), which in permissive terms allows the Courts to 'have regard to' such law. There is no injunction to do more than this.[16]

In a subsequent case, concerned with the right to criminal trial within a reasonable time under section 25 of the interim Constitution, the Court drew attention to some of the potential pitfalls involved:

> Comparative 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. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable ... Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management.[17]

The Court proceeded to show that resort to relevant tests developed in the United States requiring the assertion of a right to expeditious trial would be inappropriate in South Africa where the majority of accused persons are unrepresented and have a limited conception of the right to a speedy trial. Indeed, the Court took the view that following US precedents would 'strike a pen through the right as far as the most vulnerable members of our society are concerned'.[18]

The need for interpretation with the emphasis on domestic conditions was seen as fundamental in the right to expeditious trial decision. But in a country with extreme poverty and a history of endemic discrimination,[19] can rights to property and housing be usefully compared to formulations

[16] *S v Makwanyane and Another* 1995 (3) SA 391(CC) para 37 (per President Chaskalson).

[17] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), para 26. See J de Waal, I Currie, and G Erasmus, *Bill of Rights Handbook*, 4th edn (Cape Town: Juta, 2001), 142–3 where the learned authors review South African case law which cautions against too ready resort to foreign jurisprudence.

[18] Idem.

[19] See DL Carey Miller and A Pope, *Land Title in South Africa* (Cape Town: Juta, 2000), ch 1 ('The Development of Discriminatory Landholding').

applying in established constitutional democracies? A leading South African expert on constitutional property rights urges 'extensive use of examples from a wide range of foreign law' to serve the purposes of being alerted to problems encountered elsewhere and to allow analysis of the 'different approaches, arguments, tendencies and trends in the solution of these problems . . .'[20] The writer goes on to deal with the issue of the particular circumstances of South Africa and argues that this factor does not justify unnecessary scepticism.

> To consider foreign law does not necessarily commit the courts to following foreign law—on the contrary, reference to foreign law can often be useful in avoiding mistakes made elsewhere. Moreover, it seems logical that a decision not to follow foreign law should result from rather than preclude consideration of foreign law . . .[21]

On the particular issue of the use in South Africa of the case law of the United States Supreme Court, one writer notes the 'differences in constitutional language, history, and social construct' as a barrier to the adoption of US precedents.[22]

C. *Clearing Past Debris from the Road Ahead*

South Africa has sought to embark on its journey of human rights' discovery as it were with the slate wiped clean. Always high on the agenda of the outgoing white minority government, the interim Constitution of 1993[23] contained a mandate for amnesty legislation which, when passed, brought into being the Truth and Reconciliation Commission.[24] A decision to deal with past abuses of human rights, before venturing forward on the basis of entrenched protective norms, has featured in processes of national transition in a number of states in recent times.[25] The common denominator of these systems is the compromise feature on the basis of which absolution from the burden of the past is perceived as essential to prospects for a stable future. But, of course, the process is certain to be fraught and complex.[26] South Africa's Truth and Reconciliation model has its apologists[27] and its

[20] AJ van der Walt, *The Constitutional Property Clause* (Cape Town: Juta, 1997), 5–6.

[21] Ibid.

[22] RC Blake 'The Frequent Irrelevance of US Judicial Decisions in South Africa' (1999) 15 *SAJHR* 192, 199.

[23] See, generally, H Corder 'Towards a South African Constitution' (1994) *MLR* 57, 491.

[24] See the Promotion of National Unity and Reconciliation Act 34 of 1995.

[25] For a recent evaluation see WP Nagan and L Atkins 'Conflict Resolution and Democratic Transformation: Confronting the Shameful Past—Prescribing a Humane Future' (2002) *SALJ* 119, 174.

[26] See S Cohen, *States of Denial* (Cambridge: Polity Press, 2001).

[27] See, eg, South African Constitutional Court Judge S Sandile Ngcobo, 'Truth, Justice and Amnesty in South Africa', in *Ius Gentium* (the journal of the Center for International and Comparative Law of the University of Baltimore), forthcoming, 2003.

critics.[28] The difficulty in denying the pursuit of justice in cases of wicked abuse perpetrated in the immediate past regime is that this does not fit, in moral terms, with the wholehearted adoption of a human rights culture. At the same time, the South African solution is a serious endeavour to address a vexed problem. That the emphasis is, indeed, on the future is borne out by the creation of a Human Rights Commission.[29]

D. Choice of Routes, Structural Affinity Showing the Way

Comparative work played a major part in the development which eventually led to the South African Constitution of 1996. It is trite to observe that when root and branch institutional reconstruction takes place there is scope for the reception of completely new controlling features. In this situation the comparative constitutional lawyer can travel far and wide but, of course, limitations of context apply.[30] Foreign influence was present in the development of the interim Constitution[31] and in its revision to arrive at the final document. The category of rights provided for in the Bill of Rights was influenced by various countries including Canada, India, and the United States.[32]

Aspects of the South African constitutional dispensation reflect particular borrowing. Although affinity between the legal systems of Canada and South Africa do not immediately spring to mind, Canadian jurisprudence has come to be significant. This can be traced to the formulation of the Bill of Rights and, in particular, the general limitation provisions—which control the often critical issue of the justification for the restriction of a potentially protected right. Professor van der Walt notes the fact of this borrowing and its significance.

> The general limitation clause . . . in the South African bill of rights was probably copied from the Canadian Charter of Rights and Freedoms 1982, and consequently the Canadian example will probably weigh heavily in the interpretation and application of this provision.[33]

The successive South African constitutions of 1993 and 1996 are very much representative of the period of liberating political transition and compre-

[28] See, eg, S Wilson, 'The Myth of Restorative Justice: Truth Reconciliation and the Ethics of Amnesty' (2001) 17 *SAJHR*, 531.

[29] See ss 181 & 184 of the Constitution of the Republic of South Africa, 1996.

[30] See H Klug, 'Participating in the Design: Constitution-making in South Africa', in Andrews and Ellmann, above n 12, 128, 134–5.

[31] See, eg, J de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights' (1995) 11 *SAJHR*, 1.

[32] H Ebrahim, 'The Making of the South African Constitution: Some Influences', in Andrews and Ellmann, above n 12, 85, 88.

[33] See above n 20, 81–2.

hensive social reform in which they were written. That this underlying basis should be reflected in the interpretation of wording—often abstract—would appear to be obvious. In some instances, for the avoidance of doubt, the requirement is spelled out; as, for example, in the provision in the property clause that '[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination . . .'[34] That the Constitutional Court has led the way in developing a 'contextual' approach to interpretation in Bill of Rights cases is not surprising. A dictum of the President, following on from the passage quoted,[35] states the position in straightforward terms:

> In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution.[36]

Contextual thinking has also led to Canadian jurisprudence through the fundamental affinity deriving from the limitation clause relationship already referred to.[37] A contextual inquiry becomes relevant at the limitation stage in a two-stage process in which '[i]n the first stage, context may only be used to establish the purpose or meaning of a provision.'[38] This link with the judgments of the Canadian Supreme Court has been noted in the South African literature.

> In applying this approach, the Court has often found guidance in the more recent decisions of the Canadian Supreme Court, and in line with these decisions, has often referred to the historical context in which the interim and 1996 Constitutions were adopted.[39]

A two-stage process avoids the risk of 'still-born' rights because the right is actually identified before any limitation is prescribed. But, of course, the particular text must rule. Accordingly, regarding the duty of the state to provide medical care and treatment, the relevant right ('health care, food, water and social security') is provided for in a 'constitutional command'[40] subject to specified limits—'[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'[41]

[34] Section 25(8). [35] See above, n 16. [36] Ibid, para 39.
[37] See above, n 32. [38] See de Waal, Currie, and Erasmus, n 16, 139–40.
[39] P de Vos 'A Bridge too far?' (2001) 17 *SAJHR*, 1, 7.
[40] See E de Wet, *The Constitutional Enforceability of Economic and Social Rights* (Durban: Butterworths, 1996), 117–19.
[41] Section 27(2). See *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).

Where the normal two-stage process applies a comparative approach has been prevalent, with an interesting shift of comparative source, evident as a result of the modification of the interim Constitution's limitations provision in the final Constitution of 1996. Professor van der Walt notes that '[t]he comparative use of German law on limitations was also affected by changes in the limitations clause of the 1996 Constitution.'[42] As the learned writer goes on to show, German jurisprudence on 'the proportionality test' remains influential, with Canadian[43] and European Court of Human Rights material also playing a part.[44]

E. Map-reading Expertise Problem

Clearly, the Constitution cannot be interpreted using only the methods of statutory interpretation developed—with much assistance from English law—in the pre-reform era. But what may be natural and straightforward for the Constitutional Court, with its critical function of ultimate interpretation, does not, of course, necessarily hold for the ordinary courts even though all courts are charged, in terms of section 8,[45] with the function of giving effect to the constitution. In remarks described as 'startling'[46] a High Court Judge commented:

> During argument counsel referred me to Canadian judgements and others in the USA. They are, at face value, support for the conclusions I have come to. As I know nothing about the hierarchy of these Courts I hesitate to quote their judgements in support of my view.[47]

While this statement might be seen as questionable from a rational point of view, it is not unreasonable for a court to want to be fully informed regarding a foreign precedent. In comparative law 'a little knowledge' may well be a 'dangerous thing'. Plainly, a high level of expertise is a prerequisite. In this regard specialist academic work is clearly valuable. South African law has been well served by specialist comparative literature in both periodical[48] and monograph form.[49]

[42] See above n 20, 88.
[43] In the typical Anglo-American tradition a particular case (*R v Oakes* (1986) CRR 308) has been a primary source of influence.
[44] See above n 20, 88–90.
[45] See above n 10.
[46] (1999) 15 *SAJHR*, 393, 397.
[47] *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) 316.
[48] The *South African Journal on Human Rights* has proved to be a most valuable vehicle.
[49] See, eg, Van der Walt, above n 19; Erika de Wet, above n 40.

F. Case Law—Guide Book or Map?

A comparative law factor is present in a range of areas of development of human rights jurisprudence in South Africa, and in a number of areas it is prominent. In the present contribution the sample considered must necessarily be a limited one. Examples will be taken from three areas: the relatively specialised property right/land reform interface; the wide area of freedom of religion and expression and the rapidly developing category of equality rights labelled 'sexual orientation'.

It has been suggested that 'the purpose of extensive reference to foreign law should be, first, to take note of the problems of interpretation and application that have already been uncovered there, and, secondly, to observe and analyse different approaches, arguments, tendencies, and trends'[50] in order to better reach a conclusion as to how to deal with the problem in hand. Does the case law bear this out? Applying the apposite travel metaphor—which must be credited to my research assistant—does foreign jurisprudence fulfil a general guide-book role or is its function the more specific one of a map?

II. EVIDENCE FROM THREE AREAS

A. Property

1. The right to property and land reform

The protracted and sometimes polarised debate,[51] which eventually led to the property clause in the 1996 Constitution's Bill of Rights, was informed—and, to some extent, fuelled—by consideration of the property clauses of foreign jurisdictions.[52] But the priority of how to deal with the legacy of apartheid's unfair deprivation of property affecting the majority of South Africans made the debate an intensely political one.[53] Emphasis upon the need for far-reaching reform put into question the desirability of protecting property rights. On the other hand, however, those seeking the maintenance of the property status quo urged for a blanket protection of property formula. The Constitutional Court rejected the notion of a universally

[50] Van der Walt, above n 20, 6.

[51] See de Waal, Currie, and Erasmus, above n 17, 410: '[t]he inclusion of a constitutional right to property in both the interim and final Constitutions was the subject of a great deal of controversy.'

[52] See, eg, M Chaskalson 'The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth' (1993) 9 *SAJHR* 388.

[53] See K Savage, 'Negotiating South Africa's New Constitution: an Overview of the Key Players and the Negotiation Process', in Andrews and Ellmann, above n 12, 164, 176–81.

accepted norm of protection of property, citing the absence of a clause in the Canadian Charter of Rights and Freedoms of 1982 and the New Zealand Bill of Rights of 1990.[54] Some valuable academic work has demonstrated the utility of a comparative approach in arriving at a sophisticated understanding of the role and working of property clauses.[55] At the more particular level of the problem of remedying historical deprivation while respecting existing rights, appropriate comparators are not easily found. However, in one important piece of work, the restitution of land rights in former East Germany was compared with the constitutionally driven process under South Africa's Restitution of Land Rights Act 22 of 1994.[56]

2. *Restitution of land rights*

In re Kranspoort Community[57] involved the claim of a former mission settlement community to land owned by the Dutch Reformed Church on the basis of alleged dispossession through racially discriminatory law or practice. The entire ambit of legislative requirements for entitlement under the restitution Act was in issue,[58] and the Court—noting that 'a number of provisions ... must be interpreted for the first time'[59]—conducted a comprehensive review of the law. However, in common with other land reform legislation matters, the specific character of the statute leaves little scope for recourse to foreign material. The only significant feature of this case, from a comparative perspective, is in the negative point of the Court's contrasting the civilian based South African law and English law on the issue of the sufficiency of possession for the purposes of the concept of 'beneficial occupation' under the Act.[60] The effective rejection of the possible precedent of English law illustrates the confidence of South African law with regard to its common law sources.[61]

[54] *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744(CC), paras 71–4. This was the process in which the Constitutonal Court reviewed the draft constitution produced by the first democratically elected government for compliance with the constitutional principles which had been agreed in the 1991–3 political negotiations—see Hugh Corder 'Towards a South African Constitution' (1994) 57 *MLR* 491.

[55] See, generally, Van der Walt, above n 20; see also the particular example of DG Kleyn, 'The Constitutional Protection of Property: a Comparison between the German and the South African approach' (1996) 11 *SAPL* 402.

[56] Daniel Visser and Theunis Roux, 'Giving Back the Country: South Africa's Restitution of Land Rights Act, 1994' in MR Rwelamira and G Werle (eds), *Confronting Past Injustices*, (Durban: Butterworths, 1996), 94.

[57] *Re Kranspoort Community* 2000 (2) SA 124.

[58] DL Carey Miller and Anne Pope, *Land Title in South Africa* (Cape Town: Juta, 2000), 326–33.

[59] *Re Kranspoort Community*, para 29.

[60] Paras 64–6.

[61] See DL Carey Miller 'A new property?' (1999) 116 *SALJ*, 749, 757–8.

On the issue of the appropriate test for interdict relief in a restitution context, the Land Claims Court referred to leading decisions of the House of Lords[62] and the South African Appellate Division[63] in support of the 'balance of convenience' criterion.[64] Technically, this reference to a House of Lords decision is superfluous, given the presence of authority of the highest South African court of the time.

3. *Aboriginal title*

The decision in *Richtersveld Community and Others v Alexkor Ltd and Another*[65] illustrates the readiness of the Land Claims Court to adopt a comparative approach where this is appropriate. In this landmark decision the Court held that it was not empowered to develop the common law in realisation of the concept of aboriginal title: 'That doctrine, if it is part of South African law, still needs to be developed. It is an alternative remedy to restitution under the Restitution Act, and falls outside this Court's jurisdiction.'[66]

This decision leaves scope for a claim that an act of dispossession infringed a common law right of aboriginal title and so amounted to a deprivation of property contrary to the Bill of Rights' Property Clause.[67] The better view would appear to be that it would have to be established that there is scope for the doctrine in the context of the comprehensive programme of land reform legislation and, in particular, the limitation of restitution to post 1913 deprivations as specifically provided for in the Bill of Rights.[68] In this regard it is significant that, in arriving at the programme of land reform provided for in the Property Clause, it appears to have been accepted that the process should avoid the disruptive effect of putting all existing titles under potential threat by allowing historic or ancestral land claims to be entertained.[69]

There are two distinct but associated issues: first, whether aboriginal title is justiciable as a matter of South African common law or of international law and, if so, the overriding question of scope for the doctrine in the context of the Constitution. Clearly, foreign decisions would need to be considered in determining the issue of the standing of the concept of aboriginal title. In the *Richtersveld* case[70] the Land Claims Court referred to deci-

[62] *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL).
[63] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & another* 1973 (3) SA 685 (A).
[64] *Chief Nchabeleng v Chief Phasha* 1998 (3) SA 578 (LCC).
[65] 2001 (3) SA 1293 (CC).
[66] Per Gildenhuys AJ, para 48.
[67] Section 25(1) of the Constitution of 1996.
[68] Section 25(7).
[69] See Carey Miller & Pope, above n 19, 315–17.
[70] See above n 65, para 45.

sions of the US Supreme Court[71] and the Australian High Court[72] for the purpose of noting the recognition and nature of the doctrine relied upon by the claimants.

If the aboriginal title issue comes to be adjudicated on in the Constitutional Court it will be interesting to see how the Court interprets the property clause. An emphasis upon the broad notion of property, as demonstrated in certain foreign jurisprudence, would be receptive to aboriginal title.[73] On the other hand, the Court might well take the view that the South African property clause represents a closed domestic agenda in its emphasis on a specified programme of land reform.

4. *Burial rights*

In *Bührmann v Nkosi and Another,*[74] the Full Bench of the Transvaal High Court, in a majority judgment, upheld an appeal concerned with the extent of the rights of an 'occupier' under the Extension of Security of Tenure Act 62 of 1997 (ESTA). This legislation enhances the rights of occupiers of rural land with the owner's consent, a necessary consequence of the reform being some erosion of an owner's common law rights. Specifically, the issue was whether the occupier's right to use of the land, as provided for in the Act, included burial rights.

The occupier urged that the basis of a right of burial existed in provisions in the Act concerned with freedom of religion[75] and 'family life in accordance with the culture of that family',[76] these rights being set in the general context of the promotion of the human rights of dignity, privacy and freedom. The majority took the view that because the Act intended a balance between an occupier's rights of residence and the landowner's right of ownership, interpretation should not extend beyond what a right of residence encompassed. The correlative of this interpretation was a necessarily restricted position on the scope of the right of freedom of religion insofar as this might support a right of burial deriving from the right of occupation. Satchwell J, giving one of the two majority judgments, cites a Canadian decision[77] referred to in a South African textbook[78] defining the concept of freedom of religion in terms of rights of freedom to entertain, practice and

[71] *Oneida Indian Nation of New York v Country of Oneida*, 414 US 661 (1974) (39 L Ed 2d 73).

[72] *Mabo and Others v The State of Queensland (No 2)* (1992) 175 CLR 1.

[73] An approach of this sort would appear to be supported by Professor AJ van der Walt in his *The Constitutional Property Clause*, 1997 and *Constitutional Property Clauses*, 2000. See above n 20.

[74] 2000 (1) SA 1145 TPD.

[75] Section 5(d).

[76] Section 6(2)(d).

[77] *R* v *Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC), 353.

[78] M Chaskalson *et al*, *Constitutional Law of South Africa* (Cape Town: Juta, 1996), 19.2.

disseminate any particular religious view. The limitation of the right of freedom of religion to an essentially western first-world perception of the ambit of religious belief by the majority, of course, fits with their position that the core issue concerned an adjustment of property rights.

The minority judgment of Judge President Ngoepe interprets the right of freedom of religion and belief to give emphasis to practice. Citing the express inclusion of the right to practice religious belief[79] in the 1981 *African Charter on Human and People's Rights* and the 1990 Namibian Constitution, the learned judge observes that 'no right can be said to be meaningful if the holder is prohibited from practising it or materialising it.'[80] The opinion proceeds on the basis that the right of freedom of religion is universally understood and not open to reinterpretation in terms of particular legislative provisions. 'Section 6 cannot reasonably be interpreted as creating a new understanding of that right or its content different from the way such a right is ordinarily understood, not only under our Constitution, but universally.'[81]

Giving greater emphasis to the importance of the religious practice aspect and, at the same time, concluding that the inroad into property rights—in the limited circumstances of the rights of an 'occupier' under ESTA—was not a significant one, Ngoepe JP concluded, contrary to the majority view, that the respondent's claim to a burial right should be recognised.

A preference for African over first-world Western thinking regarding the meaning and scope of 'religion and belief' appears to be implicit in the dissenting opinion of Ngoepe JP:

> To acknowledge the respondent's right to practice and manifest her religion, but bar her from interring her son at a place and in a manner that would give meaning to her right of religion and belief could amount to no more than paying lip service to such a right.[82]

[79] Section 15 (1): 'everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

[80] 2000 (1) SA 1145 TPD, 1160.

[81] 2000 (1) SA 1145 TPD, 1161.

[82] Ibid. In *Nkosi and Another v Bührmann* 2002(1) SA 372 (SCA) the decision of the majority was upheld by the Supreme Court of Appeal, a primary aspect of the decision being the inherent problem of justifying the diminution of a landowner's patrimony on the basis of an interpretation of the right of freedom of religion. AJ van der Walt, in a critical analysis ('*Property Rights v Religious Rights*' (2002) 13 *Stell LR* 394), concluded that, while the conservative approach taken was not inconsistent with authority, it inhibits desirable development through consideration of balancing and proportionality issues, necessary in evaluation removed from any preconceived position.

5. Housing

Property and housing are associated matters but, of course, involve entirely distinct rights. The Bill of Rights protects the right of property and sets out the entrenched[83] land reform agenda. The right to housing is expressed as the right, which everyone has, 'to have access to adequate housing'; the scope of this right being clarified by the provision that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation . . .'[84] In *Government of the Republic of South Africa and Others v Grootboom and Others,*[85] the Constitutional Court interpreted the right to housing. *Grootboom* and others claimed state housing provision after their eviction from land unlawfully occupied; the Cape High Court upheld the claim ruling that 'tents, portable latrines and a regular supply of water . . . would constitute the bare minimum'.[86]

The Constitutional Court had confirmed the justiciability of the socio-economic rights provided for in the Constitution in the *First Certification* case.[87] In *Grootboom* the Court noted that socio-economic rights were at least 'negatively protected from improper invasion'.[88] Regarding the problem of establishing criteria in the area of socio-economic rights the leading textbook authors note the relevance of the United Nations (UN) material, because the provisions of 'the South African Constitution were modelled on those in the Covenant', and observe that the UN 'comments on state reports are a valuable source of guidance for South African courts'.[89] In this regard the difficulty of finding comparable foreign case law is noted 'because South Africa is only one of a few jurisdictions to incorporate an extensive list of [directly justiciable] socio-economic rights into its Constitution'.[90] According to the authors, Sri Lanka, Hungary, Lithuania and Portugal do this while most jurisdictions—including Brazil, India and Ireland—recognise these rights as 'directive principles of state policy' which are not directly justiciable.[91] A comparative approach would have needed to look beyond South Africa's usual comparators, none of which would have housing crises resembling that represented in *Grootboom.* Yacoob J's quotation[92] from the judgment of Chaskalson P in *Soobramoney*[93] well

[83] See s 25(8): 'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, to redress the results of past racial discrimination.'

[84] Section 26 (1) & (2); s 26 (3) provides that '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances' and '[n]o legislation may permit arbitrary evictions.'

[85] 2001 (1) SA 46 (CC).

[86] 2000 (3) BCLR 277 (C) 293.

[87] See n 53, para 78.

[88] 2001 (1) SA 46 (CC) para 78; see also para 34.

[89] De Waal, Currie, and Erasmus, n 17, 437.

[90] Ibid, 437 at above n 21.

[91] Ibid.

[92] 2001 (1) SA 46 (CC) para 25.

[93] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

illustrates the point: 'Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.'

Grootboom proceeds on the premise of acceptance of the importance of socio-economic rights acknowledged by the Constitutional Court in *Soobramoney*.[94] Noting that section 39 required relevant international law to be considered as a tool to interpretation of the Bill of Rights, the Court[95] referred to President Chaskalson's dictum in the death penalty case[96] and went on to consider the provisions of the UN Covenant on Economic, Social and Cultural rights and the 'minimum core obligation' concept developed by the relevant UN Committee. The Court found, however, that given the significant national variations in the circumstances and needs applying to housing, it lacked sufficient information to determine the 'minimum core obligation'.[97]

The need to balance the right to Human Dignity with the available resources of the state is the most significant aspect of the final decision, with the Court pointing out that the realisation of these rights would be progressive—the most urgent need being dealt with first.[98]

Grootboom has been characterised as the start of a new land reform jurisprudence which 'could open up the jurisprudential imagination to search for alternatives by placing emphasis on the position of the most marginalised and vulnerable members of society'.[99] This is true to the extent that the right to housing is, in a certain sense, the land reform agenda's positive right to property—in contrast to the land reform agenda rights proper which are negative in the sense of being limitations upon the general right to property. As such, the right to housing does have significant potential for development.

6. *General use of comparative law in land reform context*

The specific nature of the land reform legislation, crafted to meet the perceived needs of post-apartheid South Africa, means that the scope for recourse to foreign jurisprudence is limited on issues central to the various particular reform measures. But, of course, specific legislation may well involve general concepts which gives room for a comparative approach. At the least significant level the reference to foreign material may be no more than by way of confirmation of domestic authority.[100]

[94] See above n 43, 7 *Grootboom*, 2001 (1) SA 46 (CC) para 25. [95] Para 26.
[96] See above n 16. [97] Para 33. [98] Para 45.
[99] AJ van der Walt 'Dancing with Codes—Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *SALJ* 258, 305.
[100] See above n 64.

In a multiple claim restitution matter[101] the Land Claims Court had to decide whether claims were barred because 'just and equitable' compensation was paid at the time of dispossession. In interpreting the Bill of Rights compensation formula intended to elucidate the 'just and equitable' criterion, the Court noted that, the compensation formula being new in South Africa, '[d]irections for its interpretation and implementation may be sought from international and foreign law.'[102] Observing that in the 1996 Constitution Certification case[103] the Constitutional Court had commented on the 'the wide range of criteria for expropriation and the payment of compensation' in international conventions and foreign constitutions, the Land Claims Court stated its approach:

> Some guidance can be obtained from formulae applicable in other jurisdictions, although even they provide no certain answers. I will now proceed to examine how criteria for the determination of compensation in countries which have constitutional prerequisites for the expropriation of property that are similar to ours, have been developed and applied.[104]

A wide-ranging comparative survey follows. Covering the USA, Switzerland, Malaysia, Australia, Germany, and the European Convention on Human Rights, it is apparent that the Court's research has been informed by certain general texts. Professor van der Walt's *Constitutional Property Clauses*,[105] cited a number of times, is a major source. It is also interesting to note reference to a work on the precise subject of compensation arising from expropriation in the UK National Committee of Comparative Law Series.[106] The conclusion which the Court arrives at on the basis of this survey is that '[t]he position in other countries indicate a central role for market value in the determination of compensation.'[107] This may seem a trite point, however, it is important in confirming the Court's conclusion that market value is the primary 'readily quantifiable'[108] consideration of the factors itemised in the property clause.[109]

[101] *The Former Highlands Residents concerning the Area Formerly Known as the Highlands (now Newlands Ext 2) District of Pretoria; Ash & others* v *Department of Land Affairs* [2000] 2 All SA 26 (LCC).

[102] Para 26; referring to s 39 (1) (b) and (c) of the 1996 Constitution.

[103] *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 799.

[104] *Former Highlands Residents*, para 26.

[105] See above n 20.

[106] GM Erasmus, *Compensation for Expropriation* (UK Comparative Law Series, vol 11, Oxford: Reese/UKNCCL 1990).

[107] *Former Highlands Residents*, para 34.

[108] Ibid.

[109] Section 25(3) (a)–(e).

B. Freedom of Religion/Expression

1. Basic position

In considering the property clause, the foreign jurisprudence factor was examined in a range of distinct aspects of land reform because the particular context tends to control the scope for a comparative method. In the freedom of religion/expession area, however, there is more room for discretion. The approach will, accordingly, be from the general perspective of the extent to which a comparative method is applied—by reference to a small sample of relevant cases.

The connected human rights of 'freedom of religion, belief and opinion' and 'freedom of expression' respectively protected by sections 15 and 16 of the Constitution, have been the subject of recent attention by the South African courts. Section 15(1) provides that 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' Section 16(1) provides that 'Everyone has the right to freedom of expression, which includes—(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.' The prominence of the right to religious belief in South Africa is shown in another Bill of Rights provision protecting 'Cultural, religious and linguistic communities'. Members of such communities may not be denied the right: 'to enjoy their culture, practice their religion and use their language' and 'to form, join and maintain cultural, religious and linguistic associations and other organs of civil society'.[110] A provision concerned with language rights in the Founding Provisions of the Constitution is also relevant: this requires the Pan South African Language Board to promote and ensure respect for 'Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.'[111]

The Constitutional Court has followed Canadian jurisprudence in arriving at a detailed definition of the right of freedom of religion. In ascribing meaning to a provision similar to section 15 in the interim Constitution, Chaskalson P quoted the following definition of Dickson CJC[112] and went on to say 'I cannot offer a better definition than this of the main attributes of freedom of religion.'[113]

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and

[110] Section 31(1)(a)&(b).
[111] The Constitution of the Republic of South Africa Act 108 of 1996, s 6(5)(b)(ii).
[112] In the *Big M* case; see above n 74.
[113] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 92.

without fear of hindrance or reprisal, and the right to maintain religious belief by worship and practice or by teaching and dissemination.

In *Christian Education South Africa v Minister of Education*[114] Sachs J also quoted the Dickson definition—as applicable to section 15. In *Prince v President of the Law Society of the Cape of Good Hope*,[115] it is paraphrased by Ngcobo J and quoted again, in a footnote.

2. Prince

In the *Prince* case a Rastafarian, qualified to practice as an attorney, sought to overturn the Cape Law Society's blocking of his application to enter legal practice on the basis of convictions for possession of cannabis and his declared intention to continue illegal use of the drug. The appellant sought to have the ban on cannabis declared unconstitutional on the grounds that 'the holy herb' was an intrinsic part of his religion, and the ban infringed his right to religion. The Constitutional Court was split with five judges against and four for the appeal.

The majority judgment contains a lengthy section under the heading 'Foreign law' in which potentially influential decisions are looked at in some detail, in no sense a 'window-dressing' exercise. The 1990 US Supreme Court case of *Smith*[116] was concerned with the possible use of a proscribed substance (Peyote) for religious purposes by the Native American Church. In the classic manner of Anglo-American judicial reasoning, the decision in *Smith* was influential as a precedent because it enabled the Court to identify a point of distinction. In the process of reasoning concerned, the Court in effect rejected the basis adopted by the majority in *Smith*—that a concession would open the floodgates to a multitude of exemptions from neutral laws of general application—preferring the minority approach 'more consistent with the requirements of our Constitution'.[117] The minority in *Smith* approached the matter from a much more specific perspective. Peyote has an unpleasant taste and there is no general demand for it. For this reason an exemption would not involve any compromise of general state interests in drug control. But, of course, this did not apply to cannabis in the South African context. From the point of view of thoroughness of approach it is worth noting that the Court

[114] 2000 (4) SA 757 (CC) para 18. In this case the Court conducted a wide comparative survey on the issue of corporal punishment in independent schools before concluding in favour of 'the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption' (para 52).

[115] 2002 (3) BCLR 231 (CC) para 38, n 45.

[116] *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990).

[117] Para 122.

referred to American law review comment critical of the decision in *Smith*.[118] A receptive approach to juristic writings is, of course, traditional in the South African judicial process.[119]

A separate opinion by minority judge Sachs[120] brings in a wide range of comparative material. Sachs in particular makes use of German jurisprudence to argue for 'limited decriminalisation in appropriately controlled circumstances which could effectively balance the particular interests at stake, namely, sacramental use . . . and general enforcement of the prohibition'.[121]

3. *Islamic Unity*

In *Islamic Unity Convention* v *Independent Broadcasting Authority*,[122] the Constitutional Court allowed a direct appeal on a constitutional issue involving freedom of expression—with a certain religious twist. The constitutionality of a provision in a 'Code of Conduct for Broadcasting Services' was in issue as a possible limitation on the right to freedom of expression. The broadly worded provision prohibits broadcasting 'which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings . . . or likely to prejudice the safety of the State or the public order or relations between sections of the population.'[123] The background was a complaint by the South African Jewish Board of Deputies against a local Islamic radio station broadcast which denied aspects of the holocaust and questioned the legitimacy of Israel.

In arriving at a decision which in effect provided for the rewriting of the Broadcasting Code provision, the Court gave primary emphasis to the circumstances of South Africa. Referring to a diverse society—'for many centuries . . . sorely divided, not least through laws and practices which encouraged hatred and fear'—the Court noted that the Constitutional demands of fairness and diversity of views was 'hardly surprising in a country still riddled with a legacy of inequalities, and in which not all have equal access to and control of resources, including the electronic media.'[124] In the circumstances of an interpretation of freedom of expression with primary

[118] Para 120, above n 18.

[119] See Hahlo and Kahn, above n 15, 324–5: 'But though they are not authoritative, the views of legal writers—be they judges in an extra mural capacity, teachers of law or practitioners—may prove of considerable persuasive force for a judge having to enunciate a rule of law.'

[120] In the 1970s Albie Sachs held an academic post in the Faculty of Law, University of Southampton.

[121] Para 165.

[122] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (5) SCLR 433.

[123] Section 2(a), Schedule 1, to the Independent Broadcasting Authority Act 153 of 1993.

[124] 2002 (5) SCLR 433, para 45.

regard to perceived domestic need, it follows that scope for meaningful comparison is limited. But the strong ethos of a comparative approach prevailed and the Court as it were, 'set the scene' by reference to foreign material on the right to freedom of expression. Although a range of US and ECHR material is referred to, its role is the general one of identifying the values of 'pluralism and broadmindedness . . . central to an open and democratic society.'

The use of comparative material may be contrasted between the *Prince* and *Islamic Unity* cases. In the former a specific point is taken from a US Supreme Court minority opinion and applied in the construction of an argument leading to the ruling, in the latter the role is the much more general one of identifying the values and norms of an international first-world club which South African law sees itself as now belonging to.

4. Khumalo

In *Khumalo & Others v Bantubonke Harrington Holomisa*,[125] another direct appeal to Constitutional Court, the issue was whether the law of defamation was inconsistent with the right of freedom of expression. This issue arose because, in principle, in South African common law, a true statement may be defamatory in the sense of being an injury to dignity.[126] Even though the law has developed a defence of reasonable publication,[127] there is a tension between the protection of freedom of expression under the Bill of Rights and the protection of dignity—a right also protected by the Constitution.[128] In the *Khumalo* case a well-known politician took action for defamation but without alleging falsehood; exception was taken on the basis that the claim was unconstitutional in that the Bill of Rights protected the right of the press to publish true facts. Regarding the constitutionality of defamation O'Regan J noted that: 'we need to ask whether an appropriate balance is struck between the protection of freedom of expression, on the one hand, and the value of human dignity on the other'.

On the central issue whether the common law was inconsistent with the Constitution considerable use is made of comparative jurisprudence; indeed, the Court builds its argument on foreign case law. A Canadian

[125] *Khumalo & Others v Bantubonke Harrington Holomisa* 2002 (5) SA 401 (CC).

[126] The civilian basis of South African defamation in the *actio injuriarum* means that injury to dignity may be actionable even if there is no injury to reputation because the material published is true; see, generally, JM Burchell, *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (Cape Town: Juta, 1998) (cited in *Khumalo*, para 17, above n 14).

[127] See *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) 1207–8.

[128] See s 10: 'Everone has inherent dignity and the right to have their dignity respected and protected.'

dictum is applied,[129] supported by a reference to German law,[130] to arrive at the position that the protection of freedom of expression has no more than an attenuated interest in falsehoods. On the point that it is frequently difficult, if not impossible, to establish veracity, the Court quotes a US Supreme Court dissenting dictum stating that the passage of time 'may make it impossible . . . to disprove malicious gossip about past conduct'.[131] The point that this difficulty may have a 'chilling effect' on readiness to publish is supported by a quotation from a House of Lords speech of Lord Keith where that expression is used,[132] the point being backed up by a reference to an Australian case.[133] The scene having been set in this way, Brennan J's well-known US Supreme Court opinion[134] representing 'the high-water mark of foreign jurisprudence protecting the freedom of speech' is quoted, but subject to the observation that 'many jurisdictions have declined to follow it'.[135] In support of this questioning of the Brennan opinion, O'Regan J cites a vast assembly of Canadian, English, Australian and German case law and literature.[136]

This decision is a very strong example of comparative law in a positive role. In the construction of O'Regan J's opinion foreign jurisprudence goes to core substance in a fundamental way. The way the opinion is written means that it could not stand without the comparative part; to this extent the decision would appear to exemplify the most far-reaching application of the comparative method.

C. *Right to Equality*

1. *Basic position*

Hardly a matter for surprise, the South African Constitution gives high prominence to the right of equality. The first of the founding provisions makes reference in its first two subsections to 'the achievement of equality' and 'non-racism and non-sexism'.[137] The famously extensive right of equality in the Bill of Rights covers: 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.[138]

[129] *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106.
[130] 54 BverfGE 208 (1980) (the *Böll* case).
[131] *Philadelphia Newspapers, Inc v Hepps* (1985) 475 US 767, 785–6.
[132] *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011 (HL) 1018.
[133] *Theophanous v Herald & Weekly Times Ltd and Another* (1994) 124 ALR 1, 19–20.
[134] *New York Times Co v Sullivan* (1964) 376 US 254, 279–80.
[135] *Khumalo*, para 40.
[136] Para 40, above n 41.
[137] Constitution of the Republic of South Africa 1996, s 1 (a)&(b).
[138] Section 9 (3); the listed grounds of unfair discrimination is more extensive than in the interim Constitution (s 8(2)IC), pregnancy, marital status and birth having been added.

The racial discrimination for which South Africa was notorious was excised from the statute book as part of the process of reform.[139] Its legacy is a economic and social imbalance that is the country's most pressing problem. This inequality is addressed by the so-called 'economic and social rights'[140] in provisions in which the state's obligation to deliver human rights is interpreted in the context of the concept of 'available resources' and the notion of 'progressive realisation'.[141] The difficulty of finding relevant comparative material has been mentioned in the context of the *Grootboom* case.[142]

A small sample from the area of the right not to be subject to unfair state discrimination in matters of sexual orientation will be considered as evidence of the use of comparative law under the equality head.

2. *Gay rights*

In *National Coalition for Gay and Lesbian Equality and another v Minister for Justice and others*[143] the Constitutional Court ruled on a challenge to laws proscribing certain forms of sexual act as unfair discrimination. Even in the decision of the Court of first instance[144] there is significant recourse to foreign material; for present purposes, however, consideration will be limited to the decision of the Constitutional Court. Ackermann J observed that '[t]here is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom' to gainsay the conclusion that honestly held views on sexual matters 'cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation'.[145] Proceeding to look at the case law of some of these other societies, the outcome does seem to have been influenced by the finding that 'in many of these countries there has been a definite trend towards decriminalisation'.[146]

Noting the decriminalisation of sodomy in England and Wales in 1967 and in Scotland in 1980, the Court considered the decision of the European Court of Human Rights in finding the surviving sodomy laws of Northern Ireland[147] and Ireland[148] to be in breach of the protection of privacy under Article 8. In applying the decision as comparative authority, Ackermann J

[139] See, eg, the Abolition of Racially Based Land Measures Act 108 of 1991.
[140] See de Wet, above n 40.
[141] Constitution of the Republic of South Africa 1996, in respect of housing s 26 (2); in respect of health care, food, water and social security s 27 (2).
[142] See above n 90.
[143] 1999 (1) SA 6 (CC).
[144] *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* [1998] 3 All SA 26 (W).
[145] Paras 38–9.
[146] Para 39.
[147] *Dudgeon v United Kingdom* (1982) 4 EHRR 149.
[148] *Norris v Republic of Ireland* (1991) 13 EHRR 186.

notes that while the European 'margin of appreciation' factor makes denial of infringement decisions problematical,[149] in cases of a finding of breach, it strengthens the comparative authority because it 'suggests that there must be a very clear breach'.[150]

The opinion goes on to canvass a wide range of comparative material demonstrating the powerful tide of decriminalisation that occurred throughout the Western world in the second half of the twentieth century. Availability of sources is obviously relevant to the scope of comparative surveys; in this regard the Court seems to have been assisted by a monograph mentioned in the footnotes.[151] The comparative survey is the basis of the Court's conclusion that 'in 1967 [decriminalisation in England and Wales] a process of change commenced in Western democracies in legal attitudes towards sexual orientation.'[152]

Having adopted a liberal sexuality norm on the basis of western decriminalisation, the Court proceeds to reject the decision in *Bowers v Hardwick* in which a divided US Supreme Court found itself 'unpersuaded that the sodomy laws of some 25 states should be invalidated'.[153] The primary basis for this rejection of a potentially significant precedent is that:

> Our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgement in *Bowers* can really offer us no assistance in the construction and application of our own Constitution.[154]

The Court went on to state that the rejection of the criminalisation of sodomy in a 'number of open and democratic' societies operated to 'fortify the conclusion which I have reached that the limitation in question in our law regarding such criminalisation cannot be justified under section 36(1) of the 1996 Constitution'.

The confident position of the Court in its application of foreign material to the issue to some extent conveys the impression that it is looking for backing rather than guidance from foreign jurisprudence. Part of the reason for this is the fact of relatively well-developed South African literature,[155] especially a *South African Law Journal* article[156] much relied on by the

[149] As the Constitutional Court observed in *S v Makwanyane*, above n 16, para 109.

[150] Para 41.

[151] R Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995); see para 45, n 62 where this work is cited in support of statistical details regarding the widespread decriminalisation of sodomy.

[152] Para 52. [153] Para 53. [154] Para 55.

[155] See my comments in 'South Africa: a World in one Country on the Long Road to Reality', in A Harding and E Örücü, *Comparative Law in the 21st Century* (London: Kluwer, 2002), 281, 298–9

[156] E Cameron 'Sexual Orietation and the Constitution: a Test Case for Human Rights' (1993) 110 SALJ 450.

Court—'[i]n what follows I rely heavily on an influential article written by Professor Edwin Cameron'.[157]

3. *Same-sex life partners*

A second major Constitutional Court decision concerned with sexual orientation equality further demonstrates the role of comparative law in the context of evolving human rights' jurisprudence. In this case the revision of norms in jurisdictions perceived to share essentially similar values was significant. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[158] addressed the constitutionality of immigration legislation[159] giving entry to 'spouses' of permanent residents but denying it to gays and lesbians in 'same-sex life partnerships' with permanent residents.[160]

The opinion makes early reference to 'an important line of decisions of the Zimbabwean Supreme Court' holding that 'the constitutional right of citizens to freedom of movement is contravened when foreign national spouses ... are denied permission to reside'.[161] Ackermann J saw it as important that the contravention in the Zimbabwean cases was considered apropos of a citizen spouse residing in Zimbabwe, but an unstated southern African affinity factor seems a more likely basis for referring to the decision.

Like the earlier *National Coalition* case, the significance of this decision, for present purposes, lies in the prominent role of foreign jurisprudence in the decision-making process—on both the substantive bill of rights issue and on the mechanism for correction. Observing that '[i]n other countries a significant change in societal and legal attitudes to same-sex partnerships in the context of what is considered to constitute a family has occurred',[162] the Court noted shifts in the jurisprudence in Canada, Israel, the UK and the USA. On the critical issue of the justification for recourse to the jurisprudence concerned, the Court observed:

> In referring to these judgements from the highest Courts of other jurisdictions I do not overlook the different nature of their histories, legal systems and constitutional context ... Nevertheless, these judgements give expression to norms and values in other open and democratic societies based on human dignity, equality and freedom—an important source from which to illuminate our understanding of the Constitution and the promotion of its informing norms.[163]

[157] Para 20.
[158] 2000 (2) SA 1 (CC).
[159] Section 25 (5) Aliens Control Act 96 of 1991.
[160] Para 1.
[161] Para 28.
[162] Para 48.
[163] Ibid; the last sentence of this quotation refers, in n 69, to the two relevant subsections of s 39(1) of the Constitution: 'When interpreting the Bill of Rights, a court, tribunal or forum—(a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom* (Court's italics) ... (c) may consider foreign law.'

The Court placed particular reliance on Canadian jurisprudence concerned with overlapping categories of discrimination as well as the notion of equality and its application to the definition of the concept of family. Quotations from Canadian judgments are integral to the structure of Ackerman J's opinion.[164] The reliance on Canadian law in this case is striking. A number of pivotal aspects of the argument are supported by quotations from Canadian case law.

Having determined that the legislative provision concerned was unconstitutional, the Court also brought foreign jurisprudence to bear on the issue of an appropriate remedy. On the decision to 'read in' words to correct the offending section, the Court was 'strengthened in this conclusion by the fact that in several jurisdictions Courts have held that they do possess the power to read words into statutes where appropriate'.[165] Reference is made to the adoption of this power by the courts in Canada and the USA, as well as by the Israeli Supreme Court and the German Constitutional Court.[166] The Court quotes passages from and adopts the argument presented in an American law review article critical of the premise that there is no constitutional norm to guide a process of judicial remedy selection.[167] From the mention of a possible separation of powers' tension between the Supreme Court and Congress, it is apparent that the article is concerned with the US position. That the South African Constitutional Court recognised this is shown by the emphasis on the terms and needs of 'our Constitution' in the paragraph following the quotation.[168] This raises the issue of the point of the inclusion of the law review material. In the absence of a 'technical affinity' justification for recourse to academic work on the US model it is not easy to see what purpose is served by its inclusion.

In *Satchwell v The President of the Republic of South Africa,*[169] a High Court judge claimed unfair discrimination on the basis that regulations regarding her employment did not treat her permanent female life-partner in the same way as a judge's spouse. The issue was the constitutionality of legislation, which 'effectively excluded all those in relationships other than heterosexual marriages from the benefits it accords to spouses'.[170] In arriving at a decision in favour of the applicant, the Court refers to Canadian

[164] See para 40, *Canada v Mossop* (1993) 100 DLR (4th) 658; para 43, *Vriend v Alberta* (1998) 156 DLR (4th) 385; para 44, *Law v Canada* (1999) 170 DLR (4th) 1; para 52, *Mossop* again.

[165] Para 71.

[166] Ibid.

[167] Para 72: the article is EH Camiker 'A Norm-Based Remedial Model for Underinclusive Statutes' (1985–6) 95 *Yale Law Journal* 1185.

[168] Para 73.

[169] *Satchwell v The President of The Republic of South Africa and Another* 2002 Case CCT 45/01

[170] Para 10.

and its own, earlier, dicta in support of a wide definition of 'family'. Reference is also made to a South African law review article[171] in support of the following statement:

> In certain African traditional societies woman-to-woman marriages are not unknown, this being prevalent in families that are childless because the woman is barren or where the woman is in a powerful position in her community, like being a queen or a chieftainess, or where she is very wealthy.[172]

This is a rare instance of some element of African perspective being brought into the reckoning even though it is simply tended in support of a position contended for on the basis of specific Canadian authority.

III. CONCLUSION: FLOURISHING COMPARATIVE LAW

South African judges are making widespread use of comparative law in the development of the scope of protected human rights. In general the treatment is sophisticated. Two associated factors are probably relevant: a strong domestic academic groundwork contribution and positive reliance on this work by the higher courts. While individual judges differ in their approach to the use of foreign precedents, the 'may consider foreign law' provision concerning the interpretation of the Bill of Rights has produced a generally receptive attitude to foreign material.

The South African Law Reports, published by *Juta*, carries at the end of each monthly issue, two separate lists (since 1987) of case annotations: one for South African and another for foreign cases. The labels 'applied', 'compared', 'considered' and 'referred to' indicate the use of each case in the reported decision. This list—alphabetical by country—gives a useful indication of the foreign case law appearing, in one role or another, in the *SALR*. It has always been the case, and remains so, that the majority of the foreign cases made use of are decisions of the English courts. Although South African common law is civilian, English law has had significant influence,[173] largely in areas of active development; contract, commercial and company law, and judicial review are random examples. What is significant for present purposes is the appreciable increase in foreign material being referred to by reason of the Bill of Rights. American, Australian, Canadian, Indian and German jurisprudence appears on a regular basis.

171 B Oomen 'Traditional Woman-to-Woman Marriages, and the Recognition of Customary Marriages Act' (2000) 63 THRHR (Tydskrif van Hedendaagse Romeins-Hollandse Reg), 274.

172 Para 12

173 B Beinart 'The English Law Contribution in South Africa: the Interaction of Civil and Common Law' (1981) *Acta Juridica* 7.

The law of northern African states is conspicuous by its absence.[174] In the—admittedly limited—material looked at, the African perspective came up only at a general level, unsupported by primary source authority.[175] Customary law has a place in the Constitution alongside the common law.[176] But while one might take the view that its development calls for input from African jurisdictions representative of African legal thinking, there are certain difficulties. There is no single customary law, not even within one jurisdiction. Also, the different colonial origins and post-colonial developments in the various African jurisdictions, together with the fact that in many instances there is not much in the way of reported legal material, makes it difficult to source comparative material.

The necessarily limited survey of this chapter indicates an active comparative law factor in the development of human rights law. A cursory look at the *SALR* foreign law annotation tables, referred to above, in the years since South Africa first adopted a Bill of Rights indicates a steady increase in recourse to foreign material. The publisher's system of classification gives some indication of the significance of particular instances. The research done for this chapter indicates a spectrum of use from citations that are tantamount to being cosmetic, to cases of direct application to some central substantive issue. It is suggested that the level of use of foreign jurisprudence could be classified by reference to at least four specifically evaluative criteria: 'illustrative'; 'supplementary'; 'elucidatory'; and, 'going to core substance'. The significance and dimension of the ever-developing South African comparative approach commented on in this chapter is a phenomenon that warrants comprehensive research and study as one of the success stories of comparative law in the new millennium.

[174] The decisions of the High and Supreme Courts of Namibia and Zimbabwe—jurisdictions of the Roman-Dutch common law—are reported in the SALR.

[175] See above n 172.

[176] See, eg, s 39(2); see also, generally, C Himonga and C Bosch, 'The Application of African Customary Law under the Constitution of South Africa' (2000) 117 *South African Law Journal* 306.