ARTICLES

The Judge as Comparatist

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Traditionally, American constitutional scholarship has been deep, but not at all wide.¹

[An]s Wine and Oyl are Imported to us from abroad: so must ripe Understanding, and many civil Vertues, be imported into our minds from Forreign Writings, and examples of best Ages, we shall else miscarry still, and come short in the attempts of any great Enterprise.²

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I. Setting the Scene

Acoustically, "globalisation" is an unattractive word. For some, the images it tends to conjure up may not be much better. In economic terms, many would associate it with multinationals. Depending on underlying political beliefs, that might, in turn, prompt thoughts of contemporary economic imperialism, while to others these terms might even bring to mind the kind of riots one reads about whenever the leaders of the G8 countries meet. Culturally, the word may also imply a disappearance of national differences in tastes, fashions, and even attitudes towards matters as varied as aesthetic and moral values. Again, some may regret this diminution of cultural diversity, while others may, in specific areas, see advantages in this convergence. Lawyers, too, are not immune from the changes this phenomenon is bringing in its wake, though being (invariably) less imaginative than artists and less bold than businessmen, one might be tempted to argue that they have reacted to it, rather than helped shape it.

"Lawyers" is a broad term. It covers those who work in multinational firms, those who do (or are meant to be doing) in academic cloisters the basic thinking that lies behind the daily humdrum, those working in the public sphere (for example, as law reformers for governments and legislators, or as decisionmakers in the
various areas of public administration), and those who act as judges and resolve disputes.

Arguably, the first group has been the one most alert to these changes, but deals with them only in practical situations and without any attempt (or even the ability) to see them—let alone place them—in a wider and co-ordinated context. Despite some fascinating developments in legal practice which would merit closer analysis, harmonisation and unification of the law is, thus, taking place in a spasmodic manner, itself indirectly contributing to a different kind of diversity and, even, new problems. Academics are mostly timid by nature, and a fair number of them these days have, as far as the real world is concerned, placed themselves in the margins by advocating various theories of political correctness. This almost inevitably means that their work encourages interest in systems and topics which the real users of the law (the first and third groups) have little time for.

This Article deals with the fourth group, namely, judges. Most in this category, especially those operating in the common law world, are anything but timid in character, though some may prefer an isolated existence, which is quite a different matter. But in their professional pronouncements, they are (and should be) cautious, mainly because of reasons of democratic legitimacy. For though most systems would nowadays accept, with varying degrees of emphasis, that judges do make new law, most lawyers (and ordinary people) would agree that this should be more in the nature of bringing the law up to date with societal beliefs rather than shaping these beliefs before they have been accepted by society itself. In this Article, we deal with

3. Think, for example, of internet companies working towards standardised contractual solutions for their truly global commercial activities.


6. We are conscious of the fact that, in this Article, we do not look at legislators and law reformers, an omission partly prompted by lack of space, but also justified by the fact that some of the things that we say about judges would also be relevant and be taken into account by legislators. This admission also implies that we acknowledge and, indeed, welcome, the interaction that takes place between all these types of “lawyers,” but prefer to focus on the category which could these days be seen both in the common law and civil law systems (as well as transnational courts) to be playing a crucial role in the globalisation of ideas of justice.

7. A famous English judge, the late Lord Devlin, expressed this well extrajudicially when he distinguished between “activist” lawmaking (designed to keep the law in pace with
the first aspect of this issue, not the second, but even in this form, this is a topic that is particularly sensitive in the United States, though this does not mean that it is ignored elsewhere.

The literature on judges and their role is huge and we do not intend to re-examine it here. Our concern is to look at the “judge as a comparatist”—a role not hitherto openly ascribed to him. Yet, judges across the globe are gently entering into this marginalised area of the law curriculum, and the present authors are among those who welcome this timid innovation. Indeed, they wish to encourage it for the additional reason that they believe that, if the trend gains strength, it will encourage academics to broaden their horizons and reflect on the internationalisation of law in their books even more openly than they have hitherto done. We believe that practitioners might also benefit from such a move, since it is bound to enhance the range of arguments available to them and even their critical ability to understand their own law.

This predilection of both authors must not, however, obscure the real difficulties that retard (if not obstruct) their aim. The purpose of this Article, inevitably taking the form of a rather long article since it wishes to look at the practices of more than one system, is to provide one more building block in the revival of the study of foreign law and comparative methodology. That it can hardly aspire to do more must be stated at the outset by the authors themselves. For the topic discussed here is, at its core, largely one of political beliefs, and the one thing that globalisation has not yet managed to achieve is harmonisation on this score. Yet, even in this, the most sensitive part of any legal analysis, one cannot ignore how political and economic decisions are overtly linked to legal changes being made to their legal systems at the national level (for example, accepting Turkey into the European Union (EU) if, among other things, it modernises its

change in the consensus) and “dynamic” lawmaking (designed to generate change in the consensus). See Lord Devlin, Judges and Lawmakers, 39 MOD. L. REV. 1, 2 (1976). This also seems to be the case in many Continental European systems. Thus, for France, see the views of Guy Canivet, First President of the Cour de cassation, in Guy Canivet, Le juge entre progrès scientifique et mondialisation, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 33 (2005).

A good example of this can be seen in the 27th edition of the classic English textbook Anson’s Law of Contract undertaken by Professor (now Mr. Justice) Jack Beatson. Though the current 28th edition (2002) has changed somewhat its approach, the not-that-distant previous edition was remarkable in its attempt to present the English law of contract almost in isolation of the considerable intervening influences of European directives, international conventions, and multinational projects bringing about or suggesting important transformations of traditional, national-based law. J. Beatson, ANSON’S LAW OF CONTRACT (27th ed. 1998).
criminal code; enhancing trade with China if it improves its human rights record; or accepting former eastern block countries into organisations such as the EU or NATO). And, as indicated, the changes may affect such varied areas as human rights, family law, national criminal codes, harmonisation of currency or tax laws, and the like. More about this further down.

II. HOW JUDGES SPEAK

In an elegant piece of scholarship, written thirty years ago and dedicated to the most learned (yet, possibly, not the most influential) of British comparatists, the predecessor of the first of the present authors in the Chair of Comparative Law at the University of Oxford compared judiciaries in Courts and Codes in England, France and Soviet Russia. In his view, the distinctive features of the common law judicial style are given away by the “four dialogues” that take place in the process of arriving at a decision. The first he called the dialogue between Bench and Bar, the second was the dialogue among the Bench (one should add: conducted in a calmer tone in England than in the United States); the third was the dialogue with the past (by which the learned author meant the consideration and refinement of precedent); and, finally, the dialogue with the future (where, for instance, we find what Professor (now Sir) Neil MacCormick has described as the “consequentialist” type of arguments such as the notion of “floodgates,” which figures in common law but not in civil law decisions). What is immediately noticeable by its absence is the dialogue with (living) academics, perhaps because this was forbidden in England until the Practice Statement of the House of Lords of 1966.

But this dialogue is visible in American decisions, and it has helped both Bench and academics. For historical reasons, this

10. Id. at 1014.
11. Id.
12. Id. at 1015.
13. Id. at 1016.
14. Id. at 1017.
dialogue is even more prominent in German judgments.\textsuperscript{18} This is the “dialogue” which we wish to expand to include foreign ideas and notions (developed both by academics and judges), and, though controversial and not without its difficulties, judges the world over are already attempting to engage in it. How this is done (openly or clandestinely, boldly or hesitantly) will be discussed in Parts III and IV. In Part V, we will look at those situations where the dialogue with foreign law is most appropriate, while in Part VI, we will examine and try to address some of the most common fears expressed against the use of foreign law. In Part VII, we shall attempt to wrap things up by focusing especially on some American issues, while in Part VIII, the last one of this Article, we shall try to prophesy the future, providing some suggestions of our own to what we predict will become an ever more pressing and frequently addressed issue, even if its resolution does not follow the path we will recommend.

Before turning to these issues, however, we wish to stress our preference for the terms “dialogue” and “intellectual interaction” rather than “borrowing,” which we see as a narrow and more direct application of foreign law. Equally, we caution against the attempt to try to “transplant” or use foreign notions and concepts. We do this for two reasons. First, concepts and notions are often radically different and can, thus, discourage the natural idea of an intellectual dialogue. Indeed, concepts and notions attract definitional and linguistic difficulties, especially as one tries to find the foreign equivalent for one’s own notion or concept. Secondly, the idea of transplantation, though successful in some systems and at some times, itself carries with it the danger of subsequent “rejection” and is perhaps one of the most difficult operations lawyers can attempt to perform. To put all this differently, in accord with most comparatists, we are not recommending that foreign law should be used as binding precedent by judges, but rather as a source of inspiration, especially when national law is dated, unclear, or contradictory.

Quite obviously, then, in this Article, we are not talking about foreign law as applicable law where the rules of conflict of laws so require. Nor, indeed, are we talking of public\textsuperscript{19} international law rules

\begin{footnotesize}
\begin{enumerate}
\item For interesting statistics, see Hein Kötz, Scholarship and the Courts: A Comparative Survey, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 183 (David S. Clark ed., 1990).
\item We italicise this word since, unlike other colleagues who use the words “international law” somewhat loosely to cover public international law as well as foreign law, we are here excluding from our purview public international law. Roper v. Simmons, 125 S. Ct. 1183 (2005), reviewed by Professor Sarah Cleveland in the Washington Post of 20 March
\end{enumerate}
\end{footnotesize}
which may (in different ways\textsuperscript{20}) have become part of national law. Nor, finally, are we thinking of law that a court of one nation state has to apply because it is bound by the decisions of some supranational court (which may itself have used foreign law in order to shape its own decisions).\textsuperscript{21}

If, statistically speaking, the number of cases where the need for what we are advocating as desirable is likely to be quite small, we, nonetheless, feel this is likely to occur with greater frequency. Yet, though the number of instances where this need arises is small, their significance is considerable. Moreover, in times of rapid social change, life is constantly producing new problems (or placing old solutions under investigation), and it is here, once again, where comparison is most likely to offer maximum benefit. We submit that only persons with totally closed minds can seriously question this assertion. This means that much of what we say about the utility of studying foreign law may be appropriate not only for the new democratic states and their constitutional courts (which are often starving for inspiration or legitimisation), but also for those systems which have respectable histories to look back upon.

This last point is stressed since it has been almost consistently under estimated or ignored in comparative studies (or studies about the movement of foreign ideas from one state to another). We call it the “time factor.” This opaque phrase refers to the undoubted fact that values and ideas change over time. Unlike the Roman jurists, who stated their rules in a seemingly atemporal manner, citing each other and their predecessors as if nothing had happened between the second century B.C. (when these ideas began to acquire special interest) and the second century A.D. (when they reached their peak), we live in times where everything—from politics, regimes, \textit{mores}, and tastes—changes rapidly. This rapid change means that what was once firmly rooted in one system, and not acceptable to another, may also be subject to change. This is a crucial underlying theme of this Article. It

\begin{flushleft}
\textsuperscript{20} 2005 and examined towards the end of this Article thus had nothing to do with “international law,” but with the utility (and permissibility) of foreign law helping re-shape internal norms—in that instance, the Eighth Amendment. Sarah H. Cleveland, \textit{Is There Room for the World in Our Courts}, WASH. POST, Mar. 20, 2005, at B4.

\textsuperscript{21} 20. Note, for instance, Sections 39(1)(b)-(c) of the South African Constitution of 1996 (discussed in more detail below), according to which the courts of the land “\textit{may} consider foreign law,” but “\textit{must} consider international law” when interpreting the national Bill of Rights. S. AFR. CONST. 1996 §§ 39(1)(b)-(c) (emphasis added).

\textsuperscript{21} 21. Though, later on we have something to say about the use of comparative law by the Court of the European Communities.
\end{flushleft}
is picked up here and there, whenever appropriate, and, we feel, in the long run, favours those who, like us, believe that a purely national interpretation of the law will not be sustainable for long.

III. AS A MATTER OF PRINCIPLE: TO DO OR NOT TO DO? THE AMBIVALENCE OF THE UNITED STATES

This text evolved from a lecture delivered in the United States, so it is, perhaps, only appropriate to start by asking first this general question in the context of this country. We do so not only because this illustrates perfectly the ambivalence its lawyers seem to have towards the issue, but also because it can help highlight some of the difficulties that confront other systems, as well.

We set the scene by starting with the United States because here one also encounters some of the strongest pronouncements against even attempting the exercise. Prominent among American judges taking this view is Justice Antonin Scalia, a jurist known for views which are as strongly held as they are reiterated with (admirable) consistency. Thus, in Lawrence v. Texas, referring to submissions that other systems had decriminalised sodomy between consenting adults in private, he said:

Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. . . . The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." 22

It is the italicised end of the quotation that will arrest the attention of the foreign reader. 23 And, yet, it is the opening statement that holds


23. For how we speak often says much about how we think, and Justice Scalia's words ("foreign moods, fads, or fashions") talk volumes of how he perceives the "values" that are currently shaping the case law of foreign courts, many of which are comparable in standing to his own not only in form, but also in achievements. That Justice Scalia is, indeed, using these words in a pejorative manner can be seen from his earlier dictum in Atkins v. Virginia, where he wrote: "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people." 536 U.S. 304, 347-48 (2002) (emphasis added).

Other jurists of the American "right" have used even more vivid language to express their dislike of European criticism of American "insularity." See, e.g., ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (The AEI Press 2003) (2002). Bork refers to academics like us (arguing for an open mind) as socialist, anti-religious, "faux
the key to the Scalia doctrine, gives it coherence, and also earns it its opponents. For, paraphrasing it, the Scalia doctrine states that contemporary law reform in the United States and, \textit{a fortiori}, in foreign countries, cannot change the original understanding of the United States Constitution. For Scalia, the originalist, believes that, whether he is dealing with the Constitution or with federal statutes, he is interpreting a legal text, enacted at a particular time and place.\textsuperscript{24} To understand it and apply it, all he needs to know is the understanding of the text at the time of its enactment by the polity entitled to enact it. With such a starting point, the possibility of foreign law casting any light on the enactment in question is not possible; indeed, his approach precludes foreign law before one even gets to other reasons which make him (and other fellow jurists on the “right”\textsuperscript{25}) hostile towards foreign ideas.\textsuperscript{26} The points made above may represent an American intellectuals ... [hoping to outflank American legislatures by ... [imposing] liberal views ... on the United States,” \textit{Id.} at 2, 16. He describes the European reaction to Justice Kennedy’s reluctance to cite foreign law as “insolent ... browbeating.” \textit{Id.} at 25. That Bork was never confirmed to the Supreme Court may, conceivably, explain in part such vitriolic hyperbole. But the greatest irony must surely be that the judge he defended for siding with the majority in \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989), who refused to take into account foreign law, gave the majority decision in \textit{Roper} which invoked foreign law as a supplementary reason for the changed outcome. This, indeed, must be more than ironic; it must offer a good example of the how the “time factor”—discussed in several Parts of this Article—can legitimise the use of foreign law, reversing old practices.

The Bork polemic can be found (with some repetition) in his two other main books. \textit{See generally} ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996). Their richness, in invective and indignation, will provide European lawyers, more accustomed to restrained legal (and legalistic) discourse, interesting insights into the politicisation of contemporary American legal debate. It is a matter of speculation how much of this—in substance and in tone—will come to the “old Continent.”


25. We have, in this Article, used the labels “right” and “left” to describe the political leanings of judges or academics because they seem to crop up so often in American writings (and discussions). But for reasons that we need not discuss here, we find them unsatisfactory, and note with pleasure that they are going out of fashion in Europe where parties with realistic ambitions to power have come to realise that they can only attain it if they occupy the moderate center ground.

26. Though a jurist, Justice Scalia is, thus, part of a wider “political movement,” and the question non-American lawyers will ask themselves is “Why would a political movement commit to such a formalist theory of interpretation?” The answer seems to be clear—entirely for domestic reasons. For those who adhere to this ideology strongly dislike many of the liberty-enhancing decisions of the Warren Court (their \textit{bête noir} in particular is \textit{Roe v. Wade},
“problem,” but to the extent that they also touch upon the question “can a judge allow his personal moral view influence his judgment?,” they acquire a wider significance. We shall return to this issue later on.

In *Stanford v. Kentucky*, the point was whether the death sentence could be carried out on a defendant who was seventeen years old at the time he committed a murder (and other crimes). Delivering the opinion of the Court in this (and a similar case heard at the same time), Justice Scalia refused to hold that the carrying out of the death sentence amounted to cruel and unusual punishment violating the Eighth Amendment, inter alia, on the grounds that “it is *American* conceptions of decency that are dispositive.” Justice Scalia made this

410 U.S. 113 (1973), which they think has no roots in the Constitution). Of course, there are theories by which *Roe* is derived from the Constitution, but the right utterly rejects those theories. So, the problem the right diagnosed was unbridled judicial discretion leading to constitutionalising the political preferences of the left. Their remedy was simple—to end judicial discretion and tie judicial power to a narrow and formalist theory of interpretation. So, if the Founding Fathers of the Constitution had not said something, the judges could not say it either.

These observations are, of course, trite knowledge for American lawyers. But foreign observers of the American constitutional scene must realise the need to understand American constitutional writings and the wider political debates taking place in that country in order to understand properly American decisional law. This, in itself, is a reason why foreign admirers of American legal institutions should be slow in trying to introduce them into their systems before having carefully checked their transplantability. We discuss these dangers of comparative law in Part VI, infra.

For a very different conception of the judicial role see Canivet, *supra* note 7, at 41, where the senior French judge considers it to be “[j]un des aspects essentiels du rôle du juge ... d’assimiler le progrès et l’innovation en ne dédaignant pas d’ouvrir le débat judiciaire à la modernité.”


28. *Id.* at 369 n.1. This last sentence strikes us as ambiguous. The majority in *Stanford* had made evolving standards of decency central to the Eighth Amendment. In *Stanford*, however, Scalia was writing for the Court, and not just for himself, so he had to work within precedent. Given his general outlook (as sketched above), it would be surprising if he actually welcomed the “evolving standards of decency” standard. Arguably, therefore, his real standard is in the preceding paragraph—“those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.” *Id.* at 368 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). But assuming that evolving standards matter (either because Justice Scalia is willing to make an exception here or because he was stuck with it unless he gave up the majority opinion) he writes that they must be confined to American standards. This does get him to a square choice between American and European views, somewhat insulated from his general interpretative theory.

If we are right in the preceding analyses, this would lend some support to our view that an independent hostility to foreign law is also at work. But it is also consistent with another strand of Justice Scalia’s interpretive theory—when text and original understanding are too open-ended, one should interpret them in the light of American constitutional tradition. This is another, less satisfactory, way of looking to the voters, instead of judges deciding for
observation in dismissing the contention made by petitioners (and various amici) that the sentencing practices of other nations could indicate that a particular practice was so wide-spread as to occupy a place not only among American mores, but also, text permitting, to become capable of becoming part of American practice.

Incidentally, to a foreign observer, the use of the words “American conceptions of decency” is, given the issue in this case, arguably unfortunate, and the peremptory dismissal of this argument in a mere (short) footnote underscores the learned Justice’s hostility to the notion that an idea commonly shared by many democracies could have any relevance in the American adjudicatory process. For Scalia, if the point had to be addressed, it could be relegated to a mere footnote.

Yet, thirteen years later, the Court in Atkins v. Virginia seemed to reject Justice Scalia’s indifference to the sentencing practices of other countries and took the view that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved,” thus, banning executions in such cases as being contrary to the Eighth Amendment.29

If Justices Scalia,30 Thomas, and Kennedy have, at various times, expressed views such as the above,31 The late Chief Justice Rehnquist (though usually bracketed with the right) has made utterances that go both ways.32 On the other hand, the so-called “liberal” Justices have themselves. And if it is traditional practice among voters and elected officials that matters, then, of course, it must be American voters and elected officials.

30. The strength of Justice Scalia’s views is even more evident in his Commentary, where, referring to United States v. Alvarez-Machain, 504 U.S. 655 (1992), he wrote: “[T]here we held that the United States’ resort to self-help, even if a ‘shocking’ violation of [public] international law, was not our concern . . .” 40 St. Louis U. L.J. 1119, 1120 (1996). The litigation there arose with the kidnapping of a Mexican citizen by U.S. authorities for a crime committed in Mexico, who then insisted that he should be extradited back to Mexico for trial by his own courts in accordance with an existing United States-Mexican treaty. Alvarez-Machain, 504 U.S. at 657-58.
31. To them, we must add Judge Richard Posner’s more fully argued (extra judicially) objections in his No Thanks, We Already Have Our Own Laws, LEGAL AFF., July-Aug. 2004, at 40. His views are considered more fully in Part IV, infra.
32. In favour of an open approach, see William Rehnquist, Constitutional Courts—Comparative Remarks, in Germany and Its Basic Law: Past, Present and Future—A German-American Symposium 411 (Paul Kirchhof & Donald P. Kommers eds., 1993). Contra Atkins, 536 U.S. at 321-22, 324-25. On the other hand, in Washington v. Glucksberg, Chief Justice Rehnquist referred to a decision of the Supreme Court of Canada upholding a ban on assisted suicide and observed that “[i]n almost every . . . western democracy—it is a crime to assist a suicide.” 521 U.S. 702, 710 & n.8, 718 n.16 (1997). Would such an implicit acknowledgement of world practice have occurred if the outcome had been the other way? It is submitted that the Chief Justice’s views display the kind of pragmatism that would allow
expressed the opposite view, both in judicial opinions and extrajudicially, so the strength of their convictions must be deemed more serious and also indicative of the fact that the United States Supreme Court could (unlikely, one would add at present) change its position sometime in the near future.

Thus, in *Printz v. United States*, Justice Breyer, after citing European practices, added:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.\(^33\)

In *Atkins v. Virginia*, Justice Stevens stressed in a note that used evidence of wide-spread foreign practices that although this was "by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."\(^34\)

As a result of such thinking (and evidence), the execution of mentally retarded criminals was seen as being prohibited by the Eighth Amendment.\(^35\)

Justice Ruth Bader Ginsburg seems to have sided with the same school of thought, both judicially\(^36\) and extrajudicially,\(^37\) while Justice Sandra Day O'Connor, moderately positioned on the right of the Court, has, on this issue, joined the liberal call for open-mindedness, but has only done so extrajudicially, in essays that bear visibly the

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34. 536 U.S. 304, 316 n.21 (2002).
35. Id. at 321.
characteristics of an opening speech rather than a rigorous presentation of a scholarly position.  

The ambivalence of these dicta is further enhanced when one takes into account the fact that, occasionally, even an "anti-foreign law" judge may himself have recourse to the "condemned" practice. Thus, Justice Scalia, so extreme in his dislike of foreign law and, yet, so powerful by virtue of the strength of his convictions, himself invoked Australian, Canadian, and English law in his dissent in McIntyre v. Ohio Elections Commission in the mid-1990s when dealing with the question of whether the source of an election campaign leaflet opposing a school tax levy proposed in Ohio should be revealed to the public. He wrote:

The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. In answering this question no, the Justices of the majority set their own views—in a practical matter that bears closely upon the real-life experience of elected politicians and not upon that of unelected judges—up against the views of 49 (and perhaps all 50 . . .) state legislatures and the Federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. See, e.g., Commonwealth Electoral Act 1918, § 328 (Australia); Canada Elections Act, R.S.C., ch. E-2, § 261 (1985); Representation of the People Act, 1983, § 110 (England). How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?

How can a judge who denounces so strongly references to foreign law when opposing moves to decriminalise sodomy or restrict the application of the death penalty nonetheless invoke foreign examples himself when taking a tough line on political campaigning? It would be too crass to accuse the learned Justice of intellectual opportunism, not least since intelligent men tend to cover up well the tracks of such conduct and, here, there is not the slightest evidence of covering up.

40. Id. at 381-82 (Scalia, J., dissenting).
More in line with the general thrust of this Article would, thus, be to argue that judges are selective in their use of foreign law, making use of it in some areas of the law, but not in others. This way of explaining such quotes is, in fact, more than a hypothesis; it is a way of formulating the challenge (for us and others interested in the topic) of discovering normative rules that can help identify those areas where recourse to foreign law is desirable, and even necessary, from those where it is not. We will return to this problem later, particularly in Part VII of the Article.

In the light of the above, one thing is clear: the growing academic literature in America has not surprisingly taken a mixed, if not, on the whole, even hostile view to the issue, and the question is to what extent have academics and the judicial protagonists considered in depth the practice of other courts. As stated, our intention is to review in Part IV how these issues have been handled in other systems, while in Part V, we shall examine the cases where recourse to foreign law seems to us desirable. Part VI will then bring to a close this part of the enquiry by addressing the dangers that stem from the use (or misuse) of foreign law.

For convenience’s sake, we have placed some of the major legal systems into four categories: those which do not seem to favour recourse to foreign law (already briefly discussed in this Part); those who have recourse to it, but do not admit it openly; those which do so openly; and, finally, those who do it not only openly, but almost as a regular practice. These last three categories are discussed in Part IV. Before we turn to them, however, we must touch upon one or two important issues which run through our narrative.

The case law of the countries in the last two categories (that is, those which openly cite foreign law) raise issues of particular interest which are only now beginning to be addressed. The first and paramount of these is to find out whether the citing judge looks at foreign law because he genuinely feels it may contain an idea that may help shape his own law, or whether he has recourse to foreign law simply because he believes that by contrasting it with what he already knows, foreign ideas will help sharpen his own perception of the problem. Though the first frame of mind often leads to accepting a foreign rule more than the second (which may, after consideration, decide to reject it), they are both “intellectually” worthy of attention and should be contrasted with a third way of using foreign material, which is usually as mere “padding” for a judgment already reached on other grounds.
Resolving the first issue can, in turn, raise others such as: "Why has the judge looked at foreign law?" "Was he prompted (or simply not prohibited) by his own legal order?" "Why does the citing judge choose one system rather than another?" "Is there anything that bars a judge from using foreign law in one type of case but not another?" "Can judges seek their models in different systems depending on their subject matter?" And "can judges stray away from their genealogical ancestors as a result of modern realities more linked to commerce, finance, and politics than language, history, and culture?"

In what follows, we address some of these issues, conscious of the fact that all deserve more attention than we can give them in the space of (even) a long article. We also attempt to analyse the problem in as wide a manner as possible, so we look at two systems in each category, but, for reasons of space, do so only briefly.

IV. USING (OVERTLY OR COVERTLY) FOREIGN LAW

A. Doing It But Not Admitting: The Examples of Italy and France

1. Italy

Italian courts are among those which do not cite academic authorities in their judgments, be they of national or international origin. Indeed, such citation is prohibited by article 118.3 of the Rules Concerning the Application of the Code of Civil Procedure (1942). This, however, does not mean that Italian judges do not consult academic literature. Indeed, there is emerging (and, arguably, widespread) consensus that, in the field of private and commercial law, some important national innovations have been the result of extrajudicial meetings and exchanges between judges and academics, an exchange process which is aided by the healthy state of comparative law studies at university level. (More about this at the end of this Subpart.) The development of the particular Italian heading of damage known as dannno biologico, pioneered by the regional courts of Genoa, may owe its origins to such exchanges with the academic

41. Unlike their French counterparts, Italian administrative courts seem to have thus far shown little interest in foreign law, having instead shown a preference "towards a hand-made, domestic product." See Aldo Sandulli, The Use of Comparative Law Before the Italian Public Law Courts, in Comparative Law Before the Courts 165, 175 (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2004).

42. For an explanation and discussion of this concept, see BASS MARKESIN, MICHAEL COESTER, GUIDO ALPA & AUGUSTUS ULLSTEIN, COMPENSATION FOR PERSONAL INJURY IN ENGLISH, GERMAN AND ITALIAN LAW 1-94 (2005).
world, and the Italian law of privacy may also owe its present form to international influences.

Though this unofficial evidence suggests that this interest extends to foreign law and literature, it is important to note that it has not been documented in a fully reliable manner. Among the academics who have supported this view, we find Professor Alessandro Somma, whose work cites instances where such influences appear in the judgments. It has to be admitted they are not numerous.

This academic belief that foreign ideas lie hidden behind judicial opinions which are silent (or, at least, inconclusive) as to their (foreign) sources of inspiration has, even more recently, received further support by one of Italy’s most prolific and widely read scholars, Professor Guido Alpa. Thus, chapter 1.5 of a recently published monograph is entitled *The Use of Foreign Law by Judges*. This title is, in itself, both revealing and, perhaps, a sign of the times. In it, our colleague provides a series of wide-ranging illustrations that show Italian law changing under the influence of foreign ideas. Intriguingly, Professor Alpa also implies that these borrowings are evident from the decisions themselves. But since he writes in the Continental European tradition, giving references in his footnotes mostly to academic writings and less so to decisional law, we have not been able to verify whether the linkage has been “open” or can only be surmised by the local expert. More unfortunate is the fact that one cannot discuss how Italian judges have used the foreign ideas, for example, as supplementary arguments or as a testing ground for the validity of their own solutions and from which system these ideas have been mostly borrowed. Thus, if the above practice means that Italian courts cannot be placed (as their South African or Canadian sister courts are) among the leaders of the world in the use of foreign law and ideas, it does suggest that the practice of looking abroad may, nonetheless, be growing. More important, for long-term developments, is the fact that Italian authors are beginning to feel the need to discuss this phenomenon, more than they did in the past.

The Italian scene changes dramatically if we shift our attention to academically proclaimed interest in foreign law, and this may, indirectly, explain the slow awakening of Italian judges to the possibilities offered by comparative methodology. For, if the judicial

43. *Id.* at 84-89.
references to foreign law and ideas is poor and of little, if any, value to potential “borrowers,” in Italy the overall state of academic comparative studies is among the healthiest in Europe—if not the world. This is in no small measure due to the efforts of such grand masters of the subject as the late Professor Gino Gorla and, more recently, Professor Rodolfo Sacco—a tradition continued and even expanded by scholars such as (the late) Mauro Cappelletti (especially in the domain of civil procedure), Antonio Gambaro, Maurizio Lupo, Guido Alpa, and Mario Bussani, to mention but a few individually, and along with others, the above have generated a healthy Italian school of comparatists that has extended its reach to include the United States and Germany, and in productivity terms (and, arguably, originality), surpasses what one finds in other countries such as England and France. Since the academic side of comparative law is not, however, part of this Article’s main focus, we leave the discussion of their work for another occasion, noting simply the fact that the foundations for future growth of comparative law are well established in this country of fertile legal minds.

2. France

French law, likewise, belongs to this category, the judgments of France’s superior civil (and, to a lesser extent, administrative) courts being known for their brevity. Indeed, citing academic authority in a judgment as a reason for the solution reached by the court would be a ground for a pourvois (legal challenge) before the Cour de cassation!\(^\text{46}\) The current First President of the Cour de cassation has no doubt that this is [the?]\(^\text{47}\) main reason why French courts have not used foreign law overtly. He puts this idea in this way: “En France, la Cour de

\(^{46}\) Though the Conseil d’Etat—the supreme administrative court of the country—has shown a greater willingness to cite foreign law and, recently, has broken with tradition and cited in one of its opinions a judgment of the English High Court. See CE, Oct. 29, 2003, Rec. Lebon 260768. For more details of this developing story, see Roger Errera’s account in The Use of Comparative Law Before the French Administrative Law Courts, in COMPARATIVE LAW BEFORE THE COURTS, supra note 41, at 153-63.

\(^{47}\) The first of the authors, in a lecture to be delivered at the French Academy in March 2006 and entitled “Auto-Suffisance Nationale ou Arrogance Internationale? Le droit Étranger et les Notions Contemporaines de Justice Devant le Juge Américain et le Juge Français,” questions whether this is the only reason why French lawyers in general have, on the whole, shied away from the use of foreign law. He suggests that French academics and their State-run infrastructure may account for a degree of “ethnocentricity” which resembles the current American introversion even though it stems from different reasons. Many French academics have the courage to admit these shortcomings. See, e.g., Olivier Moréteau, Ne tirez pas sur le comparatiste, D. 2005 Somm. 452.
cassation et les autres juridictions sont structurellement contraintes, par le style d'écriture traditionnel de l'arrêt à phrase unique et l'impossibilité de l'explication interprétative de la règle, à ne pas se référer expressément aux droits étrangers dans le corps même de l'arrêt."\textsuperscript{48}

Yet, as the last seven words of the President’s text suggest, what the French judgments conceal as a result of a long historical tradition, the conclusions of the avocats généraux (who advise the Cour de cassation but do not take part in the drafting of the actual judgment and have no vote on it) increasingly make clear. These documents, longer and replete with references to the earlier case law of the Court and to academic literature, show clearly the dialogue between judges and academics, mainly the French arrêtistes, who tend to flesh out (and praise or criticise) the decisions of the Court. Along with the report produced by the juge-rapporteur, that is, the judge chosen by the panel to write the first draft of the proposed opinion, these texts are, nowadays, published with greater frequency than they were in the past; and, under the inspiration of the current First President M. Guy Canivet, the conclusions of the avocats généraux have been encouraged to reveal a growing interest in foreign law.

Indeed, we are told that these reporters are nowadays expected to consult foreign law when preparing their recommendations, and the Service de Documentation of the Court, currently headed by M. le Conseiller Alain Lacabarats, has been set up to assist in this exciting new development. Indeed, the current First President himself has both described and strongly supported this trend in a number of extrajudicial statements made while the guest of learned societies.\textsuperscript{49} The controversial, but fascinating, Perruche litigation,\textsuperscript{50} which dealt with claims of wrongful birth and wrongful life (and was eventually overruled by hastily drafted legislation supported by diverse, mainly religious, interest groups), gives some interesting insights into this new and developing trend.\textsuperscript{51}

Overall, however, the French courts have not yet acquired a leadership position in this area of the law. In part, this may be due to what, at least to us, seems to be a lack of dedicated and focused study

\textsuperscript{48} Canivet, supra note 7, at 45 (emphasis added).


\textsuperscript{50} See JCP [2000] II [10 438].

\textsuperscript{51} For a comparative discussion of the decision, see Basil Markesinis, \textit{Réflexions d'un comparatiste anglais sur et à partir de l'arrêt Perruche}, \textit{La Revue trimestrielle de droit civil} 77 (Jan.-Mar. 2001).
of foreign law by the present generation of French academics,\(^2\) and is accentuated mainly by the fact that judicial citations contain few clues as to why a particular system was chosen and how, if at all, its solutions proved useful or, on the contrary, not relevant. The brevity of the judgments may, again, be to blame for this.

B. Doing It Openly: England and Germany

1. England

Since approximately the mid-1970s onwards, British judges have taken to writing articles with an ever-growing comparative element. Originally, the impetus was provided by the European Convention on Human Rights, which, though England helped draft it and ratified it in 1951, was not incorporated into national law until the Human Rights Act 1998 (which came into effect in 2000).\(^3\) Though understandably of unequal quality, these pieces (unlike most of the extrajudicial pronouncements of their American counterparts, which tend to be short, opening addresses at conferences or legal meetings) are article-sized essays (of the usual English length of between 8000 to 9000 words) and are well supported by notes and references. For the sake of completeness, we thus refer the reader indicatively and in passing to the writings of Lord Scarman,\(^4\) Lord Woolf,\(^5\) Lord Bingham,\(^6\) Lord Browne-Wilkinson,\(^7\) Lord Hoffmann,\(^8\) Mr. Justice Laws,\(^9\) Mr. Justice

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\(^2\) Though, the work, especially in the area of comparative criminal law, of Professor Mireille Delmas-Marty of the Collège de France deserves special mention.

\(^3\) Human Rights Act, 1998, c. 42, s. 1 (Eng.).

\(^4\) His seminal *Hamlyn Lectures* in LEslIE SCARMAN, ENGLISH LAW—THE NEW DIMENSION (1974), could be credited for having started this whole debate in its contemporary form.

\(^5\) For examples of Lord Woolf’s writings, see his *Protection of the Public—A New Challenge* (1990) and his F.A. Mann Lecture in *Droit Public—English Style*, 1995 PUB. L. 57.


\(^8\) See Lord Hoffmann, *A Sense of Proportion, in European Community Law in English Courts* 149-61 (Mads Andenas & Francis Jacobs eds., 1998).

Sedley,60 Lord Justice Schiemann (now Judge Schiemann at the European Court of Justice)61 and, indeed, the former Lord Chancellor, Lord Irvine of Lairg.62 In England, the trend of publishing judicial speeches is, if anything, gaining strength.

Much more important, however, has been the trend that has gained momentum since the early 1990s for judges to invoke foreign law as supporting or supplementary evidence of what they are trying to achieve. Though not numerically significant, this newer trend is noteworthy, not only for the detail which the citation has, at times, achieved, but also for the fact that it has attracted the support of some of Great Britain's most academically minded judges such as Lords Goff, Woolf, Bingham, Steyn, and others. Thus, among the cases citing foreign law and academic authority about foreign law—and we do not include in this list decisions referring to foreign law in the process of construing international conventions or because conflicts rules made this obligatory—we note the following which have appeared in the space of the last ten years or so: 


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61. See Konrad Schiemann, Recent German and French Influences on the Development of English Law, in RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 189 (Reiner Schulze & Ulrike Seif eds., 2003).

62. For a good example of his work, see Judges and Decision-Makers: The Theory and Practice of Wednesbury Review, 1996 PUB. L. 59.
Newspapers Ltd.,75 Reyes v. The Queen,76 Fairchild v. Glenhaven Funeral Services Ltd.,77 The Starlin,78 Matthew v. State,79 and, most recently, JD (FC) v. East Berkshire Community Health NHS Trust & Others.80

Though we must again stress that the use of foreign law was "supplementary" and, on the whole, "supportive" of the main thrust of the English argument, in some cases—for example, White v. Jones81 and Fairchild v. Glenhaven Funeral Services Ltd.82—it was extensive in detail as well as breadth and was accompanied by dicta of considerable utility to anyone applying the method in practice. Noticeable in particular are three points.

First is the sophistication of some of the citations. In the Fairchild case we find, probably, the best example of what Professor McCormick has called "substantive" rather than merely "passing" citation, that is, an example "where the citing judge[s] elaborate[] on the specific content of the cited case[s] [or material]."83 Thus, two of the five judges in that case, Lords Bingham and Roger of Earlsferry, gave us references to the German practitioners' commentary of Palandt (a "difficult" book even for German lawyers to use) as well as the Motive of the Bürgerliches Gesetzbuch (BGB) (the preparatory works that justified and explained the decisions adopted by the authors of the German Civil Code).84

Secondly, in the Fairchild case it was their Lordships (and not Counsel) who took the initiative and asked to be addressed on the solutions adopted by civilian law systems, thus "forcing" Counsel to extend their research and argument beyond the traditional consideration of Commonwealth and American authority. The source of this new "interest" is, thus, as notable as the fact that by asking Counsel to give their views in open court on this foreign jurisprudence, the British judges avoided the complaint voiced by Justice Scalia in the recent American case of Roper (discussed towards the end of this

78. [2003] UKHL 12 (appeal taken from Eng.).
81. [1995] 2 A.C. 207 (H.L.) (appeal taken from Eng.).
82. [2003] 1 A.C. 32.
Article) to the effect that, in that latter case, foreign law was never subjected to open and critical discussion in the courtroom.

Thirdly, their Lordships were, in some of these cases, made aware of the fact that the major legal systems of the world were not in accord as to which solution to adopt. Thus, in the Henderson case, they weighed the respective merits of French and German law on the question of cumulation of contractual and tortious remedies, consulted the relevant literature, and finally came down in favour of the German (and American) view.\(^\text{85}\) In the Fairchild case, faced with greater diversity, Lord Bingham argued:

> Development of the law in [the United Kingdom] cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.\(^\text{86}\)

And in the McFarlane case, Lord Steyn expressed the same idea in a manner which is particularly relevant to the thesis of this Article when he argued that “the discipline of comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations.”\(^\text{87}\)

These observations merit special attention since they address an objection often raised by those opposed to the use of foreign law. Typically, this objection is phrased either in the form of, for example, “Why cite German and not French law?” or “How do we know that what is cited is accurate and up to date?” Each of these questions can justify long replies, but here are some brief reactions to them. A variant of the above is now emerging in American decisions and academic literature and asks the question: “Why look at foreign systems in one type of problem and not in others?”

With regard to the first question, one must come to accept that the chances of foreign courts using the case law of major and

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established systems are far greater than of having recourse to the outpourings of "lesser" courts. The answer is determined by the fact that some systems have, traditionally, acted as "parent" systems for most others, but also because some courts have, over a long period of time, earned their place as opinion formers whose views are worthy, at the very least, of serious consideration. But more modern courts can "earn their spurs" (as the Constitutional Court of South Africa clearly demonstrates), while what we called—without any intent to offend—"lesser" systems have also occasionally been able to innovate in a way that deserves attention. At the end of the day, however, one must not ignore the very pragmatic argument that language limitations may restrict the extent of the fishing expedition, though, as is explained below, the growing number of electronically available material is enlarging the availability of foreign primary material.

The second (and very valid) fear is addressed in greater detail below in Part VI.B through D, while the third and last question is also mentioned towards the end of this Article.

2. Germany

Turning now to German law and practice, we note a picture similar in mentality, but dissimilar in emphasis and intensity than that found in England. What follows, which to some extent draws on the research of German colleagues, again focuses on the “true” types of comparative law (that is, not those where the court is “obliged” by the nature of the subject or conflicts rules to look at foreign law). One must also note that, in Germany, the plethora of different, specialised courts means that one must distinguish between the practices of each of them. For practical purposes, however, what is of most interest are the Federal Constitutional Court, or Bundesverfassungsgericht (BVerfG) and the Federal Court of Justice, or Bundesgerichtshof (BGH), which decides cases in the areas of private and criminal law.

In an article published some twenty years ago, Professor Ulrich Drobnig identified seven decisions of the Bundesgerichtshof, one decision of the Federal Administrative Court, or Bundesverwaltungsgericht (BVerwG), and two decisions of the Bundesverfassungsgericht

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88. In this Part, we draw heavily on our material which first appeared in Basil Markesinis, Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years 75-155 (2003).
resorting to foreign law. Writing in 2000, that is, fourteen years later, Professor Hein Kötz pointed to seven additional decisions of the Bundesgerichtshof and concluded that the voluntary use of the comparative method is still confined to exceptional cases in Germany. These decisions referred to issues of tort law, family law, labour law, criminal law, and administrative law. Interestingly enough, Professor Bernhard Aubin, writing in 1970, argued that the Imperial Supreme Court or Reichsgericht (RG) had been more open to


the use of comparative material than its republican successor.\textsuperscript{96} Thus, seventeen decisions, handed down between 1909 and 1928, made use of foreign legal material; a large number of these cases dealing with issues related to limited liability companies.\textsuperscript{97}

In another study on the use of foreign material in cases involving only constitutional law issues, Professor Jörg Manfred Mössner counted twenty-four decisions of the Bundesverfassungsgericht which had recourse to comparative law.\textsuperscript{98} To these, he added two further decisions from State constitutional courts, two decisions of the Bundesgerichtshof, and one decision of the Landgericht Lübeck.\textsuperscript{99} All of these decisions involved a "voluntary" use of comparative law and dealt with the interpretation of basic concepts of the German Constitution with the help of foreign material.\textsuperscript{100}

\textsuperscript{96} See Bernhard Aubin, \textit{Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung}, 34 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelSZ] 458 (1970). English and American lawyers (judges and academics) were also more comparatively minded during the nineteenth century, especially its second half, than most of their successors were during the middle years of the twentieth century. One reason for this may have been the effects of the First and, even more so, the Second World War. But this may explain only the reduction in interest in German law, and the whole subject still awaits a more comprehensive examination.

\textsuperscript{97} Reichsgericht [RG] [Imperial Court of Justice] [1910], 74 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 276 (279) (F.R.G.); Reichsgericht [RG] [Imperial Court of Justice] [1911], 77 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 152 (154) (F.R.G.); Reichsgericht [RG] [Imperial Court of Justice] [1912], 79 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 332 (336) (F.R.G.); Reichsgericht [RG] [Imperial Court of Justice] [1912], 80 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 385 (388) (F.R.G.); Reichsgericht [RG] [Imperial Court of Justice] [1913], 82 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 116 (124) (F.R.G.); Reichsgericht [RG] [Imperial Court of Justice] Dec. 14, 1928, 123 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 103 (105) (F.R.G.).


\textsuperscript{99} \textit{Id.}

Just as interesting is to see which foreign legal systems served as models for inspiration for the German courts. In the decisions looked at by Mössner, the United States headed the list with nine examples. It was followed by Switzerland with eight, France with four, the United Kingdom with three, Austria with three, Italy with two, and the Netherlands, Norway, and Sweden each with one. The International Court of Justice was also used in one instance. Eleven cases referred to “foreign experience” in general without identifying a particular country.  


101. Mössner, supra note 98, at 228.
These statistics suggest that German courts seem more willing to look at systems outside their own (private law) legal family when dealing with constitutional issues than they are in matters pertaining to private law (where comparative material is more often taken from Austria and Switzerland\textsuperscript{102}). This would suggest that the language barrier may play a part in this “reluctance” to consult foreign material, but that it is by no means an insurmountable obstacle. Especially in the early years of the Constitutional Court, language proved less of an inhibiting factor since a substantial minority of these justices had either studied or taught in the United States or lived there as political refugees\textsuperscript{103}.

The studies also indicate that German courts use the comparative method with caution, in some instances even with an undesirable (one might add: unexpected) degree of uncertainty. Many comparative observations are thus left undocumented, with decisions often referring vaguely “to the situation in other legal systems,” without further qualification\textsuperscript{104} or making use of unspecified quotations.\textsuperscript{105} Given the German punctiliousness, this is a somewhat surprising practice and may suggest lack of confidence on the part of the citing judge in the thoroughness and reliability of his understanding of foreign law.

Equally understandable, but perhaps also surprising, is a certain degree of “mistrust” of material, which comes from a different legal family. This is obvious in one of the early leading wrongful life decisions where the Bundesgerichtshof mentioned English and U.S. case law, but cautioned against an unqualified reliance on this material. After emphasising the absence of comparable German cases, the Court, thus, stated: “It appears that foreign experience, which can already be of only limited value to national law because of the different

\textsuperscript{102} Drobnig, supra note 89, at 626. We may, by the way, be faced with a similar pattern in South Africa which in public law matters seems to have been more adventurous than it has when dealing with private law.


\textsuperscript{104} See, e.g., Mössner, supra note 98. These decisions frequently use phrases such as “the development of this area of law in other countries” or refer to “international developments.”

\textsuperscript{105} One example is the unspecified quotation of Cardozo in the famous Lüth decision of the Bundesverfassungsgericht. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (208) (F.R.G.).
legal foundations [in other countries], can be found in England and the United States.\textsuperscript{106}

The BGH noted that the claim of the child against the doctor had been rejected in \textit{McKay v. Essex Area Health Authority};\textsuperscript{107} and that legislation in Great Britain, passed a few years earlier,\textsuperscript{108} had, similarly, excluded claims of this nature. On the other hand, concerning United States law the \textit{Bundesgerichtshof} was, arguably, less accurate in its use of foreign law—citing \textit{Curleender v. Bio-Science Laboratories}\textsuperscript{109} as a decision awarding compensation to the child, but failing to mention the subsequent decision of \textit{Turpin v. Sortini},\textsuperscript{110} which had overruled \textit{Curleender} and given the child “special” damages only. Nonetheless, the most surprising, indeed disappointing, feature of the decision is the suspicion shown by the BGH towards foreign, especially non-Germanic law. We stress this since the issue before the court was not one that depended for its solution on a specific legal provision of the German Civil Code, but dealt with a wider philosophical issue that transcends state borders (and even religious beliefs) and, thus, makes legal borrowing instructive, if not even necessary.

By contrast, the \textit{Bundesverfassungsgericht} has, as already stated, shown itself more open to comparative law \textit{in general} (and, again, we note a certain parallel with South Africa). Commenting in December 1953 on the rapid development of family law by German courts over the preceding eight months,\textsuperscript{111} the \textit{Bundesverfassungsgericht}, thus, expressly included comparative law in its list of accepted and well-proven judicial techniques. The judgment stated:

The courts have quite rightly not seen it as their task to completely restructure the area of matrimonial and family law. They have rather felt themselves bound by the existing laws insofar as they are not


\textsuperscript{107} [1982] 2 W.L.R. 890.

\textsuperscript{108} Congenital Disabilities (Civil Liability) Act, 1976, c. 28 (Eng.).

\textsuperscript{109} 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

\textsuperscript{110} 643 P.2d 954 (Cal. 1982).

\textsuperscript{111} This judicial “hyperactivity” was caused by the fact that the Federal Parliament had failed to adapt all provisions of the Civil Code which contravened the principle of equality established by the Constitution of 1949. Article 117 had given the Federal Parliament up until 31 March 1953 to do this, and when the date passed without this task being accomplished, the Federal Supreme Court began to unpick one provision of the Civil Code after the other and re-fashion the law on a case law basis. For an account in English, see Basil S. Markesinis, \textit{The Applicability of Human Rights as Between Individuals Under German Constitutional Law}, 2 \textit{ALWAYS ON THE SAME PATH: ESSAYS IN FOREIGN LAW AND COMPARATIVE METHODOLOGY} 175-218 (Basil S. Markesinis ed., 2001).
incompatible with article 3(2) BL. On this basis, a number of issues could easily be resolved by the judges through the adoption of quite obvious solutions. In all other cases, courts have made use of the tried and tested judicial techniques, that is, legal interpretation and the closing of gaps in the law, also with help of the comparative method, and have taken into particular consideration the essentially unanimous demands concerning the equality of man and woman—crucial also for the purposes of legal interpretation—which have been voiced in the discussion over the past five decades.  

This clear, if brief, endorsement of comparative work by German judges is one of the rare cases in which the Bundesverfassungsgericht has actually indicated—in abstract terms—a position on the methodological status of foreign law in German judgments. This may be surprising (especially in the light of the open discussions about the merits and dangers of comparative law in contemporary U.S., English, and South African judgments). Yet, in part at least, it can be explained by the different style of German decisions, which are traditionally focused on the solution of a case and will not often feature abstract methodological discussion, for example, on the role of foreign law in the work of a court.

The famous Spiegel decision of 1966—politically a highly controversial case which also led to divided opinions within the Court—offers more insights into the use of the method by the Bundesverfassungsgericht. Here, four judges referred to foreign material in answering the question whether members of the press can refuse to give evidence in criminal proceedings involving treason and opted against such a right. Drawing on papers presented at an international conference on the legal position of the press in criminal proceedings, the Court stated:

The German and Swiss contributors concluded that the right [of members of the press] to refuse to give evidence should recede if information is [itself] gained through criminal conduct or if the criminal proceedings in question involve one of the (political) offences identified by the law.


114. The conference was organised by the Gesellschaft für Rechtsvergleichung barely a year earlier.
This corresponds to the legal approaches found in other democratic countries [reference to Swiss law omitted].

It can hardly be the aim of the Basic Law to tolerate an abuse of the freedom of the press, a great liberal achievement designed to further a more objective approach to politics through the free and public debate of responsible citizens, in order to obstruct inquiries into serious crimes directed against the security of the state and its free basic order. Such far-reaching interpretations of press freedom must also have a negative effect on the trustworthiness of the Federal Republic within an integrated alliance such as NATO, where all other members, despite the fact that their legal orders are based on essentially the same intellectual-historical traditions, regard a far more intensive protection of military secrets as something perfectly natural.\textsuperscript{115}

This argument, which not only drew parallels to other (unspecified) "democratic countries"—only Switzerland was mentioned by name—but also made a highly political case for a solution compatible with the approaches adopted by Germany's military partners, was openly rejected by the other four judges of the Senate. Interestingly, their criticism was not directed against the use of comparative law as such, but rather at the slim factual foundation on which the comparative argument was based in this particular case. They, thus, pointed out:

A comparison with the legal systems of other democratic countries is equally incapable of providing convincing arguments against the opinion presented here if this comparison is reduced to the existence or absence of one particular legal provision and fails to evaluate the other legal system as a whole—such as England and the federal law of the United States, which do not grant a right to refuse to give evidence to any profession—or to take into consideration court decisions or the democratic convictions of these societies in general.\textsuperscript{116}

The passage indicates that the depth of comparative analysis conducted behind a court's closed doors and eventually culminating in a forceful reference to "other" legal systems in the final draft of a judgment may in fact often not be state of the art in methodological terms. We will return to this problem—and how it could be overcome by closer co-operation between judges and academics—when discussing the various real or perceived dangers of using foreign law in Part VI.

\textsuperscript{115} BVerfGE 20, 162 (220-21) (authors' translation).

\textsuperscript{116} \textit{Id.} at 208 (authors' translation). The lack of a coherent comparative methodology in court decisions is also noted by Drobnig, \textit{supra} note 89, at 625.
Finally, it seems noteworthy that over eighty percent of the decisions identified by Mössner in 1973,\textsuperscript{117} Drobnig in 1986,\textsuperscript{118} and Kötz in 2000\textsuperscript{119} were delivered by the Bundesgerichtshof and the Bundesverfassungsgericht between 1951 and 1974; only three decisions with comparative input were identified over the past fourteen years. Subject to further analysis (especially of constitutional and labour law cases), this could be an indication that the use of comparative arguments has become less frequent in court decisions over the past three decades than was the case in earlier times. This would suggest a development which is directly in opposition with what we find in England and other countries (such as Israel and South Africa).

A convincing explanation for this recent decline would certainly require more research than was possible for us to conduct at this stage. Yet, it seems that the “ups and downs” of comparative law in German courtrooms may be due more to the influence of individual judges or special historical circumstances rather than to any wider reason connected with the use of comparative law in courts. This interpretation may appear to provide an “easy” way out of this dilemma, but it is supported by the study of Aubin, who identifies three (partially overlapping) “waves” of decisions with comparative input.\textsuperscript{120}

The first covers the years 1910 to 1924, with a sequence of six decisions of the Reichsgericht on limited liability companies within five years alone, and two further decisions on section 7 of the Road Traffic Act\textsuperscript{121} and family law\textsuperscript{122} (all eight decisions focusing on Austrian law). The second wave is between 1920 to 1928, with four Reichsgericht decisions on section 315 of the BGB,\textsuperscript{123} trademarks,\textsuperscript{124} insolvency law,\textsuperscript{125} and section 138 of the BGB\textsuperscript{126} (these decisions

\textsuperscript{117} See Mössner, supra note 98.
\textsuperscript{118} See Drobnig, supra note 89.
\textsuperscript{119} See Kötz, supra note 90.
\textsuperscript{120} See Aubin, supra note 96.
\textsuperscript{121} Reichsgericht [RG] [Imperial Court of Justice] Nov. 19, 1917, 91 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 269 (270-71) (F.R.G.).
\textsuperscript{122} Reichsgericht [RG] [Imperial Court of Justice] Nov. 27, 1924, 109 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 243 (250) (F.R.G.).
\textsuperscript{123} Reichsgericht [RG] [Imperial Court of Justice] May 12, 1920, 99 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 105 (107) (F.R.G.).
involve French, English, and Swiss law). The third wave covers 1951 to 1961, and has a total of eleven decisions on private, criminal, and public law issues. The same explanation would also be compatible with a thesis we tentatively put forward at the end of this Article, which sees in exceptional individuals—be they politicians, legislators, judges, or academics—a crucial factor for innovation, be it political or legal.

Closer analysis of the material provided by our German colleagues also reveals that Bundesgerichtshof decisions with comparative input, though less numerous, are fairly evenly distributed over the decades (with a decline in the area of private law beginning only in the 1990s), whereas by far the most “comparative” Bundesverfassungsgericht decisions were handed down in the first decade of its existence. After this initial flurry of comparative interest, the number of Constitutional Court judgments making references to foreign law dropped abruptly by approximately sixty-six percent, putting the Bundesverfassungsgericht on par with the rate of the BGH. This particular decline of cases involving constitutional issues is likely to find its explanation in the fact that the Bundesverfassungsgericht was still developing its jurisprudence in the early days of the Federal Republic. Called to interpret a new constitutional document born under the watchful eyes of the United States, Great Britain, and France, it seems quite logical that the Court would be particularly open to the experience of western democracies in the initial post-war phase. If this is, indeed, the answer (or part of it), then this may prove a pattern that may followed by other (new) courts (such as the South African Constitutional Court) as their local jurisprudence grows in diversity and sophistication. On the other hand, it is worth noting the continued vitality of comparative law in the Canadian courts.

The German Constitutional Court has also used comparative law on at least one occasion in this period, and has done so in order to justify a constitutional provision which distinguishes the Federal Republic from its western neighbours.

In the famous KPD case of 1956, where the Bundesverfassungsgericht banned the West German Communist Party on the basis of article 21(2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law) (GG), the unanimous judgment thus held:

127. See Aubin, supra note 96, at 465.
128. Article 21 of the Grundgesetz currently declares: (1) The political parties participate in the forming of the political will of the people. They may be freely established.
So it is no coincidence that the liberal democracies of the West do not have provisions banning political parties comparable to article 21(2) BL, which was equally unknown to the Weimar Constitution of 1919 and the contemporary constitutions of the German states. The constitutional logic of these [Western] democracies—which equally, it must be noted, lack the strong legal institutionalisation and protection of political parties as offered by the Basic Law—lies in the fact that citizens are free or, as under the Italian Constitution of 1947, even encouraged to form political parties without limitation, and that the risk of a party opposing the existing constitutional order is consciously accepted; in cases of extreme danger to the existence of the state criminal sanctions will be brought to bear against the responsible individuals. This approach may be due to the optimistic conception that the best guarantee for a free democratic state lies in the views of its citizens; where there are free elections, the fight against hostile political parties can and should express itself in the denial of votes. These parties are thus excluded from influencing the political future of the state in a way consistent with the logic of democracy. During the Weimar Republic political parties could operate unfettered in Germany and fight against state institutions in every possible form although courts had ascertained that they were aiming for the violent abolition of the existing order and its replacement by their own constitutional concepts.\(^{129}\)

At the same time, the judges were also eager to find some foreign experience which could help “soften” this seemingly harsh German approach. The same Court, thus, continued:

Recent developments have, however, shown that free democracies can equally not ignore the practical and political problems of excluding parties from public life which are hostile to the constitutional order if the threat to the state reaches a certain level of intensity. The solutions are not always the same. If the hostility of a certain party towards the constitutional order can already be safely concluded from historical experience, parties might sometimes already be prohibited by the constitution itself (for example, the Fascist Party in Italy); more often—aside from interventions on the basis of criminal law, which are limited

to extreme cases—administrative action against parties hostile towards the constitution will be authorised by special statutes or on the basis of general constitutional powers. The Communist Party was thus prohibited in France and Switzerland in 1939 and 1940 by government regulations. In the United States the party was required to register in order to allow public authorities to efficiently monitor its activities as a subversive organisation.  

It should also be noted that German judges use comparative arguments mainly to support solutions they already seem to have reached by traditional ways of reasoning; foreign material is, thus, often mentioned only as a supportive addition. In this sense, the practice of the German judges seems to be comparable to their British counterparts.

C. Wide-Ranging Use of Foreign Law: The Case of Canada and South Africa

The Constitutional Court of South Africa and the Supreme Court of Canada have been active in and (in their respective jurisdictions) commended, not criticised, for their frequent use of foreign law. But since the latter is rather better known in the United States than the former, they will, for reasons of space, receive unequal treatment in this Article.

1. Canada

There are many reasons why Canada presents a particular interest for our enquiry. We offer four (though others could easily be added).

First, we note that Canada's mixed cultural background, politically a cause for many internal disagreements prepared

130. Id. at 136.

131. Aubin, supra note 96, at 470; Hans Dölle, Der Beitrag der Rechtsvergleichung zum deutschen Recht, in 2 HUNDERT JAHRE DEUTSCHES RECHTSLEBEN 19, 37 (1960); Kötz, supra note 90, at 835; Mössner, supra note 98, at 220.

132. For instance, one could enquire to what extent the contemporary influx of American ideas was facilitated by the fact that some of the Canadian judges who had most recourse to it had studied in the United States. Though the evidence may be inconclusive (see, e.g., Peter McCormick, The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview, 8 SUP. CT. L. REV. 527, 535 (2d ser. 1997) (Can.)), the wider point deserves to be born in mind since we argue that the presence of German law in South Africa may have benefited from the fact that Germany pursued an active cultural policy of prosilisation during the apartheid years when many young South African scholars may have found it difficult to pursue further studies in countries such as the United States and Britain.
Canadians for an open and multicultural approach to law.\textsuperscript{133} Those scholars who have studied comparatively the Canadian and American systems, thus, not surprisingly, find that the Canadian courts are more prone to a "dialogic" model rather than adopt the role favoured by American courts (especially strong, it would seem, during the Rehnquist era) of "enforcers" of the internal constitutional order—a position which, almost inevitably, carries with it the idea of internal self-sufficiency.\textsuperscript{134}

Secondly, we note that from about the mid- to late-1980s, Canada has experienced an important shift towards U.S. law,\textsuperscript{135} this almost universally being attributed to the introduction of the Charter of Rights and Freedoms and the perceived need to seek inspiration from the United States.\textsuperscript{136}

This "shift" of a legal system from its genealogical ancestors to "new players" on the international scene has been little studied in comparative law, even though one can imagine other countries in the "old" world (for example, Spain moving away from the French Code) or the "new" world (for example, Brazil being drawn into the American orbit and away from its Portuguese origins) experiencing similar gravitational pulls. We raise here briefly two issues for future consideration since a longer discussion would detract us from our main theme.

The first is what accounts for this reorientation: economic, commercial, or political factors? Secondly, are these systems "shifting" towards one other system or are they being "eclectic" in

\textsuperscript{133} See Wikipedia, http://www.en.wikipedia.org/wiki/Language_in_Canada (last visited Nov. 11, 2005) ("Of the 32.2 million citizens of Canada, 17.5 million are native English speakers, 7.7 million are native French speakers and 5.2 million are native speakers of neither of Canada's two official languages.").

\textsuperscript{134} Chief among these scholars is Professor Sarah Harding. See Sarah K. Harding, Comparative Reasoning and Judicial Review, 28 Yale J. Int'l L. 409 (2003) (drawing on the work of such notable comparatists as Professor Patrick Glenn).

\textsuperscript{135} We italicise here the word "shift" for, if statistical studies of citing practices of the Canadian Supreme Court are to be believed, the shift has taken the form of looking at U.S. case law but not, necessarily, following it. Thus, if we look at all Charter cases decided between 1984 (the year of the introduction of the Canadian Charter) and 1995, we see that out of 702 such cases only four followed U.S. law, thirty refused to follow it, but 668 of them chose to consider it. To us, this does not indicate slavish imitation (nor subversion of internal law or values to foreign law), but healthy curiosity. For details, see C.L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada, 34 Canadian J. Pol. Sci. 377, 394 (2001).

their choices, moving, for instance, towards American law in such areas as commercial and trade law, but towards German law in others such as, for example, constitutional law or models of federalism?

The point is not fanciful since there is intriguing evidence from countries whose courts are “great citers” that shows that such bifurcated tendencies may already exist.\textsuperscript{137} But the question still remains how they should be explained.

Thirdly, the Canadian universalism—and statistics demonstrate\textsuperscript{138} that their courts cite not only English, Commonwealth, and American case law, but also civilian systems (beyond the obvious interest in French law)—has continued after the novelty of the Charter made such consideration of foreign experiences necessary. This is an important point to grasp, for it may neutralise the interpretation often advanced by “introverted” lawyers to the effect that new courts (or new bills of rights) are the primary promoters of an interest in foreign law and that “mature” systems do not need such additional sources of inspiration. The Canadian universalism may thus demonstrate the confident state of an eclectic mind which does not see in transnational judicial dialogues a threat to national individuality or an impoverishment of the local legal culture but, on the contrary, a source of constant inspiration and reinforced judicial legitimacy.

Finally, in the previous sentence we italicised the word “dialogues” because in the reception of American law in Canada, from about the mid-1980s onwards, we see no slavish adoption of its solutions nor, indeed, the opposite, that is, a closing of the eyes towards the large (and sometimes menacing) Southern neighbour,\textsuperscript{139} but an opportunity for a genuine dialogue in search for inspiration. Indeed, some Canadian judges may now be suggesting that the main source of inspiration for Canadian judges can come from the decisions of the Warren and Burger Courts, and that the current, more “introverted” case law of the Rehnquist court may be proving less exciting.\textsuperscript{140} For

\begin{itemize}
\item 137. Canadian courts for instance still, apparently, cite British cases more than American in matters of private law (tort, family, property), though the later system gains a clear lead in the human rights area. Likewise, South African courts retain for historical reasons the predilection to cite Roman-Dutch law in matters of private law but display a wider reach in matters of public law.
\item 138. Thus, during the period 1984-1995, 35.7\% of citations in decisions of the Canadian Supreme Court were to U.S. courts, 55\% to British, 5.9\% to Commonwealth, and 3.4\% to foreign and international. See Ostberg, Wetstein & Ducat, supra note 135, at 387.
\item 139. For statistical evidence for both of these propositions see id. at 393-94.
\item 140. See, e.g., Claire L'Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15 (1998). It would be wrong if the uninitiated reader were to attribute this “reserve” towards a conservative court as
\end{itemize}
those American lawyers who take (justified) pride at the contribution their law has made to the legal systems of other countries, this may be a warning of possible side effects of the current attitude towards foreign law. To put it differently, it is permissible to speculate as to whether, notwithstanding past practice,\footnote{This practice is described eloquently by Anthony (now Lord) Lester in his article entitled \textit{The Overseas Trade in the American Bill of Rights}, 88 COLUM. L. REV. 537 (1988).} in the years to come foreign courts may turn more and more towards those sister courts which prove themselves to be the richest source of inspiration while at the same time openly fashioning solutions that are exportable and do not depend—and are clearly stated not to depend—on the text of one constitution alone, however famous (and old\footnote{Though English common lawyers feel special reverence for antiquity, age, in this instance, may not be a point of unalloyed strength for the American Constitution. For, as Lord Diplock observed nearly twenty-five years ago, “decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly 200 years old, are of little help in construing provisions of . . . modern Commonwealth constitutions which follow broadly the Westminster model.” Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648, 669 (P.C.) (appeal taken from Sing.). These sentiments are shared by Canadian (and other) judges and may well pose a long-term threat to American intellectual imperialism.} it may be.

2. South Africa

Among the countries we have chosen to include in this survey, South Africa is today certainly located at the very top end of the scale as far as the use of comparative law is concerned. In our attempt to shed some light on the role of the judge as comparatist, the frequent references to foreign legal ideas that feature so prominently in South African judgments, thus, merit close attention. Indeed, court decisions of this country are a showcase for comparative law \textit{in action}, providing exceptional insights into the opportunities, dangers, and practical difficulties inherent to comparative law.

i. Preliminary Observations

Before turning to three particular cases, which serve to illustrate how foreign material has been used (and sometimes not used) by South African courts, a few preliminary points should be made. Notable among them is a methodological observation about the way we have approached the task of presenting the peculiarities of South Africa within such a short confine. We have, thus, chosen to present...
the South African approach to comparative law in a way that differs methodologically from that adopted to highlight some key features of the position taken by German and Canadian lawyers.

The geographical and, in some respects, cultural proximity of Canada with the United States determined how we would present the Canadian law since it has coloured much of the comparative debate in this country, especially after the introduction of the Charter of 1983. Would Canada follow the case law of the United States Supreme Court? Would it, indeed, be overwhelmed by it? Would the English links weaken as a result, or even reach a vanishing point? And what about the French factor within the wider range of debates? Inevitably, these questions spawned a fair number of Canada-related questions as well as specific American-Canadian comparisons. We also noted a useful stream of statistical surveys which proved, as stated in the preceding Subpart, that the situation actually reached in Canada is much more subtle than the above questions originally led most commentators to expect.

We could have followed the same way in presenting South African law and, indeed, in what follows, we provide the kind of information about the use of foreign material found in South African judgments which we also gave regarding Canadian judgments. On the whole, however, we have chosen to present the rich South African material in a different manner, and this for three reasons.

First, though much has been written about the South African death penalty case *State v. Makwanyane & Another*, little is really known, in the United States especially, about the constitutional *evolution* experienced by South Africa in the mid-1990s and the constitutionalisation of comparative law under the 1993 and 1996 Constitutions. In contrast with what we find in the United States, this constitutional background helps explain the willingness, if not the need, of South African judges to make use of foreign material. But if this may help explain in part the differences with the United States, it does not fully address the other wider concern of the American right, that is, the judge's ability to use his own moral perceptions in order to shape local law.

143. 1995 (3) SA 391 (CC) (S. Afr.).
Secondly, and relatedly, this gradual evolution was achieved through a subtle and complex interplay between legislator and judge, and is a key to the understanding of the judicial attempts to use foreign law to shape contemporary South African law. To our knowledge, this has thus far not been adequately discussed, at any rate, outside the contours of South Africa itself.

Finally, while South Africa has, in the area of private law, remained largely loyal to its original “dual” cultural background (common law and Roman-Dutch law) along lines similar to those found in Canada, in the area of constitutional law and human rights law, it has revealed an intriguing (some would say surprising) interest in, not only American law, but also German constitutional law. Whereas one could almost call the first interest “natural,” the interest in German law raises a host of sub-issues of its own. What promoted the interest? How was it sustained? How was the language barrier overcome? Will it continue in the future? Once again, therefore, these factors cannot (and should not) be ignored when discussing excerpts from leading South African judicial opinions, and, for this reason, we provide a brief outline of the historical developments which have shaped the current constitutional regime before coming to the cases themselves. We thus begin with some less well-known details particularly relevant to our discussion.

ii. The Constitutionalisation of Comparative Law

First, the initial decision to “open,” in principle, the South African legal system to outside influence was not made by judges, but by the political leaders engaged in the legal, economical, and social reconstruction of the country following the end of the apartheid era. Section 35(1) of the 1993 Constitution, thus, invited courts of law to have regard to comparable foreign case law when interpreting the fundamental rights contained in the third chapter of the document.147 It is also worthwhile emphasising that this provision mentioned foreign case law as a possible (but by no means binding) source of inspiration while at the same time creating a much closer link with international

147. Section 35(1) of the 1993 Constitution declares:

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.

S. AFR. (INTERIM) CONST. 1993 § 35(1).
law (which was given binding force). This distinction is in line with one of the main themes of this Article, namely that foreign solutions (however persuasive they may seem to be or however close their resemblance to national law may be) can never bind the national judge who remains entirely free to reject them or to use them either as an inspiration or as a model for his own approach.

The provision is, nevertheless, a clear constitutional mandate for South African courts to look abroad. It also distinguishes the South African set-up from that found in the United States and may, to a large extent, explain the different judicial attitudes towards the matter under investigation. This different position of “principle,” however, does not eliminate tensions between “unelected” judges and “elected” legislators, a point that has much troubled conservative American judges and lawyers. For they exist in South Africa as much as they do in most other democratically organised societies and, in one sense, may even be stronger here due to the fairly recent abolition of the principle of parliamentary sovereignty and the introduction of a supreme and judicially enforceable constitutional framework. It does, however, prevent comparative law from being drawn into the political quagmire surrounding the wider relationship between judges and legislators.

Secondly, in the latter part of the above-mentioned norm lies hidden a more subtle invitation to look abroad. This is the duty to promote “the values which underlie an open and democratic society based on freedom and equality” enshrined in Section 35 (and, later, in Section 39 of the 1996 Constitution) which itself requires a standard by which to measure the emerging new South African legal order. Indeed, it is not surprising that South African judges have frequently chosen precisely this wording as a starting point for comparative reflections.148

This approach can be contrasted with the German legal system which has both influenced the constitutional development in South Africa and, in earlier times, had itself experienced the need to make a fresh start after a period of unprecedented political, social, economic, and military upheaval. For the draftsmen of the German Grundgesetz envisaged a society based on a set of core values, which article 21(2) GG summarises as “the free democratic basic order” (freiheitlich-

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148. Take, for example, the passage from the Ferreira decision of the Constitutional Court discussed in more detail below, where Justice Ackermann turns to Canadian, U.S., and German law in order to establish “the norms that apply in other open and democratic societies based on freedom and equality.” Ferreira v. Levin, 1996 (1) BCLR 1 (CC) at 72 (S. Afr.).
demokratische Grundordnung). Just like the South African notion of an “open and democratic society,” this expression is not defined in the constitutional text and is, thus, in need of interpretation. This similarity is, however, limited. For the subtle difference in wording set the scene for a completely different approach in practice. Thus, the South African text refers to “an” open and democratic society (inviting some form of comparison) while the German phrase clearly calls for adherence to “the” free democratic basic order as established by the Grundgesetz itself. German judges have thus seldom ventured beyond this boundary. The leading case of the Bundesverfassungsgericht dealing with the freihetlich-demokratische Grundordnung, relevant not only for the purposes of article 21(2) GG but also for the determination of the protective scope of important fundamental rights such as freedom of speech (article 5 GG) and freedom of assembly (article 8 GG), demonstrates this difference for it defines the concept only by reference to the German legal order.

There is, of course, no doubt that the two provisions—German and South African—discussed here perform quite different functions in their respective constitutional environments. The South African norm contains a rule for the interpretation of the fundamental rights enshrined by the 1993 Constitution while article 21(2) GG provides a basis for the banning of unconstitutional political parties by the Federal Constitutional Court. But the different perspectives of both Constitutions nevertheless become apparent at this point. For the Grundgesetz is very much focused on the national context, and German judges have usually developed the fundamental constitutional principles and values from within the framework established in 1948 and 1949. South Africa, on the other hand, was conceived from the

149. See Grundgesetz [GG] [federal constitution] art. 21 (F.R.G.). This notion is also the focal point of Grundgesetz [GG] [federal constitution] art. 18 (F.R.G.) (dealing with the forfeiture of certain fundamental rights if someone abuses these to combat the free democratic basic order) and Grundgesetz [GG] [federal constitution] art. 87a(4) (F.R.G.) (entitling the German Federal Government to use not only police, but also military force to defend the free democratic basic order within the country if no other solution is available).

150. For further discussion, see, for example, Karl Doehring, The Special Character of the Constitution of the Federal Republic of Germany as a Free Democratic Basic Order, in Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law 25, 29 (Ulrich Karpen ed., 1988). Doehring thus describes the free democratic basic order as “the basis of the entire constitutional system.” Id. at 33.

151. Despite the initial Allied influence on the country and the desire of most Germans to embrace not only economical, but also legal, political, and social principles of leading western societies in the decades following the end of the Second World War.
outset as a more permeable legal order; conscious of and open to the ideas of a legal world outside its political borders.

A third observation concerns the scope of application of the South African provision. Interestingly, it provides a basis for comparative work in an area of the law which seems, by its very nature, to be closely connected to the intrinsic values of any society (and may, thus, a priori appear to be “national” in character)—human rights. There are a number of reasons why the political leaders responsible for the peaceful transition from the “old” apartheid regime to the “new” South Africa not only used comparative law themselves when drafting the two Constitutions of 1993 and 1996, but also felt that the judiciary (which survived this legal revolution in much the same composition) should be alerted to the rich bounty of foreign experience available to courts venturing into the uncharted waters of South African human rights protection.

This, again, marks a difference with the (much older) American Constitution and, thus, calls for special attention.

Apart from differences in “age” (which, itself, has important consequences), some of the reasons that led the South Africans to adopt a more open approach have already been indicated. The new regime’s lack of constitutional experience has often been mentioned—sometimes overstressed—by American writers. But there are others which are just as noteworthy, even if they have not received adequate attention. Among them we include the close cultural and academic ties which, in various ways, South Africa had enjoyed since its inception with different legal cultures. At this point, however, we only wish to emphasize that most of these considerations apply equally to the other parts of the 1993 and 1996 Constitutions which do not deal with human rights issues—and, yet, the same political leaders chose to limit the foreign search for inspiration to human rights and not to authorise expressly the courts to look abroad in cases pertaining to other matters. Yet, this difference has not affected legal practice. South African judges have worked comparatively when dealing with cases unrelated to human rights, and references to foreign law can be found, for example, in decisions dealing with the provincial legislative competences under the 1993 Constitution.

But it may be more than a coincidence that South African judgments have been at their “comparative best” when discussing

152. Other matters include, for example, the legislative process or questions of federalism. In both of these areas there was, incidentally, considerable foreign influence on the drafting process.
human rights disputes, and we feel that there is indeed some merit in the
general distinction that both Constitutions draw between certain
subject-matters when it comes to the use of foreign ideas in the
courtroom. The attempt to develop a rough compass for the use of
comparative law by judges must, therefore, not be restricted to the two
groups of constitutional norms identified by the South African
legislator (human rights and what Germans call Staatsorganisations-
recht, that is, all other constitutional rules pertaining to the structure
and functioning of a state). Other areas of the law where comparative
work is more or less useful must be included in such a system, which
should also try to identify different shades within the larger categories
such as human rights protection, general constitutional norms,
administrative law, or contract and torts.

We will return to this issue below, but here note that this wider
question has also been raised in two forms in the United States, mainly
by those who oppose the use of foreign law by American judges. The
first is: “Why have comparative ideas been used to enlarge or extend
existing rights and not to restrict them?” The second is: “Why have
courts resorted to foreign ideas in some subjects and not others?” Our
quick answer to both questions is consistent to the tenor of this Article:
that is how litigation has happened to develop. However, the answer to
both these questions should, as a matter of principle, be the same: no a
priori restriction should be imposed on the possibility of entertaining a
dialogue with foreign ideas. For what is determinative is not the area
of the law where comparison is contemplated or how the foreign idea
is going to be used to “affect” local law, but the “superiority” and
“transplantability” of the foreign idea when considered as an
alternative to the local model.

Finally, we note that Section 35(1) of the 1993 Constitution was
expressly confirmed by the framers of the 1996 Constitution who
opted for the same rule of interpretation153 after more than two years of
experience with a newly created Constitutional Court—a court which
had shown, on the whole, a “comparative appetite” that must surely
have exceeded the expectations of even the most open-minded
politicians. Within the South African context, the continued use of the
comparative method by judges is, thus, not an aberration forced upon
the system for a limited transitional period by truly exceptional
circumstances, but rather an informed and permanent choice of the

153. See S. AFR. CONST. 1996 § 39 (inviting courts, tribunals, or forums to consider
foreign law when interpreting the Bill of Rights).
constitutional legislator. We stress this again given how many American commentators have been quick to attribute the South African recourse to foreign and comparative law to the “youth and inexperience” of the “new” regime.

iii. The Historical Background

Why has comparative law been so successful in South Africa? Let us continue by providing a brief outline of the country’s most recent constitutional history, for it is here that one will find some explanations which may hold out lessons for others. This survey, however, will also show how South Africa was particularly ready for legal transplants.

The competing political parties, while restructuring the country’s new legal order in the 1990s, agreed on a two-staged reform process. This led to the negotiation of the so-called Interim Constitution (1993 to 1994) and—following the first free elections in May 1994—the final 1996 Constitution. Both documents were strongly influenced by foreign constitutional ideas, the German Grundgesetz of 1949 proving one important source.154 Among the systems (and legal instruments) which influenced the framers, we find the United States, Canada, India, Namibia, the European Union, and the European Convention on Human Rights.

The degree of German influence is quite remarkable given that Germany was the only country outside the common law world and the English-speaking legal community which received such attention from the framers of the new South African constitutional order. This remarkable reception of foreign ideas was mainly fostered by political parties and individual influential academics offering legal advice to the Multi-Party Negotiating Process (MPNP) at Kempton Park (outside Johannesburg) in 1993 and, subsequently, the newly elected Parliament (convened as a Constitutional Assembly between 1994 and 1996). As the cases discussed below show, the South African judiciary was (and also remains) the third main catalyst in this development. The above suggests, once again, that the “human” factor and contacts can play a more significant part in the exchange of ideas than has hitherto been

154. From the German side, in particular, one finds parts of the bill of fundamental rights, the concept of the constitutional state (Rechtsstaat), a specialised constitutional court (as opposed to the American Supreme Court model), and a number of federal features pertaining to, inter alia, the distribution of legislative competence between the central and provincial levels as well as the concept of co-operative government (kooperativer Föderalismus).
acknowledged by the academic literature. This, of course, is but an aspect of the wider issue which has occupied historians for ages: do events or personalities really shape the course of history? As a general rule the answer must surely lie in a synthesis of the two possibilities, that is, the charismatic leader appearing at the right time in history.

The reasons why German constitutional law proved to be such a successful model are of interest in the context of this Article. Thus, parts of the German fundamental rights doctrine had already found their way into southern Africa prior to the political changes in Pretoria, having permeated its borders via the Constitutions of Bophuthatswana\textsuperscript{155} and Namibia. The Supreme Court of South Africa, exercising final judicial authority in Bophuthatswana until 1982 and in Namibia as late as 1990, found itself confronted with cases of constitutional review many years before the first judgments of South African courts were handed down following the enactment of the 1993 Constitution. These judgments referred to German law on more than one occasion and were discussed in South Africa, fuelling the local fundamental rights debate and opening the doors for further German influence in the subsequent constitution-making process.

A second reason can be found in the fact that a number of (mostly Afrikaans-speaking) academics found opportunities for comparative studies in Germany at a time when academic institutions in other countries seemed closed to South African scholars due to the political quarantine imposed on that country. On the constitutional level, the inclusion of the Rechtsstaatsprinzip in the preamble of the 1993 Constitution (inserted literally “overnight” on the initiative of Professor François Venter) and the reception of article 12 GG (freedom of occupation) on the advice of the late Professor Etienne Mureinik in 1996 are, perhaps, the most remarkable direct results of this “personal” connection between the two countries.

Links between judges in southern Africa may also have had a positive effect on the awareness of and knowledge about foreign law in the country. At least one distinguished judge, Mahomed, left the Supreme Court of Namibia and became Deputy President of the new South African Constitutional Court. The close linguistic relationship between Afrikaans and German must also have served as an important bridge for legal ideas; many key German terms such as Rechtsstaat,

\textsuperscript{155} Bophuthatswana is a so-called “homeland” with its own constitution, regarded as independent by South Africa at the time, though internationally never recognised as such.
Wechselwirkung, Wesensgehalt, Drittwirkung, and Bundestreue are often not even translated by South African courts and academics.

Other factors explaining the role of German law during the negotiation process include the international reputation of the Grundgesetz and the support rendered by the German government, political parties, politically affiliated foundations, and academic institutions to the emerging new state. Finally, one could point out that the German legal system that had itself been confronted in the post-War period with a traumatic past, must have appeared as especially relevant to a country struggling to put behind it its own tormenting experience with apartheid.\textsuperscript{156}

As indicated above, the South African judiciary exerted much influence on these legal transplants and today still continues to play an exceptional role in the use of foreign ideas. The South African Constitutional Court in particular (itself a legal transplant) has repeatedly referred to foreign material in order to shape the country’s new and developing body of constitutional doctrine. Judges have thereby not restricted themselves to foreign case law; references to foreign legislation and, more importantly, to academic work feature prominently in many judgments. This demarcates a clear break with the past, when South African judges “did not value academic writing highly,”\textsuperscript{157} and is a change initially necessitated by the absence of South African precedents in this field of law.

Scrutinising Supreme Court and Constitutional Court judgments between July 1994 and August 1998, one of us thus counted no less than 1258 references to the decisions of American, Canadian, British,

\textsuperscript{156} It is important to point out that the importation of foreign ideas and notions was neither wholesale nor always long-lasting. As far as the German side is concerned, some elements such as the Rechtsstaatsprinzip, the interpretative “reading down” of constitutionally challenged statutes in the course of legal disputes (verfassungskonforme Auslegung), the “indirect” or “radiating” effect of fundamental rights in the private sphere (mittelbare Drittwirkung der Grundrechte), parts of the property clause, and the explicit protection of the essential content of a fundamental right (Wesensgehaltsgarantie) were discarded after the transitional period and partly substituted by doctrines already developed in South Africa prior to 1993. Other elements such as the establishment of a specialised court for constitutional matters and parts of the Bundesrat model found their way into the 1996 Constitution, albeit in a strongly modified form. Yet again, other items today closely resemble their German counterparts, such as the constitutional freedom of occupation, the application of certain fundamental rights to juristic persons, and parts of the limitation clause.

German, European, and Indian courts alone.\textsuperscript{158} In view of the language barrier, the strong influence of German law on South Africa thereby calls for some explanation, and our research has shown that most of this effect is due to translations of court judgments made available through the work of a limited number of (non-German!) academics.\textsuperscript{159} Basic comparative work of this kind is obviously one important key, which enables South African judges to take advantage of German ideas, especially in the area of human rights. A precondition is thereby the open-minded approach, which some judges, such as Justice Laurie Ackermann, take towards the use of foreign material.

iv. Comparative Law in South African Courtrooms

Turning now to three particular cases, our aim is to show how South African judges have actually made use of their constitutional mandate to look abroad. The order in which we discuss these three cases is not arbitrary. It reflects the degree of difference in wording and content between the relevant South African provisions on the one hand and, on the other, their foreign counterparts.

In the first case, a foreign solution is, thus, proposed although the text of the 1993 Constitution and the background material of the drafting process offer no indication that its framers had in any way discussed such a possibility. The foreign idea (which would have amounted to a judicial legal transplant) is rejected by the majority of the Constitutional Court.

This is different in the second case. Here, there are clear signs that the political parties negotiating the constitutional settlement of 1993 had already contemplated various solutions found abroad. For political reasons, the agreement eventually found was highly ambiguous, and in interpreting this text it made good sense for the judges to apply their minds to the arguments put forward in the drafting process. Comparative law suggested itself as a valuable method.

The last case concerned a legal transplant, which the legislator took from Germany for very specific reasons. The texts of the 1996 Constitution and the \textit{Grundgesetz} are nearly identical on this point, and comparative law, it seems, would have offered an ideal methodological framework within which to interpret the South African

\textsuperscript{158} JöRG Fedtke, \textsc{Die Rezeption von Verfassungsrecht: Südafrika 1993-1996}, at 446 (2000).
\textsuperscript{159} \textit{See, e.g.}, State v. Makwanyane & Another, 1995 (3) SA 391 (CC) (S. Afr.).
provision. The potential value of foreign experience is clearly the highest in this last case, and, yet, the Court did not look in any detail at the historical background of the South African provision or seek the insights German law could have provided. For reasons explained below, we believe that this was a missed opportunity, but also concede that the working conditions of judges (for example, time constraints, library resources, research staff, and the opportunity to discuss the wider background of cases with experienced colleagues) differ strongly on the various levels of a legal system. Lower courts—as in this case—may, thus, not be adequately equipped to take advantage of comparative law even if the preconditions for the use of the method are ideal.

The first South African case which we present here provides an excellent example of the second “judicial dialogue” identified by Bernhard Rudden—the dialogue between judges—when it comes to the use of foreign law.

In Ferreira v. Levin, the court dealt with the statutory duty of company employees to disclose confidential business information under circumstances specified by section 417 of the South African Companies Act notwithstanding the risk that this information might incriminate them and subsequently be used as evidence in criminal proceedings. Justice Ackermann proposed to expand the protective scope of Section 11(1) of the 1993 Constitution to include (beyond the limits of the constitutional text) a general right to freedom. After referring to Sir Isaiah Berlin and the opinion of Chief Justice Dickson in the Canadian case Regina v. Big M Drug Mart Ltd., he defined this freedom as “the right of individuals not to have ‘obstacles to possible choices and activities’ placed in their way by . . . the State.”

Justice Ackermann justified this interpretation: (1) by emphasising the vast number, extent, and variety of limitations which had been placed on the personal freedom of citizens under the apartheid regime; (2) by reference to the values underlying an “open and democratic society based on freedom and equality”; and (3) by arguing that the new constitutional order required the state to justify

160. Ferreira v. Levin, 1996 (1) BCLR 1 (CC) (S. Afr.).
161. Id. at 27-52 (examining S. Afr. (Interim) CONST. 1993 § 11(1) which grants everyone the right “to freedom and security of the person, which shall include the right not to be detained without trial”).
162. Id. at 33 (relying on [1985] 18 D.L.R. 4th 321).
163. Id. at 29-30.
164. Id. at 30.
any limitation of the citizens' freedoms.\textsuperscript{165} A broad interpretation of Section 11(1) would help to create a "culture of justification," while comparative experience had shown that it would not subject the courts to a flood of frivolous complaints or unduly restrict state legislation.\textsuperscript{166}

Despite references to foreign legal systems such as the United States and Canada, Justice Ackermann developed these ideas and addressed possible objections to his proposal in this part of the opinion primarily within the framework of South African constitutional law and the country's \textit{own} history.\textsuperscript{167}

He then, however, focused his attention to foreign law and analysed in great detail Canadian, U.S., and German experience, as well as the International Covenant on Civil and Political Rights and the European Convention on Human Rights.\textsuperscript{168} These reflections were introduced by the following passage, which seems to indicate that Justice Ackermann was using comparative law mainly (but not exclusively) to \textit{support} a result reached through other means. He wrote:

It is appropriate to consider whether comparable foreign case law would lead to a different conclusion. Direct comparison is of course difficult and needs to be done with circumspection because the right to personal freedom is formulated differently in the constitutions of other countries and in the international and regional instruments. Nevertheless, section 33(1) of our Constitution enjoins us to consider, inter alia, what would be "justifiable in an open and democratic society based on freedom and equality" and section 35(1) obliges us to promote the values underlying such a society when we interpret Chapter 3 and encourages us to have regard to comparable case law. In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character. When, for example, the United States Supreme Court finds that a statutory provision is or is not in accordance with the "due process of law" or when the Canadian Supreme Court decides that a deprivation of liberty is not "in accordance with the principles of fundamental justice" . . . we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality.\textsuperscript{169}

\textsuperscript{165} \textit{Id.} at 32.
\textsuperscript{166} \textit{Id.} at 36.
\textsuperscript{167} \textit{Id.} at 27-36.
\textsuperscript{168} \textit{Id.} at 37-52.
\textsuperscript{169} \textit{Id.} at 40.
This, then, is a good example of the open-minded approach that many South African judges take when dealing with questions of national law—societies which broadly operate on the basis of a similar set of values are taken as an additional point of reference in order to determine the validity of their own solution. What is surprising, though, is the amount of space invested for this purpose (judges in other countries such as Germany, the United States, or England would—at most—add a throwaway line or a footnote indicating that their solution is confirmed by the approaches found abroad). We, thus, suspect that Justice Ackermann's reflections served an additional purpose beyond mere confirmation of "whether comparable foreign case law would lead to a different conclusion," and the final paragraph dealing with the interpretation of Section 11(1) indicates that foreign ideas are indeed part of his ratio decidendi.¹⁷⁰

The attempt to expand Section 11(1)¹⁷¹ was, admittedly, difficult. Neither the text of the 1993 Constitution nor the negotiations at Kempton Park indicate that the political parties contemplated the introduction of any such right, and only during the later work of the Constitutional Assembly do we find references to a broad residual right in the positions of the African National Congress and the Freedom Front.¹⁷²

These textual differences between the 1993 Constitution and its foreign counterparts are an important counter-argument for the majority of the Court. Though in agreement with Justice Ackermann that the relevant provision of the Companies Act is unconstitutional (though for different reasons), President Chaskalson felt the need to explain why Section 11(1) should be interpreted primarily as a protection of the physical integrity of every person. For this purpose, he, too, relied on comparative evidence:

This is how a guarantee of "freedom (liberty) and security of the person" would ordinarily be understood. It is also the primary sense in which the phrase, "freedom and security of the person" is used in public

¹⁷⁰ id at 51. Justice Ackermann includes these ideas in his "end result."
¹⁷¹ The expansion of the document was along the lines, for example, of the German *allgemeine Handlungsfreiheit*. This notion, derived from article 2(1) GG, provides a residual right to individual self-fulfillment (*freie Entfaltung der Persönlichkeit*) subject to the rights of others and subject to the constitutional order and morality. Article 2(1) GG is a general clause establishing freedom from any kind of state intervention, but plaintiffs will only invoke the provision successfully in the absence of a more specific fundamental right. *GRUNDEGESETZ* [GG] [federal constitution] art. 2(1) (F.R.G.).
¹⁷² CONSTITUTIONAL ASSEMBLY, THEME COMMITTEE 4, SCHEMATIC REPORT ON FREEDOM AND SECURITY OF THE PERSON OF AUGUST 1995, at 2.2.1 and 2.2.2.
international law. The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and People’s Rights, all use the phrase “liberty and security of the person” in a context which shows that it relates to detention or other physical constraints. Sieghart, notes that although “... all the instruments protect these two rights jointly in virtually identical terms, they have been interpreted as being separate and independent rights”, and that the European Commission of Human Rights and The European Court of Human Rights have found that what is protected is “physical liberty” and “physical security”. There is nothing to suggest that the primary purpose of section 11(1) of our Constitution is different.  

He then emphasised the differences in wording between the foreign constitutions specifically discussed by Justice Ackermann and responded to the arguments drawn from United States, Canadian, and German law. Focusing particularly on the Lochner decision of the United States Supreme Court, President Chaskalson noted the dangers of a broad interpretation of Section 11(1) for the workload of the courts and rejected (at least for the time being) the solution proposed by Justice Ackermann.

Three points are worth emphasising in this context.

First, Justice Ackermann emerged from this judicial dialogue with some success despite the rejection of his approach by the majority of the Court. The opinion of President Chaskalson concedes that the text could be interpreted differently in other factual circumstances, and Justice O’Regan had already taken a middle ground in the subsequent Bernstein decision of 1996. Justice Ackermann’s interpretation could thus still bear fruit in the future.

173. Ferreira, 1996 (1) BCLR (CC) at 100-01.
174. Id at 102-07. President Chaskalson thus notes:
Reference is made in the judgment of Ackermann J to the manner in which the courts have construed the Constitutions of the United States of America, Canada and Germany. It is important to appreciate—as Ackermann J is at pains to point out—that these Constitutions are formulated in different terms, and the rights protected under them are not dealt with in the same way as the rights protected in Chapter 3 of our Constitution are.

Id at 102.

175. Id at 105-06 (citing Lochner v. New York, 198 U.S. 45 (1905)).
176. Bernstein v. Bester, 1996 (4) BCLR 449 (CC) at 507 (S. Afr.). Justice O’Regan thus wrote:
Section 11(1), however, will protect a residual arena of freedom. I do not believe that this residual scope of the right should be interpreted as broadly and generously as possible. To this extent I disagree, respectfully, with Ackermann J. I also
Secondly, President Chaskalson did not reject the solution proposed by Justice Ackermann simply because it was strongly influenced by foreign law. Both sides used comparative law to argue their respective positions.

Finally, Justice Ackermann’s approach would have amounted to a full legal transplant, not just an expansion or development of the law on the basis of constitutional principles already contained in the 1993 text. This free-standing use of comparative law in the courtroom must be particularly controversial as judges who venture into hitherto uncharted constitutional waters inevitably slip into a highly legislative function.

This last aspect is different in our second South African case, which is the decision of the Constitutional Court in Du Plessis v. De Klerk, dealing with the horizontal effect of constitutional rights; in contrast to the question of a residual right to freedom, which was not discussed in any detail at Kempton Park, the issue of a possible “Drittewirkung” led to one of the most heated debates between so-called “anti-horizontalists” and those in favour of the application of fundamental rights and freedoms in the private sphere. The outcome of this political conflict was a highly ambiguous constitutional text, which avoided the clear language proposed, for example, by the Technical Committee on Fundamental Rights, a body responsible for the scientific support of the politicians discussing the issue.

With respect to the use of foreign law, the Constitutional Court’s position was, thus, different from Ferreira in at least two respects. First, the Court could simply not avoid deciding the issue, which had
disagree, respectfully, with Mokgoro J that the right to freedom in section 11(1) should be limited to physical freedom. It is likely, given the clear entrenchment of freedoms such as expression, belief and association, that the residual scope of section 11(1) will largely concern physical freedom, but I am unconvinced that it should be limited to physical freedom.

_Id_. at 511.

177. A historical interpretation of Section 12 of the 1996 Constitution would thus have to consider the following passage in_SOUTH AFRICAN LAW COMMISSION, EXPLANATORY MEMORANDUM OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS TO THEME COMMITTEE 4 (1996) [hereinafter EXPLANATORY MEMORANDUM]. The report stated: “The right to freedom refers in this context to physical deprivation of liberty, not other dimensions of freedom which are protected by other rights, e.g., freedom of assembly, religion, conscience, speech etc.” _Id_. at 35 n.2. A major concern of the majority in Ferreira, the strict requirements for a limitation of Section 11(1), has, on the other hand, been mitigated by Constitutional Assembly’s sole reliance on a general limitation clause in the 1996 Constitution.

178. 1996 (3) SA 850 (CC) at 879-83 (S. Afr.).
179. See EXPLANATORY MEMORANDUM, _supra_ note 177.
been left open by the Multi-Party Negotiating Process in 1993. Here, we encounter a similarity with the well-known death penalty dispute, which was equally left for the courts to resolve.\(^{180}\) In both cases, South African judges were thus given a mandate by the political process—a mandate, one could argue, not only to apply traditional judicial, but also legislative techniques, which must surely include the use of comparative law. Secondly, the judges had to deal with an ambiguous textual framework which was already influenced by comparative arguments raised by politicians and academics alike.\(^{181}\) Instead of conjuring up a new element (as Justice Ackermann in *Ferreira*), the Court was, thus, in a way, merely completing a puzzle, many parts of which were already foreign in origin.

Taking into account this legislative background, it is, thus, no surprise that *Du Plessis* is probably one of the most comparative judgments ever published. Foreign law also had exceptional impact on the reasoning of the judges because the issue at hand—the *inter partes* application of fundamental rights—has, at one time or the other, riddled most societies with a system of human rights protection.\(^{182}\) As Justice Kentridge emphasises in the leading opinion of the judgment:

> The question whether Chapter 3 of the Constitution (Fundamental Rights) has only a “vertical” application or has in addition a “horizontal” application has been the subject of considerable debate by commentators on the Constitution. There have been similar debates, both academic and judicial, in other countries with constitutional Bills of Rights.

He continues: “The ‘horizontality’ issue has arisen in other countries with entrenched Bills of Rights and the parties have supplied

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180. State v. Makwanyane & Another, 1995 (3) SA 391 (CC) (S. Afr.).
183. *Du Plessis* v. De Klerk, 1996 (3) SA 850 (CC) at 856 (S. Afr.).
us with a wealth of comparative material both judicial and extra-
judicial, for which we are grateful.”\footnote{184} Before embarking on an
extensive analysis of U.S., Irish, Canadian, and German law, as well as
the work of Chief Justice Barak in Israel, Justice Kentridge
nevertheless emphasised the need to bear in mind the specific
characteristics of the South African setting:

There can be no doubt that the resolution of the issue must ultimately
depend on an analysis of the specific provisions of the Constitution. It
is nonetheless illuminating to examine the solutions arrived at by the
courts of other countries. The Court was referred to judgments of the
courts of the United States, Canada, Germany and Ireland. I would not
presume to attempt a detailed description, or even a summary, of the
relevant law of those countries, but in each case some broad features are
apparent to the outside observer. A comparative examination shows at
once that there is no universal answer to the problem of vertical or
horizontal application of a Bill of Rights.\footnote{185}

It would be superfluous to provide a full reconstruction of the
judgment in this Article and interested readers are, instead, referred to
the original text. We do, however, wish to stress two points.

First, we find again—as in Ferreira—a balance between a line of
reasoning which focuses on the provisions of the 1993 Constitution
and the discussion of foreign ideas. The latter are thereby not only
used to confirm a “South African” solution; references to Canadian
and German law show that some foreign ideas were actually used to
shape the result in Du Plessis. Justice Kentridge, thus, describes
remarks on considerations of policy cited from the opinion of Judge
McIntyre in Dolphin Delivery as “fully applicable to Chapter 3 of our
own Constitution,”\footnote{186} and explains that the German approach to the
interpretation of private law by a specialised constitutional court is of
particular interest to South Africa. We thus find the following passage
in the judgment:

The model of indirect application or, if you will indirect horizontality,
seems peculiarly appropriate to a judicial system which, as in Germany,
separates constitutional jurisdiction from ordinary jurisdiction. This
does not mean that the principles evolved by the German Constitutional
Court must be slavishly followed. They do however afford an example

\footnote{184. Id. at 871.}
\footnote{185. Id. at 873.}
\footnote{186. Id. at 891.}
of how the process of influencing the common law may work in practice.\textsuperscript{187}

A second element which specifically enhanced the influence of German law on the thinking of some judges is the close genealogical relationship between South African law and the German legal system. The provisions of the 1993 Constitution relevant in \textit{Du Plessis} may not have been \textit{direct} legal transplants (we will deal with such a transplant in our last example from South African case law), but there \textit{was} certainly substantial influence of German legal thinking on the work of the Multi-Party Negotiating Process related to the question of \textit{Drittwirkung}. This thinking continued to exert its influence in \textit{Du Plessis}. One can see this clearly from the following passage from the opinion of Justice Ackermann:

That the drafters of our Constitution had recourse to or were influenced by certain features of the GBL in drafting our Constitution is evident from various of its provisions. The marked similarity between the provisions of section 35(3), enjoining courts “\textit{[i]n the interpretation of any law and the application and development of the common law and customary law}” to “have due regard to the spirit, purport and objects of [Chapter 3]”, and the indirect horizontal application of the basic rights in the GBL in German jurisprudence cannot, in my view, simply be a coincidence. It provides a final powerful indication that the framers of our Constitution did not intend that the Chapter 3 fundamental rights should, save where the formulation of a particular right expressly or by necessary implication otherwise indicates, apply directly to legal relations between private persons.\textsuperscript{188}

Finally, we wish to point out that the use of comparative law was not uncontroversial in \textit{Du Plessis}. In dissenting with the majority of the Court (which opted for an indirect application of fundamental rights in the private sphere), Justice Kriegler emphasised the unique character of the South African constitutional arrangements and cautioned against too much reliance on foreign experience. At paragraph 127 he, thus, wrote:

It is therefore no spirit of isolationism which leads me to say that our Constitution is unique in its origins, concepts and aspirations. Nor am I a chauvinist when I describe the negotiation process which gave birth to that Constitution as unique; so, too, the leap from minority rule to representative democracy founded on universal adult suffrage; the Damascene about-turn from executive directed parliamentary

\textsuperscript{187} \textit{Id.} at 896.
\textsuperscript{188} \textit{Id.} at 926 (footnotes omitted).
supremacy to justiciable constitutionalism and a specialist constitutional court, the ingathering of discarded fragments of the country and the creation of new provinces; and the entrenchment of a true separation and devolution of powers. Nowhere in the world that I am aware of have enemies agreed on a transitional coalition and a controlled two-stage process of constitution building. Therefore, although it is always instructive to see how other countries have arranged their constitutional affairs, I do not start there. And when I do conduct comparative study, I do so with great caution. The survey is conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.  

And at paragraph 144, he continued:

Nor does the advent of the Constitution . . . warrant the wholesale importation of foreign doctrines or precedents. To be true we are to promote values not yet rooted in our traditions and we must have regard to applicable public international law. We are also permitted to have regard to foreign case law. But that does not amount to a wholesale importation of doctrines from foreign jurisdictions.  

We accept this criticism, which has also featured in the opinions of judges in other legal systems. At the same time, we believe that our survey has shown the colleagues of Justice Kriegler to be fairly balanced in their use of foreign law. The Ferreira decision, in particular, is an example where the majority of the Constitutional Court carefully weighed the comparative arguments put forward by Justice Ackermann—only to reject them with a view to the specific features of South African constitutional law. A second criticism of Justice Kriegler seems to be, however, more substantial. At paragraph 147 of the Du Plessis decision, he, thus, remarked:

I find it unnecessary to engage in a debate with my colleagues on the merits or demerits of the approaches adopted by the courts in the United States, Canada or Germany. That pleases me, for I have enough difficulty with our Constitution not to want to become embroiled in the intricacies of the state action doctrine, Drittwendung and the like.  

Justice Kriegler is referring here to the basic precondition of any comparative exercise, which is adequate knowledge about foreign law. He later further elaborates this point in the Bernstein case, criticising the depth of comparative analysis as conducted in South African  

\begin{footnotes}
189. Id. at 939-40 (Kriegler, J., dissenting).
190. Id. at 949 (Kriegler, J., dissenting).
191. Id. (Kriegler, J., dissenting).
\end{footnotes}
courtrooms.\textsuperscript{192} Again, we feel that both \textit{Ferreira} and \textit{Du Plessis} do not fall foul of the standards rightly invoked by Justice Kriegler, though our next case does show that especially lower courts may have difficulties in this respect. We will, thus, return to this problem when addressing the dangers of using foreign law under Part VI below.

Our last example from South Africa serves to illustrate the special importance of comparative law in situations where courts have to deal with legal transplants. These can take place on different levels of a legal system and for a variety of reasons. More than a decade ago, Alan Watson declared that "[b]orrowing from another system is the most common form of legal change,"\textsuperscript{193} and it seems as if the demise of the former socialist systems in Eastern Europe, the ambition of many countries to join the European Union and to develop active commercial relationships with the United States, as well as the democratisation of many societies, accompanied by the concerted effort to improve human rights protection around the world, have further strengthened the trend towards a global spread of legal ideas. Legal transplants are, thereby, not only the result of decisions made by national legislators but also—if not as frequent—a product of judicial activity. Borrowing is, therefore, often justified by the quality of a given foreign solution.

Other, at times overlapping, reasons include: the harmonisation of law within the framework of international agreements; the influence of new or attractive political concepts; special economic, judicial, or cultural ties between societies;\textsuperscript{194} the general influence that many "parent" legal systems continue to exert on their former colonies;\textsuperscript{195} or, finally, demands of donor countries calling for the observance of democratic standards and respect for human rights by nations receiving from them development aid.\textsuperscript{196} The unequal distribution of economic power creates further incentives for the introduction of changes based on foreign commercial law, and military intervention followed by the reconstruction of societies on the basis of "imported"

\textsuperscript{192} Bernstein v. Bester, 1996 (4) BCLR 449 (CC) at 506-07 (S. Afr.) (Kriegler, J., concurring in the result).

\textsuperscript{193} ALAN WATSON, LEGAL ORIGINS AND LEGAL CHANGE 73 (1991).

\textsuperscript{194} One such close relationship which has led to a number of mutual influences is that between Germany and Austria.

\textsuperscript{195} KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 65-67 (3d ed. 1998).

legal principles has re-emerged, it seems, as yet another scenario favouring legal transplants.

The transplantation of law is, of course, a dynamic process. The initial phase involves the identification of an appropriate model and (in most cases) more or less comprehensive adjustments of the chosen material in order to merge it successfully with the existing rules of the borrowing system. Even mere translation will, thus, often increase the differences between the original and the imitated provision.

But what about the further development of foreign ideas once they have found their way into their new legal and factual environment? The borrowing system is not in any way bound by the interpretation of the model provision in its country of origin, and the courts are, thus, free to ignore (or take into account) the case law and academic literature available in that system. That said, not even the strongest critics of comparative law in the courtroom could deny that there are, indeed, good reasons for judges to look at this foreign material. For lawyers operating in a legal system which attaches importance to the legislative intent, a comparison can only help to show why a particular foreign model was chosen; by highlighting possible differences between that model and the own national variant, the meaning of one's own law may also become clearer. More importantly, foreign case law dealing with a very similar (or even identical) provision will be likely to display a range of possible solutions for disputes with a similar factual background. At the end of the day, that does not absolve judges from forming their own opinions; it may, however, expand the "argumentative horizon" for the solution of their cases and, thus, sometimes, even save precious court time.

Let us now look more closely at one particular legal transplant and its subsequent fate in a South African courtroom.

As pointed out above, a number of ideas were taken from the German Grundgesetz in the process of reconstructing the South African constitutional order between 1993 and 1996. The right to freedom of trade, occupation, and profession guaranteed by Section 22 of the 1996 Constitution was, thereby, drafted on the basis of the German Berufsfreiheit protected by article 12(1) GG. It is not always easy to identify legal transplants, but, in this instance, the South African provision seems to be a straightforward candidate. A simple textual comparison immediately reveals the close relationship. Both norms establish the right to choose freely an occupation or profession and allow the practice of such activities to be regulated by law. Both
systems restrict the protective scope of this right to nationals. Here, then, is the text of the two provisions:

<table>
<thead>
<tr>
<th>Article 12(1) GG\textsuperscript{197}</th>
<th>Section 22 of the 1996 Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. (2) The practice of an occupation or profession may be regulated by or pursuant to a law.</td>
<td>(1) Every citizen has the right to choose their trade, occupation or profession freely. (2) The practice of a trade, occupation or profession may be regulated by law.</td>
</tr>
</tbody>
</table>

When one moves to details, three differences become apparent.

The German text includes a reference to the place of training and specifies that the practice of an occupation or profession may also be regulated pursuant to a law. In South Africa, trade is singled out as a separate category of protected activity. Closer analysis shows, however, that these differences in wording are not substantial. The term “occupation” (Beruf) is generally acknowledged to mean any permanent activity designed to create and safeguard the economical basis of earning a livelihood in Germany and covers all forms of commercial activity including trade. The choice of a place of training is thereby clearly not more than a sub-category of the right to choose freely an occupation for which such training is necessary or desirable. Finally, the ability of the South African executive to regulate the practice of a trade, occupation, or profession pursuant to a law is contained in the right to regulate by law. As in Germany, laws which meet the constitutional requirements of a limitation can authorise the executive to take further action within the limits of the empowering statute.

This \textit{prima facie} evidence that the South African provision was, indeed, drafted along the lines of the German model is further strengthened by a contextual analysis of the South African Bill of Rights. The 1996 Constitution relies on a general limitation clause

contained in Section 36. A similar provision was included in Section 33 of the 1993 Constitution, but was accompanied there by a number of additional, specific ("internal") limitation clauses located within the various human rights provisions themselves (much in the style of the German Grundgesetz, which does not contain a general limitation clause). These superfluous "internal limitation clauses" were omitted in 1996. The right to freedom of trade, occupation, and profession, however, a latecomer in the drafting process which substituted the right to economic activity introduced in 1993, obviously retained in its second sentence the first part of the special limitation clause which the draftsmen had found in its German counterpart. This second sentence seems to be redundant for the purposes of simply limiting the right safeguarded by Section 22 (which is already possible on the basis of the general limitation clause195) and can only be explained in one of two ways. Either it is an editorial error, which is rather unlikely given the omission of the words "or pursuant to [a law]" in preliminary drafts of the text and the careful deletion of the other internal limitation clauses contained in the 1993 Constitution. Alternatively, it is a sign that the draftsmen attached some significance to the difference between the choice (mentioned in the first sentence of the provision) and the practice of a trade, occupation, or profession (expressly subjected to a limitation by law in the second sentence). And sure enough—it is precisely this distinction which characterises article 12(1) GG and has influenced the approach of German courts when dealing with the interpretation of that provision. Depending on the quality of a legislative or administrative measure, different levels of judicial scrutiny are, thereby, applied with respect to limitations of the choice (mentioned in the first sentence) as opposed to the practice of an occupation or profession (mentioned in the second sentence).

198. Section 36 of the Republic of South Africa Constitution Act 1996 declares:

(1) The rights in the Bill of Rights may be limited 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, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST. 1996 § 36.

199. This is also pointed out by Ignus Rautenbach and E.F.J. Malherbe, stating, "[t]he clause does not seem to serve any purpose." I.M. RAUTENBACH & E.F.J. MALHERBE, CONSTITUTIONAL LAW 327-28 (2d ed. 1996).
Finally, the German origin of Section 22 is also confirmed by contemporary accounts of the drafting process. Peter Leon, one of the experts intimately involved in the negotiations leading to both Constitutions, recalls that the stalemate between those in favour of giving the state more latitude to engage in the socio-economic reconstruction of the country and those who stressed the protection of individual freedom, property, and economic activity, was overcome by a proposal of the late Professor Etienne Mureinik, who pointed to the German approach as a possible compromise.200

This German origin of Section 22 was acknowledged in the South African decision *City of Cape Town v. Ad Outpost (Pty) Ltd. & Others*, a case where the plaintiff (a commercial firm) challenged a municipal by-law placing restrictions on the use of billboards for commercial purposes by relying, inter alia, on the protection offered by the freedom of trade, occupation, and profession.201 Said the court:

Section 22 appears to be modelled on section 4(1) of the German Basic Law which provides that all Germans have the right freely to choose their occupation and profession, their place, work study or training. The practice of an occupation or profession may be regulated by law.

The German courts have interpreted section 12 to provide a considerable amount of constitutional protection for commercial activities. Thus in the *Pharmacy* case 7 BVerfGE 377... article 12(1) was interpreted to empower a legislature to regulate the practice as well as the choice of an occupation. Regulations dealing with the latter are greatly circumscribed by the article. The practice of an occupation which is the relevant issue in the present case may be “restricted by reasonable regulations predicated on considerations of the common good”. In short an uncritical application of German jurisprudence would afford some assistance to respondent’s attempt to attack the by-law in terms of section 22 of the Constitution.202

As pointed out above, German constitutional doctrine does, indeed, differentiate between the choice and the practice of an occupation, establishing a higher level of judicial scrutiny for limitations of the former. But, as correctly indicated in the South African judgment, both types of limitation are subject to the principle of proportionality, which is regarded as a basic constitutional safeguard often derived from the rule of law, but which is not found in the text of

201. City of Cape Town v. Ad Outpost (Pty) Ltd. & Others, 2000 (2) BCLR 130 (C) at 131 (S. Afr.).
202. Id. at 141 (citations omitted) (emphasis added).
the _Grundgesetz_ itself. Under German law, limitations such as the restrictions imposed by the City of Cape Town regarding billboards would thus have to be capable of achieving the legislative or administrative aim (Geeignetheit); they would have to be the mildest means by which this aim can be achieved (Erforderlichkeit); and they would have to be reasonable when balancing the adverse effects of the measure on the individual citizen with the positive effects on the public interest (Verhältnismäßigkeit). The different structure of the South African Constitution, which constitutionalised the principle of proportionality as part of its general limitation clause, led the South African judge to a different result regarding the appropriate standard of judicial scrutiny in this case. The Court, thus, continued:

However for Mr Heunis’ [counsel for the company] submission to be accepted, a similar approach will be required to be followed to interpret section 22. There is always a great danger in the uncritical employment of foreign law in the process of domestic constitutional interpretation. Notwithstanding that article 12 and section 22 are similar in wording the latter must be interpreted in the context of the South African constitutional text and its own pedigree... The purpose of section 22 would thus appear to be to ensure that regulations which control a citizen’s right to choose a trade and occupation or profession should be implemented in a rational manner.\(^203\)

When it comes to limitations of the practice of a trade, occupation, or profession, South African authorities, therefore, only need to show a rational connection between the desired measure and a legitimate public interest. According to this interpretation, the special internal limitation clause taken from the _Grundgesetz—specifically introduced, as shown above, in an attempt to strike a balance between necessary state intervention and the protection of the individual on the basis of the German model\(^204\)—thus, leads to a much lower level of protection for the individual. The regulation of commercial practice is not even subject to a proportionality analysis, which is only activated (on the basis of the general limitation clause) if South African authorities wanted to limit the choice of a trade, occupation, or profession. The flexible and sliding scale of judicial scrutiny—which determines the specific character of the German model and which formed the basis of the political compromise in South Africa during the negotiation process in 1996—is, thus, exchanged for an all-or-

\(^{203}\) _Id._ at 141-42.

\(^{204}\) The importance of the public interest and the degree of danger to this interest play a crucial role in the application of the principle of proportionality.
nothing approach which draws a rigid line between these two types of limitation.

The differences in the interpretation of the two provisions are even more profound when it comes to the application of the South African norm to juristic persons. In *City of Cape Town v. Ad Outpost (Pty) Ltd. & Others*, the respondent—a legal entity—could not even invoke successfully the protection offered by the freedom of trade, occupation, and profession. Dismissing Section 22 of the 1996 Constitution as a possible defence in this case, the Court explained:

In my view section 22 introduces a constitutional protection to be enjoyed by individual citizens as opposed to juristic bodies. The right ensures that each citizen will have the right to choose how to employ his or her labour and skills without irrational governmental restriction. It is not a provision which should be extended to the regulation of economic intercourse as undertaken by enterprises owned by juristic bodies which might otherwise fall within the description of economic activity.

For this reason I do not consider that section 22 is of any assistance to respondents in the present case.205

This is a surprisingly brief discussion of a very difficult and, in practice, highly relevant question which has been the subject of much academic writing and case law in Germany. Comparative work would thus have revealed that article 12 GG offers full protection to juristic persons formed under German law. This is especially important because Section 8(4) of the 1996 Constitution—dealing with the application of human rights to juristic persons in South Africa—is, again, a legal transplant based on the German approach. Thus, the two texts read as follows:

<table>
<thead>
<tr>
<th>Article 19(3) GG</th>
<th>Section 8(4) of the 1996 Constitution</th>
</tr>
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<tbody>
<tr>
<td>Basic rights also apply to domestic corporations to</td>
<td>A juristic person is entitled to the rights in the Bill of Rights to the</td>
</tr>
<tr>
<td>the extent that the nature of the right permits.</td>
<td>extent required by the nature of the rights and the nature of that juristic</td>
</tr>
<tr>
<td></td>
<td>person.</td>
</tr>
</tbody>
</table>

Under these circumstances, the arguments which led German constitutional doctrine to expand the scope of protection to legal entities when it comes to commercial activity must surely have been of interest to the South African judge confronted with the very same

205. *City of Cape Town*, 2000 (2) BCLR at 142.
question. This is especially true, since a textual analysis of the 1996 Constitution itself raises serious doubts concerning the restrictive approach of the South African court, which is to a large extent focused on the term "citizen." In all other cases, the Bill of Rights of the 1996 Constitution thus refers to citizenship only where the framers of the Constitution tried to identify rights which are granted to citizens and not to aliens. These are rights which can obviously not be exercised by a juristic person—political rights (including the right to form, participate in the activities of, or recruit members for, a political party; the right to free, fair, and regular elections; and the right to vote and to stand for public office), the right not to be deprived of citizenship, the right to enter, to remain in, and to reside anywhere in the Republic; and the right to a passport. Clearly, Section 22 does not belong to this group. The reference to "citizens" is, therefore, likely to be an editorial error resulting from the translation of the German model, which indeed refers to "all Germans"—distinguishing (as does the 1996 Constitution in the instances mentioned above!) between German natural and juristic persons and aliens. A comparative analysis could have clarified this wider background and, perhaps, led to a different outcome of the case.

At this point we feel, again, the need to emphasise that foreign law can never be a binding guideline for the national judge—not even in the case of closely related legal transplants. In this instance, therefore, the South African courts are not in any way bound by a virtual German "copyright" concerning the interpretation of their "own" freedom of occupation enshrined in the 1996 Constitution. On the contrary, the different socio-economic parameters prevalent in both countries actually call for a very careful assessment of the transplanted solution and can, perhaps, justify an interpretation which gives South African authorities more latitude in the regulation of economic activity or restricts the right to natural persons. But we also feel that comparative law can provide important additional angles from which to analyse the local legal system. Especially in the case of legal transplants, the method can lead to a more informed result, and we see no reason why it should be restricted to the legislator. Here, the German model was chosen for specific reasons by the framers of the 1996 Constitution, and we have serious doubts whether the solution adopted by the Court regarding the low level of justification required

207. Id. § 20.
208. Id. § 21.
for a limitation of the practice of a trade, occupation, or profession can be reconciled with the original intent of the Constitutional Assembly. The application of the right to juristic persons is, perhaps, a different matter. In the absence of a clear constitutional answer, the judge was bound to apply Section 8(4) of the 1996 Constitution in order to determine whether the respondent was entitled to invoke the freedom of occupation, taking into account both the nature of the right and the nature of the juristic person in question. Employing the very same approach, German experience could have been of particular interest in this context and would certainly have facilitated a more profound discussion of this important question. The South African result could still have been different, but a comparative analysis would have at least revealed that the choice of the term “citizen” in the text of the 1996 Constitution is probably just a coincidence resulting from the translation of the German text and not an informed choice of the legislator.

V. WHEN SHOULD SUCH DIALOGUE TAKE PLACE?

A. When the Court Has To Discover “Common Principles of Law”

At first blush, one would certainly expect a court which operates in an international setting—especially when it is, by its very composition, multi-national in character—to work comparatively. A distinction should be made, however, according to the rules which judges sitting on such bodies apply. These can fall into one of two categories.

In the first, they form an independent system of law, which has little or no connection to other (national or international) legal orders. Here, comparative law will have the same appeal (strong or weak) as it does in any other national courtroom. In the second category, these rules can have direct textual or contextual links to other systems of law, either by explicit references to particular features of these systems or by deriving much of their implicit logic from such law. A court working with rules which fall into the latter category will be likely to benefit from comparative work.

The European Union (EU) may arguably be the best legal order to analyse under this heading. Its roots go back to the European Coal and Steel Community of 1951, which was initially conceived by its six founding Member States to fulfil a very limited purpose. By 2005, the EU had, however, developed into a union of twenty-five nations, and it exerts substantial influence on the Member States’ national law in
areas as diverse as agriculture, environmental protection, social security, human rights, data protection, monetary policy, and, most importantly, issues related to the free movement of goods, persons, services, and capital. Some estimate that as much as sixty percent of the national law in EU Member States is today directly or indirectly influenced by European legislation.

Such a development does not, of itself, necessarily change the character of the rules applied in an international organisation, and despite the additional competences transferred to the European level over the past decades, Community law could still aim at far-reaching (or even complete) independence from the law of its Member States.

It seems, however, that Europe is not a one-way street. As the number of players (and aims pursued) have increased, the points of contact (and the frictions) between European legislation and purely national law have grown. The differing political interests of the Member States—each pursuing its own agenda and protecting its individual legal infrastructures and traditions—have contributed to this, and the exchange between the supranational level and national systems of law must, under such conditions, be quite substantial. Numerous indications of such an exchange with other systems (national and international\textsuperscript{209}) can be found in Community law. By way of illustration, we mention only two.

Article 6(1) of the Treaty of Maastricht emphasises “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” as being “common to the Member States.”\textsuperscript{210} And the Charter of Fundamental Rights of the European Union, solemnly declared eight years later, invokes in its Preamble the “spiritual and moral heritage” of the Member States and claims that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”\textsuperscript{211}

According to this document, the EU “contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the

\textsuperscript{209} Think, for example, of the European Convention on Human Rights (an instrument of the Council of Europe).


\textsuperscript{211} 2000 O.J. (C 364) 1, 1.
organisation of their public authorities at national, regional and local levels."\(^{212}\)

Finally, the Charter refers to "the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States."\(^{213}\)

These references to a common heritage and constitutional traditions common to the Member States indicate that the twenty-five independent nations currently forming the European Union share common ground, despite their national identities, and that this common ground is an important point of reference for the EU as a separate legal system.\(^{214}\) And yet there can be hardly any doubt that many of the core principles found in England, France, and Germany—to mention but three countries only—differ substantially as far as notions of democracy, judicial review, and human rights are concerned.\(^{215}\) Despite their undisputed similarities, European legal cultures are still far apart in many ways, and judges who have to determine (and then utilise) the common constitutional traditions of these twenty-five societies face a truly daunting task. But do European judges really have to worry about this?

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212. Id.
213. Id.
214. One could add here article 1-2 of the Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1, which declares:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

215. Many argue that the undiluted winner-takes-all election system to the House of Commons currently in operation in the United Kingdom would not pass constitutional scrutiny by the German Constitutional Court for lack of compliance with the idea that every vote should have equal weight. See GRUNDEGESETZ [GG] [federal constitution] art. 38 (F.R.G.). The English, on the other hand, are accustomed to—and in their majority endorse—the principle of parliamentary supremacy, and would have great difficulty in accepting the powers of judicial review accorded to the judges of the German Bundesverfassungsgericht in the first place. If the worst comes to the worst (as it seemingly did in the recent House of Lords decision concerning the Terrorism Act of 2001), English judges can only declare laws enacted by Parliament as "incompatible" with the Human Rights Act of 1998. The final word in the matter will be spoken in Westminster.

With its system of limited abstract review exercised by the Conseil constitutionnel, France takes middle ground on this question. But would the French (or the English) accept the profound impact of human rights protection as it has developed in Germany over the past fifty years—forcing the state to justify its activities in areas as diverse as zoning, the introduction of a duty to wear safety belts in motorised traffic, the use of administrative fees levied from university students, or the enactment of laws forcing citizens to keep dogs on a leash?
One could, for instance, argue that the Preamble of the Charter of Fundamental Rights exerts even less practical influence than the various human rights provisions of the document themselves. The rights enumerated in the Charter are, after all, not judicially enforceable.

The response to this argument is twofold.

First, the judges of the European Court of Justice (ECJ) may, in future years, have to apply and interpret a European Constitution which contains rights based, apparently, on these common values; indeed, the Charter is already used by the Court as an interpretative tool in the resolution of human rights disputes today. Secondly, however uncertain the fate of the Draft Constitution may be, article 6(1) of the EU Treaty (a core provision of European law) likewise calls for an interpretation of the "fundamental [rights] . . . common to the Member States." These rights are regarded as general principles of Community law, and, as such, directly impact on the outcome of cases. What, then, are these rights, and what is their precise legal content in the eyes of Europeans today? Only a comparative survey, it seems, can provide an answer to these important questions.

The thesis that the ECJ cannot ignore the law of the Member States is supported by three further arguments.

First, the Treaties themselves sometimes refer directly to national law. This is, for example, the case with article 288 of the EC Treaty, which determines that "in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

Secondly, both primary and secondary Community legislation is influenced by rules of municipal law and makes use of legal terminology which has a common content in the various national legal systems. The use of common (national) terms in EU legislation is an indication that judges applying EU law should at least seek guidance in

216. We prefer, at this stage, to call it a "draft" until it has been ratified by all twenty-five Member States. On 20 February 2005, Spain was the first country to hold a referendum (77% voted in favour). To date (April 2005), five Member States have passed legislation ratifying the Constitution.

217. EU Treaty, supra note 210 (emphasis added).

national law when ascertaining the precise meaning of particular rules in their judgments.\footnote{219}

Thirdly, judges applying EU law encounter the same difficulties as their national colleagues when it comes to gaps in the law. Judges confronted with open questions are likely to find possible answers in the law of the Member States and should make use of these "national treasures."\footnote{220}

Has the ECJ, then, used comparative law as a tool? If so, to what extent has the method influenced the development of specific principles of Community law or the outcome of particular cases?

On the surface of ECJ judgments, one finds little evidence of comparative work; open references to the national law of the Member States are, on the whole, far and few. The \textit{Algera} decision is one exception.\footnote{221} Confronted with the question of whether an individual administrative act, which has given rise to a subjective right, may be revoked by a public authority (an issue not addressed by EU law), the Court gave a detailed analysis of the law as applied in the Member States. It said:

The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member Countries.\footnote{222}

After this interesting introduction, which explains the use of the comparative method by reference to the notion of \textit{justice}, the Court then turned to examine briefly the law of the various Member States. It stated:

\begin{footnotes}
\item[219] Though one must, of course, also bear in mind that Community law serves a separate overall purpose which is different from national law, and can thus call for different interpretations.
\item[220] This view is shared, for example, by JÜRGEN GÜNDSCH & SIGRID WIENHUES, \textit{RECHTSSCHUTZ IN DER EUROPÄISCHEN UNION} 182 (2d ed. 2003); HANS-WERNER RENGELING & PETER SZCZEKALLA, \textit{GRUNDRECHTE IN DER EUROPÄISCHEN UNION} 262-63 (2004); Christian Calissis, \textit{Grundlagen, Grenzen und Perspektiven europäischen Richterrechts}, 14 \textit{NEUE JURISTISCHE WOCHENSCHRIFT [NJW]} 929, 932 (2005); Koen Lenaerts, \textit{Interlocking Legal Orders or the European Union Variant of 'E Pluribus Unum, in COMPARATIVE LAW BEFORE THE COURTS, supra} note 41, at 99-134.
\item[222] \textit{Id.} at 55.
\end{footnotes}
It emerges from a comparative study of this problem of law that in the [then] six Member States an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reversing its decision. This is true in particular of the appointment of an official.

If, on the other hand, the administrative measure is illegal, revocation is possible under the law of all the Member States. The absence of an objective legal basis for the measure affects the individual right of the person concerned and justifies the revocation of the said measure. It should be stressed that whereas this principle is generally acknowledged, only the conditions for its application vary.

French law requires that the withdrawal of the illegal measure should be pronounced before the expiry of the time-limit for instituting legal proceedings and, if proceedings have been instituted, before judgment is delivered; with certain small differences, Belgian, Luxembourg and Netherlands law seems to follow similar rules.

German law, on the other hand, does not set any time-limit for the exercise of the right of revocation, except where such a time-limit is laid down by a special provision. Thus article 13 of the Bundesbeamtengesetz (Federal Law Governing Civil Servants) allows the withdrawal of an appointment only within a period of six months. However, it is generally acknowledged that unduly late withdrawal, occurring considerably later than the date on which withdrawal could have been pronounced, is contrary to the principle of good faith (Treu und Glauben). In this connexion, case-law and learned writing found themselves also upon the concepts of waiver (Verzicht) and of forfeiture (Verwirkung) of the right of revocation.

Italian law is particularly clear on the question. Any administrative measure which is vitiates by lack of competence, infringement of the law or abuse of powers (eccesso di potere) may be annulled ex tunc by the administrative authority which issued it, irrespective of the individual rights to which it might have given rise. Such withdrawal may be declared at any time (in qualsiasi momento); thus there is no time-limit prescribed for withdrawal. However, according to learned writing and case-law, unduly late withdrawal can constitute abuse of powers; measures which have been in force for a long time (fatti avvenuti da lunga data) should be kept in force, even if they were contrary to the law, unless overriding reasons require their withdrawal in the public interest.
Thus the revocability of an administrative measure vitiated by illegality is allowed in all Member States.\(^{223}\)

In the above decision, therefore, the Court openly used national law to develop Community law.\(^{224}\) The same was done in *Hauer v. Land Rheinland-Pfalz*, where the ECJ analysed the different approaches found in the limitation of constitutionally protected property rights.\(^{225}\) Here, the Court also reiterated its view on the importance of human rights already developed in *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*\(^{226}\) and *Nold v. Commission of the European Communities*,\(^{227}\) and said:

Fundamental rights are an integral part of the general principles of law the observance of which the Court ensures. In safeguarding these rights the Court is bound to draw inspiration from the constitutional traditions common to the Member States and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the Constitutions of these States.\(^{228}\)

This is clear evidence that comparative law has a role to play in defining the standard by which the ECJ will measure possible human rights infringements.\(^{229}\)

More often, however, judgments merely give a general indication that the Court has indeed engaged in comparative work. This can, for instance, be seen in *Industrial Diamond Supplies v. Riva* where the ECJ analysed how national legal systems distinguish between "ordinary" and "extraordinary" appeals.\(^{230}\) Without specifying individual systems or their respective approaches in any detail, the Court, thus, explained:

\(^{223}\) Id. at 55-56.


\(^{225}\) Case 44/79, 1979 E.C.R. 3727, 3746.


\(^{227}\) Case 4/73, 1974 E.C.R. 491.

\(^{228}\) Id.


It follows from a comparison of the legal concepts of the various Member States of the Community that although in some States the distinction between "ordinary" and "extraordinary" appeals is based on the law itself, in other legal systems the classification is made primarily or even purely in the works of learned authors, while in a third group of States this distinction is completely unknown.\(^{231}\)

Finding that on this point national laws are not in agreement with one another, the Court then went on to develop its own definition of an "extraordinary" appeal.

Other decisions show that national solutions are sometimes only described in the facts, but do not feature openly in the reasons given by the Court. The Defrenne decision of 1976 is such a case.\(^{232}\) Defrenne is also worth mentioning because the ECJ had actually asked the Commission—involved in the dispute—to provide comparative material.

A first result of our analysis thus suggests that the ECJ does not frequently adopt an open use of comparative law. Indications, however, often compelling, do exist (albeit couched in general language), and they suggest that some degree of comparative work has taken place behind the scenes. A survey of the opinions of the Advocates General reinforces this view. Indeed, much in the tradition of the French avocats généraux, these conclusions contain fairly regular references to national law and its interpretation and application in the Member States of the Union. Advocate General Roemer, thus, expressly stated that the Court has to "call upon the law of the different Member States in order to arrive at a meaningful interpretation of... Community law."\(^{233}\)

Other examples, such as the detailed discussions of Member State law by Advocate General Lagrange in Assicurazioni Generali Siderurgiche Italiane (ASSIDER) v. High Authority of the European Coal & Steel Community\(^{234}\) and Compagnie des Hauts Fours de Chasse v. High Authority of the European Coal & Steel Community\(^{235}\) confirm the point. There can, thus, be little doubt that the comparative work contained in the much fuller opinions of the Advocates General

\(^{231}\) Id. at 2187-88.


has influenced the shorter—and indeed sometimes cryptic—judgments of the Court.

The influence of national legal traditions is also secured through the composition of the ECJ itself since every Member State is entitled to nominate one of the twenty-five judges sitting on the Court. This must result in an ongoing comparative judicial dialogue, which is supported by the ECJ’s own legal research unit. To facilitate the work of the Court, this unit produces substantial comparative reports on the law as applied in the various Member States, and the library in Strasbourg could be called a repository of national Member State law.

Though the above indicates that comparative law is a highly relevant tool in the work of the ECJ, two questions remain. First, has national law influenced the results reached by the Court beyond the limited ways outlined above? Second, why has the method not been used more openly in the judgments themselves?

The principle of proportionality is a very clear example of national law actually influencing the jurisprudence of the ECJ and, subsequently, the legal approach in other Member States. Rooted in the German notion of the Rechtsstaatsprinzip, proportionality (or Verhältnismäßigkeit) is a core unwritten principle of German constitutional law. To pass judicial scrutiny, any state action affecting the rights of individuals must comply with three requirements: (1) the public aim itself has to be constitutional and the measure capable of reaching the desired aim in practice; (2) the measure also has to be necessary in the sense that no equally effective, but less infringing, alternative exists; and (3) the public interest in reaching the aim has to outweigh the interest of the affected individual in the unlimited exercise of constitutionally acknowledged or otherwise protected rights. This last aspect of the principle calls for a complex balancing of conflicting values, which should, ideally, be reconciled so as to give each interest full constitutional recognition.

The main area in which the principle of proportionality has exerted its influence in German law is the protection of fundamental rights, and it is here, also, that it first appeared as a concern on the European stage. In the famous Internationale Handelsgesellschaft case of 1970, German judges felt that a Community system of deposits connected to export licenses was incompatible with the freedom of action, the freedom of occupation, and the principle of proportionality

236. This is a concept frequently equated with the rule of law.
as protected by the *Grundgesetz*. The Court asked the ECJ for a ruling on the validity of the Community measure.

In dealing with the reference, the ECJ first stated that Community measures could only be judged in the light of Community law. The Court stated that “[r]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law.”

This passage clearly distinguished the legal order of the Community from national constitutional law. Avoiding the apparent tension between the protection of the individual under German constitutional guarantees and the lack of a comparable regime on the European level, the Court, nevertheless, went on to say:

[A]n examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

In this passage the Court is, clearly, trying to build a bridge between its own jurisprudence and the traditions of the Member States. It is, however, a fortified bridge. The gatekeepers on the Community side are the qualifiers “traditions common to the Member States” and the “structures and objectives of the Community.”

Scrutinising the legality of the system of deposits attacked by the German plaintiff with a view to these analogous guarantees inherent in Community law, the ECJ was obviously inspired by the German notion of *Verhältnismäßigkeit* and applied, in essence, the same criteria. Taking the relevant Thirteenth Recital of the Preamble to Regulation 120/67 as a point of departure, the Court, thus, found that (1) the contested system was designed to meet an important Community objective involving “heavy financial responsibilities for the Community and the Member States,” and that the measure was capable of reaching that aim; (2) that less infringing alternatives such as, for example, a mere declaration of exports and unused quota would “be incapable of providing the competent authorities with sure data on

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238. *Id.* at 1135 (authors' translation).
239. *Id.* (authors' translation).
240. *Id.* at 1135-36 (authors' translation).
trends in the movement of goods,” and (3) that the financial loss for
the plaintiff did not “constitute an amount disproportionate to the total
value of the goods in question and of the other trading costs.”

The judgment contains no indication that the Court relied on a
principle of German law. It was, however, a preliminary reference
from a German administrative court which questioned the validity of a
Community measure by invoking, inter alia, the German concept of
proportionality. And the ECJ was clearly trying to avoid a gap
between the standard of human rights protection in this particular
Member State on the one hand and the Community on the other.

Though clothed in different words, this “discovery” of an
“integral part of the general principles of law protected by the Court of
Justice” is technically nothing else than judicial borrowing. When
compared to the other examples of legal transplants discussed in the
South African context, above, the only apparent differences seem to be
the absence of a constitutional text in the borrowing system and,
more importantly, the fact that foreign—Member State—law is,
apparently, not “borrowed” at all but rather “inherent in Community
law.”

There are, however, some crucial differences lurking below the
surface of the straightforward text of a judgment such as Internationale
Handelsgeellschaft. The Community and its Member States are
linked much closer to each other than South Africa is to the various
legal systems it has chosen to borrow from. The South African
Constitution invites judges to look at other “open and democratic
societies based on freedom and equality”—in the words of the ECJ,
“the constitutional traditions common to the Member States.” In
South Africa, this is a one-sided process, and the national judges are
free in their decision to engage in comparative thinking. In Europe,
transplants such as the adoption of the principle of proportionality are
far more complex since the game currently involves twenty-six players
(twenty-five Member States and the Community). The decision of the
ECJ to adopt a certain approach found in national law inevitably has a
knock-on effect on all other Member States, and it is interesting to note
that the notion of Verhältnismäßigkeit has spread, in some cases, not

241. Id. (authors’ translation).
242. Id. (authors’ translation).
243. Id. (authors’ translation).
244. The treaties and secondary Community law, however, fulfil a very similar
function.
245. S. AFR. CONST. 1996.
only to those parts of Member State law which are subject to Community influence but also to purely national law.\textsuperscript{247} More important is the fact that the ECJ is not entirely free to engage in this exchange of ideas. The well-known further case history of \textit{Internationale Handelsgesellschaft} shows that the tensions between the constitutional traditions of Member States and the autonomous and supreme legal order of the Community can force the ECJ to seek a compromise.\textsuperscript{248} Despite earlier indications that fundamental rights would start to play a more important role in the jurisprudence of the ECJ, German judicial resistance to the supremacy of a Community lacking (from the FCC’s point of view) adequate protection for the individual citizen affected by Community law forced the Court to develop its human rights jurisprudence. This development was largely based on comparative law, not only involving legal ideas drawn from the Member States but also, increasingly, from the case law of the European Court on Human Rights in Strasbourg.

The example of proportionality thus shows that national law has provided significant input when it comes to the development of core principles of Community law. A more detailed analysis is likely to produce even more evidence of this, though it can sometimes be very difficult, as stated above, to discern truly original “Community law” from judicial borrowing.

A more recent case shows that comparative law is also utilised to identify the substantive content of Community human rights. In \textit{Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn}, a company operating a so-called “laserdrome” had challenged an administrative order of the local police authority prohibiting the use of sub-machine-gun-type laser targeting devices and sensory tags fixed to jackets worn by players and designed to “play at killing people.”\textsuperscript{249} In making this decision, the German authorities were guided by their concern for human dignity. The Federal Administrative Court, eventually confronted with the issue, referred to the ECJ the question of whether a common legal conception in all Member States (in this case regarding human


\textsuperscript{249} Case C-36/02, 2004 E.C.R. I-9609.
dignity) was a precondition for one of those States to restrict, at its discretion, the provision of certain goods or services protected by the EC Treaty.\footnote{250} The preliminary reference was deemed necessary because the plaintiff had entered into a franchise agreement with the British producer of the laser equipment and had argued, inter alia, that the prohibition order infringed his freedom to provide services under article 49 EC. In dealing with the issue, Advocate General Stix-Hackl first argued:

[A]n established restriction on freedom to provide services cannot immediately be justified by the protection of specific fundamental rights guaranteed by the Constitution of a Member State. It is also necessary to examine the extent to which the restriction can be justified on grounds acknowledged in Community law, such as the safeguarding of public policy. A common conception among the Member States on the matter of protecting public order is not a precondition for such a justification.\footnote{251}

She then conducted a comparative survey of the approaches to human dignity found in the Member States, because

if such an examination should show that the restrictive national measure concerned is based on an evaluation of national protection of fundamental rights that reflects general legal opinion in the Member States, a corresponding requirement of protection could (also) be inferred from Community protection of fundamental rights—which would mean, methodologically speaking, that it would no longer be necessary to examine whether the national measure is to be considered a justified, because permissible, exception to the fundamental freedoms enshrined in the Treaty, but ... “how the requirements of the protection of fundamental rights in the Community can be reconciled with those arising from a fundamental freedom enshrined in the Treaty.”\footnote{252}

The ECJ followed this reasoning, stating:

[I]t should be recalled ... that, according to settled case-law, fundamental rights form an integral part of the general principles of law

\footnote{250. Cases of this kind may seem strange to many Americans (and, indeed, many Europeans). Handed down by a new post-war generation of judges, they are part and parcel of the profound changes (and sometimes even paranoia) Germany has experienced after 1945. “Killing for fun,” as the local police authority in Bonn called it, is thus still associated with the atrocities of the Third Reich, prompting administrative authorities and courts to intervene. The closer the resemblance with reality (human beings as targets instead of images in video games and the like), the greater the likelihood of state intervention.}

\footnote{251. Opinion of the Advocate General Stix-Hackl, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, ¶ 71, at http://curia.eu.int/ (search by case number C-36/02) (last visited Nov. 4, 2005).}

\footnote{252. Id. ¶ 72.
the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect.

As the Advocate General argues [...] the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services.

This juxtaposition of Advocate General Stix-Hackl's opinion and the Court's decision in *Omega* shows that the formula so frequently found in ECJ judgments—that the Court draws inspiration from "the constitutional traditions common to the Member States"—is, in fact, often a code for comparative work previously conducted by the Advocate Generals. Moulded into a corpus of Community law by the ECJ, the lines between national ideas thereby eventually fade and, over time, disappear.

The area of autonomous EU law is nevertheless likely to be substantial. A *sui generis* legal order, the Community is characterised by its very own political aims and economical objectives, practical difficulties, and legal values. These distinguish it from national law, and European judges will often develop their own solutions by reference to the increasing corpus of legal and extra-legal material by now available on the supranational level (for example, Intergovernmental Conferences, declarations of Community institutions such as the European Parliament, and documents like the European Charter of Fundamental Rights).

Notwithstanding the above, we would still expect the influence of the Member States to be more visible, and it is here that tactical

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considerations may come into play. For many years, the Court has had to fight for recognition vis-à-vis the Member States, and too much comparative work or a highly visible use of the method could have been interpreted as a sign of the Court’s insecurity, jeopardised its position in the many conflicts the ECJ had to survive, and put in question the autonomous nature of Community law. Open reliance on one particular national model also bears the danger of alienating other Member States and can draw the Court into undesirable political discussions as to why a particular legal solution was found by reference to one country and not another.255

Finally, as with any national system of law, we must stress the importance of the time factor. Fifty years into its existence, the EU has matured into a highly developed and increasingly autonomous system of law. This has clearly reduced the need for comparative considerations, though new developments and concepts—such as the accession of further countries, the introduction of a coherent regime of human rights protection, or the principle of subsidiarity—are more than likely to result in a renaissance of national legal influence on Community law. Given the necessary resources (especially judicial time), the ECJ may, thus, again, as in its early days, make more use of the comparative method. Stronger and more confident than it was two or three decades ago, the ECJ might even attempt to do this more openly. The South African experience also indicates that dissenting opinions, not possible under the current procedural arrangements of the ECJ, can be of particular value in the context of comparative law. The understanding and acceptance of the ECJ’s jurisprudence on the national level would improve substantially, we believe, if it were to discard the image of a “unanimous oracle” and revealed the difficult—and often controversial—judicial dialogue which the identification of common principles and values must surely involve.

B. When Local Law Presents a Gap, Ambiguity, Or Is in Obvious Need of Modernisation and Guidance Would Be Welcome

Two English decisions illustrate this point. The first is *Greatorex v. Greatorex*,256 but since one of us has already discussed it extensively

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elsewhere,\textsuperscript{257} we shall concentrate on the second one, namely \textit{Derbyshire County Council v. Times Newspaper Ltd.}\textsuperscript{258}

\textit{Derbyshire} was a defamation case. The Court had to resolve a disagreement between two decisions of earlier lower courts as to whether a local authority itself (as distinct from its individual councillors) could sue in defamation for allegations of inefficiency or corruption. In \textit{Manchester v. Williams} the Divisional Court had taken the view that a municipal corporation could not, itself, bring an action for libel in respect of an allegation of "bribery and corruption,"\textsuperscript{259} but the later (and much criticised\textsuperscript{260}) decision of the Queen's Bench Division in \textit{Bognor Regis Urban District Council v. Campion} held that "[j]ust as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so ... the plaintiffs as a local government corporation have a 'governing' reputation which they are equally entitled to protect in the same way."\textsuperscript{261}

For years, readers of practitioners' textbooks were offered technical ways of reconciling these two decisions. One of the most respected of these books, in fact, sided with the newer decision of what was, technically speaking, an inferior court (inferior to the one which had decided the old one) predicting its eventual confirmation by the highest court of the land.\textsuperscript{262} The decision of the Court of Appeal in \textit{Derbyshire} must have, thus, come as a surprise, as was its open and courageous admission that this issue could no longer be decided simply on tort grounds without taking into account article 10 of the European Convention on Human Rights (Convention). The decision, in other words, was the English equivalent to \textit{New York Times Co. v. Sullivan}\textsuperscript{263} insofar as it constitutionalised the English law of defamation (though one would have to wait a few more years before the

\begin{footnotes}
\item[257] Markesinis, supra note 88, at 35-74, 157-82.
\item[258] [1992] 1 Q.B. 770 (C.A.), appeal dismissed by [1993] A.C. 534 (H.L.) (appeal taken from Eng.). The Court of Appeal decision in our view is more interesting insofar that it is also more honest than the decision in the House of Lords in admitting that its outcome was largely influenced by developments at the European level.
\item[259] [1891] 1 Q.B. 94.
\item[260] See J.A. Weir, \textit{Local Authority v. Critical Ratepayer—A Suit in Defamation}, 1972 CAMBRIDGE L.J. 238. This is an essay unique for its conciseness, incisiveness, and immoderation!
\item[261] [1972] 2 Q.B. 169, 175.
\item[263] 376 U.S. 254 (1964).
\end{footnotes}
assessment offered in the text were to be truly confirmed by the coming into force of the Human Rights Act 1998).

In this light, it had to be seen as being affected by article 10 of the Convention, even though it had not, at the time, been incorporated into English law.\textsuperscript{264} Lady Justice Butler-Sloss's judgment in particular contains useful dicta as to when English courts can obtain guidance from foreign or international material. She, thus, said:

[W]here the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate.\ldots  But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10.\textsuperscript{265}

The House of Lords confirmed this result (by rejecting the appeal of the local authority),\textsuperscript{266} but via a different reasoning insofar as Lord Keith expressly stated that he saw no reason to refer to article 10 of the Convention.\textsuperscript{267} Instead, as so often happens in Britain's highest court, an attempt was made to argue that the common law was always as efficient in protecting speech but merely proceeded in a different methodological manner.\textsuperscript{268}

\begin{footnotesize}
\begin{enumerate}
\item 264. The United Kingdom ratified the Convention in 1951.
\item 266. Derbyshire County Council v. Times Newspaper, Ltd., [1993] A.C. 534 (H.L.) (appeal taken from Eng.).
\item 267. Id. at 551.
\item 268. Reference is thus often made to Lord Goff's judgment in Attorney-General v. Observer Ltd. & Others, [1990] 1 A.C. 109, 283 (H.L.) (appeal taken from Eng.), where the learned judge said:
\end{enumerate}
\end{footnotesize}

I wish to observe that I can see no inconsistency between English law on this subject [speech rights] and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.

Compare Lord Bingham's more cynical and, it is submitted, more convincing observation:

If in truth the common law as it stands were giving the rights of United Kingdom citizens the same protection as the Convention—across the board, not only in relation to Article 10—one might wonder why the United Kingdom's record as a Strasbourg litigant was not more favourable.

Nonetheless, comparative law was not avoided but merely restricted to supporting authorities from U.S.\textsuperscript{269} and Commonwealth courts.\textsuperscript{270} This preference for taking into account the experience of systems whose language we share is entirely understandable, though, in this case and, indeed, in others, it fails to show sufficient sensitivity to local conditions (in this case the United States and its First Amendment) which may not be replicated in the borrowing system and may, thus, lead its lawyers to misunderstand what they are copying. Thus, though Lord Keith even borrowed the expression “chilling effect” (which is widely used in American law but was until then uncommon in the English context), he made little reference to the First Amendment and the extent to which this has shaped the American law of defamation since \textit{New York Times Co. v. Sullivan}\.\textsuperscript{271} Though this might not have been fatal for the purposes of the litigation at hand, ignoring this (different) background factor can “inhibit” the use of American law in other areas of the law (such as our presently emerging law of privacy), given that, in England, we are now (as a result of the Human Rights Act 1998) obliged to weigh the competing rights contained in articles 8 and 10 of the Convention, and not forced to give preference to speech over reputation or dignity. English law is, thus, on this point, different from American law, and the ability to read the texts of the latter should not lull us into believing that they can be transplanted across the Atlantic without further thought.

What was said above about English law could be argued also about American law though here, at any rate as far as constitutional interpretation is concerned, we immediately run into the difficulties caused by the wider American dispute about the limits of judicial interpretation. Those, in particular, who subscribe to the “original understanding” doctrine feel unable to interpret the constitutional document by going beyond discovering the original intent (or, as it is said these days, understanding) of its drafters. The difficulty which, at any rate, non-American lawyers have with this approach is what happens when no such intent can be discovered. The constitutional text, for instance, is silent on the much debated issue of abortion. Does that mean constitutional reform or, in its absence (and everyone knows how difficult this is to achieve), judicial paralysis? From our

\textsuperscript{269} N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); City of Chicago v. Tribune Co., 139 N.E. 86 (Ill. 1923).


\textsuperscript{271} 376 U.S. 254 (1964).
experience of teaching in the United States, we realise that no amount of reasoning is likely to budge those lawyers who take this "conservative" view though we do not hide our sympathies for the more "open" view, championed by Justices such as Breyer, O'Connor, and Ginsburg, who believe, like us, that an open consideration of alternatives can only help fashion a more workable and contemporary solution. And, in any event, this must be more than permissible in those areas of (mainly) private law where the real or imaginary obstacles that emanate from the constitutional text and the intentions of (its comparatively minded) draftsmen are of no or little relevance. Nor, by the way, is the idea that state legislators can act an acceptable palliative as we know on the race relations decisions of the sixties and seventies which remedied precisely this kind of state inactivity.

C. When a Problem Is Geographically Wide-Spread and It Is Desirable To Have a Harmonised Response

The case of Fairchild v. Glenhaven Funeral Services Ltd. was an asbestos litigation case. The claimants, who had worked for various companies and, while doing so, were exposed to asbestos dust, could not identify, on the balance of probabilities, where exactly they had been exposed to the fibres. On a strict application of the "but-for test," no defendant would be held liable, but the House of Lords, reversing the Court of Appeal, held this not to be equitable. From a comparative point of view, the opinions of Lords Bingham and Lord Rodger of Earlsferry present the greater interest. The first runs to thirty pages, of which nine are devoted to foreign law; the second is twenty-three pages, of which about five considered non-English material. The space devoted to the examination of foreign law is not the only interesting feature of the decision; nor should this be sought in the fact that, in addition to Commonwealth authority, these judges also considered Roman, German, French, Dutch, and Norwegian law. How they came to do so, the reasons why they did so, the kind of materials they used, and the comments made in passing are just as important. We must look briefly at all of these points.

First, the non-Commonwealth material was, as Lord Rodger informs us, supplied by Counsel at the Lordships' request: "The

272. The open view is evidenced, for instance, not only in his many judgments, but also in his peroration, in Stephen Breyer, Changing Relationships Among European Constitutional Courts, 21 CARDOZO L. REV. 1045, 1061 (2000).
material provides a check, from outside the common law world, that the problem identified in these appeals is genuine and is one that requires to be remedied.\textsuperscript{274}

This reveals their Lordships as being as open-minded as their Canadian or South African counterparts; it also shows them fully conscious of the fact that this material is treated as a source of ideas, as a way of confirming their hunch that English law needs fine-tuning, and is not seen as being in any way binding authority. The last point, though obvious, needs to be stressed since opponents of the use of foreign law often impute to its advocates the desire to make it somehow binding on national judges, which is patently not the case.\textsuperscript{275}

Secondly, and more relevant to the present Subpart, is the reason for undertaking such a wide comparative exercise. It was given above by Lord Rodger when he noted that the problem before the national court is one that has been confronted by many others as well. The similarity of the problem, coupled with the growing similarity in socio-economic environments, at any rate among developed nations, may call for a similarity in legal outcome notwithstanding undoubted differences in language and legal techniques. The First President of the French Cour de cassation seems to agree, and his views, read in conjunction with the views of the Scottish Law Lord, lend support to the argument that in these types of cases recourse to comparative law is permissible. In a lecture delivered in London, M. Canivet, thus, said:

Citizens and judges of States which share more or less similar cultures and enjoy an identical level of economic development are less and less prone to accept that situations which raise the same issues of fact will yield different results because of the difference in the rules of law to be applied... [T]here is [thus] a trend, one might even say a strong demand, that compatible solutions are reached, regardless of the differences in the underlying applicable rules of law.\textsuperscript{276}

\textsuperscript{274} Id. at 117.

\textsuperscript{275} The above also (partly) answers the argument put forward by Professor Levinson which, in its barest outline, is this: "If the foreign law is the same why bother with it; and if it's different, we do not need it." Levinson, however, does make a limited use of foreign law whenever it performs an empirical function. See Sanford Levinson, \textit{Looking Abroad When Interpreting the U.S. Constitution: Some Reflections}, 39 \textit{TEX. INT'L L.J.} 353, 356-57 (2004).

\textsuperscript{276} The text is reproduced in Mads Andenas and Duncan Fairgrieve, \textit{Introduction: Finding a Common Language for Open Legal Systems, in Comparative Law Before the Courts}, \textit{supra} note 41, at xxxi.
In the *Fairchild* case, Lord Bingham echoed the same kind of thoughts though, significantly, he was willing to incorporate them in his judicial opinion. He, thus, wrote:

If... a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, *whatever their legal tradition*, this must prompt anxious review of the decision in question.  

We have italicised four words from the above quotation because to us they illustrate how a consciousness is gradually developing (among all save the most timorous of academics), minimising the traditional divide between common law and civil law.

Thirdly, we attach particular importance to the kind of materials used by the British judges to inform themselves about foreign law. For, in addition to "focused" textbook discussions of foreign law (instead of the old, René David-type of treatises on *Les Grands Systèmes de Droit Contemporain*), the citations also included references to such practitioner's books as *Palandt*, specific judicial decisions of foreign courts (available in translated form), and even the Motive of the BGB, which were not just cited but used to discover the policy reasons which justified the partial abandonment of the "but-for test." These, we submit, are significant observations, insofar as they support the views advanced by one of us *in extenso*, that what makes foreign law usable is (1) its relevance and (2) its helpful packaging.

Finally, it is worth reminding readers of Lord Bingham's point that when one is undertaking a broad research exercise it is likely that the various systems will not reveal a unanimity in results. In such cases, of course, one does not undertake a "head count," but learns how to differentiate between systems. Broadly speaking, this can be done in two ways.

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278. Nearly one thousand leading French and German decisions now appear in translated form (some with up-dating notes) on the Web site of the Institute of Global Law of University College London, addressing a traditional complaint that foreign material is not available in the English language.
279. Roman law texts were also cited by Sir Sidney Kentridge Q.C., counsel for the claimants, but that is understandable given that his origins and most of his career was South African as well as the fact that he was addressing one judge—Lord Rodger—who is a champion of Roman law. It is, however, also noteworthy that Lord Rodger, while citing the Roman law material, was also quick to switch his main attention to the German material which he admitted was "more instructive." *Fairchild*, [2003] 1 A.C. at 117.
280. See generally MARKESINIS, supra note 88.
The first is by placing more emphasis on systems that belong to the same legal family. The second is by looking more attentively at the major legal systems, that is, the ones from which most others have in one way or another sprung from, paying less attention to less dominant derivatives. This last observation, however, should not be taken to suggest that a smaller system never has anything to offer the comparatist. For even these derivative systems on occasion (and for reasons of their own) can innovate in interesting ways. Thus, the Greek Civil Code, which for obvious historical reasons has been closely linked to German law (enacted as it was less than fifty years after its German prototype), includes an interesting general provision which deals with the protection of human dignity and personality which has no parallel in the German BGB.

D. When Foreign Experience (Aided by Empirically Collected Evidence) Can Help Disprove Locally Expressed Fears About the Consequences of a Particular Legal Solution

Three examples (among many) can be discussed here, and it must be stressed from the outset that this heading covers the use of foreign law in an empirical way which even those who oppose recourse to it would appear to accept. This, then, could be one of the most fertile areas of further growth of judicial exchanges since, by itself, it intrudes least into the domain of local values and only wishes to demonstrate how a particular solution has worked in practice in another country. This is how one of the authors who accepts this type of use of foreign law—Professor Sanford Levinson—has put it (when discussing Justice Scalia's views in the context of the death penalty and regulation of homosexual expression). He said:

It really depends whether one is trying to place such issues within the context of expressing basic social values about the importance of retributive punishment ... and condemning “unconventional” sexual expression .... If one is behaving as a legal anthropologist manqué, which is at least one way of understanding the “fundamental values” enterprise, then the central task is indeed trying to figure out what constitutes a particular society’s way of expressing values in the world. It is, almost by definition, this society and not one elsewhere that is the center of our inquiry. ...

... [T]hings [however] get far more complicated if we view these not so much in expressive terms, reflecting our basic values, but rather far more instrumentally. Consider, for example, the proponent of capital punishment who speaks not of revenge but, rather, its deterrent effect
and concomitant saving of lives or the opponent of gays in the military who emphasizes the ostensible effects on military cohesion of accepting open gays . . . into the armed forces. Given that these latter assertions are entirely empirical in their thrust, they call for an entirely different response from those that are only expressive.281

The three topics we would like to include in this Part would come under the second of Professor Levinson's categories. All come from English law, which has opposed both the extension of privacy rights and patient rights (in the technical area of medical information before the patient's consent to treatment can be deemed to have been validly given), and has also had a tendency to provide extensive (some argue excessive) protection to statutory bodies against suits for damages flowing from their negligent conduct. In our view, and subject to some important provisos concerning the use and presentation of the material collected, in all of these cases, the fears of English courts are not substantiated by foreign experience. We, therefore, believe English law would benefit from the empirical use of foreign information that could disprove this particular kind of fear that has gripped the English judicial psyche. We shall look at these three instances under separate headings while admitting that our thoughts—brief because of the lack of space—are only meant to provide starting points for further enquiries along the lines we recommend here.

1. Liability of Statutory Bodies

The very latest judgment of the House of Lords in JD v. East Berkshire Community Health NHS Trust & Others282 touches on this point which, in the not too distant past, brought English law into collision with the European Court of Human Rights.283 The dispute, in the words of Lord Bingham of Cornhill, the Senior Law Lord, was whether

the parent of a minor child falsely and negligently said to have abused . . . the child may recover . . . damages for negligence against a doctor or social worker who, discharging professional functions, has made the

281. Levinson, supra note 275, at 363-64.
false and negligent statement, if the suffering of psychiatric injury by
the parent was a foreseeable result of making it and such injury has in
fact been suffered by the parent.284

The question, as is so often the case in such disputes, turned upon
whether the social worker or doctor owed a duty of care towards the
parents. Invoking, directly and indirectly, the usual fear of opening the
floodgates, the House of Lords, agreeing with the Court of Appeal,
rejected the existence of a duty of care. The appellants' attempt to
overturn the judgment of the Court of Appeal, which had gone against
them, failed.

Now, in England, the presence or absence of a duty of care
depends on a number of (often repetitive) policy criteria, the most
notorious (and ambiguous) of which (and not replicated in American
tort law) is that it has to be “fair, just, and reasonable” for the judge to
find such a duty. The “floodgates” fear invariably makes this unfair,
unjust, and unreasonable; and plaintiffs thus have their case “nipped in
the bud” without any evidence being called or the facts properly
investigated.

In the Berkshire case, Lord Bingham, consistent with early
opinions of his,285 was the only judge who dissented from this view. He
laid great emphasis on the fact that the law in the area had evolved in
recent years—partly as a result of decisions of the European Court of
Human Rights, which had shown “that application of an exclusionary
rule . . . may lead to serious breaches of Convention rights.”286 He also
referred to French and German law to suggest that neither of these
systems had suffered from allowing such claims. Once again, the
open-mindedness of this learned judge impresses as much as his wider
reading and common sense. But is this not also a perfect topic for
comparative empirical research to show whether other equally
advanced systems of equally industrialised societies have suffered
from the rule which so frightened the highest English court? It is with
this aspect of the case that we deal here, and we believe that it offers

child/claimant] can make good her complaints (a vital condition, which I forbear constantly
to repeat), it would require very potent considerations of public policy, . . . to override the rule
of public policy which has first claim on the loyalty of the law: that wrongs should be
remedied.” Id. at 572. A German case with very similar facts had no doubt that, in this case,
liability would be imposed. See 1-2 BGH NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2005,
68.
excellent opportunities for empirical research in order to prove or disprove the validity of these fears.

The truth of the matter is that the research here needed requires the collaboration of practitioner and academic, for only the later can furnish the former with the information he needs to support any comparative arguments in court. And collecting and shifting this raw material is not easy. For if one takes Germany, as an example, one sees that such claims have invariably been allowed to be brought before a court but that few succeed in practice.\textsuperscript{287} Lest it be objected that even this is too much for any legal system to digest, since it can take up much court time and effort, one should then enquire how many of these claims were actually dismissed summarily without the exaggerated costs and delays of a full and lengthy trial. And finally, one should check the level of awards—and if one does, one will find that these are substantially lower in these types of cases than those one would find in cases of medical malpractice or traffic accidents.

If that is, indeed, the case—and this summary is only meant to whet the appetite of the reader as to how the research should proceed—should not the answer then lie in the law of damages rather than be found through the use of the blunt instrument of duty of care? Lord Bingham touched upon these points in his judgment, and for those interested, we provide new ideas of how the evidence about foreign law should be marshalled, analysed, and then used. That this needs patience, careful research, and collaborative action is beyond doubt. But this way of providing the empirical data could also dispel the (justified) fears about the danger of producing misleading information about foreign law.\textsuperscript{288} Lord Bingham not only opened up these possibilities to inquisitive researchers and broad-minded practitioners, he also proved again that imaginative judges are the exception, those who prefer to hide behind opaque concepts, the rule. If \textit{Berkshire} represents another example of a missed opportunity to reflect about the law more widely, it also shows to those who, like us, believe in international dialogue how much ground still has to be covered before such dialogue becomes routine.

\textsuperscript{287} Useful raw data can be found in \textsc{Zur Reform des Staatshaftungsrechts} 161, 197 (Bundesministerium der Justiz 1976); \textsc{Infratest Burke Rechtsforschung, Zur Reform des Staatshaftungsrechts, Tabellarische Ergebnisse} (1993-1995), tbls. B 4.1, K 4, L 4.1, T 1 (though this material needs “packaging” before it can acquire meaningful significance for an English court).

\textsuperscript{288} \textsc{Roper v. Simmons}, 125 S. Ct. 1183, 1222 (2005) (Scalia, J., dissenting).
2. Privacy

English law has always protected aspects of human privacy and done so by using (not always successfully) a miscellany of (mostly) mediaeval torts (such as nuisance and trespass) and procedures (invoking, for instance, the wardship jurisdiction), as well as a growing number of criminal procedures. But in a world experiencing a growing ability to collect, collate, and disseminate information, this casuistic approach has been seen as inadequate by some courts, as well as officially commissioned reports, though also defended by others.

It is submitted that in this debate the real opposition has come from sections of the press anxious to exploit political misbehaviour (amounting in some cases to crimes), as well as the usual titillating stories associated with the entertainment world. But this desire to keep the reporting of such incidents, which could often increase newspaper circulation and thus provide enhanced earnings, has been shrouded behind arguments about the ability and the desirability to create a tort of privacy. Some of these arguments are as old as the so-called tort itself and are linked to the understandable wish to protect privacy without stunting free speech. Others have been associated with the real and imaginary difficulties of defining privacy rights as if the current English attempts to solve the problems coming before the courts through an ever-expanding notion of confidentiality avoid

289. For a brief comparative discussion of Anglo-American law, see Simon Deakin, Angus Johnston & Basil Markesinis, Tort Law 701-39 (5th ed. 2003). The American part was written by Professor David Anderson of the University of Texas.


292. In re X, [1984] 1 W.L.R. 1422 (Fam.).

293. Samuel D. Warren and Louis D. Brandeis prophetically foreshadowed in the United States the dissemination of information in their famous article, The Right to Privacy, 4 Harv. L. Rev. 193, 195-96 (1890).


297. In England, this argument was invoked strongly by the Report of the Committee on Privacy, chaired by Sir Kenneth Younger and published in 1972, and succeeded in stunting all further discussion for nearly twenty years.

298. This argument has been favoured in cases such as A v. B plc & Another, [2002] EWCA (Civ) 337, [2002] 3 W.L.R. 542 (A.C.) and Campbell v. MGN Ltd., [2002] EWCA (Civ) 1373, [2003] 2 W.L.R. 80 (A.C.).
such uncertainties. Here, we are not concerned with the merits of the above argument, but with the more pragmatic fear that recognition of the right of privacy would open the floodgates of litigation.

To counter this argument, the first of us attempted to collect all published decisions of Germany's highest courts on this subject during the last twenty years. The total figures hardly justified concerns, especially when seen against the background of (1) the higher volume of litigation in Germany as compared to England; (2) the cheapness of having resort to the courts in Germany as compared to the high cost of litigation in England; and (3) the real (or alleged) "mentality" differences between the two nations, the citizens of the latter apparently being much less willing than the citizens of the former to have recourse to litigation. Interestingly enough, the overall belief of the first of us that a recognition of a privacy right would not result in unmanageable litigation was also confirmed by a report prepared by a committee set up by Lord Chancellor Mackay. In the light of the above, would it not be prudent to submit such comparative evidence to a court and invite it to test it and then to draw the appropriate conclusions? As we shall note in the next Part, empirical study of foreign systems may be equally relevant to other cases where the floodgates argument is raised in order to protect other interests.

3. Informed Consent

To the question of how much information must be disclosed to the patient before his consent to medical treatment can be legally valid, three answers are possible. Interestingly, they depend on the philosophical attitude one takes towards patients' and doctors' rights (to determine how much they reveal), but they are also, indirectly, affected by fears that a pro-patient position could generate "defensive" medicine and a flood of claims. Are such fears backed by real evidence?

The first possible answer to our problem is found in English law, and it basically leaves the decision to "a responsible body of medical


301. See CONSULTATION PAPER, supra note 295.
men skilled in that particular art.  This is known as the Bolam test and is the most paternalistic of all.

One reason why English law takes such a conservative view was given by Lord Denning in Whitehouse v. Jordan & Another, and, as already hinted, it is connected with the fear of increased malpractice litigation. Decisions such as Bolitho v. City of Hackney Health Authority would suggest that a shift of emphasis is nowadays taking place in English law, which the new Human Rights Act 1998 (and the growing “rights culture” it is generating) can only accelerate further. Another example of the constitutionalisation of private law?

This English position is rejected by most common law jurisdictions, which adopt the so-called doctrine of “informed consent”—taking the view that the doctor must disclose as much information as a reasonable patient would require to make an informed choice, and frequently add, for good measure, that the doctor “should not lightly make the judgment that the patient does not wish to be fully informed.”

Germany, however, may yet be the most illustrative example for the purposes of disproving these floodgate fears. Both positions outlined above have been rejected by many decisions of Continental European systems on the grounds that they violate the patient’s right of self-determination. This position has, as stated, been forcefully stressed by German courts which, in the light of the recent past, have been only too conscious of the dangers of ignoring human dignity and not preventing unwarranted medical interferences with the body and

303. Id. This test was, essentially, reaffirmed by four out of five law lords in Sidaway v. Board of Governors of the Bethlem Royal Hospital, [1985] 1 A.C. 871 (H.L.) (appeal taken from Eng.). The tone of the judgment was set by Lord Diplock who insisted that medical opinion remained “determinative” in such matters. This can be seen in the next important case, Gold v. Haringey Health Authority, [1988] Q.B. 481 (A.C.) (Lloyd, L.J.), where the Court of Appeal overruled a more pro-plaintiff judgment by Justice Schiemann (see Gold v. Haringey Health Auth., [1987] 1 Fam. 125 (Q.B.)) by insisting that “the Judge was not free, as he thought, to form his own view of what warning and information ought to have been given, irrespective of any body of responsible medical opinion to the contrary.” Gold, [1998] Q.B. at 490.
heath of human beings. Thus, from the beginning of the post-war period, courts have stressed that “proper respect for the patient’s right of self-determination will further rather than damage the patient’s trust in his doctor;” and “to respect the patient’s own will is to respect his freedom and dignity as a human being.” Thus, the principle of full disclosure is repeatedly stressed, and in one case, involving diagnostic treatment, the court took the view that even a 0.5% chance of a particular risk occurring should be disclosed. In the case of therapeutic operations, disclosure will be geared to the patient’s individual circumstances such as his level of understanding and even the attending doctor’s degree of experience. The urgency of the situation is also a factor that can be taken into account, and even the defence of “therapeutic privilege” (no revelation of risks since a patient might not be able to “handle” adverse news) has been treated with caution, as a decision of the BGH of 28 November 1957 clearly shows. This case law has not abated, there being, over the past years, a constant drip of BGH decisions clarifying difficult related issues. But for a court that delivers around one thousand motivated judgments per annum, two or even three decisions per year is a drip, not a flood, and this remains so, even though the number of disputes at the first instance level raising such points probably runs into a few hundred


(but in a system that copes with over 1,500,000 writs per year issued before its two lower tiers of courts). \footnote{316}

The sketch of the German position may provide both an interesting contrast with English (and even American law) as well as an illustration of how current rules may have been shaped in part by a country’s particular political history. But it also serves a further purpose insofar as it shows that such a libertarian or pro-patient view has not resulted in the realisation of the fears that haunt the English courts. Indeed, we have not been able to find any statistical evidence in Germany to support this fear. A glance at the published decisions of the BGH indirectly supports our argument—even though one can find, almost on an annual basis, one or two decisions dealing with these (or closely related) issues. This may sound high in countries such as England, accustomed to something in the order of sixty (civil) appeals per annum being heard by the House of Lords. Yet, in a country where litigation is (relatively) cheap and the supreme court delivers so many motivated judgments per annum, it is statistically insignificant (even if it suggests that courts at lower levels probably hear more such cases).

At the very least, therefore, further empirical studies are needed before a conclusive view can be expressed. In the meantime, however, it is submitted that such evidence could properly be submitted before any foreign court contemplating the relaxation of local rules in favour of patients’ rights with the caveat that full and precise information is still lacking.

E. When the Foreign Law Provides “Additional” Evidence That a Proposed Solution Has “Worked” in Other Systems

The decision of the House of Lords in Hunter v. Canary Wharf Ltd. (a nuisance case), relying for additional support on BGHZ 88, 344, offers a good illustration. \footnote{317} For this reason, foreign law was also taken into account in McFarlane v. Tayside Health Board, a case involving a claim for damages regarding the costs of a healthy child born after a failed vasectomy. \footnote{318}

\footnote{316. For a dated, but, broadly speaking, still relevant discussion, see Basil S. Markesinis, Litigation-Mania in England, Germany and the United States: Are We So Very Different?, in FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 438, 453-79 (1977). As the statistics cited in the above piece show, Germany presents another significant difference with the United States and England: a much larger percentage of actions commenced end up by a full judgment.}

\footnote{317. [1997] 2 W.L.R. 684 (H.L.) (appeal taken from Eng.).}

\footnote{318. [2000] 2 A.C. 59 (H.L.) (appeal taken from Eng.). The House of Lords, making extensive use of American case law, held that these costs were not recoverable (though
F. When the Statute That Is Interpreted Comes from Another Legal System or Has Its Origins in an International Instrument

Our third South African case discussed in the previous Part involved a legal transplant from Germany, and it is here that the comparative method may be most effective. *City of Cape Town v. Ad Outpost* is, of course, a rare example where a judge had to interpret a provision that was literally translated and incorporated (with only minor changes) by the South African legislator from another system into his own national law.\(^{319}\) Other, less direct examples such as the constitutionalisation of the (uncodified) German notion of “co-operative government”\(^{320}\) and the so-called “constitutional state principle,” mentioned in the Preamble of the 1993 Constitution could, however, be added to this list. Finally, South African judges were confronted with a complete “system change” by the country’s shift from the principle of parliamentary sovereignty to the enactment of a supreme constitution and full judicial review of legislation. Compared to more specific legal transplants such as the use of article 12 GG in Section 22 of the 1996 Constitution, this was a far more profound change. Moreover, it was one which many judges—trained and accustomed to a very different regime—found difficult to adapt to.

In such instances, foreign experience is particularly valuable. We have already seen that the outcome of *City of Cape Town v. Ad Outpost (Pty) Ltd. & Others* could have been different had the court utilised the wealth of German judicial experience and academic discussion concerning article 12 GG. This material dates back as far as the *Pharmacy* case of 1958,\(^{321}\) and was clearly in the mind of Professor Etienne Mureinik when he proposed the German approach as a way to overcome the deadlock in the negotiations during the last stages of the Constitutional Assembly’s work in 1996. The importance of comparative law in these situations has also been accepted by critics of the method. For instance, Johan Krieger of the South African Constitutional Court thus stressed that “where a provision in our Constitution is manifestly modelled on a particular provision in

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\(^{319}\) 2000 (2) BCLR 130 (C) (S. Afr.).

\(^{320}\) S. AFR. CONST. 1996 §§ 40-41.

another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.\textsuperscript{322}

In other cases, national law is not based on a rule found in another national legal system but is rather modelled on provisions found in international law. The German Bundesgerichtshof has, thus, used the comparative method when dealing with rules which have their origin in international treaties or which are closely linked to international issues such as maritime disputes (an area highly influenced by English law). Here, the comparative approach is sometimes even explicitly prescribed by the German legislator.\textsuperscript{323} The common denominator of these decisions—their subject proximity to internationally harmonised rules or the conflict of laws—clearly forces judges to look out of the window of their own system which otherwise can be obscured by the curtains of legal tradition.

It could be argued that in this type of legal dispute comparative law has established itself as an essential requirement in the evaluation of many cases. An analysis of German law by Professor Ulrich Drobnig thus shows that approximately fifty percent of the decisions of the BGH and the German Courts of Appeal dealing with major international treaties such as the Warsaw Convention make use of foreign experience.\textsuperscript{324} Interestingly, the percentage of cases using such material is far lower (approximately three percent) where the two conventions on Cheques and Bills of Exchange signed in Geneva in 1930 and 1931 are concerned.\textsuperscript{325} This can be explained by the fact that these two agreements were fully incorporated into German law, whereas other treaties analysed by Drobnig were merely ratified by Germany and thus remain distinctly international in character.\textsuperscript{326}

Finally, a further area where we can expect European courts to look abroad is national legislation introduced in the wake of Community law and explicitly aimed, within more or less flexible boundaries, at harmonisation. The national courts of the Member States are Community courts in the sense that they are bound to apply EU law. Judges may, of course, refer questions regarding the

\begin{footnotesize}
\begin{itemize}
\item[322.] Bernstein v. Bester, 1996 (4) BCLR 449 (CC) at 133 (S. Afr.).
\item[324.] See Drobnig, supra note 89, at 615.
\item[325.] Id.
\item[326.] Id.
\end{itemize}
\end{footnotesize}
interpretation or validity of Community law to the ECJ if this is deemed necessary for the decision of the case at hand, but, by far, the most disputes are currently resolved solely on the national level. Courts applying this highly harmonised law without further guidance would do well in matching their own approaches with those chosen by the ECJ and other national courts confronted with the very same issues. More importantly, however, national courts continue to apply national law in areas where the Community has only identified a common aim by directive. Despite the greater flexibility of this tool (which allows Member States to adopt different means of achieving the common goal) and disregarding the special case where a directive may have direct effect, a comparative approach by judges seems particularly appropriate if Europe is to develop a coherent system of law. Thus far, however, national courts do not appear to have used in this context much comparative material.

G. When a Court Is Confronted with Law Regulating Highly Technical Matters Rather Than Value-Laden Issues

One of the recurring themes of this study is the distinction between different subject matters regulated by the laws of a society and how the use of the comparative method in the courtroom could be more appropriate in some areas and less so in others.

Further research will again be necessary before exact boundaries can be drawn. Yet, even at this early stage, it would seem that certain issues such as building regulations, rules on land development and zoning, norms regulating environmental questions such as noise levels or waste disposal, rules on public health and safety, data protection, or the labelling of products are subject-matters which by virtue of their highly "technical" content would, prima facie, belong to the category of topics where comparative work is less contentious.

This rough list of items might even be extended to constitutional matters. Proportionality, not as an underlying normative concept affecting the limitation of human rights by public authorities, but rather as a structured approach to the judicial scrutiny of legislative or administrative decisions, might qualify for inclusion under this

327. See EC Treaty, supra note 218, art. 234.
heading. Several South African judgments thus deal with the different aspects of the proportionality enquiry as developed in Canadian and German jurisprudence, while the initial decision to introduce the principle as such had already been taken by the legislator.\(^{329}\) Similarly, courts dealing with the wider question of democratic legitimacy in the context of election issues could, for instance, gain insights from the approach other legal systems take when it comes to drawing the geographical boundaries of constituencies with regard to the number of votes needed to gain a seat in the legislature.\(^{330}\)

Finally, wide areas of private and commercial law are "technical" in the sense that particular values or policy considerations play, if at all, only a subordinate role.

In all of these situations, then, most of the objections raised against the comparative method would seem less convincing. In a world which is increasingly using the same technical equipment, produced and sold under very similar or even identical conditions, and involving the same potential hazards, the legal responses\(^{331}\)—both by the legislator and the courts—to problems arising from such products should be quite similar. Though we are not advocating a far-reaching legal harmonisation, we believe that comparative law has much to offer in the judicial resolution of these less value-laden issues.

VI. THE DANGERS OF USING FOREIGN LAW

A. General Observations

Even those who favour the exchange of ideas and believe that, in a shrinking world, this practice may even be destined to become inevitable do not underestimate the difficulties (and the dangers) that accompany such intellectual exercises. Moreover, these problems can be magnified if one starts with the position that societies are very different\(^{332}\) (which is true and even more so in days gone by before the


\(^{330}\) Election principles were, thus, one of the first issues where the German Federal Constitutional Court used foreign law. See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Apr. 5, 1952, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 208 (249, 253) (F.R.G.).

\(^{331}\) We are here, for instance, referring to the liability regimes, but not the quantification of damages, for these are related to a variety of other factors (for instance, local earnings, presence or absence of social security, currency exchange rates, cost of living, and the like) which may well justify a different size of awards. Some of these points are considered by Markesinis, Coester, Alpa & Ullstein, supra note 42.

\(^{332}\) See, e.g., William P. Alford, On the Limits of "Grand Theory" in Comparative Law, 61 Wash. L. Rev. 945 (1986); George P. Fletcher, Constitutional Identity, 14 CaroZO
advent of increased travel and communication) and then try to give to these divergences a normative content. This is especially likely to happen if one ignores or underestimates, as we think adherents of this school tend to do, the growing assimilation in tastes, customs, and laws which is greatly accelerated by modern ways of communication, enhanced travel, and the internet (which brings together practically every corner of the world where individuals have access to a telephone cable).333 This trend towards assimilation is so important that it has affected even areas of the law—such as family law—which, not that long ago, comparatists (and sociologists) of great distinction declared to be immune to such globalisation and assimilation forces.334

These divergences are further enhanced if one is attempting the comparison of states which, for lack of a better term, one could prima facie say belong to different cultural worlds. This is particularly likely to be the case if the views of some contemporary comparatists, advocating a redirection of comparative law towards other cultures, continents, or countries, were to gain acceptance.335 But even this distinction should be treated with great caution. For, surely, it is becoming increasingly difficult to draw sharp lines and declare, for the purposes of the law, that country A belongs to a different culture than country B. Thus, we cannot treat Japan as belonging to a different culture for the purposes of the law,336 not only because of its long dependence on German ideas,337 and to a lesser extent French ideas,


333. The examples of how the world is shrinking are as interesting to ponder over as is the speed in which it is shrinking. Thus, it was reported that after the recent tsunami disaster in the Indian Ocean, some one-third of American households responded with donations and more than half of these did so through the internet. Borders between states, no longer able to stop the rapid movement of information and funds, will prove equally porous to ideas and tastes. The differences of geography are reduced by technology and, it could be argued, both are minimising those dictated by history and language, however much romantic spirits may regret this.


335. The first of us has expressed doubts as to whether this can really happen in the foreseeable future, given the lack of linguistic expertise and serious lack of materials. To put it differently, if the borrowing from France, Germany, or Spain is, potentially, hampered for the above reasons, how much more is this likely to be the case if the system studied belongs to one of the less developed countries (or areas) of the world?

336. Though the Japanese (and one might even venture the generalisation “Oriental”) preference to conciliation instead of litigation may affect how different parts of the law—for example, tort law—operate in practice.

337. On the influence of German private law on Japan, see Akira Ishikawa, Einflüsse des deutschen BGB auf das japanische Zivilrecht bzw die japanische Zivilrechtswissenschaft,
but also because of its growing (and in the beginning enforced) association with American (especially) public law which followed the end of the Second World War. So even though in terms of culture, arts, music, and the like, the distinctiveness of its culture will be evident to any "westerner" who has attended such artistic performances,\(^{338}\) (or simply enjoyed watching Hollywood films that have capitalised on the idea of distinctiveness) in legal terms the convergence approach is proceeding apace.

The same provision must be made by all the former Communist block countries of Eastern Europe which, not that long ago, espoused an economic world very different to the market model(s) of the West and were subject to institutional and constitutional regimes which would seriously hinder the importation of American or Western European models of law. Yet these, too, collapsed (more quickly and more unexpectedly than any specialist could have expected), and their demise led to a sudden invasion of American intellectuals—especially from the Eastern Seaboard of the United States—anxious and eager to export their own model of constitutionalism to these newly liberated countries, often in (apparent) disregard of the fact that these exporters knew little about the cultures and most certainly the language of the targeted importers.\(^{339}\) These very general observations are not meant to underestimate the obstacles placed before any transnational dialogue, but they are meant to warn the reader of the importance of the "time factor" which, to us at least, seems to be dismantling barriers hitherto regarded as unmovable. We thus shift our attention to some specific

\(^{338}\) Even though the reverse may not be true, as attested by the fact that so many Japanese, Chinese, or Korean musicians can attain musical perfection in performing the works of Mozart and Beethoven.

\(^{339}\) It is, however, worth mentioning that continental constitutional thinking was not in all cases sidelined. The German-Austrian model of a specialised constitutional court was, for instance, adopted by many countries in Eastern Europe. See, e.g., Georg Brunner, \emph{Die neue Verfassungsgerichtsbarkeit in Osteuropa}, [1993] \emph{Verfassung und Recht in Übersee} 819. In areas of commercial and company law, too, the desire to join the European Union (involving a high degree of legal compatibility or even harmonisation) frequently led these new states to draft their laws on the basis of European models.
and worrisome hurdles which the internationalist will confront and must try to overcome.

B. Lack of Precise Information

In the post-war years, comparative law was, mainly, in the hands of talented central-European Jewish émigrés. Though some branched out and taught different subjects in their host countries, transnational orientation was in most cases the only outlet for their talents. The courses were, inevitably, general in nature, and, indeed, in some countries, such as France, where Professor David and his main book seized the imagination of the scholars’ interest in the subject, the generality of the works produced was linked to the idea that the main aim of teaching foreign law was its “civilising” character. The disappearing breed of Roman lawyers took a not dissimilar line, arguing (in defence of the continued existence of their subject) that it “taught young lawyers how to reason.” For years, the idea that the same educational purpose could be achieved by teaching modern German, French, or Italian law (and also give the student some practically useful knowledge) was thus carefully obscured from the new generation of lawyers. Tradition confers an aura of respectability but, alas, it also can lead to sclerosis.

Such a state of affairs increasingly became untenable as (1) the breed of émigrés began to die or retire, (2) the needs of the new generation of students became increasingly determined by professional career demands, (3) the funding of law schools became more and more dependent on private support (which would be more forthcoming with their funds if the subject taught had a practical significance), and finally, (4) the globalisation of business required the teaching of transferable skills (for example, how to attempt comparisons) as well as specific knowledge of foreign law and not generalities. We return to these points below; here we limit our comments to a narrower but no less important question: “How does one get hold of such information?” The question, more pressing in contemporary times as a result of the predilection of the past generation of comparatists

340. The work of the late Professor Clive Schmithoff falls into this category, his considerable perspicacity and boundless energies being, on the whole, shamefully ignored by the British legal establishment.

341. RENE DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (11th ed. 2002).
towards matters of history or general culture;\textsuperscript{342} can actually be split into two components. The first concerns "access"; the second concerns the "form" in which it is made available to a potential foreign user.

Despite the often-voiced complaint that foreign material, especially "raw" foreign material (that is, statutes and leading decisions), is difficult to come by, the truth of the matter is the reverse. Thus, the Institute of Global Law of University College London and the Institute of Transnational Law of The University of Texas jointly run a Web site which in the space of the last two and half years has reproduced in translated form nearly one thousand leading German and French decisions, some of which are already accompanied by short notes indicating the subsequent history (acceptance, rejection, or modification) of their rulings.\textsuperscript{343} Though it is difficult to be precise, we estimate that this material probably approaches two million words. The richness of the (growing) collection is surpassed only by the number of hits—over 350,000 in, as stated, approximately thirty months of operation—that the site has received. Other Web sites, within the United States and abroad, have similarly sprung up, providing access to important leading materials, while (as stated) the number of books and articles written about foreign and comparative law have received a considerable boost in recent times.

Along with the above one finds other, numerous projects (mainly launched under the aegis or the support of the European Union) openly considering projects of harmonisation and unification of the law and publishing their proposals from time to time. This is no place to go into a bibliographical kind of exercise by listing the growth of the available literature, but it would be entirely wrong not to say that the sources mentioned above, coupled with state-sponsored translations of the main statutory material, are daily transforming this landscape. Though full coverage can never be achieved (national lawyers are indeed, themselves, never able to command all of their own growing material), to suggest that access to foreign ideas, decisions, statutory material, and the like is impossible in these days of electronic access is an argument that wears thin and, more importantly, will continue to diminish in force with the passage of time. Paradoxically, therefore,

\textsuperscript{342} The unwillingness of the classical comparatists of the second half of the twentieth century to bequeath a methodology for the practical use of foreign law in a national context is discussed (and criticised) by MARKESINIS, supra note 88, at 35-74.

\textsuperscript{343} UNIV. OF TEX., INST. FOR TRANSNATIONAL LAW, FOREIGN LAW TRANSLATIONS, http://www.utexas.edu/law/academics/centers/transnational/work/ (last visited Nov. 4, 2005).
what an Anglo-American researcher may often find difficult to
discover will not be a translation of a leading foreign decision, but
foreign case law on the matter that interests him, making then recourse
to foreign academic literature the only way of acquiring information
about a foreign system.344

By way of conclusion, we add that the electronic access to this
material also means that it is no longer possible to argue that students
studying in less wealthy institutions (with correspondingly weaker
library facilities) or practitioners working in smaller urban areas are
denied access to this information. Here, as indeed in law as a whole,
we are, thus, very near the stage where the main concern is not access
to material, but the absence of time to reflect on it, as well as the
inability of practitioners to understand this material without the help of
experts. This is a very valid point, and this is how Nicholas Underhill
QC, counsel for the defendants in the English blood contamination
case cited in note 344, above, had to say on this matter:

Comparative law materials are not easy to use properly. If they are not
in English, they have to be translated: even when translated, unfamiliar
terminology, concepts, and procedures have to be explained if basic
misunderstandings are to be avoided. There is no expert available to the
court, which is accordingly dependent on counsel. . . .

. . . But the fact is that English lawyers cannot hope to educate either
themselves or the court to a full understanding of the subtleties of
foreign legal systems. 345

Important though this worry is, it is not un-answerable. For in
that case both counsel for the plaintiffs and the defendants employed
the services of the retired draftsman of the EC Directive and an
Australian expert in product liability law and, by their own admission,
were greatly aided in their tasks. And for the present authors, this
supports their argument that persuading the judge and counsel to have
recourse to foreign law will also benefit the academic profession who
can then be called upon to perform this task which neither of the key
protagonists has the time or training to accomplish.

344. The point is obvious from the English "contaminated blood" case A & Others v
authorities were cited from Australia, England, the ECI, France, Germany, the Netherlands,
and the United States (Illinois and New Jersey).

345. Nicholas Underhill, Postscript to Michael Brooke & Ian Forrester, The Use of
Comparative Law in A & Others v. National Blood Authority, in COMPARATIVE LAW BEFORE
THE COURTS, supra note 41, at 79.
C. Is the Information Up to Date?

But even allowing for such progress, is the available material always up to date? How difficult this task is can, for instance, be seen by glancing again at one of the early leading German cases on "wrongful life" and "wrongful birth" actions.\textsuperscript{346} Earlier, we criticised the German court for quoting the decision of a California Court of Appeal in \textit{Curlender v. Bio-Science Laboratories},\textsuperscript{347} even though it had been overruled by the decision of the Supreme Court of California in \textit{Turpin v. Sortini}.\textsuperscript{348} Now, to be sure, \textit{Turpin} was decided eight months before the BGH reached its decision.\textsuperscript{349} But can a foreign court be expected to be so much up to speed with foreign case law?

The answer must be an emphatic "no." Our criticism was accurate though, perhaps, not fair. Yet, for our purposes, it must be coupled with the proviso that this may not always matter since what advocates of the exchange of ideas do \textit{not} call for is a consideration or transplantation of specifics. In the instant case, there was thus never any question of the German court granting the "impaired" child any special damages for its extraordinary expenses since these, under German law (and unlike American law), are always to be born by the parents. On the other hand, what matters (and mattered in that case) was to show that these (new) actions had to be met in a way that took care of the needs of the unfortunate victims and that they should not be defeated by metaphysical arguments such as the one often invoked in these cases, namely that "impaired life is preferable to non-life." Finally, it was important to show that, notwithstanding the caution showed by the German court, mutual inspiration between two very different legal systems was possible since the outcome in the German case never really depended on the wording of a particular provision of the BGB.

So, it is the \textit{wider dialogue} we are advocating, and this, where circumstances specifically demand, can be expanded on an ad hoc basis more easily in our times than in days gone by. This is partly because, in the light of the above, the basic data bank is larger than ever before and, moreover, can easily be updated. It is also due to the fact that some of the prime innovators in the area of foreign and

\textsuperscript{347} 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).
\textsuperscript{348} 643 P.2d 954 (Cal. 1982).
\textsuperscript{349} The decision in \textit{Turpin} was published on 3 May 1982, while the decision of the BGH was published on 18 January 1983.
comparative law (such as the European Court of Justice, the Strasbourg Court on Human Rights, the Canadian Supreme Court, and the South African Constitutional Court) all publish their decisions in the English language. Finally, and here we speak from experience which, though localised, may reflect a potentially growing trend, we are aware of both judges and practitioners who turn to lawyers such as ourselves—not always for reward—seeking amplifications and updates to already published material. Our submission is that if to the above one adds the long-term effect which multi-national law firms are bound to have in the dispensing of multi-national legal advice, the so-called “information gap” will become smaller and the objection “how do we find out about foreign law?” will lose some of its (understandable) force.

D. Detailed Consideration versus Generalities

Readers of the old, but continuing, debate started by Professor John Langbein’s twenty-year-old article on the German law of civil procedure will find in it an illustration for this heading. The preceding paragraphs may have, in fact, addressed this aspect, and, in the Langbein context, we shall add a few more words under the next Subpart. Here, however, we address the point touched upon in the previous Subpart, which concerns not only the access to foreign material, but also its presentation in a way that makes it attractive and usable by the national lawyer.

We raise this point here, even though one of us has made it a central theme of a book which, though published in England in 2003, has already appeared in a German and Italian edition. One of the arguments there was that the use of foreign law was impeded by the fact that it was often merely translated into the language of the potential “receiver” rather than packaged in a manner that made it useable by the judges and lawyers of the receiving system. There is no need to repeat here the many arguments put forward in that work; one example may suffice.

Take the often discussed question of liability for negligent certifications. In American law, it is dealt with through tort (or


351. This action is better known in the United States as accountants’ liability for harm caused by negligent audits.
specific statutes, not here our concern), and though one encounters the usual diversity of solutions between different state courts, the pivotal legal concept used to determine the outcome of the case is the presence or absence of duty of care. As a generalisation, one could say that, more often than not, liability is not found or it is restricted in various ways. In Germany, the approach is through contract, which is extended (over-extended, one would be inclined to say) to cover persons other than the one initially commissioning and paying for the advice. Liability is often discovered, and the need to explain this rather stark divergence from American law immediately becomes obvious, otherwise possible borrowing is out of the question (even not counting the language difficulty).

Yet, the German solution can become more relevant if presented against the background of the non-existence in Germany of the “class action” mechanism, which can (relatively easily) mobilise potential claimants in bringing an action against a company showing signs of financial difficulty and, perhaps just as importantly, the existence of compulsory insurance coverage for such claims, which achieves some (though by no means complete in the most serious of cases) satisfaction of claims without leading to the bankruptcy of the maker of the statement. What the potential user of such information thus needs to have is (1) not the doctrinal discussion of the topic as it appears in German books (which is difficult to follow for all, but the specialists in German law) nor, even, (2) decisions with factual equivalents similar to his own so that he can attempt his own comparison, but rather a sketch of the above-mentioned factors, which can help set the system in a clearer setting and will then assist the potential borrower (litigant or legislator) in deciding whether he wishes to pursue this borrowing exercise further.352

The focused examination of foreign law (coupled, where possible, with a functional rather than conceptual examination of the foreign system) must, in all but the most technical cases, be attempted against the wider background of the system used for inspiration.353


353. This is a point also made by Justice Breyer in his Changing Relationships Among European Constitutional Courts, 21 CARDOZO L. REV. 1045, 1060-61 (2000). This, incidentally, is not a task that judges can undertake on their own, but it is greatly facilitated if academics, in focused works, aid the judiciary (and, where called for, the legislator) in their task of understanding correctly the foreign ideas and solutions. This way of achieving the
This will often mean asking the question to what extent this can be fitted into the socio-economic environment of the potential borrower. This difficulty has been the subject of a heated debate in the United States during the last fifteen years, and to this we must now turn our attention. From the outset, however, one must note that the American debate has mainly focused on constitutional law matters, especially issues of judicial review, putting very much in a second place the discussion of the same issues in the private law context.

Generalised references to "foreign law" or "foreign systems" or "world consensus" are not only liable to be less usable by a (potentially) importing court, they are also likely to create problems for those relying on such generalities. 354 To invoke, for instance, the English laws of 1933 355 and 1948 356 preventing execution of the death sentence on minors even before the general abolition of the death penalty is relevant and, we believe, instructive. But wider references to "foreign systems" (such as one often finds in decisions of the German Constitutional Court) or allusions to the "historic ties"—legal and cultural in general—that have existed between the United Kingdom and the United States could easily bring about plausible counterclaims that the position of the former has, especially in modern times, drifted apart from the latter on many issues. Justice Scalia was both quick and right to point this out in his dissenting judgment in Roper v. Simmons—even though his examples had little to do with the dispute at hand. His concluding shot, therefore, that "[t]o invoke alien law [and note, once again, the careful use of words to convey not only that the law is different but that its underlying values are also alien] when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry." 357 For one is not, nor indeed should be, comparing entire legal systems but the answers they provide—no doubt understood within their wider contexts—to the problem occupying the (potentially importing) court. What would be

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354. The point is, rightly, made with some force by Professor Michael D. Ramsay in International Materials and Domestic Rights: Reflections on Atkins and Lawrence, 98 Am. J. Int'l L. 69, 77 (2004).

355. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12 (Eng.) (preventing execution of those aged under eighteen on the date of sentence).

356. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58 (Eng.) (preventing execution of anyone under eighteen at the time of the offence).

sophistry, or rather misleading practice, would be to use some views supported in a certain foreign system rather than others.

But would that ever happen? The common law "adversarial" system should be able to expose this weakness, reveal (to the potentially importing court) the divergence of views, and thus put it "on notice" of the dangers of using foreign law. This, however, is a problem we have warned against (and discussed) in several Subparts of this Article. Here, therefore, suffice it to say that we agree with the view (most recently expressed with force by Justice Scalia in Roper) that if foreign law is cited to a national court, the judges of the latter, if inclined to use it as a source of inspiration, should first invite counsel to express their views on it with regard to its reliability as well as its transplantability or inspirational value.\footnote{358} One has to admit at this point that in the United States the summary use of foreign material by the United States Supreme Court—a footnote in Atkins v. Virginia,\footnote{359} three paragraphs in Lawrence v. Texas\footnote{360}—has certainly not satisfied this requirement, whereas the House of Lords decision in Fairchild v. Glenhaven Funeral Services Ltd.\footnote{361} comes closer to the ideal we are advocating and which we believe the growing availability of foreign material in usable form nowadays makes possible.

\section*{E. The Impact of the Socio-Economic and Political Environment}

\subsection*{1. General Observations}

Much has been said about this topic as a serious inhibitor of using foreign ideas, and the value of these objections cannot be denied. But the discussion has not been focused, and, to some extent, this may be due to the vagueness of these terms and how they may operate in different parts of the law. Before we go into details, we wish to raise three preliminary points and restate our awareness of the fact that the best we hope to achieve is a contribution towards a debate which might, one day, lead to a more widely acceptable position.

\footnotetext[358]{This point is made both by Justice Scalia in Roper v. Simmons, 125 S. Ct 1183, 1222 (2005), and, on the academic front and in more general terms, by Ramsay, supra note 354, at 78-79. In France, where amicus briefs are unknown and the gladiatorial discussion of the law is almost unknown at the highest courts, an exception can be found in two instances where the Supreme Court, itself, asked the Société de Législation Comparé to prepare a research report which was then sent to all parties to use in their briefs before the Court. On this, see Canivet, supra note 49, at 191.}

\footnotetext[359]{536 U.S. 304, 316 n.21 (2003).}

\footnotetext[360]{539 U.S. 558, 556-57 (2003).}

First, one must ask the question "are all cultural factors strong—if not insurmountable—inhibitors to the use of foreign ideas?" To invoke culture in its various forms without more circumspection is tantamount to deciding in advance that national law lies beyond comparative criticism. This simply will not do for law—just as it does not in other areas either, for example, economics, politics, national security, or education (just to mention a few), where governments and other institutions and organisations refer to what is happening in other countries and try to learn from that experience. To give but two examples from England, a country not particularly known for its willingness (especially during the better part of the second half of the twentieth century) to use foreign experiences to reform its own institutions or ways of operating, this country is experiencing an unprecedented amount of discussion about using the French "baccalaureate" system to change or adapt its own so-called "A-level" system, and changing its long-respected social security systems by increasingly toying with ideas that would "privatise" some parts of it. Clearly, then, under this heading we may encounter topics (sodomy, death penalty, child chastisement, homosexual marriages) where, say, the American public opinion holds views different from those found in European countries and, moreover, has expressed them in various democratic ways.

Secondly, as the late Sir Otto Kahn-Freund (among others) stressed a long time ago, we have structural (legal) reasons that may inhibit, indeed prohibit, the subversion of deeply held local value judgments through the introduction of foreign legal material into the adjudicatory process. We shall return to this point in later Parts of this Article, but we raise it here since it strikes us as being at the core of the current debate in the United States, where there is a long and politically rooted tradition in some sectors to mistrust the subversion of constitutional ideas by means of judicial review.

Thirdly, there is the time factor. What may appear as a deep cultural difference inhibiting the influence of foreign ideas at one time may cease to be so only a few years later. That these changes can occur despite the expectations of the most acute minds and happen

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362. We have italicised "cultural" in order to exclude, for present purposes, political factors which may openly oppose the introduction of foreign notions or values. That this can raise very sensitive issues can be seen from the history of the Hong Kong Bill of Rights, which suggests that political, not cultural divergences (between East and West) gave human rights developments there its very specific flavour. See, e.g., Yash Ghai, Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights, 60 MOD. L. REV. 459 (1997).
sooner than could ever have been imaginable can be seen by reading Kahn-Freund's much cited On Uses and Misuses of Comparative Law. For there, referring to the inhibiting factor which non-legal institutions can play on the reception of foreign law, he talked about the impact of the Catholic Church on Ireland and the resulting unwillingness to recognise divorce law or, we could add, abortion. The article was written in 1974. By the end of the century, both institutions were part of the Irish legal landscape (and, one might add, the change was to a large extent facilitated by the internationalisation of law and society). The point is, thus, raised merely to act as a warning against stereotyping countries and people and then using these vague images to inhibit all discussion about the advantages derived from the consideration of foreign experiences. Indeed, when one reflects on the "reception" of American law in post-World War II Japan, German law in South Africa, or Canadian human rights law in Israel, one is forced to rethink the force of the inhibiting factor which differences in legal cultures can have at times such as ours when national borders have become so porous in so many respects. Incidentally, the importance of "time," or rather the passage of time, in facilitating the reception of a foreign idea which a few years earlier might have been inconceivable, has not been studied by scholars on either side of the Atlantic, and, yet, it seems to us to be crucial to our chosen subject. Yet, as Sophocles put it in the mouth of Ajax, "everything withers with time."

As far as the United States is concerned, one must add one further factor to those already mentioned, and this, too, shows the unpredictable nature of the time factor. Thus, when the first draft of this Article was being composed, opinion polls across the United States seemed unable to predict the electoral outcome of the November 2004 general election. At the time of writing, this is now known, and the indications are that a series of "conservative" nominations are likely to be made at the Supreme Court. At a stroke, this could radically alter the persuasive force of the arguments for and against the use of foreign law in this country for a generation or more. Such a change could, of course, be justified by invoking the idea of democratic legitimacy. But that serious arguments can end up in the waste bin of history because a couple of hundred votes went one way rather than the other (which is what happened four years ago) is hardly a good way of deciding genuinely difficult intellectual issues, however much one may try to link them to theories of democratic legitimacy.

363. See Kahn-Freund, supra note 334.
2. Two Specific Examples

The above observations, general though they are, prompt us to ask whether the question of the impact of the local environment on the consideration of foreign ideas might not be better considered by attempting, difficult though it is, a *gradation* of legal rules (and situations). Some of these rules may well reflect values so widely and deeply shared in one society that they could arguably make the consideration of foreign ideas and experiences unproductive in the context of a courtroom (though perhaps more welcome in the setting of a legislative assembly). Other rules, concerning, say, contract or tort problems, could be at the other end of the spectrum as, indeed, the American experience for the whole of the nineteenth century and the first quarter of the twentieth century supports.\(^{364}\) In between could lay a range of topics which could be argued as falling within one side of the divide or the other, and are capable of a more nuanced consideration. Let us look briefly at two situations.

The first touches upon homosexuality, always an emotive issue.

Imagine a state voting in a referendum by a substantial majority to enact an amendment that bans any judicial or legislative legitimising of homosexual marriages. (At the time of writing, eleven states had this issue on ballot, and it passed in all).\(^{365}\) Imagine further a car accident involving two couples: one legally married, the other cohabiting in an homosexual union. Two out of the four are seriously injured and rushed to hospital while a few hours later the uninjured “partners,” having heard of the accidents, visit the hospital to find out about the state of health of their loved ones. The hospital rules authorise such disclosure to spouses (or other close relatives) but not to others, with the result that the lawfully wedded partner receives the desired information whereas the homosexual cohabitee is kept in the dark. Though the state may have expressed its disapproval towards homosexual marriages, is the above (hypothetical) example consistent with ideas of fairness, equality, and proportionality?\(^{366}\) Would invoking

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365. And it may even have influenced the overall voting result in states such as Ohio, which was seen to the very end as a “swing state.”

366. In Hamburg, Germany, state legislation (the *Hamburgisches Krankenhausgesetz*) introduced a right to information of same-sex partners about half a decade ago while the
the growing tendency among Western democracies (for better or worse) to improve the status of homosexuals in society be impermissible as undermining the earlier referendum result which showed its abhorrence to the idea of homosexual marriages? We called our example a “hypothetical” because we are not aware whether a case with the kind of facts we have imagined has actually arisen in the United States. But the evidence one has from the recent expansion of statutory enactments that permit the establishment and registration of “domestic partnerships” would suggest that such rights are being slowly established in a number of states.

Though these situations may have been decided differently, both show that that a court decision at the most general level of a legal problem raising serious moral issues may go one way, while a court deciding a narrow (and one might argue: a more “technical”) question linked to the same wider issue may come to a different solution. Indeed, a series of statutes, executive orders, and other measures passed after the terrorist attacks on New York and Washington on 11 September 2001 resulted in a rapid increase of recognition of benefits given to surviving same-sex partners. These hierarchically “lesser” rules show that the legal system can tolerate at greater levels of specificity ideas which are repelled when phrased at a level of generality and abstraction that immediately provokes strong moral values and unreasoned opposition. If this assertion is correct, the room for maneuvering with foreign ideas increases accordingly.

Federal Constitutional Court had still ruled that homosexuality was a clear violation of bones noraes in 1959. Similar laws putting same-sex partners on par with married couples were enacted in the 1990s in many Scandinavian countries. For a more detailed comparative survey, see DIE RECHTSSTELLUNG GLEICHGESCHLECHTLICHER LEBENSGEMEINSCHAFTEN (Jürgen Basedow, Klaus J. Hopt, Hein Kötz & Peter Dopffel eds., 2000).

367. See CAL. FAM. CODE § 297(b)(6) (West 2005). In its 1999 form, this provision only allowed the registration of domestic partnerships. But California Code of Civil Procedure section 377.60 was amended in 2001 in such a way to enable “domestic partners” as defined by statutes to make medical decisions for each other, adopt their partner’s child, use sick leave to care for an ailing partner, and become recognised claimants for the purposes of wrongful death claims. See Holguin v. Flores, 18 Cal. Rptr. 3d 749 (Cal. Ct. App. 2004).

368. A close parallel to our hypothetical can be found in England. This went the other way, even though homosexuality has been decriminalised for some time now in that country. In the case in point, the court had to decide whether a railway company policy giving its married employees the right to obtain every now and again free tickets for their spouses could be availed by an employee for the benefit of his homosexual partner. The English court said “no,” and for reasons which need not be discussed here, the Court of the European Communities took the same view. See Case C-249/96, Grant v. S.W. Trains, Ltd., 1988 E.C.R. 1-621.

The second example is a “dryer” one, on the surface, of interest only to specialists. It comes from the area of civil procedure. Nearly twenty years ago, Professor John Langbein wrote an article commending the efficiency of German civil procedure and contrasting its merits with the demerits, as he saw them, of the American trial process.370 The proposal sparked off a heated and, at times, harshly phrased debate,371 which (it may be safe to say) failed to budge the adherents of the two views from their respective positions. More recently, however, Professor Chase372 returned to the fray and, through extensive references to sociological literature,373 attempted to suggest that cultural reasons prevented the transplantation of the German model to the United States. His views led us to reflect once again on the invocation of culture as an inhibitor of foreign borrowing.

Professor Chase’s sources confirm (or are meant to confirm—personally we adopt an ambivalent position on the evaluation of the sociological evidence since we confess a certain mistrust towards the methods adopted and the meaningfulness of the conclusions for legal rules) the well-known stereotypes of German “authoritarianism” and American “individualism.” These characteristics, he argues, tend to make the Germans value “certainty” more than the Americans. It also leads them to wish to promote settlements at every conceivable opportunity. Leaving aside the fact that we both feel that certainty, predictability, and reduction of litigation are, in principle, desirable


characteristics of any legal order, the picture painted by Professor Chase of the German and American legal systems is not one which can be recognised with ease. Here are three reasons why we say this, though again they are mentioned only briefly because of lack of space.

First, it is the Anglo-American systems that have developed and used their legal devices (for instance the duty of care in their law of torts) or arguments such as that of floodgates against litigation, or phrases such as “bright line rules” in order to ensure certainty (and rigidity) at the expense of flexibility and justice. While judges using the expression “bright line rules” have, in fact, stressed that what is uppermost in their minds is administrative convenience and not justice, courts that have condemned this reasoning have exposed the true reasons behind them. These are not arguments or devices found in any civil law system.

Secondly, Professor Chase’s article is based on a central theme which supports his contention that “[t]he German system . . . reflects a willingness to accept structures of authority that are inimical to the more individualistic Americans.” If that is the case, one may be permitted to ask: are the Greeks or Italians, who essentially share the same model of civil procedure as the Germans, also “authoritarian” and any less “individualistic” than the Americans? Since the answer must be negative, one is lead to believe that there are other more important factors which make this transplantation of ideas and institutions possible.

Finally, if civil procedure rules “must be placed in deep cultural context,” how does one explain the recent Woolf Reforms in England, which are based on a lengthy and comparative law exercise which led to the adoption of many rules and institutions that strengthen the managerial role of judges and accept the idea of court-appointed experts and the like (all of which are features which Professor Chase does not treat as “American”)? Does this mean that the English are more like the Germans than the Americans? Or does it support Professor Chase’s thesis that rules cannot be borrowed (not even ideas can be looked at) if some sociological model adopts a different way of classifying nations?

376. Id. at 17.
The problem with such an unadulterated sociological approach to law is not just that it does not sit well with what lawyers say and do; it also hides the real reason why such transplants are difficult. Professor Chase, himself, mentions it at the end of his article, though hardly gives it the prominence we think it deserves. In his words, “[e]ven if American judges would try to expand their control of the trial we can predict a long and costly struggle with the trial bar.”\(^{377}\) This may well be a valid prediction. We suspect that Professor Langbein would not deny such difficulties. But it is a pragmatic, not a cultural (except in the loosest possible sense of the word) objection, and the acceptance of the changes made in England by the Woolf reforms suggests as much.

To sum up: First, the question of cultural differences is important, as is the need to adapt a foreign idea when introducing it in a different environment. But we entirely agree with Professor Langbein when he wrote “[i]t is all too easy to allow the cry of ‘cultural differences’ to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example.”\(^{378}\) Moreover, the gradation approach we proposed shows that it does not work as an inhibitor. Secondly, practice shows that the “cultural differences” card, though both important and delicate, can be overplayed. The impact of the Canadian Charter on the development of Israeli human rights law must, surely, attest to this. The \textit{El-Al Israel Airlines Ltd. v. Danielowitz} decision of a three-judge panel of the Israeli Supreme Court proves as much in one of the most sensitive of areas on which local religious feelings have clear cut views (homosexual rights),\(^{379}\) Justice Dorner indulging in an even more extensive use of comparative (mainly Canadian) material than Justice Barak (who, in fact, nearly lost his scheduled promotion to the post of President of the Court).\(^{380}\)

The cultural factor is, thus, an important element that must be weighed carefully in any attempt to derive inspiration from another system. In many (but not all) cases, however, it may require little more than trying to understand the legal rule or solution within its wider

\(^{377}\) \textit{Id.} at 20.
\(^{378}\) Langbein, \textit{supra} note 370, at 855.
context. In a limited sort of way, we have attempted to do this in this Article, for instance, when trying to explain and discuss Justice Scalia's hostility (real or apparent) towards foreign ideas of justice within the political context in which his own ideas must be placed. Where this can be undertaken, it has, in our view, the advantage of asking the judge to analyse a legal idea within the wider constitutional and political framework which he is capable of understanding without drawing him into the more "murky" waters of sociology with which judges are less familiar.

F. Legal Certainty

The use of the comparative method substantially expands the boundaries of legal discourse. New arguments and perspectives found in foreign law can thereby impact on the outcome of a particular case and influence the further development of national law in general. Once the national gate to the world wide web of legal systems is thrown open, however, the problem of choice arises—and with it the danger of "cherry-picking" legal ideas from other systems when and where this seems appropriate to promote the judge's own cause. This, in itself, may not be so very different in disputes which are argued solely on the basis of national rules. If, however, foreign law can be introduced as persuasive authority, the parties will have to anticipate—and possibly counteract—a far larger range of legal materials than in the traditional scenario in which the rules of the game are limited to well-known boundaries. Problems that already exist in the latter case (surprising changes of the law, the sheer number of legislative and judicial developments, and, subsequently, the increasing danger of liability for legal malpractice resulting from an insufficient evaluation of litigation risks) could increase. It would be wrong to deny this danger though it would seem equally wrong to overstate it in the absence of any hard evidence to that effect.

G. Do Courts Have Enough Time To Deal with Other Legal Systems?

The cases we have discussed in the course of this study were decided by very different courts. Among them are a number of supreme or constitutional courts, specialised federal courts (such as the German Bundesgerichtshof), courts operating on a supranational level (the European Court of Justice), and courts situated on lower tiers of a country's judicial system (such as the Cape Town Division of the High
Court of South Africa). Not only do these forums operate in very different legal environments, judges sitting on these bodies are also confronted with very different restraints as far as time, money, and research facilities are concerned. These are factors that have to be taken into account when advocating recourse to foreign law, even if it only be for the purposes of inspiration. One must also admit that the chances of such comparative law exercises being carried out are much greater and, one might add, even more appropriate, at courts of the highest level. Yet, again, one must try to evaluate this danger; and, if one is to do so, on the basis of the space foreign arguments occupy in published judgments or time spent arguing it in court, the answer would seem to be that this danger can again easily be exaggerated.

H. "Depth" of Analysis of Foreign Legal Ideas

This problem comes in two guises. In some systems, judges only give the barest of indications that foreign legal ideas may have influenced their reasoning. The ECJ’s regular references to the fact that "the Court draws inspiration from the constitutional traditions common to the Member States" often falls—when viewed in isolation—into this category. Similar phrases in German decisions show that judges have identified foreign law as similar, different, or otherwise meaningful, but the reader is left in the dark as to what these similarities and differences are in detail, how they compare to German law, and how they have influenced the judge in the instant case. Here, the use of the comparative method is not superficial; actually, the method is not used at all, and the reference to foreign legal systems is little more than a signal (others would say a fig leaf) that courts are aware of the world outside. Indicative of their court’s awareness that "there is another world out there," such "mini-references" could also be seen as an individual judge’s wish to demonstrate wider culture! Either way, from a scholarly point of view, such references are of limited value and should be used with great caution.

The second variant may be more dangerous. In these cases, courts do embark on a more extensive analysis of foreign law and the

insights that can perhaps be gained from the comparison. References to the text of a single statute, a particular case, or the writings of one or two foreign academics do not, however, always reveal the full picture of the law in practice. Many questions familiar to the professional comparatist arise. How does the legal system as a whole deal with a certain issue, and can answers perhaps be found in different (and sometimes surprising) parts of the law? How has the case law in question developed, and what were the alternatives? What is the view of other academics? And, more importantly, how does all of this impact on the “local” question the court is called upon to resolve? In the United States, these legitimate questions have been exploited by those who oppose the way foreign law has been used by the United States Supreme Court, but the complaint seems to us legitimate only insofar as the way this material has been used rather than in the value of consulting this material properly—which is what we are advocating in the belief that the growing availability of material makes this possible.

Justice Johan Kriegler of the Constitutional Court of South Africa addressed this issue in Bernstein v. Bester when he responded to the extensive comparative work presented by his colleagues on the bench and counsel—a noteworthy contrast to the accusation levied against the use made by American courts—arguing the case with the following words:

I agree with the identification and the logical analysis of the principle . . . but prefer to express no view on the possible lessons to be learnt from other jurisdictions. That I do, not because of a disregard for section 35(1) of the Constitution, nor in a spirit of parochialism. My reason is twofold. First, because the subtleties of foreign jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems. For the present I cannot claim that degree of proficiency . . . .

The second reason is that I wish to discourage the frequent—and, I suspect, often facile—resort to foreign “authorities”. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is

384. 1996 (4) BCLR 449 (CC) (S. Afr.).
always useful, particularly where the courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country’s constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision. The prescripts of section 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents. 385

As stated, in the light of the enormous increase of comparative material on foreign legal systems readily available today, Justice Kriegler’s criticism may seem a little harsh.

There is, however, a difference between the availability of knowledge, on the one hand, and the use of this knowledge on the other. Courts and practitioners work under heavy time constraints and will not always invest the necessary resources into the comparative exercise. Especially in systems where comparative law is currently en vogue, there will be a temptation to rely on only one or two readily accessible sources.

An example from South Africa proves the point. In State v. Makwanyane & Another 386 on the constitutionality of the death penalty, President Arthur Chaskalson, delivering the unanimous decision of the Court, had recourse to German constitutional law in the context of (1) the use of legislative history as an interpretative tool in constitutional disputes; 387 (2) the right to human dignity; 388 (3) the limitation of fundamental rights; 389 and (4) Section 33(1)(b) of the Interim Constitution, the so-called “essential content clause.” 390 The Court, thereby, referred to provisions of the German Constitution of 1949 and various judgments of the Bundesverfassungsgericht, but it is remarkable that it did so mainly by reference to two—American—sources: Professor Kommers’ The Constitutional Jurisprudence of the Federal Republic of Germany, published in 1989, and Professor Currie’s The Constitution of the Federal Republic of Germany, published in 1994. Professor Dieter Grimm (at the time a member of the German Constitutional Court) was also cited twice, but with an

385. Id. at 506.
386. 1995 (3) SA 391 (CC) (S. Afr.).
387. Id. at 405.
388. Id. at 423.
389. Id. at 438.
390. Id. at 446-47.
English publication. Despite close linguistic ties between German and Afrikaans, original German sources (judicial and academic) were, thus, mostly referred to indirectly; the judgments of the Bundesverfassungsgericht were accessed by reference to the translations in Kommers and Currie, and one of the leading commentaries on the German Grundgesetz (by Maunz and Dürig) was cited by reference to the latter.

While the above example may have been influenced by the language barrier, the fact remains that comparative work should not rely on only one or two sources. Every author describing a legal system will inevitably make a selection of material (both cases and academic opinion); translations of court decisions will often be restricted to extracts; and summaries (such as the works of Kommers, Currie, and Grimm) will, themselves, often lack detail due to restrictions in space. This does not mean that the comparative method cannot be utilised by judges; several other examples from South Africa show that courts can engage in a meaningful analysis of foreign law. The dangers highlighted by Justice Kriegler do, however, call for a cautious and, more importantly, focused approach. They also suggest that judges (in addition to their own work) should make more use of external expertise, which can easily be provided by academic institutions specialising on foreign and comparative law or even individuals specialising in the study and presentation of foreign law. In Germany, for instance, there is already a wide-spread practice of obtaining from such institutions written opinions (wissenschaftliche Gutachten) about the state of foreign law whenever such knowledge is required by the rules of private international law, and many court libraries have acquired extensive collections of such expert opinions. The same is true of the European Court of Justice, which makes use of its own research and documentation service. These sources should not, however, remain hidden behind the kind of generalised statements referred to in the first part of this Subpart, but rather should be attached to the decisions and cross-referenced in the relevant parts of the opinions.

I. Additional Objections by American Jurists

Judge Richard Posner, a jurist always willing to venture into ever-new areas of the law with an enviable sense of self-confidence, has adduced three additional arguments in expressing his doubts (if not outright hostility) towards the use of foreign law.392

First comes the extra cost, effort, and time “wasted” on such exercises at a time when there is enough local law. Prima facie, this is a serious objection, and, though we call this an “American” objection (mainly because it has been articulated most forcefully in that country393), it is an argument that could legitimately be raised in any jurisdiction. Yet in practice, its import may have been seriously exaggerated. We offer three reasons for this scepticism.

First, one notes that the discussion of foreign law, at least in American decisions, has been minimal if one is to judge from the space they occupy in the published judgments and, even, the fact that they figure almost routinely only in footnotes. One also notes that much of the information on foreign law comes from briefs filed by amicus groups and, thus, do not burden directly (in terms of costs) either the court or the parties. Now, of course, one could argue that this is precisely because American judges tend to display a hostile reaction to foreign law. But one could then argue that even if they were receptive to it, the cost of assembling it for consideration would still be a fraction of the costs of litigation which, in any event, is wasteful in systems such as that of the United States if compared to other countries. To put it differently, one suspects (and in the absence of empirical data foreign commentators must be tentative in their reactions) that the big costs of litigation in the United States stem from other local features (class action characteristics, discovery rules, unnecessarily prolonged hearings, lack of an efficient supervisory role by the judge, at least compared to European models, and so on).

Secondly, we (tentatively) advance these concerns on the basis of some (limited) experience of the first of us before both American and British courts. Certainly in the latter situation, when the first of us appeared as “junior counsel” in one of the early cases where foreign civil law was used in England, he can testify that the presentation of

393. This was also a point also raised by counsel in Bowers v. Hardwick, 478 U.S. 186 (1986), upholding Georgia’s sodomy statute and failing even to consider the earlier decision of the European Court of Human Rights in Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A), reprinted in 4 EUR. H.R. REP. 149 (1982), holding that article 8 of the European Convention on Human Rights accorded privacy protection to adult male homosexuals.
this material took less than one hour in a hearing that lasted five days before five law lords.\footnote{394} In short, the extra cost argument, as a percentage of the total costs, seems more like a smoke screen rather than a real objection. This personal experience would seem to be supported by those who have studied the citing practices of great judges. Thus, the great Benjamin Cardozo who "cited far more authority in his opinions than did his colleagues on the New York Court of Appeals ... wrote opinions which were no longer than average."\footnote{395}

Thirdly, we feel that the invocation, in appropriate cases, of foreign precedents can be useful even though there may be much "internal" material (in the United States coming from, effectively, fifty-one jurisdictions). Yet, to paraphrase (slightly) Lord Justice Steyn (as he then was), "it is arguments that influence decisions rather than the reading of pages upon pages from judgments" which tend to echo the same basic philosophical position.\footnote{396} And arguments are sharpened and refined if they are based on the consideration of differing positions rather than being formulated on the basis of decisions which represent variations on the same themes. Incidentally, this is a further reason why one should not be too concerned about the "up-to-date" argument. For what can prompt reflection and reconsideration is not so much the recent vintage of a decision, but the novelty of its perception of a problem and the originality of the proposed solution.

Secondly, Judge Posner objects to the "undemocratic" nature of foreign judges. His concern could be understood in two very different ways.

The first is, possibly, the cruder of the two, implying that foreign judges do not undergo the same form of democratic legitimisation as most American judges do.\footnote{397} Anticipating the objection that this may not be real in the case of Federal judges, he alludes to the Senate confirmation hearings without much discussion of the fact—obvious to outside observers, perhaps, more than insiders—that they have, in recent times, become more of a show than a reality. But assuming that


\footnote{397} See Ramsay, supra note 354, at 80. We read this article as taking a similar line.
our reaction is too harsh and unjustified, so is Judge Posner’s (possible) general implication that foreign judges are so obviously undemocratic. German constitutional judges, for example (and since we are talking about comparative law in a constitutional setting, they are as good an example as any), have distinctly more democratic credentials than American Federal judges, the former having been appointed by the two German houses of parliament—the Bundestag and the Bundesrat—and, what is more, appointed for a restricted period of time. \(^{398}\) Seen in this light, one might be forgiven for suggesting, therefore, that Judge Posner’s argument is, in reality, more of a pyrotechnic than something that should leave a lasting impression on the debate. \(^{399}\)

Judge Posner, however, may have been driving at another point. For what he may have meant when referring to the foreign judges not being “democratically selected” is that their authority can (in our example) be traced to German voters, not to American ones. Posner’s point is, thus, that no country’s voters have any voice in the making of foreign law, so that importing that law is necessarily undemocratic. Posner, by the way, is no originalist. He famously rejected Scalia’s effort to eliminate judicial discretion in an article entitled *What Am I? A Potted Plant?: The Case Against Strict Constructionism.* \(^{400}\) But the objection derived from the notion of democracy is part and parcel of Scalia’s model. Judges must confine themselves to enforcing only what was enacted by elected representatives of the people; unelected judges taking initiative or exercising discretion are behaving in an undemocratic manner—even if they are domestic judges and even if they claim to be relying on domestic values. It follows from this a fortiori that if they are looking at or even relying on foreign judges, who have no claim whatever to authority derived from the American people or American voters, they are, again, acting in an undemocratic manner.

To us, the argument, thus, formulated seems to apply only to the United States—indeed, only to those judges who see dangers even in the use of foreign law as a source of inspiration or ascertainment of

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\(^{398}\) See *Grundgesetz* [GG] [federal constitution] art. 94(1) (F.R.G.); *Bundesverfassungsgerichtsgesetz* [BVerfGG] [Law regulating the Federal Constitutional Court] § 5.

\(^{399}\) Though, of course, one must admit that Posner has a point when it comes to the English system of appointing judges, a practice which only recently has become the subject of growing criticism.

“evolving ideas about justice and decency.” And we have seen in Part I that not all American justices see themselves so circumscribed in performing the task of interpretation.

The argument, most recently resurrected by an academic colleague under the heading of accountability,\textsuperscript{401} is also misleading insofar as it assumes that it is the foreign judge’s view that shapes American law (in an undemocratic manner). In reality, of course, what has happened is that the foreign idea, where it has convinced an American judge of its true merit, then becomes part of American law because he—the democratically elected or confirmed judge—chooses to formulate it as his own. For anyone who believes in the exchange of ideas, nothing could be more attractive, and if there is a danger in the practice, it lies in the fact that the “importing” judge may misunderstand (or, less likely, deliberately misuse) foreign law, and not in the purported undemocratic nature of the latter.

Finally, Judge Posner expresses the fear that such (foreign) material would be yet another example of “judicial fig-leafing.” This need not occupy us for long, for, in essence, he provides his own answer: would that be any different to anything else the judge does? After all, with various degrees of intensity, we have been told since the Realist Movement first saw the light of day that judges decide first and justify afterwards.\textsuperscript{402} Would recourse to foreign law really provide a distorting and reprehensible innovation to existing practice?

Yet, it would be wrong to read too much into statements such as these since all theories can be exaggerated, especially by those who invent them. Mr. Justice Burton’s extrajudicial comments about the hearings in the blood contamination case,\textsuperscript{403} as well as the way he reached his own judgment, thus, repay quoting in full given the important role comparative argument played in that case. He, thus, wrote:

The full and detailed oral argument was in my view essential both to ensure proper investigation of the issues and to put me in a position to arrive at an informed and reasoned decision. Bad ideas . . . can be tested and discarded. Good ideas can actually emerge in the course of discussion, but in any event can be tested and developed. . . . I had an entirely open mind and was very much swayed first one way and then


\textsuperscript{402} Even British judges nowadays admit this. See, e.g., Lord Mustill, \textit{What Do Judges Do?}, 1995 JURIDISK TIDSSKRIFT 611.

the other as the argument and evidence continued and developed. This meant that, once the case finished, I was able with a blank sheet of paper to reread not only my notes but, more importantly and more accurately, the transcripts of the forty-nine days of evidence and argument, and in particular to reconsider the bundles, including the comparative law. I was given some five weeks' "time off" to write the judgment, and I just about managed it in the dead-line, working the sort of hours which I had thought I had left behind at the Bar.404

At 170 pages, the judgment in the blood contamination case is long, even by English standards. But reading its carefully crafted text and the (subsequent) accounts provided by the main protagonists in that case not only reveals the English method of trial at its best, it also demolishes the argument that the use of foreign law would amount to little more than "judicial fig-leafing." It could, of course, be that, but if properly done it could also provide the core of the decision. So, as always, what matters is not just the provenance of the material but how it is presented and used.

VII. HEADING TOWARDS A CONCLUSION

A. Modes of Constitutional Interpretation

In recent times, the interest shown by American writers in foreign (and especially European) law appears to have diminished. To be sure, this indifference is not a universal phenomenon. The South African Constitutional Court, for example, has attracted much attention as well as a measured degree of admiration for its comparative efforts. And Canadian borrowings of American human rights law, used to shape their own human rights jurisprudence after the introduction of the 1983 Charter, have also been described by American writers in some detail, though frequently the aim of such commentaries has been to demonstrate the superiority of the American version.

If academic interest in foreign law has been slender, judicial interest, especially in the domain of public law, has been even thinner (though some of the liberal judges of the United States Supreme Court appear recently to have launched a campaign to prove to the world that America, politically as well as legally, does not speak with one voice). The American judicial debate has focused mainly on judicial review and on whether proper constitutional interpretation permits even the

consultation of foreign law, even as a mere source of inspiration. To foreign lawyers this discussion, though particularly illuminating of the inter-relationship of (American) politics and law, is of limited comparative value being closely dependent on, indeed subordinate to, the American Constitution and American theories on orginalism or textualism. Many outside the United States, would, probably, even find them odd.

Conclusions such as the above are disappointing to “outsiders” such as ourselves who have multiple links with the American legal world and who would like to see the considerable talents of American judges and academics discuss more seriously a range of problems which are increasingly common to us all. As comparatists, we would also like to have the views of our American colleagues as to when and how foreign law can be used. Yet, Americans seem closed to foreign ideas as never before. And this American “introvertedness” has, arguably, also contributed to the impoverishment of its own constitutional legal literature. Indeed, it is two Texan constitutionalists, not us, who have claimed that American constitutional literature “has been deep, but not at all wide.”405 When we read such statements, we feel that there must be something we can give back to American law in exchange for what we have taken from it.

To non-American lawyers in general and comparatists in particular, the recent American literature presents the further drawback of having focused almost exclusively on public law and, there again, mostly on the domain of judicial review. Generally speaking, therefore, the utility of the comparative method to national law, in the courtroom or the classroom, has not been systematically explored in the United States. Yet, for the reasons we shall explore further down, the negative views that seem to dominate in the domain of public law seem likely to infect—and we use the word advisedly—even the traditional area of common law where cross fertilisation was once a fact of life.

In the United States, civil procedure may, in the 1980s and early 1990s, have provided the only major exception to the above statement, but, then again, even this debate seems to have fizzled out without having led to anything concrete behind it. Thus, overall, in matters of private law, the more tolerant voices of yesterday have fallen silent, this silence engulfing English law as much as modern civil law. Further down, we ask whether this decline may have, in part, been affected by

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405. Forbath & Sager, supra note 1, at 1669.
the debates that have taken place in the domain of statutory interpretation where opposition to foreign law has been at its most virulent. For those seeking new ways to teach foreign law and, more importantly, to utilise good foreign ideas in the courtroom and in the drafting of legislation, the inspiration must be sought elsewhere (though in the sparring between the justices in the recent death penalty decision of the Supreme Court in *Roper v. Simmons*, one finds many useful tips about how to use or not to refer to foreign law).

To our knowledge only South African, Canadian, and, to a lesser extent, a small number of German, English, and Israeli judges (and academics) have shown an interest in the above matters, and their work (though by no means always convincing) has the added advantage that it ranges over the whole area of law, namely public as well as private law.

In this Article, we have consciously taken the risk of being too brief in our exposition (at some levels at least) in order to attempt to examine our topic from a wider angle than has hitherto been attempted by academic literature, that is, by discussing both public as well as private law. As stated, we have also tried to devote equal attention (if not space) to four—if we may call them “major”—legal systems, namely (in alphabetical order) the Canadian, the English, the German, and the South African, partially because (as already stated) they seem to have generated the greatest interest, and compare them with the current and ambivalent (if we may so describe it) American position. Absent from this list is the contribution of French legal thought, except in a passing manner. Though the elegance and originality of the

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407. This generalisation may do injustice to the courts of other countries, some of which have been known for courageous forays into the study and use of foreign law. See Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 BYU L. REV. 41 (citing A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA ch. XII, § 54, ¶ 1 (1949), discussing in Hungary the illegality of the death penalty on the grounds of arbitrariness); State v. Ncube, 1988 (2) SA 702 (Zimb. S. Ct.) (debating whether whipping of an adult male amounted to an inhuman or degrading punishment); Amar Nath v. State, (1951) 38 A.I.R. Punjab 18 (1950) (debating in India's Special Branch free speech and censorship); Gandhi v. Union, 2 S.C.R. 621 (India 1978) (debating due process rights, transferring the principles of the Fourteenth Amendment of the United States Constitution, despite a different textual phrasing of the Indian Constitution). For more details, ideas, and references, see generally Lester, *supra* note 141.
408. Absent from the list are Israeli court decisions, largely because of our inability to access this literature in the original language. We note, however, that our own respect for the inventiveness shown by the Israel Supreme Court is not shared by all in the United States. For instance, see the views of Robert Bork who referred to it as “the most activist, antidemocratic court in the world” in *Coercing Virtue: The Worldwide Rule of Judges*
French legal mind are incontrovertible, the attention that French law has attracted from contemporary American scholarship and court practice (outside the State of Louisiana) is smaller than that of the other three systems. For reasons of space, therefore, a fuller discussion of this system had to be deferred for another time. But should the present study ever be deemed worthy of further expansion to include a more in-depth study of the contemporary Canadian tendencies, then this omission would no longer be tolerable, and some attempt should be made to discover the true French picture despite the opaqueness of the judgments of the highest French courts.

Finally, we should stress that being descriptive has not been our only aim. For we were when we started this research—and still remain—anxious to kick-start the process of formulating normative rules which could help clarify foreign practice and determine where and how this could be used by national courts. One of us has, indeed, already written about the need of “packaging” foreign law before attempting to put it to some use in a purely national context. Here, however, we wished to go further and talk about the wider and, in terms of time, pre-existing need to engage in such foreign dialogues. Thus, in attempting to formulate the normative guidelines which follow, we have drawn on the writings of others (especially the pioneering work and terminology of Sujit Choudhry, on which we draw liberally, but not slavishly, in what follows).

Like us, Choudhry takes the view that “legal particularism underlies most American theories of constitutional interpretation.” This immediately puts the United States on the opposite camp from almost all major legal systems in the world. But Choudhry also notes that the globalisation of modern constitutionalism is also an undeniable fact of life which is not leaving even American judges and academics unmoved. So, in order to deal with this phenomenon, he suggests three different modes of comparative constitutional interpretation. The first he calls the “universalist,” which he believes


410. Id. Choudhry understands “particularism” to emphasize “that legal norms and institutions generally, and constitutions in particular, both emerge from and reflect particular national circumstances, most certainly a nation’s history and political culture.” Id. at 830.

411. For a selection of contradictory dicta, see supra Part III.
"posit[s] that constitutional guarantees are cut from a universal cloth." The second interpretative mode he calls "dialogical." This starts with the assumption that differences exist between the different legal systems, but also accepts that even in this context a dialogue with other systems is not only possible but useful in that it also "furthers legal self-understanding." Finally, Choudhry sees a third interpretative mode, which he calls the "genealogical." This sees "constitutions [as being] often tied together by complicated relationships of genealogy and history, and that those relationships themselves offer sufficient justification to import and apply entire areas of constitutional doctrine." Choudhry explores this heading by references to specific cases taken mainly from the United States, South Africa, and Canada, and throughout admits that these interpretative modes are not mutually exclusive. Towards the end of his long paper, Choudhry sets out the different "signals" that each of these interpretative modes may send out to the citizens of the deciding court as well as "outside observers."

Thus, those using the "internationalist mode" may have the international legal community in their sights, though they may also wish to internationalise their national legal culture in order to reform, revitalise, or reorient it in a new direction. Though it could be argued that such formulations were (almost) devised with the South African experience in mind (or Hungary, whose Constitutional Court was, as

412. Choudhry, supra note 409, at 833. Doctrinally, he supports this school of thought by citing the views of Konrad Zweigert and Hein Kötz contained in the first edition of their Introduction to Comparative Law (1987), which may not be advisable since this work deals almost exclusively with private law and may, thus, render the transposition of some of its ideas into the public law domain debatable. For present purposes, however, this point need not be considered further.
413. Choudhry, supra note 409, at 835.
414. Id.
415. Id. at 838.
416. Id. Choudhry's discussion on this point seems to pay inadequate attention to the point made earlier on, namely that systems are often veering away from their genealogical ancestors. Studying the reasons for such shifts is important if one is to try to predict which system (and which case law) is likely to serve as a model in the future. Yet, most American commentators (and some judges) wonder whether American constitutionalism can remain a model for exportation given its current introvertedness, and also the fact that the phrasing of its Constitution does not tally easily with the texts of modern constitutional texts. Yet, it has to be admitted that this point cuts both ways. For, if the text of the United States Constitution does not match that of most other constitutions, written much later in time and in a different political environment, then that is an obstacle not just to exporting, but also to importing foreign ideas.
417. Id. at 885-92.
already stated, early in its life willing to ban the death sentence\(^{418}\), to a large extent they can also be applied to Canada whose judges may not feel to be under similar pressures. The “dialogical mode,” on the other hand, may enable a court to learn from a foreign experience without internationalising its domestic constitutional culture, at any rate openly and drastically. To a very large extent, this seems to us to have happened in Canada in the post-Charter era.

Choudhry’s work is of great interest and value and, to our knowledge, it has been seen in this light by American academic writers. But he also seems more interested to “describe” and “classify” what happens than to come up with some kind of “normative” set of rules that might help *guide future judges and lawyers* as to when recourse to foreign law is desirable and even necessary, and when one should back away from this task. We attempt this in the next Subpart in a tentative manner, desirous to “start the ball rolling.”

**B. Values and Rules**

We again start with the American system, which nowadays seems most resistant to the use of foreign ideas, in order to explore ways of bridging the gap that separates it from the other systems discussed in this Article. An additional aim is to try to explain the complexity of American law to foreign observers (sometimes too keen to copy it without understanding its wider setting and the passions it can raise), but also to give to our American readers an indication of how (well disposed) outsiders—or, in Robert Bork’s offending language “faux intellectuals”—see it these days. To put it differently, those who wish to influence the American scene must learn to shape their proposals in a way that fits the environment they are trying to influence. The problem of “packaging” thus acquires a new dimension.

Though one can criticise the way lawyers (and the writers of amicus briefs) have tried to introduce foreign law in American constitutional litigation—Chief Justice Rehnquist and Justice Scalia did much of this in *Roper*—what seems to have been the dominant obstacle in the path of such reception has been the wider and more fundamental issue of the limits of constitutional interpretation and the concomitant danger of undermining basic, widely held American

values. At the risk of repetition, we stress again that this “lack of interest” in foreign ideas must, thus, be seen against the wider context of the American political debate about the proper role of judges—something which we have made a leitmotif of this Article since so few non-American lawyers genuinely comprehend its true importance. Conversely, this should also mitigate the extent of the “anti-European” animus which some American jurists convey in their language.

Yet, what applies to constitutional interpretation may, as stated, already be affecting (or infecting) interpretation in the private law, as well, thus reversing a well-established contrary practice. If this happens, it would represent an escalation of the isolation. Yet, it may occur aided and abetted by the belief, in the ascendency at the moment among the governing political elites, that America is “a city on a hill,” better than others and morally bound to improve others who do not attain its own standards. This sounds like a tall order; yet, indisputably, there are many politicians, and not a few economists, journalists, and even lawyers, who see in the United States an example to the world: the one that first implemented democracy, protected human rights, recognised judicial review, and now reproclaims the merits of a property-owning nation, with its citizens taking their fate in their hands.

One may debate to what extent these American claims are justified and not exaggerated. Almost every idea taken to extremes can become unattractive, even dangerous. One must at least question whether America has any right to “force” others to adopt its values rather than merely rely on the superiority of its ideas and ideals to attract their own adherents. But what cannot be in doubt is the fact that many Americans—especially those who form the ruling elites of today—believe these claims to be true. Such beliefs, thus, form part of

419. These key words, coming from John Winthrop’s address on the founding of the of the Massachusetts Bay Colony (and probably derived from Matthew 5:14), read as follows:

[F]or wee must Consider that wee shall be as a Citty upon a Hill, the eies of all people are upon us; soe that if wee shall deale falsely with our god in this worke wee have undertaken and soe cause him to withdrawe his present help from us, wee shall be made a story and a by-word through the world, wee shall open the mouthes of enemies to speake evill of the wayses of god and all professours for Gods sake; wee shall shame the faces of many of gods worthy servants, and cause thir prayers to be turned into Curses upon us till wee be consumed out of the good land whether wee are going.

John Winthrop, A Modell of Christian Charity (1630), reprinted in 2 Winthrop Papers 282, 295 (Mass. Historical Soc’y 1929) (1690). As the phrase became “politicised” over the ages, and certainly after the “Reagan years” when it became often cited, it lost its cautionary note and became simply “we are an example to the world.”
the current "political climate" that we find in this great (in more ways than one) country, and they are reinforced, in the minds of many Americans, by non-legal arguments such as the contemporary European reservations about the legality and wisdom of America’s recent invasion of Iraq. Reason and sentiment—moral, political, and economic—thus, seem to come together with legal concerns to produce an “unstable” mix the likes of which neither of us has encountered in contemporary comparative constitutional law. Taken together they must account for the suspicions which a substantial proportion of the American population (including lawyers) may nurture towards contemporary Europe, its values, its law, and its courts. A fear or dislike of foreign values nowadays, thus, comes with a very inadequate understanding of the “rest of the world,” its sensitivities, its structures, and its law. We say nothing of foreign languages, for the neglect shown towards them by the American school curriculum is something which we think is little short of a disgrace.

For us, thoughts such as the above may explain the Scalia or (more extreme) Bork positions (even though we accept that they can also be seen as extreme antitheses to some equally extreme theses). But in part, it may also explain something which we (as outsiders) see as a novel and strange trend. Thus, one can nowadays find in American academe Jewish liberal constitutional theorists of distinction (such as, for instance, our Texas colleague Sanford Levinson) who are, nevertheless, able to sympathise with Justice Scalia’s ability to “identify American values”—even though the latter is a Catholic by religion and, unhesitatingly, a “conservative” by conviction. Indeed, Professor Levinson has gone further in terms of the time continuum when he writes that “[a]s a descriptive matter, I certainly do not believe that the [United States Supreme] Court has ever deviated in any truly significant way from the dominant sensibility.”

420. Levinson, supra note 275, at 359. It is invidious for outside observers to ask questions which insiders regard as so obviously settled, but academic debate requires us to try and consider issues in a more subtle way. Thus, on the basis of all Gallup polls conducted in the United States, we understand that anything between 65-75% of those taking part seem to favour the death penalty when asked a simple straight question. These figures would, indeed, support Professor Levinson’s use of the words “dominant sensibility.” Yet, the reality in the United States seems to suggest a more nuanced picture. Thus, at the time of writing, there exist twelve “abolitionist” states, twenty-four “symbolic” states (recognising the death penalty but rarely practising it) and a further fourteen states being “executing” states. The result of these figures is an unprecedented 3500 inmates currently being on death row. We have not seen convincing explanations for the reluctance of the states in the middle group to give effect to the laws on their statute books—only hypotheses of varying degrees of plausibility. But we feel it would take a bold gambler to assert with such divided practices
Significantly, he adds—which we feel is both important but also refers to what we call “values”—that “I find it difficult to argue that the judge should ignore the dominant sensibility and declare that an inchoate notion of ‘justice’ requires something radically different.”

A tense and extreme political climate can, thus, not only polarise opinion; occasionally, it can produce strange bedfellows!

Now, in the interests of democratic legitimacy, one may well have to concede that when such basic (national) sensitivities do, indeed, exist concerning certain values, institutions, or practices (and we are deliberately not being too specific in the term we use lest we become bogged down with details and dilute at this stage the main thrust of our argument), it would be difficult, at least in countries such as the United States, to argue that a judge should be able to by-pass them with the help of imported notions, ideas, and practices. The availability of the death penalty and the banning of homosexual marriages may fall into these categories of “local realities,” which foreign jurists cannot—nor, perhaps, should—attempt to dislodge. This, however, does not remove the difficulty of knowing what practices or what values are so essential and widely acknowledged in one society so as to be untouchable by the judges. Merely relying on an academic’s assertion that the judge has “got it about right” is not enough. And in the domain of statutory interpretation, the “originalist” approach does not (in our view, as well as the views of those who do not adopt it in the United States) provide a conclusive answer either.

Moreover, as has been repeatedly stated in this Article (perhaps for the first time in academic literature of this kind), one must always be aware of the effect that the time factor has on such issues. This is particularly true in times such as ours, when public opinion is constantly evolving and the “stability” of the world of yesterday is no longer to be taken for granted today. The rapidly changing racial composition of the United States may also provoke in the not too distant future a reconsideration of values which at present seem to be fairly entrenched. Again, for the sake of completeness, one must note

that he knows what the “dominant sensibilities” truly are and even more so to argue that these do not change. In any event, we wonder how Professor Levinson will treat Roper v. Simmons? Will he (again) “side” with Justice Scalia’s dissent (in favour of the death penalty) on the grounds given in the text above? Or will he say that it is the Court which really identifies “dominant sensibilities,” in which case Justice Scalia has, on this count, now lost his touch of getting things right?

421. Id. at 359.

422. Others can be added to this list—notably child chastisement, on which Americans and Europeans may diverge significantly.
how the “originalists” reject this argument; though we, with the
temper of outsiders, wonder whether the founding fathers (astute and
experienced statesmen that they were) did, indeed, mean literally their
assertion that their Constitution was “intended to endure for ages to
come.” In making this assertion, we are not merely arguing that, in
appropriate circumstances, foreign ideas might help buttress local
views favouring the “expansion” of constitutional rights but, by parity
of reasoning, also their restriction.

The passage of time reveals gaps, even in revered constitutions,
and they are filled by courts exercising discretion and judgment.
Judicial discretion cannot be banished from the judicial process, only
disguised. For instance, the protection against unreasonable searches
and seizures could not have envisaged wiretapping. Though it involves
no trespass, and thus no violation to property, the United States
Supreme Court has included this last mentioned activity in the Fourth
Amendment. Is this not a gap-filling exercise by a court? And does
it not make sense? Likewise, the Constitution was silent about
sovereign immunity, yet the Supreme Court has incorporated the
doctrine into American law. As Judge Posner asks rhetorically, is this
importation “usurpative?”

Similar observations, arguably supporting our claim that judicial
discretion can help mould the original text beyond what was originally
envisioned, can be made by noting that its articles were sometimes
drafted in very general terms whereas in others its provisions have
been very specific. But if a clause is drafted widely, does it not invite
multiple interpretations and, to quote Judge Posner again (since he is a
conservative lawyer, though not an originalist), is not “this possibility
. . . an embarrassment for a theory of judicial legitimacy that denies
that judges have any right to exercise discretion?” And, conversely,

423. This well-known phrase forms a key part in Justice Black’s dissent in Bell v.
Maryland, 378 U.S. 226, 342 (1964) (Black, J., dissenting), warmly approved by Justice
Scalia in his Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV.
424. Though it is almost unrealistic to mention the First Amendment under this
heading, a good case could be made for nibbling at its fringes when it comes to such
neglected rights as privacy.
425. See Katz v. United States, 389 U.S. 347 (1967). For an even bolder extension,
ingenuously (or ingeniously?) presented by Justice Scalia, see Kyllo v. United States, 533
(1882).
428. Id.
have not “specific provisions creating rights . . . proved irksomely . . . [or] dangerously anachronistic”\textsuperscript{429}

Nor, finally, is it necessarily convincing to invoke popular votes or polls as a constant alternative to judicial review for, as Arthur Chaskalson, the President of the South African Constitutional Court, put it in the South African death penalty case:

If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.\textsuperscript{430}

Though there is much logical force (and humanity) in the above quotation which, for this purpose, we set out in greater length, we accept that such an approach may be difficult to transplant to an environment such as that of the United States where the constitutional

\textsuperscript{429} Id. The examples given by Posner are the right to a jury trial in a federal court and the right to bear arms.

\textsuperscript{430} State v. Makwanyane & Another, 1995 (3) SA 391 (CC) at 431 (S. Afr.). Chaskalson’s reference to the principle of parliamentary sovereignty has significance for other systems as well. Thus, influenced by the English doctrine, the drafters of the Canadian Charter of 1982 chose to give the legislature (provincial or federal) the last word on constitutional matters allowing the suspension of Charter rights for up to five years. The basic idea behind this “opt out” clause bears some resemblance to the regime now in force in the United Kingdom where, out of deference to the doctrine of sovereignty of Parliament, the Human Rights Act 1998 leaves the ultimate decision to the legislature. Such legislative supremacy is unknown both in the United States and Germany where judgments of the United States Supreme Court and the Bundesverwaltungsgericht are a binding source of law. The balance of power between the legislature and “unelected” judges is thus clearly tilted in favour of the legislator in England and Canada, while U.S., German, and South African judges wield substantial influence over the development of their respective constitutional systems. The only way to trump their will is by constitutional amendment. Yet here, too, one has to bear in mind the process allowing revision of the constitutional text in practice. Thus, whereas this has happened in less than thirty occasions in the United States, the German Grundgesetz has seen changes at a rate which (taking account of its shorter life span) is roughly nine times as high!
text, itself, unlike that of South Africa, is so much more permissive of the death penalty (as Chaskalson, too, admitted in his judgment) and only seems to allow its occasional mitigation when the protection of the Eighth Amendment can be successfully invoked.

So, does foreign law have a place in the interpretative process where other values and a different textual background seem to prohibit it? Is there a hierarchy of international values which should prevail, in part if not entirely, over a possibly different internal set of rules? Cannot these (internal) values change with time? Are all constitutional provisions impermeable to solutions dictated by changes in society? And is recourse to foreign ideas prohibited in all of these instances? These are the kind of questions that arise from the preceding paragraphs and must now be addressed, albeit briefly.

A partial answer to these undoubtedly difficult questions may lie in attempting a gradation which, to our knowledge, has never been undertaken in the domain of comparative law. This does not so much depend on the distinction between public and private law, nor on whether the borrowing is attempted to enlarge or restrict local rights and entitlements. What to us is crucial are two things: (1) the “importance” which the importing system ascribes to its own “values” (and which may be threatened by the importation of the foreign idea) and (2) whether the idea considered for importation is universally (or just restrictively) valued.

This way of looking at things would, first of all, acknowledge that the injection of foreign thinking and arguments is always made more possible and more plausible where the local constitutional texts are ambiguous or silent or, as is the case with most modern constitutions, permit limitations of the enumerated and protected rights. But this is the easy part of the answer. The real difficulty arises were the indigenous text is clearly phrased and prohibitive of foreign infiltration. Should, then, the attempt to look at foreign law for ideas be peremptorily halted? We think not, though here one should move with greater caution, paying due regard to local sensitivities.

In such situations we would, therefore, suggest a tripartite distinction between cases which involve: (1) basic universal (or transcendent) values, such as life, freedom from incarceration (subject to clear textual exceptions), or the presumption of innocence;

431. Even though, as Professor Alan Watson rightly observed, “[s]ocieties largely invent their constitutions, their political and administrative systems . . . ; but their private law is nearly always taken from others.” ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 8 (1974).
(2) classic liberal values such as speech, freedom of movement, association, religion, and the like; and (3) legal rules. Though we are mindful of the difficulty of pigeon-holing values or civil rights in one of the above categories, we, nevertheless, suggest this structure as being capable of accommodating more easily Choudhry’s universalist mode of interpretation at the one end of this scale (a) and the dialogical mode of interpretation at the other (c), with both modes shading into each other in the middle ground (b).

We would be happy if this were to prove a good starting point. Yet, even this statement needs some refinement as far as the first kind of values are concerned. For here, faced, as we are, with a universal value—the sanctity of life—and (in the United States) a clearly worded Constitution that allows the state to take it away in certain circumstances, we must explore avenues of compromise in order to accommodate what are, indisputably, two school of thoughts in the United States.

In our view, the attempts to use the Eighth Amendment as a way of avoiding the death penalty in some extreme cases (for example, for mentally retarded persons, now entirely accepted432) goes some way towards achieving this compromise between the incorporation of internationally respected values in an apparently “impermeable” national text. We see this thesis receiving further support from the very recent decision of the United States Supreme Court in Roper v. Simmons.433 For here Justice Kennedy, delivering the majority opinion, relied on foreign practice to bolster the conclusion reached by himself and his colleagues in the majority on the basis of the “internal” review of the changing pattern of state practices. He then proceeded to add:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its

interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."\textsuperscript{434}

We stress the word "bolster" since Justice Kennedy was eager to stress that while "[t]he opinion of the world community, [does not control the outcome], [it] does provide respected and significant confirmation for our own conclusions."\textsuperscript{435}

Yet, in our view, it is permissible to downplay the caveat indicated by the italicised words of the learned Justice in order to support our thesis and interpretation. And we advance this view because we feel that due regard must be had of the fact that the shift in state legislatures in favour of abolishing the death penalty for juveniles that took place between \textit{Stanford v. Kentucky}\textsuperscript{436} and \textit{Roper v. Simmons} was much lower (namely, four)\textsuperscript{437} compared to that which justified the Court in \textit{Atkins v. Virginia} to overrule \textit{Penry v. Lynaugh}\textsuperscript{438} (sixteen states passing specific statutes). Justice Scalia may thus have been right when noting, in a similar vein, (and, of course, criticising—which we do not do) a \textit{shift} from previous practice because of the pressures of international practice.\textsuperscript{439} We believe that Justice Scalia may be right in detecting such a "shift" (which now makes it easier for the Court to detect such a change in national consensus) rather than search for the emergence of an "overwhelming opposition to a challenged practice"\textsuperscript{440} before abandoning it. Yet, we also note that the members of the majority repeatedly stressed the "supportive" rather than "determinant" role which this (changed) international practice had in helping them alter their opinion. Not many, we suspect, will on reflection have difficulty in accepting such a carefully crafted formulation, and this certainly is consistent with the theory we are here advancing.

The proposed approach will not, of course, please originalists. Indeed, as already hinted, it drew a stinging attack from Justice Scalia

\textsuperscript{434} \textit{Id.} at 1198 (citing Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion)) (emphasis added).
\textsuperscript{435} \textit{Id.} at 1200.
\textsuperscript{436} 492 U.S. 361 (1989).
\textsuperscript{437} Add one state Supreme Court that had construed that state's death penalty statute not to apply to the under-eighteen offenders. \textit{See State v. Furman}, 858 P.2d 1092, 1103 (Wash. 1993).
\textsuperscript{438} 492 U.S. 302 (1989).
\textsuperscript{439} \textit{Roper}, 125 S. Ct. at 1225 (Scalia, J., dissenting) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.").
\textsuperscript{440} \textit{Id.} at 1218 (Scalia, J., dissenting).
in the *Roper* case\(^{441}\) (which, however, also presents, for the reasons already given, a considerable—if, perhaps, unintended—contribution to the wider debate of how to use foreign law in the courtroom and the classroom).

Yet at the end of the day, it remains a fact that such a shift *has* taken place (compatible with the views expressed extrajudicially by some of the Justices of the Supreme Court and referred to at the beginning of this Article). And it is also noteworthy that the reference to international practice was the main point of the otherwise very short concurring opinion of Justices Stevens and Ginsburg. Finally, it also attracted the support of one of the dissenters—Justice Sandra Day O’Connor—who observed:

> [T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.\(^{442}\)

Turning now to what we called “lesser” values (which, nonetheless, many of us would regard as the hallmarks of modern civilised society), the resistance of indigenous pressures to foreign ideas will be more understandable because, by their nature, these values leave room for more local variations. England or Germany’s willingness not to subordinate unreservedly reputation and privacy to free speech may be an illustration of this type of solution, though, as we said, a case could be made that the American preference for speech over dignity may have conceivably been taken too far. But because “variation” here is more plausible, the pressure to weaken the rigour of the First Amendment has been resisted.

The dialogical mode of interpretation can be applied “constructively” even more easily in our last category of mere rules. This may be particularly worthy of doing whenever rules are or have become unclear, contradictory, or outmoded in a particular national context as a result of technological changes, streamlining of procedural

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\(^{441}\) Id. at 1217 (Scalia, J., dissenting).

\(^{442}\) Id. at 1215-16 (O’Connor, J., dissenting). This citation is important. For, though the way foreign law was presented to the Court and used by it may leave much to be desired, it does show that five out nine judges were, in principle, not opposed to the idea of looking at foreign law.
rules, or growing international practices. We call this application of Choudhry’s mode “constructive” because we feel that here it can go beyond the role assigned to it, that is, to make the national lawyer conscious of his own law and solutions, but also to encourage him to use a foreign idea or solution in order to reshape or change his own.\footnote{443}

We are, under this heading, dealing largely with topics that traditionally fall under the heading of the common law, and we feel this is but one way of explaining past American practice\footnote{444} and sanctioning it for the future in the context of a more globalised economic and commercial world. For here, the movement of ideas on technical matters that are regulated by the kind of rules we are envisaging should be facilitated and not impeded out of abstract notions of principle, which may be relevant to the first group of cases, but not this category of disputes.

In making the above suggestion, we do not, of course, delude ourselves in believing that it will stop opponents of all forms of foreign dialogue from trying to prevent it, even in the case of a comparison of rules (and not values). For it does not take much ingenuity, but only a minimum amount of disingenuousness to claim that, for instance, even ordinary contract or tort rules can be linked to “values” held dear by some societies in order to preserve the status quo. Thus, any teacher of contract law in almost every country on the European continent will be aware of the growing number of rules favouring consumer protection.\footnote{445} Almost all—certainly those which strive for greater employment protection—could be declared as incompatible with the American form of capitalism which, to us at least, seems hell-bent since the 1980s to unpick the New Deal revolution of the 1930s and return closer to the nineteenth century ideal of \textit{laissez faire}. Those who imagine European (including English) lawyers as being all “socialists,” “anti-religious,” or “faux intellectuals” will certainly be tempted to try this tack.

The same could, likewise, be argued in the domain of tort rules, which in Europe are, admittedly, fashioned against the reality of a

\footnote{443. And it is here that the topic of “packaging” enters the equation, for the raw importation of the foreign solution or concept is often impossible.}

\footnote{444. This practice, in the past, succumbed to the intellectual appeal of foreign ideas. For an excellent collection of essays, see generally \textit{The Reception of Continental Ideas in the Common Law World 1820-1920}, supra note 364.}

\footnote{445. For a recent coverage of the German scene, see Reinhard Zimmermann, \textit{Consumer Contract Law and General Contract Law: The German Experience, in 58 Current Legal Problems} (Jane Holder ed., forthcoming 2006).}
safety net provided by a more developed system of social security.\textsuperscript{446} Finally, we remind our readers of a similar attempt to deny the possibility of considering foreign trial models which differ from the party-operated adversarial model found in American, especially state, court rules of civil procedure. For here, too, attempts were made to link these rules to deeply rooted cultural differences, though we have already expressed our reservations about the validity of such assumptions.

So, in our view, in all these instances there is room for more than just a dialogical discussion of foreign solutions, which can help identify the true reasons why such transplantation may be impossible. For if the dialogical mode helps identify the true\textsuperscript{447} reasons for the opposition to foreign ideas, it may also help find ways of addressing them. In this context, we remind our readers of the many examples of imitation, inspiration, or even transplantation which have taken place between two seemingly very different environments.

\section{C. United States: What Is the Real Problem?}

Can we then, in the light of the above, try to identify further (and then isolate) the real “bug” that causes the American legal mind to “crash” when it comes to consider the desirability of foreign law? If we combine what we said above with the essentials of the American literature we have used, we think the problem can be located in one main area of American constitutional law—judicial review. This means for starters excluding from the literature—whether it is for or against the use of foreign law—all references to public international law, traditionally governed by its own rules going back to the \textit{The Paquete Habana} decision, which made customary international law part of American law.\textsuperscript{448}

\textsuperscript{446} A host of tort rules—for example, class actions suits, capping of damages, availability of punitives—could fall into this category. For restrictions imposed on any of them would, in Europe, be seen as reflecting tort choices where, in the United States, many would regard them as giving a free hand to enterprises to place profit before social responsibility.

\textsuperscript{447} For instance opposition from the American bar may be a more realistic reason for not accepting civil procedure reform than the linking of the rules to alleged cultural differences.

\textsuperscript{448} 175 U.S. 677 (1900). This also makes it easier to exclude from the debate other statements of Justice Scalia which, again, reflect his internal optics as not being relevant to the issue which has been the subject of this Article. See, for instance, Justice Scalia’s statement, commenting on the decision in \textit{United States v. Alvarez Machain}, 504 U.S. 655 (1992): “Moreover, we held that the United States’ resort to self-help, even if a ‘shocking’
Where foreign law is used (or could have been used) to influence the outcome of a case, the fears that dominate the thinking of those who oppose it seem to us to be two. First, could foreign law end up being treated as having the force of binding authority? Secondly, could this facilitate the courts’ power to invalidate majority decisions at federal or state level in the name of the United States Constitution?

To the first question the answer (already given above) is “no,” and no advocate of the comparative method has, to our knowledge, ever suggested otherwise (except in the area of public international law).

The second issue has a particularly American flavour to it since it is linked to the fear of increasing judicial discretion through “interpretation”—which, in the eyes of the more “conservatively” inclined, is “bad enough” now and would get worse if the interpretation were “bastardised” through the importation of foreign notions of decency, morality, or legality. We venture the guess that to the conservative Justices of the United States Supreme Court, this belief is consistent with the view that restricting the sources of legal ideas and the ultimate authority of constitutional interpretation is essential to the maintenance of a coherent body of law. Such a focus on limited sources and a defined structure of legal hierarchy ensure, it is believed, coherence in constitutional interpretation. To put it in the words of Professor Harding, “[c]oherence and thus legitimacy under this model are secured through structural constraints rather than rational argumentation or persuasive reasoning. In short, ensuring coherence through the limiting of sources and participants, rather than persuasion through dialogue, is at the heart of the U.S. Supreme Court’s approach to judicial review.”

violation of international law, was not our concern, as it did not violate any United States law or any treaty to which the United States has subscribed.” Scalia, supra note 30, at 1120.

449. In the interests of completeness and consistency one must, again, admit that the distinction between “binding” and “inspirational” use of foreign law which, we think, can, in some cases, provide a workable answer to the American dilemmas, is not workable for those who subscribe to the Scalia approach. For if foreign law is treated as binding law, it is illegitimate because it was not made by American voters. And if it is not binding, but simply law that may be considered for the purposes of filling gaps or inspiration, it is still illegitimate because it involved judicial discretion and judicial lawmaking, which the followers of the school equally dislike.

450. Harding, supra note 134, at 451 (emphasis added). We italicise these words because we feel that, though true, they are understated. For coherence, to the Scalia school, is secondary—and legitimacy comes first. This is not to deny that both are important. For coherence, in itself, tends to constrain judicial discretion. But legitimacy depends on derivation from legitimate sources, and for the “right,” the list of legitimate sources is rather short. Nondiscretionary derivation from decisions of voters is the primary key to legitimacy;
Canada, South Africa, or Israel does not seem to support such fears is unlikely to influence die-hard opponents of the “foreign” method.

The threat to coherence and certainty is not the only concern that those who oppose the use of foreign law have. Coupled with it is the fear that “foreign” (one also encounters the use of the word “European” with the same sense of mistrust) values might water down the indigenous ones. We have alluded to these fears in several parts of the text and notes, so we need not return to them here. Yet, is it justified to speak of a “Europeanization” of American (or any other) law?

Ten years after the introduction of the Canadian Charter of Rights and Freedoms, the former Canadian Chief Justice Brian Dickson published an article with a title that posed this very question but with the emphasis being placed on American law. It was entitled Has the Charter “Americanized” Canada’s Judiciary? and his answer to it was an unequivocal “no.” Can anyone seriously argue that what did not happen in Canada (and, come to that, other countries that have used foreign law) would happen in the United States? Would judges like Scalia or Posner ever end up being “Europeanized” by an exposure to the ideas of their (foreign) equals? Or would state judges succumb to European-type rules without more? Only those who fear the persuasive force of honest argument can really oppose such proposals from the very outset.

It goes without saying that the above does not mean that one is advocating the adoption of a foreign solution (or concept) without considering its transplantability, which can only arise as a possibility if it has been preceded by an attempt to “package” it in any way that makes it intelligible to the potential foreign user. Bench, bar, and academe could easily thrash these out between them. And this will often mean not only citing a rule, but also testing its accuracy and utility through the purifying ordeal of adversarial debate, something which has thus far been avoided either because the consideration of foreign law was rejected outright or, if considered, has been done at a cursory level.

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coherence is good, but not the key to legitimacy. “Coherence and thus legitimacy” seems to get it backwards.

VIII. PROPHESYING THE FUTURE

Notwithstanding our efforts to find a common ground, de lege lata our study has ended by suggesting a division between the practice of U.S. courts and those of other countries. This concluding Part of this Article may thus call for a similar division. We start with the internationalists and then turn to the isolationists.

A. Shades of Internationalism

The courts of all the major systems reviewed in this Article display, or so it seems to us, a growing interest in the developments of legal ideas and solutions by sister courts and, occasionally, by foreign academics. To be sure, the interest varies in intensity, from the serious study of the foreign solution to the modest (but growing) amateurish curiosity to learn what others are doing. Further, this curiosity is sometimes concealed rather than openly displayed. Except for countries such as, for instance, Canada, South Africa, and America, judges tend to hide their academic sources, and, in some systems, they are positively expected to do so. So the full extent of the influence of foreign law may, often, be a matter of speculation.

Our study also shows that the open use of foreign law also ranges from the mere citation of foreign information as supporting material to the genuine attempt to take advantage of foreign experience for the sake of achieving the best possible solution to the national problem. In between, we find instances which are, from an academic point of view, just as interesting and important, and these include the cases where foreign law was considered, but then rejected as inappropriate to national conditions. These cases can even be the most interesting if the rejection of the foreign idea (or text) is a reasoned one and reveals the wider reasons why the national system cannot adopt it.

Whatever form it may take, the interest in foreign law may be prompted by different motives.

At one end of the spectrum, national constitutions may permit or encourage it. South Africa may be the best illustration of this category. This approach finds, these days, continued support not only in Section 39(1)(c) of the 1996 Constitution but also in the duty to "promote the values that underlie an open and democratic society based on human dignity, equality, and freedom."*452 Beyond this constitutional authorisation, it seems that comparative law was also particularly

attractive due to the hybrid character of the legal system, which is rooted not only in Roman-Dutch, but also in the English common law.

In other cases, the nature of the court or the law it generates—transnational—stimulate such interest and make mutual exchanges of varying intensity necessary. The European Court of Justice and the European Court of Human Rights in Strasbourg fall into this category subject to the caveats expressed earlier on. A similar example can be found in cases where a national court has to interpret a European Directive and, in the absence of a ruling from the European court, will naturally strive towards reaching a common meaning of the Directive. The comparative exercise undertaken by the English High Court in the blood contamination case offers such an illustration.

Finally, a few words about another reason prompting interest in foreign law. The bulk of national courts seem to be developing this internationalist spirit because of enhanced contacts between judges, courts, universities and, of course, the part of the legal profession that finds itself at the cutting edge of the globalisation phenomenon and deals with an array of commercially flavoured issues which have strong international elements. Individually and taken together, these factors will go on enhancing this trend, and we see no signs of a reverse movement developing that would push courts back to a state of intellectual self-sufficiency. The United States Supreme Court may be the one major exception, and we, thus, discuss this separately in the next Subpart. The same may be true of some of the other countries, though the reasons for their insular tendencies may be different.

Is the majority trend we detect threatening to local pride, local history, cultural diversity, and the individuality of each traditional legal system? This is a question that is more likely to cause concern to old, major, and established legal orders than to new ones, keen to learn from the experience of others. It is also often coloured by the views an individual observer or judge may hold about the political process of integration that may be taking place in a particular part of the world, notably modern Europe. Though we understand the fears, we dismiss them as essentially unfounded for two reasons.

First, the intellectual exchanges we have reviewed are not leading to one system absorbing the other but, at best, attempts to encourage organic harmonisation (not unification!) and, at worst, result in a mere exchange of ideas.453 Thus, Israel has not, in our view, suffered any serious loss in the richness of its own intellectual and religious past by

453. See Canivet, supra note 7, at 45.
modernising its law, especially in the domain of human rights, by borrowing from Canada or the United States. South Africa has been catapulted into international legal prominence and gained almost universal praise by selectively using foreign law to transform what was once a legally discredited regime, and has often done so by invoking its own local, native traditions and, indeed, showing them to be in many respects more human than those of the “advanced” world. Canada has not been Americanized (at least in its law) as it has been in other parts of its daily life. Germany has achieved in law, especially in the area of human rights law, a feat equivalent to its well-known and much vaunted post-War economic miracle (made possible by its own determination and hard work as much as by American money), though the modernisation of its law may be partly due to constitutional and statutory reform and partly due to judicial activity which has been both bold and pragmatic.  

The First President of the French Supreme Court has stated that comparative law indisputably widens the horizons of a jurist as comparative law multiplies the approaches that one can take towards a particular problem and enlarges the interpretative options. Even England has attained a truly dominant position in the domain of international legal services by modernising (without much internal foot-dragging) a legal profession that carries with it English professionalism wherever it goes. Romantics and prophets of gloom are the only ones who fear this internationalisation which, in the British Isles, takes the threatening shape of Europe. Their cries are often couched in patriotic language; their texts replete with literary references make for attractive reading. But they are unable to stop the new world which is ante portas, and this makes their calls more strident.

Who are the agents of these changes which fifty or even thirty years ago would have been unthinkable? Indisputably, it is the wider globalisation of trade and, to a secondary extent, the moves towards European integration, both of which have stimulated these developments. Additionally, the flowering of international human rights, the growing linkage of financial aid with improvements in their status, and the painfully slow dismantling of beliefs in race superiority, have all contributed to this willingness to consider good ideas whatever their origin.

It is not only events, but also actors who bring about change. In the forefront here, we must place the judges, aided and abetted by practitioners engaged in international practice. It is painful to assert (but nonetheless true) that, in this movement, academics have followed, not led. One of us has elsewhere given some reasons why this has been the case.\footnote{455} Preoccupation with the past, more euphemistically referred as interest in legal history or, at the other end of the spectrum, a newly acquired interest in trendy ideas, have all played a part in securing to modern academic comparatists the third and last place in this race—however valuable some of the tenets they hold may be.

Those are reasons that may explain a “slump” in comparative initiatives in England, especially in the seventies and eighties. Since one of us has discussed them at length elsewhere, they need not be repeated here.\footnote{456} But similar or other (more local) reasons may explain the “decline”—relative or absolute—of comparative law in the academic circles of other countries. Recently, for instance, one French comparatist, who also happens to be running one of the country’s well-known centres for comparative law, attributed the “crisis” in his country to the “ethnocentrivity” of many of his compatriots, their neglect of foreign languages, and the bureaucratic hand of the state-run underlying structures. These are phenomena which some French observers—and not only lawyers—regard as seriously affecting the progress of French society as a whole. However important these reasons may be, for us they recede into the background when compared with judicial efforts to rekindle interest in the study of foreign law, and it has been an important thesis of this Article to note this phenomenon and urge its study more deeply than we have been able to do in this Article.

Our overall conclusion, thus, is that the situation we describe in this Article will, in the systems bracketed under this heading, strengthen and not weaken with the passage of time. We regard this almost as an historical inevitability and, thus, do not feel the need to defend it further even though in Part VI, above, we stressed the \textit{indisputable} difficulties that come with this exercise. So we call colleagues to realise the trend and to work with one another to shape it in a controlled and systematic way, rather than leave it to happen in the piece-meal way that progress is achieved whenever it is in the hands of

\footnote{455} See Markesinis, supra note 88. \footnote{456} Id. at 1-70.
practitioners alone rather than theoreticians working with them for a common aim. In other words, what we call for is a mix or collaboration of the different parts of the legal profession for the benefit of all.

B. Introversion or Arrogant Self-Sufficiency?

How does one predict the future of the American model? Though the justices of the United States Supreme Court do not speak with one voice, and some recent cases such as Lawrence v. Texas\(^{457}\) and Roper v. Simmons\(^{458}\) suggest, thanks to shifting alliances, a greater willingness to look abroad, our overall impression is that the isolationists still have the louder voice. Their numbers on the Supreme Court may also increased during the next four years as two or more posts may fall vacant, in which case the present trend could be reversed. The question thus arises, how does one characterise this trend and, more intriguingly, how does one explain it?

The frame of one’s mind is crucial to matters as varied as dealing with adversity (including physical illness) or reaching a conclusion on a legal conundrum. The way we speak reflects the way we think, and this, in turn, is shaped not only by tools and arguments of our craft, but by other factors including our wider culture at a particular moment of its historical evolution. Whether a court uses foreign law as part of its arguments in justifying its decision, as occasionally it must in all democratic states, will also be determined by such factors. “Isolationism,” “introverted attitudes,” “self-sufficiency,” or “arrogance” may all lead an individual judge to a denial of even a dialogue with a foreign system, and it is hardly necessary to remind the reader that we are not talking here of treating foreign law as binding precedent, but only as a source of inspiration which might prompt local change or adaptation.

Such a state of mind can be justified, or should we say be “disguised,” by resorting to legal or legalistic arguments. Or, alternatively, it can be explained by exploring openly the above-mentioned notions—isolationism, self-sufficiency, personal culture, and arrogance—and deciding whether they can explain the use or non-use of foreign law in general and the comparative method in particular. So, which of these justifications is mostly relevant to America at the present juncture of its political and legal history? More likely, we need

a combination of legal and legalistic reasons if we are to understand the complex American scene (as, indeed, we said we do if we try to understand other national scenes such as the French).

The second of these justifications is both more unusual to assert and more difficult to prove. For, though linking politics and law may not be fortuitous, especially these days, combining it with an attempt to understand the particular judge's mentality may thus be crucial to the understanding of what is happening in the United States these days.

There is little doubt that American law, especially constitutional law, is much more self-sufficient than, say, South African law, which has a relatively new presence in this field. But, as already stated, this does not help explain Canada, which in the field of human rights may, arguably, have been a (relative) novice at the time of the enactment of the Charter and needed guidance, but can no longer be treated as an "importer" only of ideas. For the Canadian experience shows that what may have started as a need—looking at foreign law—has now become a habit, and one which not only is accepted locally but also lends to Canadian case law an international aura and appeal. The importation of Canadian ideas into Israel surely illustrates how extended the reach can be, both in terms of distance travelled and cultures bridged. The same can, probably, be said of the case of the South African Constitutional Court which can, no longer, be dismissed as a "novice." And just as success breeds success, internationalism breeds more internationalism.

If American law is, or sees itself, as self-sufficient these days, the United States as a political power is neither self-sufficient nor insular. It is, instead, a state that is enjoying a *phase* of political and military dominance which is unparalleled in historical terms and which is giving it the means and the excuse to express views (often externalised through the use of force thinly disguised behind rules of law) about events happening all over the globe.

Can such political dominance be linked with the *current* introverted unilateralism of the Supreme Court? In one sense, it should not since (as Professor Henkin has not tired in saying) the American "neglect" towards international law has, alas, a long tradition. Yet, this behaviour may be going through a new phase of acute paroxysm and, to that extent, it may not be unlinked to the wider spirit of the times. The danger of personal political ideologies "tarnishing" legal reasoning must be obvious from what has already been hinted, and it applies to us as authors of this Article (and to our explanations) as much as to everyone else.
But then law is not (and cannot be) removed from the wider political debate that is taking place around it at a given political time and place. We, thus, tentatively suggest that there are signs of “world-wide hegemony”\textsuperscript{459} in the American air and that this tendency can be found in all forms of human endeavour—including law. American law is good for exportation as are American ideas of government and the unbridled Wall Street version of capitalism. The importation of foreign ideas is, however, another matter. In this atmosphere, it is almost tempting to argue that the country’s respected (but old) Constitution is not only a reason for an introverted interpretation, it is also a helpful pretext for not opening the country up to new ideas. In making this assertion we stress, again, that the idea we are floating is not new,\textsuperscript{460} though the post-9/11 climate may have made it more obvious.

Yet, in looking at foreign events as a possible factor of internal legal attitudes, we are careful not to forget the fact that the current (sometimes desperate) attempt to get constitutional interpretation under control is more fuelled by the intensity of the conflict between the religious “right” and the secular “left” over culture issues such as abortion, gay rights, and the like than it is determined by a suspicion or dislike of European ideas which are often seen by the American right as “wooley” and “leftist.” What we are suggesting, however, is that in this wider context, the post-9/11 climate and the European (if not world) reaction to America’s current foreign policy may be fuelling further the in-built reasons for the self-sufficient approach to legal (especially statutory) interpretation.

We note, secondly (and with regret), that (contemporary) Americans find the notion that they “should be governed by ideas from foreign sources . . . [un]congenial”\textsuperscript{461} is spreading to private law even though here history suggests different attitudes in days gone by—and even though in this case one is not faced with the textual constitutional obstacles one encounters in the area of human rights.

\textsuperscript{459} Professor Ackerman used the words (and asked the question) as far back as 1997. See Bruce Ackerman, \textit{The Rise of World Constitutionalism}, 83 VA. L. REV. 771, 772 (1997).

\textsuperscript{460} We see germs of this thinking in Professor McCruden’s, \textit{A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights}, 20 OXFORD J. LEGAL STUD. 499, 520-32 (2000), and also (even earlier) in Louis Henkin’s \textit{The United States and International Human Rights}, \textit{in JUSTICE FOR A GENERATION} 372 (1985), presented in London on 15-19 July 1985 at the meetings of the ABA and the Senate of the Inns of Court and the Law Society of England and Wales.

We think it would be too facile to explain this “neglect” of foreign (and mainly) European ideas to a surfeit of local law.

Take for instance, Professor Mathias Reimann, a German scholar with a substantial contribution to both comparative law and comparative (German and American) legal history. If his learning is not in dispute, his opinions deserve to be questioned. Thus, he has entitled one of his articles *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*.

That America should and, indeed, already has its own agenda is both understandable and reasonable. Yet to refer to the European cultural influence on American law as having cast (or still casting) a shadow strikes one as an unfortunate exaggeration of (1) the past intellectual debt that America has towards Europe and (2) a serious underestimation of the intellectual vitality of modern European law especially that generated during the last twenty years. To put it differently, we doubt whether the likes of Oliver Wendell Holmes, Benjamin Cardozo, Roscoe Pound, Karl Llewellyn, Jack Dawson, Fritz Kessler, John Fleming, Arthur von Mehren, or Hans Baade would have used such terms to describe a legal culture that shaped their thought in so many ways. And we doubt even more whether, had they been alive today, they would have been ignoring the outpourings from such European courts as those sitting in Luxemburg and Strasburg. Reimann, however, is not alone. Strangely, to us at least, other American lawyers of recent European vintage have also taken this anti-European stance, expressing themselves in language that touches on the verbose. Judge Guido Calabresi is one of the relative few who have voiced in one of his judgments the opposite view and, of course, has done so in his usual restrained and elegant manner, but, then, in

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463. See, e.g., Demleitner, *supra* note 5, at 653 (“Colonialism and Social Darwinism were the primary contributors to the ethnocentric illusion of the superiority of . . . Western law. . . . Today, the presumption seems to be that legal systems . . . ‘jostle with one another in a market-place of possibilities.’” (quoting ALAN RICE, CHRISTIANS AND RELIGIONS PLURALISM: PATTERN IN THE CHRISTIAN THEOLOGY OF RELIGIONS 1 (1982)). Are we really talking of an “illusion” of (intellectually) superiority of the European systems or a very actual reality? And are these systems not the progenitors of the American and Canadian systems (and still influence the latter)? And which systems are “jostling” for the role of “inspirer” beyond the European, Canadian, and (contemporary) South African constitutional model (the latter precisely because it has proved itself so open to learning from the others)? This low regard for European ideas is also evident from the wording adopted in an article by Professor George Fletcher, *supra* note 332, at 737.

464. United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995).
him we find that mixture of cultures and breadth of knowledge that tends to dispose one towards the universal rather than the particular—a combination of European style with American dynamism.

Yet even in America, where cultures mix, the trend may be going in the other direction. Thus, a public lawyer of some repute has not only echoed thoughts similar to those we express here (with concern) but also indicated the reason why foreign ideas may be becoming less relevant to contemporary Americans. Quite simply, he feels indigenous ones are the ones that nowadays matter most. The idea makes much sense, though Professor Bruce Ackerman (the scholar we have in mind) may have expressed the thought in too extreme a manner (and one which misrepresents his own wide reading) when he wrote in the mid-1990s another of these “prophetic” texts which show that America was getting ready for its “intellectual imperialism” as the end of the Cold War deprived it of its only world competitor and in the trauma of 9/11 may have simply found the latest reason for expressing this confidence more openly. Ackerman, thus, wrote:

America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories, to decode the meaning of its national identity?

To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice.465

Such statements may sit uncomfortably with other writings by the same author, who is known not only for his liberal views but also his impressive awareness of what other systems are doing in his own field of law.466 They also seem to be unconvincing in a subject—constitutional law—where basic ideas such as justice, equity, equality, liberty, and so on are not only the lawyer’s daily tools, but also tools deeply fashioned by the classics Ackerman seems to be asking his young (new?) readers not to bother to read. To our minds, the analysis of the different types of justice has, thus, not been bettered since Aristotle wrote his Nicomachean Ethics, and it will be a shame if new

466. See, e.g., Ackerman, supra note 459.
scholars, with the apparent blessing of their teachers, no longer feel the need to read such works.

Yet, in this Article, we are not concerned in reconciling real or apparent contradictions in the published views of certain serious contemporary scholars such as Ackerman nor, indeed, attempting to belittle the autochthonous contribution of the American legal and philosophical mind, but merely trying to detect and describe an emerging trend; and we are trying to do this by looking at it from as many angles as we can.

So this, really, is our main concluding point. A system that wishes to inspire and influence others—indeed, even export its legal ideas (as many American academics and judges\textsuperscript{467} openly say they do)—cannot do this in a sustained manner (however good these ideas may be) if it simultaneously expresses its newly found confidence in a manner which would strike potential "importers" as bordering on the excessive.

Indeed, one might call this trend not merely excessive, but an historically unprecedented arrogance given that, in their heyday, neither the English jurists (nor, before them, the Romans) were so closed to foreign ideas when at the peak of their own power. To be sure, when making such comparisons, one must remember that in both of these worldly and cultural "empires" the perceived sources of law were different, and neither faced the kind of problems which in the United States the founding document seems to generate.

But law and its interpretation are not entirely dependent on rules and structures. Imagination and confidence (or lack of it) can play a part in the shaping of the national or judicial mentality, especially in times of transition and change. And the Victorians, much more than the contemporary English, were a confident lot, riding on the crest of the industrial revolution and, thus, willing not just to read, but also to say how much they admired the Germans, while the Roman debt to Greek thought was just as willingly acknowledged in public by Roman thinkers of the calibre of Cicero. We find nothing strange in this since we believe that power, well entrenched and not ephemeral, can inspire the kind of confidence that tolerates, if not actively welcomes, new ideas and comparative discussion.\textsuperscript{468} Yet, this is not the kind of

\textsuperscript{467} E.g., O'Conner, Keynote Address, supra note 38, at 348.

\textsuperscript{468} See C.H.S. Fifoot, Judge and Jurist in the Reign of Victoria passim (1959); A.W.B. Simpson, Innovation in Nineteenth Century Contract Law, 91 L.Q.R. 247 (1975). The theme of openness coming with confidence is explored in a wider context by the late
confidence that one encounters in the United States today. On the contrary, in a country constantly advocating the merits of free trade, we find the best example of protectionism in the realm of indigenous ideas through attempts to exclude in a blanket manner any active consideration of alternatives. Invoking the United States Constitution, when both its text and its founding fathers are silent, is unconvincing. Unconvincing it is and—to us at least—unrealistic to believe that if reform is to come it will come only through changing the federal Constitution or state legislation. For would the states have acted on their own if there had not been *Brown v. Board of Education*? 469

Now we do not think it involves a great logical leap to argue that American academics and judges who think in this (introverted) way may, in some respects, be in tune with the political realities which have gripped the United States in the post-9/11 era. For this terrible date inaugurated a new era in geopolitical strategy and military thinking. It has also set in motion the passing of a variety of statutes, regulations, and the introduction of practices that have the laudable aims of protecting us against the scourge of terrorism, but also have the potential of being abused to intrude into domains not really related to this threat. Last but not least, through fear and other reasons, these events have led scholars, even of a liberal predisposition, to come close to turning a blind eye to horrible practices such as torture, 470 the maintenance of prison camps, and the waging of pre-emptive wars which the (few?) remaining adherents of classical international law may find difficult to comprehend. Ultimately, all this is possible since the ruling classes believe that America’s technological might enables it to go alone on the world scene, be it in matters of war, the environment, and now, apparently, even justice. However, much American liberal thinkers may disagree with the conservative philosophies of the current ruling elites, the fact is that they do not seem—as yet—to have found a well articulated voice on most of the matters discussed in this Article. 471 We say that because we note that numerically judicial coalitions between left and moderate right may, in fact, be denting the conservative agenda. And the same people, if to be judged by their writings (admittedly brief and often conclusory in

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469. 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

470. For a collection of essays on this topic, see *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004).

tone), seem closer to the view here presented than one might think. And yet, it is the right’s position that comes across more articulated and more forcefully argued and may, with the help of some well-targeted judicial appointments, prevail for the foreseeable future. This is what we are singling out for discussion, for this is what we see happening in law. And it is to this debate that this Article (and the lecture on which it is based) aim to make a modest contribution.

Now this new American thought, in politics often referred to as “neo-conservatism,” may well be the path to the future. Equally, it may well be that the writers of this piece represent—if not the “old Europe”—the thinking of the world of yesterday (much as they proclaim their interest in the study of modern law and not the study of the law of past generations). And it may well be that the autochthonous ideas of contemporary America are sufficient (as undoubtedly they are often interesting and, occasionally, even inspiring) in that they do not need any cross-fertilisation from abroad. But, in our view, the case for such propositions has not yet been made out; and until it is, we at least feel much admiration for what our Canadian, South African, and, to a lesser extent, English and German judges are doing and hope that the growing globalisation of our universe will encourage them to redouble their efforts.

POSTSCRIPT

It is, in one sense, odd to touch upon a new idea at the end of a long article, but, then, it is also not a bad practice and one found in all kinds of literary products (such as the worthy, but unending, novels of yesterday and their less worthy contemporary successors, the television serials) to end a story by planting the seeds for its sequel. And the companion topic we propose is The Judge as Hero. For though Carlyle did not include judges or, come to that, lawyers of any kind, among those who deserved to be hero-worshiped (even though he lived at the time when the English judge was, arguably, reaching his apotheosis, as the late Mr. Fifoot’s elegant Hamlyn Lectures showed many years ago), our suggestion could form a mighty subject. For though one normally ascribes to judges, if not anonymity, a low profile (and neither are attributes of heroism), the fact is that some of them can be shown to have been the catalysts for the adoption of foreign law in their own systems with consequences which are only now beginning to be grasped. So, along with political figures who, across the centuries, have been closely linked to major legal changes—Justinian, Napoleon, de Gaulle, and Mandela provide some obvious examples—why could
we not explore the contribution made to our topic by judges such as Barak, Chaskalson, Kentridge, Bora Laskin, Canivet, Goff, or Bingham, whose broader cultures enabled them to open our eyes to different worlds? The answer is: We must. For this seems to be another aspect of contemporary discourse about judges and their role in society which seems to have escaped attention.